

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

PLAINTIFF

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. 5)

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

1. I am dealing now with Module IV of this matter which, having heard from the parties, is limited to the question of costs. The position is that costs are discretionary but generally follow the event pursuant to O. 99 of the Rules of the Superior Courts. That general rule may be departed from in appropriate circumstances, as set out in *Dunne v. Minister for Environment* [2008] 2 I.R. 775 and *Grimes v. Punchestown Company Limited* [2002] 4 I.R. 515. By virtue of *Veolia Water U.K. plc v. Fingal County Council* [2007] 2 I.R. 81, in complex cases where the winning party has not succeeded in all issues the court should consider whether to structure the order in such a way as to reflect matters such as the reasonableness of the conduct of the parties and their success or otherwise on particular issues.

2. This was a complex matter by any standards. Firstly, before O'Keeffe J. it was at hearing for 23 days. There was a further day on which judgment was given in an adjournment application resulting in an adjournment mid-trial. There were then eight further days dealing with discovery and a mistrial application. The matter was back before the court for a day regarding an order on that issue and on a later date regarding an order for costs, including costs of the adjournment application. In the second trial, which commenced in March, 2017, the matter has now been before me for 56 days so there is a total of 90 days accounted for, together with other mention dates not included in that list.

3. Mr. Peter Bland S.C. (with Mr. Michael O'Donnell B.L.) for Brownfield submits that in essence there is a public interest dimension in the case and that Brownfield has, as he puts it, done the State some service; which I accept to some extent but that is not an absolutely conclusive argument for full costs because, first of all, there were certain serious allegations and other matters that Brownfield chose to agitate and did not succeed on; and secondly, it is not a purely public interest case because Brownfield is a commercial entity seeking to protect its investment in the property, which of course it is quite entitled to do and I am not in any way criticising it for that. Having regard to all the circumstances, this is clearly a case where the *Veolia Water* approach should be applied.

Costs in the 2005 proceedings

4. The 2005 proceedings have been struck out so in principle there will be an order for costs in favour of Brownfield, but that will be subject to some qualifications.

5. First of all it does not include the eight days in relation to which the matter was dealt with by way of a mistrial application or by way of discovery applications or the date of judgment on those matters. That is because there has already been an order for costs in relation to those matters on the 7th December, 2010, where Brownfield were awarded 60% of their costs of those matters. Impliedly in that order, there was no order as to the remaining 40% of those costs.

6. Secondly, the order for costs in relation to the 2005 proceedings will not include costs of the motion for costs dated 4th December, 2012, or the motion for an adjournment dated 9th December, 2011, because those costs have already been disposed of by order of the 19th December, 2012.

7. Thirdly, costs of the 2005 proceedings will not include any costs after the re-entry of the proceedings in 2015 because costs since then have essentially arisen under the 2008 proceedings. The only matter regarding the 2005 proceedings since then that Brownfield were significantly affected by is the application in relation to Rockbury but as that arose as a result of incorrect and inaccurate averments on behalf of Brownfield that the latter was the owner of the site. That had to be rectified and indeed it could have been rectified more rapidly had Brownfield not put forward those inaccurate statements. So to avoid double counting of costs then there will be no order for costs after the re-entry of the proceedings in 2015 and the costs incurred after that date are essentially to be

treated as having been incurred in the 2008 proceedings.

Costs in the 2008 proceedings

8. As I have said the length of the proceedings and their complexity warrants a *Veolia Water* approach. First of all, there was the time spent on the application for a modular trial. Mr. James Connolly S.C. (with Mr. Damien Keaney B.L.) for the council succeeded on that motion but the issue was essentially neutral as between the parties so there will be no order as to costs in relation to that.

9. Secondly, insofar as the council applied in relation to adding Rockbury in the 2008 proceedings I will award costs of that issue to the council. The necessity for that application, even though it was not ultimately pursued, was down to Brownfield's incorrect averments that they were the owner of the premises.

10. The third issue is the costs of re-entry against Swalcliffe. In relation to that I will make no order as to costs; that is not a matter in relation to which the council should be required to pay Brownfield's costs.

11. The next issue is in relation to the costs of agreeing the issue paper. Again, I will make no order as to costs. That was a neutral issue which did not go to either side, although if anything the council's material was more succinct and was more of a basis for the ultimately determined issue paper than Brownfield's initial draft.

12. The next matter is the costs of the council's application regarding filing a supplemental affidavit in relation to decisions in the run-up to exercising its s. 56 powers. In relation to that issue I will award costs of that application to the council. Brownfield only announced well into the hearing of that issue that its view was that the documents were already exhibited. They should have signalled that position well before 11 am on the day. Parties are required to save the court's time and it was not helpful, to say the least, to have saved the point until towards the end of the reply to the application. The approach adopted did not pay due regard of the need to make the most efficient use of the court's resources. I do not believe that counsel intended to waste the court's time but unfortunately that was the effect of the course of action adopted. Inadequate attention was given to the need for husbandry of scarce judicial resources and I must mark the fact that that was not the appropriate way of meeting the application by awarding costs to the council.

13. The next issue is the costs in relation to Module I which was mainly on the issue of *mala fides*. Serious allegations were made against the council. Brownfield did not succeed in those issues, although it won on certain legal issues. I rejected corruption allegations against the council and I can have regard to the failed nature of those allegations when dealing with costs. Some criticisms of Mr. Duffy were also agitated. I impliedly rejected those criticisms in Module I and I now should expressly reject them. Mr. Duffy's involvement in dealing with Mr. Ó Laoire was of a humanitarian nature and was carried out in good faith. Indeed, he should be commended for having entertained Mr. Ó Laoire's approach for humane reasons rather than having refused to talk to him out of self-protection. To have acted as he did required some spirit and courage on Mr. Duffy's part. The issue was re-agitated by Brownfield without good reason. They did not follow through with it by way of cross-examination and I have regard to that. Mr. Bland submits that it is appropriate that an innocent party should "*chase the hare*" of corruption as he put it, but parties should not chase every hare. They must rationalise the issues to be pursued and must pursue them as efficiently as possible. The case was listed for two weeks and we are now in the middle of week 17. The cross-examination of Mr. Ó Laoire and Mr. Sheehy was meant to be a day each and took three days each. Mr. Bland also submits that the court has an interest in unearthing and addressing false evidence. That may be so but as in many things there are limits to pursuing issues of principle having regard to scarce resources. Brownfield chose to march the regiments up to the top of the hill claiming corruption by the council and has now had to march them back down again. Having absorbed resources in that regard, that is something I can and should take into account. So taking all the factors into consideration, the council should get two-thirds of the costs of Module I, Brownfield should get a third, and setting off one against the other the net order is that the council will be awarded one-third of the costs of Module I.

14. The next issue then is the costs in Module II which I award to Brownfield who succeeded on the issues in that module.

15. The next issue then is Module III. The council succeeded on the primary issue of the time-scale (albeit that it had mixed success on some of the subsidiary procedural or legal issues) and in the circumstances I will award the council costs of Module III.

16. Finally then Module IV which is the present matter relating to the costs. The council have essentially succeeded in their costs submissions, so I will award the costs of Module IV to the council.

General matters

17. Costs under any individual heading will include reserved costs relating to that issue together with whatever proportion of brief or instruction fees, drafting fees, motion fees or other fees, costs and expenses as should properly be apportioned to the module in question. All costs (whether in the 2005 or 2008 proceedings) are to be considered together for the purposes of set-off such that costs in favour of the council are to be set off against costs in favour of Brownfield in either set of proceedings, resulting in a single net amount to be paid to whichever party is ahead in costs terms. All costs are to be taxed in default of agreement.