THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 130

Peart J.
Mahon J.
Edwards J.

330/2012

332/2012

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

v

CAVAN COUNTY COUNCIL

And

OXIGEN ENVIRONMENTAL LIMITED

Appellants

Judgment of the Court delivered on the 24th day of June, 2015 by Mr. Justice Edwards

Introduction

1. This is a case in which the appellants, Cavan County Council and Oxigen Environmental Limited, each pleaded guilty on 30 November 2012 at Cavan Circuit Criminal Court, to one count of having disposed of waste other than in accordance with a term of the waste license that had been granted by the Environmental Protection Agency, contrary to section 39 (1) and 39 (9) of the Waste Management Act 1996.

2. The offences related to the disposal of waste at a landfill in Corranure and Lismagratty Townlands, Cootehill Road, Cavan, between the 14th of February 2007 and the 30th of September 2007, in respect of the first named appellant, and between 1st of October 2007 and 14th of February 2009, in respect of the second named appellant. During both periods, Cavan County Council was the licensee of the landfill site. It was itself in occupation and control of same up to, but not including, between 1st of October 2007 and 14 February 2009, during which time Oxigen Environmental Limited was contracted to manage and operate the site.

3. At sentencing, Cavan County Council received a fine of €260,000. Oxigen Environmental Limited received a fine of €780,000.

4. The appellants now appeal against the severity of these fines.

Background and relevant evidence

5. The Corranure facility was originally a traditional style dump, in use since the 1960s. In 2001, the first named appellant, Cavan County Council, began investing in the site in order to develop a modern, technologically advanced, landfill facility and has expended approximately €19,000,000 to that end in the intervening period.

6. The first named appellant was issued a waste license by the Environmental Protection Agency. Condition 7.1 thereof imposed a duty on the Council to ensure that odours emanating from the landfill did not give rise to a nuisance at the facility or in its immediate vicinity.

7. However, inspections of the site undertaken by the Environmental Protection Agency on 30th of May 2007, 11th of July 2007, 4th of November 2008 and 11th of November 2008, detected the presence of noxious odours which were being emitted primarily as a result of waste deposited into engineered cells but also as a result of malodorous landfill gases which this waste generated. Notices of non-compliance were issued to the appellant following these inspections.

8. The odours, which were described as moderate, strong and persistent, caused significant interference with the amenities of landowners and residents beyond the boundaries of the licensed facility, up to and including 2km from the site. The landfill is located within a 1.6km radius of approximately 100 residences. There are also two secondary schools, housing developments and a residential nursing home within a short distance. According to the Environmental Protection Agency, Ballyhaise village and the northern part of Cavan town were also adversely affected by the emissions. Consequently, between 2007 and 2010, the Environmental Protection Agency received over 1,400 complaints relating to the problem.

9. The level of dissatisfaction within the local community with odours emanating from the facility was reflected by the fact that when Oxigen Environmental Limited applied for planning permission to expand the landfill site, and applied for a waste licence in its own name, these were objected to by local residents who had been extremely discommoded by the nuisance at issue. A number of residents formed an organisation to oppose the applications as part of a campaign entitled "Cavan Better Waste Management Group". The existence of this group, the fact of their objections, and press reportage unfavourable to the appellants in "The Anglo Celt" and other newspapers, formed the basis of an application to Cavan Circuit Criminal Court by the appellants to have their trials transferred to the Dublin Circuit Criminal Court. That application was unsuccessful. However, the judge's ruling in that regard does not form the basis of any ground of appeal.

10. Mr Kealan Reynolds, inspector at the Environmental Protection Agency (E.P.A.), accepted that waste management was more difficult in recent years due to a higher proportion of biodegradable content in waste going to landfill, owing to increased recycling, which produces more odours, and that this has precipitated regulatory reform in the waste industry.

11. Secondly, it was accepted by Mr Reynolds that the first named appellant had made a substantial investment in the Corranure site and that, notwithstanding the breach at issue, the site was now being operated in full compliance with the waste licence, and the E.P.A. had no ongoing concerns with respect to either appellant in relation to how the Corranure site was being operated. In addition,

while condition 7.1 of the waste licence had undoubtedly been breached during the period at issue, the breach related to the creation of a nuisance for those in the vicinity in breach of a requirement that that should not occur, and therefore involved non-compliance with a result based condition, rather than any wilful and deliberate disregard of a specific technical requirement or some limiting condition of the licence. In particular, there was no suggestion of waste limits being breached at any time. On the two occasions that the first named appellant was served with notices of non-compliance with the licence, it had responded in a speedy and detailed fashion, outlining its intention to remedy the issue and expeditiously undertaking the proposed work.

12. It was also accepted by Mr Reynolds that, during the management of the site by Oxigen Environmental Limited, who had, for a period, been employed as a specialist contractor by the first named appellant to take over the day to day operation of the facility, the first named appellant remained involved insofar as possible and liaised with the Environmental Protection Agency despite its limited control of the site at that time.

13. In addition, Mr Reynolds confirmed that he had been informed, in interviews with employees of the Council, that there had been no financial restrictions limiting the actions which the Council was willing to, or needed to, undertake to remedy the issue of the malodorous emissions.

14. In cross-examination on behalf of the first named appellant, Mr Reynolds accepted that the Council was now operating the Corranure landfill in accordance with best practice and that the risk of malodorous emissions was being effectively controlled.

15. Mr Reynolds further confirmed that the second named appellant had fully engaged with the E.P.A's inspectors, and his agency had no outstanding issues with that company.

16. Mr Eoin Doyle, Director of Services with the first named appellant, told the Court since 2001 the first named appellant had expended in the region of €19 million in capital expenditure on the site. Under cross-examination he agreed with counsel for the respondent that in 2007 and 2008, when the offences were committed, the Council earned €8,300,000 and €8,730,000, respectively, in waste disposal fees. This was based on approximately 80,000 tonnes of waste a year being received at €100 per ton. However, this was gross income and did not take into account the substantial costs of operating the site. He was not asked to provide net profit / loss figures for those years and the Court received no evidence in that regard. The witness told the Court that since 2010 the Council was no longer accepting waste at Corranure and accordingly has received no income from the site since then. Despite this the annual maintenance cost for the non-operating facility was very substantial. This maintenance cost was separate from any further operating costs that would have been incurred when waste was being received. The Court was told the first named appellant would be incurring costs of approximately €300,000 per annum to manage the site for the next 30 years. This was despite the Council's budget being substantially reduced due to the economic downturn. The Court heard the maintenance figure for 2012 (the year in which the sentencing hearing took place) was in fact €396,000.

17. Mr Doyle expressed an apology on behalf of the first named appellant and proposed that it would do everything possible to ensure that this issue does not repeat itself. Mr Doyle confirmed that the Council had expended approximately €19,000,000 since 2001 to bring the facility up to the appropriate standard and outlined that and the fact that the facility, from 2010, was neither receiving waste any longer, nor was it, accordingly, receiving income.

18. On behalf of Oxigen Environmental Limited, Mr Aidan Doyle offered his apologies to residents in the area of the landfill site for the inconvenience that had been caused.

19. The Court heard that the first named appellant has two previous convictions, one recorded in 2005 for failure to maintain landfill gas management infrastructure and a second, recorded in 2007, for causing nuisance off-site and for failure to maintain infrastructure to manage landfill gas.

20. Unlike the first named appellant, the second named appellant had no previous convictions.

Submissions at the sentencing hearing

21. Both appellants relied on their guilty pleas, entered at an early stage, as mitigating factors and the fact that it was neither argued by the prosecution, nor was it suggested at any stage, that the appellants had economically benefited from the breach of the waste license.

22. It was pleaded in mitigation, on behalf of the first named appellant, that the circumstances in this case did not concern an individual engaged in inherently wrongful activity but related instead to a public body providing a public service, whose breach of a licence arose not as a result of specifically prohibited action or inaction, nor any other intentional, reckless or negligent act, but instead as a result of a failure to keep pace with technical and regulatory change.

23. The first named appellant had emphasised, during the course of the sentencing hearing, that the Corranure landfill was a difficult site to manage and one which was going to require constant monitoring and control as it has been anticipated that the landfill will continue to produce gases and to generate leachate for the next 20 to 25 years.

24. In that regard, it was further argued in mitigation that the sentencing judge should take into account the Council's inability to make profit from the Corranure site and its public duty to operate the site against a backdrop of declining financial resources. The first named appellant submitted that the offence, being a nuisance rather than an offence causing significant environmental harm, should be more properly situated on the lower end of the spectrum of gravity for similar offences.

25. The second named appellant adopted the submissions made on behalf of the first named appellant to the extent that those submissions were relevant to its case. It further relied on its admission of responsibility and the apology that it had offered.

26. It was submitted on behalf of the respondent that there were aggravating circumstances in the case. It was contended that despite the appellants being informed of the nuisance by those affected, they did not proceed in a timely or efficient manner to prevent the emissions. It was only when the first named appellant was served by the E.P.A. with notices of non-compliance with the waste licence that the action, previously referred to at paragraph 11, was taken.

27. It was further submitted that the appellants had in fact benefitted financially from their breach in that the Corranure site was receiving 80,000 tons of waste a year during 2007 and 2008 when the offences occurred, and received over €800,000 in waste disposal fees in each of those years in respect of that waste.

Sentence

28. The maximum penalty which could have been imposed by the sentencing judge was a fine of up to €12,700,000. The judge chose to impose a fine of €10,000 for every week that the appellants had managed and operated the site for the duration of the offences. Accordingly, the 26 week period within which the Council controlled the site resulted in a fine of €260,000 for the first named appellant, whilst the second named appellant received a fine of €780,000 to reflect the 78 week period for which it was contracted to manage the site.

29. The judge remarked upon sentencing;-

> *"It is a very serious case in that there -- the Environmental Protection Agency is there literally for our protection and to protect us from if you like nuisances and things that happen within our environment which causes discomfort in our lives or makes our ability to enjoy our environment any less than it should be and consequently when somebody like the Cavan County Council or indeed Oxigen Environmental Limited do something or fail to do something such as to ameliorate the obvious if you like outflow from collecting waste and it causes odours within the vicinity; it was something that causes difficulty within the environment. People within the particular area have made complaints to the Department of the Environment and I'm sure to the County Council and to various other people, their TDs and all the public representatives that they're very uncomfortable with what is going on and consequently the matter comes before the Courts and in recent times as can be seen by this particular statute which was brought in in 1996, which isn't an awful long time ago, and a statute was created whereby the Oireachtas decided that they would make it a criminal offence for a county council or Oxigen Environmental Limited or against any person who, if you like, offended against the rules of the statute and very draconian penalties were suggested and set down in statue. It's not often that I have the pleasure of hearing that I have the jurisdiction to fine somebody millions of euro; it's a wonderful experience or indeed send somebody to jail for offending against the -- or for creating damage to the environment. I think however, that while it is serious and there's no doubt that this is a serious case or it wouldn't be brought before the Courts unless they were serious and the great result of this particular case is that yes it was surfaced, yes it was prosecuted and yes it has been solved; in other words the -- of the offence if you like has been solved and we are now back in a situation whereby the environment is back to the situation it was in prior to all this -- these odours if you like escaping from a particular site. There are other sites in the country which one has read about in the paper. I think there was one in Kildare and there was one -- I think the two I mentioned when I was talking about Donabate and possibly Dunsink. These are places that one reads in the paper, the problems that the residents suffered in relation to that, but they too as a result of this statute have to a large extent been solved. I don't know to what extent, but they have been solved as a result of pressure brought up on them by the EPA who do a very valuable -- do very valuable work and have brought about -- I'm sorry bettered the situation for the community where they have worked. So the first thing I have to deal with is the fact that what are the offences that each of these parties have pleaded guilty? There were 30 counts on this indictment and it was agreed and accepted and has been accepted by the state that two would be pleaded to. Admittedly a sample counts, but nonetheless they are counts which it is agreed a plea will be accepted and the other particular matters will not be gone in to. Again it is agreed that the only reports of inspections that I am told about in relation to Cavan County Council arise in February 2007 and September 2007 […] and in relation to Oxigen Environmental on the 4th of November 2008 and the 11th of November -- sorry I think, yes, the 11th of November 2008 and they're the only two areas where I am asked to if you like look from a microscopic point of view what the situation is in that it is suggested that this reflects basically what was going on, on-site. I then go back to the counts and I look at count number 2 and that's the one against the County Council and it relates to if you like a nuisance in the form of odour that was -- that existed at this particular site between the 14th day of February 2007 and the 30th day of September 2007.*
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> *So you're looking at […] 26 weeks in the case of the County Council and you're looking at 78 weeks in the case of Oxigen Limited, and that's what I'm looking at. So I then look to see what are the aggravating factors in relation to a case such as this because it is a criminal case and the first aggravating factor if there is one -- there is in fact -- there's a duty on a county council or a public authority in the exercise of their duty to the public to do so carefully and to do so in such a way as to use all their expertise to eliminate any problems that might arise from carrying out their operation and the aggravating factor if you like would be that if an inspector from the EPA can go out and without any special equipment using his nose find out that there are odours that are objectionable and strong and disruptive to the community, if he can do that surely the people who are experts in it, namely the people who are managing the site should be able to do it too and use their expertise to eliminate the problem. It took the public's complaints to draw it to the attention of the County Council and indeed Oxigen Limited, but they are the experts and they should have done something before the EPA became involved because they would have known or ought to have known that the situation was as it was. I have the two counts which say that it only appeared over a period of time, either 78 weeks or 26 weeks, but we do know that it had gone on for a considerable length of time, but strictly speaking I'm only asked to look at these particular areas, but I find those to be two aggravating factors namely the fact that it should have been spotted and the time it took to address it. It took the EPA to make their report to draw their attention to what should be done. Now having said that they did it, they did respond and they responded quite quickly. So they're the aggravating factors.*
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> *The mitigating factors are really very numerous. First of all there's the plea. In any criminal case the plea is of huge value because it saves the state a huge amount of money in prosecuting the case and a huge amount of time from the Court's point of view even though the Courts will use that time if necessary; it's not a question of if you like being a good boy by keeping everybody happy, but no, 250 pages of evidence, 50 witnesses; it would have taken an inordinate length of time and that was outlined to me at the very beginning when the application was made to transfer the matter to Dublin. So the plea is very, very important. The -- as a result of the EPA making their report and giving their recommendations to the parties concerned in this case the works that had to be done were of considerable cost. It is accepted that they would have been costly anyway to run a site, a waste disposal site, but by reason of these complaints that extra mile had to be gone to spend money to get rid of the complaint and that was done and it is proven to have been done on the basis that it is now declared to be -- I won't say completely odourless because I don't think that's possible, but it has been declared to be odourless to the extent that it is no longer a nuisance to the environment. Thirdly, the apology from both parties I believe is genuine. I believe they have done everything they possibly can to alleviate this particular problem and that it has if you like sharpened them up as to be more alert to this in the future. I'm very conscious of the fact that the general public in this country make a lot of presumptions about waste. They seem to think that they can generate it in huge amounts, put it outside their gate and that if somebody has an obligation to make it fly away. It costs a lot of money to make it fly away and huge resources have to be invested in it, but once upon a time and it's up on the subject now again, there used to be a thing called rates and rates were able to cover the cost of a lot of stuff like that like waste disposal. That's no longer the case. There are other matters which we won't go in to which I believe are going to be mentioned next Wednesday again in that we'll reflect on that, but so be it. Waste is something that we're very bad about as civilians and it's not easy to manage. The resources that have been expended to solve this problem, again a lot of money has been invested and I'm not losing sight of the*

fact that for example I'm told that it'll cost the County Council or the Local Authority €396,000 in 2012 just to manage this particular site with nothing going in to it. From a commercial point of view this particular site is not earning any money. It might have been at one time, but it's not earning any money now. Potentially it might be able to do so, but it's not doing it now.

The other matter is that in relation to any punishment for what has gone wrong one asks whoever is fined, who pays it? Who really pays the fine? In the case of the County Council who pays it? The citizens of County Cavan pay it and the citizens of the country pay it insofar as there was a contribution from central funds. There is no -- it doesn't matter what money I calculate as the fine. Yes, it will be paid, there's no doubt about it, it will be paid, but who or where is it going to come from and what other services within the county are going to be affected by reason of the fact that that money has to be paid as a fine for something they did wrong and something else down along the line which is equally as important to the environment and to the civilians within the county is going to suffer. It's fact, it's not mystery. It could be said that in the case of Oxigen Limited that doesn't apply. Well it does apply to this extent that if the fine that is meted upon them is such as to hurt sufficiently and they don't have the resources to pay, the people who work for Oxigen Limited will suffer in that somebody might lose their job or their operation will have to be contracted or something like that. So yes I have a public duty to do something for the breach of the law, but I must be mindful as to the knock on effect of what is going -- what the cost of that is going to be and who's going to pay it.

This was not, as I see it, a deliberate act on the part of either the County Council or Oxigen. If one collects waste, waste smells. If you don't control the smells adequately they leak out from where they're attempted to be contained and other people will be affected, but I don't accept on the evidence that I've heard that there was any deliberate steps taken on part which could be considered to be if you like dodging the issue, trying to fudge the issue, trying to fox if you like the EPA, trying to put them off the scent and put them going around in ever decreasing circles for the purposes of putting them off the scent as to what might be wrong. No, the parties each of them in this case have faced up to it straightaway and dealt with it as quickly as possible and that is a mitigating factor. I accept fully the statement that it is very difficult in the present day to keep pace with the regulations and the technical matters that arise in relation to either waste or indeed many other things. We are full of regulations and yes they should be obeyed and no they shouldn't be deliberately broken, but sometimes it can be difficult to keep up with them, but it has to be done and I think that the County Council and Oxigen in this case have done their best to do so and in fact have succeeded in bringing the whole matter under control. They cooperated fully each of them with the investigation, they made statements, they proffered their own if you like expert advice to the EPA and to the prosecution; they have cooperated in every way with the prosecution.

I think it's important too to mention that it is a nuisance case as opposed -- a case -- as opposed to a case where one is being prosecuted for causing permanent damage to the environment. For those of you who don't understand nuisance, nuisance is something which discommodes somebody and can be remedied; you can abate a nuisance. If the dripping tap is causing you a nuisance you can change the washer on the tap to get rid of the drip and that's the end of the nuisance because you've abated the nuisance, but if you've done something that permanently damages the environment, you're -- and if you have any knowledge of the fact that your operation is likely to do that I think that a Court would take a much more serious view of the outfall from that in that there was a certain amount of deliberateness about it, there was a certain amount of thought as to what would go in to what we call in criminal terms mens rea; in other words if you like a criminal mind or bold mind or a bad mind that ah sure we'll do that -- sure we'll pick up the pieces later and it doesn't matter; the end justifies the means. No, that's not this case, that's not this case.

So for all those reasons while the case is a very serious one and it's one which I have to admire the EPA for bringing it's a case which attracts a fine and I'm very conscious of the fact that the fine I'm going to -- fines I'm going to hand down are stiff and what I've done is this is a very simple arithmetic calculation. I'm fining the County Council and Oxigen Environment Limited €10,000 for each week that this particular thing went on for which it is before this Court, the two pleas. So it's 78 weeks in one and 26 in the other and that works out for Oxigen as 780,000 and for the County Council the 260,000 and they're the two fines I'm handing down on each of the counts. And on that I would say that on the basis of the County Council's figure as to how much it would cost to maintain what's there now at three hundred and odd thousand a year comes to around 7,500 a week so I don't believe that the fine I'm handing down is excessive."

Grounds of appeal

30. Both appellants argue that the fines they received are unduly severe and ought to be set aside. The appellants have submitted grounds of appeal which, unsurprisingly, are broadly similar and overlap to a significant extent, and which can be summarised as follows;-

(a) The sentencing judge erred in principle in assessing the offence as a "very serious one", and as warranting a "stiff" fine, thereby indicating that he was treating the case as one towards the upper end of the range of gravity for the particular offence, when the offence was more properly to be seen as one falling at the lower end of that range;

(b) The sentencing judge failed to locate the offences appropriately on the scale of gravity;

(c) The sentencing judge failed to apply the mitigating factors having first correctly located the offence on the scale of gravity;

(d) The sentence imposed would only have been appropriate had there been evidence that the appellants had profited from the offence;

(e) The sentencing judge erred in principle in calculating the fines by reference to the cost of ongoing environmental maintenance, thereby punishing the first named appellant for its continuing commitment to the maintenance of high environmental standards at the facility, a factor that should have been more properly treated as a mitigating factor;

(f) The sentencing judge erred in law in failing to distinguish between the appellants in calculating the fine for the second named appellant on the basis of money being spent by the first named appellant towards ongoing maintenance of the site;

(g) The sentencing judge erred in law in failing to consider that, in providing for a determinate albeit substantial fine, the Oireachtas had sought to limit the maximum fine that could be levied in a given case;

(h) The sentencing judge erred in principle in calculating the fines on the basis that it did not matter what level of fine was imposed and that he erred in law in calculating the fine in an arbitrary fashion;

(i) The sentencing judge erred in law in calculating the fine on a simple arithmetic basis and failing to have regard to the principle of proportionality;

(ii) There was an error in principle in that the fines represent a substantial departure from previous sentencing precedents in like cases;

Submissions

Submissions on behalf of the first named appellant
31. Counsel for the first named appellant has referred the Court to the judgment of Egan J in *People (D.P.P.) v M* [1994] 3 IR 306, where he stated:-

> *"It must be remembered also that a reduction in mitigation is not always to be calculated in direct regard to the maximum sentence applicable. One should look first at the range of penalties applicable to the offence and then decide whereabouts on the range that particular case should lie. The mitigating circumstances should then be looked at and appropriate reduction made".*

32. Counsel for the first named appellant submitted that the Waste Management Act 1996 is unusual in that the general sentencing provisions contained therein apply to all offences created by the Act which can be prosecuted on indictment and that this imposes a particular onus on the sentencing judge to afford special consideration to the level of culpability .involved in the offence, given the extremely varying degrees of gravity which may be concerned. It was further submitted that the sentencing judge erred in principle in failing to clearly indicate where on the scale he was locating the offence in terms of its gravity, alternatively in classifying it as "serious" thereby suggesting that it should be located towards the upper end of the scale which was to overestimate the gravity of the offence.

33. It was further submitted that the sentencing judge should have considered the offence for which his client was convicted to have been one of much lesser gravity than other offences coming under the Act, on the basis that it was one which neither caused significant environmental damage nor generated any economic benefit for the appellant. In support of that argument, it was reiterated that the nuisance did not arise as a result of any deliberate act on the part of the appellant, nor did it relate to the breach of a specific technical condition of the licence. On the contrary, the breach in question was in respect of a broad result-based condition, during a time of frequent regulatory amendments and changes in the composition of landfill waste. Furthermore, counsel for the first named appellant argued that the offence should be properly perceived as being at the lower end of the range of gravity on the basis that the appellant was making substantial efforts, at significant expense, to avoid creating a nuisance.

34. Counsel for the first named appellant referred to his client's long-term and costly obligation to manage the landfill site, and submitted that that was in fact a mitigating factor but that the sentencing judge failed to treat it as such. He submitted that any proposed fine should have taken account of that significant ongoing obligation and should have been fixed at a level that would not likely jeopardize the first named appellant's ability, as a public body with statutory responsibilities, to continue to meet its obligations in that regard.

35. The Court was referred to the case of *The People (Director of Public Prosecutions) v South East Recycling Limited* [2011] 3 I.R. 35, a decision of the Court of Criminal Appeal. In that case the applicant company pleaded guilty in the Circuit Criminal Court to one count of disposal of waste otherwise than in accordance with the terms of its waste licence for the calendar year 2007, contrary to s. 39(1) and (9) and s. 10 of the Waste Management Act 1996. The applicant was aware of the breach of the licence as it occurred. The trial judge invited evidence as to the finances of the company and the manner in which those finances were affected by the breach of the licence. Such evidence was given in the form of rudimentary evidence of profit suggesting that the defendant had earned a gross profit from relevant activities of between €140,000 and €170,000 during the period of the breach. The facts of the case had been stark and it appeared that the breach of the licence had been wholly advertent and wholly deliberate. There was, however, no damage done to the environment. The trial judge imposed a fine of €350,000 and the costs of the prosecution. The applicant company appealed against the severity of the sentence.

36. The Court of Criminal Appeal, in finding an error of principle in sentencing, and in reducing the fine to one of €200,000, held that if the activities engaged in were economically beneficial and if it appeared that they were done deliberately and were part of an economic calculation, then it might be necessary to fix the fine at a level that provided a significant disincentive to a breach of the law. The Court further held that in the event that profiting from the breach was a potentially relevant circumstance the prosecution should be in a position to present its own evidence and demonstrate why the fine to be imposed should be set at a level which would both remove the economic benefit of such wrongdoing and deter future breaches. By the same token it was open to the defence to adduce evidence to explain its financial position or to explain its actions. The Court found that the figures before the Circuit Court were unsatisfactory and insufficiently detailed. While not criticizing the sentencing judge for attempting her own calculation of what might be appropriate in the absence of more detailed evidence, the Court considered that the fine actually imposed might have been simply too high in the circumstances of the particular case, and to that extent considered that the sentencing judge had erred in principle.

37. In so holding, O'Donnell J, in giving the judgment of the Court, stated:

> *"The Court is however concerned that in the current economic climate, and in circumstances where no positive evidence has been adduced either as to the environmental damage or the economic benefit, the fine may be too high. The Court considers that it is entitled, in fact obliged, to attempt some limited calculation of a figure which will show and demonstrate to everybody concerned, and in particular the company, the absolute necessity of compliance with the law, whatever the particular content of the licence or the attached conditions. The obligation of any licensee is simply to comply with its licence unless and until it is lawfully altered. It should never be an option for a licensee to consider that it is sensible or wise or even profitable to proceed and breach any provision of any licence. The Court considers therefore that the trial judge was not wrong to consider that a significant fine should have been imposed. With no great confidence that this Court can calculate that figure any more accurately than the trial judge, or indeed can be sure of the impact of any such fine either on the viability of the business or that it is creating a sufficient disincentive or deterrent, the Court is nevertheless prepared to vary the decision of the trial judge and substitute a fine of some*

EUR200,000 together with the costs."

38. The first named appellant contends that neither it, nor it's co-accused the second named appellant, were as culpable as was the defendant in the *South East Recycling* case. The present appellants' breach of condition 7.1 of the waste licence was neither advertent nor deliberate. Moreover, it was contended that the appellants had not profited at all from breach of the condition in question. Although an unpleasant nuisance had been caused to persons in the vicinity of the site by transient malodorous emissions there was no actual damage to the environment in their case. In the circumstances the ostensible disparity in the severity of their sentences when compared with the sentence imposed in the *South East Recycling* case, which had not been appealed as being unduly lenient, was suggestive of an error in principle.

39. The first named appellant has suggested that other than the *South East Recycling* case, there is little Irish jurisprudence concerning the correct approach to sentencing in environmental cases. In the circumstances the Court was referred to what is, in effect, a digest comprised of brief accounts of environmental prosecutions under the Waste Management Acts, and related legislation, and the penalties imposed, as published on the E.P.A.'s website, covering the period from 2006 to 2013 (see http://www.epa.ie/enforcement/prosecute/). The appellant suggests that a consideration of this material provides evidence that the fines imposed in the present cases represent a significant departure from those imposed in other broadly comparable cases. Moreover, it was further contended, the prosecution did not identify any unusual aggravating feature in the present case which could have justified such a departure and disparity in sentencing practice.

40. The first named appellant commends to the Court the comments of Thomas O'Malley, at p. 314 of *Sentencing Law and Practice (*Dublin, 2000, 1st ed.), cited by Hardiman J in the *Court of Criminal Appeal in The People (Director of Public Prosecutions) v Redmond* [2001] 3 IR 390 at page 403, that;-

"Regard must be had to the means of the offender when a fine is being imposed".

The Court of Criminal Appeal went on to observe in that case that:-

"A cumulative fine of £7,500.00 is neither lenient nor harsh in itself, but only in terms of the circumstances of the person who must pay it".

41. The first named appellant identified in the evidence that had been before the sentencing judge a number of circumstances that were capable of amounting to mitigating factors; namely, that the Council had invested heavily in modernising the facility, that the site was no longer receiving any income, that the Council's budget had been significantly reduced, that it was burdened by an annual bill that will continue for decades and finally, that as the Council was required to operate a balanced budget on an annual basis, any fine imposed would potentially impact adversely upon the provision of services by the Council as a local authority.

42. In development of the latter point it was further submitted that the fine imposed by the sentencing judge had the potential to imperil the ability of the Council to continue to fund ongoing maintenance of the Corranure landfill. Moreover, it could also potentially affect the provision of other, non waste management, services. It was argued that to have created these difficulties for the first named appellant by the imposition of such a large fine was, in the absence of any significant aggravating circumstances, contrary to the purposes of sentencing and amounted to an error in principle on the part of the sentencing judge. In addition, it was submitted, that to have calculating the appropriate fine by reference to the first named appellant's maintenance costs as opposed to by reference to its means amounted to a further error of principle.

Submissions on behalf of the second named appellant

43. Counsel for the second named appellant indicated that he was adopting the submissions advanced on behalf of the first named appellant, to the extent that they had relevance to his case.

44. In addition, it was contended on behalf of the second named appellant that, in circumstances where that company had pleaded guilty at an early stage, before any trial date had been fixed, and in circumstances where an application to transfer was pending, the plea was of substantial value and obviated any need for what would otherwise have been a lengthy trial. This was a substantial mitigating factor to which insufficient weight was ostensibly attached by the sentencing judge.

45. It was further submitted on behalf of the second named appellant that the sentencing judge also failed to afford sufficient mitigation for other important factors such as the second named appellant's lack of previous convictions, its engagement with the E.P. A. during their on-site inspections, the remedying of the emissions issue, albeit undertaken by Cavan County Council, the apology advanced on Oxigen's behalf by Mr Aidan Doyle, and the acknowledgement by Mr Reynolds on behalf of the E.P.A. that his Agency had no outstanding issues with Oxigen.

46. The second named appellant has also contended that the sentencing judge failed to place the offence at the correct point on the relevant spectrum. The breach of a waste license, it was submitted, was a less serious offence than other offences under the Waste Management Act 1996 such as illegal dumping or disposal of waste in an unlicensed manner. Accordingly, the second named appellant argues that the judge erred in placing excessive emphasis on the maximum penalty provided for by the legislature without due regard for the seriousness of the particular offence. The appellant submitted that the judge should have distinguished between a general penalty provision and a penalty for a discrete and defined offence.

47. In addition, the second named appellant submitted that the arithmetic calculation of the sentencing judge was premised on the amount of money that was being expended by the Council to operate the site on an ongoing basis which, it was contended, was of no relevance or materiality in the assessment of a suitable fine for Oxigen. It was submitted that this form of calculation leads to an unreasonable result whereby the greater the amount of money the Council spends on maintaining the site the greater will be the fine to be imposed; notwithstanding that logic would imply that the greater the amount of money spent on site maintenance the lower the environmental impact should be. Spending more money on protecting the environment should be regarded as a virtue rather than a vice.

48. The second named appellant also submitted that the sentencing judge failed to have regard to the proportionality principle in calculating the fine to be imposed in this case. It was contended that the sentencing judge's purely arithmetic determination of the fine to be imposed was arbitrary, was not rooted in sound sentencing principle, and resulted in the imposition of a disproportionate and excessive fine.

49. The second named appellant submits that the fine it received is several magnitudes greater than any other fine imposed before or since this case. In making this assertion the second named appellant also relies on the comparators to be found on the E.P.A.'s

website and previously referred to. Amongst these, there are few direct or close comparators. The majority of the cases described there related to illegal dumping or disposal of waste without a licence, which, the second named appellant suggests, are more grave offences than breach of a result based condition in a waste management licence. However, in all cases fines at a significantly lower level than those imposed in the present case were levied. Some of the other cases were concerned with the emission of noxious odours, and again the fines imposed were also of a lesser magnitude than those imposed in the present case.

50. The Court's attention was drawn in particular to *The People (Director of Public Prosecutions) v Wyeth Medical Ireland Ltd* (http://www.epa.ie/enforcement/ prosecute/2010/name,43046,en.html#.VYL96vlVhHw) as being the most relevant comparator as it was a case on indictment, and the facts in that case were substantially more serious than the circumstances in the present case. Despite this a significantly lower fine was imposed in the Wyeth Medical case. That case had concerned the shipping of waste rinse water containing the hormone Medroxyprogesterone acetate out of the state without a permit in breach of an Integrated Pollution Prevention Control Licence granted to them by the E.P.A. The sentencing judge in that case imposed a fine of €40,000.

51. The Court's attention was also drawn to *The People (Director of Public Prosecutions) v Oran Pre-cast Concrete* (unreported, Court of Criminal Appeal, 16th December 2003). In that case the applicant company was prosecuted for five offences contrary to the Safety, Health and Welfare at Work Act, 1989, and having pleaded guilty was fined €500,000. The prosecution had been precipitated by a serious accident in which an employee of the applicant company, who was working at a height without a safety harness, had fallen thirty feet and had been killed. The appellant company had appealed against the severity of the fine imposed. In finding a number of errors of principle by the sentencing judge the Court of Criminal Appeal took the opportunity to enunciate two principles in relation to the assessment and imposition of fines. These may be summarised as follows:-

> (a) In assessing the level of fine to be imposed the actual level of fault on the part of the offender is the most important consideration;
>
> (b) Where a fine is unlimited the sentencing judge must show considerable restraint.

In determining that the fine in that case was disproportionate the Court had regard to a number of comparators. Hardiman J noted that the fine that had been imposed was greater than "any which the diligence of counsel on both sides can find in a case of this sort, either here or in the United Kingdom. It is two and a half times greater than the largest fine on a corporation in this country. There is nothing on the transcript to support that level of disparity". The Court of Criminal Appeal reduced the fine to one of €100,000.

52. The second named appellants have submitted that the level of fine imposed in the present case cannot be reconciled with the fine imposed in the Oran Pre-Cast Concrete Case, and that the disparity is all the more stark when account is taken of the fact that that case had involved what the Court of Criminal Appeal characterized as a "bad case of an industrial fatality".

53. In addition, on behalf of the second named appellant, it is again emphasized that the breach of the waste license was neither wilful, deliberate, nor calculated and that it occurred due to the change in profile of the waste being deposited in the landfill site over time, owing to the marked increase in organic content linked to the success of recycling initiatives. The second named appellant asks the Court to note that the breach did not lead to an increased profit for the Council or itself, and thus the facts disclosed a low degree of culpability and turpitude on the part of the appellants.

Submissions on behalf of the respondents

54. Counsel for the respondent reiterated her contention that there were aggravating features to the case which rendered it a serious one, that the appellants had had knowledge of a continuing nuisance but only acted with respect to it when the E.P.A. had become involved. Moreover, the facility had been operating at the relevant time and was generating a substantial income in waste disposal fees. In addition, the first named appellant had previous convictions for environmental offences.

55. The respondent also seeks to rely on *The People (Director of Public Prosecutions) v South East Recycling Limited* [2011] 3 I.R., in particular the remarks of O'Donnell J who observed that, notwithstanding the absence of damage to the environment in that case, the actions of the appellant demonstrated a lack of respect for the law and the licensing regime. While accepting that it is the most relevant authority, the respondent submits that South East Recycling is not on all fours with the present case.

56. The respondent does not accept that the judge's arithmetic calculation of the fines was arbitrary. It was submitted that the sentencing Judge attempted to make his own calculation on the financial information that had been provided to the it by the first named appellant. A similar position pertained in the *South East Recycling* case when the Court of Criminal Appeal *stated "this Court does not consider that this was an error of principle on the part of the trial Judge"*

57. The respondent refers the Court to *The People (Director of Public Prosecutions) v Roseberry Construction Limited* [2003] 4 I.R. 338, a case in which the Court refused an appeal against the severity of fines which had been imposed at Naas Circuit Court citing *The People (Director of Public Prosecutions) v Redmond* [2001] 3 IR 390 wherein the sentencing judge remarked that:-

> *"[A] fine is neither lenient nor harsh in itself, but only in terms of the circumstances of the person who must pay it".*

58. In relation to the comparators adduced and relied upon by both appellants the respondent commends to the Court as apposite certain remarks of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v Strong* [2011] IECCA 79 (Unreported, Court of Criminal Appeal, 23rd May, 2011). McKechnie J, giving judgment for the Court, said, with reference to a submission that the court should have regard to comparators, that:

> *"whilst such an exercise is of value, caution must be applied in any such analysis, as inevitably each case will be fact or circumstance specific. Therefore, even with appropriate adjustment, this exercise may not deliver value or utility"*

Conclusions and Decision

59. The exercise of sentencing corporate offenders in environmental cases should in principle be similar to the sentencing of private individuals in ordinary criminal cases, though relevant factors may receive different emphasis. Accordingly, the well established procedure of first locating the offence on the relevant scale in terms of its seriousness taking into account any aggravating circumstances and arriving at an appropriate sentence for the crime, and then factoring in any mitigating circumstances to reduce the sentence to one appropriate for the crime as committed by the particular offender should, in general, be followed.

60. When a private individual is being sentenced there is an overriding constitutional requirement that a sentence should be

proportionate, requiring the striking of a balance between the gravity of the offence in the particular circumstances in which it was committed and the relevant personal circumstances of the offender. Thus, in considering any particular sentencing option, or combination of options, the Court must take due account of the extent to which the proposed measure or measures would interfere with the personal rights, including the right to liberty, of the individual and satisfy itself that such interference was necessary and proportionate to the gravity of the offence. In seeking to strike the right balance a sentencing court has to have regard to a number of legitimate sentencing objectives including retribution, deterrence (both specific and general), and rehabilitation.

61. In the case of a corporate offender, while there is no constitutional requirement of proportionality in terms of interference with personal rights and personal liberty, sentencing must nevertheless be fair to the corporate offender and be in accordance with the constitutional guarantee of due process. Accordingly, the process of sentencing a corporate offender must still take account of the gravity of the offence, including the culpability of the offender, and relevant circumstances of the entity concerned should be taken into account in mitigation. A sentencing court must still have regard to the sentencing objectives of retribution, deterrence (both specific and general), and rehabilitation but there will frequently be more emphasis on deterrence than on the other objectives.

62. That having been said, the limited sentencing options available in respect of a corporate offender mean that in reality a monetary sanction will often be the only appropriate penalty. That being so, a sentencing court will be required to avoid what Thomas O'Malley refers to as "the deterrence trap" (see *Sentencing Law and Practice* (Thompson Round Hall, 2006, 2nd ed., at para 19-06) of imposing a fine at a level likely to precipitate corporate dissolution. An appropriate balance must be struck between the need for deterrence on the one hand, and putting the offender out of business where that can be avoided.

63. Equally the court must be conscious of the spill over effects of a large fine that may unjustly punish persons not directly responsible for the offence such as shareholders, employees, creditors, customers, consumers, trading partners and, in the case of a public authority that might not be put out of business by a large fine in the same way that a commercial company might, but which might have to divert resources away from other public services being provided by it, the public at large. While a large fine that causes some spill over will not necessarily be wrong in principle, a court considering the imposition of such a fine is obliged to consider the potential spill over effects and satisfy itself that the proposed measure is none the less merited and proportionate, and a failure to do so would amount to an error in principle.

64. Having carefully considered the circumstances giving rise to the appeals in this case, including the evidence that was before the sentencing judge, the pleas in mitigation made to him, the sentencing judge's remarks, the grounds of appeal advanced, and the parties respective submissions, the Court is satisfied that the sentencing judge erred in a number of material respects and that the appeals should be allowed.

65. In the first instance the Court considers that the sentencing judge erred in over-estimating the seriousness of the case. While he does not make clear where exactly he located the offences on the scale of seriousness, it is clear from his characterization of them as "serious", and having regard to the very substantial fines imposed, that he could only have been of the view that they were to be located high on the said scale. This Court considers that there is substance in the point made by the appellants that this was a less serious type of case than one involving illegal dumping, or breach of waste limits, or disposal of waste in an unlicensed manner.

66. An important factor, though by no means the only factor, to be taken into account in determining the seriousness of the offence for the purposes of this exercise, was the range of available penalties. In that regard, however, in terms of offences arising under the Waste Management Act 1996, it required to be borne in mind that that Act contains a general penalty provision (s. 10) rather than providing for individual penalties for each discrete offence created by the Act. Accordingly the range of penalties created by the penalty section of that Act are applicable to a spectrum of offending behaviour ranging from relatively minor and technical transgressions to major breaches of the law with far reaching adverse environmental impact. The range of penalties available under s. 10 of the Waste Management Act 1996 may therefore be a less than reliable tool for accurately gauging the seriousness of any particular offence arising under that Act, and certainly not one to be relied upon in isolation.

67. In sentencing the appellants in this case the sentencing judge referred specifically to the "draconian penalties" provided for in the Act, and commented that *"It's not often that I have the pleasure of hearing that I have the jurisdiction to fine somebody millions of euro; it's a wonderful experience or indeed send somebody to jail for offending against the -- or for creating damage to the environment."* This Court agrees that the sentencing judge ostensibly attributed too much weight to the available penalties in assessing the seriousness of the offending conduct.

68. While this Court agrees entirely with the view expressed by O'Donnell J in the *South East Recycling* case that *"even with no damage to the environment, there is a damage done to respect for the law and the licensing regime if companies consider that they can simply breach a licence, offer no explanation and in a sense offer no real evidence other than to say, 'we have breached the licence, we did not deny it, or conceal it in that it is apparent on the documentation which we maintained'",* it agrees with the appellants' contention that the South East Recycling case can be legitimately distinguished from the present as being a much more serious case.

69. This Court agrees with the appellants' contention that the nature of the offence to which they have each pleaded guilty is qualitatively different from the offence at issue in the *South East Recycling* case. The breach of the licence in the latter case, which involved breaching waste limits set by the licence, was an active one, involving, as the Court of Criminal Appeal characterised it, a "wholly advertent", "wholly deliberate" and "flagrant breach of the law". In contrast, the breach in the present case was passive and involved a sin of omission rather than commission. It was not the result of any deliberate act or determined delinquent conduct. Rather, it involved a breach of a broad result based condition, namely that the facility should not give rise to a nuisance either on the site or in the immediate vicinity of the site.

70. In the Court's view the seriousness of the offence was properly to be rated as falling in the low to medium range on the scale of seriousness, in circumstances where no damage to the environment has been caused by the breach but by the same token a substantial number of persons were affected by the nuisance created, were inconvenienced and suffered transient prejudice to their amenities and the enjoyment of their properties. The offence was slightly aggravated by the appellants' failure to respond as quickly as they ought to have done to the complaints communicated to them. However, it is acknowledged by the respondent, and the Court takes account of the fact, that action to address these complaints was taken promptly once the E.P.A. had become involved and served Notices of Non-compliance on the appellants.

71. The Court does not consider that, in the circumstances of this case, it is a fair characterisation of the matter to suggest that the appellants profited from the breach. While the facility was receiving waste at the material time, and was receiving waste disposal fees, there was no direct nexus between the breach and the generation of that income, nor is there any suggestion of increased income on account of the breach. The evidence did not go so far as to suggest that the nuisance was the direct result of the waste

received during the period in question. Rather, the Court understands that the breach was due to structural issues giving rise to technical inadequacies in the management of landfill gases generated over time by the decomposition of waste that had been deposited into engineered cells. The Court heard that even today, five years after this landfill last received new waste, the site continues to generate landfill gases that require to be managed, and it is expected to continue to do so for the next 20 to 25 years. However, this was not a case where commercial entities were cynically driving a coach and four through the law and the relevant regulatory requirements in pursuit of profits.

72. The evidence is clear that the first named appellant is a responsible public body that has been doing its best to comply with a fast changing regulatory environment, and unanticipated consequences from the promotion of recycling as a matter of public policy which led to waste received at the site in latter years having a higher proportion of biodegradable content than had previously been the case. While it is true that the first named appellant had two previous convictions for somewhat similar or related offences, it is clear that the issue of adequately managing increased landfill gases had taken time and substantial investment to address, and had not been amenable to an instant or easy fix. There is no suggestion that following the first named appellant's convictions in 2005 and 2007 that it had failed to attempt to address the issues that had led to its prosecution or of any want of good faith in those efforts. In fairness to the sentencing judge he did not specifically allude to the previous convictions at all in his sentencing remarks and does not therefore appear to have attached undue weight to them or to have regarded them as greatly aggravating the culpability of the first named appellant in the circumstances of this case. This Court considers that he was correct in that aspect of matters.

73. Equally, while the second named appellant, albeit a commercial company, had had subcontracted to it the day to day management of the site it was not responsible for addressing structural issues. It was outside of the remit of the second named appellant to make structural improvements to, or to upgrade, the facility, in circumstances where the first named appellant remained involved as the primary licence holder, and the second named appellant was merely its agent responsible for day to day operations.

74. In this Court's view the sentencing judge also fell into error in imposing a far greater fine on the second named appellant, than on the first named appellant merely on the basis that the second named appellant was in charge of day to day operations on the site for a greater proportion of the relevant time. In this Court's view there was no legitimate basis for such discrimination having regard to the agency relationship between the parties.

75. In terms of mitigation, the Court considers it to be a substantial mitigating factor that the first named appellant has invested very substantial funds in upgrading this facility, and also that it is saddled with a very substantial ongoing commitment in terms of maintenance of what is now a non-operating landfill site. It is the case that the sentence as currently structured penalises both appellants for the fact that the first named appellant is committed on an ongoing basis to the spending of substantial monies on protecting the environment. That the fine should have been linked to such expenditure is unfair and unjust in the case of both appellants, and is in addition quite arbitrary in the case of the second named appellant. The fact that the second named appellant has contracted to act as the agent of a principal with such commitments in no way increases the second named appellant's culpability. Equally importantly, the first named appellant though undoubtedly more culpable overall than the second named appellant, was entitled to substantial increased mitigation on account of its historical capital expenditure aimed at upgrading the facility in the public interest and with a view to restoring it to a position where it could comply fully with the terms of its licence, and its ongoing current and future liabilities in terms of continued maintenance.

76. The Court further considers that the sentencing judge did fall into "the deterrence trap" in the circumstances of this case. The fines imposed were the highest ever imposed historically and were imposed without adequate regard to the ability of the appellants to pay, or to spill over effect. While there were no direct comparators, the fines imposed in this case were also considerably out of kilter with such indirect comparators as were available, and were so by several orders of magnitude. In terms of the penalties actually imposed it is difficult to quantify the discount actually given by the sentencing judge for mitigating factors such as the pleas of guilty, the parties' co-operation with the E.P.A., their current good standing with the E.P.A., the remedial works and efforts undertaken, and the remorse and apologies expressed. The Court is not therefore satisfied that the sentencing judge gave sufficient allowance for mitigation in either case.

77. The Court is satisfied that in all the circumstances of the case the fines imposed were excessive and disproportionate to a significant degree, and it will quash both sentences and proceed to sentence both appellants afresh.

78. The Court having invited the parties in accordance with established jurisprudence to place any additional materials before it that they might wish to have taken into account, has received updated figures from the first named appellant concerning its 2013 and 2014 maintenance and capital expenditure outlays in respect of the Corranure facility. The Court has had regard to these. The figures provided indicate current expenditures of €427,878 and €392,665 for 2013 and 2014, respectively; and capital expenditures of €728,668 and €535,296 for the same years, respectively.

79. It is not necessary for the purposes of the re-sentencing exercise to rehearse again the relevant aggravating and mitigating factors arising in the case, as these have already been addressed earlier in this judgment. While the Court considers that the greater balance of culpability in respect of the offending conduct rests with the first named appellant as the licence holder, and as the party primarily responsible for addressing structural issues on the site, the first named appellant is also entitled to more substantial mitigation than is available to its co-accused on account of the substantial capital investment that it has made in addressing the problem, and also it's very substantial ongoing maintenance commitment. The Court considers that in the circumstances of the case the first named appellant's greater culpability is cancelled out by the extra mitigation to which it is entitled, and it therefore proposes to treat both of the appellants in the same way and to impose the same penalty on each of them. The Court will impose a fine of €50,000 on each of the appellants in substitution for the fines of €260,000 and €780,000, respectively, imposed by the court below.

80. This Court substitutes these fines in the belief that they are proportionate and appropriate penalties sufficient on the one hand to deprecate on the part of the people of Ireland the appellants admitted breaches of the law, which were not in any sense minor matters, and on the other hand to serve to deter these appellants and others from re-offending; while at the same time making due allowance for the individual circumstances of the appellants, including their ability to pay, and minimising other spill over effects with potential in themselves to give rise to injustice.