

THE HIGH COURT

BROWNFIELD RESTORATION IRELAND LIMITED

PLAINTIFF

AND

WICKLOW COUNTY COUNCIL

DEFENDANT

AND

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

NOTICE PARTIES

(No. 9)

JUDGMENT of Humphreys J. delivered on 16th day of May, 2023

1. This is the sixteenth decision in the 44-year history of this matter, the previous ones being as follows:

- (i) In *Wicklow County Council v. O'Reilly (No. 1)* [2006] IEHC 265, [2006] 2 JIC 0803 (Unreported, High Court, Clarke J., 8th February, 2006), the court made orders as to the appropriate defendants in waste enforcement proceedings brought by the council.
- (ii) In *Wicklow County Council v. O'Reilly (No. 2)* [2006] IEHC 273, [2006] 3 I.R. 623, [2006] 9 JIC 0801, the court declined to stay the proceedings pending prosecutions arising from the illegal dumping.
- (iii) In *Wicklow County Council v. O'Reilly (No. 3)* [2007] IEHC 71, [2007] 3 JIC 0203 (Unreported, High Court, Clarke J., 2nd March, 2007), the court directed the trial of a preliminary issue regarding the liability of a director.
- (iv) In *Wicklow County Council v. O'Reilly (No. 4)* [2010] IEHC 464, [2010] 12 JIC 0705 (Unreported, High Court, O'Keefe J., 7th December, 2010), the court refused a mistrial application although it decided that the council had not made proper discovery.
- (v) In *Wicklow County Council v. O'Reilly (No. 5)* (*Ex tempore*, Not circulated, O'Keefe J., 20th December, 2011), after 23 days of hearing, the court decided to adjourn the remediation proceedings on the council's application, pending proposed remediation actions by the council. The proceedings so derailed never effectively restarted but were instead replaced by the present proceedings, which were waste enforcement proceedings brought by the landowner against the council, partly on the basis that the remediation actions carried out were inadequate or inappropriate.
- (vi) In *Brownfield Restoration Ireland Ltd v. Wicklow County Council (No. 1)* [2017] IEHC 310, [2017] 4 JIC 2604 (Unreported, High Court, 26th April, 2017) (noted Joseph Richardson BL (2017) 24(2) *I.P.E.L.J.* 56), I granted the council's application for the modular trial of the proceedings.
- (vii) In *Brownfield Restoration Ireland Ltd v. Wicklow County Council (No. 2)* [2017] IEHC 397, [2017] 6 JIC 1201 (Unreported, High Court, 12th May, 2017), I decided a number of preliminary issues including the rejection of certain allegations of misconduct against the council.
- (viii) In *Brownfield Restoration Ireland Ltd. v. Wicklow County Council (No. 3)* [2017] IEHC 456, [2017] 7 JIC 0706 (Unreported, High Court, 7th July, 2017) (noted Estelle Feldman (2017) *A. Rev. Ir. Law* 95), I decided in principle to order remediation.
- (ix) In *Brownfield Restoration Ireland Ltd. v. Wicklow County Council (No. 4)* [2017] IEHC 486, [2017] 7 JIC 1907 (Unreported, High Court, 19th July, 2017), I made the formal order directing remediation and set out indicative timelines for fifteen steps with a definite final date for completion of full remediation and handover to the landowner. That long-stop date was in effect 19th January, 2024.
- (x) In *Brownfield Restoration Ireland Ltd. v. Wicklow County Council (No. 5)* [2017] IEHC 487, [2017] 7 JIC 1908 (Unreported, High Court, 19th July, 2017), I decided on the question of costs.
- (xi) In *Wicklow County Council v. O'Reilly* [2019] IECA 257, [2019] 10 JIC 1607 (Unreported, Court of Appeal, Costello J., 16th October, 2019), the Court of Appeal dismissed an appeal regarding the timeline allowed for remediation. It partly allowed an appeal regarding costs.
- (xii) In *Brownfield Restoration Ireland Ltd. v. Wicklow County Council* [2021] IESCDT 71 (Supreme Court Determination, Not yet circulated, 21st June, 2021, O'Donnell, MacMenamin and Woulfe JJ.), the Supreme Court refused leave to appeal in relation to the timeline issue.
- (xiii) In *Brownfield Restoration Ireland Ltd v. Wicklow County Council (No. 6)* [2021] IEHC 599, [2021] 9 JIC 3007 (Unreported, High Court, 30th

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

- (xiv) In *Brownfield Restoration Ireland Ltd v. Wicklow County Council (No. 7)* [2022] IEHC 662, [2022] 12 JIC 0201 (Unreported, High Court, 2nd December, 2022), I determined the agenda for the hearing on the remediation plan approval, and directed that any approval would be without prejudice to the previous orders.
- (xv) In *Brownfield Restoration Ireland Ltd v. Wicklow County Council (No. 8)* [2023] IEHC 137, [2023] 3 JIC 2102 (Unreported, High Court, 21st March, 2023), I approved the remediation plan in part and determined that certain matters would be addressed at a later stage in a specified way.

2. A total of seven issues were raised arising from the No. 8 judgment, of which six turned out to be not particularly contentious at this stage. I will deal with these in turn.

Typographical-type issues

3. The council raised a couple of typographical-type issues in relation to the initial version of the No. 8 judgment, so I circulated an unapproved amended version correcting these. The council then raised a further consequential change, so without objection from any other party I indicated that the approved version would correct this also.

Terms of the order regarding licensed disposal facilities

4. The EPA did not get involved in the hearing leading to the No. 8 judgment. However they did appear thereafter indicating a possible issue with the order insofar as it related to the terms of the licence applying to facilities where the council was proposing to dispose of waste. It was agreed that they would have liberty to bring a motion in that regard returnable for 22nd May, 2023. Perhaps I can be allowed to record that ideally and all other things being equal I would welcome their assistance more generally if and insofar as any further technical issues may arise in the proceedings regarding the mechanics of the remediation.

Impact of EPA motion on tendering timelines

5. In anticipation of the possibility that any adjustment to the arrangements for waste disposal could have a knock-on effect on the timelines for the preparation of tendering documentation, it was agreed that the council would have liberty to bring their own motion in due course seeking to make any consequential adjustment to the timelines that was allegedly necessitated.

Whether the order should be perfected at this stage

6. The council suggested that, pending clarification of the EPA's position, the order on foot of the No. 8 judgment should not be perfected for the time being. This was agreed.

Directions regarding the independent expert

7. The council indicated that it might want directions concerning the appointment of an independent expert, but the plaintiff asked that that be done by formal notice of motion. That was agreed, so the council has liberty to bring a motion in that regard in due course.

Costs of matters prior to the remediation plan approval process

8. While the plaintiff initially sought all costs to date, in effect, the council indicated that they were not on notice of such an extensive application. After some discussion, it was agreed to deal at this stage only with costs of the process of approval of the remediation plan and to give liberty to the plaintiff to bring a motion regarding any other costs. This also has the advantage that the plaintiff can provide chapter and verse as to what costs exactly we are talking about.

Costs of the remediation plan approval process

9. This was the one contentious issue to be resolved at this point. Firstly, it is important to define the time period to which this relates. The council first indicated to the court on 28th September, 2022 that it was circulating the draft plan, so it was agreed that the costs to be now disposed of are those incurred between that date and the date of the No. 8 judgment, 21st March, 2023 (just within the 6-month period envisaged by the remediation order).

10. In the No. 5, judgment, costs of the remediation order were addressed, and this order was somewhat varied by the Court of Appeal. The Supreme Court declined to allow a further appeal, notwithstanding the plaintiff's argument for full costs of pretty much everything based on the polluter pays principle.

11. The ultimate position was that the plaintiff in substance got the costs of the order for remediation subject to some fairly minor and for present purposes irrelevant qualifications.

12. The proceedings predated the commencement in 2019 of s. 169 the Legal Services Regulation Act 2015 by the Legal Services Regulation Act 2015 (Commencement of Certain Provisions) (No. 2) Order 2019 (S.I. No. 502 of 2019).

13. Since the 2015 Act deals with changes to the entitlement to costs rather than merely the procedure for addressing costs, it should be presumed not to apply to pre-existing proceedings and there isn't any pressing reason for that presumption to be displaced.

14. So the starting point for the substantive disposition of costs is the older law of costs

following the event.

15. That doesn't get us much further unfortunately because it isn't absolutely obvious what the event is – is it the order for remediation, of which the approval process was merely a consequence, or is it the approval process on which the "event" was divided in the sense that the plan was approved in part and postponed in part?

16. Article 191(2) TEFU states: "Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."

17. In *Wicklow County Council v Fenton (No. 2)* [2002] IEHC 102, [2002] 4 I.R. 44, [2002] WJSC-HC 7382, [2002] 7 JIC 3112 O'Sullivan J. said at p. 64 that "The 'polluter pays' principle requires that the party causing pollution should pay for it in full rather than an innocent party such as the applicant in this case or the community at large. The community at large would 'pay' for pollution in this sense, in my opinion, if it is left unremediated or partially remediated".

18. Especially in a context governed by the polluter pays principle, the court should lean towards the essential event as being the order for remediation, so that the costs of any motions or applications properly consequent on that should align with the costs of that primary event.

19. However this wouldn't apply to any and every motion in the case. Indeed, it seemed to be accepted by the plaintiff that if an unnecessary motion was brought by it which was wholly rejected, then the costs of that motion would be subject to no order as to costs rather than automatically following the costs of the primary event.

20. The situation here is that there would have had to be an application to approve the plan in any event. This was a consequence of the order for remediation. That latter question was an issue on which the council were unsuccessful and for which the plaintiff got its costs. On that basis one would be inclined to the view that the costs of the application to approve the plan should properly follow the costs of the order requiring that there should be an application to approve the remediation plan.

21. Should that approach be changed because "the Plaintiff's written and oral submissions urged an outright rejection of the draft remediation plan" as the council submits at para. 17 of its written submissions, arguing for no order? The council argues very persuasively at para. 21: "[i]n the circumstances, it is submitted that the appropriate order is that the parties bear their own costs. Although the Plaintiff relies heavily on the 'polluter pays' principle, this is not a *carte blanche* to recover costs in every circumstance and should not entitle the Plaintiff to costs where it outright objected to the draft remediation plan without putting forward any alternative constructive proposal. Disagreement for the sake of it should not be rewarded."

22. That criticism would pack more of a punch if this was indeed a case of disagreement for the sake of it, but I don't think that that would be a totally valid characterisation of the plaintiff's position here. It is true certainly that the plaintiff's submissions as a matter of form did rather ambitiously argue for rejection of the plan, and also that I didn't reject it either in whole or even in part at this stage. And that on the contrary some of the concerns raised by the plaintiff were not accepted. But in substance, the plaintiff's central point was that the plan didn't fully demonstrate compliance with the existing order, which is a point that I basically accepted, although I addressed that in a different way than was precisely argued for. So clearly the plaintiff's submissions had a substantial influence on the terms of the order actually made. Maybe in hindsight it would have been more astute for the plaintiff to have adopted a slightly less absolutist stance regarding rejection of the plan, but its possible failure to adopt the most legally guileful position shouldn't distract from the legitimately positive consequences of the position that it *did* take.

23. *Veolia Water UK Plc. v. Fingal County Council (No. 2)* [2006] IEHC 240 doesn't apply here because the issues raised by the plaintiff didn't materially add to the length of the hearing, which was one day.

24. So, in short, the plaintiff should get its costs because the approval application followed from the order for remediation, and, in that context, disposition of costs of the former should be substantially guided by disposition of costs of the latter, which was in favour of the plaintiff.

25. The council then alternatively argues that costs should be reserved, but that runs against the policy (now O. 99 r. 2(3), first adopted in 2008 rules) that costs of applications should be addressed as they arise.

26. These proceedings commenced on 22nd January, 2008, just two days before the Rules of the Superior Courts (Costs) 2008 (S.I. No. 12 of 2008) were approved on 24th January, 2008. The current iteration of the rule is O. 99, r 2(3) RSC as amended by the Rules of the Superior Courts (Costs) 2019 (S.I. No. 584 of 2019) with effect from 3rd December, 2019.

27. However, that rule is procedural rather than substantive – it doesn't say what the entitlement to costs should be but rather the procedure and timing for deciding that. There

is a presumption that, unlike substantive provisions, merely procedural changes apply to administrative or judicial processes already underway. So insofar as they are merely procedural rules, the 2008 and 2019 rules should be applied to proceedings in being.

Order

28. For the sake of completeness I should say that, in the light of the foregoing, I don't think that any sufficient doubt arises regarding the meaning or relevance of the polluter pays principle in the context of the facts here such as to raise the issue of whether the plaintiff's argument involves EU law questions appropriate for reference to the CJEU.

29. For the foregoing reasons, it will be ordered that:

- (i) the plaintiff, defendant and first named notice party be at liberty to bring motions as set out in the judgment, the first named notice party's motion being returnable for 22nd May, 2023 and other motions to be listed as and when issued;
- (ii) the order on foot of the No. 8 judgment not be perfected until at least 22nd May, 2023 or further direction;
- (iii) the plaintiff be awarded costs for the period 28th September, 2022 to 21st March, 2023 as against the defendant, including costs associated with the No. 7 and No. 8 judgments and any costs reserved in relation to that period; and
- (iv) unless written submissions are lodged with the court within 7 days from the date of this judgment, the order on foot of the present judgment will be perfected on the basis that the costs of the costs issue be awarded to the plaintiff as against the defendant including those associated with the present No. 9 judgment, and the costs of written submissions and any other paperwork and any costs reserved in relation to the period from 22nd March, 2023 to the date of this judgment.