[2023] IEHC 712

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.SP.2008.0000056]

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. 10)

JUDGMENT of Humphreys J. delivered on Monday the 18th day of December, 2023

Judgment history

1. In the 44 years since a huge illegal dump, possibly the largest in the history of the State, began operating at a quarry site at Whitestown in West Wicklow in around 1979 onwards, the situation has led to at least 5 sets of proceedings, 22 years of litigation and numerous judgments and decisions of which this is the eighteenth. It might perhaps be worth having a quick recap of the history of the matter, seeing as we are on the cusp of the expiry, in January, 2024, of the six and a half years fixed by the court for remediation, with a grand total of zero tonnes of waste out of the minimum of a quarter of a million tonnes on site having been removed since the court's order requiring that to be done.

2. A pessimist could rather be forgiven for hoping that, all being well, we may see remediation before hitting the official *Jarndyce v. Jarndyce* threshold of 54 years in 2033 (see *Lehane v. Wymes* [2021] IEHC 427, [2021] 7 JIC 0206, para. 1).

3. The proceedings generated by this situation are as follows:

(i) enforcement proceedings [Case C-494/01] against Ireland by the European Commission initiated on 20th December, 2001 and finalised by the CJEU in 2005;

(ii) waste enforcement proceedings brought by Wicklow County Council against various alleged polluters [2005 No. 89 SP] and now adjourned generally;

(iii) a defamation action by the council's authorised officer Donal O Laoire against Brownfield [2005 No. 1472P], in respect of which there seems to have been no recorded activity since 2020;

(iv) the present waste enforcement proceedings brought by the current landowner, Brownfield, against the council [2008 No. 56 SP]; and

(v) an action for damages and constitutional and other reliefs brought by Brownfield against the council [2020 No. 5730P], currently adjourned to 22nd January, 2024.

4. The previous decisions are as follows:

(i) in *Commission v Ireland,* judgment of 26 April 2005, *Commission v Ireland*, C-494/01, ECLI:EU:C:2005:250, [2005] ECR-I 3331, the CJEU ruled that there had been a failure to ensure a correct implementation of the provisions of Articles 4, 5, 8, 9, 10, 12, 13 and 14 of Council Directive 75/442/EEC of 15 July 1975 on waste, by reference to nearly 100 sites of which the Whitestown dump was one;

(ii) 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;

(iii) in *Wicklow County Council v. O'Reilly (No. 2)* [2006] IEHC 273, [2006] 3 I.R. 623, [2006] 9 JIC 0801, (Clarke J.), the court declined to stay the proceedings pending prosecutions arising from the illegal dumping;

(iv) 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;

(v) in *Wicklow County Council v. O'Reilly (No. 4)* [2010] IEHC 464, [2010] 12 JIC 0705 (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;

(vi) in *Wicklow County Council v. O'Reilly (No. 5)* (*Ex tempore*, Not circulated, O'Keeffe 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;

(vii) 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;

(viii) 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;

(ix) 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;

(x) 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;

(xi) 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;

(xii) 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;

(xiii) in *Brownfield Restoration Ireland Ltd. v. Wicklow County Council* [2021] IESCDET 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;

(xiv) 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;

(xv) 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;

(xvi) 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; and

(xvii) in *Brownfield Restoration Ireland Ltd v. Wicklow County Council (No. 9)* [2023] IEHC 250, [2023] (Unreported, High Court, 16th May, 2023), I gave directions for the issue of motions and awarded certain costs to the applicant.

Facts and procedural history

5. As noted above, a large illegal dump operated at a quarry site at Whitestown in West Wicklow from around 1979 onwards.

6. Part of the site is a candidate Special Area of Conservation along the banks of the Carrigower River, which supplies human drinking water supply to nearby urban areas.

7. The council itself under the directions of middle management dumped a significant quantity of material on the site during the period 1979 to 2001, including non-inert and hazardous waste. Complaints were made to the council about the dump going back to 1989 but no effective action was taken; the council states that it did not find evidence during site visits. In November, 2001, the senior management of the council say they discovered the dump and the council took steps to close it. On the day it was being closed, two lorry-loads of waste were in the course of being dumped on behalf of the council on the same site.

8. In December, 2001, the European Commission's enforcement action was commenced.

9. The council then engaged Donal Ó Laoire as a consultant and later appointed him as an authorised officer. Mr Ó Laoire developed a proposal, which he himself correctly described in evidence as corrupt, whereby he and his associates (variously described as a syndicate or consortium) would make a personal profit from a commercial venture designed to remediate the

site, using powers enjoyed in his official capacity as well as court proceedings assisted by him in that capacity, both civil and criminal.

10. In May, 2002, the council entered the site, took possession of it and used a mechanical excavator to cap the main waste dumps with material. It is agreed that the waste on site when the council entered on the lands included inert, non-inert and hazardous waste.

11. On 16th October, 2002, Commissioner Margot Wallström of the European Commission issued a letter pursuant to art. 226 of the EC Treaty regarding implementation of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended with a view to a possible further enforcement action before the CJEU. The letter complains at para. 3 that the council was notified in 1998 that dumping was taking place but took no enforcement action. The Commission was concerned that it was indicated that the intention was to seal the site rather than remediate.

12. On 26th September, 2003, a subsidiary of Brownfield, Rockbury Ventures Ltd. (incorporated in the British Virgin Islands), acquired the site, their interest being later transferred to Brownfield itself.

13. In 2005 the council brought injunctive proceedings under s. 58 of the 1996 Act against Brownfield and various other defendants. Importantly, in those proceedings the council sought full remediation which would have complied with EU law, involving the removal of all waste from the site. As will be seen, when the council envisaged other people paying for the remediation, it set the bar very high in terms of what needed to be done.

14. On 26th April, 2005, the European Court of Justice, in *Commission v Ireland*, C-494/01, ruled that Ireland had failed to comply with directive 75/442/EEC as amended by directive 91/156/EEC. Paragraph 135 of the judgment refers to close to 100 illegal sites, some of which were of considerable size and contained hazardous waste originating, in particular, from hospitals. As already noted, this site is one of the 100 so mentioned.

15. In 2008 Brownfield brought the present s. 58 proceedings, this time for an injunction against the council.

16. A letter of formal notice was issued by the European Commission on 30th September, 2010, including a complaint regarding delay in dealing with Whitestown. This triggered engagement between the Department and the council in relation to dealing with the site.

17. A manager's order to proceed to remediate the site under s. 56 was made on 23rd November, 2011.

18. A first trial of the two s. 58 actions took place before O'Keeffe J. A critical decision was in *Wicklow County Council v. O'Reilly* (No. 5). O'Keeffe J. was assured by the council that Brownfield would get a remediated site back, and he granted an adjournment mid-hearing (after 23 days) on that basis. The submission, made on 13th December, 2011 (p. 37 of transcript) was that "At the end of it all, Brownfield, instead of having a highly polluted site, will have a remediated site, probably enhanced in value, and it may be that the benefit or windfall to them may have to be offset in some way at a later stage under the section 58 proceedings which we're adjourning when we come back to look at who pays for the clean-up costs and what they may all cost".

19. But the site was not "remediated" in the sense envisaged by the court. As enforcer, the council wanted others to remove all waste; but when the council had to do the work itself, the bar was lowered to a bonsai level – 93% of the waste was left in the ground.

20. From the outset of its DIY remediation process, the council took the approach that "as much [waste] as possible will be allowed to remain on site" (email a Senior Executive Engineer to the assistant chief executive of 22nd February, 2012). This was at least a week before the council's consultants White Young Green (WYG) reported in the Tier 2 report and 3 months before the risk assessment. The executive decision to allow as much waste as possible to remain on site thus preceded the risk assessment. As held in the No. 3 judgment, this was a fundamentally flawed approach and completely contaminated the whole approach taken by the council. It was reinforced by the adjustment and amendment of the risk assessment by council officials rather than having a science-driven approach.

21. WYG followed this up with a "Tier 2&3" report in May, 2012. In the Tier 2 report of February, 2012, the water table was shown significantly intersecting with the waste in Zone C at both ends of the zone. In the Tier 2&3 report, this was changed to become a mere glancing blow with the water table, only minimally impacting at the bottom of the waste. The change was essentially due to discounting data that did not fit the council's hypothesis.

22. The council established a Technical Working Group (TWG) to assist with its remediation plan. This included an EPA representative. Whether it was appropriate for the EPA to participate in a non-statutory process of this kind which it would later have to deal with in the exercise of statutory functions was viewed as highly questionable in the No. 3 judgment.

23. At a TWG Meeting No. 7 on 29th May, 2012 (again notably, over 3 months after the council had decided on the executive approach of leaving as much waste as possible *in situ*), the more limited remediation approach was pursued. The minutes of the meeting record that the approach

discussed was (i) "Zone A: Excavate/screen the dry, Excavate and dump the wet" (ii) "Zone B – remove hot spots and improve grass coverage" (iii) "Zone C: Cap the zone with impermeable barrier or with good quality clay layer. Not as elaborate cap as in a municipal landfill"

24. This was followed up with a "summary remediation plan" prepared by WYG on 1st June, 2012 and sent with the comment "I hope this meets with your present requirements". The introduction to this document states that "in Zone C … all of the waste is located above the permanent water table". The emphasis on "permanent" (a questionable and contested concept) obscures the admitted seasonal rises in the groundwater leaving aside the contention that the so-called permanent water table is in fact above the bottom of the waste. It also comments minimisingly that "Zone C is contributing a relatively smaller amount of pollution compared to zone A"; but relative size is questionable given a later memorandum dated 6th June, 2012, that calculates costs "based on Zone C containing a tonnage of waste that is equal to 70% of the tonnage present in Zone A" and obscures the large absolute size of Zone C. No reference is made to Zone B contacting the groundwater.

25. The memorandum of 6th June, 2012 notes that the cost of capping the waste in Zone C is €500,000 but the cost of excavating and screening the waste would be approximately €2,800,000. The cheaper option was of course chosen.

26. An official of the EPA (who was a member of the TWG and had been copied with drafts and material) indicated on 27th June, 2012, that he was happy for the remediation plan to be circulated to other parties although (despite this tacit form of approval) emphasised that it should not be referred to as EPA approved. The council reassuringly replied that "it will be printed as is with a WYG cover etc."

27. On 22nd August, 2014, a different official of the EPA wrote to Brownfield, misleadingly stating *inter alia* that "[t]he requirements of the EPA Code of Practice … were applied by the [Technical Working Group] in assessing the site". A similar assertion was made in the WYG Tier 2&3 report. It is clear that the code was not complied with – the full extent of non-compliance will be discussed further below. The letter from the EPA goes on to say that "there is no conclusive evidence from reviewing the logs of boreholes installed during the most recent site investigation that the waste in … Zone C … is in contact with groundwater". The conclusion is plainly incorrect. In addition, the notion that the EPA are concerned about whether there is "conclusive evidence" as opposed to risk indicates a fundamental misunderstanding by the EPA of the precautionary principle and of the legislation it is meant to be applying.

28. It was not until 10th February, 2014 (over 3 years after the decision to remediate) that the council's contractor entered on the site.

29. The council remains in exclusive possession of the site, which is fenced off to all other persons, including Brownfield.

30. The site can be divided into four parts: three main dumping zones (A, B and C) together with the rest of the site which can be considered as a fourth area. It is agreed that the waste on site when the council entered the site included hazardous, non-inert and inert waste. The remediation actually carried out involved removing the waste from zone A, trommelling the waste in zone A to fines (this involved a mixing and trommelling of the waste (Brownfield says this involved mixing hazardous waste with other wastes) and a reduction of waste to fines), returning what the council says is inert waste to zone A and using some of it as a cover for B and C, as well as removing a small amount of waste from zone B. The vast majority of waste in B remains in the ground as does all waste in C. No geomembrane separates the waste from the groundwater in any of the zones. The council's position is that groundwater is in contact with backfilled material in zone A and B which the council contends is inert. It is accepted by the council that the waste in zone C is in contact with the groundwater in some circumstances ("under extreme wet conditions groundwater rises into a small area of waste deposits for a short period of time"). The council does not have and never had a waste licence and did not carry out an Environmental Impact Assessment (EIA) or Appropriate Assessment (AA) in respect of any of the remediation works. It is agreed that the current waste material on site amounts to a minimum of 250,000 tonnes, and that in the course of the remediation 16,479.8 tonnes of waste were removed from the site. In other words, a minimum of 93% of the illegally dumped waste remains in the ground.

31. On 26th June, 2015, the Department notified the Commission that "all waste" had been "removed" from Whitestown. This was obviously incorrect. The document given to the Commission also stated that certain waste was still in place, so to that extent the material furnished was contradictory and inaccurate.

32. The 2008 action was then re-entered on 20th July, 2016, by direction of Gilligan J., and a renewed hearing commenced before me on 7th March, 2017.

33. As noted above, in the No. 2 judgment I rejected certain allegations of misconduct against the council. In the No. 3 judgment I decided in principle to order remediation. In the No. 4 judgment, 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.

34. 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. It is worth recalling that Costello J. said *inter alia,* as follows:

(i) "The history of the dumping on the site, complaints in relation to the existence of the site and attempts to close the site and remediate it, were described by the trial judge as a saga; they could equally be described as Kafkaesque. For the purposes of this judgment, it is not necessary to set out all the depressing and shocking events in exhaustive detail." (para 4);

(ii) "It appears that the council was aware of this shocking breach of the Waste Management Act – or at least ought to have been – from, at a conservative estimate, the mid-1990s. Despite this, it was not until 2001 that the council claimed publicly that it had "discovered" the dump and closed it." (para. 5);

(iii) "These proceedings would not be particularly remarkable save for the astounding fact that, for more than two decades, the council itself had dumped vast amounts of waste at the illegal landfill. Furthermore, there had been complaints to the council from 1989 onwards concerning the enormous illegal dump operated openly on the site. In the circumstances, it is absolutely astonishing and shocking that in 2001 the council claimed to have "discovered" the illegal dumping, and then proceeded in 2005 to sue twelve other parties, and to seek to compel them to remediate the site, while declining to accept any responsibility itself for the situation." (para. 11);

(iv) "The cases had been adjourned generally while the council was making further discovery. Once this was completed the cases were listed to recommence before O'Keeffe J. on the 24th January, 2012. On the resumed date the council applied to adjourn the proceedings generally, with liberty to re-enter, as the council proposed to carry out remediation works itself pursuant to s. 56 of the [Waste Management Act] 1996. The High Court was assured that within a year it would deliver a remediated site, probably enhanced in value, with a windfall to Brownfield. Both the High Court and Brownfield believed that the council would proceed in accordance with its position to date: that all of the waste and contaminated soil was required to be removed in order properly to remediate the site and that this was the course of action it was proposing to follow. On this basis, the High Court acceded the application to adjourn the proceedings with liberty to re-enter." (para. 16);

(v) "In fact, the council had decided, once it was the party responsible for remediation, that "as much as possible [of the waste] will be allowed to remain on site"." (para. 17);

(vi) "The trial judge referred to this as a "bonsai" remediation and a "botched" remediation. He concluded emphatically at the end of his third judgment that, by reason both of the waste which had been dumped on the site and of the botched efforts by the council to remediate the site, it was necessary to remove all waste and contaminated, or potentially contaminated, soil from the site in order to comply with the requirements of environmental protection law." (para. 18);

(vii) "Notwithstanding the fact that the council's remediation exercise left 93% of the waste on the site, in 2015 the council told the Department of the Environment that it had successfully remediated the site and Ireland then informed the European Commission on the 26th June, 2015 that all waste had been removed from the site. The council cannot have believed that this was the case. Tests conducted in 2015 revealed that the waste on-site was polluting the ground water which flowed into the nearby River Slaney. Notwithstanding this fact, the council took no steps to correct the information furnished by Ireland to the Commission." (para. 19);

(viii) "The council emphatically lost the case and the court directed the council to remediate the site in full." (para. 21);

(ix) "When one examines each of the steps set out in [para. 24] of the [No. 4] judgment, it appears to me that all of them are either necessary, or appropriate, in the circumstances of the huge illegal dump which requires remediation. Some of the steps are unavoidable. The council is obliged to comply with the requirements of public procurement law. Even in urgent situations, the timelines for complying with the requirements of public procurement are truncated, not dispensed with. The trial judge was required to balance practicalities with risk. There is a risk of leachate discharging into the ground water during the process of remediating the material, and there is a requirement to cover the waste every night. There may be other risks which need to be identified and addressed in the preparation of the remediation plan. It is appropriate

and sensible that the council and Brownfield have the opportunity to consult with the EPA and statutory consultees in relation to the plan. Given the previous history of this site, and in particular the distrust arising from the "botched" remediation by the council and the denial by the council that any further remediation is required, this is wholly appropriate in my judgment." (para. 24); and

(x) "It is, therefore, simplistic to say that the trial judge on the one hand rejected the requirement of the council to conduct an EIA [Environmental Impact Assessment] or AA [Appropriate Assessment], but on the other hand failed to "strip out" the time for conducting an EIA or AA when he fixed the overall time for compliance with his order. Time is required for consultation and preparation of a plan, whether or not the council conducts a quasi EIA or AA. The steps set out by the trial judge, including a resumed hearing and order of the court receiving or approving the plan as the case may be, involves steps 1-12 of the order and in my judgment, were necessary. Certainly, I do not accept that the trial judge was in error in directing any of the steps listed. The times suggested for each step are indicative, not binding and they seem to me to be reasonably tight for a public authority to comply with." (para. 25).

35. In the No. 8 judgment, I approved the remediation plan in part and determined that certain elements would be addressed at a later stage on the basis of specified options, specifically either agreement, acquisition of the land by the council, or following the appointment of an independent expert.

36. In the No. 9 judgment, I gave directions for the issue of motions including by the EPA in respect of its issues concerning the remediation plan and by the council in respect of the independent expert.

37. The matter was listed for mention on 22 May, 2023 regarding the EPA motion, when times for replies were directed and the matter was adjourned to 12th June, 2023. On the latter date the EPA's motion and the council's motion regarding the expert were adjourned for 2 weeks with provision for replies. The matter was adjourned again on consent and then on 24th July, 2023, the council sought an extension of time for a further late affidavit. That was granted and the matter was adjourned to 2nd October 2023 with the parties directed to finalise affidavits.

38. Following yet a further consent adjournment I was compelled to intervene more actively to manage proceedings towards some form of progress, and on 6th November, 2023 I listed the issue of the sequence in which the motions and disagreements would be addressed as being fixed for hearing on 20th November, 2023 at the end of the list.

39. On the latter date I decided (without a contest from the applicant, in the end) that the sequence would be

(i) the issue between the EPA and the council regarding waste disposal facility availability;
(ii) the issue of the expert including whether to appoint such a person, who it should be and who would instruct such a person and how; and
(iii) costs.

40. I then listed the first of those issues, that between the EPA and the council, for hearing at the end of the list on 27th November, 2023, and gave directions as to affidavits.

41. On the latter date the EPA motion effectively settled and was adjourned generally with liberty to re-enter. The EPA was excused from further active involvement with liberty to reapply.

42. I noted (without deciding on) the council's request for adjustment of the timeline without prejudice to the long stop date and existing orders.

43. I also ordered without objection that there would be a person or persons appointed as expert to assist the court.

44. The responsibilities, terms of reference and modalities applying to the expert was the next issue, and that was listed for hearing on 4th December, 2023, subject only to counsel's availability, with directions for affidavits.

45. The issue of the terms of engagement of the expert was heard on 4th December, 2023, and judgment was reserved. That is the issue I am dealing with now.

Relief sought

46. The council's notice of motion seeks the following primary relief:

"1. An Order pursuant to Judgment (No. 8) of this Honourable Court directing the appointment of an independent expert to ensure and guarantee independently the volume of waste and soil removed from the site at Whitestown and in this regard to carry out the following: (i) to review and assess the suitability of the approach, methodology, site investigation and environmental monitoring data, risk assessment(s) and all other relevant information used in the preparation of the remediation plan to determine that the soils remaining in situ in Zones D, E, F and G do not pose an environmental treat; (ii) to review and assess the approach and methodology proposed in the remediation plan to determine all waste and potentially contaminated soil is removed from Zones A, B and C; (iii) to review

and assess all scientific evidence to include but not limited to environmental data and risk assessments to confirm that all waste and potentially contaminated soil is removed from the site."

47. As follows from the above, that relief is being taken in stages. The decision in principle to appoint an expert has been dealt with. I am now dealing with the terms of engagement of the expert. The question of who that will be will follow next.

The overall brief of the expert

48. The applicant points out that Kelly J. appointed his own expert in *Curley v. Galway County Council* (Unreported, Kelly J., 30th March, 2001) to advise on the remediation of a site at the expense of the polluter (also a local authority), and also awarded costs of the application to the applicant on a solicitor-client scale.

49. As regards the critical issue of how wide the expert's brief should be, there were a number of options:

(i) a narrow approach - to report purely on the aspects of the remediation plan yet to be approved;

(ii) an intermediate approach - to report on such matters as the parties disagree on and as the court considers could be assisted by the expert; and

(iii) a wide approach – to maintain a continuous involvement in all aspects of the matter.

50. Having heard the parties it seems to me that the intermediate approach is going to be by far the most useful, and the council didn't particularly disagree with that option.

51. Turning then to the form of the form of the order, the applicant helpfully prepared a document listing potential orders, of which the first was:

"1. Appointing an independent expert to prepare such reports as the Court may direct to assist the Court as to what is required to ensure and guarantee that the remediation plan or any variation thereof shall achieve the objectives of the Court's Orders for the full remediation of the site, with particular reference to the matters identified in Judgment No. 8 (Zones A to C, Zones D to G and Infilling)."

52. The council did not have a huge issue in principle with point 1. I think that these matters can be incorporated into a more general wording that there be an order that the expert will report at such times and in such manner as may be directed by the court from time to time on such matters as arise in the proceedings as the parties disagree on and as the court considers could be assisted by the expert, including what is required to ensure and guarantee that the remediation plan or any variation thereof shall achieve the objectives of the Court's Orders for the full remediation of the site, in line with the judgments and orders of the court.

Powers of the expert

53. The applicant's proposal in this regard was an order:

"2. Directing the parties to cooperate with the expert and to provide him or her with any information or document or to do such things or take such measures as may be required to assist him or her in the performance of his role under 1.

3. Providing the expert with such powers of inspection and action as may be required for the purpose of informing the preparation of reports."

54. The council proposed that the expert be provided with the draft remediation plan and appendices. The reference to the expert's proposed power of action in point 3 was said by the council to be unduly vague if not invasive. I tend to agree and don't see any immediate need for the expert to be given any powers at this stage unless you want to call making requests a power. If such requests are refused then the matter can be reported on to the court and any appropriate directions can be given. Presumably this won't arise. For example if an expert considered that certain information was required in order to be satisfied that waste had been removed, and the information was not produced, one might legitimately infer that one could not be satisfied that the waste had been removed. No powers as such are necessarily required, but if they become required the court can make any appropriate orders once informed of problems. It feels a bit paternalistic to direct the parties to co-operate with the expert. If they don't co-operate I should get to hear about it from the expert, and we can discuss the appropriate directions at that point. But I am sure that won't actually happen.

55. So I would not propose to make any specific order under this heading at the moment, other than being able to revisit this under the liberty to apply.

Frequency of reporting

56. The applicant's next proposed order was:

"4. Providing for interim reports, a final report on the remediation plan and a final report on the remediation process."

57. Point 4 while not specifically objected to seems to be slightly prescriptive. What would be more flexible would be to provide that the expert would report from time to time, when and in such manner as required by the court, as already referred to in the order proposed above.

Costs of the expert

58. The applicant's next proposed order was:

"5. Providing for the costs of the expert to be paid by the Respondent."

59. Point 5 was not an issue and indeed has already been ordered so there is no need to repeat it.

60. As regards details of payment of the expert, the matter can be dealt with by providing that the expert would be paid by the council within 2 months of the expert issuing a request for payment from time to time with any disagreement as to amount or timing to be dealt with by the court rather than being prescribed in advance.

Applicant's costs

61. The applicant sought an order as follows:

6. "Providing for the costs of the Applicant in cooperating with and providing assistance to the expert."

62. The council was concerned as to the open-ended nature of point 6. It was accepted insofar as the expert requested the applicant to do something but was too open ended otherwise.

63. As regards a blanket order that the applicant's costs of dealing with the expert into the future, it seems to me that that is too much of a blank cheque at the moment. But the applicant can have liberty to apply from time to time.

64. Insofar as the applicant was concerned about its lack of funds, it is open to it to apply for payment on account in respect of any costs already awarded, or once particular costs are awarded hypothetically at any future time. There did not seem to be an objection to such an application being made, at the level of principle, so I will specifically provide for liberty to the applicant to do that.

Modality of instruction

65. A related issue was how the expert was to be instructed. The easiest way for this to be done would be, as sought by the council, for its law agent to pass on the instructions to the expert in accordance with either such matters as are agreed or in default of agreement as the court directs. The council can also act to pass on to the court and the applicant such queries or reports as the expert wishes to communicate.

66. The applicant thought this would create some form of confirmation bias whereby the council-expert relationship would become too close. That's a risk, I suppose, but the possibility of getting too close to the solicitor providing instructions isn't a risk that can be eliminated by providing that the applicant's solicitor would play that role.

67. The applicant also pointed out its position as the enforcing party, who would normally be instructing any relevant expert. That is a generally valid point; but on the other hand the law agent's status as a public servant is a factor in favour of the council playing that role, since operating in an official environment, especially at local level, superimposes another layer of oversight and accountability on top of the professional requirements applying to solicitors generally. Elected members can be a restless cohort at times, and no official, legal or otherwise, would want to give them unnecessary grounds for scrutiny or complaint. But that isn't going to be a problem for the Law Department in relation to this case because, not least having regard to its efficient role in the proceedings to date, I am confident that all matters connected to its role in relation to the expert will be handled with the utmost professionalism. That isn't some kind of comparison, because the applicant's and, insofar as they have been involved, the first-named notice party's solicitors and the CSSO for the second-named respondent, have been equally helpful and professional.

68. All correspondence should be copied to the applicant and in the event of disagreement the court can be so advised. The council is obviously to instruct the expert in a way that gives effect to directions of the court and thus not in terms that are likely to be contentious, at least not without informing the applicant first and seeking directions.

69. The council will also be responsible for the mechanics of preparing and filing any affidavits by the expert including affidavits exhibiting reports. The applicant suggested these be given directly to the court, but that is to assume that the court is acting sub-optimally if it is not acting directly and personally. The fallacy of this suggestion is possibly illustrated if one contrasts it with the type of decision where such a rule could more cogently be argued for – it is as if the court was making a decision of major import, akin to, taking a current example, the UK authorities determining whether to implement a Strasbourg rule 39 indication, a decision which is proposed to be reserved by clause 5(4) of the Safety of Rwanda (Asylum and Immigration) Bill 2023 to "a Minister of the Crown acting in person". While one could see an argument that high-level decisions must be made at a high level, the mechanism by which an individual affidavit reaches a given judge is not such a decision. Nor is such a judge confined to the lonely and thankless task of doing everything herself. The Central Office is not an independent agency. It is an instrument the High Court has to enable its paperwork to be processed. Filing something *is* giving it to the court, for such purposes.

70. Admittedly an individual judge doesn't delegate her judicial adjudicative decision-making function as such, even on minor matters, whether to the internet, AI, judicial assistants, experts or otherwise – despite occasional overcaffeinated claims to the contrary. But she can delegate a great deal of administration, research and drafting, for example, although in practice in Ireland such matters are delegated nowhere near as much as could happen in theory. And she can do things that are functionally equivalent to delegation in certain instances such as leaving matters to be agreed by the parties rather than specified by order. Plus the system can delegate limited judicial functions in civil matters to non-judges, such as the Master of the High Court or County Registrars. So delegation shouldn't be seen as inherently problematic as long as the limits are understood.

Sequencing of remaining issues

71. As regards the sequence of events from here, there was no pronounced disagreement on the following sequence:

(i) who the expert should be;
(ii) the applicant's existing costs motion;
(iii) any motion for payment on account, if brought; and
(iv) the council's request to vary timelines.

72. I would therefore propose to list the next issue, the question of who the expert should be, for mention at the end of the list on the next Monday following the date of this judgment for the appropriate directions to enable it to be heard.

Costs of the present matter

73. Rather than suggest at this point how costs of the present matter should be dealt with, what I would propose instead subject to any contrary argument would be that those costs could be adjourned to be dealt with when the applicant's costs motion is heard, on the basis that the parties would prepare an overall table of all of the various applications and time periods that have given rise to costs not already disposed of, and setting out their respective positions on the appropriate orders.

The substantive matter

74. For the avoidance of doubt, I should emphasise that the council should proceed with its steps towards remediation at pace, and the imminence of the long-stop date or the lack of agreement or directions on extending the time-scale should not in themselves be a cause for delaying progress either at this or future junctures.

Order

75. For the foregoing reasons, it is ordered that:

(i) the expert be directed to report at such times and in such manner as may be directed by the court from time to time on such matters as arise in the proceedings as the parties disagree on and as the court considers could be assisted by the expert, including what is required to ensure and guarantee that the remediation plan or any variation thereof shall achieve the objectives of the court's orders for the full remediation of the site, in line with the judgments and orders of the court;
(ii) the expert be instructed via the council's law agent passing on instructions to the expert in accordance with either such matters as are agreed or in default of agreement as the court directs, and passing on to the court and the applicant such queries or reports as the expert wishes to communicate, on the basis that all correspondence be copied to the applicant and that in the event of disagreement the court be so advised, and on the basis that the instructions be provided in a way that gives effect to directions of the court and thus not in terms that are likely to be contentious, without informing the applicant first and seeking directions;
(iii) the council be responsible for the mechanics of preparing and filing any affidavits by the expert including affidavits exhibiting reports;
(iv) the issues before the court be sequenced as set out in the judgment;
(v) there be liberty to apply generally, without prejudice to the more specific liberty to apply in relation to costs referred to below;
(vi) the matter be listed for mention in respect of the question of who the expert should be, at the end of the list on Monday 15th January, 2024, for the appropriate directions to enable that question to be heard;
(vii) the expert be paid by the council within 2 months of the expert issuing a request for payment from time to time, and any disagreement as to amount or timing be dealt with by the court;
(viii) the applicant's reasonable costs of complying with any request to it by the expert be paid by the council;
(ix) the applicant have liberty to apply for any other costs of the applicant in engaging with the expert from time to time;

(x) the applicant have liberty to apply from time to time for payment on account in respect of any costs already awarded as of the date of such application; and

(xi) costs of the present application be adjourned to be dealt with when the applicant's costs motion is heard, on the basis that the parties would prepare an overall table of all of the various applications and time periods that have given rise to costs not already disposed of, and setting out their respective positions on the appropriate orders.