Environmental Insurance - a developing market in Ireland

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Environmental insurance is a developing and growing market in Ireland. We have considered some of the key issues relevant to this area. In particular, we have assessed significant decisions (both UK and Irish) which inform the current landscape of environmental matters and highlight the parallels which currently exist within this area, across the jurisdictions.

Environmental law is ever evolving and changing. At present, the European legal framework for environmental liabilities is set out in several EU directives. The purpose of these directives is to establish a framework of environmental liability based on the "polluter-pays" principle, to prevent and remedy environmental damage.

The Irish Environmental Protection Agency ("EPA") is tasked with managing the permit system which authorises industrial and agricultural activities, including waste management. Integrated Pollution Control ("IPC") licenses are required in respect of large or complex industries with significant polluting potential.

Financial Provision

The EPA may require IPC licensees (as a condition of the licence) to make adequate financial provision to respond to the potential environmental liabilities which may occur as a result of their licensed activities, arising from either unforeseen incidents or from a potential closure of a site, to include remediation and an aftercare management plan.

In order to meet this requirement, licensees are required to put in place an EPA approved financial instrument or other provision. The type and amount of financial provision that is acceptable to the EPA is case specific and solely a matter for the EPA.

The financial instruments acceptable to the EPA include:

- Secured funds
- On-demand performance bonds
- Parent Company Guarantees
- Charges on property
- **Insurance**

We are seeing a growing number of Insurers expanding into this market by providing environmental impairment liability insurance.

Liability for clean up costs

In circumstances where Insurers are expanding into this area, it is useful for Insurers to be aware of recent case law dealing with how liability for clean up costs would be attributed before the Irish courts. This case law also has implications for Insurers writing D&O insurance in Ireland.

It has been held in the Irish High Court[1], that where a company was not in a position to pay clean up costs, due to the appointment of a receiver, insolvency or otherwise, individual directors could be held liable, on the basis of the European "polluter pays" principle. This became known as a "fall-back" order. However, two later key decisions put this approach in question.

In the case of *EPA v Nephin & Others*[2], the Environmental Protection Agency ("EPA") and the Department of the Environment spent approximately €3m fighting a major fire at a landfill which burned for almost 4 weeks. At the time, the full clean-up of the site was expected to cost in excess of €30m. The landfill and recycling facility was operated by Nephin Trading and associated companies, who subsequently went into liquidation. On this basis, the EPA sought a “fall-back order” to make the directors of the companies involved personally liable.

Mr Justice Edwards disagreed with previous decisions and held that the "polluter pays" principle does not automatically entitle the courts to pierce the corporate veil in order to impose liability on directors for environmental clean up. It was determined that in fact the "polluter pays" principle had not been properly transposed into Irish law and accordingly the

corporate veil should not be pierced.

However, in the case of *Ronan v Clean Build & Others*[3], South Dublin County Council sought to pursue Clean Build, its' directors and the owner of the property, following breaches in respect of waste operations. Mr Justice Clarke, while noting the decision in Nephin, held that the Nephin decision did not address a situation where a director/shareholder is found to be independently liable. It was held that the directors had sufficient involvement in the day to day activities at the site, to be considered "holders" of waste for the purpose of the enforcement legislation, and thus liable for clean up costs.

The divergence in these two decisions does not necessarily indicate uncertainty in the area. On the basis of the reasoning adopted by the Court in each decision, it is quite clear that save in specific circumstances, the Courts are reluctant to look behind the corporate veil for the sole purpose of applying the "polluter pays" principle. Rather, personal liability of directors will only apply where it can be shown that they were sufficiently involved with the operation and exercised a level of control over the activities.

UK position

A recent decision of the UK Court of Appeal also provides a useful comparator to the Irish position. In *R v Powell & Westwood*[4], consideration was again given to the ability of the courts to pierce the corporate veil.

This case involved a breach of a waste permit. By the time the Regulator stepped in with enforcement notices, the operation in question was already out of business and as a result no financial recovery was available from the Company. The clean up costs fell to the owner of the lands (the Ministry of Defence) and an Order was sought against Directors of the Company in their personal capacity.

The Court determined that the corporate veil could only be pierced where the person relying on the protection of the corporate veil was the sole controller or the sole owner of the company. As neither respondent director was the sole controller or the sole owner of the company, the judge ruled that the court was not entitled to pierce the corporate veil and the respondents could not be personally liable for the costs of clean up. This decision was challenged in the Court of Appeal, however the appeal was dismissed and the decision upheld.

What does the case law tell us?

Fundamental principles of company and insolvency law (specifically the protection of the corporate veil) are unaffected by the "polluter-pays" policy. This has led to the situation whereby national authorities are left to ensure that remediation costs are protected by the licensing conditions imposed, justifying the necessity for EPA requirements in respect of financial provision (designed to include circumstances of insolvency), which can be onerous.

For the corporate veil to be pierced in either jurisdiction, it must be proven that the individual being pursued had an involvement over and above their role as Company Director.

Disclaiming of licences

A further parallel that exists between the Irish and UK environmental law landscape is that it remains open to the liquidator of a company to disclaim its' environmental licences. Once disclaimed, any remaining liabilities will rank as an unsecured creditor. This is clearly an unsatisfactory situation for the EPA, charged as it is with enforcement in this area. On this basis, calls for legislation to carve out priority for environmental liabilities in the context of insolvency, receivership and liquidation are likely to increase.

[1] *Wicklow County Council v Fenton* [2002] 4 IR 44

[2] [2011] IEHC 67

[3] [2011] IEHC 350

[4] [2016] EWCA Crim 1043

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