OUTER HOUSE, COURT OF SESSION

[2018] CSOH 89

P599/17

OPINION OF LORD DOHERTY

In the note by

BLAIR CARNEGIE NIMMO C.A. and GERARD ANTHONY FRIAR C.A., as the joint liquidators of DOONIN PLANT LIMITED

Noters

for

Directions

Noters: Sellar QC; Addleshaw Goddard LLP
Respondent: Lake QC; Brodies LLP

28 August 2018

Introduction

[1] The Noters are the joint liquidators of Doonin Plant Limited ("the company"). The respondent is the Scottish Environment Protection Agency ("SEPA"). In terms of section 30(1)(a) of the Environmental Protection Act 1990 ("the EPA") SEPA is the "waste regulation authority" for the purposes of Part II of the Act. The Noters seek directions from the court on three issues concerning the implications for the liquidation of certain provisions of the EPA. In the event that the Court disagrees with the Noters' suggested directions and

agrees with SEPA's suggested directions the Noters seek an order under section 156 of the Insolvency Act 1986.

Background

[2] The company is registered in Scotland. On 10 July 2015 the Court ordered that the company be wound up and appointed the Noters to be interim liquidators. At a meeting of the company's creditors on 11 August 2015 the Noters' appointment as liquidators was confirmed. In terms of section 129 of the Insolvency Act 1986 the liquidation date is 8 January 2015.

[3] Prior to the liquidation date the company carried on a waste management business at a number of sites including a former colliery site in Armadale ("the site"). The company had licences under the EPA authorising the carrying on of certain waste management activities. However, the licence in respect of the site was suspended in 2006.

[4] SEPA maintains that between 2010 and the liquidation date the company deposited controlled waste at the site which it was not licensed to deposit (and that even if the licence had been operative it would not have authorised the deposits made). On 12 September 2012 the company and one of its former directors were convicted at Livingston Sheriff Court of contraventions of section 33(1) of the EPA in respect of deposits made by the company at the site in 2010.

[5] On 12 December 2012 SEPA issued a notice ("the 2012 notice") to the company in terms of section 59(1) of the EPA requiring it to remove unlawfully deposited controlled waste from the site by 12 March 2013. The relevant controlled waste was described in the Schedule to the notice. Nearly a year after the liquidation date, on 17 December 2015, SEPA issued a further section 59(1) notice ("the 2015 notice") requiring the company to remove

controlled waste (described in part 2 of the Schedule to the notice) from the site within a period of 6 months. The notice also required the company to take the steps specified in part 4 of the Schedule within 12 months with a view to eliminating or reducing the consequences of the deposit of the controlled waste.

[6] The company appealed against the 2012 notice. The appeal has not yet been determined. I was not advised whether the company appealed against the 2015 notice. However, the Noters are content to proceed (for the purposes of the directions hearing only) on the basis that prior to the liquidation date the company did indeed unlawfully deposit the specified controlled waste at the site and that the need for removal and remediation is attributable to the activities of the company prior to the liquidation date. The Noters have not carried out any waste management activities at the site.

[7] The company has not executed any remediation work in response to either section 59(1) notice. In terms of section 59(6) of the EPA where a person fails to comply with a requirement which has been specified in a notice SEPA may carry out the remediation work itself and recover from that person the expenses reasonably incurred in doing so. To date SEPA has not purported to exercise those powers, nor has it indicated any intention to exercise them.

[8] The Noters have realised all of the company's assets other than the site. They estimate that the cost of remediation work to comply with the notices would be somewhere between £2.3 million and £3.7 million. Standing the remedial work required it is unclear to the Noters whether the site has any realisable value. As at 13 February 2018 the company's funds were £634,841.59 before payment of liquidation expenses. Since that date the Noters have incurred further outlays and have rendered further services in respect of which they will seek reimbursement and remuneration. It is plain that the company's funds fall far

short of the expenditure which would be required to comply fully with the section 59(1) notices.

The directions issues

[9] In their Note the Noters refer to the company's obligations under the section 59(1) notices as "the Notices Obligations" and to its section 59(6) obligations as "the section 59(6) Recovery Liability". They aver (paragraph 8.1) that the overall question which is in dispute is in effect whether funds ingathered ought to be applied by the Noters to fund remediation work. They break that down further into three directions issues:

> "9.1 The first ... is whether the Notices Obligations, or the s. 59(6) Recovery Liability, (or all of them) comprised, at the Liquidation Date, ordinary, unsecured debt which was contingently owed by the Company to SEPA ("a contingent debt") and in respect of which SEPA has the right to rank in the Liquidation under the Insolvency Rules...
> ...
> 10.1 The second ... assumes that the First Directions Issue is answered in the negative in every respect...
> 10.2 The Second Directions Issue is then whether the Liquidators would be obliged by the Notices Obligations to have the Remediation Work carried out by the Company and to apply the Surplus Funds for that purpose... the issue is whether the Liquidators should, to the extent that funds are available, procure that the Company meets the obligations under the notices...
> 11.1 The third ... assumes that the First Directions Issue is answered in the negative and that the Second Directions Issue is answered in the affirmative...
> 11.2 The Third Directions Issue is then whether the Remediation Costs would comprise, under Rule 4.66(1)(a) of the Scottish Rules, "expenses of the liquidation"...
> 11.3 More specifically, the Third Directions Issue is whether the Remediation Costs would be "an outlay properly chargeable or incurred by the liquidator in carrying out his functions in the liquidation..." within Rule 4.67(1)(a) of the Scottish Rules..."

[10] In the event that the court directs that the remediation costs would be a liquidation expense the Noters ask the court to make an order in terms of section 156 of the Insolvency

Act 1986 that their remuneration and outlays be paid in priority to that liquidation expense. On that hypothesis SEPA would not resist that application.

Hearing

[11] Counsel prepared written submissions in advance of the hearing. While the case was at *avizandum* Lord Clark issued his Opinion in *Administrator of Dawson International PLC, Noter* [2018] CSOH 52. Counsel then submitted further written submissions relating to that decision. I am grateful to counsel for the assistance which I have obtained from their written and oral submissions.

The relevant statutory provisions

[12] Sections 143(1), 156, 175 and 411 of the Insolvency Act 1986 provide:

> "**143.— General functions in winding up by the court.**
>
> (1) The functions of the liquidator of a company which is being wound up by the court are to secure that the assets of the company are got in, realised and distributed to the company's creditors and, if there is a surplus, to the persons entitled to it.
>
> ...
>
> **156. – Payment of expenses of winding up.**
>
> The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the expenses incurred in the winding up in such order of priority as the court thinks just.
>
> ...
>
> **175.— Preferential debts (general provision).**
>
> (1) In a winding up the company's preferential debts shall be paid in priority to all other debts.
>
> ...
>
> **411.— Company insolvency rules.**
>
> (1) Rules may be made—
>
> ...
>
> (b) in relation to Scotland, by the Secretary of State, for the purpose of giving effect to Parts I to VII of this Act.
>
> ..."

Preferential debts are defined in section 386 and Schedule 6.

[13] The Insolvency (Scotland) Rules 1986 were made under the power conferred by section 411. Rules 4.16F, 4.66 and 4.67 provide:

"**4.16F.— Debts depending on contingency**

(1) Subject to paragraph (2) below, the amount which a creditor shall be entitled to claim shall not include a debt in so far as its existence or amount depends upon a contingency.

(2) On an application by the creditor—

(a) to the liquidator; or

(b) if there is no liquidator, to the court, the liquidator or court shall put a value on the debt in so far as it is contingent, and the amount in respect of which the creditor shall then be entitled to claim shall be that value but no more; and, where the contingent debt is an annuity, a cautioner may not then be sued for more than that value.

(3) Any interested person may appeal to the court against a valuation under sub-paragraph (2) above by the liquidator, and the court may affirm or vary that valuation.

...

4.66.— Order of priority in distribution

(1) The funds of the company's assets shall be distributed by the liquidator to meet the following expenses and debts in the order in which they are mentioned:–

(a) the expenses of the liquidation;

...

(b) any preferential debts within the meaning of section 386 (excluding any interest which has been accrued thereon to the date of commencement of the winding up within the meaning of section 129);

(c) ordinary debts, that is to say a debt which is neither a secured debt nor a debt mentioned in any other sub-paragraph of this paragraph;

(d) interest at the official rate on –

(i) the preferential debts; and

(ii) the ordinary debts

... and

(e) any postponed debt.

...

(3) The expenses of the liquidation mentioned in sub-paragraph (a) of paragraph (1) are payable in the order of priority mentioned in Rule 4.67.

(4) Subject to the provisions of section 175, any debt falling within any of sub-paragraphs (b) to (e) of paragraph (1) shall have the same priority as any other debt falling within the same sub-paragraph and, where the funds of the company's assets are inadequate to enable the debts

mentioned in this sub-paragraph to be paid in full, they shall abate in equal proportions.

(5) Any surplus remaining, after all expenses and debts mentioned in paragraph (1) have been paid in full, shall (unless the articles of the company otherwise provide) be distributed among the members according to their rights and interests in the company.

(6) Nothing in this Rule shall affect–

(a) the right of a secured creditor which is preferable to the rights of the liquidator; ...

...

4.67.— Order of priority of expenses of liquidation

(1) Subject to section 156 and paragraph (2), the expenses of the liquidation are payable out of the assets in the following order of priority–

(a) any outlays properly chargeable or incurred by the provisional liquidator or liquidator in carrying out his functions in the liquidation, except those outlays specifically mentioned in the following sub-paragraphs;

(b) the cost, or proportionate cost, of any caution provided by a provisional liquidator, liquidator or special manager in accordance with the Act or the Rules;

(c) the remuneration of the provisional liquidator (if any);

(d) the expenses of the petitioner in the liquidation, and of any person appearing in the petition whose expenses are allowed by the court;

(e) the remuneration of the special manager (if any);

(f) any allowance made by the liquidator under Rule 4.9(1) (expenses of statement of affairs);

(g) the remuneration or emoluments of any person who has been employed by the liquidator to perform any services for the company, as required or authorised by or under the Act or the Rules;

(h) the remuneration of the liquidator determined in accordance with Rule 4.32;

(i) the amount of any corporation tax on chargeable gains accruing on the realisation of any asset of the company (without regard to whether the realisation is effected by the liquidator, a secured creditor or otherwise).

(2) In any winding up by the court which follows immediately on a voluntary winding up (whether members' voluntary or creditors' voluntary), such outlays and remuneration of the voluntary liquidator as the court may allow, shall have the same priority as the outlays mentioned in sub-paragraph (a) of paragraph (1).

(3) Nothing in this Rule applies to or affects the power of any court, in proceedings by or against the company, to order expenses to be paid by the company, or the liquidator; nor does it affect the rights of any person to whom such expenses are ordered to be paid."

[14] The EPA (as applicable in Scotland) provides:

"**Part II** WASTE ON LAND

...

33.— Prohibition on unauthorised or harmful deposit, treatment or disposal etc. of waste.

(1) Subject to subsection (2), (2B) and (3) below a person shall not—

(a) deposit controlled waste, or knowingly cause or knowingly permit controlled waste to be deposited in or on any land unless a waste management licence authorising the deposit is in force and the deposit is in accordance with the licence;

(b) treat, keep or dispose of controlled waste, or knowingly cause or knowingly permit controlled waste to be treated, kept or disposed of—

(i) in or on any land, or

(ii) by means of any mobile plant, except under and in accordance with a waste management licence;

(c) keep or manage controlled waste in a manner likely to cause pollution of the environment or harm to human health.

...

(6) A person who contravenes subsection (1) above or any condition of a waste management licence commits an offence.

...

59.— Powers to require removal of waste unlawfully deposited.

(1) If any controlled waste is deposited in or on any land in the area of a waste regulation authority or waste collection authority in contravention of section 33(1) above, the authority may, by notice served on him, require the occupier to do either or both of the following, that is—

(a) to remove the waste from the land within a specified period not less than a period of twenty-one days beginning with the service of the notice;

(b) to take within such a period specified steps with a view to eliminating or reducing the consequences of the deposit of the waste.

(2) A person on whom any requirements are imposed under subsection (1) above may, within the period of twenty-one days mentioned in that subsection, appeal against the requirement to a magistrates' court or, in Scotland, to the sheriff by way of summary application.

(3) On any appeal under subsection (2) above the court shall quash the requirement if it is satisfied that—

(a) the appellant neither deposited nor knowingly caused nor knowingly permitted the deposit of the waste; or

(b) there is a material defect in the notice; and in any other case shall either modify the requirement or dismiss the appeal.

(4) Where a person appeals against any requirement imposed under subsection (1) above, the requirement shall be of no effect pending the

> determination of the appeal; and where the court modifies the requirement or dismisses the appeal it may extend the period specified in the notice.
>
> (5) If a person on whom a requirement imposed under subsection (1) above fails, without reasonable excuse, to comply with the requirement he shall be liable, on summary conviction, to a fine not exceeding level 5 on the standard scale and to a further fine of an amount equal to one-tenth of level 5 on the standard scale for each day on which the failure continues after conviction of the offence and before the authority has begun to exercise its powers under subsection (6) below.
>
> (6) Where a person on whom a requirement has been imposed under subsection (1) above by an authority fails to comply with the requirement the authority may do what that person was required to do and may recover from him any expenses reasonably incurred by the authority in doing it.
>
> ..."

None of the qualifications to section 33(1) contained in section 33(2), (2B) and (3) are relevant in the present case.

Waste Framework Directive

[15] Part II of the EPA was intended to give effect to the Waste Framework Directive (Council Directive 75/442/EC of the 15 July 1975). In *In re Celtic Extraction Ltd (in liquidation)* [2001] chapter 475 Morritt LJ set out a convenient summary of that directive (at paragraph 10):

> "10 ... In the recitals to the Directive the Commission recognised that the disparity in the treatment of the control of waste by member states affected the functioning of the common market and should be harmonised with the essential objective of the protection of human health and the environment against harmful effects of the collection, transport, treatment, storage and tipping of waste. It enunciated a principle of "polluter pays" and required member states to take the necessary measures. Naturally it did not go into any detail and, in particular, was silent as to the consequences of the insolvency of the polluter."

[16] Similar observations could be made of the current Waste Framework Directive - Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008. It continues to enunciate the polluter-pays principle. It too is silent as to the consequences of the insolvency of the polluter. The Recitals in its Preamble narrate:

> "(1) Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste establishes the legislative framework for the handling of waste in the Community ... It ... establishes major principles such as an obligation to handle waste in a way which does not have a negative impact on the environment ... and, in accordance with the polluter-pays principle, a requirement that the costs of disposing of waste must be borne by the holder of waste, by previous holders or by the producers of the product from which the waste came.
>
> ...
>
> (26) The polluter-pays principle is a guiding principle at European and international levels. The waste producer and the waste holder should manage the waste in a way that guarantees a high level of protection of the environment and human health.
>
> ...
>
> (45) Member States should provide for effective, proportionate and dissuasive penalties to be imposed on natural and legal persons responsible for waste management, such as waste producers, holders, brokers, dealers, transporters and collectors, establishments or undertakings which carry out waste treatment operations and waste management schemes, in cases where they infringe the provisions of the Directive. Member States may also take action to recover the costs of non-compliance and remedial measures...
>
> ..."

Articles 14 and 36 provide:

> "*Article 14*
> **Costs**
>
> 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.
>
> ...

Article 36
Enforcement and penalties

1. Member States shall take the necessary measures to prohibit the abandonment, dumping or uncontrolled management of waste.
2. Member States shall lay down provisions on the penalties applicable to infringements of the provisions of this Directive and shall take all necessary measures to ensure that they are implemented. The penalties shall be effective, proportionate and dissuasive."

Counsel for the Noters' submissions

[17] Mr Sellar advanced a number of submissions in support of the proposition that, on a proper construction of section 59, any liabilities arising were liabilities of the company, not personal liabilities of the liquidators. Since in fact that proposition was not disputed, it is unnecessary to rehearse those submissions.

The first directions issue

[18] Mr Sellar submitted that the Notice Obligations did not create a debt of any sort owed to SEPA. The short point was that they did not create any obligation to pay SEPA.

[19] On the other hand, the reasonable expense which SEPA would incur if it carried out the work necessary to comply with the notices - the section 59(6) Recovery Liability - was a contingent debt owed by the company to SEPA at the liquidation date. It fell to be valued at that date (taking account of the hindsight principle if appropriate). Reference was made to *Liquidator of Ben Line Steamers Ltd* 2011 SLT 535, per Lord Drummond Young at paragraphs 21 and 23; *Costain Building and Civil Engineering Ltd* v *Scottish Rugby Union plc* 1993 SC 650, per Lord President Hope at p 654A; and *Joint Liquidators of Scottish Coal* v *Scottish Environment Protection Agency* 2014 SC 372, per the Opinion of the Court delivered by the Lord Justice Clerk (Lord Carloway) at paragraph 145. On a proper analysis the

company was subject to a contingent liability to pay SEPA the remedial costs. Reference was made to *In re Nortel GmbH* [2014] AC 209, per Lord Neuberger of Abbotsbury PSC at paragraphs 76-86; *In re Sutherland, decd* [1963] AC 235, per Lord Reid at pp 247-248, and per Lord Guest at p 264; *Gloag on Contract* (2nd ed.), p 272; *Laverty* v *British Gas Trading Ltd* [2015] Bus LR 17, per Sir Terence Etherton C at paragraphs 81-83; *Administrator of Dawson International PLC, Noter, supra*, per Lord Clark at paragraphs 74 - 80 and 91. As at the liquidation date the offending waste had been deposited on the site by the company. The 2012 notice had been served requiring the removal of the waste specified in that notice. Although at that date the 2015 notice had not yet been served and SEPA had not exercised any of its powers under section 59(6) in relation to any of the waste, the company had subjected itself to the section 59 regime. It had been vulnerable to the section 59(6) powers being exercised by SEPA. That had been sufficient to give rise to a contingent debt owed at the liquidation date to SEPA. There had been a real prospect that the specific liability to repay SEPA would be incurred. In the case of a statutory obligation it is a question of statutory interpretation whether the obligation gives rise to a contingent debt. Whether or not such a liability exists cannot depend upon the particular policy of a putative creditor.

[20] Accordingly the first directions issue should be answered in the negative in respect of the Notices Obligations but in the affirmative in respect of the section 59(6) Recovery Liability.

The second directions issue

[21] If, as the Noters maintain, the section 59(6) Recovery Liability was a contingent debt, the second and third directions issues do not arise. If SEPA is entitled to prove for that liability there could be no question of the Noters being obliged to carry out the work.

[22] Even if the section 59(6) Recovery Liability was not a contingent debt for which SEPA could prove, the Noters are not bound to carry out the company's Notice Obligations. The Notice Obligations were requirements which were imposed on the company by virtue of SEPA's exercise of a statutory power. No requirement had been imposed upon the Noters (cf. the regulations considered in *Joint Liquidators of Scottish Coal* v *Scottish Environment Protection Agency, supra,* and the very different circumstances of *Re John Willment (Ashford) Ltd* [1980] 1 WLR 73 where the incurring of liability stemmed from the receiver's actions). The Noters' functions are to secure that the assets of the company are got in, realised and applied or distributed in accordance with the scheme of distribution laid down by the Insolvency Act 1986 and the Insolvency (Scotland) Rules 1986. It would not be right for the Noters to give the Notice Obligations a priority which the statutory scheme does not accord to them. The second directions issue should be answered in the negative.

The third directions issue

[23] Since the Noters are not obliged to use the funds ingathered to carry out any part of the works described in the Notice Obligations the third directions issue does not arise.

[24] If the Noters were to pay any of the costs of complying with the Notice Obligations such payment would not be an outlay properly chargeable or incurred in carrying out their functions in the liquidation in terms of Rule 4.67(1)(a). In *In re Nortel GmbH, supra,* Lord Neuberger considered the analogous question of administration expenses at paragraph 100:

> "100 While it would be dangerous to treat any formulation as an absolute rule, it seems to me, at any rate subject to closer examination of the authorities and counter-arguments, a disbursement falls within rule 2.67(1)(f) if it arises out of something done in the administration (normally by the administrator or on the administrator's behalf), or if it is imposed by a statute whose terms render it clear that the liability to make the disbursement falls on an administrator as

> part of the administration—either because of the nature of the liability or because of the terms of the statute."

[25] Mr Sellar accepted that where a legislative provision is enacted with a view to giving effect to an EU directive the provision ought to be given a conforming interpretation (see eg *Vodafone2* v *HMRC* [2010] chapter 77, per Sir Andrew Morritt C at paragraphs 36 - 37 and Longmore LJ at paragraph 70; *Football Association Premier League Ltd* v *QC Leisure* [2012] EWCA Civ 1708, per Etherton LJ at paragraphs 51, 55, 57 and 60). However, a conforming interpretation could not go "against the grain" of the legislation. It is not permissible under the guise of such an interpretation for the court to be required to make decisions on issues which it is not equipped to evaluate. Whether or not preservation of the environment is more important than the expeditious and equal distribution of available assets among the unsecured creditors of an insolvent company is such an issue.

[26] The section 59 regime does not provide expressly that the Notice Obligations bind the liquidator instead of, or in addition to, the company (cf. the regulations considered in *Joint Liquidators of Scottish Coal* v *Scottish Environment Protection Agency, supra*); and on a proper construction of section 59 no such liabilities fall to be implied by reason of the nature of the liability which section 59(1) makes provision for.

[27] The notice requirements stem from the pre-liquidation date activities of the company. They are not post-liquidation liabilities. They were not incurred by the Noters in carrying out their functions in the liquidation. Their payment would not involve the liquidators discharging pre-liquidation liabilities for the benefit of the liquidation. Reference was made to *Laverty* v *British Gas Trading Ltd, supra; In re Toshuko Finance UK plc* [2002] 1 WLR 671; and *In re Lundy Granite Co, Ex p Heavan* (1871) LR 6 chapter App 642.

[28] Mr Sellar submitted that if SEPA's approach is correct it would make liquidations unworkable where a company had significant section 59(1) obligations. It would result in insolvency practitioners declining appointment as liquidators in those circumstances. If, as here, the costs involved exceed the funds ingathered it is difficult to see how the liquidator is to decide what elements of the obligations should be given priority. At a practical level, contractors would be likely to insist that liquidators assume personal liability under contracts for remedial work. Since if payments for remedial work are liquidation expenses they would have priority over the payment of the liquidator's remuneration, liquidators would be placed in the invidious position of accepting appointment in the hope that the court would make a section 156 order varying the statutory priority.

[29] Accordingly the third directions issue should be answered in the negative.

Section 156 order

[30] In the event that the second and third directions issues fall to be answered in the affirmative, the Noters seek an order providing that their remuneration and outlays should have priority over section 59(1) remedial costs. Reference was made to *Joint Liquidators of Direct Sharedeal Ltd* 2013 SLT 822 and *Re Berkeley Applegate (Investment Consultants) Ltd* [1989] Ch 32.

Counsel for SEPA's submissions

The first directions issue

[31] Mr Lake submitted that the Notice Obligations were not a debt owed to anyone. They could not be enforced by private law action (cf *Re Mineral Resources Limited* [1999] BCC 422, per Neuberger J at p 433A; *Joint Liquidators of Scottish Coal v Scottish Environment*

Protection Agency, supra, per the Opinion of the Court at paragraphs 120, 146). Failure to comply with the notices without reasonable excuse is a criminal offence (section 59(5)).

[32] For there to be an enforceable civil liability under section 59(6), a section 59(1) notice has to be served; there has to be no successful appeal against the notice; there has to be a failure to carry out the works specified in the notice; and SEPA has to carry out the works and seek recovery of the expenses reasonably incurred in doing that.

[33] In the present case SEPA had not exercised its power under section 59(6) to carry out remedial work. SEPA's policy was to adhere to the polluter-pays principle. It had limited funds. It was unable to bear the cost of the remedial work here. There would be no real prospect of any significant recovery from the company were SEPA to do the work.

[34] The waste had been deposited before the liquidation date, but that was not sufficient to create a legal relationship between the company and SEPA which was capable of giving rise to civil liability. Civil liability to make payment to SEPA would arise only if there was both service of section 59(1) notices and performance by SEPA of the remediation work. Standing SEPA's policies and limited resources it could not be said that at the liquidation date there had been a real prospect of SEPA carrying out the works so as to give rise to contingent debt. This is not a case where the criteria discussed by Lord Neuberger at paragraph 77 of *Re Nortel GmbH, supra* were satisfied at the liquidation date.

[35] It follows that at that date the company did not owe a contingent debt to SEPA. The first directions issue should be answered in the negative in relation to both the Notice Obligations and the section 59(6) Recovery Liability.

Second directions issue

[36] A company's private law obligations continue between the dates of liquidation and dissolution though they might not be enforceable against the company by specific implement (*Asphaltic Limestone Concrete Co Ltd* v *Glasgow Corporation* 1907 SC 463; *Smith* v *Lord Advocate* 1978 SC 259; *Joint Administrators of Rangers Football Club plc, Noters* 2012 SLT 599). The statutory obligations of a company also continue during that period. The section 59(1) notices imposed requirements on the company which arose (in the case of the 2015 notice) or continued (in the case of the 2012 notice) after the liquidation date. It is not suggested that section 59(1) expressly or impliedly imposed personal liability on the Noters to comply with the notice requirements. However, notwithstanding the liquidation the company remains bound to comply with those requirements to the extent which it is possible to do so with the company's assets; and the Noters, as officers of the company in liquidation, should see to it that the company does that. Therefore the second directions issue should be answered in the affirmative.

The third directions issue

[37] The EPA was intended to give effect to the Waste Framework Directive. That directive set out the polluter-pays principle. In characterising the nature of the liabilities imposed by section 59(1) that principle should be kept clearly in view. In that respect the exercise ought to be similar to the interpretation of domestic legislation which was intended to implement an EU directive (*Wicklow County Council* v *Fenton (No. 2)* [2002] 2 IR 583; *Pfeiffer* v *Deutches Rotes Kreuz, Kreisverband Waldshut* [2004] ECR I-8835; *Environmental Protection Agency* v *Neiphin* [2011] 2 IR 575). Having regard to the nature of the liabilities imposed here it may reasonably be concluded that the statutory intent was that funds so expended should

be liquidation expenses in terms of Rule 4.66(1)(a), being outlays properly incurred in carrying out the Noters' functions as liquidators within the meaning of rule 4.67(1)(a). For the UK to comply with its obligations under the directive there has to be an effective means of requiring that those who deposit waste unlawfully bear the responsibility for its removal and remediation. That is so even if the person becomes insolvent. Thus, in the event of liquidation a company should continue to be obliged to carry out removal and remediation of waste, and the expense involved should be a liquidation expense. Otherwise the polluter would generally escape liability. Indeed, a company could enter voluntary liquidation in order to escape its section 59(1) liabilities. Accordingly the third directions issue should be answered in the affirmative.

Section 156 order

[38] In the event that the second and third directions issues are answered in the affirmative, SEPA does not oppose the section 156 order sought by the Noters.

Decision and reasons

The order in which the directions issues should be considered

[39] Both parties proceeded on the basis that the first directions issue should be considered first, and that if it is answered in the affirmative the second and third directions issues do not arise. In my opinion that is not the correct approach.

[40] It seems to me that, strictly speaking, whether expenditure to comply with the Notice Obligations would be a liquidation expense ought to be the prior question. In terms of rule 4.66(1)(a), liquidation expenses are accorded the highest priority. The logical course is to identify the highest priorities first. If satisfaction of a liability would be a liquidation

expense it would be putting the cart before the horse to ask if the liability was a contingent debt at the liquidation date. The enquiry could only be "On the hypothesis that satisfaction of this liability would not be a litigation expense, was it a contingent debt at the liquidation date?" An affirmative answer to that question would not be determinative of the issue whether satisfaction of the liability would be a liquidation expense. The directions issues as framed assume - wrongly, in my view - that it would be determinative of that issue.

[41] In my opinion the right approach is to enquire first whether there is a liquidation expense. If there is, it is unnecessary to go on to consider the first directions issue. On that scenario, because expenditure would qualify as a liquidation expense if it is in fact expended by the liquidator, a creditor cannot also prove for a debt based on the liability which the liquidation expense has met (even though, were the expenditure not a liquidation expense, the underlying liability which it satisfied might have been a provable debt (In *re Noretel GmbH, supra,* per Lord Neuberger at paragraph 57; In *re ABC Coupler and Engineering Co Ltd (No 3)* [1970] 1 WLR 702)).

[42] In fact, because of the conclusions I reach below, the order in which the directions issues are considered is not critical to the outcome of the present case. In light of that, and because of the way matters were focussed in the submissions before me, (and in case the views I express in paragraphs 39 to 41 are challenged if the case goes further), it is convenient to deal with the directions issues in the order in which the parties have raised them.

The first directions issue

[43] It is common ground that at the liquidation date the Notice Obligations were not a debt of any sort owed by the company to SEPA. In my opinion that is correct. The company

had a statutory obligation to comply with the 2012 notice, and it was susceptible to the contingency that a more comprehensive notice (like the 2015 notice) would be served on it: but it did not owe a debt to SEPA by virtue of the Notice Obligations.

[44] Was the position with the section 59(6) Recovery Liability any different? That depends on whether that statutory source gave rise to a contingent debt in the circumstances.

[45] At the liquidation date the 2012 notice had been served. In so far as potential section 59(6) liability stemmed from work specified in the 2012 notice, it was contingent upon (i) there being no successful appeal against the notice; and (ii) SEPA carrying out the work required (following the company's failure to do so) and SEPA seeking reimbursement from the company.

[46] At the liquidation date the 2015 notice had not been served. In so far as potential section 59(6) liability stemmed from work specified in that notice, it was contingent upon (i) a section 59(1) notice being served; (ii) there being no successful appeal against the notice; and (iii) SEPA carrying out the work required (following the company's failure to do so) and SEPA seeking reimbursement.

[47] The fact that some of the contingencies involve the exercise of discretion does not preclude the conclusion that there was a contingent debt at the liquidation date. As Lord Sumption observed in *In re Nortel Gmbh, supra,* at paragraph 179:

> "179 ... It is not a condition of the right to prove for a debt or liability which is contingent at the date when the company went into liquidation that the contingency should be bound to occur or that its occurrence should be determined by absolute rather than discretionary factors."

Lord Drummond Young made observations to similar effect in *Liquidator of Ben Line Steamers Ltd, supra,* at paragraph 26*:*

> "[26] One further point calls for comment. Contingencies can arise from various different sources. In many cases, an obligation will be contingent because it is conditional upon the occurrence of some possible future event. In other cases, an obligation may be contingent because someone has the power to determine whether or not it is to be due, or to determine its amount. An insurance policy is an example of the former; it is payable in the event that the sum insured against happens. The classic example of the latter is a guarantee payable on demand, which is payable in the event that it is called up by the creditor. Another example is a call made on shares: *Creswill (sic) Ranche and Cattle Co Ltd v Balfour Melville* [(1901) 9 SLT 356)]. The critical point, illustrated by these examples, is that the contingency may arise from the existence of a liability to the exercise of a power by another person."

[48] Nor is it fatal to the existence of a contingent debt that two of the contingencies here were dependent on the exercise of powers by SEPA. As Lord Drummond Young emphasised at paragraph 37:

> "[37] ... The critical point is that a contingency can be dependent on the exercise of a power by the creditor in a contingent obligation, or indeed a third party; the existence of such a power creates the correlative liability in the debtor. In my opinion it is immaterial that the power involved is a "double" power, in the sense that the creditor can exercise one power to enable itself to exercise a second power: in this case, to exercise of power of amendment to enable the making of a monetary claim. Both of those powers are contained within the terms of the MNOPF scheme, and are contractually binding on the company..."

[49] Mr Lake's argument on this part of the case centres on the proposition that there was not a contingent debt at the liquidation date because, he maintains, there was not a real prospect of the company incurring section 59(6) liability. He says that, on a correct reading of the test discussed by Lord Neuberger at paragraph 77 of *In re Nortel GmbH,* it has to be shown that there was a real prospect that the relevant contingencies would be purified. However, the reality here was that, as a matter of policy and because of budget constraints, SEPA would not exercise its section 59(6) power to carry out the work itself.

[50] In *In re Nortel Gmbh, supra,* at paragraphs 75 - 77 Lord Neuberger opined:

> "75 Where a liability arises after the insolvency event as a result of a contract entered into by a company, there is no real problem. The contract, in so far as

> it imposes any actual or contingent liabilities on the company, can fairly be said to impose the incurred obligation. Accordingly, in such a case the question whether the liability falls within paragraph (b) will depend on whether the contract was entered into before or after the insolvency event.
>
> 76 Where the liability arises other than under a contract, the position is not necessarily so straightforward. There can be no doubt but that an arrangement other than a contractual one can give rise to an "obligation" for the purposes of paragraph (b)... As Lord Hoffmann said, (albeit in a slightly different context) in relation to contingent liabilities arising on a liquidation, in *Secretary of State for Trade and Industry v Frid* [2004] 2 AC 506, para 19, 'How those debts arose—whether by contract, statute or tort, voluntarily or by compulsion—is not material'.
>
> 77 However, the mere fact that a company could become under a liability pursuant to a provision in a statute which was in force before the insolvency event, cannot mean that, where the liability arises after the insolvency event, it falls within rule 13.12(1)(b). It would be dangerous to try and suggest a universally applicable formula, given the many different statutory and other liabilities and obligations which could exist. However, I would suggest that, at least normally, in order for a company to have incurred a relevant "obligation" under rule 13.12(1)(b), it must have taken, or been subjected to, some step or combination of steps which (a) had some legal effect (such as putting it under some legal duty or into some legal relationship), and which (b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred. If these two requirements are satisfied, it is also, I think, relevant to consider (c) whether it would be consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation under rule 13.12(1)(b)."

[51] Lord Neuberger was dealing with the language of the Insolvency Rules 1986 (since replaced by the Insolvency Rules 2016). The relevant terms of the Insolvency (Scotland) Rules 1986 are less detailed and somewhat different from the rules he was considering, but neither party suggested that that was a material factor.

[52] I am mindful of the limited ambit of the hindsight principle. Where a contingent debt exists at the liquidation date, application of the hindsight principle when the debt comes to be valued may result in the value being higher or lower than it might otherwise have been at the liquidation date (*Wight* v *Eckhardt Marine GmbH* [2004] 1 AC 147, per the judgment of the Board of the Judicial Committee of the Privy Council delivered by

Lord Hoffmann at paragraph 32; *Liquidator of Ben Line Steamers Ltd,* per Lord Drummond Young at paragraph 23). However, the hindsight principle has no part to play in determining whether a contingent debt existed at the liquidation date (*Liquidator of Ben Line Steamers Ltd,* per Lord Drummond Young at paragraph 23).

[53] I turn then to the application of the test posited by Lord Neuberger at paragraph 77 of *Nortel* to the facts.

[54] So far as part (a) of the test is concerned, the unauthorised deposit of waste by the company had very significant legal effects. By doing what it did the company placed itself very firmly within the regime in Part II of the EPA, and, in particular, sections 33 and 59.

[55] Satisfaction of part (b) of the test is much more problematic. SEPA had limited resources. Its policy was that the polluter should pay. The company was insolvent and if SEPA were to do the remedial work it was highly unlikely that it would be reimbursed by the company. In my opinion, on any common sense view of the circumstances at the liquidation date there was not a real prospect of SEPA carrying out the necessary remedial work in the future. There was not a real prospect of the company becoming liable to reimburse SEPA.

[56] Moreover, in my view part (c) of the test is not satisfied. It was not consistent with the section 59 regime that section 59(6) should give rise to a contingent debt in the circumstances. On the contrary, as I shall explain later, in my opinion the section 59 regime envisages that sums expended by a company in liquidation on section 59(1) remedial costs should be a liquidation expense.

[57] It follows that the first directions issue falls to be determined in the negative both in relation to the Notice Obligations and the section 59(6) Recovery Liability.

The second directions issue

[58] Mr Lake made clear that he did not maintain that the Noters were personally obliged to comply with the Notice Obligations. His submission was that the company remains bound to comply with the Notice Obligations notwithstanding the liquidation. The Noters, as the company's responsible officers, should apply such funds as the company has towards compliance with those obligations.

[59] In my opinion the company's Notice Obligations do indeed continue notwithstanding the liquidation. The real question, it seems to me, is what, if any, priority is to be accorded to those obligations.

[60] Insolvency law determines the priority which the Noters should give to each of the company's debts and obligations. They are obliged to apply or distribute the company's funds to meet expenses and debts in the order set out in rules 4.66 and 4.67. The critical issue is where (if anywhere) in that waterfall of priorities does expenditure complying with the Notice Obligations sit? Liquidation expenses are accorded a high priority (rule 4.66(1)(a)). If expenditure complying with the Notice Obligations is a liquidation expense falling within rule 4.67(1)(a) (as an outlay "properly chargeable or incurred by ... the liquidator in carrying out his functions in the liquidation") it would have priority over the other categories of liquidation expenses in rule 4.67. It would also have priority over preferential debts and ordinary debts. It follows that in order to decide whether the Noters are obliged to incur remediation costs it is necessary first to determine whether such costs are liquidation expenses. If they are not, the company's ordinary debts have priority over the Notice Obligations and those ordinary debts will exhaust the funds ingathered. Consequently, the answer to the second directions issue is dependent upon the answer to the third directions issue.

The third directions issue

[61] In *In re Nortel GmbH* Lord Neuberger discussed the analogous position of administration expenses at paragraphs 97-128. At paragraphs 100 and 111 he observed:

> "100 ... a disbursement falls within rule 2.67(1)(f) if it ... is imposed by a statute whose terms render it clear that the liability to make the disbursement falls on an administrator as part of the administration—either because of the nature of the liability or because of the terms of the statute.
>
> ...
>
> 111 ... In my view, the general guidance given by Lord Hoffmann in *In re Toshoku Finance [2002] 1 WLR 671* is to be found in para 46, where he said that "the question of whether [any particular] liabilities should be imposed on companies in liquidation is a legislative decision which will depend on the particular liability in question". In a case, such as the present, where (i) the statutory liability is one which could have been imposed before or after liquidation, (ii) the liability does not give rise to a provable debt (as is being assumed for present purposes) and (iii) the statute is completely silent as to how the liability should be treated if it is imposed after an insolvency event, the liability can only be an expense of the liquidation or administration if the nature of the liability is such that it must reasonably have been intended by the legislature that it should rank ahead of provable debts. It would be wrong to suggest that this is a test which may not need to be refined in future cases, but it appears to me to be supported by the facts and arguments raised on these appeals."

[62] I agree with Mr Sellar that the language of section 59(1) of the EPA does not make it clear that the liability to comply with a notice is a company obligation which the liquidator requires to meet as part of the liquidation, and that the expenditure involved is to be a liquidation expense. By contrast, in *Joint Liquidators of Scottish Coal* v *Scottish Environment Protection Agency* and *In re Toshuku Finance UK plc* the applicable statutory provisions expressly imposed liability on liquidators (see paragraphs 129 and 137 of *Scottish Coal* and paragraph 2 of *Toshuku*; see also paragraphs 112-113 of *Nortel*).

[63] Accordingly, the critical issue here is whether the nature of the liability imposed by a section 59(1) notice is such that it must reasonably have been intended by the legislature that

expenditure by a liquidator complying with a notice should be a litigation expense (which would therefore rank ahead of provable debts).

[64] The nature of the obligations which may be imposed by a section 59(1) notice are obligations to remove waste which has been unlawfully deposited and to remediate damage caused by that. Essential objectives of section 59(1) and of the Waste Framework Directive are the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste. The polluter-pays principle is also one of the main objectives of the directive. That principle requires that the costs of waste management be borne by the original waste producer or by the current or previous waste holders.

[65] In my opinion, in characterising the nature of the relevant obligations regard should be had to the aims and objectives of the directive which Part II of the EPA was intended to implement. In that respect the approach is not dissimilar to that followed when domestic legislation implementing an EU directive requires to be interpreted (*Marleasing SA* v *La Comercial Internacional de Alimentation SA* [1993] ECR I-4135; *Pfeiffer* v *Deutches Rotes Kreuz, Kreisverband Waldshut, supra; Joint Liquidators of Scottish Coal* v *Scottish Environment Protection Agency, supra,* at paragraphs 142-144: see also *Wicklow County Council* v *Fenton (No. 2), supra,* per Sullivan J at pp 56-60; *Environmental Protection Agency* v *Neiphin, supra,* per Edwards J at paragraphs 101-105)). Viewing the nature of the liability imposed by a section 59(1) notice through the prism of the directive which Part II of the EPA was intended to implement, I conclude that it must reasonably have been intended by the legislature that expenditure by a liquidator complying with a section 59(1) notice should be a liquidation expense. Otherwise it is very likely that polluters who become insolvent would frequently escape paying for the damage to the environment which their conduct has caused. I am not persuaded that the

legislature intended that provable debts should have priority over expenditure by a liquidator to comply with section 59(1) notice obligations.

[66] In *Joint Liquidators of Scottish Coal* v *Scottish Environment Protection Agency* at paragraph 144, the Inner House thought there were persuasive factors in favour of giving pre-eminence to the policy of maximising environmental protection over the policy of expeditious and equal distribution of available assets among the unsecured creditors of an insolvent company, and it endorsed observations to that effect by Neuberger J in *Re Mineral Resources Ltd* at p 431. At first instance Lord Hodge also expressed agreement with Neuberger J's observations that there is a strong public interest in the maintenance of a healthy environment, the remediation of pollution and the maintenance of biodiversity (*Joint Liquidators of Scottish Coal, Petitioners* 2013 SLT 1055 at paragraph 51). I agree that these are powerful arguments. I am not convinced that the courts in those cases were not equipped to evaluate the issues which they did. Nor am I persuaded that in doing so they strayed beyond the boundaries of their judicial competence and intruded into an area reserved to the legislature. If in the present case it had been necessary to rely upon the persuasive factors in favour of giving pre-eminence to the policy of maximising environmental protection they may well have carried the day. I put the matter that way because in my opinion the exercise upon which I am engaged does not involve weighing the relative importance of protection of the environment on the one hand and the expeditious and equal distribution of available assets on the other. The exercise involves the proper characterisation of section 59(1) notice liabilities in an insolvency. The nature of those liabilities indicates that they ought to be liquidation expenses, in my opinion. That conclusion does not undermine the statutory scheme in rules 4.66 and 4.77. It clarifies where such liabilities fit into the scheme.

[67] I should deal with two other matters on which Mr Sellar placed some reliance. The first was *In re Celtic Extraction Ltd (in liquidation), supra.* At paragraph 39 Morritt LJ (as he then was) opined:

> "39 ... There is nothing in the Directive to suggest that the "polluter pays" principle is to be applied to cases where the polluter cannot pay so as to require that the unsecured creditors of the polluter should pay to the extent of the assets available for distribution among them. Yet this is the consequence of the argument for the agency that the costs of compliance have priority over provable debts and that the assets of the company must be set aside to pay for future compliance with the terms of the licence before the company is dissolved."

I agree with Lord Hodge's observation in *Joint Liquidators of Scottish Coal, Petitioners, supra,* at paragraph 46, that EU law has been clarified since *In re Celtic Extraction Ltd* was decided. I also find paragraph 39 of *Celtic* unpersuasive for other reasons. Where an insolvent company has assets, in my opinion it is not correct to say that "the polluter cannot pay" and that unsecured creditors of the polluter pay. Any assets are the company's assets. They are held by the liquidator to be applied to meet liquidation expenses and claims in accordance with the statutory scheme. If meeting section 59(1) environmental obligations is a liquidation expense then the company's assets fall to be used for that purpose because the expense has priority over creditors' claims. That approach does not offend against the statutory liquidation regime. On the contrary, it is entirely consistent with it.

[68] The other matter I should deal with is Mr Sellar's warning that if section 59(1) liabilities are a liquidation expense insolvency practitioners will not accept appointment as liquidators. That, it was said, was for a number of reasons. The first was that section 59(1) outlays would have priority over the liquidator's claim for remuneration unless the court ordered otherwise. Insolvency practitioners would not take the risk of the court refusing to make such an order. Second, if contracts had to be entered into in respect of work relating to

a section 59(1) requirement, in practice contractors would be likely to insist upon the liquidator undertaking personal liability. Third, where, as here, the company's assets are insufficient for all section 59(1) work to be carried out, the liquidator would be in the difficult position of having to decide which part of the required work ought to be done.

[69] Similar arguments were advanced by the liquidators in *Joint Liquidators of Scottish Coal* v *Scottish Environment Protection Agency* (see paragraphs 78-79). It seems clear that the court did not find them persuasive. Nor do I. An affirmative answer to the second and third directions issues may make the task of liquidators more challenging than if they are answered in the negative. However, I am not convinced that any of the suggested difficulties would make the liquidation process unworkable. In my view there is no real risk that the court would refuse to order that a liquidator's remuneration be paid in priority to section 59(1) expenditure if that is necessary to ensure that a liquidator would be remunerated. In negotiating contracts a liquidator may be expected to safeguard his own legitimate interests as well as those of the company. Decisions as to the ways in which limited available resources ought to be used may be expected to be taken following consultation with SEPA.

[70] For all of these reasons I conclude that the second and third directions issues should be answered in the affirmative.

Section 156 order

[71] I am satisfied that the company's assets are insufficient to meet its liabilities and that it is appropriate to make a section 156 order providing that the Noters' remuneration and outlays are paid out of the assets in priority to the expenses of complying with the section 59(1) notices.

Disposal

[72] I shall put the case out by order for discussion of the precise terms of an appropriate interlocutor to give effect to my decision and to hear submissions in relation to the expenses of the proceedings. In the event that parties are agreed on those matters the by order hearing can be dispensed with.