Ref: **McA11132**

Neutral Citation No: [2019] NICA 71

Judgment: approved by the Court for handing down

(subject to editorial corrections)*

Delivered: **11/12/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

WILLIAM ROBERT THOMPSON MORROW

Defendant/Appellant.

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Before: Morgan LCJ, McCloskey LJ and McAlinden J

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McALINDEN J (delivering the judgment of the court)

[1] This is an appeal against the making of a confiscation order in the sum of £325,609.20 by HHJ Grant on 21 March 2019 at Downpatrick Crown Court. Leave to appeal was granted by the single Judge on 3 September 2019. On the morning of trial at Downpatrick Crown Court on 17 April 2018, the appellant pleaded guilty to offences of depositing and treating controlled waste between 24 May 2013 and 19 November 2015 contrary to Article 4(1)(a) and Article 4(6) of the Waste and Contaminated Land (Northern Ireland) Order 1997 (the "1997 Order") and an offence of keeping controlled waste between 18 November 2015 and 6 April 2016 contrary to Article 4(1)(a) and Article 4(6) of the 1997 Order. Following the making of the confiscation order on 21 March 2019, the appellant was sentenced to 180 hours of community service in respect of each of the three charges of depositing, treating and keeping controlled waste on 10 April 2019 by HHJ Grant at Downpatrick Crown Court, each sentence to run concurrently. The appellant has not sought leave to appeal the community service sentences imposed on 10 April 2019.

[2] The charges relate to the deposition, treatment and keeping of controlled waste on lands owned by the appellant at 102 Ballydrain Road, Comber. These lands are located near Castle Espie and are adjacent to the Strangford Lough Area of Special Scientific Interest. On 19 November 2015, officers from the

Northern Ireland Environment Agency ("NIEA") carried out an inspection of premises adjoining the appellant's land. It was noted that a shed was being built on the appellant's property on top of an area of infill. The owner of the neighbouring property informed the NIEA that he had seen lorries depositing materials on the appellant's site several times a day during the summer of 2015. Prior to this, in or around 2014, a house and some outbuildings had been demolished on this site.

[3] The NIEA conducted an inspection of the appellant's property on 15 December 2015. The Agency's officers observed a large area of waste infill, consisting of clay, building rubble, wood, glass, tarmac and plastic piping. Other items among the infill included golf trolleys, a child's bicycle, a water tank, radiators, metal girders, concrete slabs, electrical wiring, toilet seats, textiles, linoleum, for sale signs, paint tins, hard plastic, wrapping material, shoes, plumbing parts and window frames. The infill material had been flattened and covered with a layer of gravel to a depth of 0.2 to 0.5 metres. On 5 April 2016, an intrusive survey was conducted by the NIEA. It was estimated that the infilled area was 1,223 cubic metres in volume and the overall amount of material was estimated to weigh approximately 3,942 tonnes.

[4] The appellant was interviewed by the NIEA on 25 May 2016. He initially stated that the materials contained in the infilled area had been taken from buildings onsite as well as from his other properties at 40 Ballydrain Road, Comber and 6 Tullynakill Road, Comber. He said that he had demolished buildings on his three properties for the purpose of constructing the platform which was then in situ at the subject property. The appellant later accepted that the majority of the materials present in the platform were brought onto the subject site from sites other than those owned by him. The appellant contended, however, that the materials emanating from the three sites owned by him were always intended for the purposes of building a construction platform on the subject site and, accordingly, should not be classified as waste.

[5] As part of his preparations for the trial of this matter, the appellant retained the services of Dr Craig Fannin of TerraConsult Limited who carried out test excavations on site and provided expert reports which were placed before the court. In pleading guilty to the three counts referred to above, the appellant put forward a basis of plea to the effect that although the majority of the material in the platform was brought from sites other than those owned by the appellant and was, therefore, rightly classified as waste, a significant amount of the material present in the platform (49%) was building rubble and similar material originating from the demolition of buildings on the appellant's properties that had been demolished to provide such material and as such this material was not waste.

[6] The prosecution did not accept the appellant's assertion that the material in the platform on the subject site which originated from the appellant's

properties was not waste. Consideration was given as to whether this disputed issue should be resolved by way of a *Newton* hearing or as part of the confiscation order process. It was accepted by the Crown and the defence that the nature of the sentence which would ultimately be imposed in this case was not dependent upon the resolution of this issue but that resolution of this issue would have a direct bearing on the amount of any confiscation order made in this case. In addition to being asked to consider whether a *Newton* hearing was the appropriate way to advance this matter, the court was also invited to consider the appropriate approach to adopt in the conduct of any such *Newton* hearing. At a hearing on 3 May 2018, the Crown invited the court to consider whether a *Newton* hearing was necessary. The Judge was referred to the case of *R v Cairns* [2013] EWCA Crim 467 which makes it clear that the decision as to whether a *Newton* hearing is required is one for the court. At paragraph [6] of *R v Cairns*, Leveson LJ stated:

> "Without seeking to be exhaustive of the issues that might arise (or citing all the relevant authorities), there is no obligation to hold a *Newton* hearing (a) if the difference between the two versions of fact is immaterial to sentence (in which event the defendant's version must be adopted: *R v Hall* (1984) 6 Cr App R (S) 321; (b) where the defence version can be described as 'manifestly false' or 'wholly implausible': *R v Hawkins* (1985) Cr App R (S) 351; or (c) where the matters put forward by the defendant do not contradict the prosecution case but constitute extraneous mitigation where the court is not bound to accept the truth of the matters put forward whether or not they are challenged by the prosecution: *R v Broderick* (1994) 15 Cr App R (S) 476."

[7] If the court determines that the matter should be resolved by way of a *Newton* hearing, then the case of *R v Newton* (1982) Cr App R 13 itself gives clear guidance as to how such a hearing should proceed. Lord Lane at page 15 stated as follows:

> "It is in certain circumstances possible to obtain the answer from the jury. For example, when it is a question whether the conviction should be under section 18 or section 20 of the Offences against the Person Act 1861, the jury can determine the issue on a trial under section 18 by deciding whether or not the necessary intent has been proved by the prosecution…The second method which could be adopted by the Judge in these circumstances is himself to hear the evidence on one side and another,

> and come to his own conclusion, acting so to speak as his own jury on the issue which is the root of the problem.
> The third possibility in these circumstances is for him to hear no evidence but to listen to the submissions of counsel and then come to a conclusion. But if he does that, … where there is a substantial conflict between the two sides, he must come down on the side of the defendant. In other words, where there has been a substantial conflict, the version of the defendant must so far as possible be accepted."

[8] At the hearing on 3 May 2018, Mr McClean, of counsel, on behalf of the Crown argued that there was no requirement for a *Newton* hearing –

> "… because the surrounding facts that are accepted by all parties are such that regardless of what account Mr Morrow gives… (his case) …will manifestly fail."

On this basis, the court was invited to –

> "… hear arguments on that issue and then to rule on that specific issue as to whether or not a *Newton* hearing just isn't required, because even on the defendant's account, it is bound to fail."

It was further submitted by Mr McClean that following the court's ruling on the discrete issue of whether a *Newton* hearing was required-

> "…then we can consider how we proceed thereafter….and how the matter is to be dealt with thereafter."

(The quotations are taken from the official transcript).

[9] Mr McClean, Counsel for the Crown, then outlined the facts of the case to the court, made submissions on the law, specifically on the definition of "waste", and concluded his submissions in the following manner:

> "It is my submission that taking all these matters into consideration the court has to carry out an exercise of looking at whether a *Newton* hearing is required. It is my submission that essentially we are in the position that if we look at the nature of this material and if we look at the use that this material was put to, that the undisputed facts in relation to those points show that

> really regardless of what his evidence will be in terms of his intentions or the source of the material, that the material will be waste and therefore it does fall within the second category of case and that a *Newton* hearing wouldn't be required because of that."

[10] Mr Magee, Counsel for the appellant, in his written submissions referred to the judgment of Lord Lane in *R v Newton*. In particular, he referred to the three approaches to be used in determining a disputed issue which were described by Lord Lane in his judgment. In his skeleton argument for the purposes of this appeal, Mr Magee stated that he had made the submission before the Judge that the fairest approach in the circumstances of this case would be to permit determination of the disputed issues by a jury. This formulation does not appear in the Skeleton Argument put before the Judge at first instance nor does it appear in the transcript of the hearing on 3 May 2018. If this argument was made at some earlier stage, it is clear that this approach was not adopted by the Judge and the appellant does not challenge the failure of the Judge to adopt this approach in this appeal. It is the appellant's contention that the Judge instead followed the third approach outlined by Lord Lane in *R v Newton* (determining the matter on the basis of submissions) in accordance with which the court is obliged to determine that "if there is a substantial conflict between the two sides….the version of the defendant must so far as possible be accepted."

[11] Building on this proposition, in his oral submissions to the Judge on 3 May 2018, Mr Magee submitted that it was for the Crown to prove beyond a reasonable doubt that the 49% of the material which the appellant claims emanated from the appellant's own lands was in fact waste. If the court concluded that the Crown had not established this matter to the requisite standard of proof, then "the court should proceed to sentence and confiscation on the basis of plea provided in this case." Mr Magee, in response to the oral submissions of Mr McClean attempted to persuade the court that the issue that the court had to determine was "taking the defendant's case at face value as set out in his basis of plea, does the court agree that 49% of the materials or a proportion thereof could be classified as material other than waste as defined by the Act and the Directive?" Mr Magee referred the court to the salient facts of the case as put forward by the appellant and made submissions on the law including the meaning of the term "waste" in the context of the European Framework Directive (2008/98/EC) and concluded his submissions by stating that "What the court …needs to focus on is the test within the Directive and ask itself, taking what the defendant is saying basically at its height, is that material capable of being something other than waste, and we respectfully submit the answer to that must be yes."

[12] Pausing, it is clear from the foregoing that no agreed basis of plea was placed before the Judge. Ultimately, it was the agreed position of the parties before this court that HHJ Grant received the appellant's draft basis of plea

document endorsed with some manuscript insertions from Crown counsel but there was no final agreed document.

[13] Having considered the transcript of the hearing before HHJ Grant on 3 May 2018, this court cannot but conclude that it is difficult to ascertain what task the Judge was asked to perform by the parties and whether the parties were ad idem in relation to the nature of the decision which the court was requested to make. The arguments and submissions made by the parties before this court do not mirror the arguments and submissions made before HHJ Grant on 3 May 2018. As far as this court can discern from the transcript, the Crown was urging the Judge to accept that a *Newton* hearing was not necessary on the basis of the second ground set out in *R v Cairns* and the appellant at that stage was arguing that if the court intended to conduct a *Newton* hearing on the basis of submissions, then the court had to accept the appellant's version of events and if the court did that, it could not find beyond a reasonable doubt that the material in the platform which emanated from the appellant's properties was waste.

[14] Having listened to the submissions of both Counsel, HHJ Grant took some time to consider the matter and subsequently gave his decision on 22 May 2018. The Judge outlined the facts of the case including the appellant's pleas of guilty in respect of the three charges outlined above. He then went on:

> "I required an agreed basis of plea to be considered, an agreed statement of facts. One was exchanged between Counsel and there are a number of areas on which there are a clear dispute. And that being the position, the question of a *Newton* hearing inevitably arises…"

The Judge then discussed a number of Northern Ireland, England and Wales and ECJ authorities which deal with the definition of "waste" and described at a little length the various types of material recovered from a number of the trial excavations that were dug during the investigations carried out by the NIEA and TerraConsult. He then stated:

> "I am satisfied that, on the evidence before me, the prosecution has established, to my mind beyond reasonable doubt, that this is material that falls within the definition of 'waste'."

[15] The transcript of the hearing on 22 May 2018, confirms that the Judge recognised that there were a number of areas of clear dispute between the Crown and the appellant, adding "… that being the position, the question of a *Newton* hearing inevitably arises …" However, no express consideration was given as to whether evidence should be heard and it is clear that without hearing any evidence from the appellant or Dr Fannin; but grounding his determination on

his consideration of the submissions of Counsel and the papers in the case, the Judge concluded that all the material in the platform was waste. There was no express discussion by the Judge of the three possible approaches to a *Newton* hearing set out in the judgment of Lord Lane. There was no specific reference in his decision to the arguments made by Mr McClean to the effect that a *Newton* hearing was not necessary on the basis of the second ground referred to in *R v Cairns*. Equally the Judge made no reference to Mr Magee's submissions on the *Newton* hearing issue.

[16] What the Judge appears to have done is to make a determination on the central issue in dispute between the Crown and the appellant following a hearing which consisted of him considering written and oral submissions but in doing so he has not expressly indicated his acceptance of the appellant's case as contained in the basis of plea. It is to be doubted whether the task which the Judge set for himself at the outset of his ruling on 22 May 2018 (a *Newton* hearing) was actually performed by him.

[17] Following this decision, it was eventually agreed that for the purposes of the confiscation order proceedings, the benefit accruing to the appellant from his criminal activity was the avoidance of landfill tax on the amount of material in the platform and that the confiscation order which should be made should equal the amount of landfill tax which ought to have been paid on 3,942 tonnes of waste. On that basis, at the confiscation hearing which took place on 21 March 2019, a confiscation order was made by consent in the sum of £325,609.20. At the subsequent sentencing hearing on 10 April 2019, HHJ Grant made the following comments:

> "As a result of the discussions between the parties, it became necessary to hear a *Newton* hearing and, in the course of the confiscation process, I heard that hearing – I heard a substantial body of evidence and I was satisfied that all the material found on that site was waste material which falls within the requirements of the legislation. This is clearly a very substantial default on the part of the defendant. It is a serious offence and confiscation order proceedings were finally agreed and made by consent in the sum of £325,609.20."

The Judge concluded his sentencing remarks by setting the period of imprisonment to be served by the appellant if he does not pay the compensation order sum. This default sentence under section 185 of the Proceeds of Crime Act 2002 ("the 2002 Act") was set at 4 years.

[18] As indicated earlier, in this judgment the appellant does not challenge the decision of HHJ Grant to conduct a *Newton* hearing in relation to the issues

which were in dispute. Whether a *Newton* hearing was the appropriate mechanism for resolving this dispute is not a matter which this court is required to decide. The gravamen of the challenge brought by the appellant is the manner in which the *Newton* hearing was conducted.

[19] In summary, the grounds of appeal in this case, as expanded in the appellant's skeleton argument and supplemented in Counsel's oral submissions, concentrate on the following matters:

i. It is argued that the Judge's ruling on 22 May 2018 which precluded the calling of evidence on essential factual issues was wrong in law.

ii. It is argued that the Judge failed to appreciate the nature of the ruling which was sought.

iii. Further, it is argued that the appellant was entitled to call evidence on the origin and condition of the materials which the appellant alleges emanated from demolition work carried out on his lands and the appellant's intentions in respect of the use to which those materials would be put.

iv. It is argued that the Judge, without hearing evidence from the appellant or Dr Fannin, wrongly ruled that the materials on the site that were derived from the applicant's own demolished buildings were, as a matter of law, waste. The Judge was wrong to draw such a conclusion without first hearing evidence from the appellant and Dr Fannin, an expert witness, on the issues of origin, volume and intention.

v. The appellant argues that it is self-evident that the effect of the Judge's ruling was to tie the hands of the appellant on the calculation of benefit from criminal conduct.

vi. The making of the confiscation order, specifically the finding in respect of benefit from criminal activity, was entirely contingent upon the outcome of an issue identified to the court in advance of a proposed Newton hearing.

[20] The Crown, in response to these arguments, submits that the approach adopted by the Judge was entirely appropriate in that having considered the detailed written and oral submissions of Counsel and having been referred to and having taken into account the contents of the depositions, the additional evidence served in the case and the expert reports of Dr Fannin and TerraConsult, the court properly applied the law to the facts and rightly concluded that all the material in the platform was waste which had been improperly disposed of.

[21] It is not the role of this court in this appeal to determine the issue of whether the material in question was or was not waste. This court's function in this case is to examine the Judge's decision making and determine whether in coming to his decision that the material in question was waste, he fell into error. Large portions of the oral and written submissions made to and placed before the lower court dealt with the definition of waste. As this court does not have to determine whether the material is or is not waste, it is not proposed to unduly lengthen this judgment by conducting an in-depth analysis of the law relating to this issue. However, a brief overview of the relevant legislation and caselaw will help to construct a useful framework with which to analyse the Judge's decision making.

[22] Article 3.1 of the European Framework Directive (2008/98/EC) defines waste as "any substance or object which the holder discards or intends or is required to discard." This definition largely mirrors the definition contained in an earlier Waste Framework Directive which was in turn reflected in the definition of waste contained in Article 2 (2) and Schedule 1 of the Waste and Contaminated Land (Northern Ireland) Order 1997. The definition set out in the Directive has been the subject of extensive judicial consideration in the European Court and in the various UK jurisdictions. A worthwhile starting point is the judgment of Girvan J in the case of *DEHS v O'Hare* [2007] NICA 45 at paragraphs [13] and [14] where he stated:

> "[13] In the decision of the European Court of Justice in *Tombesi* [1997] All ER (639) the court held that the concept of waste in the directive is not to be understood as excluding substances capable of economic utilisation. The fact that a substance is classified as a reusable residue without its characteristics or purpose being defined is irrelevant. In *Inter-Environment Wallonie Asbl v Region Wallonie* [1998] All ER (EC) 155 the ECJ held that the scope of the term "waste" turned on the meaning of the word discard which covered both disposal and recovery of a substance or object (see also *Arco-Chemie Nederland Ltd v Minister Von Volkshuisvesting* [2003] All ER (EC) 237. In *Palin Granite Oy v Vekmassalon* [2003] All ER (EC) 366 the court stated the material should only be regarded as a by-product as opposed to waste if its reuse was a certainty not a mere possibility and no further processing or treatment required prior to its reuse. In *Van de Walle v Texaco Belgium* [2004] EU ECJ C-1-03 the ECJ applied the same test as in *Wallonie* and held that the word "discard" must be interpreted in the light of the aim of the directive which aids the

protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste and in light of the EC policy of ensuring a high level of protection for the environment based on a precautionary approach. The word discard therefore cannot be interpreted restrictively.

[14] Relevant domestic case law is to be found in cases such as *Long v Brooke* [1980] Crim LR 109, *Kent County Council v Queensborough Rolling Mills Co Ltd* [1990] 154 JP 442, *Ashcroft v McErlain Ltd* QB Eng 30 Jan 1985, *Attorney General's Reference No 5-2000* [2001] EWCA 1077 and *R (OSS Group Ltd) v Environment Agency* [2007] EWCA Civ 611, *Cheshire County Council v Armstrongs Transport (Wigan) Ltd* [1995] Crim LR 162. The following principles can be deduced from these and the European authorities:

(i) The word 'discard' when read in the light of the other language texts of the Directive points to the concept of getting rid of an unwanted object or substance (see in particular the judgment of Carnwath LJ in *R (OSS Group Ltd) v Environmental Agency* [2007] EWCA Civ 611 and the judgment of Butler-Sloss LJ in *Cheshire County Council v Armstrongs Transport (Wigan) Ltd* [1995] Crim LR 162.

(ii) A rational system of control points to the conclusion that the categorisation of materials as being waste or not being waste depends on the materials' qualities and not on the qualities of their storage or use even if the storage or use is environmentally safe. (See *Castle Cement Ltd v Environmental Agency & Lawther* per Stanley Burton J.

(iii) The nature of the material has to be considered at the time of its removal from the original site (*Kent County Council v Queensborough Rolling Mills Co Ltd* [1990] 154 JP 442).

(iv) The definition of waste in the act must be taken from the point of view of the person disposing

> of the material (*Long v Brooke* [1980] Crim LR 109).
>
> (v) Excavated soil is capable of being waste. Whether or not it is in any given case is a question of fact to be determined on the evidence adduced (*Ashcroft v McErlain Ltd* QB Eng 30 Jan 1985)."

[23] Two matters are immediately apparent from the above paragraph. Firstly, the "point of view" of the person disposing of the material is relevant. Secondly, excavated soil and, by analogy, building rubble is capable of being waste. Whether or not it is in any given case is a question of fact to be determined on the evidence adduced.

[24] Sir Anthony May in the case of *Environment Agency v Inglenorth Limited* [2009] EWHC 670 (Admin) at paragraphs [10] and [11] helpfully set out and endorsed the summary of the law applicable in England and Wales which had been formulated by the Justices in the lower court in that case. At paragraphs [10] and [11] he states as follows:

> "[10] Returning to the case stated, the Justices set out their understanding of the legal framework as follows:
>
> > '…. From our understanding of the authorities, we interpreted the meaning of the word 'discard' as equivalent to 'get rid of', but understood the law to be that the words 'waste' and 'discard' should not be interpreted restrictively, and should be interpreted in the light of the aims of the Directive. These are the protection of human health and the environment, against the harmful effects caused by the collection, transport, treatment, storage and tipping of waste, and Community Policy on the environment, which aims at a high level of protection, based on a precautionary principle and a principle that preventative action should be taken.
> >
> > The intention of those in control of the material to re-use it, must be a clear,

> immediate intention and not merely a future possibility of reuse.
>
> However, the intention of the owners of the material … was not determinative of the matter. It was one of a number of considerations for us to take into account.
>
> "Waste" includes substances discarded by their owners, even if capable of economic reutilisation, or which has a commercial value and is stored on a commercial basis for recycling or reuse.'
>
> [11] Pausing there, in my judgment that is a good summary of the relevant law to be applied in this case, economically set out. Mr McCullough does not accept that one sentence there correctly states the law. The sentence which he challenges is that which says the 'intention of those in control of the material to re-use it, must be a clear, immediate intention and not merely a future possibility of reuse'. He says that that was a misdirection. He submits that there is a distinction between the immediacy of an intention and the immediacy of use and he submits that it is the latter which would be relevant, not the former. I shall return to that point a little later in this judgment."

[25] Sir Anthony May addressed this last issue in paragraph [33] of his judgment where he stated:

> "[33] …. immediate use cannot be taken literally. As for example, if material is deposited at a site intending it to be used straight away for building operations, if it is not used straight away, because, for instance, the weather is bad and prevents building operations; or other and different material is required to be delivered first before this material can be used; or machinery has to be brought on to the site before it can be used and there is some delay before it is brought to the site; any of these examples would not, depending on the facts, prevent the material from being reused immediately, if that is the expression that needs to be addressed. The distinction in my judgment must be between depositing the material

> for storage pending proposed reuse and depositing it for use more or less straight away without it being, in any sensible use of the word, stored. Depending always on the facts, hardcore which is going to be used next week for current building operations is not being stored."

[26] Turning then to consider the issues that this court has to address, it is clear from the above analysis of the law that the intention of the appellant in relation to the use of the material which emanated from his properties is clearly relevant to the determination of whether the material is waste. It is also clear that any analysis of the make up or composition of the material has to be carried out at the time of its removal from the original site and in the context of this case this means that the composition of the material created by the demolition of buildings on the index site has to be assessed at the time of original deposit prior to it being mixed with other materials which were used in the platform. What this means is that in the absence of agreed facts on these issues, it is incumbent on the court of trial to make the necessary findings of fact – and to do so in accordance with a procedurally fair process.

[27] The questions which this court must answer can be stated in the following terms. Bearing in mind the clear disputes that existed between the Crown and the appellant in relation to what material did and did not constitute waste, did the Judge fall into error by determining the disputed material was waste without hearing evidence from the appellant and Dr Fannin and instead making his determination on the basis of his consideration of the written and oral submissions of Counsel and the depositions, the additional evidence served in the case and the reports of Dr Fannin and TerraConsult? In light of the fact that there were these clear disputes between the Crown and the appellant in relation to what material did and did not constitute waste, did the need to ensure that he had all the evidence before him to properly adjudicate on those disputed matters require him to hear evidence from the appellant and Dr Fannin? Fundamentally, was the appellant deprived of his right to a fair hearing?

[28] The Crown argues that hearing oral evidence in the context of this dispute was not necessary. The Crown's case is that even if the court accepted the appellant's case that a number of buildings were demolished on his properties to provide material for the construction of a platform on one of those properties and that the appellant always intended to use the materials resulting from the demolition of the buildings in this manner, the material so produced was still waste and, in effect, nothing the appellant or Dr Fannin could have said in evidence could have altered the Judge's determination. However, this submission by the Crown fails to recognise the assessment of the material for the purpose of ascertaining whether it is waste is to be performed at the time of its removal from the original site or in the context of this case prior to it being mixed with other materials which were used in the platform.

[29] In this regard, Mr McClean was forced to concede that the Judge had no evidence before him as to the sequence in which the various loads of material were deposited on the site in order to construct the platform. It was pointed out to him that it is possible that the material resulting from the demolition of the building on that site was the first material to be deposited into a pristine excavation. The question which must be asked is whether that material was waste, having regard to the assessment of its nature at that time. It is possible that material resulting from the demolition of buildings on other sites owned by the appellant was then brought to the site and added to the material already present in the excavation. Would that material be waste bearing in mind that such material has to be assessed at the time of its removal from the original site? There was no evidence of this nature before the Judge. In the circumstances, by virtue of the decision to determine the issue on the basis of submissions, the appellant was deprived of the opportunity to place crucial evidence before the Judge which would have enabled him to properly address the issue of the nature of the material which was disputed in this case. It is the conclusion of this court that the Judge, having identified that there was a dispute about whether or not 49% of the material in the platform was or was not waste, should have conducted a hearing to resolve this dispute and that hearing should have included giving the appellant the opportunity to give oral evidence and to adduce oral evidence from an expert Dr Fannin.

[30] Turning again to the passage of the Judge's decision which is quoted in paragraph [18] above, this court considers that this passage betrays a clear misconception on the Judge's part. As our analysis above demonstrates, the Judge has not in fact conducted a *Newton* hearing. Nor has he "heard" evidence: quite the contrary. Furthermore, he made no ruling on the *Newton* hearing issue.

[31] It is the conclusion of this court that the procedure adopted by the Judge to determine the issue of whether all the material found in the site was waste did not afford the appellant the opportunity to adduce evidence in relation to intention and other matters such as the timing and sequencing of the deposit of materials used to construct the platform or indeed to adduce evidence from an expert who could have given evidence about the nature and extent of the material which was alleged by the Crown to constitute waste. By proceeding to determine the issue of whether the disputed material was waste on the basis of submissions when significant issues of fact were either disputed or unknown, the Learned County Court Judge erred in law as such an approach effectively precluded relevant evidence being adduced by the appellant as to his intention in respect of the use of the materials and the timing and sequencing of the deposit of materials used to construct the platform or any evidence being given by any expert on behalf of the appellant.

[32] The fundamental error of law which this court has identified is that the appellant was deprived of his right to a procedurally fair hearing in the sentencing process which unfolded following his pleas of guilty.

Disposal

[33] Having found that the Learned Trial Judge erred in law in the manner set out above, the court must allow the appellant's appeal and quash both the finding of the Judge that all the material in the platform constituted waste and the resulting confiscation order. This finding was made during the course of a hearing which has been described as a *Newton* hearing as opposed to a hearing under the 2002 Act. As stated above, whether a *Newton* hearing was the appropriate mechanism for resolving this dispute is not a matter which this court is required to decide but now that the finding of the Learned Trial Judge has been quashed, it is appropriate for this court to give guidance as to the way forward.

[34] Sections 164 and 165 in Part 4 of the 2002 Act provide a specific power to postpone confiscation order proceedings until after sentencing. The existence of such a power supports the proposition that in certain circumstances, the confiscation aspect can be detached from the remainder of the sentencing process. In light of our conclusions, we consider that a *Newton* hearing is now required in this case in which the Judge should determine the issues in dispute. Such a hearing should include the opportunity for the appellant and Dr Fannin to give evidence on the matters outlined above. Any subsequent assessment of the appellant's benefit from criminal conduct under section 158 of 2002 Act will in all likelihood be dependent upon the prior assessment of the quantity of waste for which landfill tax at the rate applicable at the time of the offending was not paid. We do not consider that it would be necessary or appropriate to revisit the other aspects of the sentencing exercise.

[35] Finally, we consider the following observations appropriate:

(a) Without in any way levelling any criticism at Counsel in this case, the inability to agree the basis of a plea has had unfortunate consequences. The court would remind the prosecution and the defence in this and other cases of the need to use their best efforts to agree the factual basis of plea in order to avoid costly and time-consuming hearings in busy Crown Courts.

(b) The court would wish to emphasise how rarely a "Newton" ruling/outcome should purport to make definitive findings/conclusions regarding contested material issues without affording the Defendant a full opportunity to be heard and call witnesses. This is especially so in a context where the central issue

in dispute is mainly one of fact. Elementary fair hearing rights must be scrupulously respected.

(c) There is a need for clearly understood parameters at the outset of every such hearing, whether of the *Newton* variety or otherwise.

(d) Every defendant's right to a fair trial extends to the sentencing process. This inalienable right is not restricted to the determination of guilt/innocence.

(e) Finally, the court would positively encourage strenuous *inter-partes* attempts to resolve confiscation order applications by agreement, subject of course to judicial endorsement, as there is a strong public interest in such matters being resolved without the need for time consuming and costly hearings.