PRECEDENT SETTING DECISION OF THE HIGH COURT OF JUSTICE

Dismantled asbestos/Photo: Avri Lachman

Israel's High Court of Justice has rejected a petition against a section of the Asbestos Law in a ruling that upholds the polluter pays principle

The polluter-pays principle was upheld by Israel's Supreme Court sitting as the High Court of Justice in a landmark decision to reject a petition by the owner of a former asbestos cement factory in northern Israel. The company petitioned the High Court of Justice against a section of the 2011 Prevention of Asbestos Hazards and Hazardous Dust Law which places financial liability on the company for half the costs of a major asbestos waste clean-up project in the Western Galilee, up to a ceiling of NIS 150 million. The purpose of the law, which was initiated by the Ministry of Environmental Protection is to "prevent and minimize environmental and health hazards caused by asbestos and hazardous dust."

The precedent-setting decision was handed down by the High Court of Justice in the beginning of April 2013, two years after the Asbestos Law was published and two years after the launch of the life-saving project for identifying, removing and disposing of asbestos waste in the Western Galilee. **The petition challenged the constitutionality of section 74 of the law** which states that the project "shall be funded from the State budget and from payments to be transferred by the asbestos companies, as well as payments to be transferred by local authorities within whose jurisdiction the project is implemented."

Eitanit, which operated the asbestos factory in Nahariya between 1952 and 1997, sold or distributed the industrial asbestos waste which accumulated in its factory to residents as cover or fill material. As a result, the waste found its way to trails, parking lots, private homes and public and agricultural roads in the Western Galilee. Asbestos distribution surveys initiated by the Ministry of Environmental Protection identified wide areas of asbestos waste contamination throughout the region (see Israel Environment Bulletin, Volume 37, September 2011 for further details).

In its petition, Eitanit claimed that the law violates its constitutional rights to property and equality. It further claimed that the law is a personal law which imposes retroactive liability on the company. The respondents to the petition, including the State of Israel, the Israel Knesset, the Ministers of Environmental Protection and Finance, the Mate Asher Regional Council and The Association for Quality of Life and Environment in Nahariya, countered these arguments. The State, on its part, argued that section 74 does not violate the company's constitutional rights because the purpose of the legislation is proper, and any impairment is proportionate, based on the polluter pays principle and the factual circumstances and measures taken to minimize the impairment.

The State also argued that the company's right to equality was not violated, because, in fact, its misconduct differentiated it from other entities. This position was accepted by the High Court, which found Eitanit to be different with respect to its knowledge, control and profit. The judges ruled that there was no prejudicial discrimination of Eitanit in the law since it was the only factory in Israel which dealt with crude asbestos at the time and the only one known to have dispersed asbestos waste in the region. Similarly, the court emphasized the fact that the end users of the asbestos waste did not have access to the information which was available to Eitanit about the risks associated with the material. In this regard, Supreme Court Justice Hendel determined that "the obligations imposed on a producer are not identical to the obligations imposed on the user… There is much logic in imposing extended

responsibility on the producer and in directing the financial burden toward him, both from considerations of justice and fairness and from considerations of economic efficiency."

In its decision, the court stated that based on its survey of comparative law, strict liability is practiced in many countries, especially in relation to pollution by hazardous substances, and that in some countries liability for the removal of a hazard is retroactive. In this matter, the judges cited both Jewish law and the law practiced in countries worldwide according to which activity which causes "foreseeable and highly significant risk of damage" justifies the imposition of strict liability. The judges determined that Eitanit predicted or should have foreseen the risks associated with asbestos at the time.

While the court acknowledged that Eitanit's property rights were impaired, Justice Hendel nevertheless determined that the purpose of the law, namely to reduce asbestos hazards and to dispose asbestos waste from the Western Galilee, is appropriate. The purpose of the law, he stated, fulfills the right of the residents of the region to health and environmental quality and outweighs the damage to the petitioner. Furthermore, the court related to the "polluter pays principle" on which the law is based, noting that it is founded on "considerations of efficiency, deterrence and justice". Efficiency considerations, according to the court, assume that "requiring the polluter to internalize the costs of pollution will induce him to reduce the scope of pollution to the absolute minimum. The aim is to reduce the quantity of waste designated for removal, and to encourage the polluter to take precautionary measures and to develop 'green' technology." Similarly, considerations of justice dictate that "it is not just that the polluter who profited from the act of pollution will divert the costs to the public."

"The court ruling constitutes a most important infrastructure for the legal protection of the environment," says Att. Dalit Dror, Legal Advisor of the Ministry of Environmental Protection. "It establishes the rule of strict liability in relation to hazardous substances and pollutants, even in the case of past hazards whose adverse effects continue today, and it bases the 'polluter pays' principle and the 'extended producer responsibility' principle which is derived from it."

In reflecting about the case, Att. Neta Drori, the ministry attorney who accompanied the case from beginning to end, is especially gratified by the concluding words of Justice Hendel: "[The law] is challenged by the changing reality, which requires the legislator to find solutions to issues which threaten society, in one way or another. To achieve this aim, it is sometimes necessary to draft legislation which is based on a new vision of legal principles…In order to adapt the law to reality, laws were enacted, which ostensibly deviate from the hitherto known and established rules of law. It appears that our subject matter too, as part of Israel's new environmental legislation, joins this list.

The major potential of harm in asbestos waste, with its complexity – requires a solution which does not move along the traditional axis of tort liability. In general, finding a solution to a complex problem is not necessarily a legal compromise in the sense of a waiver. This is how the law progresses." The judge then went on to say that **section 74 of the Asbestos Law is part of the "evolutionary processes" that the law undergoes as it searches for new solutions to new problems.** The challenge, says Att. Drori, is to embark on new and unconventional ways of thinking to solve complex problems. "The fact that we succeeded in doing so is a major accomplishment. We viewed this as a life project and therefore we are especially gratified by the results."

The High Court decision assures that the Western Galilee asbestos clean-up project will continue. It assures that the "ticking time bomb," in the words of the court, will be removed or minimized as much as possible. Since the project began two years ago, some 100 sites were cleaned up and 40,000 tons of asbestos-contaminated waste were removed from the Western Galilee at a cost of NIS 90 million.

Packing asbestos for removal/Photo: Yoram Varga