THE HIGH COURT

[2012 No. 3728 S]

BETWEEN

CORK COUNTY COUNCIL

PLAINTIFF

AND

VALENTINE O'DRISCOLL

DEFENDANT

JUDGMENT of Ms. Justice Baker delivered the 18th day of April, 2018.

1. The plaintiff seeks to recover a landfill levy claimed to be due under the Waste Management Act 1996 ("the 1996 Act") as amended. The claim is made on foot of a notice served pursuant to Art 9 of the Waste Management (Landfill Levy) Regulations 2002, S.I. No. 86 of 2002 (as substituted by Art 6 of the Waste Management (Landfill Levy) (Amendment) Regulations 2006, S.I. No. 402 of 2006), "the Regulations of 2002" and "the Regulations of 2006" respectively or, where the context admits, "the Regulations".

2. The defendant has defended the claim on a number of grounds, which may conveniently be described as grounds deriving from an interpretation of the Regulations, and that the claim is either barred by statute or ought to be struck out on the grounds of delay. The defendant contests the claim also on its merits and argues that the materials brought onto his lands were inert and were necessary to alleviate a flooding risk on the lands. The defendant did have a waste licence issued pursuant to the Regulations for the relevant period, but it is argued by the plaintiff that the licence was subject to a number of conditions precedent, none of which had been satisfied.

3. The claim is for €1,208,880, being the levy calculated in accordance with the provisions of the Regulations. The levy notice was issued on 30 June 2008, and demanded payment within four weeks. Whilst interest was originally claimed in the proceedings, that claim is no longer being pursued.

4. The levy is claimed to be payable in respect of an activity at the farm of the defendant at Ballinderrig, Courtstown, Little Island, County Cork, the lands comprised in folio CK 67991F of which the defendant is registered owner. The plaintiff is the statutory body responsible for the collection of the landfill levy within its functional area.

The procedural history

5. A summary summons was issued on 1 October 2012, and after an appearance was entered by the defendant on 13 November 2012, a motion to amend the summary summons and for final judgment was returnable before the Master of the High Court on 28 February 2013. The matter was adjourned from time to time before the Master and several affidavits were filed before the motion for judgment came on for hearing before Birmingham J. on 26 and 27 February 2014. Birmingham J. delivered a written judgment on 29 April 2014, *Cork County Council v. O'Driscoll* [2014] IEHC 243, and as a consequence the matter was remitted to be determined at plenary hearing.

6. Pleadings were then exchanged and closed in September 2014. The case was finally concluded before me on 6 December 2017.

Legislation

7. The Regulations are made in exercise of the powers conferred by ss. 7, 18, and 73 of the 1996 Act (as amended).

8. Section 7 of the Act provides that the Minister may make Regulations for the purposes of the Act, and the Regulations of 2002 and 2006 were made for the purposes of s. 73 of the Act, as inserted by s. 11 of the Waste Management (Amendment) Act 2001.

9. Section 55 of the Act provides for the power of the relevant local authority to require measures to be taken in relation to the holding, recovery or disposal of waste:

> "(1) (a) Where it appears to a local authority, as respects its functional area, that it is necessary so to do in order to prevent or limit environmental pollution caused, or likely to be caused, by the holding, recovery or disposal of waste, the local authority may serve a notice under this section on a person who is or was holding, recovering or disposing of the waste, as the case may be.
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> (b) Paragraph (a) shall not apply in respect of the recovery or disposal of waste carried on in accordance with a waste licence, or a licence or revised licence granted under Part IV of the Act of 1992.
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> (2) A notice under this section may require—
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> (a) the taking of specified measures which the local authority considers necessary in order to prevent or limit the environmental pollution concerned or prevent a recurrence thereof,
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> (b) the cesser of the holding, recovery or disposal concerned,
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> (c) the mitigation or remedying of any effects of any activity aforesaid in a specified manner,
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> within a specified period (not being less than 14 days commencing on the date of the service of the notice).
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> (3) A notice under this section—
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> (a) may be served whether or not there has been a prosecution for an offence under this Act in relation to the activity concerned;

(b) shall not prejudice the initiation of a prosecution for an offence under this Act in relation to the activity concerned.

(4) – (5) […].

(6) If a person on whom a notice under this section has been served does not, within the period specified in the notice, comply with the terms thereof, the local authority concerned may take such steps as it considers reasonable and necessary to secure compliance with the notice, and may recover any expense thereby incurred from the said person as a simple contract debt in any court of competent jurisdiction.

(7) Without prejudice to the generality of subsection (2), a notice under this section may require—

(a) the removal of waste to any location or locations,

(b) the disposal of waste in a specified manner or at a specified facility,

(c) the taking of measures to prevent the continuance of the activity to which the notice relates,

(d) the treatment of affected lands or waters so as to mitigate or remedy the effects of the activity concerned,

(e) the taking of such other action as may be necessary to counteract any risk of environmental pollution arising from the activity concerned.

(8) A person who fails to comply with a notice under this section shall be guilty of an offence.

(9) […]."

10. The levy is imposed pursuant to Art 3 of the Regulations of 2002 as substituted by Art 4 of the Regulations of 2006, by which provision is made for the imposition of a landfill levy in respect of the disposal of waste at a facility by an activity referred to in the third Schedule to the 1996 Act.

11. Art 3 provides for the imposition of a "landfill levy" in respect of the disposal of waste at an unauthorised landfill facility of €15 per tonne of waste up to 27 July 2006 and, after that date, at €20 per tonne.

12. The relevant parts of the third Schedule by which the activity subject to the levy is defined are para. 1 which refers to the deposit "into or on to land" and para. 5 which refers to "specially engineered landfill", including "placement into lined discrete cells which are capped and isolated from one another and the environment, etc".

13. A landfill activity is authorised if it meets the requirements of Art 2 of the Regulations of 2002, as amended by Art 3 of the Regulations of 2006, where the relevant definitions for the purpose of the present case are to be found. An "authorised landfill activity" is one specified in sub-arts (a), (b), or (c) of Art 4 of the 2002 Regulations. The relevant sub-article is sub-article (a) which refers to:

"landfill activity at a facility in respect of which there is in force a waste licence, by the holder of such licence".

14. Art 4(1)(c) of the Regulations of 2002 as substituted by Art 5 of the Regulations of 2006 governs the class of persons against whom the levy is payable:

"in the case of an unauthorised landfill facility by the person who carried on or is carrying on the waste disposal activity concerned or, where that person cannot for whatever reason discharge the levy liability or in the event that responsibility for the activity cannot be imputed to any person, the owner of the facility concerned".

15. Art 5(1)(a) of the Regulations of 2002 provides that the levy does not apply where the disposal is of specified non-hazardous and inert waste at an authorised landfill facility as follows:

"Article 3 shall not apply in respect of the disposal, by means of an authorised landfill activity, of the following wastes:

a) non-hazardous waste from construction and demolition activity, comprising concrete, bricks, tiles, road planings or other such similar materials, with a particle size of 150mm or less, which is used for landfill site engineering, restoration or remediation purposes".

16. The primary issue in the present case is whether the defendant had the benefit of an operative licence such that the disposal of waste on his land was an authorised activity in respect to which no levy is chargeable.

Material facts

17. Mr O' Driscoll is the registered owner of the lands comprised in Folio CK 67991F on which it is alleged that waste was unlawfully deposited. It is accepted by all witnesses that the farming enterprise carried out by Mr. O'Driscoll is of the highest standard, and his land is in general of very good quality, albeit that part is not suitable for some farming activity because of the wet nature of the area. Mr. O'Driscoll does not deny the depositing of material on the lands at the relevant dates but argues that the material put onto the land by him was inert soil and stone, that he deposited the material very carefully, and that the activity was authorised by licence.

18. The relevant development plan of Cork County Council identified the subject lands as pNHA ("proposed Natural Heritage Area") designated under the Wildlife Acts since the 1990s, and as candidate Special Area of Conservation ("cSAC").

19. The lands were excluded from the cSAC in the summer of 2005, but by then had become part of the Cork Harbour Special Protection Area ("SPA"), under the Council Directive 79/409/EEC on the Conservation of Wild Birds, as amended and now replaced by Council Directive 2009/147/EC on the Conservation of Wild Birds ("the Birds Directive"), as the land was regarded as important for

wading birds, which used part of the lands for refuge and feeding, and the depositing even of inert material would raise the levels of the land and make it less suitable as a wetland habitat.

20. The land has been dividend for the purposes of this case into two zones. Zone 1 is the area north of the farmland, not substantially within the protected areas, and Zone 2 near the estuary of Cork Harbour and within the protected areas.

21. The evidence is that in November 2003 the defendant was observed engaging in the activity of depositing materials on his land and was contacted and informed that he needed a licence for the works. A licence was obtained on 20 January 2004 (waste permit CK(S)79/03), for a period of two years commencing on 20 January 2004. The licence permitted the defendant to receive and not to collect material. Because the land was a cSAC, the licence was conditional, and two conditions under the heading "Additional Statutory Requirements" are argued to be material:

> "10.1 The granting of this permit, and any condition imposed by it, does not exempt the holder of the permit from complying with the statutory obligations of any relevant legislation, including:
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> - Water pollution,
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> - Health and Safety,
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> - Air pollution,
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> - Waste and litter
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> - Planning legislation.
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> 10.2 Note that these lands are part of the Great Island candidate Special Area of Conservation (cSAC) and as such works may not commence at the site until such time as there is complete agreement with the National Parks and Wildlife Service as to the size, scale and nature of the operation. A copy of this permit has been furnished to the National Parks and Wildlife Service for comment. Therefore there might be additional conditions added by Cork County Council under instruction from National Parks and Wildlife Service".

22. The reason for conditions 10.1 and 10.2 is set out as follows:

> "In order that all Statutory obligation are meet".

23. The cover letter of 2 November 2004 made specific reference to these conditions, the relevant section of which reads as follows:

> "I wish to inform you that the Permitting Authority requires you to comply with all of the relevant conditions applied to the waste permit CK(S)79/03 prior to the acceptance of any waste at your facility in Ballinderrig, Little Island, Co. Cork. In particular the Authority wishes to draw to your attention your statutory obligations as set out in Condition 10 of the waste permit".

24. The plaintiff makes the argument that because of its conditional nature the licence did not authorise the activity of depositing material on the land, and that the licence never became operative because the preconditions to its operation were never met.

25. It is clear that planning permission did not exist for the waste deposit activity. On 17 February 2004, Cork County Council on application by the defendant made a declaration under s. 5 of the Planning and Development Act 2000 ("the Planning Act") that the depositing of materials on the land was not exempted development under the provisions of s. 4(1) to (3) of that Act.

26. A planning application by the defendant for permission to infill the lands was refused in 2005 by the Development Applications Unit of the then Department of Environment, Heritage and Local Government.

27. In that context it should be noted that if the land was governed by the requirements of the Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora ("the Habitats Directive") the use could not be exempt under planning legislation. A challenge to the designation of the site is not before me.

28. Evidence was adduced that no arrangement was ever made with the National Parks and Wildlife Service ("NPWS").

29. A second period of activity commenced in January 2006, after the expiration of the licence. The uncontroverted evidence was that repeated warnings to the defendant to cease the activity of depositing material on the site were not heeded.

30. On 21 June 2007, Mr. O'Driscoll pleaded guilty in the District Court to the charge of disposal of non-authorised materials on the site on 18 August 2006, and the conviction order recites as follows:

> "the […] accused did on or about the 18-Aug-2006 at Ballinderrig Farm, Little Island, Co Cork […] dispose of or undertake the recovery of waste […] without their [sic] being a waste licence in force. Contrary to Section 39(1) of the Waste Management Act, 1996 as amended".

31. The defendant and his engineer, Mr. Kelleher, accept that he received waste on the relevant dates.

32. It is useful to set out a summary of my findings on the evidence, although I note that there was no real contest regarding much of the factual matrix.

The evidence of Nicholas Bond

33. Mr. Bond is the head of waste enforcement in Cork County Council since March 2006 and a civil engineer. He gave evidence regarding the means by which the amount of deposited material was calculated for the purposes of the levy.

34. In 2003, Mr. Buttimer of MB Precision conducted a survey of the level of the lands and repeated the survey in September 2007. A report was prepared by Toddy Cuthbert, a qualified suitable consultant who had previously worked for Cork County Council but was then acting for Mr. O'Driscoll, in which the material deposited was identified as "soil and stone and construction and development

waste". The Cuthbert Report contained an assessment of the volumes of waste deposited by means of a comparison between the levels of the lands in 2003 and 2007 and this assessment was accepted by all parties as being correct for the purposes of the present case.

35. Mr. Bond gave evidence of serving a notice pursuant to s. 55 of the 1996 Act on the defendant directing that he would remove the waste and requiring that he would provide a topographical survey.

36. Mr. Bond gave evidence of attending the site on 20 October 2006 and of finding thereon what he described as "large amounts of construction and demolition waste deposited and piled up on the lands". He observed that no fresh grass growth was apparent on the materials which had been deposited and also observed fresh tracks on the site. He described it as having the appearance of being "an active site" and said there was machinery.

37. He visited again on 5 December 2006 and saw machines actively working on the site, and expressed a view that the appearance of the site gave the impression that more materials had been deposited since his last visit.

38. On his third visit on 31 July 2007 he observed that the site had been levelled to some extent but noticed no other remediation works of note. Under cross examination it was suggested to Mr. Bond that the lands had been fully remediated. Mr. Bond accepted that he had not been on the lands since 30 June 2008, the day the notice seeking the landfill levy pursuant to the Regulations was served. His evidence however was that the key to the uniqueness of the site was that the land flooded and that any infill which made the land impermeable would change its character.

The evidence of Mr. Ronan Whelan
39. At the relevant times, Mr. Whelan was assigned to the NPWS Designations Unit of the Department of Environment ("the Parks Division") and was involved with the circulation of maps of the designations for natural heritage areas, special areas of conservation, and special protection areas. From June 2008 to February 2015, Mr. Whelan was the head of the Development Applications Unit in that Department, which administered and advised the Minister on development applications which bear on heritage matters and in the vicinity of European sites and pNHA.

40. Mr. Whelan confirmed that no agreement was reached with the Parks Division for the purpose of compliance with condition 10.2. He also gave evidence that in his view the waste licence should not have issued at all, and that the Parks Division of the Department ought to have been consulted before it issued. Mr. Whelan confirmed that by a letter of 19 September 2005 the Development Applications Unit of the Department of Environment wrote to Cork County Council recommending that no planning permission would issue in respect of the site.

41. Mr. Whelan rejected the suggestion put to him in cross examination that there was an unfairness or irrationality in the designation of the site as a cSAC.

The evidence of Mr. Patrick Smiddy
42. Mr. Smiddy was at the relevant time a conservation ranger appointed pursuant to the Wildlife Act 1976 and was employed by the NPWS. He held that role since February 1980. At the relevant times, his area of responsibility was the townland of Little Island, County Cork, in which the subject lands are situate.

43. Mr. Smiddy gave evidence that the pNHA has the same boundary as the cSAC and the subject lands were designated cSAC and pNHA by 1995. The reason for designation was that the lands were wet grass lands, which is regarded as an important habitat for wild birds, particularly in winter time.

44. Mr. Smiddy gave evidence of observing trucks drawing soil and rubble and depositing this onto the site on 6 November 2003. He made contact with a Cork County Council Heritage Officer as he was unaware of whether there existed a valid licence for the activity. He gave evidence of visiting Mr. O'Driscoll later that day, informing him that the area was a cSAC and making arrangement to forward a map to him of the designated area. Mr. O'Driscoll informed him that his intention was to raise the level of the land by half a metre to improve the land for agriculture purposes. Mr. Smiddy was concerned of the possible loss of special habitat from this proposed activity as the designation arose from the fact that the lands were wet.

45. Mr. Smiddy prepared a report dated 20 January 2004 for the purpose of dealing with the application by the defendant for the waste licence and his view was that the licence may have issued prematurely as no suitable arrangement existed for the protection of the habitat. Mr. Smiddy's second report dated 26 February 2004 sets out a number of concerns regarding the issue of the licence.

46. Mr. Smiddy said in a third report dated 25 August 2005 that he did not believe that agreement was reached at any time with the defendant regarding the deposit of material. Mr. Gerard Tobin, an ecologist, was employed by the defendant to advise regarding the ecological importance of the site and Mr. Smiddy's view is that the survey engaged by Mr. Tobin in April 2005 was not adequate as the winter habitat is more important for breeding resident birds.

The evidence of Imelda Kind
47. Ms. Kind was the staff officer in the Environmental Department of Cork County Council at the material times. She was responsible for the issue of the notices under s. 55 of the 1996 Act and gave evidence of the service of the notices by registered post and that the letters were not returned.

The evidence of Kevin Murphy
48. Mr. Murphy is an executive engineer with the Environmental Department of Cork County Council and was employed by the waste regulation section from January 2005 to January/February 2006. Mr. Murphy had interaction with Mr. O'Driscoll commencing with a meeting on 23 January 2006. He observed a number of trucks tipping soil on the land. He gave evidence that he notified the drivers of the trucks that the deposit of soil on the lands was not authorised.

49. Mr. Murphy visited on the next day, met the defendant himself, and informed him that he was not authorised to deposit soil on the lands.

50. By letter of 25 January 2006, Mr. Murphy wrote to Mr. O'Driscoll and had no recollection of any communication from Mr. O'Driscoll thereafter.

The evidence of Mr. Coleman Kelly
51. Mr. Kelly is an executive scientist with Cork County Council who first visited the site on 9 June 2006 on foot of a complaint from a

member of the public concerning alleged illegal dumping of waste. He met Mr. O'Driscoll on that day. He confirmed that he did not witness any activity on the site that day, but did observe newly deposited sand and stones and what he believed to be soil and development material. He observed tracks on the land, soil on the roadways, and confirmed that there was no vegetation visible on the material which led him to believe that the material had been freshly deposited. He said he told Mr. O'Driscoll to cease accepting waste and Mr. O'Driscoll confirmed that he did not at the time have a relevant licence. Mr. Kelly visited again on 12 June 2006 with Mr. Cuthbert and observed piles of soil/spoil, construction waste, and also noticed fresh tracks and believed that the levels of the lands had been raised. He produced in evidence photographs of a dumping trailer or tip.

52. A warning letter issued to Mr. O'Driscoll on 15 June 2006 in which it was said that the depositing of waste on the site could be an offence under s. 39 of the 1996 Act.

53. His next visit was on 18 August 2006 and his evidence is that the waste activity was ongoing. He did not meet Mr. O'Driscoll on that occasion. He said that there were individuals drawing in waste soil and stone in tractors and trailers and produced in evidence photographs taken by him on that date. His view was that the activity in August 2006 was in Zone 1.

54. Following that visit, a letter of 21 August 2006 was sent in terms similar to the earlier letter.

55. The first notice pursuant to s. 55 of the 1996 Act was then served on 9 October 2006, in which five measures were required to be done: that the activity cease; that the premises be secured; that prior to remedying the effects of the activity a report be carried out by a suitably qualified consultant; that that report be furnished to Cork County Council within fourteen days; and that a topographical survey of the lands be conducted.

56. Mr. Kelly gave evidence that the notice was not complied with and none of the required measures were taken.

57. Mr. Kelly made a further visit on 17 October 2006 when he said he observed "a lot of activity", fresh tracks and noticed a spreading machine on site. He produced photographs showing construction or depositing traffic and mud and tyre tracks on the road which appeared to be fresh.

58. The next visit was on 20 October 2006 and further photographs taken of Zone 1 showed fresh tyre tracks. Mr. Kelly says he did not see anyone coming or going on that day and that all the vehicles were parked.

59. Aerial photographs taken on 18 December 2006 showed a tractor and a trailer coming from Zone 2 towards the main road at Little Island, tyre marks from what looks to be a large vehicle, and fresh soil and stone without any obvious vegetation growth.

60. A further warning letter was sent by Mr. Kelly to the defendant following the taking of those photographs on 3 January 2007.

61. Further photographs were taken on 22 January 2007 showing similar materials.

62. The next photographs were taken on 21 March 2007 and show a tractor and dump trailer and two trucks with a tip or grab device attached.

63. Mr. Kelly was present on the site when the trial holes for the topographical survey were carried out in conjunctions with Max Buttimer. Mr. Cuthbert's report concluded that the calculation of Mr. Buttimer was correct. It is accepted that of this 53,000 cubic metres approximately 42,000 were deposited in Zone 1 and the remainder in Zone 2. Mr. Kelly communicated with Mr. Cuthbert, who prepared the already cited report.

64. Mr. Kelly accepted that the material deposited on site was primarily waste soil and stones and that there was "no really hazardous material" on site.

65. Mr. Kelly gave evidence that he recommended a further notice pursuant to s. 55 of the 1996 Act be served, and such further notice was then served on 3 March 2008.

66. Mr. Kelly gave evidence of making a recommendation that a landfill levy be imposed upon Mr. O'Driscoll on 26 June 2008.

67. Photographs taken on 31 July 2008 show the material remained on site, although the evidence of Mr. Kelly was that the County Council was satisfied that Zone 2 had been substantially remediated by then. Mr. Kelly's evidence is that he believed no further waste was brought on to Zone 2 thereafter, although the waste remained in Zone 1.

The evidence of Max Buttimer

68. Mr. Buttimer is a qualified civil engineer and engages mostly the activity of land surveying. He carried out a survey of the lands on 11 September 2007 in conjunction with Mr. Cuthbert and gave evidence of the differences he observed between the levels of the lands on that occasion and when he had previously visited in 2003. He calculated the volume of infill material by assessing the levels shown on his new survey and subtracting the original survey levels. His final calculation was of 11,256 cubic metres in Zone 2 and 42,472 cubic metres in Zone 1. Mr. Buttimer did not then compute the tonnage. His methodology was accepted by all parties.

The evidence of Jean Sayers

69. Ms. Sayers is employed in the waste division in Cork County Council, as a senior executive engineer. She gave evidence of the letter sent by registered post to the defendant on 2 November 2004 enclosing the waste licence, and that it was not returned. Ms. Sayers confirms that she received no communication from Mr. O'Driscoll thereafter, but she did phone him on 19 January 2005, when they discussed the site. Mr. O'Driscoll told her that the site had not been in operation for the last two months and she informed him that he could not operate the site until condition 10.2 of the licence was complied with.

70. Ms. Sayers was not involved in the application for the licence. It seems that the Planning Department and the Environmental Department operated at the time as two separate departments within the County Council and there was little or no communication between them relating to imposition of the conditions, but since 2008, they have been "intertwined". Ms. Sayers was not in a position to confirm that the NPWS was notified of the issue of the licence.

The evidence of Mike Mills

71. Mr. Mills is a town planner and worked in the enforcement section in the Planning Department of Cork County Council at the material times. He inspected the lands on one occasion only, on 20 January 2006. He confirmed that no planning permission existed for the activity then being carried on. He confirmed that planning permission was sought and refused and that a complaint of

unauthorised infilling was received in the Department in November 2005. A warning letter had been issued from the Enforcement Section of Planning Department of Cork County Council on 17 November 2005 pursuant to s. 152 of the Planning Act.

The evidence of Dónal Kelleher
72. Mr. Kelleher is a civil engineer and gave evidence on behalf of Mr. O'Driscoll. He estimated the correct computation of the levy as €6,044.40. He gave evidence, which is not essentially controverted, that the bulk of the material deposited on the site was stone and top soil all of which was inert. Mr. Kelleher's view is that Zone 2 has been remediated, but his considered view was that the materials deposited on that area did not have any adverse environmental impact.

73. Mr. Kelleher accepted that the measurement of the waste was derived from a report prepared by Mr. Cuthbert. He accepted that the calculation of the tonnage derived from the Cuthbert Report is correct. Mr. Kelleher did not become involved with O'Driscoll's lands until 2012 and he is relying for his calculation of the actual infill material on assumptions which are not borne out by the evidence. Mr. Kelleher admitted that he was not aware of the Buttimer calculations, or that Mr. Buttimer had been engaged by Mr. Cuthbert to calculate the volumes of material on site. Mr. Kelleher in cross examination was unable to say that the calculation of Mr. Buttimer was incorrect.

74. Mr Kelleher's evidence does not displace the evidence of actual waste deposit activity on the lands at the relevant dates and his view that the materials were inert is not controverted. The waste activity was one that required a licence and Mr. Kelleher is unable to offer any useful evidence that the conditions of the licence were met, or that a licence was a matter of law not required.

The evidence of Mr. Gerard Tobin
75. Mr. Tobin, environmental consultant, has a BSc and MSc and lectures in sustainable development in UCD. He visited the site on 9 and 10 April 2005 on the instructions of Mr. O'Driscoll and accepted that April was late in the year to assess the density of wintering birds on site. He found no evidence of frogs or otters. He gave evidence of speaking to Mr. Smiddy. He conceded in cross examination that he did not have a copy of the licence at the time he carried out his inspection, and also that he would have conducted his survey during the winter months if he had been asked by Mr. O'Driscoll to do so. He considered that the site was an important roosting and feeding habitat and accepted in cross examination that the habitat had been significantly impacted.

The evidence of John Crowley
76. Mr. Crowley is an agricultural consultant with a bachelor in agricultural science and 40 years' experience of working as an agricultural advisor. He considers that Mr. O'Driscoll has a very fine farm, and described the farm as an "immaculate" dairy farm. His considered view is that the Zone 2 lands deteriorated in quality after the N25 works were done.

77. His evidence may come to have a bearing on the other related proceedings but are not relevant to my view in the present case.

The evidence of William Mulligan
78. Mr. Mulligan worked on the N25 National Road as a mason and gave evidence of witnessing the depositing of rubbish at or near the O'Driscoll lands, in 1997 and 1998, by contractors engaged in the road building.

79. His evidence does not assist in the matter of the levy.

Summary and findings on the evidence
80. As is apparent from the narrative of the evidence there is little factual dispute between the parties. There is uncontested evidence of the deposit of material on the site and of numerous warnings, verbal and written, given to Mr. O'Driscoll to cease the activity. The evidence of service of the levy notice was not controverted. The lands are in the title of Mr. O'Driscoll, and it appears to me from the evidence that the deposit of material on the lands was done intentionally and with a view to ameliorating the wet nature of the lands.

81. Whilst the giving of warning is not a statutory proof, I am satisfied that Mr. O'Driscoll had ample warning of the objections of the plaintiff to the activity in which he or his agents were engaged.

82. I am further satisfied that there was no agreement with the National Park and Wildlife Service regarding the deposit of material on site, and that planning permission did not exist for the works. The two conditions in condition 10 of the licence were not satisfied.

83. I am satisfied that the waste was inert and primarily composed of builders' rubble and soil. The question for determination is whether the defendant was entitled to deposit these or any materials having regard to the conditions in the licence he held, and for the reasons stated I am satisfied that the deposit of materials was not authorised.

84. I consider more fully below the argument that the conditions are not essential to the existence or operation of the licence.

The statutory basis of the claim
85. The claim for payment of the levy is made under the Regulations of 2002, as amended. The only relevant material change between the Regulation of 2002 and the amending Regulations of 2006 was the multiplier, and the plaintiff brings the claim under the old multiplier of €15 per tonne of waste. The claim is made under Art 3(1) of the Regulations by which the imposition of the levy is given statutory force. The language of the article is mandatory:

> "[…] there shall be chargeable, leviable and payable a levy (which shall be known as a 'landfill levy' and in these Regulations referred to as 'the levy') in respect of the disposal of waste at a landfill facility".

86. The levy is payable either by the person who is the holder of a waste licence or the owner of the land under Art 4(c).

87. In general, the disposal of non-hazardous waste is not subject to a landfill levy if it is done with the benefit of a licence, or if it is in the language of the Regulations "authorised". The waste deposited on the land of the defendant is accepted not to have been hazardous waste, and accordingly, had the defendant had the benefit of a licence, no levy would have been payable. I have already found that the defendant did not have the benefit of a licence and that the activity was not authorised. The levy is payable if the statutory proofs are met, subject only to the arguments made by counsel for the defendant which I will consider later.

88. Two factual matters therefore require to be established by the plaintiff in order to satisfy the statutory precondition for the imposition of the levy.

89. First, it has to be established that waste was deposited on the land, and that the relevant waste is non-hazardous. The levy is

payable unless the activity was authorised by a licence. The amount of the levy is then calculated by reference to the weight of the materials.

90. Second, the statutory notice of the imposition of the levy is to be served.

91. I turn now to consider the statutory proofs.

Statutory demand of levy payment
92. The imposition of a levy requires the service of a statutory notice. Art 9 of the Regulations of 2002, as substituted by Art 6 of the Regulations of 2006, provides for the service of notice requiring payment of the levy as follows:

> "(1) A relevant local authority shall, by notice in writing, require a person referred to in article 4(c) to pay such amount of levy as may be determined by that authority to be payable in respect of the waste disposed at the unauthorised landfill activity.
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> (2) A person who receives a notice under sub-article (1) shall, within a period of four weeks of the date of the said notice, remit to the said local authority the amount of levy determined to be payable, in such form, or by such lodgement to such financial account, as shall be specified by that authority.
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> (3) – (4) […].
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> (5) In proceedings for the recovery of levy payable under these Regulations or for an offence under these Regulations, it shall be presumed, unless the contrary is proved, that waste disposal at an unauthorised landfill facility was carried out subsequent to 1 June 2002".

93. I am satisfied from the evidence of Ms. Kind and Mr. Bond that the notice under Art 9 was served on Mr. O'Driscoll.

94. The imposition of the levy is mandatory and the legislation does not contain any requirement that a warning be sent before a statutory notice triggering the requirement to pay is served. The obligation to pay the levy is not therefore in my view subject to any requirement that the person from whom the levy is demanded be aware that the local authority considers the activity to be unlawful. However, I am satisfied that the defendant received multiple warnings in the form of letters, visits, and phone calls. The replying affidavits in the summary proceedings were tendered by the defendant as evidence-in-chief but he did not give oral evidence at trial and was not cross examined. The evidence of service of the statutory notice and of repeated warnings was not challenged.

Calculation of levy
95. For the purposes of the determination of the amount of the levy Art 6(3) of the Regulations of 2002 provides for the determination of the weight of the waste by the following formula:

> "(a) by means of weighing any such waste that is removed from the facility concerned, by or at the direction of the relevant local authority or the Agency, for disposal elsewhere; and
>
> (b) in any other case, by means of such methodology as is from time to time notified in writing to the relevant local authority by the Agency".

96. The levy is to be charged by the application of a multiplier to the quantity of waste disposed. Provision is made for a precise calculation by means of weighbridge at the facility but in the absence of evidence from this source, the local authority is permitted under Art 6(3)(b) to determine the weight by means of any other methodology as from time to time is notified in writing to it by the agency. The agency referred to in the legislation is the Environmental Protection Agency ("the EPA), which has promulgated a code of practice. At the time of the activity complained of on Mr. O'Driscoll's farm, there were no guidelines issued by the EPA.

97. In the present case the calculation was made from figures in a report prepared by a comparison of the levels of the land in 2003 before any waste was deposited on the land, with the levels in 2007. Mr. Kelleher who gave evidence for the defendant, did not offer any meaningful challenge to the methodology of the calculation.

98. There is therefore ample and uncontroverted evidence as to the amount of materials deposited on Mr. O'Driscoll's land.

99. The legislation provides a statutory presumption and reversal of proof in Art 6(4) of the Regulations of 2002:

> "In proceedings for the recovery of levy pursuant to these Regulations or for an offence under these Regulations, it shall be presumed, unless the contrary is proved, that a determination made by a local authority for the purposes of sub-article (3) is in accordance with the methodology approved for that purpose".

100. Insofar as any argument exists as to the correctness of the calculation and the methodology used by Mr. Buttimer, the statutory presumption has not been rebutted by any evidence or argument from the defendant.

101. The calculation made from the comparison of levels of the lands may therefore be accepted as a correct basis for the calculation of the quantum of the levy to be imposed.

102. The obligation to pay is not dependent on proof that the waste was of a particular type, nor is the plaintiff required to show that the material in fact caused damage to the environment, provided it can be shown that the waste activity was not authorised.

103. The levy is payable only following the service of a notice under Art 9 of the Regulations. A person who receives a notice has four weeks to pay and the claim may be brought by way of proceedings for a simple contract debt.

104. Article 9(5) of the Regulations provides that in proceeding for the recovery of a levy it shall be presumed that the waste was disposed subsequent to 1 June 2002. No argument is made and no evidence adduced that the waste might have been deposited prior to the operative date of 1 June 2002, and indeed Mr. Cuthbert's evidence from which the calculation of volume is made proceeds on the basis that the waste was deposited after 2003.

105. Article 15 of the Regulations of 2002 provides that the amount of the levy:

> "[…] shall be recoverable from the person concerned as a simple contract debt in any court of competent jurisdiction".

106. In order that the levy be payable as a matter of law, a notice must be served. No proceedings for the recovery of the levy may be instituted until the four-week time limit for payment fixed by the notice has passed. The claim may be brought by summary summons in the High Court, the means by which a claim for a simple contract debt is made.

107. I am satisfied that the statutory proofs are met and that the levy is payable subject only to the defences offered by the defendant, to which I now turn.

Was the activity authorised?
108. Mr. O'Driscoll's primary argument on the merits is that he had the benefit of a waste licence, that the depositing of waste material on the site was permitted, and that as a result he was not engaged in any unlawful waste activity.

109. Section 39(1) of the 1996 Act imposes a requirement that a person disposing of waste shall hold a licence:

> "Subject to subsections (4) and (7), a person shall not dispose of or undertake the recovery of waste at a facility, on or after such date as may be prescribed, save under and in accordance with a licence under this Part (in this Act referred to as a "waste licence") that is in force in relation to the carrying on of the activity concerned at that facility".

110. It is accepted that the defendant did have a waste licence for the years 2004 to 2006. The plaintiff argues that the licence issued by Cork County Council did not authorise the waste activity as it was subject to two conditions, argued to be conditions precedent to the operation or efficacy of the licence.

111. Section 41(1) of the 1996 Act provides for the imposition of conditions on a waste licence:

> "A waste licence may provide as respects any condition attached to it that the condition shall be complied with before or after any activity to which the licence relates has been commenced or has ceased".

112. Section 41(2) provides a non-exhaustive list of the type of conditions that may be attached to a licence. The legislation does not provide any means by which the conditions are to be characterised or the effect of their breach.

113. The relevant conditions in the licence are condition 10.1 and 10.2. Condition 10.1 merely states that the facility requires planning permission and, as Birmingham J. said giving judgment on the motion for summary judgment, that condition does no more than state the general law, i.e. that if planning permission is required, the licence is not equivalent to such permission, and does not dispense with the requirement of the Planning Act. I am satisfied that planning permission was required and had not been granted, and the declaration made under s. 5 of the Planning Act supports this finding.

114. Condition 10.2 gave rise to most argument. That condition is mandatory in its language and requires that before the activities commence, consent be reached with the NPWS. The condition does not mandate that consent be in writing, and the facts of the present case do not give rise to the need to consider whether an oral or verbal consent might suffice in certain circumstances. The evidence of Mr. Smiddy was that no agreement had been reached with Mr. O'Driscoll regarding the carrying out of any waste activity on the site. Mr. Kelleher gave evidence that the defendant accepts that no consent was in place. I find that no consent or agreement, formal or informal, was reached with the NPWS.

115. The nature and effect of the conditions in a waste licence has not been considered by any decided case. The issue raised in the present case is whether the conditions are of a nature such that breach might be termed technical, or whether the conditions are to be treated as conditions precedent and necessary to the operation of the licence. Counsel for the plaintiff argues that the two parts of condition 10 are conditions precedent which are so fundamental to the nature of the licence that a failure to satisfy them must be regarded as fundamental to the very existence of authorisation. He argues this both from the European status of the site and the literal meaning of the conditions. The defendant argues that the conditions are not fundamental and are technical and were capable of resolution in the currency of the activity.

116. The Court of Appeal for England and Wales, in *Whitley & Sons Company Limited v. Secretary of State for Wales* [1992] 3 PLR 72, considered the nature of conditions in a planning permission and referred to the possibility that some conditions might be regarded as conditions precedent, but that compliance with other conditions could be achieved in the currency of the permission or after works or development activity had commenced.

117. That Court returned to the question of whether conditions are to be regarded as conditions precedent to the coming into effect of a permission in R (On the application of *Hart Aggregates Ltd) v. Hartlepool BC* [2005] EWHC 840 (Admin). At para. 65, Sullivan J. held that:

> "the statutory purpose is better served by drawing a distinction between those cases where there is only permission in principle because no details whatsoever have been submitted, and those cases where the failure has been limited to a failure to obtain approval for one particular aspect of the development."

118. He continued as follows:

> "In the former case, common sense suggests that the planning permission has not been implemented at all. In the latter case, common sense suggests that the planning permission has been implemented, but there has been a breach of condition which can be enforced against. I appreciate that these are two opposite ends of a spectrum. Each case will have to be considered upon its own particular facts and the outcome may well depend upon the number and the significance of the conditions that have not been complied with".

As noted at para. 7-28 in Simons, *Planning and Development Law* (2nd edn., 2007), that approach meant to "steer a middle course by looking to the substance of the condition, and recognising that the mere fact that the literal wording of a condition requires matters to be attended to prior to the commencement of development should not necessary be conclusive in deciding that the condition is truly a condition precedent."

119. I adopt that approach to the means by which conditions may be properly characterised and I consider that a condition must be examined in the light of the facts, the considerations regarding the purpose or mischief intended to be achieved by the imposition of the condition, and the probable consequence of breach.

120. Some argument by analogy is made from decisions of the Irish courts in applications for planning injunctions under s. 160 of the Planning Act. In *Eircell Limited v. Bernstoff* [2000] IEHC 18, Barr J. suggests that the test in such an application might be whether a local authority would in the circumstances give retention permission. Dunne J., in *Conroy v. Craddock* [2007] IEHC 336, suggested that there might be certain matters which could be dealt with in the course of construction, and rejected an argument that such types of conditions were truly precedent to a valid permission:

> "I am satisfied that there is little to be concerned about in relation to a number of the conditions referred to. In fairness to the applicant a number of the conditions do relate to plans to be submitted for such matters as bus, pedestrian and bicycle use in the site, the details of the management company to be formed to manage the site, the disposal of materials excavated on the site and so on. They were pre-commencement conditions but they are eminently suitable to be dealt with in the course of construction. The delay in compliance in the overall context of the development as a whole is not, in my view, of major significance and I accept that these are all matters which will be dealt with as a matter of course as the construction of the development progresses. For example, in relation to Condition 25 which referred to a proposed pumping station and rising main on the site, it appears that a different sewer system has been agreed with the Council which has avoided the need for a pumping station".

121. The example given by Dunne J. is instructive in the light of the facts of the present case. In *Conroy v. Craddock* an alternative sewage system had been agreed with the Council in the course of construction, which avoided the need for a pumping station and rising mains for which permission had issued. Dunne J. considered that the agreement was sufficient to in effect comprise an alteration of the pre commencement conditions.

122. In the present case, no evidence has been given of any agreement or attempt to reach agreement with the NPWS regarding the deposit of the waste on the environmentally sensitive site. It might have been possible to achieve an agreement regarding a suitable location for the deposit of material to achieve some alleviation of the flood risk without endangering the protected bird habitat. That possibility must have been in the thinking of the County Council when it issued the licence. I accept that, perhaps somewhat late in the day, Mr. O'Driscoll did employ Mr. Tobin to attempt to negotiate with the NPWS representative, Mr. Smiddy, with a view to reaching an accommodation. Mr. Tobin's report did not meet Mr. Smiddy's requirements because of the time of year when Mr. Tobin carried out his inspection.

123. The licence is silent regarding the time for reaching agreement, and does not require consent to be reached before the activity commenced. In my view, however, having regard to the environmentally sensitive nature of the site, the condition regarding the consent of the NPWS was intended to be fundamental and the licence required at a minimum that the waste be deposited in a manner at times and at locations which were to be agreed with the NPWS before the material was deposited on the sensitive parts of the site. For that reason, I consider that condition 10.2 regarding the consent of the NPWS is an operative and essential condition of the licence and that without a consent the licence did not authorise the activity complained of.

124. I consider also that condition 10.1, which required that planning permission be obtained for the activity, is to be treated as a necessary and fundamental condition of the licence primarily because the site was a priority habitat and that, in the light of the decision of the Court of Justice of the European Union ("the CJEU") in C-258/11 *Sweetman v. An Bord Pleanála*, ECLI:EU:C:2013:220, the nature of the receiving environment as an environmentally sensitive or priority habitat must inform the characterisation of a condition.

125. The protected nature of the site made planning permission mandatory and it could not be said that the terms of condition 10.1 are to be treated as not fundamental.

126. Furthermore, I consider that the proper characterisation of the two parts of condition 10 must be interpreted in the light of the express language of the Regulations.

127. The licence was granted and recited as being granted "in pursuance of the powers conferred on [Cork County Council] by the Waste Management Acts, 1996 to 2003 and the Waste Management (Permit) Regulations, 1998, " "under Article 5(1) of said Regulations".

128. The Waste Management (Permit) Regulations, 1998, S.I. No. 165/1998 (the Regulations of 1998) were amended *inter alia* by the European Union (End-of-Life Vehicles) Regulations 2014, S.I. No. 281/2014.

129. Article 5(1) of the Regulations of 1998 provides that a local authority may grant a waste licence in accordance with the Regulations or refuse to do so as the case may be.

130. Article 5(2) provides *inter alia* as follows:

> "A local authority shall not grant a waste permit unless it is satisfied that-
>
> (a) the activity concerned, carried on in accordance with such conditions as are attached to the permit, will not cause environmental pollution".

131. The plaintiff argues that the express conditions of the licence were imposed pursuant to those articles and Art 17 of the Regulations of 1998, and that the licence must be read in conjunction with any conditions so imposed. I consider that the plaintiff is correct and the purpose of imposing conditions pursuant to Article 5(2) of the Regulations of 1998 was to ensure that environmental damage would not be caused by the licensed activity, as the subject site is environmentally sensitive and the activity carried on by Mr. O'Driscoll was likely to cause environmental pollution in that it was done with the object and effect of raising the ground levels, reducing the flooding risk, and alleviating the wet nature of the soil.

132. For all of these reasons I consider that conditions 10.1 and 10.2 are fundamental conditions to be regarded as essential, and the performance of which is to be regarded as precedent to the existence or operation of the license. Therefore, I reject the contention of the defendant that his failure to adduce evidence of the performance of the conditions prior to the commencement of the activity is to be regarded as technical and may be excused.

Entry on the register

133. Section 19 of the 1996 Act provides for the maintenance of a register of waste licences by each local authority and the EPA. The licence issued to Mr. O'Driscoll was entered on the relevant register maintained by Cork County Council and the entry contains the date of issue and the date of expiry.

134. The defendant argues that entry on the statutory register amounts to an acknowledgment or representation that the licence is valid and in force.

135. I disagree. The legislation does not make registration of a licence a mandatory condition for its validity, but equally the entry of a licence on the register does not of itself represent that an activity is validly being carried on with the benefit of the licence. That must be particularly the case where the licence contains conditions, as a local authority or court reviewing an activity must have regard to the terms of the licence and not merely the fact that it has issued and is registered.

136. I reject this ground of defence.

Is the claim statute-barred?

137. The defendant pleads that the claim is barred by the Statute of Limitations 1957. The claim being one in contract is subject to the six-year limit set out in s. 11(1) but the defendant says that the time began to run whenever the activity was carried out, and that the proceedings must be instituted within six years of the event in respect of which the entitlement to charge the levy arose, viz. when the waste was deposited. The plaintiff argues that the service of notice is a procedural step which triggers the obligation to pay, and the cause of action does not subsist until the notice is served.

138. The greatest part of the waste deposited on the defendant's land took place during the period for which the defendant had a waste licence which expired on 19 January 2006. The plaintiff was prosecuted in the District Court on 18 May 2006 and the notice was served on 30 June 2008.

139. The defendant argues that the cause of action accrued at the time the waste was deposited, or at the latest at the date when the offence crystallised and the defendant pleaded guilty at the District Court hearing. It is argued that the fact that the amount of the levy had not been quantified or calculated does not prevent the running of time, and the assessment is a matter which was within the control of the plaintiff and could have been done at any time after early 2006, when the waste activity effectively ceased. Reliance is placed on the decision of the Supreme Court in *Gallagher v. ACC Bank* [2012] IESC 35, [2012] 2 IR 620, where the Supreme Court found that the plaintiff's cause of action accrued at the date when the plaintiff entered into a contract with the defendant, and not when the plaintiff was in a position to quantify his losses.

140. I consider that *Gallagher v. ACC* is not on point, as that judgment concerned the running of time in a cause of action arising from the giving of allegedly negligent advice, and where the plaintiff had argued that the financial product was wholly unsuitable for his needs. The judgment of the Supreme Court was concerned with the question of when the negligent act had occurred and when damage was suffered.

141. The question in the present case is when the cause of action identified by and wholly derived from a statutory provision can be said to accrue. The levy is chargeable in respect of the carrying out of a waste disposal activity. I do not consider that the fact that the legislature made provision for the bringing of proceedings to collect the levy by way of an "action for simple debt" makes the claim a claim in contract. The claim is a statutory claim brought pursuant to a statutory power and in accordance with the statutory provisions. The service of notice is an essential step in the claim process. The breach of the statutory requirement that such an activity be carried on only with the benefit of a licence may well occur at an earlier date, but the power to commence proceedings for the collection of a levy can only accrue when the statutory notice is served.

142. Counsel for Mr. O'Driscoll makes another argument relating to the running of time, that Art 6 of the Regulations of 2002 is mandatory in nature and that there existed an obligation to commence the process of charging the levy at the time the waste was disposed. I cannot agree with that interpretation of Art 6 which in my view is mandatory with regard to the imposition of the levy but not with regard to the collection of the levy by the commencement of proceedings.

143. The obligation to collect the levy is mandatory, and the effect of the Regulations is to remove any discretion that the local authority might have regarding the imposition of a levy for unlawful waste activity. The levy requirement and its mandatory nature were introduced following the decision of the CJEU in C-358/97 *Commission of the European Communities v. Ireland*, ECLI:EU:C:2000:425. The purpose of making a levy mandatory was to avoid the exercise by a local authority of any discretionary power to determine not to levy a charge or to excuse an unlawful waste disposal activity.

144. The local authority is obliged to collect the levy and the starting point of the process is the service of the notice. Proceedings are not inevitable or mandatory and a person who received the notice may pay the amount of the levy without objection, or make acceptable arrangements for payment with the local authority. Therefore, I do not accept the argument of the defendant that the fact that service of the notice is mandatory means as a matter of law that the commencement of proceedings is also mandatory.

145. The Court of Appeal for England and Wales, in *Legal Services Commission v. Rasool* [2008] EWCA Civ 154, 1 WLR 2711, considered at para. 29 the distinction between a case where a cause of action for debt accrued only when the sum was ascertained and one where:

> "the process of ascertainment of the amount […] is a mere procedural requirement, not an inherent element of the cause of action itself."

146. The court was construing the relevant legal aid Regulations for the purposes of an argument that the defendant was not liable to pay to the plaintiff the costs of an action where a legal aid certificate had been revoked under the Regulations. On a determination of the question of whether the claim was statute-barred under the relevant legislation, the court considered whether time began to run from the date of revocation of the legal aid certificate or the date when the costs were ascertained or measured. The court held that actual taxation or assessment was not a necessary precondition to the commencement of the proceedings or the running of time and distinguished between those circumstances and the circumstances which prevailed in *Swansea City Council v. Glass* [1992] QB 844 where the claim by a local authority which had carried out works to the defendant's property after the defendant had failed to carry out those works following a notice to do so, and it was held that the cause of action accrued on the completion of the works.

147. Taylor L.J. at p. 852 said the following:

> "[…] a cause of action may well accrue before, for procedural reasons, the plaintiff can bring proceedings. Where a cause of action arises from statute, the question as to what is merely procedural and what is an inherent element in the cause of action is one of construction."

148. The notice that is to be served before the commencement of proceedings for the recovery of a waste levy requires a demand for

payment, and I consider that the provisions of Art 9(1) of the Regulations do require that the notice specify the amount of the levy to which the notice relates. This is apparent from the fact that Art 9(2) fixes a period of four weeks for payment, and because the notice mandates the payment to be made. The ascertainment of the amount must be made before the notice is served.

149. However, it is not always the case that the amount must be ascertained. That the nature of the statutory regime is crucial is clear from the judgment in *Hillingdon LBC v. ARC Limited (No.1)* [1999] Ch 139 where the Court of Appeal for England and Wales accepted that the cause of action accrued on the entry upon the land and not on the determination of the amount of compensation that was to be payable as result of the entry. Nourse L.J., at p. 157, explained the matter as follows:

> "it is established by authority that a cause of action for a sum recoverable by virtue of an enactment 'accrues' notwithstanding that it remains to be quantified and, further, that the quantification may have to be made by a tribunal other than a court of law."

150. It seems also to me that on a plain reading of the statute the obligation to pay arises only on the service of a notice, and that the notice must identify the amount to be levied. Art 9(1) of the Regulations provides in its terms that the notice shall "require" payment by the person to whom the notice is directed. It is this notice that creates the obligation to pay, and time commences to accrue at service.

151. Counsel for the defendant makes the not unreasonable argument that a local authority could be faulted for failing to serve a notice under Art 9(1) for many years after the activity complained of. It is argued that in those circumstances the Oireachtas intended that service be effected upon the happening of the alleged unlawful activity. I cannot agree with that proposition. There is ample jurisdiction to strike out proceedings for delay, and that is especially so in the case where it could be argued that a defendant has suffered prejudice on account of a delay whether excusable or not. Indeed, that precise jurisdiction is invoked by the defendant as an alternative argument in the present case. A local authority that delayed many years after the occurrence of an alleged unlawful waste activity would be met with an application to dismiss the claim on the grounds of delay, and a very late notice in those circumstances might not be actionable.

152. In summary, time does not run until the obligation to pay has crystallised by the service of notice. I am of the view that time begins to run at the date of service of the notice, albeit that proceedings may not issue until the four-week period has expired. Until that time the quantum of the levy has not been assessed, and no statutory obligation can be said to exist. It is not the event of depositing material which determines the running of time, but on a plain reading of the legislation time begins to run when the notice is served. The claim is not barred by statute.

Strike out for delay?

153. The defendant argues that the claim is to be struck out for delay and relies on the well-established authoritative and recent jurisprudence. I do not consider that there is post commencement delay in the sense explained in *O'Domhnaill v. Merrick* [1984] 1 IR 151, or *Toal v. Duignan (No. 1)* [1991] ILRM 135. The plaintiff served the notice in June 2008, and the proceedings did not issue for four further years. The defendant has not established any basis in which I might consider that it is unfair to ask him to defend the case after a long lapse of time. The factor that most influences me in my consideration of this point is that the defendant continued to engage with Cork County Council regarding the lands, and the evidence of the defendant in his replying affidavit in the summary proceedings is based entirely on documentary proofs and written expert reports.

154. Insofar as any argument might be made by the defendant that interest ought not be chargeable on the unpaid levy on account of delay, the plaintiff's agreement not to seek the statutory interest pursuant to Art 14 of the Regulations of 2002 deals fully with that argument.

155. With regard to the test established in *Primor plc v. Stokes Kennedy Crowley* [1996] 2 IR 459, to quote the recent *dicta* of Irvine J. in *Flynn v. Minister for Justice* [2017] IECA 178 restating at para. 19 the summary laid down by Barrett J in the High Court judgment [2015] IEHC 672, there has been no impediment that might impair "the ability of the court to find out what really happened". I am not satisfied that justice has been put to hazard.

156. Any post commencement delay was caused by a multiplicity of factors, not least of which was that after the summary proceedings were commenced and a motion for judgment issued in the normal way, Birmingham J. refused to grant summary judgment and remitted the matter to plenary hearing. That process was to the benefit of the defendant, as he succeeded in persuading Birmingham J. of the correctness of his position.

157. Further delay after the matter was remitted to plenary hearing cannot be blamed on the plaintiff.

Estoppel or acquiescence

158. The defendant also pleads that the plaintiff is estopped from maintaining the claim and relies on principles of estoppel founded in contract law including *Dublin Corporation v. McGrath* [1978] ILRM 208. No sustainable argument has been made in my view that the principles which have evolved regarding the waiver of contractual rights or the plea of estoppel arising from an alleged representation operate in the statutory context in which this claim is brought.

159. In *Dublin Corporation v. McGrath*, a representation made by a planning inspector to a developer that a proposed development was an exempted structure was held not to be binding on the planning authority as the inspector had no power to determine the planning status of the development. This approach is consistent with the Supreme Court decision in In *Re Green Dale Building Company Limited* [1977] 1 IR 256 where Henchy J. considered that the donee of a statutory power could not extend his powers by creating an estoppel, and relied on the *dicta* of Lord Greene M.R. in *Minister of Agriculture and* Fisheries v. Hulkin (Unreported, cited in Minister of Agriculture and Fisheries v Matthews [1950] 1 KB 148, at p. 154).

160. The defendant relies also on legitimate expectation and the leading judgment in the Supreme Court in *Glencar Exploration v. Mayo County Council (No.2)* [2002] 1 IR 84. At pp. 162 to 163, Fennelly J. identified the ingredients of a successful defence or claim based on legitimate expectation as requiring:

> (a) a statement by the adoption of a position "amounting to a promise or representation";
>
> (b) a person or group has "acted on the faith of the representation";
>
> (c) the representation or adoption of the position must be such "as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust,

licence the public authority to resile from it" .

161. Mr. O'Driscoll relies on a conversation he had with the National Roads Authority ("the NRA") during the construction of the N25 roadway, and a recommendation said to have been made by officials of the NRA regarding the means by which he could remediate what he argues was an increased risk of flooding of his lands following the construction. That flooding is the subject matter of other plenary proceedings. I am not satisfied that a third party, albeit a third party with statutory powers, could make a representation which could bind the local authority its dealing with the waste levy.

162. The issuing of the waste licence is not in my view a representation. It is a licence to do something which would otherwise be unauthorised, but the licence was not unconditional, and it could not be said on any plain reading of the licence that Mr. O'Driscoll could reasonably rely on the licence as giving him power to do something which expressly is conditional on the happening of other events. The fact that the defendant has a waste licence does not on any reading of the licence itself authorise him to operate the facility in the way that he did.

163. I reject this ground of defence.

Conclusion
164. For these reasons I am satisfied that the defendant has not made out a defence and that the plaintiff is entitled to judgment in the amount claimed.