March 2013

The Environmental Court of Appeal rules on liability for contaminated land

In a recent ruling, the Environmental Court of Appeal clarified the allocation of the joint and several liabilities between operators of hazardous activities; evidential requirements; and the value of contractual disclaimers.

Background

In case M 7995-11, Landskronahem acquired a property from Trianon in 2001. The purchase price was SEK 1,500,000. A former textile factory had operated from the property. The environmentally hazardous activities conducted by Trianon on the property involved the use of oil for heating, which Landskronhem continued to do after the purchase. In 2003 an odor of petroleum was detected in the sewers of an adjacent property. After an injunction from the Environmental Health Committee the acquired property was investigated and extensive land and groundwater pollution was discovered. In consultation with the Environmental Health Committee, Landskronahem took remedial measures to eliminate the contamination. The cost of this amounted to approximately SEK 23,000,000.

Landskronahem initiated proceedings against Trianon, in accordance with the rules of the Environmental Code on allocation of liability, and claimed that the company in its capacity as operator with joint liability for the contamination should compensate Landskronahem for the cost of remediation.

Trianon contested Landskronahem's claim basically on three grounds: that the sales contract contained a disclaimer clause; that Trianon had not caused the contamination; and that Landskronahem should not be regarded as operator under the requirements laid down in the Environmental Code, consequently an action for recourse could not be filed.

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The Operator

Trianons objection in this respect was no longer maintained when the case reached the Environmental Court of Appeal, since case law at the time had clarified that Landskronahem under current circumstances was to be regarded as operator under the Environmental Code.

The Agreement

The parties' agreement contained what can be described as an ordinary disclaimer regarding the property's condition. According to this clause, Landskronahem affirmed, among other things, that the company had made a close inspection of the property and released Trianon from *any and all liability concerning actual defaults or detriments of any kind […] which the seller may be responsible for as seller of the property.*

The Environmental Court of Appeal made the same assessment of the scope of the disclaimer as the Land- and Environment Court did. The lower court, in its turn, established that the clause does not contain any wording to the effect that it was the parties' intention that the provision should apply to anything but strictly the effects concerning the law of obligations on the contract, i.e. the transfer of the real estate. The clause simply did not set forth that the disclaimer, which seems to address certain provisions in of the Code of Land Laws, also should have reference to liability pursuant to chapter 10 of the Environmental Code. Since Landskronahem's claim was not based on sales law rules, but instead on public law regulations regarding liability under the Environmental Code, the court ruled that the disclaimer should be disregarded.

Burden of proof

The burden of proof in an action for recourse has been unclear since the Environmental Code does not give any guidance, and since case law has been lacking completely. The question is particularly interesting since, pursuant to chapter 10, the Environmental Code has a reverse burden of proof as regards the operator's liability for contamination. In the case of an injunction from the supervisory authority, the operator thus has to prove that they have not caused the contamination. The previous uncertainty has concerned the next stage, i.e. when the obliged operator, by action of recourse, approaches a previous operator which the operator considers to be jointly liable.

The Environmental Court of Appeal initially established that it is incumbent on the plaintiff in an action for recourse to prove that the defendant has contributed to the contamination in such a manner that chapter 10 of the Environmental Code applies.

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The claimant in an action for recourse can substantiate this by demonstrating proof that activities, which typically cause similar contaminations as those discovered, have been conducted by the defendant. The court, however, expressly states that no affirmation of a certain course of event is required.

If the claimant in an action is able to prove that such activities have been conducted, it will be up to the defendant to substantiate by proof that the operations have not caused the contamination. The court holds that *the burden of proof, for the degree of participation, should be placed on each and every one of the jointly liable operators.* Consequently a respondent in an action for recourse also has a burden of proof in this sense.

The Court concludes this part of the judgment by establishing that "*there is no reason to evaluate the proof brought forward in an action for recourse in any other way than in accordance with the stipulations laid down in the Rules of Civil Procedure in the Code of Judicial Procedure*".

Allocation of liability

The judgment also clarifies how the liability should be allocated between the operators.

In the case the Environmental Court of Appeal considered that the investigations presented by the parties could not clarify the course of events when the soil was contaminated, neither did the investigations prove that the contamination ceased, or had ceased, when Landskronahem purchased the real estate. Under these circumstances the court finds that the extent of liability should be determined from the time each operator has conducted activities on the property. Since Trianon pursued business on the property during 15 out of 18 years, the company shall be responsible for 15/18 of the remediation costs.

This gave rise to a reduced liability for Trianon in relation to the judgment of the lower court, where the company was obligated to pay the claimed amount in total.

Conclusion

The judgment provides significant guidance and answers to several questions which have previously caused uncertainty. The reasoning of the courts regarding the disclaimer establishes the importance of specific provisions concerning liability pursuant to chapter 10 of the Environmental Code in agreements regarding the sale of real estate. To use standardized Code of Land Laws disclaimers, in the belief that these disclaimers will protect the seller from any and all claims from the purchaser, is out of the question.

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The courts clarification regarding evidentiary requirements in actions for recourse will simplify future decisions on whether or not it will be worthwhile bringing an action of recourse against a previous operator. Correspondingly the court's clarification as regards the allocation of liability between the operators provides a predictability which previously has been lacking.

Whether these clarifications will result in more cases being settled in court, or if the inclination towards settlement will increase, is difficult to predict.

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