

## THE HIGH COURT

[2008 No. 56SP]

BETWEEN

BROWNFIELD RESTORATION IRELAND LIMITED AND DEAN WASTE CO. LIMITED

PLAINTIFFS

AND

WICKLOW COUNTY COUNCIL

DEFENDANT

AND

[2005 No. 89SP]

WICKLOW COUNTY COUNCIL

PLAINIFF

AND

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

DEFENDANTS

(No. 1)

**RULING of Mr. Justice Richard Humphreys delivered on the 26th day of April, 2017**

1. Mr. James Connolly S.C. for Wicklow County Council has brought a notice of motion dated the 24th April, 2017 seeking directions as to a modular trial. He relies on *Weaving Macro Fixed Income Fund Limited (In Liquidation) v. PNC Global Investment Servicing (Europe) Limited (now known as BNY Mellon Investment Servicing (International) Limited)* [2012] 4 I.R. 681 which establishes that there is jurisdiction in the court (as part of its inherent jurisdiction to regulate the manner in which a trial is conducted) to direct a modular trial such that some issues are determined ahead of others. That decision relies on a stream of jurisprudence including *Cork Plastics Manufacturing v. Ineos* [2008] IEHC 93 (a judgment of Clarke J.), *P.J. Carroll and Co. Ltd. v. Minister for Health No. 2* [2005] 3 I.R. 457 (a judgment of Kelly J. as he then was) and *Millar v. Peeples* [1995] N.I. 6. The jurisprudence supports the view that one should take a broad and realistic view of what is just and convenient in that regard seeking to avoid unnecessary expense in making effective use of court time and balancing the advantages and disadvantages of modularisation to each party.

2. At p. 693 of *Weaving*, Clarke J. (quoting from his judgment in *Cork Plastics Manufacturing*, para. 3.1) stated that the default position is "a single trial of all issues at the same time". In considering whether to depart from that, one must have regard to all relevant matters. One is the relative length of different modules. In the present case we have had four witnesses so far; we are now in the sixth week of the hearing and there are another nine witnesses at least to go. The question of significant overlaps in the evidence also arises and here the points at issue in the potential Module I seem to be reasonably discrete. The question of risk of unfairness must be considered but it seems to me that does not arise here. Mr. Connolly submits that a modular trial would be an efficient management of court time and would give rise to a saving of costs, and that the points that potentially could be distributed between the different modules are separable. The one identifiable downside of modularisation at this point is the risk of deciding a hypothetical. Mr. Connolly says that any such risk is itself hypothetical. He says that the issues he wants decided are not hypothetical. It seems to me however that if there is some risk of deciding a hypothetical, that is not an absolute bar on modularisation but rather it is an element or a factor to be put into the balance; and one must then take an overall view as to where the preponderance of benefits lie.

3. The cross-examination in what are being called the prior proceedings (which are the proceedings up to the adjournment of the hearing by O'Keeffe J. on 20th December, 2011, after 23 days of hearing) has almost concluded if not entirely concluded because Mr. Peter Bland S.C. for Brownfield is saying now that he is not likely to require to cross-examine the last outstanding witness in that regard, Mr. Duffy.

4. Mr. Bland's attitude to the present motion is that he very helpfully accepted that there was "an obvious benefit" in determining early what he calls a "kryptonite point" that could shorten matters by way of early knock-out; secondly he says that there is benefit in determining factual issues where the evidence has concluded and while the matter is fresh in everybody's minds including those of counsel; and thirdly he accepts the benefit in principle in dealing with all European law points together which would allow me to take a holistic view of the impact of European law on the case.

5. The impact of EU law is a potentially important addition to the jurisprudence on modularisation because that jurisprudence to date does not seem to have specifically had occasion to consider the impact of the reference procedure. That procedure does not entirely sit well with the general principle that all issues must be decided in a single trial at the same time, for the obvious reason that the making of a reference would require an adjournment of the proceedings prior to a final decision (seeing as a reference only arises while the matter is "raised before" or "pending before" the national court (art. 267 TFEU), not after it has been decided). In this case it seems to me it would be contrary to the effective management of the case to have the possibility that I might hear highly technical and lengthy scientific evidence and cross-examination and then adjourn the proceedings without making a decision on that evidence for an indeterminate period. It seems to me the intersection of even the possibility of a reference with a highly technical element of the case (that could not be determined until any questions referred (if that arose) were answered) leans strongly in favour of determining at an early stage whether I should decide those questions myself or whether I should refer them; and thus leans in favour of modularisation. Both sides took the view that the European law questions should be resolved in their favour on an *acte clair* basis, but both sides also said that if I was not minded to go that route that I should consider a reference. I should stress for clarity that I am not to be taken as expressing a view that a reference is a likelihood at this stage; all I need to ascertain now is that it is a possibility, and, if so, to factor it in procedurally.

6. In the end, the principle and the broad lines of possible modularisation in this case were not strongly disputed, so having heard and considered the submissions my ruling on the motion is that matters will proceed as follows:

(i). Firstly, by confirming with counsel that there is no completed cross-examination in relation to the affidavits in the prior proceedings. I understand Mr. Bland to be now saying he does not need to cross-examine Mr. Duffy.

(ii). Secondly, insofar as it is still an issue, on 27th April, 2017, I will deal with the application to file an additional affidavit from Mr. Duffy exhibiting further documentation, if that is still live.

(iii). Thirdly, I will direct a modular trial in two modules as follows.

7. Module I will consist of the following:

(i). Firstly, evidence and submissions on (a) the conflict of evidence between Mr. Ó Laoire and Mr. Sheehy insofar as it is relevant to the proceedings, apart from Mr. Ó Laoire's evidence relevant to current environmental risks which is a Module II item, (b) whether the council invocation of s. 56 was *bona fide* and (c) the extent of the council's responsibility for dumping on the site prior to s. 56 being invoked.

(ii). The second element of Module I will be submissions on the following legal issues. Firstly, questions 1 to 5(iii), 5(v), 5(vii), 6, 8 and 9 on the list of issues prepared by Mr. Connolly following discussion between both sides and the court, with the qualification that that will be on the basis of a more defined statement of the factual premises of numbers 3, 4, 5(v), 5(vii), 8 and 9, and secondly such other points of European Union law, if any, as may arise in the proceedings that can be determined at this stage.

(iii). The third element of Module I will be to hear submissions as to whether Brownfield should be struck out of the *Wicklow County Council v. O'Reilly* [2005/89 SP] proceedings and if so any costs implications to the extent that they can be determined now.

8. At the end of those three items I will either determine those issues, or refer questions, or a mix of both. It was agreed there should be a rider to any order for modularisation that if on later consideration I felt that it emerged that a matter did require properly to be postponed to Module II I would retain jurisdiction to do so.

9. Following Module I, Module II will deal with evidence regarding the current environmental risk and submissions on issues arising therefrom, which are questions 5.4, 5.6, 7 and 10.

10. Finally I will direct the parties to clarify in writing the factual premises of questions 3, 4, 5(v), 5(vii), 8 and 9 by way of an agreed statement of factual premises or assumed factual premises of those questions. They may have to be pitched at a certain level of generality, and the way forward in principle I think would be for Mr. Bland to prepare a draft statement of facts and for Mr. Connolly to reply and suggest any amendments and I can resolve any remaining differences if matters are not agreed.