[2023] IEHC 137

THE HIGH COURT

[2008 No. 56 SP]

BROWNFIELD RESTORATION IRELAND LIMITED

PLAINTIFF

AND

WICKLOW COUNTY COUNCIL

DEFENDANT

AND

THE ENVIRONMENTAL PROTECTION AGENCY AND THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE

NOTICE PARTIES

(No. 8)

JUDGMENT of Humphreys J. delivered on the 21st day of March, 2023

1. As noted in previous judgments, the controversy with which we are now concerned began forty-four years ago as a result of illegal dumping on a site in Whitestown, County Wicklow. This is the fifteenth decision in the matter, the previous ones being as follows:

(i). In *Wicklow County Council v. O'Reilly (No. 1)* [2006] IEHC 265, [2006] 2 JIC 0803 (Unreported, High Court, Clarke J., 8th February, 2006), the court made orders as to the appropriate defendants in waste enforcement proceedings brought by the council.

(ii). In *Wicklow County Council v. O'Reilly (No. 2)* [2006] IEHC 273, [2006] 3 I.R. 623, [2006] 9 JIC 0801 the court declined to stay the proceedings pending prosecutions arising from the illegal dumping.

(iii). In *Wicklow County Council v. O'Reilly (No. 3)* [2007] IEHC 71, [2007] 3 JIC 0203 (Unreported, High Court, Clarke J., 2nd March, 2007), the court directed the trial of a preliminary issue regarding the liability of a director.

(iv). In *Wicklow County Council v. O'Reilly (No. 4)* [2010] IEHC 464, [2010] 12 JIC 0705 (Unreported, High Court, O'Keeffe J., 7th December, 2010), the court refused a mistrial application although it decided that the council had not made proper discovery.

(v). In *Wicklow County Council v. O'Reilly (No. 5)* (*Ex tempore*, Not circulated, O'Keeffe J., 20th December, 2011), after 23 days of hearing, the court decided to adjourn the remediation proceedings on the council's application, pending proposed remediation actions by the council. The proceedings so derailed never effectively restarted but were instead replaced by the present proceedings, which were waste enforcement proceedings brought by the landowner against the council, partly on the basis that the remediation actions carried out were inadequate or inappropriate.

(vi). In *Brownfield Restoration Ireland Ltd v. Wicklow County Council (No. 1)* [2017] IEHC 310, [2017] 4 JIC 2604 (Unreported, High Court, 26th April, 2017) (noted Joseph Richardson BL (2017) 24(2) *I.P.E.L.J.* 56), I granted the council's application for the modular trial of the proceedings.

(vii). In *Brownfield Restoration Ireland Ltd v. Wicklow County Council (No. 2)* [2017] IEHC 397, [2017] 6 JIC 1201 (Unreported, High Court, 12th May, 2017), I decided a number of preliminary issues including the rejection of certain allegations of misconduct against the council.

(viii). In *Brownfield Restoration Ireland Ltd v. Wicklow County Council (No. 3)* [2017] IEHC 456, [2017] 7 JIC 0706 (Unreported, High Court, 7th July, 2017) (noted Estelle Feldman (2017) *A. Rev. Ir. Law* 95), I decided in principle to order remediation.

(ix). In *Brownfield Restoration Ireland Ltd v. Wicklow County Council (No. 4)* [2017] IEHC 486, [2017] 7 JIC 1907 (Unreported, High Court, 19th July, 2017), I made the formal order directing remediation and set out indicative timelines for fifteen steps with a definite final date for completion of full remediation and handover to the landowner. That long-stop date was in effect 19th January, 2024.

(x). In *Brownfield Restoration Ireland Ltd v. Wicklow County Council (No. 5)* [2017] IEHC 487, [2017] 7 JIC 1908 (Unreported, High Court, 19th July, 2017), I decided on the question of costs.

(xi). In *Wicklow County Council v. O'Reilly* [2019] IECA 257, [2019] 10 JIC 1607 (Unreported, Court of Appeal, Costello J., 16th October, 2019), the Court of Appeal dismissed an appeal regarding the timeline allowed for remediation. It partly allowed an appeal regarding costs.

(xii). In *Brownfield Restoration Ireland Ltd v. Wicklow County Council* [2021] IESCDET 71, (Supreme Court Determination, Not yet circulated, 21st June, 2021, O'Donnell, McMenamin and Woulfe JJ.), the Supreme Court refused leave to appeal in relation to the timeline issue.

(xiii). In *Brownfield Restoration Ireland Ltd v. Wicklow County Council (No. 6)*

[2021] IEHC 599, [2021] 9 JIC 3007 (Unreported, High Court, 30th September, 2021), I directed that (without prejudice to the long-stop date) the council was to complete the biodiversity surveys required for the preparation of a Natura Impact Statement by 17th December, 2021; and that the matter be listed for mention to deal with the subsequent steps.

(xiv). In *Brownfield Restoration Ireland Ltd v Wicklow County Council (No. 7)* [2022] IEHC 662, [2022] 12 JIC 0201 (Unreported, High Court, 2nd December, 2022), I determined the agenda for the hearing on the remediation plan approval, and directed that any approval would be without prejudice to the previous orders.

2. The formal order for remediation of the site was made in the No. 4 judgment, and indicative timetables were set out for fifteen steps in that regard, with a final long-stop date which was, as noted above, in effect 19 January, 2024. The current step is step 9 which is as follows: "[p]resentation 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).".

3. The draft remediation plan is now before the court. The indicative date for completion of step nine is 29th March 2023, in the context where step 8 was concluded on 29th September 2022.

Matters to be addressed

4. The primary issue at this stage is approval or otherwise of the council's draft remediation plan. While that can be stated simply, it gives rise to a range of potential options for the court including:

(i) acceptance of the plan in whole or in part;
(ii) rejection of the plan in whole or in part;
(iii) amendment of the plan in some specified respect;
(iv) adjournment of a decision in whole or in part pending further steps being taken; or
(v) some combination of the foregoing.

5. Once one starts to get into it, these sub-options represent a dizzying array of possibilities, and in that regard I have been guided not just by the previous decisions and the principles set out in those decisions (including the need for environmental protection, the precautionary principle, and the principle that the polluter pays), but also by the need for an approach that might be likely in the long run to minimise the level of disagreement.

6. I have had particular regard to the judgment of Costello J. in these proceedings in the Court of Appeal, noted above, in which she said *inter alia*:

(i). "The history of the dumping on the site, complaints in relation to the existence of the site and attempts to close the site and remediate it, were described by the trial judge as a saga; they could equally be described as Kafkaesque. For the purposes of this judgment, it is not necessary to set out all the depressing and shocking events in exhaustive detail." (para 4);

(ii). "It appears that the council was aware of this shocking breach of the Waste Management Act – or at least ought to have been – from, at a conservative estimate, the mid-1990s. Despite this, it was not until 2001 that the council claimed publicly that it had "discovered" the dump and closed it." (para. 5);

(iii). "These proceedings would not be particularly remarkable save for the astounding fact that, for more than two decades, the council itself had dumped vast amounts of waste at the illegal landfill. Furthermore, there had been complaints to the council from 1989 onwards concerning the enormous illegal dump operated openly on the site. In the circumstances, it is absolutely astonishing and shocking that in 2001 the council claimed to have "discovered" the illegal dumping, and then proceeded in 2005 to sue twelve other parties, and to seek to compel them to remediate the site, while declining to accept any responsibility itself for the situation." (para. 11);

(iv). "The cases had been adjourned generally while the council was making further discovery. Once this was completed the cases were listed to recommence before O'Keeffe J. on the 24th January, 2012. On the resumed date the council applied to adjourn the proceedings generally, with liberty to re-enter, as the council proposed to carry out remediation works itself pursuant to s. 56 of the [Waste Management Act] 1996. The High Court was assured that within a year it would deliver a remediated site, probably enhanced in value, with a windfall to Brownfield. Both the High Court and Brownfield believed that the council would proceed in accordance with its position to date: that all of the waste and contaminated soil was required to be removed in order properly to remediate the site and that this was the course of action it was proposing to follow. On this basis, the High Court acceded the application to adjourn the proceedings with liberty to re-enter."

(para. 16);

(v). "In fact, the council had decided, once it was the party responsible for remediation, that "as much as possible [of the waste] will be allowed to remain on site"." (para. 17);

(vi). "The trial judge referred to this as a "bonsai" remediation and a "botched" remediation. He concluded emphatically at the end of his third judgment that, by reason both of the waste which had been dumped on the site and of the botched efforts by the council to remediate the site, it was necessary to remove all waste and contaminated, or potentially contaminated, soil from the site in order to comply with the requirements of environmental protection law." (para. 18);

(vii). "Notwithstanding the fact that the council's remediation exercise left 93% of the waste on the site, in 2015 the council told the Department of the Environment that it had successfully remediated the site and Ireland then informed the European Commission on the 26th June, 2015 that all waste had been removed from the site. The council cannot have believed that this was the case. Tests conducted in 2015 revealed that the waste on-site was polluting the ground water which flowed into the nearby River Slaney. Notwithstanding this fact, the council took no steps to correct the information furnished by Ireland to the Commission." (para. 19);

(viii). "The council emphatically lost the case and the court directed the council to remediate the site in full." (para. 21);

(ix). "When one examines each of the steps set out in [para. 24] of the [No. 4] judgment, it appears to me that all of them are either necessary, or appropriate, in the circumstances of the huge illegal dump which requires remediation. Some of the steps are unavoidable. The council is obliged to comply with the requirements of public procurement law. Even in urgent situations, the timelines for complying with the requirements of public procurement are truncated, not dispensed with. The trial judge was required to balance practicalities with risk. There is a risk of leachate discharging into the ground water during the process of remediating the material, and there is a requirement to cover the waste every night. There may be other risks which need to be identified and addressed in the preparation of the remediation plan. It is appropriate and sensible that the council and Brownfield have the opportunity to consult with the EPA and statutory consultees in relation to the plan. Given the previous history of this site, and in particular the distrust arising from the "botched" remediation by the council and the denial by the council that any further remediation is required, this is wholly appropriate in my judgment." (para. 24); and

(x). "It is, therefore, simplistic to say that the trial judge on the one hand rejected the requirement of the council to conduct an EIA [Environmental Impact Assessment] or AA [Appropriate Assessment], but on the other hand failed to "strip out" the time for conducting an EIA or AA when he fixed the overall time for compliance with his order. Time is required for consultation and preparation of a plan, whether or not the council conducts a quasi EIA or AA. The steps set out by the trial judge, including a resumed hearing and order of the court receiving or approving the plan as the case may be, involves steps 1-12 of the order and in my judgment, were necessary. Certainly, I do not accept that the trial judge was in error in directing any of the steps listed. The times suggested for each step are indicative, not binding and they seem to me to be reasonably tight for a public authority to comply with." (para. 25).

7. A specific six-point agenda was set out in the No. 7 judgment which is as follows:

(i). The extent to which the draft final remediation plan produced by Wicklow County Council ("WCC") is compliant with and/or is required to comply with the Order of the High Court and the Court of Appeal.

(ii). The extent to which the methodology employed by WCC is appropriate and relevant to the location, characteristics, classification and identification of waste relative to the existing information and to the judgment, findings and Order of the High Court and the Court of Appeal.

(iii). The extent to which the draft final remediation plan complies with and/or is required to comply with the requirements of the Habitats Directive and the Environmental Impact Assessment Directive in light of the findings and the Order of the High Court and the Court of Appeal

(iv). The procedures, activities and methodology which are not authorised by the Order of the High Court and the extent to which these may be incorporated into the draft final remediation plan and the Court judgment and Order varied by reference to such.

(v). The extent to which timescales relative to the Order of the High Court and

the Court of Appeal have been breached, and the consequences which flow from a failure to comply with the Court Order and the approach to be adopted in respect of the assessment of damages that flow to the Applicant on foot of such default.

(vi). The extent to which the technical approach adopted by WCC is consistent with the findings of the Court as set out in the various judgments and Order and the extent to which WCC can rely on statutory requirements to avoid and/or delay compliance with the Order of the Court.

8. I will deal with these points in turn although perhaps not in the precise order set out in that agenda.

Whether the council's methodology was appropriate (agenda items 2, 4 and 5)

9. It seems to me that broadly speaking the council's methodology is closely related to the content of their proposals. It is probably more a matter of presentation rather than anything else as to whether to deal with those points separately or together, because both headings relate to the fundamental point as to the extent to which the council is departing from the existing court orders, and whether this is justifiable. Accordingly, I think the methodology is best addressed under the later heading of the content of the council's proposal.

Compliance with the EIA and Habitats Directives (agenda item 3)

10. As regards EIA, I held in the No. 4 judgment that EIA was not required for the urgent removal of waste although it could be required for post-removal works such as landscaping.

11. Given the order that is going to be made, as set out below, it is not necessary to make a final decision at this point on EIA as regards post-removal works, but I will require the council to present proposals to the court on an EIA process when that point arrives.

12. As regards appropriate assessment under the Habitats Directive, I made a similar decision in the No. 4 judgment to the effect that this was not required for urgent removal of waste. But matters have changed since then by virtue of the issue of a statutory request by the Minister for Tourism, Culture, Arts, Gaeltacht, Sports and Media under reg. 42(19) of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011), to the effect that the council should conduct an appropriate assessment. That has now been done in the sense that a Natura Impact Statement was prepared by the council's consultants, and this was accepted and set out by the council in the draft plan (see in particular volume 1). That effectively constitutes the appropriate assessment. The conclusion proposed is that the competent authority can be satisfied of no impact on a European site. The "competent authority" in this context, unusually, means the court, given that pursuant to the existing orders the court has the function of approving the plan.

13. It seems to me that insofar as the works under the draft plan are going to be approved in the present order, I can conclude to the required standard, having regard to the appropriate assessment conducted by the council, and for the reasons set out in the Natura Impact Statement and in section 1.13 of the draft plan, that the project, either individually or in combination with other plans or projects, will not have a significant effect on, or adversely affect the integrity of, any European site, in view of the site's conservation objectives.

14. However, in the event that any further proposed change in either the plan or ecological conditions creates the possibility of such an impact, the council will be required to revert to the court for further directions.

Liability of the council following remediation (agenda item 6)

15. Section 58(1)(a)(ii) of the 1996 Act states that the power of the court in dealing with waste enforcement proceedings includes a power to make an order "to mitigate or remedy any effects of the said holding, recovery or disposal of waste in a specified manner and within a specified period."

16. Subsection (7) provides: "Without prejudice to any powers of the court concerned to enforce an order under subsection (1), a person who fails to comply with an order under that subsection shall be guilty of an offence." The other powers of the court to enforce a remediation order are therefore expressly recognised by that introductory phrase.

17. While the council argued for a restrictive interpretation of these provisions, it seems to me that such argument yet again falls into the category of an argument which, while being advanced here by the council-as-polluter, would be rightly rejected by the council-as-enforcer.

18. The plaintiff is naturally concerned that if at some future point the remediation turns out to be defective, complex questions could arise as to liability in that context. So in order to make the position as clear and as enforceable as possible, it seems to me that the appropriate order is to direct that the requirement on the council to remediate the effects of the holding, recovery or disposal of waste in accordance with the orders of the court will be ongoing until such remediation is fully effected. Hence, if following the transfer of the lands to the plaintiff, it turns out that pre-existing waste was not actually fully removed, the council will remain liable in that regard.

19. Such an approach is appropriate in the context of the broad and non-prescriptive scope of the section, the policy of the legislation, the European law principles to which I have

already referred, the interests of legal certainty and the aim of ensuring the full remediation of the site. Furthermore, this approach would assist the council in its capacity as waste law enforcer. I consider that such an order is well within the scope of s. 58 of the 1996 Act having regard to sub-s. (1)(a) and by necessary implication from sub-s. (7).

20. This will be subject to a liberty to apply, for example if the council were to decide to seek to arrange matters so that the transfer of the lands to the plaintiff will no longer arise, which is a possibility I refer to further below.

Consistency and compliance with the existing orders of the court (agenda item 1)

21. As regards consistency with existing orders, I will consider the specific sub-issues raised before turning to the areas of significant departure from those orders.

Made ground

22. The plaintiff complains that the draft plan does not involve the removal of all "made ground", which it equates with waste. Unfortunately, that equation is a misunderstanding.

23. "Made ground" would seem to be a relatively recent term in the sense that it does not appear to be included in the *New Shorter Oxford English Dictionary* (Oxford, Clarendon Press 1993).

24. Consistently with other public domain material, the draft plan (Vol. 1 p. 11 n. 1) defines "made ground" as "areas where natural and undisturbed soils have been raised or replaced by the deposition of other materials such as other natural soils, quarried materials or other materials i.e., soil that has been subjected to anthropogenic intervention".

25. Hence, made ground cannot be equated with waste as such and therefore does not need to be removed unless it constitutes waste or contaminated or potentially contaminated soil.

Disposal of waste

26. The plaintiff raised issues about the difficulty of disposing of waste removed from the site, but overall that seems to me to be a bit of a counsel of despair. Any problems in that regard will have to be addressed as they arise. The broad approach in the remediation plan is reasonable, namely disposing of waste in existing licensed facilities.

Timelines

27. As noted above we are currently at step 9 in the timeline set out in the No. 4 judgment. The remaining timelines are:

> "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)."

28. Thus, from the present point in time — judgment on the draft remediation plan to completion — the timeline would be 50 months (four years and two months). One can contrast that with what is proposed by the council in the current draft plan which is as follows, although one must first add the 3 month period for preparation of tender documentation:

> "Works Procurement
>
> The following procurement timeline is estimated
>
> - Issue of Tender Documentation – Restricted Procedure
> - Tender Response Period Contractors 2 months
> - Tender Assessment Period 10 Weeks
> - Tender Standstill Period 2 Weeks
>
> The procurement process is to be completed with 4 months of the completion of the detailed design.
>
> 1.14.1 Works Programme
>
> The following timeline for works is estimated based on the final draft remediation plan prepared:
>
> - Pre-Contractual Negotiations and Mobilisation Period 2 Month
> - Site Mobilisation and Set Up 2 Month
> - Enabling Works 2 Months
> - Zone C Works 15 Months
> - Zone A & B Works 12 Months
>
> Landscaping Works 3 Months
>
> Validation Period – [council requests 12 months rather than six months]."

29. This amounts to a total of 56 months, which is not a very significant difference and is accounted for by the suggested extension of the validation period of 12 months that was informed by a submission by the EPA in the light of the precautionary principle.

30. Subject to the other matters dealt with in this judgment, and the completion of earlier steps in a timely manner, it seems to me that the timeline proposed by the council including the extension of the validation period is acceptable. However I emphasise that this does not exclude the possibility of further works as set out below.

31. In order to ensure that we are all working off a consistent numbering of the steps required, I can number the new steps consistently with the existing order as follows:

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).

Equates to Issue of Tender Documentation – Restricted Procedure. I might note here that I will leave it to the council as to whether to include provision for its proposed works after the removal of material in Areas A to C, but if it does, the contractual enforceability of such provision must be made conditional on a further order of the court being made, about which there can be no guarantees or representations at this stage.

Plus Tender Response Period Contractors 2 months.

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

To be sub-divided into:

Step 12A - Tender Assessment Period - 10 Weeks (**2.5 months**)

Step 12B - Tender Standstill Period - 2 Weeks (**0.5 months**).

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

To be sub-divided into:

Step 13A - Pre-Contractual Negotiations and Mobilisation Period - 2 Months

Step 13B - Site Mobilisation and Set Up - 2 Months

Step 13C - Enabling Works - 2 Months

Step 13D - Zone C Works - 15 Months (less time estimated for post-removal works)

Step 13E - Zone A & B Works - 12 Months (less time estimated for post-removal works)

Step 13F – Council to revert to court for decision on post-removal works, such as in-filling and landscaping (within 40 month pre-monitoring timescale estimated in the draft plan).

Step 13G – carrying out of post-removal works if so approved (within 40 month pre- monitoring timescale estimated in the draft plan). [council estimated 3 months for this step]

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

To be extended to **12 months** (subject to review if the foregoing steps are not completed in a timely manner).

15. Handover of possession of site to plaintiff – forthwith on completion of the time period allowed for the limited monitoring in step (14).

32. One point I should now mention is that by incorporating the timelines into the present order, their status is now raised from being merely indicative to being required deadlines (up to the expiry of the overall long-stop deadline). In the event that the council is not planning to comply with any particular deadline or sub-deadline it would need to make application under the liberty to apply provision, and the pros and cons of agreeing to that can be debated at that point.

Finished profile and final use of the lands

33. The draft plan states as follows in relation to the proposed finished profile:

"Proposed Finished Profile

In designing the proposed finish profile in line with the proposed after use, several design related issues have been considered, including:

- minimisation of earthwork requirements post removal of all waste from the site
- creation of permanent wetland habitat and protection of existing habitats
- retention of the existing derelict house and disused shed
- protection and retention of the existing ESB network infrastructure
- improvement to the site entrance and access road to aid materials movement

The proposed finished profile will ensure that the existing floodplain area is maintained and enhanced. The enhancement of the floodplain area is in

keeping with the estimated floodplain extents of the site prior to the activities undertaken at the site."

34. In relation to protection of existing habitats, the council has already undertaken works to protect the habitat on site for the smooth newt. Those works as well as the question of the final use of the site are addressed by the council as follows:

> "All works were designed and supervised by a suitably qualified ecologist. Works include:
>
> 1. Amphibian Fencing
> 2. Amphibian Translocation Pond
> 3. Amphibian Hibernaculum
> 4. Invasive Species Management (to commence in Q4 2022)
> 5. Seed Saving and Harvesting Zone C (to commence in Q2 2023)
>
> The Minister's concerns were two-fold. First, the importation and placement of sub-soil and topsoil to reprofile the site for use as low intensity agricultural would require works likely to have significant effects on the Slaney River Valley SAC [Special Area of Conservation], as these works were likely to mobilise considerable volumes of silt and would alter drainage patterns on site, leading to the destruction of otter habitat (wetlands). Secondly, an increased recognition of the potential of quarries to contribute to national and local biodiversity objectives has led to more being rehabilitated to nature conservation. The Minister's submission noted that "[t]he existing habitats, species and structural heterogeneity of this site should inform the remediation plan".

35. The concluding paragraph of the Minister's submission stated that "[c]onsidering the likelihood of significance effects on the Slaney River Valley SAC outlined above, and taking account of the developing habitats on the site, the Department advises that the aim to restore the site to low intensity agriculture use should be reconsidered".

36. As regards the final use, what the council is proposing is that the land be rendered as "calcareous and neutral grassland with what is described in the final draft remediation plan as a mosaic of scrub and wetland habitats ultimately providing lands suitable for low intensity grazing and the conservation of existing habitats and species of biodiversity value in accordance with submission from the NPWS [National Parks and Wildlife Service] and in a manner which the NIS has confirmed will not affected the integrity of the Slaney River SAC."

37. It seems to me that the council's proposals in relation to the finished profile including the amphibian fencing, translocation pond and construction of hibernacula are entirely appropriate, as is the final land use for low intensity grazing and conservation of existing habitats and species, in the light of *inter alia* the submissions received from statutory bodies, the potential effects on the adjacent European site, the need to protect habitats on site and the precautionary principle.

Potential departures from process required by existing orders

38. Both sides in this case have, over the years, been very well served by their legal representatives, and in arguing for something less than what was envisaged by the existing judgments and orders, the council spent a great deal of energy on submissions referring to issues such as the separation of powers, comity between the court and public authorities, Article 28A of the Constitution, the expenditure of substantial public monies on remediation and the fact that other public bodies have agreed to the draft plan. While the temptation to succumb to this mellifluous message is palpable, there are some fairly major problems with it.

39. The first stumbling-block is that it is relatively incidental that the polluter in this case happens to be a public authority. To that extent, Article 28A, the separation of powers, and similar points, are of limited relevance. The court's general approach to remediation by a polluter should not be significantly diluted merely because the person against whom a remediation order is made happens to be a public law entity.

40. The second and even more major problem with the council's submission is that it ignores or at least minimises the immense amount of effort already given to the case (noted in the judgment of Costello J. referred to above): the lengthy trial, and the series of judgments and orders, including the appeal to the Court of Appeal and subsequently the further leapfrog application to the Supreme Court. It always seems to be Groundhog Day at Whitestown.

41. Indeed the fact that the plaintiff has not put in a replying affidavit at this stage is not particularly crucial, in a context where the court has already received a vast amount of evidence including oral evidence and has conducted a lengthy trial in relation to the matters at issue.

42. One factor should be mentioned now as coming into focus. Given the choice between "good enough" remediation and "full" remediation, I directed full remediation, as noted above in the extracts of Costello J.'s judgment. There were a number of reasons for that, but one really crucial reason was that in the end of the day there would be a hand- over to the plaintiff. This was not a case where the lands would remain in the possession of the defendant on an ongoing basis. The problem thereby created is that generally it is not lawful to transfer waste other than under ministerial regulations or to an appropriate person as

defined by statute – see s. 32(2) to (5) of the 1996 Act. Breach of this prohibition is an offence – see s. 32(6).

43. Hence, since the whole plan is meant to culminate in the transfer of the lands (and anything thereon) back to the plaintiff, if remediation was merely "good enough" but not "full", a breach of the Act could take place.

44. The fundamental problem with the council's approach and methodology since the order in the No. 4 judgment is that it has essentially sought to treat the site like a freshly-discovered dump and to apply business-as-usual EPA criteria such as standard Waste Acceptance Criteria (WAC) levels. This airbrushes away the entire process already engaged in by the court by way of volumes of affidavits, oral evidence, cross-examination and evaluation of all of that. On the contrary, the starting point has to be the existing suite of orders.

45. It follows that if the council really want to revisit the issue of whether standard EPA criteria could apply (as opposed to total removal of everything potentially contaminated), they will have to come up with a way to avoid the need to transfer the site to the plaintiff at the end of the day. On the face of things, that should be something well within the capacity of the parties to agree if they are so minded, but if it can't be done, and subject to a possible report to the contrary by an agreed expert, the council may just have to live with the existing orders. I emphasise that hypothetically agreeing to acquire title would not be a complete home run – the existing orders will remain subject to any variation, there will still have to be remediation, and the plaintiff could still prosecute the proceedings (or, since we are purely dealing with hypotheticals, if it decided not to do so, some other public interest actor could seek to be substituted as plaintiff or bring their own proceedings) or take any other proceedings of whatever nature it may think fit arising from any failure to achieve full remediation by the long-stop date; but such a development would introduce a degree of flexibility that might allow an outcome more along the lines of what the council is now contending for.

46. There are three related elements of the plan in respect of which I am not currently satisfied that compliance with existing orders will be entirely assured. These relate to Areas A to C, Areas D to G, and in-filling.

Areas A to C

47. It is broadly common case that the primary concentrations of waste on site are in zones A to C. And the council indeed says it intends to remove all waste, contaminated soil and potentially contaminated soil from these areas. That is obviously welcome insofar as it goes. The question mark is whether the volume of material that will be removed from these areas is sufficient to assure those objectives. Given that s. 58 of the 1996 Act gives the court a degree of scope to require mitigation and remedying to be carried out "in a specified manner", it seems to me that the appropriate way to ensure and guarantee independently that the volume of waste and soil removed from zones A to C is sufficient to achieve the objectives of the order is to approve the removal proposals in relation to Zones A to C insofar as they go, subject to a requirement that not later than the completion of the proposals as so approved, the council must do one or other of the following:

(i). obtain the agreement of the plaintiff that the orders have been complied with in such zones;

(ii). neutralise the difficulty latent in the potential transfer by acquiring the land; or

(iii). involve an independent person with expertise in this area, to be agreed by the parties, so that the question can be reviewed in the light of such person's report. In default of such agreement the person would be appointed by the court. In the light of the polluter pays principle, the cost of the independent expert should be borne by the council rather than shared between the parties.

48. Such a procedure would not prevent the approval of the existing plan insofar as it relates to the removal of waste and soil from zones A to C.

Areas D to G

49. The second problem is the council's proposal not to remove anything from areas D to G. In that regard it seems to me the plaintiff is correct to say that the council has adopted an incorrect approach of risk assessment, which would be appropriate for the approach from scratch being taken to a newly-discovered illegal dump but is not appropriate where what is in issue is not risk assessment but the enforcement of a court order that has been made after a lengthy trial. It seems to me that the council's methodology in this regard is flawed and has failed to adequately take into account the existing orders.

50. The residual risk assessment is set out in volume 8 appendix 34. The broad approach is set out as follows in s. 1.1:

> "Introduction
>
> To define the remediation action that is required, a comprehensive site investigation (SI) was carried out in two phases – Phase 1 – Zones D, E and F and Phase 2- Zones A, B, C and G between 2018 and December 2019. Findings are presented in Volume 3 – Sections 3 and 4. The SI and the revised remediation plan conclude that Zones

D, E and F (DEF) are largely free of waste. As part of the consultation process for the draft remediation plan dated 30 November 2020, the EPA requested that a residual risk assessment to downgradient receptors, notably the Carrigower River, is required to determine if materials in Zones D, E & F can be left in place or used for regrading in their immediate locality as part of the site remediation plan."

51. Notable is the conclusion that zones D, E and F are "largely" free of waste. Self-evidently this implies that such zones are not entirely free of waste, which unfortunately for the council, is the end result which it has already been ordered to achieve.

52. Calling the scientific evidence which was before the court at the time of the making of the order for remediation "historical" data is an impermissible rhetorical move. None of the waste that was on site when the order was made has been removed. So, there is nothing historical about the data which were before the court when the order for remediation was made. Indeed, I specifically rejected the concept that there should be further site testing and investigation. The legal system cannot tolerate a situation where the default setting is that every year is year zero as far as the Whitestown dump is concerned, every time the site is reviewed it must be treated in effect as if it was newly- discovered, everything that has happened to date is "historical", and in effect "more research is needed" before anything can be done.

53. The existing order has therefore simply not been adequately taken on board by the risk assessment approach. At p. 45 of Appendix 34, the risk assessment states specifically as follows:

> "A risk assessment has been prepared to validate the proposed materials screening values for materials encountered within Zones D, E & F. It is concluded that:
>
> - Zones DEF comprises natural sediments and spoil from past quarrying activity.
> - very minor C&D [construction and demolition]-type waste was found in 5 of 49 no. trial pits, mainly near/along the site access track.
> - extensive spatial soil sampling within Zones D, E & F confirms that soil contamination is largely absent
> - soil metals data from Zones DEF are broadly consistent with published naturally occurring metal concentrations in Irish soils. Groundwater quality in monitoring well MW27 (Zone E) is influenced by nitrogen, as follows:
> - Consistently elevated nitrate concentrations (23.3 to 46.5 mg/l as NO3) are lower than the groundwater quality standard of 50 mg/l as NO3 but higher than what would be expected as a natural background concentration.
> - Low but persistent detections of ammoniacal nitrogen (0.013 and 0.032 mg/l as NH4) in MW27 are below screening criteria but nonetheless point to the presence of a nitrogen source.
> - Background wells installed at offsite locations to the west have been dry since they were drilled in 2019 and do not offer data as to actual natural background values in the area surrounding the site."

54. Again, the reference to soil contamination been "largely" absent implies that it is not entirely absent. There seems to be a willingness to identify Construction and Demolition (C&D) type waste with quarrying activity, but the evidence at the main hearing was that C&D type waste was very much part of the council's dumping activity. In such circumstances I would certainly not be prepared to assume that C&D material can effectively be ignored. All such waste is covered by the existing remediation order. The upshot in relation to areas D to G (even bearing in mind the council's claim not to have found evidence of waste in area G) is that I would not be prepared at this time to approve the plan insofar as it proposes not to remove anything from these zones. This issue will have to be revisited depending on whether the council can work something out with the plaintiff, or if not, by way of involving an independent person. Short of that, we are looking at full compliance with all existing orders. So a similar caveat will apply to any proposals as will apply to Areas A to C.

In-filling

55. The question of in-filling material was also of concern to the plaintiff given that the existing judgments and orders require inert in-filling material to be sourced elsewhere. If it can be definitively established that there is some suitable soil on site that is inert and not in any way contaminated by waste, I would in principle be prepared to permit that to be used as in-filling material, but it seems to me that would be premature pending a final decision in relation to the foregoing matters. So again at this time I would not be in a position to approve the proposals regarding in-filling based on the existing material before the court.

Order

56. In the light of the foregoing, the order will be as follows:

Overall matters

(i). As directed in the No. 7 judgment, the present orders are without prejudice to:

(a). the existing orders in the case;

(b). in particular, the long-stop deadline of 19th January, 2024, so that, for the avoidance of doubt, if timelines are provided in the

implementation plan after that date, they cannot be taken in any way to prejudice the existing long-stop deadline; and

(c). the entitlement of either party to make any application it thinks appropriate if the site remains unremediated as of 20th January, 2024 or thereafter.

(ii). Insofar as the works under the draft plan are approved in the present order, it is concluded to the required standard, having regard to the appropriate assessment conducted by the defendant, and for the reasons set out in the Natura Impact Statement, and section 1.13 of the draft plan, that the project, either individually or in combination with other plans or projects, will not have a significant effect on or adversely affect the integrity of any European site in view of the site's conservation objectives.

(iii). The requirement on the defendant to remediate the effects of the holding recovery or disposal of waste in accordance with the orders of the court will be ongoing until such remediation is fully effected.

Approval of plan in part

(iv). The timeline for remediation will be amended in the manner set out in the judgment including the overall extension of the time for subsequent steps from 50 to 56 months, addition of sub-deadlines and the extension of the monitoring period from 6 to 12 months (all without prejudice to the long-stop date). The individual timelines for steps following this judgment will now be binding deadlines, not indicative ones, subject to the overall envelope of the long-stop date.

(v). Without prejudice to the possibility of more extensive removal being ordered in due course, and subject to the terms of this order, the draft remediation plan is approved insofar as it relates to the removal of waste and contaminated or potentially contaminated soil in Zones A to C.

(vi). The ecological works already carried out and proposed to be carried out by the defendant are approved, which will include any further works necessary to protect flora or fauna that may be directed by a suitably qualified ecologist in the course of the remediation process, including *inter alia* measures relating to:

(a). amphibian fencing;
(b). amphibian translocation pond;
(c). amphibian hibernacula;
(d). invasive species management; and
(e). seed saving and harvesting in Zone C.

(vii). The defendant's proposals regarding the finished profile and future use of the lands are approved as set out in the judgment, and in particular the manner of remediation will be such that the final use of the land will be as calcareous and neutral grassland with a mosaic of scrub and wetland habitats ultimately providing lands suitable for low intensity grazing and the conservation of existing habitats and species of biodiversity value in accordance with the submission from the NPWS and in a manner which will not affect the integrity of the Slaney River SAC.

Matters to be addressed at a later stage

(viii). Not later than the completion of the implementation of the plan as so approved, the defendant must do one or other of the following:

(a). obtain the agreement of the plaintiff that the orders have been complied with in such zones;
(b). obviate the need for transfer of the land to the plaintiff by acquiring the land; or
(c). involve an independent person with expertise in this area, to be agreed by the parties, so that the question of compliance can be reviewed in the light of such person's report. In default of such agreement the person would be appointed by the court. In the light of the polluter pays principle, the cost of the independent expert should be borne by the defendant rather than shared between the parties.

(ix). Not later than the completion of the implementation of the plan as so approved, the defendant must revert to the court with proposals for:

(a). the completion of remediation including:
1. whether any further removal is required in areas A to C;
2. whether any removal is required in areas D to G; and

(b). post-removal in-filling and landscaping; and the carrying out of an EIA process regarding any works other than removal of waste and contaminated or potentially contaminated soil.

(x). If the defendant intends at that point not to remove any material from areas D to G it must do one or other of the following:

(a). obtain the agreement of the plaintiff to such an approach;
(b). obviate the need for transfer of the land to the plaintiff by acquiring the land; or
(c). involve an independent person with expertise in this area, to be agreed by the parties, so that the question can be reviewed in the light of such person's report. In default of such agreement the person would be appointed by the court. In the light of the polluter pays principle, the cost of the independent expert should be borne by the defendant rather than shared between the parties.

(xi). Pending the foregoing, the proposals regarding non-removal of material from Zones D to G and regarding post-removal works such as in-filling are adjourned pending further application by the defendant in due course.

(xii). In the event that any further proposed change in either the plan or ecological conditions creates the possibility of an effect on a European site, the Defendant will be required to revert to the court for further directions in relation to AA.

Procedural and general matters

(xiii). If no submissions to the contrary regarding costs are received by the List Registrar within 7 days of the date of this judgment, the foregoing order will be perfected at that point with costs being reserved.

(xiv). If such submissions are so received, the other party will have 7 days for a replying submission and the matter will be listed thereafter on a date to be notified by the List Registrar for determination.

(xv). There will be liberty to apply in accordance with the terms of the judgment.

(xvi). The matter will be listed for mention on 2nd October, 2023, to confirm timely implementation of the directions as of that point.