Neutral Citation: [2014] IEHC 178

THE HIGH COURT

COMMERCIAL

[2013 No. 1682 P]

[2013 No. 47 COM]

BETWEEN

THE ENVIRONMENTAL PROTECTION AGENCY

PLAINTIFF

AND

GREENSTAR HOLDINGS LIMITED (PARTLY IN RECEIVERSHIP)

GREENSTAR LIMITED (IN RECEIVERSHIP)

GREENSTAR NORTH EAST LIMITED

GREENSTAR SOUTH EAST LIMITED

GREENSTAR CONNAUGHT LIMITED

KTK LANDFILL LIMITED

DAVID CARSON

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

DEFENDANTS

AND

[2013 No. 2793 P]

[2013 No. 46 COM]

BETWEEN

CLM PROPERTIES LIMITED

PLAINTIFF

AND

GREENSTAR HOLDINGS LIMITED

AND

KTK LANDFILL LIMITED

AND

THE GOVERNOR AND COMPANY AND THE BANK OF IRELAND

AND

DAVID CARSON

DEFENDANTS

JUDGMENT of Ms. Justice Finlay Geoghegan on a Preliminary Issue delivered on the 8th day of April, 2014.

1. This judgment is given in two sets of proceedings on an identical preliminary issue directed to be tried in each of the proceedings. The issue primarily concerns the interpretation of s. 53A of the Waste Management Act 1996 (as amended).

Background

2. By orders of the High Court (Charleton J.) on 24th July, 2013, it was directed that a similar preliminary issue be tried in each set of proceedings. In each, the respective plaintiff was to be the plaintiff on the issue and the Governor and Company of the Bank of

Ireland ("the Bank") to be the defendant. The orders did not identify the facts upon which the preliminary issue was to be tried. The proceedings are plenary proceedings, requiring in normal course to be tried on oral evidence. The parties did not, in advance of the hearing date, agree the facts upon which the preliminary issues were to be determined. The parties did not intend calling any evidence at the hearing of the preliminary issue. Hence, a difficulty arose at the commencement of the hearing of the preliminary issue as to the facts upon which the preliminary issue was to be determined. A further difficulty arose as to the formulation of the preliminary issue, which had been done by the Bank, having regard to the absence of any intention to call evidence or have determined facts which may be in dispute between the parties.

3. On the first day of the hearing, the parties indicated a willingness to agree relevant facts and to identify as the preliminary issue the question of law in dispute but excluding any reference to matters which would require a determination by the Court of facts in dispute or exercise of a discretion which would require an assessment by the Court of the full facts.

4. This was done and on the second day of the hearing, there remained a small dispute between the parties as to the formulation of the preliminary issue and, ultimately, the Court determined that the preliminary issue to be determined would be in the following terms:

> "Whether all monies collected pursuant to s. 53A(4)(c) of the Waste Management Act 1996, were required by law to be used solely for the purpose of paying for the closure, restoration, remediation and aftercare of the landfill to which they relate for a period of thirty years and were not available to the Licensee to invest, spend, charge or otherwise use in any form or manner."

5. There was agreement in each of the sets of proceedings as to the facts upon which the Court should determine the preliminary issue. These were reduced to writing and furnished to the Court.

6. In the course of the hearing, counsel for the Environmental Protection Agency ("the Agency") indicated that it intended asking the Court to make a reference to the Court of Justice of the European Union (CJEU) pursuant to Article 267 on the Treaty on the Functioning of the European Union (TFEU). At the request of the parties, there was a further hearing on that issue. Counsel for CLM Properties Ltd. ("CLM"), the plaintiff in the second proceedings, supported the application for a reference. The reference was opposed by the Bank.

7. The defendants, other than the Bank, did not participate in the hearing on the preliminary issue.

Agreed Facts

8. The agreed facts to be assumed by the Court for the determination of the preliminary issue in each set of proceedings were set out in writing and include a booklet of core documents. For the judgment, they may be summarised as follows.

9. The Agency is established pursuant to s. 19 of the Environmental Protection Agency Act 1992 (as amended). It is vested with functions under s. 52 of the 1992 Act. It is also the Competent Authority for the purposes of Council Directive 75/442/EEC on waste, Council Directive 2008/98/EC on waste ("the Waste Framework Directive") and Council Directive 99/31/EC ("the Landfill Directive"). It is also the body responsible for the granting of waste licences including in respect of landfills in accordance with the Waste Management Act 1996 (as amended) and is vested with other functions under the Act of 1996 and Regulations made thereunder.

10. Greenstar Holdings Ltd. ("Greenstar Holdings") is the holding company of a group of companies which operate a nationwide waste management undertaking including the operation of four landfills relevant to these proceedings. Greenstar Ltd. operates a countrywide waste collection and transfer business. It holds licences for waste transfer stations, holds permits for waste collection and charges people to collect waste which, in turn, it disposes of at a landfill.

11. Whilst Greenstar Holdings holds the waste licence in respect of three landfills (and KTK Landfill Ltd ("KTK"), for the fourth), each of those landfills is, in fact, operated by another Greenstar company stated to be on their behalf. The charges collected for waste disposal in landfills is done by Greenstar Ltd. and stated to have been done as agent, either of the landfill operating companies or Greenstar Holdings and KTK. The charges are referred to as "Gate Fees". It is proposed, for the purposes of considering the applicable E.U. and Irish provisions relevant to the preliminary issue for the most part, to ignore the multiple Greenstar companies involved and to refer to one company as "Greenstar" as if it were the holder of the licence, the operator of the landfill and the collector of the charges imposed and determined pursuant to s. 53A(4)(c) of the 1996 Act.

12. Each of the licences (with some variations in wording) issued by the Agency in respect of the landfills impose, *inter alia*, a condition that in substance the licensee:

> (a) make financial provision, to the satisfaction of the Agency, to cover any liabilities associated with the operation (including the closure and aftercare) of the facilities the subject matter of the Licenses; and
>
> (b) ensure that the costs of, *inter alia*, closure and aftercare for a period of at least 30 years shall be covered by the price to be charged for the disposal of waste at the facility and that the Licence holder would comply with s. 53A of the 1996 Act.

13. Greenstar was also required under its licence obligations and s. 53A to submit annual environmental statements to the Agency. These included the statement required under s. 53A(5) of the 1996 Act. The licencees also submitted their annual accounts. These included provision for site restoration and aftercare. As an example, a note to the consolidated financial statements for Greenstar Holdings for the year ending 31st March, 2011, entitled 'Restoration and Aftercare' stated "[a]t 31 March 2011, the site restoration and aftercare provisions were €27,224,000. The provisions are made for the net present value of the Group's costs in relation to restoration liabilities at its landfill sites and of post-closure costs based on the quantity of waste input into the landfill during the period".

14. As a matter of fact, the charges collected by Greenstar Ltd., including pursuant to s. 53A(4)(c) of the 1996 Act, were not transferred to Greenstar Holdings but were retained in a bank account of Greenstar Ltd. and used for the benefit of Greenstar Ltd. and other members of the Greenstar Group.

15. In 2006, a syndicate of banks for which the Bank acts as agent made facilities available to the Greenstar Group. The facilities were secured by charges of Greenstar Group assets and guarantees from Greenstar companies. By 30th June, 2012, "events of default" had occurred which entitled the Bank to make demand for repayment of the sums then due and owing pursuant to the Facilities. The Bank demanded repayment and ultimately made demand for payment of the entire sum due (€83,247,921) from the

Greenstar Group companies which had guaranteed the loans.

16. On 23rd August, 2012, the Bank appointed Mr. David Carson, the seventh named defendant as receiver and manager over certain assets of Greenstar Holdings and Greenstar Ltd. but not over shares in the landfill companies or the licences or properties or rights connected with the activities the subject of the landfill licences.

17. On 23rd and 24th August, 2012, the Bank transferred a total of €12,022,449.85 from various accounts of Greenstar Ltd. and the Greenstar Group to its own possession against the sum then due and owing. The said sum is less than the combined charges collected by Greenstar pursuant to s. 53A(1), s. 53A(3) and s. 53A(4)(c) of the 1996 Act.

18. CLM carried out certain works at the landfills of Greenstar and is owed approximately €3 million in respect of the works carried out. The works carried out by CLM are contended to form part of restoration, remediation and aftercare of a landfill and are so considered by the Court for the purposes of the preliminary issue.

19. Each of the plaintiffs claim in their proceedings that the monies collected by Greenstar as part of the Gate Fees representing the amount determined in accordance with s. 53A(4)(c) of the Waste Management Act 1996, are required by law to be used solely for the purposes of paying for the closure, restoration, remediation and aftercare of the landfill to which they relate for a period of thirty years and were not available to the licensee for any other purpose, including the giving of security to the Bank.

The Law

20. Article 4(2)(e) of the TFEU provides for shared competence between the Union and Member States in the area of the environment. Article 191(2) provides that Union policy on the environment "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".

21. Directive 2008/98/EC of the European Parliament and of the Council of 19th November, 2008 ("the Framework Directive") was adopted, as stated in Article 1, to lay down "measures to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of waste and by reducing overall impacts of resource use and improving the efficiency of such use". It sets out in Article 4 the waste hierarchy to be applied in waste prevention and management legislation and policy starting with prevention and ending with disposal.

22. In Article 12 in relation to disposal, it provides:

> "Member States shall ensure that, where recovery in accordance with Article 10(1) is not undertaken, waste undergoes safe disposal operations which meet the provisions of Article 13 on the protection of human health and the environment."

Article 13 obliges Member States to take the necessary measures to ensure that waste management is carried out without endangering human health, without harming the environment and, in particular without certain other specified matters which are not directly relevant.

23. In relation to cost at Article 14, the Framework Directive provides:

> "1. In accordance with the polluter-pays principle, the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders.
>
> 2. Member States may decide that the costs of waste management are to be borne partly or wholly by the producer of the product from which the waste came and that the distributors of such product may share these costs."

24. "Waste holder" is defined in Article 3 as meaning the waste producer or the natural or legal person who is in possession of the waste. Whilst the Framework Directive was enacted in 2008, it was made, *inter alia*, for the purpose of repealing and replacing Directive 2006/12/EC (which in turn had repealed and replaced Directive 75/442/EEC) which had contained provisions in relation to the imposition of the cost of disposing of waste in accordance with the polluter pays principle.

25. The Council had, in 1999, put in place Directive 1999/31/EC of 26th April, 1999, on the landfill of waste ("the Landfill Directive"). The Landfill Directive recites at Recital (5) that under the polluter pays principle it is necessary, *inter alia*, to take into account any damage to the environment produced by a landfill; it states at Recital (18) that because of the particular features of the landfill method of waste disposal "it is necessary to introduce a specific permit procedure for all classes of landfill in accordance with the general licensing requirements . . .".

26. At Recitals (28) and (29), it provides:

> "(28) Whereas the operator should make adequate provision by way of a financial security or any other equivalent to ensure that all the obligations flowing from the permit are fulfilled, including those relating to the closure procedure and after-care of the site;
>
> (29) Whereas measures should be taken to ensure that the price charged for waste disposal in a landfill cover all the costs involved in the setting up and operation of the facility, including as far as possible the financial security or its equivalent which the site operator must provide, and the estimated cost of closing the site including the necessary after-care."

27. The aim of the Directive in Article 1 is stated to be "by way of stringent operational and technical requirements on the waste and landfills, to provide for measures, procedures and guidance to prevent or reduce as far as possible negative effects on the environment … from landfilling of waste, during the whole life-cycle of the landfill".

28. Article 7 obliges Member States to take measures in order that the application for a landfill permit must contain at least particulars of the matters specified at paras. (a) to (i). These include:

> "(g) the proposed plan for the closure and after-care procedures;
>
> . . .

(i) the financial security by the applicant, or any other equivalent provision, as required under Article 8(a)(iv) of this Directive."

29. Articles 8 and 10 are central to the disputes between the parties relevant to the preliminary issue. Insofar as relevant, they provide:

"Article 8

Conditions of the permit

Member States shall take measures in order that:

(a) the competent authority does not issue a landfill permit unless it is satisfied that:

(i) without prejudice to Article 3(4) and (5), the landfill project complies with all the relevant requirements of this Directive, including the Annexes;

(ii) the management of the landfill site will be in the hands of a natural person who is technically competent to manage the site; professional and technical development and training of landfill operators and staff are provided;

(iii) the landfill shall be operated in such a manner that the necessary measures are taken to prevent accidents and limit their consequences;

(iv) adequate provisions, by way of financial security or any other equivalent, on the basis of modalities to be decided by Member States, has been or will be made by the applicant prior to the commencement of disposal operations to ensure that the obligations (including after-care provisions) arising under the permit issued under the provisions of this Directive are discharged and that the closure procedures required by Article 13 are followed. This security or its equivalent shall be kept as long as required by maintenance and after-care operation of the site in accordance with Article 13(d). Member States may declare, at their own option, that this point does not apply to landfills for inert waste;

(b) . . .

(c) . . .

…

Article 10

Cost of the landfill waste

Member States shall take measures to ensure that all of the costs involved in the setting up and operation of a landfill site, including as far as possible the cost of the financial security or its equivalent referred to in Article 8(a)(iv), and the estimated costs of the closure and after-care of the site for a period of at least 30 years shall be covered by the price to be charged by the operator for the disposal of any type of waste in that site. Subject to the requirements of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment Member States shall ensure transparency in the collection and use of any necessary cost information."

30. The Waste Framework Directive and the Landfill Directive are given effect in Ireland by the Waste Management Act 1996 (as amended by the Waste Management (Amendment) Act 2001 and the Protection of the Environment Act 2003). All subsequent references to the 1996 Act are to the relevant provision as amended. There are three sections central to the implementation of Article 14 of the Framework Directive and Articles 8 and 10 of the Landfill Directive. They are sections 31A, 53 and 53A which provide:

"31A Costs
In accordance with the polluter pays principle, the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders.

…

53 Financial provisions regarding waste recovery and disposal.
(1) The Agency may, before it does any of the following things, namely

(a) decides whether to

(i) grant a waste licence,

(ii) transfer such a licence,

(b) conducts a review of a waste licence,

require the applicant for, or the holder of, the licence or the proposed transferee, as the case may be, to—

(i) furnish to it such particulars in respect of such matters affecting his or her ability to meet the financial commitments or liabilities that the Agency reasonably considers will be entered into or incurred by him or her in

carrying on the activity to which the licence relates or will relate, as the case may be, in accordance with the terms of the licence or in consequence of ceasing to carry on that activity as it may specify, and

(ii) make, and furnish evidence of having so made, such financial provision as it may specify (which may include the entering into a bond or other form of security) as will, in the opinion of the Agency, be adequate to discharge the said financial commitments or liabilities.

(2) A person who, pursuant to a requirement made of him or her under subsection (1), furnishes to the Agency any particulars or evidence which he or she knows to be false or misleading in a material respect shall be guilty of an offence.

(3) The Minister may make regulations for the purposes of this section.

(4) Without prejudice to the generality of subsection (3), regulations under this section may specify by reference to the type of activity to which the waste licence concerned relates or will relate -

(a) the nature of the financial provision that the Agency may require a person to make under subsection (1)(ii),

(b) the matters to be had regard to by the Agency in determining the amount of financial provision that it may require a person to make under subsection (1)(ii).

53A Operator of landfill facility to impose charge for disposals.
(1) The operator of a landfill facility (other than an internal landfill facility), or such other facility for the disposal of waste as may be prescribed for the purposes of this subsection, shall impose charges in respect of the disposal of waste at the facility.

(2) Subject to subsection (3), different amounts of charges may be imposed under subsection (1) in respect of different disposals of waste at the facility concerned.

(3) The amount or amounts of charges imposed under subsection (1) shall be such as the operator of the facility concerned determines is likely to ensure that the result specified in subsection (4) is achieved.

(4) The result referred to in subsection (3) is that the aggregate of the amount of charges imposed by the operator, in relation to the facility concerned, during the relevant period will not be less than the amount that would meet the total of the following costs (irrespective of whether those costs, or any of them, have been or will be met from other financial measures available to the operator), namely -

(a) the costs incurred by the operator in the acquisition or development, or both (as the case may be), of the facility,

(b) the costs of operating the facility during the relevant period (including the costs of making any financial provision under section 53), and

(c) the estimated costs, during a period of not less than 30 years or such greater period as may be prescribed, of the closure, restoration, remediation or aftercare of the facility.

(5) The operator of the facility concerned shall prepare a statement in writing in respect of the determination he or she makes under subsection (3) in each year of the amounts of charges and that statement shall specify the method he or she has employed in making that determination and the assumptions and any relevant accounting principles he or she has used for the purpose of that method.

(6) A copy of a statement prepared under subsection (5) shall be furnished by the operator to the Agency not later than 1 month following the end of the year to which the statement relates.

(7) An operator who fails to comply with subsection (6) shall be guilty of an offence.

(8) The Agency shall not grant a licence or revised licence in respect of the disposal of waste at a facility referred to in subsection (1) unless it is satisfied that the proposed licensee or licensee will take or will continue to take steps to comply with this section.

(9) The Minister may by regulations make such incidental, consequential or supplementary provision as may appear to him or her to be necessary or proper to give full effect to any of the provisions of this section.

(10) In this section—

'internal landfill facility' means a landfill facility that is used solely for the disposal of waste produced by an activity (other than one involving the sorting, mixing or segregation of waste or the recovery of materials front waste) and is operated by or on behalf of the person carrying on that activity;

'relevant period' means such period as the Agency determines to be appropriate for the purposes of Article 10 of the Council Directive 99/31/EC in relation to the facility concerned and specifies in writing for the purposes of this section.”

31. Sections 53 and 53A are in Part V of the 1996 Act, which relates to the recovery and disposal of waste. Section 39 prohibits the disposal or recovery (including the treatment) of waste at a facility, save under and in accordance with a licence granted under Part

V of the 1996 Act, which is referred to as a "waste licence", that is in force in relation to the carrying on of the activity concerned at the relevant facility. Section 40 of the 1996 Act authorises the Agency to grant licences and sets out in some detail the matters to be considered by the Agency on an application for a grant of a licence. Section 41 sets out, again in some detail, conditions which may be attached to a waste licence and in respect of certain matters minimum conditions to be attached. Section 41(2)(b)(xii) specifies that the conditions to be attached to a waste licence may "require the making and maintenance of such financial provision as may be required under s. 53(1)".

Applicable E.U. Principles

32. As stated, the issue to be determined by the Court is:

> "Whether all monies collected pursuant to s. 53A(4)(c) of the Waste Management Act 1996, were required by law to be used solely for the purpose of paying for the closure, restoration, remediation and aftercare of the landfill to which they relate for a period of thirty years and were not available to the Licencee to invest, spend, charge or otherwise use in any form or manner".

33. The plaintiffs' submissions rely upon the relevant provisions of the Framework Directive and the Landfill Directive. However as Greenstar Holdings and its associated companies are not "emanations" of the State, it is accepted that the relevant law is the 1996 Act, as amended.

34. This Court, as a national court, applying domestic law adopted to implement a directive is bound to interpret it "so far as possible" in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive. As put by the European Court of Justice in *Adeneler (Case C-212/04)* [2006] E.C.R. I-6057 at para. 108:

> "When national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC (see, inter alia, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 113, and the case-law cited). This obligation to interpret national law in conformity with Community law concerns all provisions of national law, whether adopted before or after the directive in question (see, *inter alia*, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, and *Pfeiffer and Others*, paragraph 115)."

35. The limits of the national courts' obligation of "conforming interpretation" was considered in the Supreme Court by Fennelly J. (with whom the other members of the Court agreed) in *Albatross Feeds Ltd. v. Minister for Agriculture* [2006] IESC 51, [2007] 1 I.R. 221. At pp. 243 to 244, he stated:

> "59 It is, at the same time, perfectly clear that the court is under an obligation to interpret national law, *so far as possible*, in the light of the Community law provisions it is designed to implement. The important qualification is: *so far as possible*. The European Court of Justice does not interpret national law. It is a fundamental principle that the Community law respects national procedural autonomy. The national court is subject to the obligation of 'conforming interpretation,' as the court described it in its judgment in *Criminal proceedings against Pupino (Case C-105/03)* [2005] E.C.R. I-5285. There are, however, limits to that obligation. Most recently, the European Court of Justice in its judgment in *Adeneler v. Ellinkos Organismos Galaktos (Case C-212/04)* [2006] I.R.L.R. 716 repeated at para. 110 that 'the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem*.'
>
> 60 The national court is not obliged so to interpret its national law in a way which would be incompatible with the relevant national legislation."

Submissions

36. In considering the application of the 1996 Act to the facts herein, I propose ignoring the fact that there are different companies within the Greenstar Group which held the licence for the landfill and which collected the waste and was paid the charges by the waste producers. For the purposes of identifying the proper meaning of the 1996 Act, I propose assuming that the same corporate entity is the licensee, operator of the landfill site and recipient of the charges paid by the waste producer for the disposal of the waste in the landfill. All references to sections below are to sections of the 1996 Act unless otherwise stated.

37. The plaintiffs' primary contention is that s. 53A is a provision which is intended to give effect, *inter alia*, to Article 14 of the Framework Directive and Article 10 of the Landfill Directive. This is not disputed by the Bank.

38. The allied submission of the plaintiffs is that sections 31A and s. 53A, in implementing Articles 14 of the Framework Directive and 10 of the Landfill Directive, mean that so much of the charge paid by the waste producer to Greenstar as represents the estimated costs, during a period of not less than 30 years of the closure, restoration, remediation and after care of the landfill to which they relate, were required to be used only for the said purpose and were not available to Greenstar to invest, spend, charge or otherwise use in any form or manner. They submit that unless such an obligation and restriction is implied by law, then, in circumstances such as exist herein, if Greenstar, as licensee, is permitted to otherwise use or charge the said monies and then becomes insolvent, such that the charges paid to it by the waste producer are no longer available to it, then effectively, in the future, the cost of the closure, restoration, remediation and aftercare of the landfill will have to be paid by a person other than the producer of the waste. They submit that this is contrary to the "polluter pays principle" and Article 14 of the Framework Directive and s. 31A of the 1996 Act.

39. The Bank submits, firstly, that Article 14 of the Framework Directive and s. 31A of the 1996 Act, are not provisions which, of themselves, are capable of imposing obligations on an operator of a landfill such as Greenstar. It accepts that the Landfill Directive should be construed so as to give effect to the polluter pays principle set out in Article 14 and, similarly, that sections 53 and 53A of the 1996 Act should likewise be construed so as to give effect to the principle set out in section 31A. It submits that the scheme of the Landfill Directive, as reflected in Articles 10 and 8, intended to give effect to the polluter pays principle through a twin-track approach. The Bank submits, firstly, that Article 10 is directed to securing that the price to be paid by a waste producer is an amount which reflects the entire cost of the disposal of waste in a landfill. As provided, the price to be charged is to include all the costs involved in the setting up and operation of the landfill, including in its submission, most importantly, the "cost of the financial security or its equivalent referred to in Article 8(a)(iv)" and as a third element, the estimated costs of the closure and aftercare of the site for a period of at least 30 years. The Bank's submission is that Article 10 is directed to the quantum of the price, charge or 'Gate Fee' to be paid by the waste producer and is not in any way directed to the question as to what Greenstar, as operator of the site, may or

may not do with some or all of the price or charge paid to it by the waste producer.

40. The Bank's further submission is that Article 8(a)(iv) of the Landfill Directive is intended to ensure that Greenstar, as licensee or landfill operator, having been paid a price reflecting the three elements of costs, will have put in place financial security or equivalent such that the necessary funds will be available to carry out the restoration, remediation and aftercare of the landfill facility during the 30-year period, even if the operator were itself to become insolvent. The Bank submits that sections 53 and 53A are in proper implementation of Articles 8(a)(iv) and 10, respectively.

41. The Agency and CLM have requested that the Court submit a preliminary reference to the CJEU pursuant to Article 267 of TFEU on the interpretation of Article 14 of the Framework Directive and Article 10 of the Landfill Directive. I will return to this issue.

Discussion

42. The starting point of this Court's consideration of the issue which it has to determine must be the interpretation of the relevant provisions of the Framework Directive (Article 14 in particular) and the Landfill Directive (Articles 8 and 10 in particular). Whilst the obligations contended for in this case may only be imposed on Greenstar by the 1996 Act, the relevant sections of the Act must be construed insofar as possible so as to give effect to the Directives.

43. The Agency and CLM, in support of its submission that Article 14 of the Framework Directive and Article 10 of the Landfill Directive must be interpreted as meaning that a portion of the charges collected by Greenstar as landfill operator representing the estimated cost of closure, restoration, remediation and aftercare of the facility concerned, for a period of 30 years, be retained and used exclusively for that purpose, submit that the true meaning of the polluter pays principle is that both the polluter pays and a result is achieved in which no other person pays for the cost of disposing of the waste. The plaintiffs submit that unless Article 10 of the Landfill Directive is interpreted as imposing a restriction on the use which may be made by the landfill operator of this element of the charge, then the inevitable consequence is in circumstances such as the present where the landfill operator becomes insolvent, that a person other than the polluter will have to pay for the carrying out of the closure, restoration, remediation and aftercare of the facility.

44. The plaintiffs submit that such an interpretation of the polluter pays principle was stated by Advocate General Kokott in *Futura Immobiliare (Case C-254/08)* [2009] E.C.R. I-6995. That case concerned a preliminary reference from Italy in proceedings in which certain hotels had challenged a waste tax which imposed on them a significantly higher tax than on individuals occupying similar residential premises. The question referred, as construed by the Advocate General, was whether Article 15 of Directive 2006/12/EC (the predecessor of Article 14 of the Framework Directive) precludes legislation under which payments for waste disposal are assessed on the basis of area used and the economic revenue earning capacity of the waste producer, and not according to the waste actually produced.

45. The Advocate General, at paras. 25 to 27 of her Opinion, refers to the polluter pays principle in Article 15 of the then Waste Framework Directive, the choice of form and methods left to Member States pursuant to Article 249 EC and then states:

> "27. Article 15 of the Waste Framework Directive therefore, first of all, allows a certain margin of discretion when it is being determined who is to bear the costs of disposing of waste. The group of those who may be liable to pay the costs is limited by the wording of the provision, but not laid down definitively. Secondly, there is a margin of discretion in the choice of form and methods of transposition.
>
> 28. In the present case, the only possibility is the waste holder who has waste handled by a waste collector or a disposal undertaking. It is of no apparent relevance in the present context to what extent, for example, the producer of products which become waste may also be required to pay the costs.
>
> 29. It is uncertain, however, whether the guiding principle of Article 15 of the Waste Framework Directive, the 'polluter pays' principle, permits the payments for waste disposal to be calculated on the basis of the area used and the economic revenue-earning capacity of the waste producer, and not according to the waste actually produced."

46. She then continues to consider the essence of the polluter pays principle and identifies that it gives polluters an incentive to avoid polluting the environment and refers to its past regime and then states:

> "31. The 'polluter pays' principle is important in terms of environmental protection above all because it gives polluters an incentive to avoid polluting the environment. Where, as in Article 15 of the Waste Framework Directive, it is implemented not as a prohibition on behaviour which pollutes the environment, but in the form of a cost regime, the polluter is able to decide whether he will cease or reduce the pollution or whether instead he will bear the cost of removing it.
>
> 32. The 'polluter pays' principle also has the aim of fair allocation of the costs of environmental pollution. The costs are not imposed on others, in particular the public, or simply ignored, but assigned to the person who is responsible for the pollution. The Court has therefore regarded the 'polluter pays' principle as a reflection of the principle of proportionality. It would be inappropriate to impose the costs of disposing of waste on someone who has not produced the waste.
>
> . . .
>
> 34. The Court therefore considers, on the one hand, that it would be incompatible with the 'polluter pays' principle if the persons who have contributed to the creation of waste could escape their financial obligations as provided for in the Waste Framework Directive, whilst, on the other, burdens should not be imposed on anyone for the elimination of pollution to which he has not contributed."

47. Insofar as Advocate General Kokott refers to the polluter pays principle as including that the cost of disposing of waste or other imposition of burdens for the elimination of pollution should not be imposed on those who have not produced or contributed to the waste, the view expressed must be understood in the context of the issue she was addressing, where the effect of the challenged tax was to permit the residential house owners escape from paying the true cost of disposal of waste produced by them and instead making the hotels pay for it.

48. On the facts before the Court in these proceedings, there is no question of those who have created the waste escaping their financial obligations imposed by the polluter pays principle as implemented in relation to landfills, specifically, by Article 10 of the Landfill Directive. The price which has been paid by the waste producers to Greenstar as operator of the landfill includes the full cost of the operation of the landfill, including the estimated future closure and aftercare costs. That is in contradistinction to what was at

issue and being referred to by the Advocate General in *Futura Immobiliare* whereby it was contended that by reason of the methodology for computing the waste tax, the residential homeowners were not paying the full cost of disposing of waste produced by them, and rather, the hotels were being required to pay for the disposal of waste which they did not produce.

49. Article 10 of the Landfill Directive and its relationship with the polluter pays principle was considered by CJEU and Advocate General Sharpston in *Pontina Ambiente Srl (Case C-172/08)* [2010] E.C.R. I-1175. This was also a preliminary reference from Italy. Similarly, the question considered is different to that raised by the present proceedings. Nevertheless, both the views expressed by the Advocate General in her Opinion and the judgment of the Court are of assistance in considering the interpretation of Article 10 in its application of the polluter pays principle.

50. The reference made by the Italian courts was understood to raise a question as to whether a law which imposed a levy on a landfill operator in relation to disposal of solid waste and penalties for late payment of the levy but did not provide for the passing on of the levy and penalties to the producers of the waste (the municipalities), was compatible with Article 10 and its purpose of the Landfill Directive. The Advocate General considered Article 10 at paras 43 to 47:

> "*The terms of Article 10*
>
> 43. Article 10 expressly refers to '*all* of the costs involved' in the setting-up and operation of a landfill site. The municipal authorities supply waste to Pontina Ambiente for treatment. Pontina Ambiente duly performs its side of the contract and disposes of the waste. The levy becomes chargeable as a direct consequence of that sequence of events. It is a special levy on the disposal of solid waste in landfills. The basis of assessment is the quantity of waste deposited.
>
> 44. In those circumstances, it is abundantly clear that the levy is a cost that the landfill operator necessarily incurs; and one that is a cost inextricably bound up with the operation of a landfill site. To put the same point a different way: it is impossible to operate a landfill site for waste disposal in Italy without necessarily having to pay the levy.
>
> 45. The terms of Article 10 of the Landfill Directive are unequivocal: all such costs are to be included in the price to be charged by the operator for the disposal of any type of waste in that site. On a textual reading of that provision, the levy is a cost that is to be included in the price charged.
>
> *The purpose of Article 10*
>
> 46. The aims of the Landfill Directive likewise support that reading of Article 10. The Community legislature intended to protect the environment by, inter alia, dissuading people from creating landfill waste. Recitals 6 and 9 underline the need for adequate management of landfill waste. The wording of recital 29 anticipates the substantive wording of Article 10.
>
> 47. One mechanism to achieve that aim is to try to ensure that the full costs of setting up, running and managing a landfill site are borne by those who create the waste that is deposited there. That is what Article 10 does. In short, the Landfill Directive is a specific expression of the 'polluter pays' principle, whilst also reflecting the principle that waste should be disposed of as close as possible to its source. The 'polluter pays' principle is only satisfied if the incentive to reduce waste is ultimately applied to the waste provider: that is, the municipal authorities. That will only happen if the levy is treated as a 'cost' that is passed to the waste provider in the price paid for the waste disposal service."

51. The Court, at para. 32 of its judgment, stated of Article 10:

> "32. Pursuant to Article 10 of Directive 1999/31, Member States are to take measures to ensure that all of the costs involved in the setting up and operation of a landfill site are covered by the price to be charged by the operator for the disposal of any type of waste in that site."

52. The CJEU, in *Pontina Ambiente* was not, of course, considering the issue which this Court has to consider, namely, whether Article 10 of the Landfill Directive requires the Member States to enact laws or otherwise put in place a legal framework which restricts a landfill operator who is paid charges which have been quantified in accordance with Article 10 from using some or all of those charges for purposes other than the closure, restoration, remediation and aftercare of the landfill concerned. For the purposes of the preliminary issue, it is agreed that the price charged by Greenstar for disposal of waste in the landfills was determined in accordance with Article 10, as implemented by s. 53A of the 1996 Act.

Conclusion

53. My conclusion is that Article 10 of the Landfill Directive, interpreted in conjunction with Article 14 of the Framework Directive does not require Member States to enact laws or otherwise put in place a legal framework which restricts a landfill operator, such as Greenstar, who has been paid charges which have been quantified in accordance with Article 10, from using some or all of the monies received for purposes other than the closure, restoration, remediation and aftercare of the landfill concerned. My reasoning is as follows.

54. The Landfill Directive, as stated by Advocate General Sharpston in *Pontina Ambiente* is a "specific expression of the 'polluter pays' principle". In accordance with Article 14 of the Framework Directive, that includes that "the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders". A landfill operator is a waste holder. In addition, the polluter pays principle includes that an incentive to reduce waste is ultimately applied to the waste provider by making him pay a price which reflects the full cost of waste disposal.

55. Landfills have very special characteristics. One such characteristic is the long period for which they have to be maintained and their closure and aftercare requirements. The Landfill Directive implements the polluter pays principle by, firstly, requiring Member States to put in place laws whereby the price to be paid by a waste producer for disposal of waste to a landfill will include the full cost of the establishment, operation and the estimated costs of closure, restoration, remediation and aftercare of the landfill concerned (Article 10). In accordance with the principles set out in Articles 4, 12 and 13 of the Framework Directive, in addition to the polluter pays principle, it then obliges Member States to put in place a system for the granting of permits for the operation of landfills and to impose, *inter alia*, on the operator, responsibility for the maintenance, monitoring and control of a landfill in the aftercare phase (Articles 7, 8 and 13(c)). The Landfill Directive further specifically addresses what Member States must put in place to ensure that there will be available, in the long term, adequate financial resources to enable a landfill operator discharge its closure and aftercare obligations imposed pursuant to Article 13. This is done principally by the combined provisions of Article 7(g) and (i) and Article 8(a)(iv) of the Landfill Directive.

56. In accordance with Article 7(g) and (i), Member States are obliged to ensure that an application for a landfill permit will include the proposed plan for the closure and aftercare procedures and the financial security or any other equivalent provision to be provided as required under Article 8(a)(iv). Further, by Article 8, Member States must take measures in order that the competent authority i.e. the Agency does not issue a permit unless adequate provision by way of financial security or any other equivalent has been made or will be made by the applicant prior to the commencement of the disposal operations "to ensure that the obligations (including aftercare provisions) arising under the permit issued . . . are discharged and that the closure procedures required by Article 13 are followed". The security, or its equivalent, has to be kept as long as required by maintenance and aftercare operations of the site.

57. The Landfill Directive accordingly, in the system which it requires the Member States to put in place, takes a two-pronged approach to ensure that the original waste producer and the landfill operator (as holder of the waste) respectively pay for and is in a position to discharge the cost of closure, restoration, remediation and aftercare of the landfill. In the first instance, Article 10 requires a legal framework to be put in place by the Member States to ensure that the price paid by waste producer includes the full cost of closure, restoration, remediation and aftercare of the landfill. The responsibility for carrying out the closure, restoration, remediation and aftercare of the facility must be imposed on the landfill operator. To ensure that there are adequate adequate financial resources available in order that a landfill operator is in a position to carry out its obligations, Member States must pursuant to Article 8(a)(iv) have in place a lagal reqirement that as a condition of the permit under which it operates an operator has in place adequate financial security or other equivalent provisions...

58. I do not accept the plaintiffs' submission that if the Court does not interpret Article 10 and s. 53A as imposing a restriction on the use to which Gate Fees paid to a licensee may be put, that it means that person other than the waste producer or waste holder will have to pay for the closure and aftercare costs of the landfill. Sections 41 and 53, in implementing Article 8(a)(iv), enable (and possibly oblige) the Agency to impose, as a condition of a waste licence, the provision by the licensee of financial security or equivalent to ensure that its obligations in relation to closure and aftercare are discharged. Such monies should be available in the event of insolvency of a licensee. The provision of this security is the means whereby the imposition of the costs of closure and aftercare on third parties may be avoided. The Landfill Directive implements in full the polluter pays principle by a combination of Article 10 and Article 8, and in particular sub-section (a) and (iv).

59. In simple terms, Article 10 is directed to the computation of the price to be paid by the original waste producer. It cannot be read as including any requirement that the Member States impose by law a restriction on the landfill operator as to what it may do with the monies paid after receipt of same. Member States are required by the Landfill Directive to put in place a legal framework whereby a landfill operator provides financial security or equivalent to ensure that it is in a position to discharge its potentially long-term obligations in relation to the landfill, including closure and aftercare obligations. This requirement is imposed by Article 8(a)(iv) and should be required as a condition of the licence.

60. Ireland has implemented Article 10 of the Directive by s. 53A of the 1996 Act. Section 53A obliges the operator of a landfill to impose charges in respect of disposal of waste at the facility (sub-section (1)) and specifies how the amount of those charges is to be determined (sub-sections (3) and (4)). The section imposes certain consequential obligations, primarily in relation to the provision of a statement in relation to the determination of the charges (sub-sections (5) and (6)).

61. Ireland has separately purported to implement Article 8, *inter alia*, by s. 53 and s. 41 of the 1996 Act. The plaintiffs do not seek to rely on any part of those provisions as being in purported implementation of Article 10 of the Framework Directive or as imposing a restriction on Greenstar as to the use to which the Gate Fees paid to it may be put.

62. Section 53A of the 1996 Act has been set out in full at para. 30 of this judgment. The section does not include any words which, in accordance with their ordinary meaning could be construed as imposing a restriction on the use to which Greenstar, as operator of a landfill, could put monies paid to it as charges imposed pursuant to s. 53A(1) which had been determined in accordance with sub-section (3) so as to achieve the result specified in sub-section (4)(c). Section 53A, construed in accordance with the ordinary meaning of the words used, implements the obligation imposed on Ireland pursuant to Article 10 of the Landfill Directive. Section 53A of the 1996 Act is the only provision of Irish law relied upon by the plaintiffs as imposing an obligation restricting the use of any part of charges collected pursuant to that section.

63. On a full consideration of the facts and the relevant law, it appears that it may not be strictly accurate to refer to any element of the charges collected by Greenstar as operator of landfill as having been "collected pursuant to sub-section (4)(c) of s. 53A" as the obligation imposed by the section to collect charges from a waste producer is pursuant to sub-section 53A(1). Nevertheless, the intention of the parties in so framing the preliminary issue was to refer to the portion of the charges which related to the amount of the estimated costs of the closure, restoration, remediation and aftercare of the facility referred to in sub-section (4)(c) as distinct from the full charges determined in accordance with sub-section (4)(a), (b) and (c). Accordingly, I propose answering the preliminary issues in the following terms:

> Monies collected pursuant to s. 53A(1) of the Waste Management Act 1996, representing the amount determined to ensure the result specified in s. 53A(4)(c) of the 1996 Act is achieved, were not required by law to be used by the licensee solely for the purpose of paying for the closure, restoration, remediation and aftercare of the landfill to which they relate for a period of 30 years.

Application for a Preliminary Reference

64. The plaintiffs requested that the Court make a reference to the CJEU pursuant to Article 267 of the TFEU in relation to the proper interpretation and meaning of Article 14 of the Waste Framework Directive and Article 10 of the Landfill Directive. They also suggested ancillary questions in relation to Article 8(a)(iv) of the Landfill Directive and the obligations of this Court.

65. The primary purpose of the reference sought was that the Court should ascertain from the CJEU whether Article 14 of the Waste Framework Directive and Article 10 of the Landfill Directive should be interpreted as contended for by the plaintiffs on the preliminary issue, namely, as meaning that Article 10 imposes on a landfill operator an obligation to use a portion of charges paid to them by a waste producer for disposal of waste in a landfill for the purpose of paying for the closure, restoration, remediation and aftercare of the landfill concerned and not for any other purpose. I do not propose referring to the actual wording of the questions proposed as they themselves were the subject of dispute by the Bank. I considered the application upon the basis that the plaintiffs seek to have this Court make a reference pursuant to Article 267 for a preliminary ruling on the interpretation of Article 14 of the Framework Directive and Article 10 of the Landfill Directive.

66. In accordance with Article 267, this Court may only make a reference "if it considers that a decision on the question is necessary to enable it give judgment". It is commoncase that this Court, not being a court of final appeal, has a discretion as to whether or not

to make a reference.

67. I am not satisfied that the Court has jurisdiction pursuant to Article 267 to now request a preliminary ruling from the CJEU on the interpretation of Article 14 of the Framework Directive and Article 10 of the Landfill Directive as it does not appear to me that a ruling on the interpretation of those provisions is necessary in order to determine the preliminary issue herein for the following reasons.

68. It is accepted that as Greenstar is not an "emanation" of the State, it is s. 53A of the 1996 Act which is the relevant law contended to impose the obligation or restriction which, the plaintiffs submit, exists in relation to the charges collected. Whilst, in accordance with principles already set out in this judgment, s. 53A must be interpreted and applied by the Court, in accordance with the principles of conforming interpretation, this Court is bound by the limits of those obligations as determined by the Supreme Court per Fennelly J. in *Albatross Feeds Ltd. v. Minister for Agriculture* [2006] IESC 52, [2007] 1 I.R. 221. As appears from the extract of that judgment set out at para. 35 above, this Court's interpretive obligation of the implementing Irish Legislation is limited by general principles of law, including those of legal certainty.

69. Even if, contrary to the view which I have taken, Article 10 of the Landfill Directive, in conjunction with Article 14 of the Framework Directive, is to be interpreted as requiring Member States to impose by law a restriction on the right of a landfill operator to use a portion of the charges paid to it by a waste producer for a purpose other than the closure, restoration, remediation and aftercare of the landfill concerned, it does not appear that s. 53A, as enacted by the Oireachtas, even in conjunction with s.31A, could be interpreted by this Court as imposing a restriction on a landfill operator as to the use to which the portion of the charges determined to achieve the result specified in s. 53A(4)(c) may be put.

70. A landfill operator may be a legal or natural person inevitably carrying on a business. The charges to be imposed pursuant to s. 53A(1) are fees to be paid by a waste producer in consideration of the service to be provided by the landfill operator. Once paid, the money is part of the business receipts and *prima facie* is the property of the landfill operator. A person, whether legal or natural, is entitled to the benefit of its property and to use it as it sees fit, save as may be restricted by law. Any such restriction imposed by statute, in accordance with the principles of legal certainty, must be in clear and precise terms. There is nothing in the wording of s. 53A of the 1996 Act which could justify an interpretation that it imposes a restriction on the use to which a landfill operator could put a part of charges imposed and collected by it pursuant to section 53A. Accordingly, this Court is precluded by the Supreme Court judgment in *Albatross Feeds* from so interpreting s. 53A, irrespective of a different interpretation of Article 10 of the Landfill Directive to the one set out in this judgment. It follows that a question on the interpretation of the Landfill Directive is not necessary to enable me give judgment on the preliminary issue.