Neutral Citation Number: [2010] IEHC 464

THE HIGH COURT

2005 89 SP

IN THE MATTER OF THE WASTE MANAGEMENT ACTS 1996 TO 2003

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 58 OF THE WASTE MANAGEMENT ACT 1996 (AS AMENDED BY SECTION 49 OF THE PROTECTION OF THE ENVIRONMENT ACT 2003)

AND IN THE MATTER OF AN APPLICATION BY WICKLOW COUNTY COUNCIL

BETWEEN

WICKLOW COUNTY COUNCIL

PLAINTIFF

AND

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

DEFENDANTS

JUDGMENT of Mr. Justice O'Keeffe delivered on the 7th day of December, 2010

1. This is an application on behalf of the second ("Brownfield") and eighth named defendants (sometimes referred to as Dean Waste) for an order as against the plaintiff pursuant (i) to the inherent jurisdiction of the court declaring the trial herein to date a mistrial or (ii) an order dismissing the plaintiff's claim for failure to make discovery, pursuant to orders for discovery of 7th December, 2007 and 23rd July, 2009.

Background

2. Before I deal with these motions, I should say something of the proceedings. This action commenced before me on 7th July, 2009. Mr. James Connolly, S.C. in his opening, informed the court that the plaintiff is a statutory authority and has obligations for the County of Wicklow in relation to the Waste Management legislation. The proceedings seek relief under s. 58(1)(a) of the Waste Management Act 1996 (as amended) as against the defendants for holding or disposing of waste in a manner that causes environmental pollution.

3. He stated that the background was that in November 2001, it was discovered by representatives of Wicklow County Council that unauthorised dumping was being operated at Whitestown quarry in Co. Wicklow and that the activities being carried on would normally require a licence under s. 39 of the Waste Management Act, that is a waste licence and no such licence existed. Wicklow County Council put in train technical investigations of the site and these investigations culminated in the issue of these proceedings by way of a special summons on 4th March, 2005. Section 58, he said, effectively required a party against whom an order was made under the section to carry out remedial work in order to ensure appropriate protection of the environment. The lands with which the court is dealing, he said, in 2003, were owned by Mr. O'Reilly who represents himself in these proceedings. They are situated in the flood plain of the Carrigower River, that is a tributary of the River Slaney and they are also beside the N81, the public highway between Blessington and Baltinglass, that is in the western part of Co. Wicklow. The site measures 8.65 hectares, he said, and there is a worked out quarry on the site of 630,000sq m. Mr. O'Reilly's former dwelling house is on the site excluding which the nearest dwelling house on the landfill site was about 200m away. He said, Mr. O'Reilly originally owned the lands but in September 2003, he sold the lands to Brownfield.

4. The proceedings have been discontinued against Mr. Ray Stokes and Anne Stokes, who were directors of Brownfield. The proceedings were also discontinued against Mr. Louis Moriarty and Eileen Moriarty who are directors of Swalcliffe Limited, that is Dublin Waste, and also proceedings were discontinued against William John Campbell, Anthony Dean and Una Dean, the tenth, eleventh and twelfth named defendants. They were directors of Dean Waste, the eighth named defendant. The main parties before the court are Mr. O'Reilly, Brownfield, Swalcliffe and Dean Waste.

5. He said an Environmental Protection Agency licence was obtained in relation to the development of the site by Brownfield after they acquired the property in 2003. Dean Waste were substituted into the proceedings for A1 Environmental Management Limited. Dublin Waste and Dean Waste are waste companies who operate waste transfer stations in the Dublin area.

6. He claimed that Brownfield had the full notice of the problems in relation to the O'Reilly site at the time when they acquired it from Mr. O'Reilly. There had been a certain amount of media attention and Brownfield knew that there were problems with the site when they acquired it from Mr. O'Reilly. Wicklow County Council submitted that Brownfield were/are holders of waste and as such are liable as holders.

7. He said at various stages prior to Brownfield coming onto the site, Mr. O'Reilly had caused or permitted waste to be deposited on the site over a period of years as had Dean Waste and Dublin Waste. He said the contract of the sale of the O'Reilly lands was 16th June, 2003 and they actually took possession on 16th September, 2003.

8. The amount of the claim for compensation by the plaintiff was dependent upon whether the remediation was done on the site or offsite.

9. Dean Waste, whilst accepting that it dumped materials at Whitestown, denied it caused environmental pollution. Both defendants claimed that the dumping by the plaintiff's employees of waste on Mr. O'Reilly's lands was illegal and caused pollution. The plaintiff

claimed any materials deposited/dumped by it were inert in nature.

10. The court was informed by Mr. Connolly that there were some 50 affidavits and as the procedure was by way of special summons, it was agreed that the affidavits were evidence in the case subject to cross examination of the various deponents.

11. The first four days of hearing were comprised of opening the affidavit exhibits and some primary legal submissions. The affidavits and exhibits comprised over 1750 pages. The hearing of this case was subject to case management directions by Clarke J. from December 2007.

12. The County Manager, Mr. Edward Sheehy, swore the grounding affidavit.

13. The plaintiff's principal independent witness who was engaged on behalf of the Council from November 2001 to investigate the unauthorised dumping of waste that had taken place in the Whitestown Quarry was Mr. Donal O'Laoire. Mr. O'Laoire, together with his partner, Ronald Russell formed the firm of O'Laoire Russell Associates, Environmental Management Consultants. He had almost 20 years experience as an Environmental Consultant, both in Ireland and internationally. He had particular expertise and experience in hazardous waste management. He had been consulted in relation to industrial environmental management projects. His firm, he said, was retained by the plaintiff in the context of the plaintiff's discovery of a number of illegal landfills in the west Wicklow area in the mid-late 2001. He said his task was to detect illegal landfills and to co-ordinate the environmental risk assessment and investigation of materials found on illegal landfills. They were to have regard to the possibility that some of the material uncovered in illegal landfills could be classified as hazardous waste. Advice was also given on appropriate methods of remediation to ensure the reduction or minimisation of environmental pollution caused as a result of unauthorised dumping in illegal landfills. His firm was first retained in relation to the lands at Whitestown on 21st November, 2001. The site he said was best described as a worked out sand and gravel site from in or about 1979 onwards. He was appointed an authorised person under the Waste Management Acts 1996 – 2003 by the plaintiff.

Outline of 2009 Hearing

14. On day 5 (14th July, 2009) the cross examination of Mr. Sheehy commenced. He was County Manager since 3rd January, 2001. He described how he had made a statement to An Garda Síochána in January 2002 alleging illegal dumping at Whitestown. The criminal investigation was conducted by the National Bureau of Criminal Investigation (NBCI). This involved the taking of statements from the Council's employees. He had read some of these statements of the employees who acknowledged that there had been dumping of material by the Council on Mr. O'Reilly's lands but he said at no time did they detect the presence of anything significant other than inert material clay and similar materials.

15. The first time he became aware that the Council might have deposited material on Mr. O'Reilly's lands was on 5th December, 2001 when he received a letter from Mr. O'Reilly's solicitor and he passed the complaint to the gardaí. He said, Mr. O'Laoire was retained as an independent expert advisor to investigate the illegal dumping which had taken place on a number of sites and to produce reports to the County Council. Such investigations might also involve criminal proceedings and civil proceedings to have the sites remediated. From the time he made the complaint to the gardaí, Mr. O'Laoire was also working with the gardaí in general terms. He described how Mr. O'Laoire had been asked to submit a proposal to the Council on how the site at Whitestown could be remediated. At that stage, Mr. O'Laoire prepared a proposal dated 5th April, 2002, addressed to Mr. Sheehy which included a company, Carrigower Technologies Limited, which he, Mr. O'Laoire, had set up in order to carry out remediation works.

16. Mr. Sheehy said that following a consideration of the document of 5th April, 2002, he had a meeting with Mr. O'Laoire, the date of which he cannot recall nor did he take a note of the meeting. In relation to the proposal that the remediation would be carried out by Mr. O'Laoire and paid for by the plaintiff (which would seek to recover the cost from the polluters) he said that he made it clear to Mr. O'Laoire that any involvement by Mr. O'Laoire with such proposal to remediate had to end. The reasons for this were explained to Mr. O'Laoire which was that his proposal to remediate the site on a commercial basis whilst continuing to be engaged by the Council as its independent expert exposed him to potential conflict of interest, the plaintiff did not have the financial resources to fund the proposal and such proposal would involve tendering under national and European public procurement procedures. He said that as far as he was concerned that was the end of the matter although it appeared that Mr. O'Laoire did not heed his direction.

17. He was cross examined on behalf of the second and eighth named defendants on the fifth and sixth day of the hearing (14-15th July, 2009). This cross examination took place in the absence from court of Mr. O'Laoire as it had been agreed by the parties that he should not be in court during the evidence of Mr. Sheehy, nor should he be privy to any of this evidence.

18. On day 7, the cross examination of Mr. O'Laoire commenced. Towards the end of his cross examination on that date it emerged he had received a copy of the transcript in respect of the previous day.

19. On day 8 (17th July), his cross examination continued. It was disclosed to the court that the law department of the plaintiff had circulated on the 15th July, 2009, at 9.14am electronic copies of the first five days of the hearing to a group of people, including Mr. O'Laoire (and also Mr. Sheehy and Mr. Philip Duffy, Senior Executive Officer in the Water and Environmental section). It was stated that it was done inadvertently. Mr. O'Laoire stated that he had not read the transcripts but had forwarded the email and electronic transcripts to his solicitor who, in turn, passed them to counsel who communicated with and so informed Mr. Ian Finlay S.C. (counsel for Brownfield). As this communication was contrary to what had been agreed between the parties, much of the day's hearing was taken up on exploring the extent of this issue. Another witness was also cross examined.

20. Day 9 (21st July), continued with the cross examination of Mr. O'Laoire. It was disclosed to the court that Mr. Duffy had spoken on the phone to Mr. O'Laoire on day 6 about personal and other matters. This communication was potentially contrary to the agreement that had been made by counsel concerning Mr. O'Laoire's presence in the court during the evidence of Mr. Sheehy. Mr. Duffy swore an affidavit in which he stated that Mr. O'Laoire had discussed with him matters that had arisen in court, in particular, the instruction that had been given by Mr. Sheehy (according to his evidence) whereby he told Mr. O'Laoire not to have any further involvement in the remediation project company which he was recommending to the plaintiff for remediation purposes. During this conversation, Mr. Duffy disclosed to Mr. O'Laoire part of the evidence of Mr. Sheehy in relation to such issue namely the potential conflict of interest and procurement issues. He claimed that he had not mentioned these issues in the context of Mr. Sheehy's cross examination. In response, Mr. O'Laoire said he did not recall such discussion.

21. On day 10 (22nd July), there was the cross examination of Ms. Sonia Dean, Arthur Dean and the further cross examination of Mr. O'Laoire continued.

22. On day 11 (23rd July), Mr. O'Laoire was cross examined in particular in relation to discovery. He said he had no input into providing the information in relation to the Discovery Order. In relation to the 2007 Discovery Order (which I set out later) in respect of which

an affidavit was sworn on behalf of the plaintiff on the 19th February, 2008, he did not recall any contact being made with him by the plaintiff or its lawyers in connection with its preparation. He had no recollection of being asked for his own documents in relation to the discovery.

23. On the 23rd July, 2009, the court made an order directing that the plaintiff make further and better discovery not later than 9.30am on Tuesday the 28th July, 2009, in terms of the Order made by the court on the 7th December, 2007, and to produce all documents in the power, possession or procurement in relation to the remediation and proposals for remediation of the lands at Whitestown, the subject matter of these proceedings, but not to include any or all documents in the power, possession or procurement of Mr. Donal O'Laoire ("the 2009 Order"). The affidavit of discovery was to be made by Phillip Duffy.

24. On that date the court directed Mr. O'Laoire to produce documents. Substantial quantities of documents were received from Mr. O'Laoire on foot of the court's direction and also from the plaintiff on foot of the 2009 Order.

25. On day 12 (24th July), Mr. O'Laoire produced three folders of documents which had not been discovered before. There were also documents on the hard drive of his computer which had not been discovered. It was agreed that these were to be discovered in the presence of the representatives from Brownfield and Dean Waste.

26. On day 13 (28th July) an affidavit of Mr. Duffy was submitted. In addition, five volumes of documentation were produced by Mr. O'Laoire and were additional to the three volumes of documentation produced by him the previous week. He confirmed that he did not have an opportunity to review all the documentation in case he may wish to claim privilege in relation to communications between the plaintiff and the law department concerning the preparation and presentation of the case. Since 2001, all his records were primarily electronic but there may have been other files. It was agreed that Mr. O'Laoire would furnish a list of the documents on which he was claiming privilege if an issue arose and could be dealt with in September at a vacation sitting. Any issue in relation to privilege or production of additional documents was to be dealt with by the 24th August by the plaintiff. The plaintiff had until 31st August to make an application for discovery, if required.

27. The hearing resumed on the 20th October, 2009, and was adjourned until the 22nd October (day 15).

28. On day 15 (22nd October) Mr. O'Laoire and Mr. Duffy were cross examined in the context of discovery and their earlier evidence in relation to the motion to strike out the claim for failure to make discovery. Mr. O'Laoire confirmed that he had not been asked by the plaintiffs for documents for discovery. An email of 20th September, 2008, from Mr. O'Laoire to Mr. Duffy was put to him. (This email had become available from the plaintiff's supplemental discovery of 750 documents.) The email was in response to an affidavit and notice of motion on behalf of Dean Waste which had come from A&L Goodbody to Mr. Duffy and which Mr. Duffy forwarded to Mr. O'Laoire. He replied to Mr. Duffy attaching three documents which he said may have already been discovered. He said that he hoped that the letter to Mr. Sheehy, (a copy which he enclosed) had been included previously in discovery. This was a copy of the letter of 5th April, 2002. There was also a further letter by Mr. O'Laoire to Mr. Duffy of the same date which again referred to his letter of 5th April, 2002 to Mr. Sheehy and questioning whether this had already been discovered. This email was entitled *"Documents relating to the proposal of Carrigower Technologies/Environmental Remediation Limited to remediate the Whitestown site as requested"*. It appears that there was no response to such communications from Mr. Duffy. He was also shown another letter of 21st September, 2008, written by him to Mr. Duffy. It deals with the question of discovery relating to the Carrigower initiative. He said he provided concept papers to the National Bureau of Criminal Investigation as part of their investigation into the Stokes allegations. He said Stokes may have some of these documents and he needed expert advice on this. He said that at the time he was undertaking an investigation of the site on behalf of the Gardaí at a criminal level and he was also the subject of an investigation relating to allegations made against him. He was looking for advice from Mr. Duffy in the context of discovery (it has to be noted that the date of these emails post-dated the 2007 Discovery Order). He did not recall specific discussions about discovery with the plaintiff. He then stated he would have been involved in the process of discovery from late 2007.

29. In cross examination, Mr. Duffy said that he did not ask Mr. O'Laoire to produce documentation for discovery but he would have discussed the question of discovery with him. He did not believe the plaintiff asked Mr. O'Laoire formally to produce documentation for the purpose of discovery or compliance with discovery. He said there were face to face discussions and telephone conversations over a lengthy period and Mr. Duffy said he was quite sure discovery came up in such discussions. His discussions from 2002 onwards covered many aspects and all aspects of the investigation and litigation. In relation to the two emails which had been referred to, there may have been other communications about discovery. He said that in relation to the request from Mr. O'Laoire as to whether he needed expert advice on the matters raised by Dean Waste, he did not believe that he obtained any expert advice for Mr. O'Laoire but that he got some legal advice himself in relation to the matter. When asked why he did not request Mr. O'Laoire to produce documents in his role as an authorised officer, he said it was his understanding that his reports satisfied the requirements in relation to discovery. He said he suspected he would have taken legal advice from the legal department, most likely the law agent but that he did not have formal written advice or anything like that in relation to discovery of Mr. O'Laoire's working papers. In relation to his view that documents in the possession of Mr. O'Laoire were not relevant to the obligations on discovery, he said he could not specifically say that the law agent would have told him that such documents were not discoverable. He could not recall any specific advice from the law agent and he did not have any written advice on the issue (of looking to Mr. O'Laoire for documents in his possession for the purpose of discovery). In relation to asking Mr. Sheehy for his diaries for the relevant periods, he had no recollection but then stated that he probably did not.

30. He would not have considered documents in the possession of Mr. O'Laoire to be relevant to the order save for the final report of Mr. O'Laoire which was discovered. He said he had no explanation as to why the document of 5th April, 2002 was not included in the original discovery. He assumed, as Mr. O'Laoire did, that it had been. He said that the omission of the document of 5th April, 2002 was a mistake but was not deliberate. He did not believe he checked its position in September 2008 as he would have assumed that it had been discovered previously. At the time (September 2008) he was looking for documentation in the context of the request for discovery in relation to Carrigower Technologies and that initiative. He subsequently took the view that any documentation in relation to Carrigower was outside the scope of the order.

31. On day 16 (27th October) Mr. Connolly referred to the ongoing process of the plaintiff meeting its discovery obligations to provide documents. Various diaries were being made available. Mr. Finlay referred to the inspection of Mr. O'Laoire's computer records which involved retrieving material from his hard disk including material which may have been deleted. Mr. Finlay made submissions in relation to the non-discovery of the letter of 5th April, 2002 sent by Mr. O'Laoire to Mr. Sheehy, which remained in the possession of Mr. Sheehy. He submitted that the subsequent but belated release of that information to Brownfield under the Freedom of Information request did not detract from the failure to make such discovery. He submitted that the obligation to make such discovery was reinforced by such letter being sent by Mr. O'Laoire to Mr. Duffy and the emails which took place between the two in relation to discovery in September 2008. He submitted that Brownfield to a significant degree, in its defence of the plaintiff's case, depended upon discovery as it was a stranger to the events that had occurred on the site including dumping by the plaintiff, the plaintiff's

knowledge of that dumping and the manner in which the plaintiff dealt with the issue and in its dealing with the investigations by the Gardaí and with the Gardaí through Mr. O'Laoire. He submitted that the 750 additional discovered documents were produced as a result of the motion to strike out the plaintiff's claim because of non-discovery. He referred to the fact that on 6th July, 2009, Brownfield had issued a notice of motion seeking an order that the plaintiff make further and better discovery of all documents falling under the categories covered by the 2007 order and specifically requiring the plaintiff to make discovery of all documents in written, printed, photographic or electronic form. A further affidavit was sworn by Mr. Duffy on 9th July in which he stated that the exhaustive process undertaken by the plaintiff and by him in respect of discovery confirmed to him that the plaintiff did not have additional documentation in its possession coming within the ambit of the original discovery order. In reliance of this, Brownfield agreed to have the motion struck out with costs to be reserved. Mr. Finlay said following the evidence from Mr. O'Laoire and Mr. Duffy (on day 15), the production of the 750 additional documents and the evidence of the emails of 20th and 21st September, 2008 a decision was made to apply for a direction for mistrial, in the light of the evidence then available and additional to the application to strike out the plaintiff's claim for failure to make discovery.

Discovery History and Freedom of Information Application

32. It is convenient at this stage to set out the order for discovery of 7th December, 2007 and also information in relation to the Freedom of Information application as these matters are referred to later in the judgment. On 7th December, 2007, the High Court made an order pursuant to the notice of motion of the first named defendant. The order was in the following terms:-

> *"IT IS ORDERED that the Plaintiff not later than the 18th day of January 2008 do make discovery on oath to all of the Defendants herein of the documents within the following categories of documents which are or have been in their power possession procurement or control and in particular without prejudice to the generality of the foregoing to include all documents records and receipts in relation to the following:-*
>
> > *1. All documentation records and/or receipts (including diaries of relevant personnel) relevant to the deposition whether by way of dumping or otherwise of materials on or under the lands the subject matter of the proceedings herein by or on behalf of Wicklow County Council its servants agents or contractors from the 1st day of January 1978 to the 31st day of December 2001 inclusive*
> >
> > *2. All documents records and/or receipts (including diaries of relevant personnel) relating to payments made by or on behalf of Wicklow County Council to the First Named Defendant or the calculation of monies due by Wicklow County Council to the First Named Defendant herein relating to the deposition whether by way of dumping or otherwise of material on or under the lands the subject matter of the proceedings herein by or on behalf of Wicklow County Council its servants agents or contractors from the 1st day of January 1978 to 31st day of December 2001 inclusive*
> >
> > *3. All documents records and/or receipts (including diaries of relevant personnel) relating to the following*
> >
> > > *(a) the clearance of the site which has been an official halting site at Carrigower Dunlavan in the County of Wicklow and in particular the disposal of the materials therefrom between the years 1999 and 2000 inclusive*
> > >
> > > *(b) the disposal of waste material (including in particular the tarmacadam arising from the resurfacing roadworks at Dunlavan) between the years 1999 and 2000 inclusive*
> > >
> > > *(c) the disposal of waste materials including in particular tarmacadam and/or asphalt from repair and/or improvement works carried out on the N81 between 1990 and 2000 inclusive and in the County of Wicklow by or on behalf of Wicklow County Council in relation to the disposal of the materials therefrom*
> >
> > *4. All documentation memoranda correspondence reports and investigations relating to the lands the subject matter of the proceedings herein on the source nature and extent of material deposited on or under same as well as all enquiries or investigations and the results of same in relation to the identity of the persons or individuals who were responsible either directly or indirectly for such deposits or dumping*
> >
> > *5. All disciplinary proceedings or internal enquiries carried out by Wicklow County Council in relation to the involvement of its servants or agents in the dumping or depositing of material or on under the lands in question"*

33. The initial application pursuant to the Freedom of Information Act was made by Brownfield on the 31st January, 2006, and related to the involvement of the plaintiff with the lands at Whitestown Lower and any use made in relation to such lands. The initial response of 28th February, 2006, was that the matter was deemed to be sub-judice because of the proceedings. A formal decision to refuse the request is dated the 28th February, 2006. On the 27th March, 2006, Brownfield sought a review of that decision. There was further correspondence between the parties on the 4th April, 2006, 25th May, 2006, and ultimately no response was given. A review was requested on the 5th September, 2006, from the Office of the Information Commissioner in the light of the failure of the plaintiff to reconsider the application. On the 10th October, 2006, the plaintiff issued a decision to uphold the original decision to refuse access to the release of records. A further review was sought from the Office of the Information Commissioner dated the 13th December, 2006. Further correspondence took place between the 6th September, 2007 and 5th March, 2008 resulting in a decision from the plaintiff on 30th June, 2008, to release specific records of the plaintiff. A further letter was sent by the plaintiff on the 13th February, 2009, indicating a range of documents which it was prepared to release (save for specific exceptions). On foot on this decision the document of the 5th April, 2002, by Mr. O'Laoire to Mr. Sheehy was made available to Brownfield.

34. Two motions were issued on 1st April, 2008 and 16th April, 2008 by Brownfield seeking specific documents and also seeking access to documents in respect of which claims of privilege had been maintained (a similar motion was brought on behalf of the other defendants). Following assurances from the plaintiff that all documentation had been discovered and the provision of certain documentation upon which privilege was initially claimed but then waived, Brownfield's motion was struck out with costs reserved.

35. The Court was informed by counsel on behalf of the eighth named defendant that on the 10th June, 2009, a letter had been written to Mr. O'Laoire and Mr. Russell seeking non-party discovery under O. 31, r. 29. This letter was written, counsel stated, as a result of the materials that became available when the eighth named defendant sought non-party discovery against Mr. McGreal and also against the Environmental Protection Agency. On the 16th June, 2009, the law agent for the plaintiff wrote a letter to the eighth named defendant's solicitor stating that it was inappropriate that non-party discovery should be requested of consultants who had been engaged by the plaintiff and that they carried out their functions under the instructions and on behalf of the plaintiff.

36. On 6th July, 2009, a further motion was brought seeking not only specific documentation but also an order that the plaintiff may make further and better discovery, including any document in written, printed, photographic or electronic form and any item from which information may be derived. As a result of an affidavit sworn by Mr. Duffy on 9th July, 2009, in which he said that the plaintiff did not have any additional documentation in its possession within the ambit of the 2007 order it was agreed that the motion would be struck out with costs reserved.

37. Details of the 2009 discovery order have been set out earlier.

Evidence of the defendants on Motions
38. Mr. David O'Dea, Solicitor on behalf of Brownfield stated that since the proceedings issued in 2005, the plaintiff had sworn seven affidavits in relation to discovery. Mr. Duffy on behalf of the plaintiff had sworn that the plaintiff had made complete discovery. He said that during the course of the cross examination of Mr. O'Laoire (on the eleventh day of the trial) it became clear that the plaintiff had failed to discover all relevant documentation. It was stated that in answer to specific question Mr. O'Laoire had never been consulted in relation to discovery by the plaintiff.

39. By that time on the 23rd July, 2009, the two principal witnesses, namely Mr. Sheehy and Mr. O'Laoire, had been extensively cross examined by the defendants. It was contended that the defendants had been unaware of this fact and as a result, an application was made in relation to further discovery.

40. It was contended that Mr. O'Laoire's documents were at all times within the procurement of the plaintiff and were relevant and were never disclosed by the plaintiff. It was contended that this failure of the plaintiff is all the more culpable given that Mr. O'Laoire is its principal witness and had been involved in all major investigations in respect of the lands, the unlawful dumping on the lands and the person responsible for coordinating the analysis of the waste deposited on the lands and he had been responsible for identifying persons who might be liable for any such unlawful dumping.

41. He claimed that there was a fundamental failure on the part of the plaintiff to comply with the terms of the 2007 Order insofar as Mr. O'Laoire's documentation in respect of which it is claimed was within the procurement of the plaintiff, was not discovered. He contended that the subsequent disclosure by Mr. O'Laoire of a range of documents indicated that he had material documents which were clearly captured by the 2007 Order and, in particular, paras. 1 and 4 thereof.

42. It was contended that Brownfield was entitled to rely on the averments made on behalf of the plaintiff as to the completeness of the plaintiff's discovery. It was contended that the cross examination of Mr. Sheehy was conducted in the absence of such documents and that a substantial part of the cross examination of Mr. O'Laoire was also carried out in the absence of relevant documents. The cross examination of both witnesses continued until the 23rd July, 2009, when it became clear, arising out of the question raised, that there were documents which had not been disclosed. However, it is claimed that the absence of these documents has had a very serious and prejudicial effect on Brownfield in the cross examination of these witnesses and also in the defence of the proceedings.

43. Specifically it was claimed that the plaintiff withheld critical documents which were available to it and which it knew it was required to discover. This related, *inter alia*, to Garda statements of the plaintiff's employees arising from the criminal investigation carried out by the Gardaí in respect of dumping on the site. It was claimed that the statements were in the possession of the plaintiff and were not discovered and that Mr. Sheehy had indicated in his evidence that the statements had not been retained by the plaintiff.

44. It was claimed that as a result of the proceedings on the 22nd October, 2009, the plaintiff had not still made complete discovery of all relevant documentation. In particular, it was stated that the plaintiff now accepts that documents in the nature of the County Manager's diaries which may have been relevant documentation had not been discovered or requested from the relevant person, and that such was a breach of the order.

45. The 2009 Order resulted in a further affidavit of discovery sworn by Mr. Duffy on the 28th July, 2009. Twelve lever folders of documents were subsequently furnished.

46. An I.T. exercise was undertaken to identify and retrieve all relevant emails, resulting in 750 additional documents being received by the defendant on 19th October, 2009, the day before the trial was to resume.

47. Extensive correspondence in relation to the ongoing discovery obligations took place in August, September and early October, 2009.

48. Ms. Alison Fanagan, Solicitor on behalf of the eighth named defendant reiterated the stance taken by her client namely that it had always admitted, including at interviews with the gardaí that it was responsible for placing certain materials on the lands in question which were small in quantity and was deposited during a very limited period in early 1998. It was inert construction and demolition waste that could not and did not cause pollution. She said two features had arisen during the cross examination of Mr. O'Laoire:-

> (a) The failure of Mr. O'Laoire to detect the role of the plaintiff in dumping material on the lands; and
>
> (b) The failure of Mr. O'Laoire to reveal his private commercial interest in the remediation of the lands, which interest was capable of and did in fact interfere with the impartial and disinterested performance by Mr. O'Laoire of his functions.

49. Whilst three boxes of discovery documents were furnished by the plaintiff in mid August 2009, she complained that the late delivery of documents in October shortly before the trial was to commence had presented difficulties to the defendants and substantial resources of time had to be allocated.

Affidavits of Mr. Duffy
50. Mr. Duffy swore affidavits on 16th, 20th and 26th October. The first two affidavits were filed in connection with the original motions brought to strike out the plaintiff's claim for failure to make discovery.

51. In relation to the affidavit made pursuant to the 2007 order, he said that Part A Fifth Schedule listed documents in respect of which privilege was claimed. As a result of the challenge by the solicitors for Brownfield such privilege was waived by letter dated 17th November, 2008.

52. He said that the plaintiff limited its searches for discovery to its own records and that Mr. O'Laoire's investigation report was subject to legal professional privilege, based on the plaintiff's interpretation of the discovery order. He would have discussed discovery in a general way with Mr. O'Laoire.

53. He said that on 19th September, 2008, he instructed his colleague to send a copy to Mr. O'Laoire of the affidavit of Sam Steers and notice of motion in which they were seeking further and better discovery. The particular reason for sending the notice was clear as it sought all documents between the plaintiff and Mr. O'Laoire in relation to the proposal by Carrigower Technologies to remediate the Whitestown site.

54. He said that he was advised and believed there was no onus on the plaintiff to search out information relating to the allegations surrounding Mr. O'Laoire's proposals to remediate the site on a commercial basis.

55. In relation to the issue of the employee statements to the Gardaí being furnished to the plaintiff, he said they were given to the plaintiff and had formed part of the NBCI file on the criminal investigation into the Whitestown site. He understood that they were to be kept on a confidential basis and as such were kept by Liam Fitzpatrick, separate from the Whitestown file under lock and key. He did not consider them, the plaintiff's documents. He said that he did not request the permission of NBCI to disclose the documents. There was no deliberate suppression of the statements. He said these documents were obtained by Dean Waste as part of the disclosure process in the criminal proceedings.

56. He said he never sought to deceive or to deliberately keep material from the court. He was never requested by any other official of the plaintiff or any person to suppress or withhold documentation from the court. If materials were not discovered under the discovery order which should have been discovered, it was as a result of inadvertence oversight or a misinterpretation of the scope of the plaintiff's obligations under the original discovery order and not an attempt to mislead the court or the defendants in the defence of the proceedings.

57. He accepted that the document of 5th April, 2002, fell within the ambit of para. 4 of the order for discovery and he accepted responsibility for not discovering it.

58. He said that he swore an affidavit in response to the Dean Waste motion on 30th September, 2008, in which he contended that the remediation proposal put forward by Carrigower Technologies did not come within the ambit of the order of 7th December, 2007 which related to dumping on the lands. He said Dean Waste did not proceed with the motion.

59. He referred to emailed documents which were produced as a result of an examination of logs obtained following exercises carried out by outside companies on behalf of the plaintiff called Topsec Technology and Pixalert. These searches involved an examination of some 267 computer hard drives in the plaintiff's possession to identify any relevant files from a figure in excess of 267 potentially relevant files and the search was narrowed down to some 8,500 files which might have been relevant. From this number and with further searches the number was reduced to the 750 documents which were discovered. He said they were also asked to provide the log records to the defendants. He stated of the documents discovered on foot of the affidavit of 28th July, 2009, a substantial volume related to the additional category of discovery which was the subject matter of the order of 23rd July, 2009 which specifically referred to documents relating to the remediation and proposals for the remediation of the Whitestown lands. It was claimed that this was a new category of discovery which had not been previously ordered. The exercise of identifying deleted documents, it was agreed would be postponed pending the outcome of this application.

60. Mr. Duffy contended that this application must be considered in the context of the public law nature of the proceedings which are brought by the plaintiff in the public interest.

61. Mr. Duffy considered the 2007 order did not extend to Mr. O'Laoire (and others) as they were not employees of the plaintiff but were its paid independent experts. He said that he would have discussed the position regarding discovery with Mr. O'Laoire in a general way in the sense that he was one of the plaintiff's experts in respect of the case and would have been in regular contact with him about the status of the proceedings but that was not to say that he requested him to search his own documents for relevant documentation. He said that he sent the emails of 20th and 22nd September, 2008, which contained the notice of motion and affidavit in respect of an application by the eighth named defendant for further and better discovery to Mr. O'Laoire (this was the notice of motion which referred, *inter alia*, to documents between the plaintiff and Mr. O'Laoire and any other party in relation to the proposal by Carrigower Technologies Limited to remediate the Whitestown site). This was a matter that related to Mr. O'Laoire.

62. It was, however, stated by Mr. Duffy that he did not ask Mr. O'Laoire to furnish the documents relevant to this request for discovery.

63. In relation to the existence of a memorandum from Michael Nicholson to the law agent dated 21st April, 2004, it was stated that whilst it was discovered in the affidavit of discovery, a privilege was claimed over it but that privilege was waived in July 2009. It is stated that such document had been furnished to Brownfield as part of the plaintiff's release of documentation under the Freedom of Information Act.

64. Mr. Sheehy swore an extensive affidavit detailing much of the factual history and the involvement of Mr. O'Laoire and himself in relation to Carrigower Technologies and making comments in relation to the affidavits sworn on behalf of the defendants. He denied that there was any wilful or deliberate or orchestrated attempt on the part of the plaintiff to suppress documentation (as distinct from such documentation not being produced due to mistake, inadvertence or even neglect or ineptitude).

65. He said that Waste Management Acts and the relevant European Waste Directives require a determination of the substantive issues raised in the proceedings. Aborting the proceedings would have the effect of depriving the public at large of the benefit of having the site remediated with culpable parties being made to shoulder their burden of the costs associated with such remediation.

Legal Submissions of the Defendants

66. The defendants submitted that they were entitled to a dismissal of the plaintiff's claim. They accepted there was no Irish authority which they had located on declaring a mistrial in the course of trial. They submitted it was based on the court's inherent jurisdiction. It was akin to a mistrial in a criminal case. They submitted that the ambit of the 2007 order was extensive and included documents within the power, possession or procurement of the plaintiff which included those of Mr. O'Laoire.

67. There were three grounds to the mistrial application:-

(i) The absence of proper discovery which had the effect of infecting adversely critical cross examinations of the

plaintiff's witnesses;

(ii) The action taken by the plaintiffs witnesses contrary to the parties agreement that is the telephone calls between Mr. O'Laoire and Mr. Duffy; and

(iii) The electronic transmission by the plaintiff of transcripts to Mr. O'Laoire contrary to the agreed procedures.

68. The decision not to make proper discovery had lengthened the trial, distracted the court and the participants from the real issues and impaired the ability of the defendants to conduct a focused and well prepared defence and to have an effective cross examination of Mr. Sheehy and Mr. O'Laoire. Theses were, they submitted, real and substantial prejudices suffered by the defendants.

69. In relation to the plaintiff's discovery obligations, they submitted there was no evidence as to what structure or process the plaintiff had in existence and the extent to which same had been adhered to by the plaintiff in the preparation and making of such discovery.

70. They pointed to the additional documents that had become available on discovery either from Mr. O'Laoire, or amongst the 750 documents that had then recently become available following the 2009 order.

71. In relation to the legal authorities, they relied on the decision of the High Court and Supreme Court in *Murphy v. Donohue & Ors* [1996] 1 I.R. 123; which was a case where the plaintiff sought to strike out the defence for failure to make proper discovery. They submitted that the Supreme Court judgment adopted statements of the law as set out by Johnson J. in the High Court. They also referred to the case of *Mercantile Credit Company v. Heelan* (Unreported, Supreme Court, 14th February 1995). They submitted that there was wilful default and negligence on the part of the plaintiff in the making of discovery. Whilst the Supreme Court had referred to the purpose of the rule not to punish but to facilitate the administration of justice by ensuring compliance with the orders of the court, this had to be viewed in the context not of a pre-trial situation but as in this case where the trial had been conducted for some considerable time and the cross examination of critical witnesses had taken place. They submitted the obligation to make full discovery extended to electronic documents.

72. They submitted that the plaintiff, a corporate entity could not hide behind the default of an employee in making discovery. It was open to the court to consider their actions as a conscious concealment of documents by the plaintiff e.g. the statements of the employees.

73. It was further culpable negligence they submitted by the plaintiff not to discover the document of 5th April, 2002, which Mr. Sheehy acknowledged had been kept in his office at all times and in circumstances where Mr. O'Laoire sent a copy to Mr. Duffy on 20th September, 2008, expressing the hope that it had already been discovered.

74. In relation to the defendant seeking discovery of documents from Mr. O'Laoire they referred to the plaintiff's response by letter of 16th June, 2009. They submitted that the words of the letter that the consultants had been engaged by the plaintiff and had carried out their function under the instructions and on behalf of the plaintiff was consistent with the language of agency which is central to the concept of procurement.

75. They referred to the decision of Barron J. *in Radiac Abrasives Inc. v. Prendergast & Ors* (Unreported, High Court, 13th March, 2006) where the court decided that parties in proceedings who had deliberately concealed documents in its discovery could not when it was found out be allowed merely to amend its discovery. They submitted that the trial to date had gone ahead on a fundamentally flawed and incomplete basis. The discovery process and production of documents and diaries was at the date of the hearing of the motion still going ahead.

76. They submitted that there was a corporate duty on the plaintiff to respond to the orders for discovery and their failure to do so was a form of corporate culpability. No attempt had been made by the plaintiff to suggest that the affidavits were made on the basis of independent legal advice. It was not, they submitted, a case of mere in advertence, oversight or misinterpretation of the scope of the plaintiff's obligations as was stated by Mr. Duffy.

77. They referred to the decision in *Dunnes Stores v. Irish Life Plc & Joseph O'Reilly* (2008) IEHC 114, which was a case in which *Dunnes* sought to establish that the consent of the landlords to change of use of part of the premises was unreasonably withheld. The court concluded that there was very serious failure on the part of Irish Life and Mr. O'Reilly to comply with their disclosure obligations to the court. This case, it was submitted was the only case where comparable issues arose in the course of a case in this jurisdiction.

The Plaintiffs Legal Submission

78. On behalf of the plaintiff, Ms. Butler stated that the original discovery on foot of the 2007 Order comprised some 750 documents and files. It was the subject of very extensive discovery made by the plaintiff. There were subsequently applications for further and better discovery which she said were not pursued by the defendants. She submitted that there was nothing in the documentation which would suggest that the scope of the order was sufficient to include all the personal working papers and correspondence of Mr. O'Laoire in connection with the Whitestown site. She also submitted that remediation did not fall within the terms of the original order. She said that whilst the plaintiff was not abdicating its corporate responsibility for its obligations pursuant to discovery orders and whilst accepting that it was evident from Mr. Sheehy's affidavit that he accepts that errors were made, he categorically did not accept that there was any wilful default or culpable failure on the part of the plaintiff.

79. Ms. Butler acknowledged that the plaintiff had made the following errors:-

(i) There was a failure to conduct a thorough electronic search from the outset. She said the manner in which it should have been dealt with in January 2008 was not appreciated. If it had to be done again it would be done differently. Some 750 documents were discovered on foot of the electronic searches on 16th October, 2009. She said that it was explained in the affidavits that the search was as thorough as could reasonably be done, which did not exclude the possibility of some documents being missed because of search terms. No legal advice was taken on this.

(ii) There was a failure to discover relevant entries from diaries. The diaries were now being made available to the parties. The diaries were being made available without qualification to reference to the terms of the 2007 order or the terms of the 2009 order as extended to include remediation, she stated. The diaries of the County Manager, Mr. Duffy and Mr. Nicholson were being made available. She conceded that initially the search had been to disclose diaries of employees and overseers at local office area rather than at senior level. Paragraph 4 was broad enough to encompass diaries.

(iii) The mischaracterisation of the letter of 5th April, 2002, sent by Mr. O'Laoire to the County Manager (which referred to the establishment of the company by Mr. O'Laoire in order to deal with remediation). The letter had been treated as a remediation document even though it was now accepted on behalf of the plaintiff that the first two or three pages of the letter came within the scope of para. 4 of the 2007 order. It was disclosed to Brownfield pursuant to the Freedom of Information request in January – February 2009. This disclosure, she contended was not consistent with a plaintiff who wilfully concealed relevant material or with culpable neglect so concealed.

(iv) The failure to discover copies of the garda statements of employees which had been retained on a separate file and which were discovered by Mr. Duffy in July 2009. He (Mr. Duffy) stated that, however, these documents were considered as confidential by the plaintiff having been given to the plaintiff by the gardaí who were conducting the criminal investigation. The statements had been given to Mr. Sheehy with a memorandum of the law agent dated 8th January, 2003. She referred to the County Manager's (incorrect) understanding that the statements were returned to the gardaí, the statements having been furnished to Mr. Sheehy for the purpose of making statements to the gardaí in January 2003. These statements were on a file kept by Mr. Fitzpatrick.

80. She acknowledged that the appropriate course of action that should have been adopted in the original affidavit of Mr. Duffy was to indicate the existence of the statements and to claim privilege. She said that Dean Waste had obtained copies of these documents as part of the criminal investigation and that they were then available publicly in court. It was accepted that the decision not to discover was not made as a result of legal advice being obtained by the plaintiff. However, it was accepted that these documents should have been disclosed and a claim of privilege should have been made. She said there was no wilful attempt to conceal something. She acknowledged that Mr. Sheehy, in his grounding affidavit, referred to such statements as being partly relied on. As a result of the application of the eighth named defendant, Brownfield obtained copies of the statements but not through the discovery process. She submitted Brownfield did not suffer any prejudice. They were discovered in the further and better discovery in July 2009.

81. She submitted that there was no authority for the declaration of a mistrial.

82. She submitted the right to litigate even by a party who has been in default of a court order is a fundamental right which should not be taken away from the litigant merely because the litigant had offended the court by not complying with its orders.

83. She referred to the case of *Logicrose v. Southend United Football Club* (The Times, 5 March 1998), where the court held, in respect of an application mid way through a trial which took over 50 days, that a litigant was not to be deprived of his right to a fair trial as a penalty for his contempt or his defiance of the court order unless his conduct amounted to an abuse of the process of the court which would render any proceedings unsatisfactory and prevent the court from doing justice. This case she said was cited by Johnson J. in the High Court in *Murphy v. Donohue*.

84. She claimed there was legal advice given by the plaintiff's solicitor in relation to the interpretation of the order so as not to include remediation and also not seeking of documents from the plaintiff's experts and such decisions were not taken by a non-legally qualified employee.

85. The plaintiff had been willing to making further and better discovery.

86. She referred to the Supreme Court decisions in *Mercantile Credit Company of Ireland v. Heelan* and the principles set out in that judgment and in Murphy v. Donohue.

87. She referred to the *Dunnes Stores* case where Clarke J. considered whether a fair trial could be achieved and stated the consequences of any failure to make proper discovery should be in costs or other matters directly flowing from the failure concerned.

88. The letter of 5th April, 2002, was not the subject of specific legal advice. There was advice about the scope of the order and she said there was a mischaracterisation of its discoverability.

89. She referred to the case of *Wicklow County Council v. Fenton* where the High Court recognised in respect of environmental damage that the polluter should pay, in order that the principles underlying the directive should be achieved.

90. Ms. Butler referred to the discovery order which had been made (the 2007 Order) and stated that it was not a general order for discovery as against the plaintiff. It arose from a motion for discovery brought by the then legal advisers of the first named defendant. She submitted that it was an order limited in its terms. She drew a distinction between such order and the documents that had been made available to Brownfield pursuant to the Freedom of Information request. Such request was in general terms she stated. She stated that the order did not cover remediation. She submitted that Mr. O'Laoire was engaged as an expert and privilege was claimed in relation to his reports. She accepted that he had been appointed as an authorised person on 16th April, 2002. The Freedom of Information request sought everything in connection with Whitestown. She said that in the affidavit of discovery that was made on behalf of the plaintiff, privilege was claimed on the reports of Mr. O'Laoire. This subsequently became an issue between the parties and the claim for privilege was waived. No application was ever brought for further and better discovery of Mr. O'Laoire's background documentation she stated. Mr. O'Laoire was directed by the court to bring to court all documents in his possession or within his procurement in relation to the matters in issue in the case, to include electronically created documents. It was also agreed that Mr. O'Laoire would deliver his computer for examination to Brownfield's solicitor's office, she said.

91. Ms. Butler submitted that the interpretation of the ambit of the 2007 order was not tantamount to a blanket order for discovery of documents. She referred to the amendments to the Rules of Court and the obligation on parties to specify categories of documents required to be discovered and the reasons therefor. She said such an interpretation was consistent with the initial letter seeking such discovery from the first named defendant and the reply thereto of the plaintiff. She referred to extracts from chapter 10, *Civil Procedure in the Superior Courts on Discovery* in Delaney and McGrath. She referred to the Supreme Court decision in *Taylor v. Clonmel Healthcare Limited* [2004] 1 I.R. 169 which held that the object of the amending rule (Rules of the Superior Court (No.2) Discovery 1999) was to remedy the mischief of automatic and unnecessary resort to blanket discovery without sufficiently specifying the documents sought and the reasons for which their discovery was sought and that even if the reasons for which discovery was sought were not sufficiently set out in the grounding affidavit, this object would be achieved if the reasons were set out in the letters which were exhibited in the affidavit. This amending Rule refers to documents which are, or have been, "in his or her possession or power".

92. She submitted that if the plaintiff adopted an interpretation of the order on the basis of legal advice, even if it was incorrect, it was a reasonable position for it to adopt.

93. She submitted that Mr. O'Laoire was not the agent of the plaintiff and consequently his documents other than those documents which he furnished to the plaintiff, were not within the power of the plaintiff for the purpose of making discovery. If the plaintiff was incorrect in this regard, he was an agent of the plaintiff for limited purposes namely for the carrying out of a site investigation and making a report to the plaintiff, which report was intended to include proposals on how the site might be remediated. He was not acting as the agent of the plaintiff in advancing any commercial proposal with third parties in relation to the remediation of the site. She said he was engaged as an expert by the plaintiff and was not an employee although he was an authorised officer which gave him certain statutory powers to enter upon the land and to carry out investigations and tests. She said that by being appointed an authorised officer, he had access to third party lands from which investigations and scientific tests could be carried out. He was appointed an authorised agent on 16th April, 2002, by Mr. Nicholson pursuant to delegated powers. She accepted that he had authority to discuss the site with the EPA but he did not have the power to write to the EPA in relation to Carrigower Technologies emanating from Wicklow County Council.

94. She further submitted that the fact that Mr. O'Laoire was appointed an authorised officer in April 2002 under s. 14 did not alter the nature of his relationship with the plaintiff (he having powers under s. 14 in relation to the entry on to a site carrying out tests and investigations) anymore than the statutory powers in the *Leicestershire County Council v. Faraday* altered the status of the valuers. They were not converted from being professional persons engaged by a client into being quasi employees. Alternatively, she submitted that if the exercise of the statutory powers conferred by s. 14 put Mr. O'Laoire into some sort of an agency role with the plaintiff, it only arose in relation to the exercise of such powers under s. 14 of the Waste Management Act. She submitted that there was no agency relationship between the plaintiff and Mr. O'Laoire in relation to his private commercial venture which he entered into with third parties.

95. The motion for further and better discovery was dealt with by their law agent writing a letter on 17th November, 2008, in which he waived privilege in respect of the documents in the Fifth Schedule, Part A. She submitted that the withdrawal of privilege did not alter the status of the underlying documents that is the working papers of the experts engaged.

96. She referred to the response of the plaintiff to the request to Mr. O'Laoire by Dean Waste for third party discovery which is contained in the letter of 16th June, 2009 and which is as follows:-

> *"It seems to me entirely inappropriate that non party discovery should be requested of Consultants who have been engaged by Wicklow County Council the Plaintiff in the above proceedings and who have carried out their function under the instructions and on behalf of such Plaintiff."*

97. She submitted that this did not convert Mr. O'Laoire into the employee or the official of the plaintiff.

98. She referred to *Bula v. Tara Mines (No. 6)* [1994] 1 IRLM 111, where a distinction was drawn between categories of documents held by professional advisers. She submitted that this case had approved the principle in *Leicestershire County Council v. Michael Faraday and Partners Limited* [1941] 2 KB 205.

99. In *Bula v. Tara Mines*, the court held that a document is within the power of a party if he has an enforceable legal right to obtain, from whoever actually holds the document, inspection of it without the need to obtain the consent of anyone else.

100. She relied on the case of *Johnston v. Church of Scientology* [2001] 1 I.R. 682, where the Supreme Court held that documents to be discovered must be in the possession, custody or power of a party in accordance with the enforceable legal right test.

101. She submitted that the test was not the willingness with which Mr. O'Laoire might have co-operated with the request by the plaintiff, but whether his documents were such that the plaintiff had an enforceable legal right to them so as to make them documents within the power of the plaintiff and discoverable by the plaintiff to the respondents in the case. She submitted that the relationship between the plaintiff and Mr. O'Laoire was not such as to give the plaintiff an enforceable legal right over his documents save in accordance with the *Bula v. Tara Mines* decision and save insofar as they consisted of finalised documents furnished by him to the plaintiff.

102. She submitted that the facts in the *Leicestershire County Council* case (which was approved by the Supreme Court in *Bula v. Tara Mines*) were similar to the facts in this case. In that case, it was held that the relationship between the County Council and the valuers was that of client and professional and not that of principal and agent. As a result, documents which the valuers had prepared in carrying out their expert work were their own property. In the absence of agreement they were not bound to hand over such documents. Section 38 of the Rating and Valuation Act 1925, provided for the establishment of a County Valuation Committee who may if they think fit, employ a competent person "*to give advice and assistance in connection with the valuation of any hereditaments in their area*", and a person so employed may, subject to the conditions prescribed by the section, enter on, survey and value any hereditaments in the area which the committee may direct him to survey and to value.

103. She relied on the decision in *Bula v. Tara Mines (No. 5)* [1994] 1 I.R. 487, a decision of the Supreme Court for the proposition, there was no authority that an order for discovery imposed a general obligation upon the party against whom it was directed to make discovery of documents subsequently coming into existence. There was no continuing obligation on a party to make discovery after the date of his original affidavit.

104. In relation to the failure by the plaintiff to conduct a thorough electronic search of its records at the time the original affidavit of discovery was being prepared, she accepted that this was an error on the part of the plaintiff, and this had prompted a very exhaustive search being carried out by the plaintiff in order to meet the court's order for further and better discovery.

105. She referred to the statutory instrument S.I. No. 93 of 2009 introduced in relation to electronic discovery and stated that, whilst not contending that the statutory instrument was applicable to the order made by Clarke J. in 2007, it did have peripheral relevance or interest as it introduced an element of proportionality or reasonableness in relation to the searches which had been conducted for the purpose of compliance. She accepted that the new rule did not apply to the court's order of July 2009 directing further and better discovery of the order made in December 2007.

106. She referred to the case of *Digicel v. Cable & Wireless* [2009] 2 All ER 1094. This was a case involving proceedings in seven different Caribbean jurisdictions by Digicel complaining that the incumbent operator of telephone services was not providing the necessary interconnection facilities for it to operate its mobile phone services. Extensive discovery was sought and ordered and there was, she submitted in the decision of Morgan J., a helpful discussion on the extent, nature and limitations in relation to electronic discovery. A reasonable search for relevant documentation was required under the UK Rules. The rules did not require that no stone should be left unturned.

107. She stated that the documents discovered pursuant to the order of July 2009 contained three categories of documents namely:- (i) documents which should have been discovered originally but were not; (ii) documents falling within the broader order covering remediation; and (iii) documents from the date of the original affidavit (February 2008) to the date of the affidavit made following the courts supplemental discovery order.

108. Towards the conclusion of counsel for the plaintiff's submissions, the Court noted that there was no affidavit sworn by the law agent and that in certain cases there were statements that the deponent (Mr. Duffy) was advised but it did not state by whom or in what respect the advice was given. I was informed on the second last day of the hearing that the law agent had been on extended leave and was not available to swear an affidavit. She, however, submitted that the plaintiff on legal advice had taken the view that the motion for discovery did not cover remediation. She accepted that no legal advice had been taken in relation to including the discovery of electronic documentation and that no legal advice was taken in relation to the letter of 5th April, 2002 from Mr. O'Laoire to Mr. Sheehy.

109. She submitted that the plaintiff is acting in the public interest and for the purposes of protecting the environment within its functional area and protecting the amenities of persons who live adjacent to that environment and she submitted that this factor should be taken into account.

110. She referred to the judgment of O'Sullivan J. in *Wicklow County Council v. Fenton* [2002] 4 I.R. 44 and submitted the Judge gave a significant weight to the public interest that underlies the mechanisms in the legislation whereby the community can secure the remediation of a polluted site, where unlawful dumping had taken place.

Replying Submissions of Defendants

111. They relied on the case of *Donal Geaney v. Elan* [2005] IEHC 111, where Kelly J. expressed his displeasure at the way in which discovery had been conducted and awarded costs against the other side on a solicitor and client basis.

112. Mr. Murphy on behalf of Dean Waste stated that he did not get the document of the 5th April, 2002, until the middle of the trial. This is to be contrasted with Brownfield who got it under the Freedom of Information request. Dean Waste had received the two attachments referred to in the emails from Mr. O'Laoire in relation to Brendan Wall and Mr. Carty, but those were obtained by way of non-party discovery. They did not obtain the document of 5th April, 2002.

Legal Considerations

113. I start with a consideration of the Supreme Court decision *Mercantile Credit Company of Ireland Limited & Anor v. Heelan & Ors* [1998] 1 I.R. 81 where the court had to consider an application to strike out a defence for failure to make discovery in accordance with O. 31, r. 21 of the Rules of the Superior Courts 1986. At p. 85, the Supreme Court said:-

> *"The power given by the said rule to the court to strike out the defence of a defendant who has failed to comply with an order for discovery is discretionary and not obligatory, and should not be exercised unless the court is satisfied that the defendant is endeavouring to avoid giving the discovery, and not where the omission or neglect to comply with the order is not a culpable one, for instance, if it is due to loss of memory or illness.*
>
> *It should only be made where there is wilful default or negligence on the part of the defendant and then only upon application to the court for an order to that effect.*
>
> *The powers of the court to secure compliance with the rules and orders of the court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order."*

114. The matter was again considered by the Supreme Court in *Murphy v. Donohue* [1996] 1 I.R. 123 where the court considered an appeal against a judgment of Johnson J. which had struck out a defence on the grounds of failure to make discovery. In the appeal, the court stated at p. 142:-

> *"Order 31, r. 21, exists to ensure that parties to litigation comply with orders for discovery. It does not exist to punish a defaulter but to facilitate the administration of justice by ensuring compliance with the orders of the court.*
>
> *Undoubtedly cases may exist where one party may not be able to get a fair trial because of the other party's wilful refusal to comply with an order for discovery. In such cases it may be necessary to dismiss the plaintiff's claim or to strike out the defendant's defence. But such cases will be extreme cases. As Hamilton C.J. put it in Mercantile Credit Co. v. Heelan (Unreported, Supreme Court, 14th February, 1995):-*
>
> > *'The powers of the Court to secure compliance with the rules and orders of the Court relating to discovery should not be exercised so as to punish a party for failure to comply with an order for discovery within the time limited by the order.'"*

115. The Supreme Court went on to say that if the defendants were acting on advice from independent legal advisers who were prepared to stand over their advice in court, this, in itself was a factor which mitigated the default of the defendants even in the event of the trial judge holding that the advice was wrong. Allowing the appeal, the Supreme Court expressly stated at p. 141 that it did not criticise the trial judge's statement of the law and that the problems arose with the application of the law to the circumstances of the case. In the High Court, Johnson J. at p. 129 referred extensively to a quotation on discovery from Halsburys Laws of England (4th Ed.) Vol. 13 paras. 39 and 45:-

> *"'**Documents in possession, custody or power of party**. The existence of all documents must be disclosed which the party giving the discovery has or has had in his possession, custody or power. For this purpose, 'possession' means the physical or corporeal holding of the document pursuant to the right to its possession, as in the case of an agent or bailee; 'custody' means the mere actual physical or corporeal holding of a document, regardless of the right to its possession, as in the case of a servant or employee; and, 'power' means an enforceable right to inspect it or to obtain possession or control of the document from the person who ordinarily has it in fact. The requirements of the rules that the documents to be disclosed must be or have been 'in the possession, custody or power' of the party making the discovery are disjunctive in their operation, so that disclosure must be of all documents which are or have been in the possession or the custody or the power of that party; and equally only those documents can properly be withheld from*

disclosure which are not and have not been in the possession or custody or power of that party.

Accordingly, all documents must be included of which the party giving discovery has, or has had, possession or custody even if he had, or has had, no property at all in them; but documents which never were in his possession or custody need not be included unless he had some kind of property in them. Documents which are or were in the possession or custody of the party's agent must be included provided the agent held them in his capacity as agent. Documents which are or have been in the party's possession jointly with or as agent for another have also to be included in the list.

Careful search must be made for all relevant documents in the party's own possession and proper inquiries and efforts made with regard to those which are not. His solicitor is under a special duty to advise him as to what documents should be included in the list."

Paragraph 45 provides:-

> ***'Duty of a solicitor** . A client cannot be expected to realise the whole scope of his obligation, regarding discovery without the aid and advice of his solicitor and the latter has a particular duty, as an officer of the court, carefully to investigate the position and, as far as possible, to see that full and proper disclosure of all relevant documents is made. The solicitor cannot simply allow the client to make whatever list of documents the client thinks fit nor can the solicitor escape the responsibility of careful investigation or supervision. It is his duty to take positive steps to ensure that the client appreciates the duty of discovery and the importance of not destroying documents which might have to be disclosed, and in the case of a corporate client to ensure that knowledge of this burden is passed on to anyone who may be affected by it. Indeed, the solicitor owes a duty to the court carefully to go through the documents disclosed by his client to make sure, as far as possible, that no relevant document has been withheld from disclosure. If the client will not give him the information he is entitled to require, or if the client insists on making a list of documents or swearing an affidavit verifying the list which the solicitor knows to be imperfect, it is the solicitor's duty to withdraw from the case. If the solicitor is guilty of misconduct in this respect, he may be ordered personally to pay or to contribute to the costs of the action. In this matter a solicitor must search his conscience.'"*

116. I adopt the foregoing principles by Johnson J.

117. Each party relied on certain parts of the decision of Clarke J. in *Dunnes Stores (Ilac Centre) Limited v. Irish Life Assurance* (Unreported, High Court, 23rd April, 2008). In this case, a discovery issue arose during the hearing in a case where Dunnes sought a declaration that the refusal by the landlord to consent to a change of use was unreasonably withheld. I refer to Clarke J at para 3.3:-

> *"3.3 It has often been said that discovery relies to a large degree on trust. This is true. Discovery orders are made by the court (or an agreement is reached by the parties which has a similar effect) on the basis of defining the obligations of the parties concerning disclosure of documents. The book then passes to those charged with swearing the affidavit of discovery, upon whom a trust is placed that they will conscientiously and diligently deal with the task in hand. It is, of course, the case that mistakes can and do happen. Such mistakes can range from the entirely innocent and understandable to those which might be characterised as blameworthy to a greater or lesser extent. At the other extreme are cases where there has been a deliberate failure to disclose material information. At a minimum it is manifestly clear, on all of the evidence, that those involved in making discovery on behalf of the landlords in this case did not take and act upon proper legal advice as to their obligations in relation to discovery. It is, of course, the case that individuals themselves may not fully understand either their overall obligations in relation to discovery, may not be able to properly address questions of relevance which may arise as to whether documents should properly be included, and most certainly may not be able to deal with legal issues, such as privilege, which may arise. However, the obligation on such parties, in those circumstances, is to take proper legal advice and to act upon it. It is again particularly regrettable that major organisations such as the landlords, who have ample resources available to them and had also access to the best of legal advice, should have failed to take the elementary step of ensuring that they knew what their obligations were and of taking advice in respect of any questions of difficulty that might arise.*
>
> *3.4 I must, therefore, conclude that, at a minimum, there was a very serious failure on the part both of Irish Life and of Mr. O'Reilly to comply with their disclosure obligations to the court. Both were in significant breach of the trust that was placed on them to deal with discovery in a fair and proper manner. There is no doubt but that amongst the consequences of that failure was that these proceedings were significantly lengthened. However for the purposes of this judgment it is important that I emphasise what, if any, consequences for the case itself (as opposed to issues relating to the costs of the proceedings) can properly flow from the failure to make proper discovery.*
>
> *3.5 I should emphasise that a court has no business in seeking to punish a party who has failed to make proper discovery by interfering with what would otherwise be the proper and fair result of the proceedings. The proper way to deal with a culpable failure of discovery is to direct the consequences to the wrongdoing concerned. If it remains, nonetheless, possible that there be a fair trial, then the court should conduct that fair trial and come to a just conclusion on the evidence and the law. The consequences of any failure to make proper discovery should be in costs or other matters directly flowing from the failure concerned."*

118. In *Johnston v. Church of Scientology Mission of Dublin Limited & Ors* [2001] 1 I.R. 682, the Supreme Court had to consider whether or not documents had been created by an agent of the first defendant and whether the defendant had a legal right to obtain them. At p. 700 the Supreme Court stated:-

> *"8. Decision*
>
> *In relation to the discovery of documents the law evokes three concepts, possession, custody and power: see O. 31, r. 12(1) of the Rules of the Superior Courts, 1986, and Appendix C, No. 10, paragraph 7. In Bula Ltd. v. Tara Mines Ltd. [1994] 1 I.L.R.M. 111 at p. 113, O'Flaherty J. stated:-*
>
> > *"I believe that the three concepts come into play, viz. possession, custody and power and they are to be considered disjunctively."*

'Power' was defined by O'Flaherty J. at p. 113 as:-

> *'A document is within the power of a party if he has an enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else.'*

This statement was reinforced in Quinlivan v. Conroy [1999] 1 I.R. 271 at p. 281, when O'Flaherty J., in a judgment agreed to by the four other members of the court, referred to the fact that an enforceable legal right to obtain the documents is necessary, stating:-

> *'Nor would the relationship (if it existed) give to the defendants the enforceable legal right to obtain those documents which, as has been held by this Court in Bula Ltd. v. Tara Mines [1994] 1 I.L.R.M. 111, is necessary to establish that documents are within the 'power' of a party or person for the purposes of O. 31, r. 12 of the Rules of the Superior Courts, 1986.'*

Thus a document to be discovered must be in the possession, custody or power (in accordance with the enforceable legal right test) of a party.

In this case, the learned High Court Judge in his judgment directed that the documents now in issue be procured by the first defendant and be produced for inspection to the plaintiff. That direction was based on the premise that the documents in question were in the possession of the English Church of Scientology Corporation as agents of the first defendant. In effect the learned High Court Judge was holding that the documents were within the power of the first defendant because of an agency relationship with the English Church of Scientology and for that reason could be procured by them.

As to the matter of agency, the first defendant is sued in its capacity as a corporation. On the basis of the facts adduced in this application, the first defendant is a separate corporate body to the English Church of Scientology corporation. While it has been shown that both corporations work towards the same goal and that they have co-operated in matters of mutual interest, it has not been established that, on the facts of this case, the English corporation acted as the agent for the first defendant in relation to the documents at issue. This is not to say that the first defendant and the English Church of Scientology must be treated in all circumstances as if they were wholly separate and distinct corporate entities operating at arms length. The court is not concerned with the general relationship between those two entities, but only with their relationship so far as it is relevant to the documents in issue in this discovery application. The documents now in issue between the parties originated in England, were created by the English Church of Scientology and have never been in Ireland. It has not been established by the plaintiff that the English corporation created or has custody of those documents as the agent for the first defendant. Indeed, in this case the evidence is that the English corporation acted independently and not as agent for the other in respect of those documents. Accordingly, the plaintiff has not established that the first defendant had an enforceable legal right to obtain the documents in question from the English corporation. The fact that the English corporation may have acted as the agent of the first defendant in other specific situations does not confer on the first defendant an enforceable right to obtain the documents in question and they therefore are not within its power.

…

I am satisfied that the relevant legal principles were correctly set out by O'Flaherty J. in Bula Ltd. v. Tara Mines Ltd. [1994] 1 I.L.R.M. 111 and Quinlivan v. Conroy [1999] 1 I.R. 271.

9. Conclusion

Documents which are in the possession, custody or power of a party must be discovered. A document is in the power of a party when that party has an enforceable legal right to obtain the document.

The documents in issue in this case are not in the possession, custody or power of the defendants and the defendants have no enforceable legal right to obtain them. Accordingly, the plaintiff is not entitled to the discovery sought. I would allow the appeal."

DECISION

2007 Discovery Order

119. The full context of this order is set out earlier in my judgment. The primary paragraphs to be considered are paras. 1 and 4. It is clear that the thrust of the documentation sought relates to the deposition of materials, whether by way of dumping or otherwise, by the plaintiff in para. 1. Paragraph 4 relates to documentation relating to the lands, the subject matter of the proceedings, on the source, nature and extent of material deposited on or under the same (that is the lands the subject matter of the proceedings) as well as inquiries or investigations in relation to the identity of persons who were responsible, either directly or indirectly, for such deposits or dumping. Again it is clear that it is the activity of "dumping" which qualifies the documentation sought in paragraph 4.

120. In my opinion there is nothing in this order which suggests that it relates to remediation either expressly or by implication.

121. I am of the view that the scope of the order is not a blanket order of discovery. In this regard I have noticed the changes in the Rules of the Superior Courts in the extent and manner in which categories of discovery can be sought and the reasons therefor stated by an applicant. It has also to be remembered that it is an order initially sought by the first named defendant, albeit made in favour of all the defendants.

122. I, therefore, reject the submissions of the defendants as to the scope of the order.

Persons within the Discovery Order

123. The 2007 Order directed the plaintiff not later than the 18th January, 2008, to make discovery on oath to all the defendants of documents within the specified categories which "*are or have been in their power, possession, procurement or control*". The issue arises as to whether the order covers documents held by Mr. O'Laoire and whether the plaintiff ought to have sought such documents

from Mr. O'Laoire. Mr. O'Laoire was chosen as the person to investigate, analyse and put forward proposals for remediation. He became the chief liaison person between the plaintiff and the guards in the course of their criminal investigations. He was a witness in the criminal prosecutions. He was a member of the Waste Management Committee of the plaintiff. He sent briefing notes to the plaintiff in relation to the progress of the criminal proceedings. He interviewed Mr. O'Reilly and others for the purpose of getting evidence for the plaintiffs.

124. He was appointed an authorised person under s. 14 of the Waste Management Act 1996, on 16th April, 2002. As an authorised person, if he had reasonable grounds for believing that there may be a risk of environmental pollution, he could enter any premises and bring other persons with him including members of An Garda Síochána. He also had powers to detain a vehicle. He had powers on entering premises to make plans, photograph and carry out inspections, take samples, carry out surveys, excavations and carry out examination of the depth and nature of subsoil, require the production of, and inspect records and documents and take copies and extracts therefrom for the purpose of his examination. He was given these powers so as to avoid the necessity of having to be accompanied by an employee of the plaintiff's on each occasion when he would otherwise have had to be so accompanied. He, or the plaintiff, also had power to apply to the District Court for a warrant when evidence might be removed or destroyed. Additionally, provision was made for a local authority to indemnify an authorised person against all actions and claims arising from the performance of his duties.

125. By early 2002 his task included devising proposals for the remediation of the lands. He discussed this with officials of the plaintiff in early 2002. He put forward proposals whereby a company established by himself and his partner, Carrigower Technologies Ltd would provide the remediation. I am satisfied that this proposal was within the scope of what he had been asked by the plaintiff to do and to advise on. Ultimately he wrote the letter of the 5th April, 2002, to Mr. Sheehy. He had a meeting with Mr. Sheehy in relation to this. Accepting, for the purposes of this application, that Mr. Sheehy told him to desist from that proposal some time later, although this direction was not recorded in writing by Mr. Sheehy, and on the basis of the evidence to date, it is my opinion that the document of 5th April, 2002, and the proposals in relation to Carrigower Technologies Ltd were all part of the scope of the work that Mr. O'Laoire was required to do by the plaintiff.

126. I have also regard to the evidence of Mr. O'Laoire in relation to the communications which he got in September, 2008 from Mr. Duffy in relation to a request for further and better discovery which A&L Goodbody on behalf of Dean Waste were making. Mr. O'Laoire referred to the document of 5th April, 2002, as documents in relation to Carrigower Technologies and enclosed a copy of it.

127. There is also the response of the solicitors to the plaintiff when third party discovery was sought in June, 2009 from Mr. O'Laoire. The plaintiff's solicitors objected to such communication and described the work done by Mr. O'Laoire as "*for and on behalf*" of the plaintiff. Therefore, I conclude that Mr. O'Laoire had a multifunctional role for and on behalf of the plaintiff.

128. Having regard to the extensive powers which are conferred on an authorised person pursuant to s. 14 and to the structure in the legislation within which he is authorised to act, I conclude that his role in this respect can be distinguished from the valuers in the *Leicestershire County Council* case.

129. I would not consider that the plaintiff would be restricted in informing Mr. O'Laoire as to the precise manner in which he should discharge his powers nor would the plaintiff only be entitled to "*final reports*" from such an authorised person. It is also significant that employees of the plaintiff were appointed authorised persons. In my opinion, a principal-agent relationship exists for this role, and Mr. O'Laoire is the agent of the plaintiff as the authorised person. I also consider he can have a separate role as an expert witness in the traditional sense that term is used. Denham J. recognised in the *Church of Scientology* case that a person may act in different legal capacities. I conclude the plaintiff had a legal enforceable right to obtain such documents from Mr. O'Laoire in his role as an authorised person.

Compliance with Discovery

130. To start my consideration of this matter I refer to a short passage from the decision of Clarke J. in the *Dunnes Stores* case:-

> *"It has often been said that discovery relies to a large degree on trust. This is true. Discovery orders are made by the court (or an agreement is reached by the parties which has a similar effect) on the basis of defining the obligations of the parties concerning disclosure of documents. The book then passes to those charged with swearing the affidavit of discovery, upon whom a trust is placed that they will conscientiously and diligently deal with the task in hand."*

131. Earlier in this judgment, I have adopted the principles set out by Johnson J. in *Murphy v. Donohue*. At this junction, I reiterate and apply what he stated at p. 130 in relation to the duty of a solicitor.

132. In the Supreme Court Barrington J., stated of O. 31, r. 21, that it existed to ensure that parties to litigation comply with orders for discovery. It did not exist to punish a defaulter but to facilitate the administration of justice by ensuring compliance with the orders of the court.

133. In this case there is no affidavit sworn by the law agent. There is no evidence before the court as to how the process of discovery was embarked upon. It is true to say that there was correspondence exchanged between the respective legal advisers in which the law agent takes a view as to the interpretation of the 2007 Order in respect of certain documents. Mr. Duffy also in his affidavits states that he was advised, but does not say by whom or in what respect. The cross examination of Mr. Duffy on day 15 does not reveal very much in relation to what direction, discussions or advice that he got from the law agent. On the basis of his cross examination, I conclude that the evidence of Mr. Duffy was unsatisfactory on this point and I am driven to the conclusion that very little specific advice was sought or obtained in respect of specific documents or categories of documents in the production of the affidavits of discovery. I accept, of course, as I was told on the second last day of the hearing that the law agent had been on extended leave for a number of months and had not been able to swear an affidavit. The manner and circumstances in which Mr. Duffy has discharged his duties have been put in issue in the many affidavits sworn in this application and also in the submissions of the defendants.

134. I also conclude, from the cross examination of Mr. O'Laoire on day 15 and the exchanges between Mr. Duffy and Mr. O'Laoire in September, 2008, that it appears there were discussions over an extended period by Mr. Duffy with Mr. O'Laoire in relation to discovery, and this is manifest from the manner in which the emails are sent by Mr. O'Laoire to Mr. Duffy questioning whether specific documents and, in particular, the document of 5th April, 2002, were discovered.

135. Counsel for the plaintiff conceded that there was a failure to look for the electronic documentation. There is no evidence to suggest that any legal advice was obtained or sought in relation to this matter. It was agreed that there was no legal advice taken in relation to the mischaracterisation of the document of 5th April, 2002. There was no legal advice taken in relation to the statements

from the employees which had been obtained from the gardaí and upon which Mr. Sheehy, in part, based his affidavit.

136. In addition, when the case resumed further discovery was being made including the electronic documents, culminating in the 750 documents and also the diaries.

137. In respect of certain of the documents *e.g.* letter of 5th April, 2002, counsel for the defendants refers to the fact that these documents were made available pursuant to the Freedom of Information application. As I have set out earlier in the judgment, the application for documentation under this heading was resisted over an extensive period of time amounting almost to three years. A party is entitled to discovery under the rules and not to be reliant upon documentation supplied under a Freedom of Information application. I conclude the plaintiff neglected to make proper discovery. Such failure is not wilful nor was there any concerted plan amongst the senior officials of the plaintiff to do so.

138. The document of 5th April, 2002 and the statements of the employees contained evidence critical to the defences of Brownfield and Dean Waste.

139. I must also acknowledge the co-operation received from the plaintiff and its advisers in relation to the additional discovery made pursuant to the order of July, 2009. Whilst I accept there have been delays in such documents being discovered, I have evidence before me which I accept from the experts as to the difficulties there have been and I conclude that there have been reasonable efforts made for compliance with the court's orders.

Prejudice
140. As I indicated earlier, this application is brought on affidavit with liberty to cross examine the deponents. For this form of hearing to be effective and in order to give the parties a fair trial, it is necessary that full and proper discovery should have taken place so as the parties cannot be disadvantaged in the conduct of the case and, in particular, in their cross examination. I have already referred to the different heads of prejudice which counsel for the defendants submitted they had suffered as a result of the failure to make full and proper discovery. I accept such submissions that the defendants are likely to suffer such prejudice and disadvantage in the conduct of the case. Some documents that were not discovered initially were discovered in the July, 2009 order. Whilst some of the documents in respect of which issue has been taken during the hearing of this application were not discovered initially, but were subsequently discovered or in respect of which privilege was first claimed and later waived, it cannot be said in absolute terms that there is no disadvantage or prejudice accruing to the defendants. The volume of documents discovered since July, 2009, whether by way of documents from the plaintiff or Mr. O'Laoire and the further discovery of electronic documents and diaries of the senior personnel of the plaintiff, all indicate there is a large amount of documentation which must be assessed by the legal advisers for the defendants in order to re-address their cross examination of the plaintiff's witnesses, in particular, Mr. O'Laoire and Mr. Sheehy. I am, however, confident that they can do so and that a fair trial will not be denied to the defendants who are parties to this application.

Mistrial
141. I am not satisfied there is any legal basis for declaring a mistrial.

Further Action
142. I will hear the parties on what consequential orders (if any) are now necessary in order that the trial can continue. In my opinion, there should be a further affidavit sworn by the plaintiff confirming that it has made full discovery as it is likely that additional documents may have been discovered since the first motion was brought. If that is not the position, it is still appropriate to have up to date confirmation of compliance with the court orders.

General
143. Having regard to the manner in which this case had been heard in July 2009, the problems which have emerged in relation to the discovery and the prejudice which I have found Brownfield and Dean Waste have suffered as a result, I believe the motion to strike out for failure to make proper discovery was brought with justification when the hearing resumed. Whilst the purpose of this application is not to punish the plaintiff but to determine whether a fair trial can be achieved, I direct that 60% of the costs of this application for each of the defendants should be borne by the plaintiff on the basis of one motion. In effect, there was one motion with alternative reliefs sought.

144. This judgment is not:-

> (i) A determination in any way on the credibility/evidence of Mr. Sheehy, Mr. O'Laoire or any other witnesses in respect of the substantive case.
>
> (ii) A determination in any way on what are or may be the consequences of the disruption of the hearing as a result of Mr. O'Laoire receiving electronic copies of the transcripts and his discussions with Mr. Duffy that touched on the evidence given by Mr. Sheehy (contrary to the agreement between the parties that Mr. O'Laoire should not be privy to such evidence).