THE HIGH COURT

[2008 No. 56SP]

BETWEEN

BROWNFIELD RESTORATION IRELAND LTD.

PLAINTIFF

AND

WICKLOW COUNTY COUNCIL

DEFENDANT

AND

THE ENVIRONMENTAL PROTECTION AGENCY

NOTICE PARTY

AND

[2005 No. 89SP]

BETWEEN

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 (IN RECEIVERSHIP), WILLIAM JOHN CAMPBELL, ANTHONY DEAN, UNA DEAN, SAMUEL J. STEARS AND ROCKBURY LIMITED

DEFENDANTS

AND

THE ENVIRONMENTAL PROTECTION AGENCY

NOTICE PARTY

(No. 4)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 19th day of July, 2017

1. In *Brownfield Restoration Ireland Ltd. v. Wicklow County Council (No. 3)* (Unreported, High Court, 7th July, 2017) I rejected what might be called the Leona Helmsley theory of compliance with legal obligations. Her view allegedly was that "*only the little people pay taxes*", and here the council's argument (bathed in the soothing language of proportionality that Ms. Helmsley might have done well to emulate) was in effect that only little dumps should be remediated; absent perhaps compelling or conclusive evidence of a kind that would never be insisted upon for small offenders. In finding that large dumps should be remediated, and in particular that in principle the council should carry out full remediation of the illegal landfill at issue here, the biggest illegal dump ever discovered in Ireland, it follows that extensive steps will be required and reasonable time allowed for that process. I now deal with Module III of the hearing which relates to the remaining issues on the issue paper, essentially the question of the appropriate terms for the formal order including resolution of a dispute as to how long should be afforded for the works. This judgment should be read in conjunction with the previous judgments in these proceedings.

2. Mr. Peter Bland S.C. (with Mr. Michael O'Donnell B.L.) for Brownfield submits that the matter should be treated as urgent, such that the requirements of Environmental Impact Assessment (EIA), Appropriate Assessment (AA), licensing by the Environmental Protection Agency (EPA), planning processes and procurement processes should not be utilised, and the remediation should be carried out urgently over an approximately two-and-a-half year timescale. Mr. James Connolly (with Mr. Damien Keaney B.L.) for the council seeks a longer timescale of somewhat over 6 years from now. I have also heard helpful submissions from Mr. Alan Doyle, Solicitor, for the EPA. I note that Mr. Bland has helpfully withdrawn Brownfield's current licence application, so as to clear the ground for the order now being made.

Should public procurement requirements be set aside on the basis of urgency?

3. The council submits that procurement requirements should be complied with, Brownfield submits not and the EPA is neutral.

4. These requirements arise under directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement. In principle this project is within procurement criteria (see David Browne, *The Law of Local Government* (Dublin, 2014) pp. 204-205). Considerations of urgency may allow disapplication of the requirements (see Prof. Sue Arrowsmith, *The Law of Public and Utilities Procurement: Regulation in the EU and UK*, 3rd Ed. (London, 2014) pp. 1072-1077), but generally situations of "*extreme*" urgency are required and even then, the directive's procedures should be accelerated rather than disregarded entirely. Prof. Johnston's evidence, which I accepted, was that the manifestation of the risk in receptors could unfold over a fairly lengthy period of time, and in the circumstances the risk is not the sort of acute urgency such as to set aside procurement procedures. I have of course determined that there is a current risk to the environment from the present condition of the site. While that risk (as well as the historic and current breach of the licensing regime) warrants the making of an order under s. 58 of the Waste Management Act 1996, it does not follow that that current risk translates into such a degree of urgency as to set aside all other statutory requirements. Mr. Bland submits that the judgment would be a roadmap for future s. 58 proceedings and that it would thus be "*a very bad precedent*" if a party facing s. 58 proceedings could assert a need to delay remediation by reason of procedural matters because every transgressor will seek to rely on such matters, thereby erecting a further test of urgency on top of the test of risk. That submission is not without merit; but it depends what the procedural issue is. The particular issue relating to procurement is one that only affects public rather than private remediators and does not set a precedent (bad or otherwise) for the normal case where a private entity is being required to remediate its own dumping. Procurement requirements do serve important public policy functions, a point I touched on in the discussion of reasons for procurement decisions in *RPS Consulting Engineers Ltd v. Kildare County Council* [2016] IEHC 113, para. 58, and I would not be minded to set those requirements aside here even if I could do so, which having regard to EU law I cannot.

Is EIA/AA required?
5. The council submits that EIA and AA are required while Brownfield and the EPA consider not.

6. I held in *Brownfield Restoration Ireland Ltd. v. Wicklow County Council (No. 2)* [2017] IEHC 397 (Unreported, High Court, 12th May, 2017) that assessment and licensing requirements were not necessary where removal works were directed by the court, as opposed to where long-term licensable activity was taking place. As the primary order here is one for removal as directed under the 1996 Act, it seems to me that the logic of allowing the Act to operate effectively and of reading the various directives harmoniously means that EIA and AA are not required. The same logic would apply where removal of illegal waste is required under any other provision of the 1996 Act.

7. Mr. Doyle submitted that remediation under directive 2008/98/EC of the European Parliament and of the Council of the 19th of November 2008 on waste (the waste framework directive) is an activity which does not require an EIA or AA. If one was contemplating a situation where the waste would remain on site that would be different but where what is being looked at is removing waste that should never have been there, it would be contrary to the effective implementation of EU law to apply the machinery of EIA and AA. On that basis, remediation ordered pursuant to national legislation implementing the waste framework directive should not be considered to require assessment or development consent under the EIA directive (Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment) or habitats directive (Council Directive 92/43/EEC of the 21 May 1992 on the conservation of natural habitats and of wild fauna and flora). I would uphold that submission which is in line with my view as set out in the No. 2 judgment.

8. In any event the council, while not required to conduct an EIA/AA process are not being prohibited from doing so, and given that the council wishes to include in its remediation plan an assessment along the lines of what is required in an EIA report and NIS, and wishes to ensure consultation which can be considered by the court prior to the approval or otherwise of the remediation plan in due course, I would propose to facilitate that.

Should there be an application for an EPA licence?
9. The council submitted that there should be an EPA licence for the remediation works, whereas Brownfield and the EPA submitted that it was not necessary.

10. Mr. Connolly suggested that the matter be dealt with by way of an order to apply for a waste licence. But there is a certain implausibility in requiring that an activity be licenced by a regulator if the regulator does not want to licence it.

11. Admittedly, in *Wicklow County Council v. Fenton (No. 2)* [2002] 2 I.R. 583 [2002 No. 25 MCA], the works were carried out under a licence from the EPA, by order of the court. However the adoption of an approach in any given case (especially if full ramifications are not teased out with all relevant parties) does not mandate the adoption of such an approach in all cases. That is to apply the concept of *stare decisis* in a mechanical and primitive fashion. *Stare decisis* only applies to the *ratio* of a decision anyway, and *Fenton* did not decide that remediation must always be carried out under a licence, merely that it should be so carried out in that case.

12. Mr. Doyle submitted that by analogy with Case C- 215/06 *Commission v. Ireland* ECLI:EU:C:2008:380, the EPA could not licence past illegal dumping, save perhaps in exceptional circumstances which we can take it do not apply here. Furthermore, Mr. Doyle submitted that the EPA needs a "*fire brigade action*" available in an urgent situation such that waste can be removed without a licence. He submitted that a licence should not be required in such instances as it would slow down the remediation and would run contrary to the objectives of EU law. His submission came down to the consequential implausibility and difficulty in practice of drawing a dividing line between remediation that was urgent enough to warrant being ordered without a licence and that which was not so urgent. To my mind this argument is compelling. To say that a licence is required for mandated removal of waste under the 1996 Act would be to impair the effectiveness of the remedies provided to implement EU law, even if the need for removal was not itself of an acutely urgent nature. It would be otherwise if some activity requiring long-term licensing were being permitted but that does not arise here, for reasons I will address shortly.

13. Mr. Doyle's position is that the urgent and legal nature of s. 58 supersedes the licensing process. The EPA could advise under s. 56 of, and give directions under s. 63 of, the Environmental Protection Agency Act, 1992. From a pragmatic point of view, the one attraction of EPA involvement is that the micro level details of how this affair is to be managed from here can be dealt with by the statutory regulator as opposed to by repeated applications to court, which might appear to be in the interests of finality as far these proceedings are concerned. Having said that it seems possible to involve the EPA (at an appropriate arms-length from the council) as a consultee, without having to do so through the licensing process.

14. Mr. Connolly submits that there is no counterpart in the 1996 Act to the provision in s. 163 of the Planning and Development Act 2000 exempting from planning consent works required under a court order. That may well be so but it does not solve the problem of statutory interpretation here. *Expressio unius* is only one aspect of interpretation; the ultimate rule is to promote the purpose of the legislation as a whole. As Posner J. put it extra-curially, "*[a] legislature is thwarted when a judge refuses to apply its handiwork to an unforeseen situation that is encompassed by the statute's aim but is not a good fit with its text*"; "The incoherence of Antonin Scalia", *New Republic*, 24th August 2012. It would thwart the statutory purpose of the effective implementation of EU law for the court to read in a requirement to obtain an EPA licence in order to implement removal works ordered by the court itself to redress illegal dumping.

15. It is true that on-site sorting of material might require a licence if it was not being done under court order. But it is, so that problem does not arise because such sorting is temporary and ancillary rather than a long-term activity.

16. The only element of the activity here that will endure into the long term is the use of materials to in-fill the hole in the ground left by removing the waste. It seems to follow from Case C-114/01 *AvestaPolarit Chrome* ECLI:EU:C:2003:448 [2003] I-08725, para. 43 that, speaking in the context of a mine, discarded materials are waste "*unless [the holder] uses them lawfully for the necessary filling in of the galleries of that mine and provides sufficient guarantees as to the identification and actual use of the substances to be used for that purpose*." In my view, to either use unquestionably inert materials found on site (a hypothesis I am not absolutely ruling out by way of the liberty to apply if the sort of clear scientific consensus appropriate to a European site can be reached, but which I am not proposing to provide for in the order given the failure of that approach previously) or brought-in inert materials for the purposes of "*filling in*" as the CJEU puts it is not an activity that requires long-term licensing from the EPA as it is not holding or disposal of waste. (See also *Brady v. Environmental Protection Agency* [2007] 3 I.R. 232, Case C - 113/12, *Brady v. Environmental Protection Agency* ECLI:EU:C:2013:627 and Case C-9/00 *Palin Granit* ECLI:EU:C:2002:232 [2002] ECR I-3533).

Is planning permission required?

17. After some discussion the parties agreed that planning consent was not required for court-ordered works. Such consent would not arise under Part X of the 2000 Act (approval by An Bord Pleanála) in any event given my finding in relation to the lack of need for an EIA; nor does it arise under Part XI and indeed it would be something of a charade to provide for a potential veto by the elected members under Part XI of mandatory works ordered by a court to comply with EU law.

Is a remediation plan required and if so containing what?
18. The parties were substantially in agreement as to the need for a remediation plan. Mr. Connolly accepts the need for a plan although his preference was that it be in the form of a licence application, an option I have discounted above.

19. Mr. Doyle's submission was that the council should come up with a working methodology with how it is going to remove the waste in a manner not going to cause leachate. It should provide that a part of the site is to be designated for sorting, with an impermeable surface so that any leachate can be collected and taken away. The area should be graded so that no contaminated liquid should escape and that such liquid can be properly collected. There should be a wheel wash for trucks. It will be necessary to cover the waste overnight, and it should not be exposed to ingress of water. The process needs to be done incrementally to avoid leachate. I can however leave over the contents of the remediation plan to a later stage in view of the next issue.

Who should approve the remediation plan?
20. The parties were in essence in agreement that endeavours should be made to agree the plan between themselves, and that when the plan was decided upon the parties could return to court to have it approved or to have any remaining issues resolved. At that point the plan could be received and made a rule of court, and any disputes resolved as necessary.

On what timescale should the works be carried out?
21. In order to provide for a formal order for the remediation, it is necessary to specify a date for the ultimate conclusion of the process. It seems appropriate to also set out an indicative timescale for the various steps to get to that end-point, to which the council should have regard, but which is not itself binding as to the intermediate dates.

22. While Mr. Bland naturally requested a very accelerated timescale for preparation and implementation of the remediation plan, it seems to me that Mr. Connolly's submission that a more detailed process is required is more compelling. Neither party put forward any specific evidence on this issue so I am forming my view of the likely magnitude and course of the task based on my assessment of all of the evidence I have received in the proceedings to date. That more detailed process is also more likely to ensure that there is a minimum of disagreement on the details of the remediation plan once it comes back to the court.

23. The timescale I consider appropriate based on the foregoing considerations is as follows. In setting out these steps, the intention is that the council will be bound as to the steps to be carried out but not as to the exact timescale for each individual step (other than that everything should be completed within 78 months). The intermediate time scales must therefore be regarded as indicative only.

1. Prepare a briefing document in respect of the appointment of an environmental consultant –2 months from the order.

2. Invite and receive tenders in respect of the appointment of an environmental consultant –2 months from step (1).

3. Consider tenders and appoint an environmental consultant –2 months from step (2).

4. Preparation of remediation plan, including such measures as the council wishes to include in relation to an Environmental Impact Assessment Report and Natura Impact Statement, to be prepared by the environmental consultant –6 months from step (3).

5. Circulate draft remediation plan to Brownfield and EPA and allow comments plus consultation and entities that are statutory consultees for EIA/AA purposes –3 months from step (4).

6. Review by council of draft remediation plan in the light of observations received together with any consultations between parties aimed at resolving disagreement – 2 months from step (5).

7. Circulate the revised draft remediation plan back to EPA and Brownfield plus public consultation and statutory consultees – 3 months from step (6).

8. Review by council of revised draft remediation plan in the light of observations received together with any consultations between parties aimed at resolving disagreement. Prepare final draft of plan and, if disagreement remains between the parties, preparation by the council of a Scott schedule setting out areas of disagreement with the parties' respective positions – 2 months from step (7).

9. Presentation of agreed final draft of remediation plan to court or in the event of no agreement, presentation of council's final draft plan together with identification of areas of dispute; resumed hearing and order of the court receiving or approving the plan as the case may be – to conclude within 6 months of conclusion of step (8).

10. Preparation by the environmental consultant of tendering documentation in respect of the appointment of a contractor to undertake the works permitted under the remediation plan –3 months from step (9).

11. Invitation and receipt of tenders for appointment of contractor – 2 months from step (10).

12. Consideration of tenders and appointment of contractor – 3 months from step (11).

13. Carrying out of and completion of works permitted under the remediation plan and restoration of the site – 36 months from step (12).

14. A strictly limited period of post-remediation monitoring to confirm no unexpected pollution emissions – 6 months from step (13).

15. Handover of possession of site to plaintiff – forthwith on completion of the time period allowed for the limited monitoring in step (14). The total duration of the process is therefore 78 months.

Order

24. Having regard to the foregoing I will order:

1. that the council will be required to remove to a licensed waste disposal facility all waste and all soil or other materials contaminated or potentially contaminated by such waste from all areas of the site including areas that are already the subject of attempted remediation and to appropriately fill and landscape the site with inert matter sourced elsewhere and to return possession of the site to Brownfield within a period of 78 months from the date of the order;

2. that in implementing the order the council shall take the intermediate steps set out in this judgment and in doing so shall have regard to the indicative timetable set out in relation to those steps;

3. that there be liberty to apply; and

4. that the hearing proceed forthwith to Module IV which will consist of the issue of costs of these proceedings and the 2005 proceedings and such consequential or other matters if any as arise in these proceedings.