THE HIGH COURT

[2008 No. 56SP]

BETWEEN

BROWNFIELD RESTORATION IRELAND LIMITED AND DEAN WASTE CO. LIMITED

PLAINTIFFS

AND

WICKLOW COUNTY COUNCIL

DEFENDANT

AND

[2005 No. 89SP]

WICKLOW COUNTY COUNCIL

PLAINITFF

AND

JOHN O'REILLY, BROWNFIELD RESTORATION IRELAND LIMITED, RAYMOND STOKES, ANNE STOKES, SWALCLIFFE LIMITED TRADING AS DUBLIN WASTE, LOUIS MORIARTY, EILEEN MORIARTY, DEAN WASTE CO. LIMITED, WILLIAM JOHN CAMPBELL, ANTHONY DEAN, UNA DEAN AND SAMUEL J STEARS

DEFENDANTS

(No. 2)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 12th day of May, 2017

1. When the Oireachtas provided that an application for an injunction to deal with unauthorised waste could be made "*in a summary manner*" (s. 58(2)(a) of the Waste Management Act 1996), it was probably not envisaged that such an application could be ongoing for a period of 12 years and occupy over 50 hearing days of court time. The matter has already generated six previous judgments of the High Court (*Wicklow County Council v. O'Reilly and Ors.* (No 1) [2006] IEHC 265, Clarke J., (8th February, 2006), (No. 2) [2006] IEHC 273, Clarke J. (8th September, 2006) reported at [2006] 3 I.R. 623, (No. 3) [2007] IEHC 71, Clarke J. (2nd March, 2007), (No. 4) [2010] IEHC 464, O'Keeffe J. (7th December, 2010) and (No. 5) (*Ex tempore*, not circulated, O'Keeffe J. (20th December, 2011)), as well as *Brownfield v. Wicklow County Council* (No. 1) (Unreported, High Court, 26th April, 2017) regarding modularisation.

2. A full account of this saga would be of book-length, but in the spirit of the summary procedure envisaged by the legislation I propose to endeavour to deal with the issues now arising with as much brevity as circumstances permit, and will set out the key factual and legal matters rather than an exhaustive chronology of every twist in the tale. I have heard from Mr. Peter Bland S.C. and Mr. Michael O'Donnell B.L. and from Ms. Deirdre Courtney (who also addressed the court when counsel were unavailable) for Brownfield Restoration, the plaintiffs in the 2008 proceedings. The same lawyers also appear for Rockbury Ventures Ltd. I have also heard from Mr. James Connolly S.C. and Mr. Damien Keaney B.L. for the council. Dean Waste did not pursue the 2008 proceedings as plaintiff. The only live defendants in the 2005 proceedings are the first defendant Mr. O' Reilly, the second defendant Brownfield, the fifth defendant Swalcliffe Ltd. and the eighth defendant Dean Waste (in receivership), not counting the proposed thirteenth defendant Rockbury. I also heard from Mr. Eoin Kidd B.L. for Swalcliffe. Dean Waste did not appear. The remaining defendants had previously been struck out over the course of the prior 12 year history of the 2005 case in the High Court.

Findings of fact

3. A large illegal dump operated at a quarry site at Whitestown in West Wicklow from around 1979 onwards. Mr. Bland describes it as the largest illegal dump in the history of the State. The council itself under the directions of middle management dumped a significant quantity of material on the site during the period 1979 to 2001, including non-inert and hazardous waste. Complaints were made to the council about the dump going back to 1989 but no effective action was taken; the council states that it did not find evidence during site visits. In November, 2001, the senior management of the council say they discovered the dump and the council took steps to close it. On the very day it was being closed, two lorry-loads of waste were in the course of being dumped on behalf of the council on the same site.

4. The council then made the fateful decision to engage Mr. Donal Ó Laoire as a consultant and later appointed him as an authorised officer. Mr. Ó Laoire developed a proposal, which he himself correctly described in evidence as corrupt, whereby he and his associates (variously described as a syndicate or consortium) would make a profit from a commercial venture designed to remediate the site, using statutory powers and court proceedings, both civil and criminal. One of his collaborators was Mr. Roger McGreal, an agent of Dean Waste, and the originator, in his Garda interview, of the term "*syndicate*" (a term with telling overtones of organised illegality: see *Walsh v. Walsh* [2017] IEHC 181 para. 17). The syndicate approached Mr. John O'Reilly, the original owner, to seek to acquire the site. Simultaneously Mr. Ó Laoire was the star witness in civil and criminal proceedings against Dean Waste and Mr. O'Reilly. Clearly he was engaged in a massive conflict of interest that was actual rather than merely potential. In an email of 2nd March, 2002, he said that the *"real agenda"* was to *"capitalise on the aftershock I am generating",* that is to make money from the "*Whitestown opportunity"* (draft document of 3rd August, 2002). As it was put in that document, *"[t]hrough his work Donal has identified an opportunity for a new player in the waste business".*

5. In May, 2002, the council entered the site, took possession of it and used a mechanical excavator to cap the main waste dumps with material. It is agreed that the waste on site when the council entered on the lands included inert, non-inert and hazardous waste.

6. On 16th October, 2002, Commissioner Margot Wallström of the European Commission issued a letter pursuant to art. 226 of the EC Treaty regarding implementation of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended. The letter complains at para. 3 that the council was notified in 1998 that dumping was taking place but took no enforcement action. The Commission was concerned that it was indicated that the intention was to seal the site rather than remediate.

7. On 26th September, 2003, a subsidiary of Brownfield, Rockbury Ventures Ltd. (incorporated in the British Virgin Islands), acquired the site. Mr. Stokes of Brownfield has repeatedly (and apparently inaccurately) asserted that Brownfield are the owners and has specifically averred to Brownfield being the owner and occupier. Brownfield later (in September 2006) obtained a waste licence from the Environmental Protection Agency (EPA) to remediate the site.

8. Brownfield assert that in 2003 the council locked the gate of the site (this is to some extent accepted by the council) and at a later stage, on request, gave a key to Brownfield. Brownfield were thus able to access the site, at least for investigations. The precise legal basis for the council asserting an entitlement to enter onto the land from 2001 onwards and to lock the gate between 2003 and 2011 is contended to have been s. 14 of the Act (regarding powers of authorised persons) although this has not been spelled out on affidavit quite as explicitly as one might ideally like. Mr. Keaney who also addressed me on this point submitted that the extent of Brownfield's access to the site amounted to dominion. Mr. Bland submits that *animus possidendi* is established by putting a lock on the gate.

9. Ms. Sonia Dean averred at para. 5 of her affidavit of 20th July, 2005, that having examined the land she said she *"informed Mr. O'Reilly that I would have to close the site and investigate the risk created by the fact that waste had been illegally dumped on the lands".* The suggestion is that Mr. O'Reilly acquiesced in the proposal to close the site and that the council's acts thereafter were by consent and that no enforcement action (whether in the District Court or under s. 58) was required.

10. The contention that the council did not close the site on a long-term basis is supported by an affidavit of Mr. O'Reilly of 8th December, 2006, which avers at para. 10 that the site was closed for four weeks.

11. On 15th August, 2006, Mr. Stokes swore an affidavit averring at para. 3 that Brownfield was the owner *"and occupier"* of the lands.

12. It seems to me as a matter of fact having regard to the foregoing that the council cannot be regarded as having been in exclusive possession prior to 2012. The extent of the council's interventions on the property prior to then appear to relate to steps under s. 14 and acts with the acquiescence of the owners. Particularly where occupation is positively admitted by Brownfield, and their possession of a key is also admitted, I must conclude that Brownfield/Rockbury had control or possession of the site for the purposes of the 1996 Act between 2003 and 2012.

13. In 2005 the council brought injunctive proceedings under s. 58 of the 1996 Act against Brownfield and various other defendants. Importantly, in those proceedings the council sought full remediation which would have complied with EU law, involving the removal of all waste from the site. As will be seen, when the council envisaged other people paying for the remediation, it set the bar very high in terms of what needed to be done. When at a later stage it had to do the work itself, the bar was lowered rather considerably, to what Mr. Bland calls a *"bonsai"* level.

14. On 26 April, 2005, the European Court of Justice, in Case C-494/01 *Commission v. Ireland* [2005] ECR-I 3331, ruled that Ireland had failed to comply with directive 75/442/EEC as amended by directive 91/156/EEC. Paragraph 135 of the judgment refers to close to 100 illegal sites, some of which were of considerable size and contained hazardous waste originating, in particular, from hospitals. This site is one of the 100 so mentioned.

15. In 2009 Brownfield brought the second set of s. 58 proceedings, this time for an injunction against the council.

16. A letter of formal notice was issued by the European Commission on 30th September, 2010, including a complaint regarding delay in dealing with Whitestown. This triggered engagement between the Department and the council in relation to dealing with the site.

17. A manager's order to proceed to remediate the site under s. 56 was made on 23rd November, 2011. The council contends, and I accept, that it was in exclusive occupation of the site from 2012 onwards.

18. A first trial of the two s. 58 actions took place before O'Keeffe J., which he ultimately adjourned on 20th December, 2011, after 23 days of hearing, in order to allow the council to remediate the site under s. 56 of the Act. The council's position was set out in an email of 22nd February, 2012, from Mr. Andrew Lawless to the assistant county manager Mr. Bryan Doyle, that *"as much as possible [of the waste] will be allowed to remain on site".*

19. The council retained possession of the site and after the carrying out of various studies its contractor entered on the site on 10th February, 2014. The council remains in exclusive possession of the site, which is fenced off to all other persons, including Brownfield.

20. Part of the site is a candidate Special Area of Conservation along the banks of the Carrigower River, which supplies human drinking water supply to nearby urban areas. The site can be divided into four parts: three main dumping zones (A, B and C) together with the rest of the site which can be considered as a fourth area. It is agreed that the waste on site when the council entered the site included hazardous, non-inert and inert waste. The remediation actually carried out involved removing the waste from zone A, trommelling the waste in zone A to fines (this involved a mixing and trommelling of the waste (Brownfield says this involved mixing hazardous waste with other wastes) and a reduction of waste to fines), returning what the council says is inert waste to zone A and using some of it as a cover for B and C, as well as removing a small amount of waste from zone B. The vast majority of waste in B remains in the ground as does all waste in C. No geomembrane separates the waste from the groundwater in any of the zones. The council's position is that groundwater is in contact with backfilled material in zone A and B which the council contends is inert. It is accepted by the council that the waste in zone C is in contact with the groundwater in some circumstances *("under extreme wet conditions groundwater rises into a small area of waste deposits for a short period of time"*). The council does not have and never had a waste licence and did not carry out an Environmental Impact Assessment (EIA) or Appropriate Assessment (AA) in respect of any of the remediation works. It is agreed that the current waste material on site amounts to a minimum of 250,000 tonnes, and that in the course of the remediation 16,479.8 tonnes of waste were removed from the site. In other words, a minimum of 93% of the illegally dumped waste remains in the ground.

21. On 26th June, 2015, the Department notified the Commission that *"all waste"* had been *"removed"* from Whitestown. This is obviously incorrect. The document given to the Commission also stated that certain waste was still in place, so to that extent the material furnished was contradictory and inaccurate. In this regard I would request the council to draw the Department's attention to this erroneous statement so that the material given to the Commission can be corrected.

22. The matter was then re-entered on 20th July, 2016, by direction of Gilligan J., and a renewed hearing commenced before me on 7th March, 2017.

Issues at this stage

23. The council brought a motion applying for directions as to a modular trial, which I granted. Cross-examination of witnesses relevant to issues up to the adjournment of the proceedings in 2011 has been completed. The parties have also very helpfully agreed an issue paper containing 10 factual and legal issues for determination (albeit that some of these issues may contain further sub-issues). Following directions in that regard, the questions potentially arising at the present phase, Module I, are as follows:

(i) Factual issues:

(a) a conflict of evidence between Mr. Edward Sheehy, former county manager, and Mr. Donal Ó Laoire, council consultant and authorised officer;

(b) whether the council acted in good faith in invoking s. 56;

(c) the extent of the historic council dumping;

(ii) Legal issues:

(a) questions 1 to 4, 5(i)-(iii), (v), (vii), 6, 8 and 9 on the issue paper, which are all net points of law;

(b) any other question of EU law that arises and is appropriate for determination at this stage;

(iii) Costs issues:

(a) whether the 2005 proceedings should be struck out against Brownfield;

(b) if so, what order if any as to costs is appropriate at this stage.

24. Arising from submissions on the foregoing, one further issue was added by consent to Module I on 4th May, 2017, namely the liability of the council *qua* dumper without a licence. In addition, on 5th May, 2017, I gave liberty to bring motions to add Rockbury as a defendant to the 2005 action and to re-enter that action against Swalcliffe.

25. The intention was that the matters to be left to Module II relate to the scientific evidence regarding the current environmental risk and submissions relating to questions 5(iv), (vi), 7 and 10 on the issue paper, including as to what order if any is appropriate and against whom. It was however agreed that if on further consideration I decided that any Module I issues were best moved to Module II, I could proceed on that basis.

Conflict between Mr. Sheehy and Mr. Ó Laoire

26. Numerous conflicts of fact arose between Mr. Sheehy and Mr. Ó Laoire. I am leaving aside until Module II an assessment of Mr. Ó Laoire's scientific evidence. Having seen and heard the witnesses I prefer the evidence of Mr. Sheehy to that of Mr. Ó Laoire. I found Mr. Sheehy to be an intelligent witness with a clear understanding of the legal and ethical framework within which he operated. His evidence was broadly internally consistent, was broadly consistent with other known facts on the issues on which he conflicted with Mr. Ó Laoire (I will deal below with his hearsay comments on the extent of council dumping) and was broadly consistent with his previous testimony. In the few points where he had to correct previous testimony, I find that inadvertence is a much more probable explanation than design for any errors or omissions in his previous evidence.

27. Mr. Ó Laoire is qualified in his field and presented as an amiable individual, but he appeared to me to have little understanding of the legal and ethical constraints of his position as an authorised officer and public sector consultant. He accepts that while acting for the council he was also part of a syndicate or consortium seeking to make a multi-million euro profit from remediating the site. He himself now accepts the reality that this conflict of interest amounted to corruption. He brought defamation proceedings (which are still extant) against Brownfield for claiming that this syndicate existed even though he now accepts that the main allegations to which the defamation proceedings relate are true. Such an action is of course oppressive of Brownfield but more fundamentally is a fraud upon the court. Mr. Ó Laoire has drawn his business partner Dr. Ronald Russell into the frame in that regard because the firm was added as a plaintiff in the defamation action alongside Mr. Ó Laoire. It is clear from the documentary evidence and Mr. Ó Laoire's oral evidence that both principals knew that these allegations were true and that both knew that there was a syndicate because they were both members of it. Mr. Ó Laoire has done nothing, even to this day, to face up to the consequences of that contradiction in the context of those defamation proceedings. His correspondence in connection with the defamation issue was disingenuous and misleading. Mr. Ó Laoire's evidence was inconsistent with his previous testimony and multiple previous versions of events he had given in writing both to Gardaí, the council (to whom he repeatedly confirmed that he had been told not to pursue the syndicate/consortium) and otherwise. He gave clearly inconsistent and incomplete statements to the Gardaí. He accepts he gave false testimony at the first hearing before O'Keeffe J. Furthermore he became highly suggestible under cross-examination, which Mr. Sheehy very perceptively described as a Punch and Judy show. His best lines were scripted for him in the questions asked. His reliability is not enhanced by his use of strange, idiosyncratic assessments (such as the unexplained references to *"sins of the past"* or a *"viable career horse",* when referring to a previous County Manager) or by the curious episode whereby his company, Carrigower Technologies Ltd./ Environmental Remediation Ltd., offered heads of agreement to Mr. O'Reilly without any funds on hand to pay the sums due under the agreement. Overall, I find Mr. Ó Laoire not to be a credible witness and insofar as his evidence conflicts with that of Mr. Sheehy I prefer Mr. Sheehy's, having heard and seen them both. I reject the notion that the council or Mr. Sheehy were involved in pursuing Mr. Ó Laoire's scheme to make a profit from his work as an authorised officer, or in covering up such involvement. This scheme was a non-runner from the off. No motive has been established for the council's officers to get involved in the alleged conspiracy. I find that Mr. Sheehy vetoed this scheme for clearly identified reasons, that he was not involved in corruption in this matter and has given honest evidence to the court.

28. It may fairly be said that the council were tardy in dealing with the problems created by Mr. Ó Laoire, and that Mr. Sheehy should at an earlier stage have *"joined the dots"* as he put it regarding the extent of Mr. Ó Laoire's involvement with the syndicate. For example, as late as July 2008 the council were filing an affidavit by Mr. Ó Laoire attesting to his probity when the council had plenty of material to the contrary. This was unfortunate and inappropriate. Around this time Mr. Sheehy was giving evidence and somewhat minimised the issue. But there is a clear dividing line between handling a matter sub-optimally and handing it improperly. I put a certain amount of the delay in dealing with Mr. Ó Laoire down to what might be called the "braking distance", that is the time lag between the first glimmer of perception of the need to stop a process and the process actually coming to a final and complete halt. The council were heavily committed to Mr. Ó Laoire by this stage and it clearly took them some time to realise that they needed to disengage from him. The question of whether the council managed this whole affair well or badly is quite separate. Mr. Bland places heavy reliance on self-serving documents created by Mr. Ó Laoire, and on the lack of clear instructions in writing issued by Mr. Sheehy. Those are far too slender and delicate foundations for the weighty accusations being heaped on the council. Mr. Ó Laoire's self-serving material is of little moment, and chimes with his general happy-go-lucky approach of emphasising the sunny side of things and failing to see the overall institutional constraints. Mr. Sheehy expressed some regret about not having issued an unambiguous minute scotching the scheme, but in the real world, not every important communication is reduced to writing; and nothing adverse to Mr. Sheehy can be drawn from the absence of such a minute in the context of all of the material to which I have had regard. It is unnecessary to go through every fragment of evidence in tedious detail (see Charleton J. and Saoirse Molloy, "Case Management: Fairness for the Litigants, Justice for the Parties" Vol. 20 Issue 3 *Bar Review* p. 59 (June, 2015)); suffice to say that I have carefully considered all of the points made by counsel under this and all other headings but, having seen and heard the witnesses and considered their evidence together with all of the affidavits and documentary material, I have no hesitation in favouring the evidence

of Mr. Sheehy. Mr. Sheehy provides three clear and logical reasons as to why he instructed Mr. Ó Laoire to drop his remediation proposals: procurement issues, conflict of interest concerns, and an unwillingness to take the risk of direct remediation as opposed to simply making the polluters pay. I accept his evidence that he gave such an instruction or veto (as it was described in a note prepared on behalf of Mr. Ó Laoire). I accept that he was not improperly involved in Mr. Ó Laoire's remediation venture or in covering it up. Such an approach is consistent with the view I have formed that Mr. Sheehy clearly understood the institutional constraints under which he was acting, whereas Mr. Ó Laoire did not. I reject the contention that the council was involved in an attempt to cover up the existence of the remediation venture and its involvement in that venture. I am satisfied that Mr. Ó Laoire wrongly concealed from the council the full extent of his activities in advancing the syndicate. If one looks at how he dealt with the Gardaí, the council and the court, one draws the conclusion that the truth comes out in a drip-feed manner with Mr. Ó Laoire, if it comes out at all. I have no doubt that Mr. Sheehy got similar treatment. Clearly Mr. Ó Laoire's serious breaches of duty have caused enormous complication in these proceedings as well as significant loss and expense to the council. All of the claims against the council under this heading alleging corruption, *mala fides* and fraud on the court bring to mind Carl Sagan's maxim that *"extraordinary claims require extraordinary evidence"* (*Broca's Brain: Reflections on the Romance of Science,*(New York, 1986), p. 73). Translated into forensic terms, extraordinary claims require adequate evidence, and in this case, that evidence is not only well short of adequate but very much to the contrary.

Whether the council acted *bona fide* in invoking s. 56

29. Having regard to the foregoing I reject the contention that the council acted *mala fides* in deciding to invoke s. 56 of the Act in the sense of acting for an improper purpose. Certainly, doing so had a tactical advantage in the proceedings in that the council were running into some difficulties with Mr. Ó Laoire. But I find on the evidence that this was not the dominant motivation. It is clear in correspondence that the Department of the Environment, under pressure from the European Commission, were involved in stimulating the council to go the s. 56 route. Obviously, the foregoing conclusion is not to endorse any and every aspect of the council's handling of the matter, but any mistakes made do not amount to *mala fides* for this purpose.

The extent of historic council dumping

30. In affidavits filed on their behalf, the council consistently sought to minimise the nature and extent of the material dumped by it on the site in the period 1979-2001. Mr. Sheehy's position on this – for example, that the material was mainly clay and stones – was borne out of second hand reports and not personal knowledge. His evidence on this issue is hearsay and can be discounted. This evidence is inaccurate but not deliberately so and I would not accept that it arises from a complex conspiracy and cover-up. I think it is best attributed to excessive bureaucratic hunkering-down and minimising of problems. The other factor at work (evident for example in Mr. Declan Geraghty's Garda statement) was a failure to appreciate that road surfacing materials such as tarmac are not inert materials, as continually asserted. The two drivers tendered by the council, Mr. Kevin Fluskey and Mr. Michael Coleman, backed away very considerably in their evidence from the minimising affidavits which they had furnished at the council's instigation. Indeed, oddly, their evidence was to the effect that these affidavits were not sworn at the place where the affidavits were said to have been taken. It was accepted that hazardous materials such as asbestos and non-inert materials such as tarmac were dumped on the site. Having heard their evidence, it is clear that this dumping was council practice, albeit a practice at middle-management level rather than necessarily at the level of the council's senior management team. It was not something that individual council drivers could be massively faulted for as they were clearly acting on instructions. Internal documentation also indicates that council contractors (as well as staff) dumped large quantities of materials from road-works, which clearly included non-inert material.

31. Mr. Connolly submits that Brownfield's application for a waste licence did not mention the presence of large amounts of asphalt on the site. Not a great deal can be read into that. He relies on Mr. O'Reilly's apparently conflicting affidavits, although Mr. O'Reilly ultimately appears to me to have sought to put forward a final position broadly consistent with that contended for by Brownfield, and he was not cross-examined on behalf of the council. As regards the burden of proof being on Brownfield on this issue, it seems to me that there is ample material on which they have discharged that burden.

32. Mr. Sheehy accepted that thousands of tonnes of material had been dumped by or on behalf of the council on the site. Mr. Bland has sought to quantify the material dumped by the council between 1979 and 2001 at 68,360 tonnes although I think that his figures have an element of double-counting. I would tend to agree with the council's submission that *"[t]he evidence of engineers and overseers regarding dumping is most likely inclusive of the dumping carried out by Mr. Coleman and Mr. Fluskey".* In my view the best estimate that can be arrived at is as follows.

33. Firstly, dealing with ongoing dumping by council staff:

> (i) Mr. Jack Keogh, overseer, referred to up to 70 ten-tone loads per year; extrapolated on average (by way of estimate) over a 22 year period this amounts to 15,400 tonnes; assuming a similar load was produced by workers under the direction of the other council overseer Mr. Mullins, this would total a figure of 30,800 tonnes;
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> (ii) A similar figure can be arrived at by extrapolating the figures in Mr. Declan Geraghty's Garda Statement on average (by way of estimate) over a 22 year period, which comes to around 31,000 tonnes; I think this is likely to be an estimate of the same sort of dumping as Mr. Keogh is discussing;
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> (iii) It seems to me that this material can be taken to include the material referred to by Mr. Michael Coleman, driver, and assumptions that a similar figure was dumped by Mr. Kevin Fluskey and other drivers.

34. Then dealing with one-off dumping, particularly by contractors:

> (i) a once-off dumping of around 2,000 tonnes referred to by Mr. Hogan, area engineer in 1997-99, relating to around 1000 m3 of material including non-inert road material recovered from the junction of Hollywood Cross and the N81;
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> (ii) an amount of around 6,000 tonnes including non-inert road material waste dumped by a subcontractor, Morriseys, according to Mr. Barry O'Shea, Engineer, in August –December, 2001.

35. This amounts to a figure of a minimum of 38,800 tonnes which I think is a very conservative estimate because, even allowing for the fluctuating nature of the material dumped by the council over a period of time, it seems likely, although there is no direct evidence, that other council contractors probably followed suit over the 22 year period involved. As I said, the fact that not one but two truckloads were being delivered on the very day that the dump was being closed is at a minimum indicative of very continuous and substantial ongoing dumping by or on behalf of the council. I also have regard to the evidence of Mr. Michael Maher who identified a large amount of loose asphalt type materials on the surface of the site. He was able to back this up with photographic evidence and pointed to road markings characteristic of public roads. His evidence was not challenged on cross-examination. The

council's replying affidavits, particularly from Mr. Ó Laoire and Mr. Andrew Lawless, do not adequately join issue, do not take all relevant materials into account, and are somewhat speculative, minimising, legalistic and tendentious. They fail to deal adequately with crucial issues such as the extent to which Mr. Maher provides clear photographic evidence to substantiate his conclusions. Clearly, inadequate and unconvincing denial of telling facts on affidavit does not automatically amount to a conflict which thrusts the onus of proof back on the other side absent cross-examination of the unconvincing denier. Mr. Ó Laoire was cross-examined, and backed away radically from his averments, claiming that the council had essentially kept him in the dark as to the extent of their dumping. Brownfield's failure to cross-examine Mr. Lawless is not fatal in those circumstances (see *Koulibaly v. Minister for Justice, Equality and Law Reform* [2004] IESC 50).

36. Overall, the material dumped by or on behalf of the council clearly included significant quantities of non-inert waste and some hazardous waste. In addition it seems more likely than not that the known fact of the council's dumping can only have had an encouraging effect for other polluters of the site, as averred to (unchallenged) by Mr. Sam Stears on behalf of Dean Waste.

Liability of the council for historic unlicensed dumping
37. The council is potentially liable under s. 58 in two capacities: firstly *qua* unlicensed dumper and secondly *qua* causer of environmental pollution. I will consider its status as an unlicensed dumper first.

38. For the purposes of this leg of the argument, the jurisdiction to make an order under s. 58(1)(a) depends on a finding *"that [a] person … has held, recovered or disposed of, waste in a manner that … has caused … section 39(1) to be contravened".*

39. This requires two elements to be established: (a) that the council has held, recovered or disposed of waste and (b) that it has done so in a manner that has caused s. 39(1) to be contravened.

Has the council held waste within the meaning of s. 58(1)(a)?
40. The jurisdiction to grant a s. 58 injunction to redress dumping that caused a breach of s. 39 was introduced by way of an amendment set out in the Protection of the Environment Act 2003. Mr. Connolly makes two retrospection-type arguments as to why his client's dumping, or some of it, does not engage s. 58. Firstly, he says that the section does not catch material dumped before the commencement of s. 58 (20th May, 1998); and secondly, he submits that the provision regarding dumping giving rise to a breach of s. 39 does not apply to material dumped prior to the commencement of the amendment to s. 58 by the 2003 Act (22nd October, 2003).

41. It must be emphasised that if the Act applies to material illegally dumped by the council, it does not apply retrospectively as such (in the sense of changing the legal status of something that has already happened). Rather it creates a new procedural remedy for something that was illegal or improper when it happened. (Of course the 1996 Act was not the start of EU law regulating waste: see the European Communities (Waste) Regulations 1979, the European Communities (Toxic and Dangerous Waste) Regulations 1982, the European Communities (Waste Oils) Regulations 1984 and the European Communities (Waste Oils) Regulations 1992.)

42. The fundamental difficulty with the argument that s. 58 should not be read as providing an injunctive remedy against historic dumping is that the Court of Justice has repeatedly and emphatically emphasised that states (of which the council is obviously an emanation and which in this case is being specifically financially underwritten by the Department) are responsible to ensure that historic dumps are fully remediated so that there is compliance with EU law.

43. Prof. Ludwig Krämer in EU Environmental Law, 8th ed. (Sweet & Maxwell, 2016) p. 364 comments that: *"The Court of Justice clarified in a number of judgments that Member States do not only have the obligation, flowing out of Article 36 of the Directive 2008/98 to prohibit the unauthorised landfilling, but that they also must clean up unauthorised landfills. This raises the important question of differentiating between such clean-up operations and the cleaning of contaminated sites which are not covered by EU law. As EU law prohibited since 1997, when Directive 74/442 became applicable, the unauthorised dumping of waste, it must be concluded that the legal clean-up obligation under EU waste law exists since that time; for Member States which joined the EU after 1977, the borderline date is that of their accession to the European Union. Contaminated sites are then sites which already existed in 1977 or at the moment of the accession. No publicly accessible inventory exists for them".*

44. The general principle is stated in directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, art. 36(1) of which provides that *"Member States shall take the necessary measures to prohibit the abandonment, dumping or uncontrolled management of waste."*

45. The Court of Justice has on several occasions emphasised the obligation to close down and where necessary clear up unauthorised landfills, in particular:

(i) Case C-494/01 *Commission v. Ireland* EU:C:2005:250 [2005] ECR-I 3331;

(ii) Case C-502/03 *Commission v. Greece* EU:C:2005:592;

(iii) Case C-135/05 *Commission v. Italy* ECLI:EU:C:2007:250.

(iv) Case C-37/09 *Commission v. Portugal* EU:C:2010:331;

(v) Case C-378/13 *Commission v. Greece* ECLI:EU:C:2014:2405;

(vi) Case C-600/12 *Commission v. Greece* EU:C:2014:2086;

(vii) Case C-196/13 *Commission v. Italy* ECLI:EU:C:2014:2407;.

46. In *Commission v. Ireland*, as noted above, the present site at Whitestown was one of the specific concerns that formed part of the material on which the court found a failure to comply with Ireland's obligations under directive 75/442/EEC.

47. In *Commission v. Portugal* (C-37/09), it is emphasised that the Treaty-level commitments to environmental protection required an extensive rather than a narrow reading of the waste directives: "[Para. 47] *Il convient également de rappeler, d'une part, que l'article 174, paragraphe 2, CE dispose que la politique de la Communauté dans le domaine de l'environnement vise un niveau de protection élevé et est fondé sur les principes notamment de précaution et d'action préventive et, d'autre part, que le deuxième considérant de la directive 2006/12 énonce que toute réglementation en matière de gestion des déchets doit avoir comme objectif essentiel la protection de la santé de l'homme et de l'environnement contre les effets préjudiciables causés notamment par le*

traitement des déchets … [Para. 49] *En outre, il est de jurisprudence constante que, s'agissant de la notion de «déchet» au sens de l'article 1er de la directive 2006/12, cette dernière ne peut être interprétée de manière restrictive (voir arrêts du 15 juin 2000, ARCO Chemie Nederland e.a., C 418/97 et C 419/97, Rec. p. I 4475, point 40; ainsi que du 22 décembre 2008, Commission/Italie, C 283/07, point 42).* [Para. 50] *Or, exclure du champ d'application de l'article 8 de ladite directive les dépôts non autorisés de déchets aurait pour effet d'interpréter de manière excessivement restrictive la directive 2006/12 et partant de remettre en cause l'objectif de l'Union d'un niveau élevé de protection de l'environnement et plus spécialement les principes de précaution et d'action préventive qui sous-tendent ledit article."*

48. It followed that member states have active obligations in relation to unauthorised dumps, going well beyond closing them and prosecuting the owners: "[Para. 54] *En second lieu, la Cour a eu l'occasion de juger que l'exploitant ou le propriétaire d'une décharge illégale doit être considéré comme le «détenteur» des déchets au sens de l'article 8 de la directive 2006/12, de sorte que cet article impose à l'État membre concerné l'obligation de prendre, à l'égard de cet opérateur, les mesures nécessaires pour que ces déchets soient remis à un ramasseur privé ou public ou à une entreprise d'élimination, à défaut pour ledit exploitant ou propriétaire de pouvoir lui-même en assurer la valorisation ou l'élimination (voir, notamment, arrêts San Rocco, précité, point 108; du 9 septembre 2004, Commission/Italie, C 383/02, points 40, 42 et 44; du 25 novembre 2004, Commission/Italie, C 447/03, points 27, 28 et 30, ainsi que du 26 avril 2005, Commission/Irlande, C 494/01, Rec. p. I 3331, point 181)." Para. 55 provides that "La Cour a par ailleurs jugé qu'il n'est pas satisfait à une telle obligation lorsqu'un État membre se limite à ordonner la mise sous séquestre de la décharge illégale et à diligenter une procédure pénale contre l'exploitant de celle-ci (arrêt San Rocco, précité, point 109)."*

49. In *Commission v. Greece* (C-378/13), it was made clear at para. 25 that the obligation under Directive 75/442/EEC, as codified by Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste and as replaced by Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, is to both close down illegal landfills and to clear them up: "*In order to determine whether the Hellenic Republic has adopted all the measures necessary to comply with the judgment in Commission v Greece (EU:C:2005:592), it must be determined whether it has fully ensured compliance with Articles 4, 8, and 9 of Directive 75/442, more specifically, by closing down and cleaning up all the illegal landfills at the centre of the dispute between the parties in the present case. Indeed, it can be seen from paragraphs 8 and 9 of the judgment in Commission v Greece (EU:C:2005:592) that the Court inferred the existence of an infringement of those provisions from its finding that 1 125 uncontrolled waste disposal sites were still in operation on Greek territory in February 2004. Moreover, it is common ground in the present case, given the parties' arguments in the present proceedings, that the failure to fulfil obligations established in the judgment in Commission v Greece (EU:C:2005:592) will continue as long as some of the landfills identified in their respective answers of 13 and 15 May 2014 to a question put by the Court have not been closed down and cleaned up."*

50. In *Commission v. Italy* (C-196/13), it was observed at para. 52 that "*a deterioration in the environment is inherent in the presence of waste in a landfill irrespective of the nature of the waste in question, and that merely closing down an landfill, or covering waste with earth and rubble, cannot suffice for compliance with the obligations arising in particular under Article 4 of Directive 75/442", citing Case* C-37/09 *Commission v. Portugal* para. 37. At para. 51, the fact that a certain discretion is left to the authorities as to "*the actual content of the measures which must be taken" to comply with the directive, a "provision [which] is none the less binding on the Member States as to the objective to be achieved" is noted.* At para. 53, the court found that "*a Member State is also required, under Article 4 [of directive 75/442], to determine whether it is necessary to clean up old illegal sites and, if so, to clean them up"*. As regards the need for ensuring that a licence was in place for all landfills and that the waste was held in accordance with EU law, the court said at para. 63 that "*merely closing down a landfill is no more sufficient for compliance with the obligation under Article 9 of Directive 75/442 than it is for compliance with the obligations under Articles 4 and 8 of that directive".* Member states are also "*required to record and identify in a systematic manner all the hazardous waste discharged on their territory"* (para. 66).

51. The European jurisprudence makes it clear that all historic dumps must be rectified whenever necessary to do so. The 1996 Act is designed very explicitly to implement the relevant provisions of EU law. Section 2 of the 1996 Act provides that the purposes for which the provisions of the Act are enacted include the purpose of giving effect to the following Community acts:

(i). Council Directive 75/439/EEC of 16 June, 1975 on the disposal of waste oils;

(ii). Council Directive 75/442/EEC of 15 July, 1975 on waste [Added by S.I. No. 126 of 2011];

(iii). Council Directive 76/403/EEC of 6 April, 1976 on the disposal of polychlorinated biphenyls and polychlorinated terphenyls;

(iv). Council Directive 80/68/EEC of 17 December, 1979 on the protection of groundwater against pollution caused by certain dangerous substances;

(v). Council Directive 85/337/EEC of 27 June, 1985 on the assessment of the effects of certain public and private projects on the environment;

(vi). Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance;

(vii). Council Directive 86/278/EEC of 12 June, 1986 on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture;

(viii). Council Directive 87/101/EEC of 22 December, 1986 amending Directive 75/439/EEC on the disposal of waste oils [Added by S.I. No. 126 of 2011];

(ix). Council Directive 87/217/EEC of 19 March, 1987 on the prevention and reduction of environmental pollution by asbestos;

(x). Council Directive 89/369/EEC of 8 June, 1989 on the prevention of air pollution from new municipal waste incineration plants;

(xi). Council Directive 91/156/EEC of 18 March, 1991 amending Directive 75/442/EEC on waste [Added by S.I. No. 126 of 2011];

(xii). Council Directive 91/157/EEC of 18 March, 1991 on batteries and accumulators containing dangerous substances;

(xiii). Council Directive 91/271/EEC of 21 May, 1991 concerning urban waste water treatment;

(xiv). Council Directive 91/689/EEC of 12 December, 1991 on hazardous waste [Added by S.I. No. 126 of 2011];

(xv). Commission Directive 93/86/EEC of 4 October, 1993 adapting to technical progress Council Directive 91/157/EEC on batteries and accumulators containing certain dangerous substances;

(xvi). Council Directive 1999/31/EC on landfill;

(xvii). Council Directive 2011/97/EU amending Directive1999/31;

(xviii). Council Regulation (EEC) No. 259/93 of 1 February, 1993, on the supervision and control of shipments of waste within, into and out of the European Community;

(xix). Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste [S.I. No. 113 of 2008, Art. 19(1)];

(xx). European Parliament and Council Directive 94/62/EC of 20 December, 1996 on packaging and packaging waste;

(xxi). Council Directive 96/61/EC of 24 September, 1996 concerning integrated pollution prevention and control [Added by S.I. No. 126 of 2011];

(xxii). European Parliament and Council Directive 2000/53/EC of 18 September, 2000 on end-of-life vehicles;

(xxiii). European Parliament and Council Directive 2000/76/EC of 4 December, 2000 on the incineration of waste [Added by 2003 Act s. 19];

(xxiv). Directive 2002/95/EC of the European Parliament and of the Council of 27 January 2003 on the restriction of the use of certain hazardous substances in electrical and electronic equipment;

(xxv). Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE) - Joint declaration of the European Parliament, the Council and the Commission relating to Article 9;

(xxvi). Directive of the European Parliament and Council 2003/108/EC 8 December 2003 amending Directive 2002/96/EC on waste electrical and electronic equipment (WEEE);

(xxvii). Directive 2006/21/EC of the European Parliament and of the Council of 15 March 20062 on the management of waste from extractive industries;

(xxviii). Directive 2008/1/EC of the European Parliament and of the Council of 15 January 20083 concerning integrated pollution prevention and control;

(xxix). Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives [Added by S.I. No. 126 of 2011];

(xxx). Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste [Added by S.I. No. 113 of 2008 art. 19(1)].

52. Such is the inter-relationship between the various legal instruments involved and the overarching Charter- and Treaty-level commitments to environmental protection, the instruments specifically enumerated need to be considered in the context of EU environmental law as a whole. Given the repeated and emphatic emphasis by the Court of Justice and the multitude of European obligations which the Act is expressly designed to promote, in my view it is *acte clair* that the Act should be read in a way that gives the fullest effect to, rather than limits, an emphatic application of Court of Justice judgments, delivered on multiple occasions. Subsequent to those judgments there can be no doubt that the 1996 Act has to be interpreted in a manner such that the injunctive enforcement powers fully apply to historic dumping.

53. Mr. Connolly suggested at one stage in oral submissions that the Act may have fallen short of what the directives required; that I might find a shortfall in that regard; and that that does not necessarily mean that the underlying directive should be applied. He accepts I should give the Act a purposive meaning but says there is a limit to this and I should not re-write the Act by making it retrospective; and says I should leave any lacuna to be dealt with by way of a challenge to the Act or by Commission proceedings against Ireland down the line. It seems to me that this is not an argument that is properly open to an emanation of the State, still less to an emanation that is expressly being funded in these proceedings by a Department of central government which, as the State, is directly liable for failure to implement EU law. In the *Commission v. Italy* cases, the fines imposed by the CJEU ran to amounts in the order of 85 million euros a year. It is hard to see how the rule of law is served by a state emanation arguing for a position that could put Ireland on the wrong side of such a process. Even if the council is entitled to make this argument, and even if possible Commission proceedings against the State are to be disregarded entirely, I would reject this submission as it is clear that the Act is entirely capable of applying, and should be applied, prospectively, to a current application for an injunction to redress historic waste.

54. Mr. Connolly relied on the decision of Edwards J. in *Environmental Protection Agency v. Neiphin Trading Limited* [2011] IEHC 67 [2011] 2 I.R. 575 to support a restrictive reading of the Act, but there are a number of reasons why that argument falls flat. The decision relates to a very specific and different situation. It relates to an issue on which there is a conflict of judicial authority at High Court level, which by definition awaits final resolution. It was delivered in March, 2011 and predates the decisions of the Court of Justice in *Commission v. Italy* and *Commission v. Greece.* More fundamentally, it upheld an argument for a restrictive interpretation that was being put forward by a private party, not a state entity. Here we have the unfortunately slightly unedifying situation where a constitutional and statutory public body which itself has engaged in illegal dumping of non-inert and hazardous waste is arguing for a restrictive interpretation of domestic legislation that was enacted to provide effective remedies to rectify environmental damage. If such an interpretation was pandered to, it might suit the council as a polluter but it certainly would not suit this council, and other council, or the State generally, as an enforcer of EU environmental law.

Has the council held waste in a manner that has caused s. 39(1) to be contravened?

55. The relevant permit requirements, breach of which can trigger a s. 58 injunction, are ss. 34 and 39.

56. As regards s. 34, a person other than a local authority requires a permit to collect waste (see sub-s.(1)). Thus the council did not contravene that section because it does not apply to the authority.

57. As regards s. 39, sub-s.(1) provides that a person *"shall not dispose of or undertake the recovery of waste"* at a facility save under and in accordance with a licence.

58. Even assuming that Mr. Connolly is correct in contending that a person dropping material at an illegal dump is not themselves in breach of the requirement to have a waste licence under s. 39, that is not the test to trigger s. 58. The section refers to causing s. 39 to be contravened: that is, contravened by *someone*, not necessarily by the person dropping off the waste. By having dropped waste to an unlicensed dump, a council would be holding waste in a manner giving rise to a breach of s. 39 on the part of the dump operator, and thus rendering the council itself liable to an order under s. 58.

Whether the landfill directive requires a geomembrane
59. As regards the geomembrane, Annex I para. 3.1 of the landfill directive requires that *"[p]rotection of soil, groundwater and surface water is to be achieved by the combination of a geological barrier and a bottom liner during the operational/active phase".* In the present case there is no bottom liner in place in any part of the site. It is clear that there is a violation of EU law in this respect.

Whether there has been a breach of the groundwater directive
60. As regards direct contact of waste with the groundwater, it is accepted by the council that at least for short periods, some of the waste is in contact with the groundwater. Mr. Bland contends that the contact is permanent rather than intermittent, although it is not necessary to resolve that issue at this point. The directives prohibit direct discharge of waste into groundwater by virtue of art. 4(1)(b) and 11(3)(j) of the water framework directive and art. 6(1) of the groundwater directive. Mr. Bland submits that by definition, having waste in contact with groundwater is a violation of this provision. This basic proposition was accepted by Mr. Connolly as a matter of interpretation of the directive.

Issue regarding trommelling
61. I should note that it is disputed whether hazardous waste was dealt with in a manner that was contrary to art. 18 of the waste framework directive which prohibits mixing of hazardous and non-hazardous waste, and the corresponding provision in the landfill directive, or in breach of art. 6(b) of the landfill directive which requires separate hazardous waste landfills. That dispute means that further consideration of this issue will be left over to Module II.

Conclusions on violations of EU law
62. It is clear that there are at least two breaches of European law that can be identified at this stage: the fact that the waste is in direct contact with the groundwater, contrary to art. 4(1)(b) and 11(3)(j) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy and art. 6(1) of Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration, and the related fact that the landfill lacks a bottom layer or geomembrane, as required by Annex I of the landfill directive, Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste. The consequences if any of these violations will be addressed in Module II.

Position of council *qua* waste authority
63. Turning to the alternative leg of liability, the position of the council qua waste authority, Mr. Connolly makes an elaborate argument that the council as waste authority is not holding, disposing of or recovering waste and is not amenable to s. 58 by virtue of what it does as waste authority under s. 56 (or indeed s. 14). He submits that his acts should only be challenged on judicial review and makes other related arguments. I deal with these below.

Because no judicial review was mounted to the s. 56 process, does that preclude challenge now?
64. The core obligations of the waste directive 2008/98/EC include the provisions of art. 10 requiring that waste undergoes recovery operations, of art. 12 that if recovery is not undertaken, waste undergoes safe disposal, and of art. 13 which Mr. Bland describes as the core provision in the context of s. 58, and which provides that *"Member States shall take the necessary measures to ensure that waste management is carried out without endangering human health [and] without harming the environment".* Also relevant is art. 17 which requires controls on hazardous waste and art. 18 which prohibits mixing of hazardous waste with other wastes. Legislation implementing these provisions must be interpreted in a manner consistent with the principle of effective judicial control.

65. Mr. Connolly submits that the council's decision to involve s. 56 should have been challenged by judicial review if it was to be challenged at all, and that it is not now amenable to review through the mechanism of s. 58. On his submission, the plaintiff would have had 3 months from either the date of the manger's order or at the latest from Brownfield's knowledge of what was happening on the ground.

66. This inventive argument is to read the tailor-made injunctive provisions of legislation, designed to ensure the effective implementation of EU law, in a narrow and artificial manner which would radically impair that effective implementation. The message from the CJEU jurisprudence is clear. In my view it is *acte clair* that the legislation applies to anyone with responsibility for pollution, even a waste authority. Again, my previous comments apply to this and all related arguments. Upholding this argument would amount to clipping the wings of Irish environmental law at the instance of a public body seeking to avoid court scrutiny of the alleged environmental damage caused by their actions. I appreciate of course that the council also contend that they have a complete defence on the merits, which will be fully considered in due course, but the argument that the court cannot even assess their actions, in terms of whether they created environmental risk, is contrived and artificial and undermines effective judicial control of EU law. In any event it is not an argument that properly lies at the instance of a state authority, still less one that is being specifically financed for the purpose by central government. I would decline to emasculate the legislation in the manner sought, in terms of its capacity to provide for full enforcement of EU environmental law.

Whether ss. 56(3) or 56A(2) oust the court's jurisdiction to review acts of a local authority
67. Mr. Connolly contends that ss. 56(3) and 56A(2) provide an ouster of jurisdiction. The submission is that otherwise, the public good would be jeopardised because councils would be reluctant to invoke such powers.

68. Having regard to the considerations already mentioned, it is *acte clair* that the principle of effective judicial control in the context of the landfill directive and in particular arts. 10, 12, 13, 17 and 18 and/or the waste directive and in particular arts. 3(1), 4 and 6 to 9 precludes an interpretation of domestic law which exempts a competent authority purportedly exercising powers to remediate waste

from review by the court by way of an injunctive process applicable to all other parties allegedly causing environmental damage. Independently of that, even on their ordinary interpretation, these provisions are not drafted as a complete exemption from liability in the event of botched remediation, but are rather aimed at liability for non-feasance.

Whether the council are or were holding, recovering or disposing of waste
69. Mr. Connolly also submits that acts taken under s. 56 do not amount to holding, recovering or disposing of waste. This argument is not entirely without substance in the sense that a council properly carrying out functions under the 1996 Act is not thereby holding someone else's waste. But if the council carries out its functions in an unlawful manner, such as for example by moving waste into a new position on a site without complying with EU law regarding geomembranes or contact with groundwater, and if environmental damage is thereby caused, then the council must be liable for malfeasance if EU law is to be effectively enforced and if the CJEU jurisprudence is to be upheld. Otherwise there would be a lack of effective judicial control of unlawful acts brought about by a public authority acting under colour of remediation powers. Insofar as the council carried out acts of moving or disposing of waste in a manner contrary to relevant EU directives, it has in the course of its attempted remediation held or disposed of waste in a manner that engages s. 58. Given the emphatic jurisprudence of the CJEU applying to both public and private entities, the point is also *acte clair*. Whether such actions warrant relief under s. 58 will be a matter for Module II.

Whether the council required a licence for the remediation works carried out?
70. Article 23(1) of the waste directive requires that *"Member States shall require any establishment or undertaking intending to carry out waste treatment to obtain a permit from the competent authority".* That wording and the scheme of the directive appears to me to envisage that steps taken by competent authorities for the purposes of removing illegally dumped waste are not steps envisaged as coming within the licensing requirement. The same point would apply to removal ordered by a court, which is in a similar position. While the council here can hardly be said to have dealt with this particular case urgently, in principle urgent action could be required in such a situation. A purposive interpretation therefore leans against the view that a licence is necessary for such intervention. A different position applies if the actions taken by the council go much beyond mere removal and result in an ongoing state of affairs that itself requires a licence, such as the long term storage of waste.

71. The situation in the present case is that Brownfield/Rockbury are the owners of the site and were occupiers up to 2012. The requirement to have a waste licence effectively falls on them. By attemptedly remediating the site the council do not take on Brownfield/Rockbury's licensing requirements, unless it were the case that they brought new waste on to the site other than perhaps incidentally.

Whether curial deference should be afforded to the council?
72. Mr. Connolly submits that the council's judgment as to what remediation works were required and whether they have been appropriately carried out is a matter that warrants a presumption of regularity and curial deference. He submits that the s. 58 process if applied to the council should be viewed as a review and not as a *de novo* exercise of an injunctive jurisdiction. Again, the principle of effective judicial control in the context of the landfill directive and in particular arts. 10, 12, 13, 17 and 18 and/or the waste directive and in particular arts. 3(1), 4 and 6 to 9 precludes an interpretation of domestic law that a court exercising an injunctive jurisdiction to prevent environmental damage should afford deference to the views of a competent authority which is alleged to be a polluter when the court would not so defer to the views of any other defendant. This is another iteration of the judicial review argument. In any event even if I am wrong about that, any presumption of regularity or curial deference has been well rebutted at this stage given:

> (i) the council's own role as a major dumper on the site, including of hazardous and non-inert waste,
>
> (ii) its disposal of waste on the site in the course of attempted remediation works in a manner that contravened EU law in a number of aspects, and
>
> (iii) its radical shift in position as to how much remediation is required, requiring remediation at a level that would have complied with EU law if others were to remediate matters and reducing that requirement to *"bonsai"* levels, in violation of EU law, when it had to carry out the works itself.

73. Having said that, it must be recognised that the State generally and the council in particular does have a margin of appreciation as to how the objectives of the directives are to be achieved. The determination of whether that margin has been exceeded is one for the court and not one where deference to the council's view is appropriate. That determination will arise in Module II.

Whether an injunction should be approached on the basis of a material risk of pollution or likelihood of pollution
74. Article 191 of the TFEU provides that *"Union policy on the environment shall aim at a high level of protection"* and that it "shall be based on the precautionary principle and on the principles that preventative action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay". In my view the principle applies in interpreting the 1996 Act (see Yvonne Scannell, *Environmental and Land Use Law* (Roundhall, Dublin, 2006), p. 693), and the judgment of O'Sullivan J. in *Wicklow County Council v. Fenton* (No. 2) [2002] IEHC 102 [2002] 4 I.R. 44 (a decision I would prefer to any contrary interpretation emerging from *Neiphin)).*The United Nations Rio Declaration on Environment and Development of 1992, which I would accept as a guide in this regard, states *that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be sued as a reason for postponing cost-effective measures to prevent environmental degradation"* (Principle 15). The European Commission communication on the precautionary principle, of 2nd February, 2000, also emphasises that the general principles of risk assessment apply, including proportionality between the measures taken and the chosen level of protection.

75. Section 5 of the 1996 Act defines *"environmental pollution"* as the holding, transport, recovery or disposal of waste in a manner which would endanger human health or harm the environment, and in particular *"create a risk to waters, the atmosphere, land, soil, plants or animals".* Thus it is clear that if acts in relation to waste create a risk, such a situation in itself constitutes environmental pollution. Any further examination of the precise level of risk is probably best postponed to Module II in the context of a more tangible engagement with the evidence in that regard.

Whether a risk of pollution should be inferred from the absence of an EIA or AA
76. While Mr. Bland argued that a risk of pollution should be inferred from the absence of either an EIA or AA (although a NIS was prepared at one stage), this is not a public law challenge to the s. 56 process, and the question of whether the s. 56 remediation is invalid because of the lack of assessment does not arise. Even if *arguendo* such assessment was necessary, and even if all other things being equal a risk of pollution could be inferred, when this case proceeds to Module II I will have expert scientific evidence available so it is unlikely that I will need to rely on a mere inference. Thus this question may not really arise in this case.

Whether ss. 56(3) or 56A(2) provide a defence to the council

77. Mr. Connolly submitted that the sections provide a defence to the council against what might otherwise be strict liability. This point appears to me to be functionally indistinguishable from his earlier submission as to an ouster of jurisdiction but if there is some difference, the point is fully covered by the previous discussion of EU law and is also untenable to *acte clair* level. As these and the other EU law points appear clear, the question of a preliminary reference does not arise.

Consideration of the appropriate order
78. It follows from the foregoing that the court has jurisdiction to make an order against the council under s. 58 by virtue of the acts of the council *qua* unlicensed dumper, even without a showing of environmental pollution. However the level, if any, of pollution thereby caused could be relevant as to whether any order should in fact be made. In addition, given that the remediation works attempted by the council involved disposing of waste on the site in a manner that violated EU law, the council is in principle also liable under s. 58 if environmental pollution can be shown. That matter is to be dealt with in Module II. One potential complication is that a substantial amount of waste continues to be held in an unlicensed manner. Even if risk does not exist, it could be relevant for the parties to identify whether and if so how the lack of a licence is going to be addressed.

Whether an EIA or AA is required if the court orders work to be carried out
79. While Mr. Connolly argued that waste treatment carried out by a council was not a *"project"* within the meaning of the EIA directive, this argument does not seem to me to be correct having regard to the wide definition in that directive. Annex 1 of the EIA directive makes clear that a landfill of this size or nature requires an EIA. Furthermore, the potential effect on the European site at the Carrigower River engages art. 6(3) of the habitats directive.

80. The question arising here is whether, if the court were to grant the relief sought by the plaintiff, namely removal of all non-inert waste from the site (which would mean the removal of all waste, its sorting to remove and dispose of all non-inert waste, and the disposal of the inert waste either at this site or some other site), such a court order would be subject to the assessment provisions of the EIA directive and habitats directive.

81. In my view this may depend on the nature of the court order if any being made. An order involving immediate and urgent removal of waste is in the nature of enforcement of the Act to prevent environmental damage, and on a purposive interpretation does not require to be delayed pending assessment. On the other hand, more long term works involving for example landscaping or storage of inert waste are ones where EIA and AA seem appropriate and necessary. This matter can be reviewed if any order is ultimately found to be appropriate.

Whether a licence is required if the court orders work to be carried out
82. A related question is whether the term *"establishment or undertaking"* in art. 23(2) of the waste directive includes a competent authority or other entity carrying out waste treatment pursuant to an order of the court exercising an injunctive jurisdiction to prevent environmental damage. This involves a tension between the two objectives of the directive, namely the requirement for licensing and the requirement for effective judicial control and for effective if not immediate remedies. A related issue is whether the licensing requirements in arts. 6 and 7 of the landfill directive have a similar effect. For similar reasons to my view on the question of whether a waste authority requires a licence for remediation carried out by it, I think that the answer to this question depends on what the work is. In the case of mere removal of illegally dumped waste, I am not persuaded that work ordered by the court requires a licence. The position could be otherwise if the result of such work would be the long-term carrying out of an activity requiring a licence, such as the permanent storage of that waste. Otherwise one would have court sanction being given for an illegal (because unlicensed) situation: that would not immediately strike one as a tenable position.

Whether the 2005 proceedings should be struck out against Brownfield and other procedural issues
83. The council has brought two procedural motions: one to have Rockbury Ventures Ltd. joined as a defendant to the 2005 proceedings and one to re-enter those proceedings against Brownfield. Following discussion with the parties on 11th May, 2017, those motions were postponed until further steps could be taken to notify all parties in the 2005 proceedings.

84. Mr. Bland indicates that, on behalf of Rockbury, he will be applying in due course to have the proceedings struck out against that entity (he consented to the addition of Rockbury only as counsel for Brownfield). In view of the intention to have such an application in due course, which Mr. Bland accepts will be made on similar grounds to the application to strike out Brownfield, it seems appropriate to postpone a decision on whether to strike out Brownfield until a later stage to avoid waste of resources and a repetitious determination of the issues. Furthermore in any event such an application may be simplified potentially depending on what may or may not happen in the 2008 proceedings.

85. Dean Waste did not appear in answer to the motions or to comment on whether they should be struck out of the 2008 proceedings, never having prosecuted those proceedings.

Order
86. Having regard to the matters set out in this judgment the appropriate order is as follows:

(i) In the 2005 proceedings:

(a) that the title to the 2005 proceedings be amended to refer to Dean Waste "(In receivership)";

(b) that the application that the 2005 proceedings be re-entered against Swalcliffe and the application to add Rockbury Ventures Ltd. as a 13th defendant in the 2005 proceedings be dealt with as soon as all relevant parties can be notified of those applications;

(c) that the application to strike Brownfield out of the 2005 proceedings be postponed until not before determination of the application to add Rockbury, and if that application is granted, until not before the hearing of any similar application by Rockbury if brought;

(d) that the other elements of the 2005 proceedings be listed to be taken up immediately following the determination of the 2008 proceedings and that the council be required to notify all parties accordingly; and

(ii) in the 2008 proceedings:

(a) that Dean Waste be struck out as a plaintiff in the 2008 proceedings;

(b) that the application that Rockbury be added as a notice party in the 2008 proceedings be dealt with as soon as the motion to add Rockbury to the 2005 proceedings has been dealt with; and

(c) that the hearing proceed forthwith to Module II of the 2008 proceedings on the basis of the findings set out in this judgment.