

THE HIGH COURT

[2021] IEHC 599
[2008 No. 56 SP]

BETWEEN

BROWNFIELD RESTORATION IRELAND LIMITED

PLAINTIFF

AND

WICKLOW COUNTY COUNCIL

DEFENDANT

AND

THE ENVIRONMENTAL PROTECTION AGENCY

NOTICE PARTY

(NO. 6)

JUDGMENT of Humphreys J. delivered on Thursday the 30th day of September, 2021

1. Illegal dumping on a site in Whitestown Co. Wicklow began in 1979, commencing a 42-year long and counting saga that awaits final resolution. In 2005, Wicklow County Council commenced proceedings to seek remediation of that site. In *Wicklow County Council v. O'Reilly (No. 1)* [2006] IEHC 265, [2006] 2 JIC 0803 (Unreported, High Court, Clarke J., 8th February, 2006), in those proceedings, the court made orders as to the appropriate defendants.
2. 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 criminal proceedings arising from the illegal dumping.
3. 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. In 2008, Brownfield Restoration Ltd., the current owners, commenced the present counter-proceedings against the council.
4. 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 and determined that the council had not made proper discovery.
5. 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 council's remediation proceedings pending proposed remediation actions by the council. Those proceedings never got back on the rails, but were superseded in effect by the 2008 enforcement proceedings brought by the Brownfield, which in effect developed to also encompass a complaint against the council's efforts at remediation.
6. In *Brownfield Restoration Ireland Limited v. Wicklow County Council (No. 1)* [2017] IEHC 310, [2017] 4 JIC 2604 (Unreported, High Court, 26th April, 2017), I granted the council's application for the modular trial of these proceedings.
7. In *Brownfield Restoration Ireland Limited v. Wicklow County Council (No. 2)* [2017] IEHC 397, [2017] 6 JIC 1201 (Unreported, High Court, 12th May, 2017), I decided a number

the EU law issues including that appropriate assessment (AA) is not required where the court directs remediation. That has become a significant issue now for reasons that will be explained shortly.

8. In *Brownfield Restoration Ireland Limited v. Wicklow County Council (No. 3)* [2017] IEHC 456, [2017] 7 JIC 0706 (Unreported, High Court, 7th July, 2017), I decided in principle to order remediation.
9. In *Brownfield Restoration Ireland Limited v. Wicklow County Council (No. 4)* [2017] IEHC 486, [2017] 7 JIC 1907 (Unreported, High Court, 19th July, 2017), I directed remediation and set out indicative timelines of 15 steps with a definite final date for full remediation and handover. Allowing for the various steps specified, that final date is 19th January, 2024. That remains as a binding deadline for the council, enforceable in the same way as any other order of the court, all things being equal (which they may or may not be). I did, however, allow the council to engage in a process along the lines of AA, in a context where the earlier No. 2 ruling indicated that AA was not strictly required.
10. In *Brownfield Restoration Ireland Limited v. Wicklow County Council (No. 5)* [2017] IEHC 487, [2017] 7 JIC 1908 (Unreported, High Court, 19th July, 2017), I decided on costs (the costs order was later varied by the Court of Appeal).
11. On 29th July, 2021 I gave further directions as set out below and now take the opportunity to give reasons for doing so. This is now the 11th High Court judgment in this matter.

Implementation of the existing orders

12. In May 2020, the council brought a motion to approve a methodology of removal under the Environmental Protection Agency (EPA) code of practice.
13. Brownfield's response was essentially that the council was ignoring the previous judgments and orders and that instead of working on the methodology of implementing the removal directed by the court, the council was rewinding the clock and asking whether and to what extent removal of waste was required, or asking what further studies should be carried out, despite the fact that all of this had already been the subject of a definitive order after lengthy and hotly contested proceedings on oral evidence.
14. The council then indicated that in view of Brownfield's position it would not proceed with the motion and would move straight on to the remediation plan, although clearly much time had passed in the meanwhile. Whether the lapse of time between the judgment of 19th July, 2017 and these developments in mid-2020 involved scrupulous attention to and acceptance of the detail of the judgment, accompanied by its vigorous implementation, or as the plaintiff contends, a process of the unauthorised revisiting of central aspects of the judgment resulting in the stalling or delaying of implementation, may possibly be relevant to what orders are appropriate should the final deadline of 19th January, 2024 hypothetically not be met. No doubt this can all be discussed in due course if that becomes necessary.

15. Matters developed on the basis of preparing a remediation plan until 15th March, 2021 when the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media directed the preparation of a Natura Impact Statement pursuant to reg. 42(19) of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011).
16. I am now dealing with whether to make further specific directions regarding the timeline for remediation in the light of that intervention.
17. We are currently as far as step 5 (of 15) in the No. 4 judgment, namely circulation of a draft remediation plan. The council proposed a timeline along the following lines to deal with steps 6 to 8:

<i>Step 6 - Review by council of draft remediation plan in the light of observations received together with any consultations between parties aimed at resolving disagreement - 2 months from step (5)*</i>	Step 6(a) Complete Biodiversity Surveys required for the preparation of Natura Impact Statement (NIS) as required by Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media (NPWS) pursuant to Regulation 42(19) Regulation of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477/2011), as set out in her observation dated 15 March 2021	17th December 2021
	Step 6(b) Preparation of Ecological Impact Assessment Report	18th February 2022
	Step 6(c) Finalisation of revised draft remediation plan	31st March 2022
	Step 6(d) Preparation of NIS	31 st March 2022
<i>Step 7 - Circulate the revised draft remediation plan back to EPA and Brownfield plus public consultation and statutory</i>	Step 7(a) Submission of NIS to Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media (NPWS)	29th April 2022

<i>consultees – 3 months from Step 6</i>		
	Step 7(b) Re-circulation of draft revised remediation plan to consultees	29th April 2022
	Step 7(c) Review of NIS by Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media (NPWS)	10th June 2022 (6 weeks)
	Step 7(d) Public consultation – revised draft remediation plan to be put on public display and observations from the public invited	29th July 2022 (3 months)
	Step 7(e) Circulation of draft remediation plan by the EPA and Brownfield plus consultees to whom the original draft plan was circulated at Step 5	29th July 2022 (3 months)
<i>Step 8 - Review by Council of revised draft remediation plan in light of the observations received together with any consultations between the parties aimed at resolving disagreement. Prepare final draft of plan and, if disagreement remains between parties, preparation by the council of a Scott schedule settling out areas of disagreement with the parties – 2 months from Step 8</i>	Review of observations received on foot of consultation process under Step 7(d) and Step 7(e) Finalisation of final draft of remediation plan and, if necessary, preparation of Scott schedule for submission to the Court	29th September 2022 (2 months)

18. The plaintiff didn't raise any objection in principle in all of the circumstances to revisiting the question of whether AA should be required notwithstanding the No. 2 judgment. Nor did Brownfield have any specific objection to the timeline for the first step, namely the biodiversity surveys. Brownfield did, however, question whether the ecological impact assessment report should be finalised before the draft plan or only when the draft plan had been prepared. I don't immediately see that as a fundamental objection given that the Natura Impact Statement won't be finalised until alongside the draft plan.
19. A direction at least as to step 6(a) is the best way to move the matter along as rapidly as possible bearing in mind the need for an opportunity for Brownfield to review and consider whether and to what extent it wishes to object to any of the specific subsequent steps proposed now by the council.

Order

20. In all of the circumstances and without significant objection from either party or from either the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media or the EPA who were also represented, the order made on 29th July, 2021 was as follows:
 - (i). that the council is to complete the biodiversity surveys required for the preparation of a Natura Impact Statement by 17th December, 2021; and
 - (ii). that the matter be listed for mention on 11th October, 2021 to facilitate the parties in considering whether the subsequent steps and timelines proposed by the council are acceptable, and if not, to fix a date for a hearing to finalise those steps.