THE COURT OF APPEAL
CIVIL

Birmingham P.
Whelan J.
Costello J.

Neutral Citation Number: [2019] IECA 257

Record Nos. 2017/432

2017/433

High Court Record Nos. 2005/89SP

2008/56SP

IN THE MATTER OF THE WASTE MANAGEMENT ACT 1996-2003
IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 58 OF THE WASTE MANAGEMENT ACT 1996 (AS AMENDED BY SECTION 49 OF THE ENVIRONMENT ACT 2003)

AND

IN THE MATTER OF AN APPLICATION BY WICKLOW COUNTY COUNCIL

BETWEEN/

Record No. 2017/433

WICKLOW COUNTY COUNCIL

PLAINTIFF

- AND -

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

DEFENDANTS

Record No. 2017/432

BROWNFIELD RESTORATION IRELAND LIMITED

PLAINTIFFS

- AND -

WICKLOW COUNTY COUNCIL

DEFENDANT

JUDGMENT of Ms. Justice Costello delivered on the 16th day of October, 2019.

1. On the 19th July, 2017, the High Court held that Wicklow County Council ("the council") was responsible for illegal dumping of inert, non-inert and hazardous waste at lands situated in Whitestown at Stratford-on-Slaney near Baltinglass, County Wicklow and required the council to remove all waste and contaminated, or potentially contaminated, soil from the site.

2. Brownfield Restoration Ireland Limited ("Brownfield") appealed part of the order of the High Court relating to the time provided for the council to fully remediate the site and the order for costs insofar as all of the costs of the two related hearings were not awarded to Brownfield, who had succeeded in the two related actions.

Background

3. The proceedings are two related actions concerning the remediation of what by any standards is an appalling illegal dump. The illegal landfill is known as Whitestown dump

and was situate near Stratford-on-Slaney near Baltinglass, County Wicklow. The site is particularly sensitive and totally unsuitable for use as a landfill. Waste was dumped in a disused sand-and-gravel pit, with the result that it was in contact with the ground water and discharged leachate beside a SAC of wetlands and an important salmonid river feeding a public water supply. As it was an illegal dump, none of the precautions usually associated with landfill, such as impermeable liners and monitoring of leachate discharge, was ever in situ. The amount of waste illegally dumped on the site was truly vast and shocking. Between the years 1979 to 2001, over 250,000 tonnes of mixed domestic, industrial and hospital waste was deposited on the site. The waste includes non-inert and hazardous waste, as was set out in graphic and horrific detail in the third judgment of Humphreys J. delivered on 7th July, 2017 ([2017] IEHC 456).

4. 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. I adopt the finding of facts and the recital of the history of the relevant facts as set out in the judgments of the High Court in this matter. For the purposes of this judgment, it is necessary simply to record the following facts.

5. The council is the waste authority charged with the statutory responsibility for the supervision and the enforcement of the relevant provisions of the Waste Management Act 1996, in relation to the holding, recovery and disposal of waste within its functional area. It also has responsibilities under European Law as set out in detail by the trial judge, deriving both from the European Charter of Fundamental Rights of the European Union, the European Treaties and various waste and environmental directives. Complaints were made to the council about the illegal landfill from as early as 1989. The council carried out a number of inspections of the site. 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. The council then engaged a consultant, Mr. Donal O'Laoire, to advise on the remediation of the site. 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 was common case that the lands included inert, non-inert and hazardous waste at this time.

6. In October 2002, the European Commission issued a letter pursuant to Article 226 of the European Communities Treaty regarding the implementation of Council Directive 75/442/EEC of 15th July, 1975 on waste (as amended). The letter complained 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 it.

7. On the 26th April, 2005 the European Court of Justice in Case C-494/01 *Commission v. Ireland* [2005] ECR-I 3331 ruled that Ireland had failed to comply with Directive

75/442/EEC as amended by Directive 91/156/EEC. Paragraph 135 of the judgment referred to close to one hundred illegal sites, some of which were of considerable size and contained hazardous waste originating, in particular, from hospitals; specific reference was made to the Whitestown dump. Following on from this judgment, the Department of the Environment was in communication with the European Commission in relation to the rectification of this default by Ireland in relation to dumps, including the Whitestown dump.

8. The lands comprised in the Whitestown dump were originally owned by Mr. John O'Reilly, the first named defendant in the first set of proceedings ("the 2005 proceedings"). Mr. O'Reilly operated the dump for more than two decades. After the landfill had been closed by the council and the council had entered the site in May 2002, Mr. O'Reilly sold the lands.

9. At all material times, Brownfield represented itself as being the purchaser and beneficial owner of the lands. It subsequently emerged that, in fact, the lands were purchased by a subsidiary of Brownfield, Rockbury Ventures Limited, a company incorporated in the Virgin Islands in 2003. In 2005, Brownfield applied to the Environmental Protection Agency for a licence to operate the site as a lawful landfill. As part of the process, the council made submissions on the proposal to the EPA. The council submitted that Brownfield should be required to remediate the entire site by removing all of the waste and contaminated material from the site i.e. none should be left in situ. The EPA granted Brownfield a licence to remediate the site which required it to remove all of the waste and contaminated soil within a period of three years.

10. On the 4th March, 2005, four years after the council claimed to have "discovered" the illegal dump, and nearly three years after it had taken possession of it, the council instituted proceedings pursuant to s. 58 of the Waste Management Act 1996 against those parties it believed were legally responsible for the situation, and who could be ordered to remediate the site. Brownfield was sued as the current holder of the waste on the basis that it had purchased the site from Mr. O'Reilly. The council alleged that the defendants were holding, recovering and disposing of waste on the lands in a manner that is causing and/or has caused environmental pollution and/or was in contravention of s. 34 and/or s. 39 of the Waste Management Act 1996 and, as a result, remediation steps were required to be taken to mitigate and/or remedy the effects of the alleged holding, recovering or disposal of waste on the lands, having regard *inter alia* to the "polluter pays" principle. The council sought an order pursuant to s. 58 of the Act of 1996 requiring the defendants to take such steps or measures which the court shall specify to be necessary to mitigate or remedy any effect of environmental pollution caused and/or being caused by the said activity, within such time as the court should direct. It also sought an order directing the defendants to pay to it all costs, outlays, fees and expenses incurred and/or expended by the plaintiff in relation to its investigation and detection of waste held and/or recovered and/or disposed of by the defendants.

11. 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.

12. The 2005 proceedings were grounded on three affidavits, one of which was sworn by Mr. Donal O'Laoire, the person who had been appointed by the council as an authorised officer under the statutory codes and charged with responsibility for remediation of the site. Mr. O'Laoire's affidavit warned of the environmental risk presented by the enormous deposit of waste in such a sensitive location and urged that the court should require the removal of all waste and contaminated soil before further pollution arose.

13. Brownfield discovered the fact that the council was, to a considerable extent, responsible for illegal dumping on the site and it then issued proceedings pursuant to s. 58 of the Act of 1996 against the council in 2008 ("the 2008 proceedings"). It sued as the owner and occupier of the land, and said that it was the owner of, in or about, 8.65 hectares of land, having purchased them from Mr. O'Reilly in or around 2003. Brownfield alleged that the council was causing and/or had caused environmental pollution as defined by s. 5 of the Waste Management Act 1996, and that the council was holding and/or recovering and/or disposing of waste on the lands in the absence of a waste licence contrary to s. 39(1), and/or a waste permit contrary to s. 34 of the Act of 1996. It also claimed that certain steps of remediation were required to be taken to mitigate and/or remedy the effect of illegal holding, recovery and/or disposal of waste by the council on the land, having regard, inter alia, to the "polluter pays" principle. It sought orders which mirrored those sought by the council against, *inter alia*, Brownfield in the 2005 proceedings.

14. Both actions came on for hearing together before O'Keeffe J. in the High Court in 2009. At that point in time, the council claimed that any materials deposited or dumped by it at the illegal landfill were inert in nature. This was emphatically rejected subsequently in the High Court by Humphreys J. The trial before O'Keeffe J. ran for twenty-three days, of which eight were taken up by a motion by Brownfield seeking a direction of a mistrial on the basis of the inadequate discovery made by the council to date. The High Court held that Brownfield had been prejudiced by the failure of the council to make proper discovery, but refused to order a mistrial. The council was ordered to make a further affidavit of discovery, which was finally delivered on the 27th October, 2011, the seventh of its affidavits of discovery in the proceedings.

15. The European Commission continued to pursue Ireland in relation to the failure to deal with over one hundred illegal landfills. It issued a formal notice on the 30th September, 2010 which included a complaint regarding the delay in dealing with the Whitestown dump.

16. 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 Act of 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.

17. 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*". As Humphreys J. stated in his judgment no. 3 of the 7th July, 2017:-

> *"Wicklow County Council was one of a number of polluters engaging in significant illegal dumping at a huge illegal dump in Whitestown, Co. Wicklow, apparently the largest illegal landfill in the State. Following closure of the site in 2001, when the council envisaged that other dumpers would be paying for remediation, it proposed a scheme of full remediation, processing and removing all non-inert waste at a cost of anything up to €35m depending on the methodology availed of. But when the remediation was actually carried out at public expense, the council spent the much reduced figure of €3.868m, in a process that left at least 93% of the waste on site."*

18. 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.

19. 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.

20. Brownfield was dissatisfied with the situation and it applied to re-enter the two proceedings in July, 2016; a resumed hearing commenced on the 7th March, 2017 before Humphreys J. That hearing ultimately ran for fifty-three days and concluded on the 19th July, 2017. Part of the hearing was taken up in pursing an argument raised by Brownfield

which was ultimately rejected by the trial judge. Most of the time was spent on the issues whether or not the site was contaminated and whether there was an environmental risk. The council maintained that the site no longer posed any environmental risk. In addition, there were a significant number of legal arguments advanced by the council as to why it should not be required to remediate the site in full even if the trial judge found that there was a continuing environmental risk posed by the site.

21. The council emphatically lost the case and the court directed the council to remediate the site in full. The council discontinued the 2005 proceedings against Brownfield. While the council lost the war, it won a number of skirmishes along the way. So, despite the fact that Brownfield obtained the relief it sought in the 2008 proceedings and the 2005 proceedings were discontinued against it, it appealed against the time afforded to the council to comply with the order of the court, and against the order for costs insofar as not all of the costs had been awarded to Brownfield.

The time allowed for remediating the site

22. The trial judge heard submissions from the parties as to the form of order which he should make in light of the findings made in his third judgment. He rejected Brownfield's argument that the requirements of public procurement should be set aside on the basis of urgency. He rejected the submission of the council that it was necessary to conduct an EIA and an AA, and that it was required to obtain a licence from the EPA for the works, or a grant of planning permission. The trial judge held that, while neither an EIA nor an AA were required as a matter of law, the council was not prohibited from carrying out an assessment along the lines of what is required in an EIA report and a NIS in its remediation plan, and that he proposed to facilitate that. He accepted that the parties would endeavour to agree a remediation plan, and that when the plan was decided upon the parties should return to court to have it approved or to have any remaining issues resolved.

23. He then went on to consider the time by which the council should comply with the court order. He noted that neither party had put forward any specific evidence on the issue and stated that he was forming his own view of the likely magnitude and scope of the task, based on his assessment of all of the evidence he had received in the proceedings to date. He specifically held that a detailed process was more likely to ensure that there was a minimum of disagreement on the details of the remediation plan when it came back to court for approval. On that basis he directed:-

> *"23. The timescale I consider appropriate based on the foregoing considerations is as follows. In setting out these steps, the intention is that the council will be bound as to the steps to be carried out but not as to the exact timescale for each individual step (other than that everything should be completed within 78 months). The intermediate time scales must therefore be regarded as indicative only.*
>
> *1. Prepare a briefing document in respect of the appointment of an environmental consultant –2 months from the order.*

2. *Invite and receive tenders in respect of the appointment of an environmental consultant –2 months from step (1).*

3. *Consider tenders and appoint an environmental consultant –2 months from step (2).*

4. *Preparation of remediation plan, including such measures as the council wishes to include in relation to an Environmental Impact Assessment Report and Natura Impact Statement, to be prepared by the environmental consultant –6 months from step (3).*

5. *Circulate draft remediation plan to Brownfield and EPA and allow comments plus consultation and entities that are statutory consultees for EIA/AA purposes –3 months from step (4).*

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).*

7. *Circulate the revised draft remediation plan back to EPA and Brownfield plus public consultation and statutory consultees – 3 months from step (6).*

8. *Review by council of revised draft remediation plan in the light of observations received together with any consultations between parties aimed at resolving disagreement. Prepare final draft of plan and, if disagreement remains between the parties, preparation by the council of a Scott schedule setting out areas of disagreement with the parties' respective positions – 2 months from step (7).*

9. *Presentation of agreed final draft of remediation plan to court or in the event of no agreement, presentation of council's final draft plan together with identification of areas of dispute; resumed hearing and order of the court receiving or approving the plan as the case may be – to conclude within 6 months of conclusion of step (8).*

10. *Preparation by the environmental consultant of tendering documentation in respect of the appointment of a contractor to undertake the works permitted under the remediation plan –3 months from step (9).*

11. *Invitation and receipt of tenders for appointment of contractor – 2 months from step (10).*

12. *Consideration of tenders and appointment of contractor – 3 months from step (11).*

13. *Carrying out of and completion of works permitted under the remediation plan and restoration of the site – 36 months from step (12).*

14. *A strictly limited period of post-remediation monitoring to confirm no unexpected pollution emissions – 6 months from step (13).*

15. *Handover of possession of site to plaintiff – forthwith on completion of the time period allowed for the limited monitoring in step (14). The total duration of the process is therefore 78 months."*

24. When one examines each of the steps set out in this paragraph of the 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.

25. It is, therefore, simplistic to say that the trial judge on the one hand rejected the requirement of the council to conduct an EIA or AA, 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.

26. Brownfield does not dispute the time for carrying out and completing the works, and for post-remediation monitoring, set out in steps 13 and 14. In essence, its objection is to the pre-commencement of work steps which the court deemed were necessary steps to be taken. In my judgment, his assessment is within the margin of appreciation to be afforded to a High Court judge in the exercise of his discretion as to the order to be made pursuant to s. 58 and, in particular, in this case of its exceptional complexity and unedifying history.

27. For this reason, I would reject this ground of appeal.

Costs of the 2005 proceedings

28. O'Keeffe J. made two orders dealing with the costs in this case. On the 7th December, 2010 he refused Brownfield's application for an order pursuant to the inherent jurisdiction

of the court declaring to date a mistrial; however, in view of the fact that it had been prejudiced by the council's failure to make proper discovery, he ordered the council to pay 60% of the costs to Brownfield. This disposed of the costs of eight of the twenty-three days the trial ran before O'Keeffe J. In 2009, Brownfield issued a motion seeking an order for the costs of the entire proceedings. O'Keeffe J. refused that motion and ordered Brownfield to pay the council the costs of the motion. He also ordered the council to pay Brownfield the cost of the adjournment application, to include the times it was listed for mention. In July 2017, Humphreys J. ordered the council to pay Brownfield the costs of the 2005 proceedings, to include reserved costs, save for the two costs orders of O'Keeffe J. and the costs arising following the re-entry of the proceedings in 2015.

29. There can be no complaint as regards the prior orders of O'Keeffe J.; they were not the subject of an appeal and Humphreys J. could not interfere with those orders. Brownfield was otherwise awarded the costs of the 2005 proceedings. Its only complaint, therefore, is the costs of the 2005 proceedings incurred since the re-entry of the proceedings in 2015. In his judgment issued on the 12th May, 2017 [IEHC] 397, Humphreys J. noted that the council had brought two procedural motions; one to have Rockbury Ventures Limited joined as a defendant in the 2005 proceedings, and one to re-enter the 2005 proceedings against Brownfield. He ordered that the application to strike Brownfield out of the 2005 proceedings was to be postponed until not before the determination of the application to add Rockbury as a party, and if that application is granted, until not before the hearing of any similar application by Rockbury, if brought. He then ordered that "the other elements of the 2005 proceedings be listed to be taken up immediately following the determination of the 2008 proceedings and that the council be required to notify all parties accordingly". Thus, it is clear that while the 2005 proceedings remained live against Brownfield, they were, in effect, postponed until the 2008 proceedings were determined. As these were ultimately determined in favour of Brownfield, and the council discontinued the 2005 proceedings against Brownfield, no further costs were actually incurred in the 2005 proceedings.

30. It is in the light of this order that one has to consider the order for costs made by Humphreys J. on the 19th July, 2017. At para. 7 of his judgment he provided that the costs of the 2005 proceedings will not include any costs incurred after the re-entry of the proceedings in 2015 because costs since then had essentially arisen under the 2008 proceedings. He held:-

> *"…The only matter regarding the 2005 proceedings since then that Brownfield were significantly affected by is the application in relation to Rockbury but as that arose as a result of incorrect and inaccurate averments on behalf of Brownfield that the latter was the owner of the site. That had to be rectified and indeed it could have been rectified more rapidly had Brownfield not put forward those inaccurate statements. So to avoid double counting of costs then there will be no order for costs after the re-entry of the proceedings in 2015* ***and the costs incurred after that date are essentially to be treated as having been incurred in the 2008 proceedings****." (emphasis added)*

31. The net effect of these orders and rulings is that Humphreys J. awarded Brownfield the costs of the 2005 proceedings up to the re-entry of the proceedings in 2015, save insofar as costs were previously dealt with by O'Keeffe J. Insofar as any costs arose after the 2005 proceedings were re-entered, they were to be treated as costs in the 2008 proceedings. Given the fact that the parties had, by agreement, treated the affidavits in the 2005 proceedings as relevant to the 2008 proceedings, and the fact that affidavits in the 2005 proceedings were relied upon heavily by Brownfield in particular in Module II of the 2008 proceedings, this seems to me entirely sensible. The Taxing Master, in effect, has been directed to allow all such costs as part of the 2008 proceedings and to tax those costs in accordance with the order of Humphreys J. in the 2008 proceedings.

32. Of course, it is true that the application to join Rockbury Ventures Limited as a co-defendant in the 2005 proceedings was a motion brought in the 2005 proceedings and not in the 2008 proceedings. However, this matters little as the trial judge made a specific order in relation to this application, and he did so in accordance with his ruling that all such costs were to be treated as costs in the 2008 proceedings. Brownfield was unable to point to any prejudice which it might suffer as a result of this order and, in my opinion, no sufficient error of principle was identified such as would warrant this court interfering with the exercise of the High Court's discretion in relation to the costs of the 2005 proceedings. I, therefore, reject this ground of appeal.

Costs of the 2008 proceedings

33. The matter is otherwise with regard to the 2008 proceedings. Brownfield was clearly the victor in the 2008 proceedings also. This should be reflected in the order for costs unless there is a special reason to depart from the rule. Furthermore, in my opinion, the provisions of Ord. 99 RSC are reinforced in this case by the application of the principle that the polluter pays. In my judgment, the trial judge failed to give sufficient weight to this principle when he ruled on certain elements of the costs of the 2008 proceedings. As was submitted by counsel for Brownfield, it is not appropriate that the polluter should be awarded its costs against the party who obtained orders against it to remediate the pollution for which it was, and is, responsible, unless there are very cogent reasons to the contrary which would justify departing from a principle established by European Law.

34. Brownfield contended that the trial judge erred in holding that this was a complex case to which the principles in *Veolia Water UK Plc and Others v Fingal County Council, Respondent (No. 1)* [2007] 1 IR 690 apply. It submitted that it was a one issue case: should the council be ordered to remediate the Whitestown dump? The council lost on this point and therefore all of the costs of the action should be awarded to Brownfield against the council.

35. In my judgment, the trial judge was correct in holding that the litigation was complex. It generated an extraordinary amount of technical evidence and legal argument, on a myriad of distinct issues. It was perfectly possible that Brownfield might not succeed in relation to one or more of these issues, but nonetheless succeed overall. It was, therefore, open to the trial judge to decide that the principles set out in Veolia Water applied in the case of one or more of these issues, depending on the time taken on the

issue and whether it was, in fact, reasonable or appropriate for the successful party to pursue the issue on which it was ultimately unsuccessful, as it did.

36. The trial judge ordered that the case proceed by way of a modular trial. He made no order as to costs in respect of the application for a modular trial. The application was brought by the council and agreed to by Brownfield. Normally, the cost of such an application would be costs in the cause. This is because costs have been properly incurred on a procedural matter which is of equal benefit to the parties and in ease of the court. In fact, the trial judge determined the issues to be dealt with in each module, so it clearly assisted in the efficient hearing of an already very unwieldy case. It is appropriate that there should be an order as to costs as opposed to no order as to costs and that they should go to the party who ultimately prevails, in accordance with the primary rule as to costs. Such an award of costs would have been appropriate in this instance and would have preserved the costs for the victor. In my opinion, the trial judge erred in failing to award the costs to the prevailing party, Brownfield. I allow the appeal on this ground, and direct that the council pay to Brownfield the costs in respect of the application to proceed by way of a modular trial.

37. Brownfield appealed the trial judge's decision to make no order as to costs in respect of the application by the council to re-enter the proceedings against Swalcliffe Limited, which application ultimately was not proceeded with. Time was taken by the council on this motion and Brownfield incurred legal costs simply by being in court, even if it was not a matter which directly concerned it. Brownfield was not excused from attending court at any stage and, therefore, was obliged to incur costs for whatever time was devoted to the application. Therefore, any expenses incurred by Brownfield in relation to this application should be recoverable by it. The fact that they may be relatively modest, in that Brownfield may not have prepared any replying affidavit, does not detract from the fact that, in my judgment, the trial judge erred as a matter of principle in withholding the costs incurred by Brownfield being in court for an application brought, and not proceeded with, by the council. I allow the appeal in respect of this order, and order that Brownfield recover from the council the costs in respect of the application to re-enter the proceedings as against Swalcliffe Limited.

38. The trial judge ordered that there be no order in respect of the costs of agreeing the issue paper herein. As in the case of the application for a modular trial, I am of the opinion that he erred as a matter of principle in making no order as to costs in respect of this matter for the reasons set out above. It is not appropriate that the successful party is thereby deprived of the costs which should otherwise have been awarded to it. I allow the appeal to that extent and reverse the order. Accordingly, the order should be that the council is to pay to Brownfield the costs of agreeing the issue paper herein.

39. The trial judge ordered that Brownfield was to pay the council the costs in respect of the application by the council to join Rockbury Ventures Limited as a defendant to the 2008 proceedings (sic) on the basis that it was Rockbury Ventures Limited, and not Brownfield, who was the owner of the land from 2003. In my judgment, the trial judge correctly

identified the fact that had Brownfield stated the position correctly from the beginning, and had it made clear that Rockbury Ventures Limited and not Brownfield was in fact the purchaser of the site, then the confusion with regard to the parties, and the need to join Rockbury Ventures Limited to the proceedings, would not have arisen. Furthermore, the problem could have been resolved much sooner (as it ultimately was) by Rockbury Ventures Limited transferring title to Brownfield. This was a problem generated entirely by Brownfield which was required to be rectified. I do not accept that the trial judge erred in principle in the exercise of his discretion, and I would not interfere with the trial judge's decision in respect of these costs.

40. Late in the trial the council applied to file a supplemental affidavit pertaining to the decision of the council to exercise its powers under s. 56 of the Act of 1996. Unfortunately, neither the council nor Brownfield appreciated that, in fact, the documents had already been exhibited by Brownfield in the extraordinarily voluminous materials previously put before the court. The initial error was that of the council and it did not realise its error until it was pointed out to it by Brownfield. Brownfield only realised that the documents sought to be introduced were already before the court well into the hearing of the application. In relation to this issue the trial judge said at para. 12:-

> *"Brownfield only announced well into the hearing of that issue that its view was that the documents were already exhibited. They should have signalled that position well before 11 am on the day. Parties are required to save the court's time and it was not helpful, to say the least, to have saved the point until towards the end of the reply to the application. The approach adopted did not pay due regard of the need to make the most efficient use of the court's resources. I do not believe that counsel intended to waste the court's time but unfortunately that was the effect of the course of action adopted. Inadequate attention was given to the need for husbandry of scarce judicial resources and I must mark the fact that that was not the appropriate way of meeting the application by awarding costs to the council."*

41. In my judgment, these strictures apply equally to the council, who brought the unnecessary application. The appropriate order in the circumstances would be to make no order as to costs. It is not appropriate to exonerate one party and to visit the costs of the mistake on the other party on the basis that they only recognised the error "well into" the hearing of the application. In my judgment, this amounts to an error in principle by the trial judge, a *fortiori*, when the principle of the polluter pays is brought to bear. I would vary the High Court order, and order no costs in respect of this matter.

42. Modules III and IV were concerned with the form of the order and the order as to costs. Separate applications on these two matters were necessary owing to the complexity of the case and the nature of the order to be made. In my judgment, the trial judge erred in principle in his approach to these modules. They were concerned with the form of order and the costs of the proceedings. They were necessary applications which flowed from the outcome of the proceedings. Brownfield did not unduly prolong the hearings nor raise

issues which ought not to have been raised. Thus, there was no reason to apply *Veolia Water* principles. In my judgment, the trial judge erred in approaching the issue of the costs associated with determining the form of the order and the costs of the proceedings on the basis that the party whose submissions found most favour with the court should be awarded the costs of the applications. This loses sight of the fact that the council lost the proceedings and these applications were necessary to give effect to the decision of the court in Brownfield's favour.

43. Furthermore, the trial judge was, strictly speaking, incorrect to say that the council had succeeded as regards the substantive order to be made. The council unsuccessfully argued that it was required to perform an EIA and an AA, that it required planning permission to carry out the work and that it required an EPA licence. The trial judge expressly noted that neither party had submitted any evidence as to the timelines to be adopted. The trial judge made clear that he largely crafted the form of the order and the steps to be taken himself, in light of his rulings and the extensive evidence he had previously considered. It is noteworthy that the council did not apply for the costs of this Module or Module IV. In my opinion, in all the circumstances the trial judge erred as a matter of principle in awarding the costs to the council, and in failing to award the costs to Brownfield. I would allow the appeal, therefore, and award Brownfield the costs of Modules III and IV against the council.

44. The trial judge awarded Brownfield the costs of Module II as against the council and there was no appeal in relation to that order.

45. This leaves the appeal in relation to the order for costs in respect of the first module. The trial judge ordered that Brownfield was entitled to one third of the costs of that module and that the council was entitled to two thirds of the costs of the module; there was to be a set-off between the two, so the net effect was that the council was to recover from Brownfield one third of the costs of Module I. The trial judge explained that, in his opinion, Module I was mainly concerned with the issue of *mala fides* on the part of the council. Serious allegations were made by Brownfield against the council and Brownfield did not succeed in those issues, although it won on certain legal issues. He noted that he had rejected corruption allegations against the council and said that he could have regard to the failed nature of those allegations when dealing with the costs.

46. The first point that needs to be clarified is the extent of Module I. In its appeal, Brownfield asserted that the trial judge, in effect, did not rule on all of the costs of the hearing before him. The submission was predicated on the basis that Module I did not commence until after the court had directed a modular trial, many days after the trial recommenced. This is incorrect. The council made clear in its application to the trial judge that it was applying for costs in respect of this module on the basis that Module I ran from the date the trial recommenced before Humphreys J. on 7th March, 2017 until the trial judge delivered his judgment in respect of Module I. In my judgment, it is clear that the trial judge treated Module I as commencing on 7th March, 2017 and he awarded costs on that

basis. There was thus, no failure to address the costs of the hearings preceding the order that the case proceed on a modular basis.

47. The trial judge was best placed to assess how much of the time from the 7th March, 2017 until the conclusion of Module I (save in relation to the issue of framing the issue paper and the actual application for a modular trial) was devoted towards the issue of alleged corruption/*mala fides* of the council, as opposed to the legal issues dealt with in judgment no. 2. It was his assessment that it was "mainly" on conspiracy/*mala fides* issues. He clearly considered it to be more than the six days in which Mr. Sheehy and Mr. O'Laoire were cross-examined by counsel for Brownfield.

48. Brownfield succeeded in establishing that Mr. O'Laoire had intended to engage in a corrupt practice in relation to the subsequent development of the site as a commercial venture. However, the trial judge rejected its argument that the council was also involved in this corrupt design. The trial judge was of the view that disentangling the possible liability of the council for the proposed actions of Mr. O'Laoire, and his syndicate, was not in fact necessary to determine the issues before him. Thus, this brought into play the principles in *Veolia Water*. The trial judge felt that pursuit of this issue was a discrete matter in respect of which he felt it was appropriate to make an order for costs against the overall victor in the proceedings, being the party who was unsuccessful on this particular issue. Brownfield has not established any error on the part of the trial judge in this regard. Further, it seems to me that it is a matter to which the principle that the polluter pays does not apply. In those circumstances, it seems to me that the High Court should be awarded a margin of appreciation as to how it apportioned the time taken on this failed and ultimately irrelevant, although extremely grave, issue. I am not satisfied that the appellant has established that the trial judge erred in principle in the manner in which he dealt with costs in respect of Module I and, accordingly, I refuse the appeal in respect of this portion of the order.

49. Finally, there is no reason, in principle, why there should not be a set-off where there are costs awarded to opposing parties in proceedings in respect of different issues. It is clear that the council would be a mark for any costs ultimately due and owing in favour of Brownfield. The same might not be said in respect of Brownfield, in view of the application to come off-record made, mid-trial, to the High Court. In those circumstances, it seems to me that it was properly within the discretion of the trial judge to order that the ultimate award of costs should be set-off as against each other.

50. Brownfield says that there should not be a set-off between the costs awarded in the two different proceedings. It is not clear why this is so, or what prejudice Brownfield suffers as a result. Brownfield will be owed costs by the council in the 2005 proceedings. It is likely that it will be owed costs by the council in the 2008 proceedings after the individual orders have been set-off in those proceedings in light of the outcome of this appeal. The costs awarded included reserved costs. Insofar as there may be some difficulty in apportioning costs between modules or issues, that is a matter to be resolved by the Taxing Master and is a matter peculiarly within his area of expertise. In light of the

outcome of this appeal, it is unlikely to prove as problematic as counsel for Brownfield submitted.

Conclusion

51. Brownfield has not established that there was any error in the time afforded to the council to comply with the order that it is to remediate the site at Whitestown in full. I refuse the appeal in relation to the form of the order. The trial judge erred in principle in relation to some of the orders as to costs, as I have set out. I allow the appeal in respect of those matters and I order the council to pay to Brownfield the costs of the agreement of the issue paper, the costs of the application for a modular trial, the costs of the application to re-enter the proceedings against Swalcliffe Limited and the costs of Modules III and IV. There should be no order as to the costs of the application by the council to file a supplemental affidavit dealing with its decision to remediate the site under s. 56 of the Waste Management Act, 1996 (as amended). The balance of the order is affirmed.