Ilari Hovila – Anssi Kärki

Environmental liability enforcement in bankruptcy

Additional learning materials (case law)

1. Aznacóllar dam disaster of 1998

The Aznacóllar dam disaster is an accident that happened in Spain in 1998. The event involved a dam that was meant to hold and isolate acidic mine tailings. Due to this purpose the water contained dangerous levels of several heavy metals.

Originally the mine and the dam were operated by a Spanish company called Andaluza de Piritas, S.A (Aprisa). The dam was built to the standards of best available technology at the time and its design was commissioned from a Spanish engineering company Intecsa. Another Spanish company called Dragados did the construction. A Swedish company called Boliden AB bought Aprisa in 1987 and changed its name to Boliden-Aprisa. The Swedish company was the parent company of Aprisa and held full control over it. In 1996, a survey was conducted on the dam site. The results listed several required actions to strengthen the dam and enhancing its stability. The same company that had made the survey then oversaw the planning and construction aimed at increasing the holding capacity of the dam. This work was approved in the Andalusia regions council in 1996. For this work, the company received extensive financial support from Spanish communal and state agencies.

The dam failed the 26th of April 1998 and the water burst into the nearby River Agrio, eventually reaching its affluent the River Guadiamar. Over six million cubic meters of contaminated water made its way into the streams The failure was due to complex and unforeseen geotechnical issue. The environmental damage was massive. The current estimate for the amount Spanish government contributed is around 250 million euros. Additionally, several other entities have contributed tens of millions to the clean-up and compensations. Aprisa contributed 36 million euros.

These events resulted in multiple law suits. Most of them took place in Spain. Several criminal charges were made against the management of the company, but all of them were dismissed.

The main reasoning was, that the actions of these persons did not fulfil the element of carelessness that is demanded for criminal liability to apply. Several administrative procedures were also initiated. In these processes, the company could be sought liable for any damage caused to the watery areas and any costs the authorities have incurred when cleaning those areas. In 2002, Aprisa was given these administrative sanctions to the amount of ca. 45 million euros. The basis for the decision was that the company had neglected due diligence that was required by the risky operation of the business. Appealing this decision, Aprisa argued that it alone could not be held responsible for the entire accident. Instead, the designer and builder of the dam should also be held liable. Additionally, it claimed that some of the costs the government claimed compensation for were without merit. The Spanish Supreme Court did not accept these arguments. It held that Aprisa was able to both choose the contractors and was required to supervise their work. In a separate suit, Aprisa sought the contractors liable for damages and the economic sanctions.

The Andalusia regions government also raised a civil suit against Aprisa for tort damage amounting to 90 million euros. The idea behind this was to acquire a civil judgement. The civil court decided that it did not have jurisdiction over this claim and directed the appellant to the administrative courts. Instead, the regional government made an administrative decision to sanction Aprisa for the full 90 million. Aprisa appealed the decision, but to no avail. Instead, the appellate court raised the compensation amount to 108 million.

Needles to say, these massive sanctions and compensations ruined Aprisa's financial state. It was unable to pay them and was declared bankrupt. It has no business, assets or capital in Spain. In the end, all the court proceedings were for naught, since Aprisa could not cover any of the liabilities. The Spanish Authorities instead decided to seek liable the Swedish parent company Boliden AB. That case must be tried in Sweden, since Boliden AB was not present in Spain. The Spanish judgements were administrative in nature. The main issue therefore is, whether the Boliden AB can be held liable for its subsidiary's conduct in Spain.

Question: What instruments would you use to hold Boliden AB liable?

2. Hempel AS v. the Norwegian State

decided by the Norwegian Supreme Court on 10 Mar. 2010

This English description of the Hempel case was written by Beate Sjåfjell.

> Sjåfjell, Beate. 'Environmental Piercing of the Corporate Veil: The Norwegian Supreme Court Decision in the Hempel Case'. European Company Law 7, no. 4 (2010): 154–160.

The issue in the case is the responsibility for pollution of the ground after decades of manufacturing of ship paint and plastic and related waste disposal. The company Monopol Maling- og Lakkindustri AS carried out this business from 1918 to 1991, with waste disposal from the 1960s. In 1983, Monopol Maling og Lakk merged with a subsidiary of the Danish company Hempel AS, the parent company in this case. The result of the merger was given the name Hempel Coatings (Norway) AS14 and by 1989 the parent Hempel owned 100% of the shares. The polluted properties were sold in 1995 and 1996, with a disclaimer for environmental liability on the behalf of the seller. This latter point was not a topic for discussion in the Supreme Court's deliberations. The first indications that the ground was polluted seem to have come after investigations carried out in 1984 and 1991/ 1992. After a mapping in the mid-1990s, the county governor in 1997 ordered Hempel Coatings to carry out preliminary environmental investigations. After submitting a complaint in vain, Hempel Coatings carried out the preliminary investigations, which concluded with pollution on both properties and the nearby ocean floor. By the time the county governor received the report, the calendar showed March 2001. Hempel Coatings had in the meantime changed its name to Askøy Eiendom AS and was without assets and undergoing liquidation. Through a demerger in 1991, the manufacturing and sales-related assets (except for the polluted properties) had been transferred from this subsidiary to a new subsidiary of the parent

Hempel. The new subsidiary was given the name Hempel (Norway) AS. The Climate and Pollution Agency took over the case and issued a notice of order in 2003 to carry out further investigations to the parent Hempel, the new subsidiary Hempel (Norway), and the new owners of the polluted properties. In 2004, the Climate and Pollution Agency chose to order the parent Hempel to carry out further investigations to determine the extent of the pollution and also to identify the remedial action that should be set into force. After submitting a complaint to the Ministry of Environment in vain, Hempel sued the state in 2007, with the NHO – the Confederation of

Norwegian Enterprise – as a third party intervener before the Court of Appeal and the Supreme Court. According to the judgment, the environmental investigations were carried out in the meantime, so that the case at issue before the Supreme Court was whether the state should compensate Hempel's expenses. All three court instances decided that the parent company could be made responsible in accordance with section 51 of the Pollution Control Act.

In its unanimous decision, the Supreme Court emphasized the legislative objective, the very wide wording of the provision, and the preparatory works' indication that a concrete assessment should be made taking into account a variety of aspects. Among indications for a piercing in this case, the deliberations open with a quote from the Ministry of Environment's decision concerning the complaint from Hempel, stating that such orders are of a different nature than claims from ordinary creditors. Such orders have a public utility [or general societal] function that is to ensure that important societal interests are taken care of. Environmental and societal interests therefore, in the opinion of the Ministry, gave grounds for 'a restrictive interpretation of the company law limitation of liability'. Against this stood the limited liability of shareholders as a 'fundamental principle of company law, of great societal significance', as the Supreme Court points out after giving an account of the Ministry of Justice's view on the matter.

The Supreme Court went on to emphasize that the case does not concern liability for shareholders in general, but rather the special case where there is a group of companies. The Supreme Court underlines that a parent company normally has the possibility of controlling the subsidiary and that it has an economic interest in the subsidiary's business (presumably the Court here means more than the average individual shareholder usually has). However, the Court does not discuss whether Hempel was in a position to actually exert control over the polluting subsidiary (and especially its predecessor), nor the consequences of Hempel's lack of even the possibility of control for most years of the polluting activity. Finally, the Supreme Court seems to place decisive weight on the argument that mergers and demergers, restructuring and splitting up of companies, should not have as a consequence that in the end there is no responsible or solvent legal entity.