

[2022] IEHC 662

THE HIGH COURT

[2008 No. 56 SP]

BETWEEN

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. 7)

JUDGMENT of Humphreys J. delivered on the 2nd day of December 2022.

1. This is the fourteenth decision in a matrix of proceedings relating to illegal dumping which began 43 years ago in 1979 on a site in Whitestown, County Wicklow. The previous decisions were as follows:

- (i). In *Wicklow County Council v. O'Reilly (No. 1)* [2006] IEHC 265, (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, 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, (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, (Unreported, High Court, O'Keeffe J., 7th December, 2010), the court refused a mistrial application although it decided that the council had not made proper discovery.

- (v). In *Wicklow County Council v. O'Reilly (No. 5) (Ex tempore)*, Not circulated, O'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 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 (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, McMenamin and Woulfe JJ.), the Supreme Court refused leave to appeal in relation to the timeline issue.
- (xiii). In *Brownfield Restoration Ireland Ltd v. Wicklow County Council (No. 6)* [2021] IEHC 599, [2021] 9 JIC 3007 (Unreported, High Court, 30th September, 2021), I directed that (without prejudice to the long-stop date) the council was to complete the biodiversity surveys required for the preparation of a Natura Impact Statement by 17th December, 2021; and that the matter be listed for mention to deal with the subsequent steps.

2. The matter was listed again on 1st November, 2021, at which point Brownfield was primarily concerned with whether the council could clarify whether it was going to comply with the existing deadline. The council responded that there was “no reality” to the long-stop date being complied with.

3. I added the Minister for Housing, Local Government and Heritage as a notice party essentially in lieu of the National Parks and Wildlife Service, having regard to the transfer of functions under the Heritage (Transfer of Departmental Administration and Ministerial Functions) Order 2021 (S.I. No. 302 of 2021). The Environmental Protection Agency had already been joined as a notice party by order of 23rd May, 2017.

4. Subsequent to that, both the EPA and the State were given an opportunity to review the draft remediation plan and were then excused from further participation in the proceedings, with liberty to apply.

The plenary proceedings

5. There are also two sets of plenary proceedings, separate from the two sets of waste enforcement actions referred to above:

- (i). *Brownfield Restoration Ireland Ltd v. Wicklow County Council* [2007] No. 1541P, referred to at para. 40 of the No. 3 judgment. That was struck out against certain defendants and then discontinued against the other defendants.

- (ii). A further set of proceedings was issued after the order for remediation: *Brownfield Restoration Ireland Ltd v. Wicklow County Council* [2020] No. 5730P. That sought damages and other remedies related to breach of constitutional rights and deprivation of property, as well as making a constitutional challenge to s. 58 of the Waste Management Act 1996.

Materials before the court

6. For the record, materials placed before the court by being uploaded to the ShareFile folder for this case included books of affidavits, judgments, correspondence, a list of issues, and papers on the Whitestown Remediation Project (Drawings, Plans, Reports), running to a combined total of 6,572 pages (something of a local record at the moment).

Issues at this point

7. A wide variety of issues were raised at a hearing on 14th November, 2022. Such is the level of controversy and complication in the proceedings that the sole agenda for that hearing (and thus the purpose of the present judgment) was to fix an agenda for the next hearing. Five specific headings were raised:

- (i). The 2020 proceedings.
- (ii). The need for further affidavits and documents.
- (iii). A preliminary objection arising from the principle as to whether the court could be asked to approve a plan that involved a timeline going beyond the long-stop date.
- (iv). Provision for the landowner's costs.
- (v). The agenda for approval of the remediation plan.

8. At the conclusion of that hearing, I announced the order being made, and indicated that I would give written reasons later, which I now do.

The 2020 proceedings

9. The current position in the 2020 proceedings appears to be that the plaintiff has not served notice of intention to proceed, not having taken any other step during the past twelve months. Under those circumstances, I do not need to decide what should be done with the 2020 proceedings at this point. There would seem, however, something very considerable to be said for postponing the actual hearing of those proceedings until 20th January, 2024 or thereafter, at which point any non-compliance with the original order would either have actually occurred or not. Any interlocutory issues can be progressed in the meantime.

Request for affidavits and documentation

10. The plaintiff asked that the council should file an affidavit exhibiting all documentation in relation to the various steps taken so far relating to remediation. The purpose of that appears to be more directed to an allegation that the council has essentially dragged its heels in not implementing remediation within the fairly generous period allowed by the court. That, it seems to me, is more relevant to the post-January 2024 situation as to the consequences of any non-compliance.

11. The plaintiff said that it wanted the question of discovery or disclosure dealt with in context of approval of the remediation plan, but the reality was that the substance of their point was to do with the timeline of the remediation rather than its content. For that reason, it seems to me unnecessary to address the question of disclosure prior to the approval of the remediation plan. That can be dealt with in the 2020 proceedings.

12. If the plaintiff wishes to pursue the question of discovery in those proceedings, it should serve notice of intention to proceed and then serve a detailed discovery letter in accordance with O. 31 RSC, following which the matter can be dealt with in the appropriate way. Even if the 2020 proceedings are not substantively heard until after January, 2024, the time between now and then can be used to resolve any questions of disclosure, if the plaintiff wants to make that an issue.

Preliminary objection arising from non-compliance with the order

13. The plaintiff essentially complains that the court should not undertake the exercise of approving a remediation plan at all, in view of the imminent non-compliance by the council with the existing orders. The answer to that, it seems to me, is that any approval of the remediation plan can be made without prejudice to the existing long-stop order. That in a sense avoids having to deal with the issue at all at this point, and also charts a middle ground between the plaintiff's arguably premature demand to deal with non-compliance before it actually occurs, and the council's (again arguably equally premature) demand to in effect excuse the non-compliance before it has happened. One particular reason that the latter might be premature is that any evaluation of whether the council's pace of implementing the remediation order has been unduly leisurely is perhaps best carried out with due regard to how close the council is to the finishing line as of January, 2024. Any suggestion of possible indulgence now (even if that were possible and appropriate) might have the counterproductive practical effect of encouraging even further delay later. That is not to

suggest that the council should get any indulgence at all – that question is just best parked until the appropriate time.

Provision for plaintiff's costs

14. The plaintiff complained that it was lacking in funds, and suggested that the court should make orders that would allow the engagement of appropriate expertise to deal with the details of remediation. While that might well be a desirable objective, it was not made clear (to me at any rate) what the appropriate procedural mechanism for that to be achieved might be. My view at this stage is that there is not a huge amount I can do about that in the absence of any formal application for an interlocutory order under any specific rule of court or any identified inherent jurisdiction, whether in the 2008 proceedings or the 2020 proceedings.

Approval of the remediation plan

15. Step 9 as set out in the No. 4 judgment is as follows: “[p]resentation of agreed final draft of remediation plan to court or in the event of no agreement, presentation of council’s final draft plan together with identification of areas of dispute; resumed hearing and order of the court receiving or approving the plan as the case may be – to conclude within 6 months of conclusion of step (8).”.

16. Step 8 was concluded on 29th September, 2022 so the completion of step 9 would be meant to occur before 29th March, 2023.

17. The council has not identified what it thinks is in dispute to the level of granular wording, but has presented a remediation plan with a spreadsheet indicating details of the process to date and the proposed process going forward.

18. On behalf of Brownfield, their solicitors Ivor Fitzpatrick & Co. wrote on 20th October, 2022, setting out an eight-point agenda which is as follows:

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

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

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

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

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

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

7. The extent to which the actions of WCC, and in particular the finding that it has been solely liable for the damage caused to the Applicant's lands, the extent and the period of which the Applicant has been deprived of its lands and the opportunity to have this asset available to assist in the funding of the proceedings, has impacted on the Applicant. The issue of how the Applicant can be facilitated in participating in subsequent and continuing proceedings, particularly when WCC is in default of its statutory requirements and the Court Order, where the Applicant's lands have been sheared of any value such as to justify the continuing expenditure in vindicating its legal and constitutional rights, including under Articles 40.3 and 43, as well as the ECHR.

8. Access to all documentation and communications regarding the various parties including the European Commission.”.

19. It seems to me that points 1, 2, 3 and 4 relate to the content of the plan, as does the first half of point 6 up to the words “judgment and order”. The rest of the points relate to either the timescale issue which can be dealt with after January 2024, or constitutional-

type issues which can be dealt with in the context of the 2020 proceedings, again preferably after January 2024.

20. In oral submissions, a further point was added on behalf of the plaintiff, which was: “the extent to which following remediation, any further responsibility of the landowner for waste or for the consequences of the council’s actions will be avoided.”. That, it seems to me, is also a legitimate point for discussion in terms of the content of the remediation plan.

Order

21. Accordingly, the order made on 14th November, 2022 was:

- (i). any order that will be made on foot of the council’s application to approve the draft remediation plan will be without prejudice to:
 - (a). the existing orders in the case;
 - (b). in particular, the long-stop deadline of 19th January, 2024, so that, for the avoidance of doubt, if timelines are provided in the implementation plan after that date, they cannot be taken in any way to prejudice the existing long-stop deadline; and
 - (c). the entitlement of either party to make any application it thinks appropriate if the site remains unremediated as of 20th January, 2024 or thereafter;
- (ii). the approval, amendment or otherwise of the remediation plan will be fixed for hearing commencing on 24th January, 2023 at 9.30 a.m. to continue thereafter on a day-to-day basis as necessary, with the agenda of:
 - (a). points 1 to 4 in the Ivor Fitzpatrick agenda;
 - (b). the first half of point 6 up to the words “judgment and order”; and
 - (c). the additional point raised in oral submissions as set out above; and
- (iii). liberty to either party to mention the matter in the meantime on notice to the List Registrar.