

[2024] IEHC 260

THE HIGH COURT  
PLANNING & ENVIRONMENT

[H.SP.2008.0000056]

BETWEEN

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

AND  
THE HIGH COURT  
PLANNING & ENVIRONMENT

[H.SP.2020.0005730]

BETWEEN

BROWNFIELD RESTORATION IRELAND LIMITED

PLAINTIFF

AND  
WICKLOW COUNTY COUNCIL, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

(No. 11)

**JUDGMENT of Humphreys J. delivered on Wednesday the 8th day of May, 2024**

**1.** Nearly seven years ago, the court ordered the council to remediate Whitestown dump by January 2024. That deadline for *completion* of the total and complete removal of waste and contaminated or potentially contaminated soil passed months ago, but the actual removal of waste hasn't even *begun*.

**2.** Before the court are various applications arising from or related to this situation. Among other things, non-compliance can have consequences in terms of costs or contempt, and here we have applications under both headings. Out of the myriad of issues to be dealt with now, the two most pressing questions are as follows.

**3.** The first prominent issue is - where the council delayed implementing the court's order and engaged in gathering new data when the court had already ruled that there was enough data, does the council have a liability for costs arising from that period and in particular for costs of its attempt, later abandoned, to reopen issues in that regard that had been settled by the court after a lengthy trial?

**4.** The second pressing issue arises from the fact that to proceed against a party for contempt, the law normally envisages service of the order marked with the penal endorsement prior to the expiry of the time for compliance. The plaintiff failed to effect such service. Should the court therefore hold off on proceeding with any contempt issue against the council until, for example, the time for compliance is extended and the order served within the time as so extended?

**Procedural history**

**5.** A potted history of this matter is set out in *Brownfield Restoration Ireland Ltd. v. Wicklow County Council (No. 10)* [2023] IEHC 712 and perhaps that can be taken as read as a statement of the background for present purposes.

**6.** This matter concerns two sets of proceedings, a 2008 waste injunction action and a 2020 damages type plenary action.

**7.** A first trial of the 2008 action took place before O'Keefe J. in 2011, but was adjourned on the basis of a proposal by the council to remediate the site.

**8.** A second trial took place in 2017 following that attempt at remediation, which resulted in an order for full remediation to be carried out by the council over a 6 and a half year timescale. That deadline expired in January 2024 as noted above.

**9.** 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 the balance of the plan would await further steps including advices from a court-appointed expert if appointed.

**10.** In *Brownfield Restoration Ireland Ltd v. Wicklow County Council (No. 9)* [2023] IEHC 250, [2023] 5 JIC 1606 (Unreported, High Court, 16th May 2023), I awarded costs to the applicant for the period 28th September 2022 to 21st March 2023 and provided for the issue of certain motions by the parties as follows:

- (i) a motion by the EPA regarding the terms of the remediation plan;
- (ii) a motion by the council varying the time lines;
- (iii) a motion by the council concerning the appointment of an expert; and
- (iv) a motion by the application concerning costs incurred prior to the remediation plan approval process.

**11.** On 27th November 2023, on the council's application, I ordered that there would be such an expert to be appointed by the court. I also adjourned the EPA motion regarding the terms of the remediation plan generally with liberty to re-enter on the basis of an agreed approach between the EPA and the council.

**12.** In *Brownfield Restoration Ireland Ltd. v. Wicklow County Council (No. 10)* [2023] IEHC 712, certain modalities of the work of the expert were set out. It was also directed, without objection, that the sequence of the remaining issues would be:

- (i) who the expert should be;
- (ii) the applicant's costs application;
- (iii) any motion for payment on account, if brought (it wasn't); and
- (iv) the council's request to vary timelines (the council hasn't pressed this issue as yet).

**13.** I also directed that the costs of the application leading to the No. 10 judgment would be addressed when the court dealt with the applicant's costs motion (in fact that has been now superseded by a formal motion).

**14.** On 22nd January 2024 I gave further interim directions, without objection so that the remediation timetable would continue. In accordance with the council's own time estimate, it would be required to procure and secure void spaces and circulate suitability assessment questionnaires (SAQs) by 31st March 2024 without prejudice to the long stop date.

**15.** On 29th January 2024 I set a date for the hearing of most of the outstanding matters (16th April 2024 onwards). I also heard evidence from the first of the proposed candidates for the position of expert. It was also ordered by consent that there be no duty of care on the part of the experts in favour of any third party including the parties herein and that the duty of care of the experts shall be to the court alone. The parties were directed to prepare a Scott schedule in relation to the costs issues. Finally the plaintiff was permitted to bring any fresh motions returnable for 12th February 2024, having raised the issue of possibly bringing motions on payment on account and on the consequences of non-compliance by the council with the existing orders. While not recorded in the perfected order, I provided a deadline for step 10C (as set out in the third affidavit of Mary Cahill), finalisation of the tender documentation, in the council's suggested amended variation of the timescale, by end-June 2024, subject to that being revisited in the light of the expert's view when appointed. And in the 2020 5730P proceedings I directed that discovery letters would issue prior to 12th February 2024.

**16.** On 12th February 2024 I heard evidence from the defendant's second proposed candidate expert. I also gave directions regarding further steps:

- (i) the plaintiff would have until Monday 19th February 2024 to issue its motions:
  - (a) in the 2008 case regarding failure to comply with the court order;
  - (b) in the 2008 case, regarding costs from 21st March 2023 to the hearing of April 2024; and
  - (c) in the 2020 case regarding moving the case along by interlocutory directions;
- (ii) such motions were to be returnable for 26th February 2024;
- (iii) time would be extended to 13:00 on Friday 23rd February 2024 for the issue of the plaintiff's and council's discovery letters;
- (iv) the plaintiff to reply to the State's discovery request (made on of 9th February 2024) by 13:00 on Friday 23rd February 2024;
- (v) there be a formal order (to rectify the omission from the perfected order of 29th January 2024) that step 10(c) in the 3rd affidavit of Mary Cahill (finalise tender documentation) be carried out by 30th June 2024, subject to any contrary views of the expert in due course;
- (vi) the parties would agree a document on the forensic duties of the expert within 2 weeks;
- (vii) the council to propose rates and terms and conditions within 2 weeks;
- (viii) the plaintiff to populate a Scott schedule of its costs position within 2 weeks by reference to specific dates and matters; and
- (ix) the council's first motion (dated 1st June 2023) regarding an expert, which was subsequently re-issued, was struck out.

**17.** On 26th February 2024 the position was as follows:

- (i) the plaintiff confirmed that the motions regarding contempt and costs had been issued;
- (ii) discovery letters were in progress, the plaintiff had agreed the defendant's request for discovery in the 2020 proceedings and the defendant was considering the plaintiff's request;

- (iii) the date of the hearing was changed by agreement from 16th April 2024 for four days to 18th April 2024 for 2 days; and
- (iv) the agenda for the hearing was to be the contempt motion and the plaintiff's two costs motions, together with any outstanding issues from the council's motion to appoint the expert.

**18.** On the following mention date of 11th March 2024, the position was:

- (i) as regards a date for legal submission and any replying affidavit by the council on the contempt issue, this was to be by 11:00 on Tuesday 19th March 2024 with a reply by the plaintiff by 25th March 2024, the plaintiff's submission by 28th March 2024, the council's legal submission by 10th April, 2024 and the statement of case by 12th April 2024;
- (ii) as regards the Scott schedule on costs, the plaintiff's information had been included but the council had not done so and would complete it by 19th March 2024;
- (iii) no provision was sought for further affidavits on the costs issue;
- (iv) as regards the document on the duties of the expert the council had proposed an amended version of the terms including these duties - the council would now prepare an amended version of this with the duties in a schedule, with appropriate headings distinguishing the duties applying to experts generally (points 1-8) from those applying to court appointed assessors (9 and 10), and would create a separate document listing relevant caselaw that has been drawn upon, by 20th March 2024, with the plaintiff to have until 4th April 2024 to propose amendments by way of tracked changes;
- (v) as regards the terms and conditions of the expert, the council had proposed a text in that regard for consideration by the plaintiff;
- (vi) as regards a potential indemnity, the council now included this in the draft terms for the expert;
- (vii) as regards discovery by the council, the council has issued a reply to the plaintiff's request for discovery rejecting the discovery sought, which the plaintiff is considering and is reserving its position;
- (viii) as regards discovery by the plaintiff, the plaintiff had yet to reply;
- (ix) the parties were to seek further information on the motion recorded on the High Court system dating from 2009;
- (x) word versions of plaintiffs motions regarding contempt and second costs motion were to be uploaded by 13th March 2024;
- (xi) Brownfield needed to issue a notice of intention to proceed in the plenary action and should do so by 8th April 2024;
- (xii) the council's application to approve the remediation plan was to be dealt with after the expert's advice is available; and
- (xiii) the matter was to be listed on 8th April 2024 for review of progress.

**19.** The position on 8th April 2024 was as follows:

- (i) the council had completed suggestions for the terms of reference and duties;
- (ii) both sides had completed the costs Scott schedule; and
- (iii) the plaintiff was to prepare a draft statement of case by Friday 12th April 2024 with the council populating it by Monday 15th April 2024.

**Motions issued to date in the 2008 proceedings**

**20.** The motions and applications recorded in the High Court system in the 2008 proceedings are as follows:

- (i) 19th February 2024 – plaintiff's motion regarding contempt (currently live);
- (ii) 19th February 2024 – plaintiff's motion seeking costs from 23rd March 2023 to date (currently live);
- (iii) the plaintiff's motion dated 15th June 2023, seeking costs of proceedings from 19th July 2017 to 28th September 2022 (currently live);
- (iv) 9th June 2023 - Motion Filed by Council Reissued regarding independent expert (currently live);
- (v) 1st June 2023 - Motion Filed by Council regarding Independent expert (struck out);
- (vi) 19th May 2023 - Motion Filed by EPA seeking to amend Order at para. 56 in judgment delivered 21st March 2023 (subsequently adjourned generally);
- (vii) 20th April 2022 - Motion filed by the council seeking admission to the Commercial List (date on plaintiff copy is 14th April 2022) (which was granted);
- (viii) 16th June 2020 - Motion filed by council regarding a detailed quantitative risk assessment, which was a form of revisiting the previous judgments of the court (date on copy served on plaintiff is 15th June 2020) (adjourned generally – see No. 6 judgment para. 14, and No. 8 judgment);

- (ix) 24th April 2017 - Motion filed by council seeking directions for a modular trial (granted); and
- (x) 14th October 2009 Notice of Motion relating to discovery (disposed of by O’Keefe J.).

**Motions and applications currently before the court**

**21.** Motions (i) to (iv) above are currently live. The order in which they were to be dealt with at the hearing of 18th April 2024 was to be as follows:

- (i) finalise issues regarding expert including formal appointment;
- (ii) contempt; and
- (iii) costs motions, with the discussion assisted by the Scott Schedule.

**22.** These matters were heard, broadly in that order, on 18th and 19th April 2024 when judgment was reserved.

**23.** The 2020 proceedings were also mentioned and addressed by agreement in that they were adjourned generally with liberty to re-enter. The parties are of course at liberty to progress any issues like discovery in the meantime if they so wish, but basically the plaintiff felt that the complexities of the 2008 case should be resolved first and the other parties agreed to that.

**Issue 1 - Matters relating to the expert**

**24.** The council’s motion seeks the following reliefs:

- “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.
2. Further or other order.
3. An Order for the costs of, and incidental to, this application.”

**25.** Some issues relating to the expert have already been dealt with, and I am now dealing with the balance of the issues and also wish to set out a little more detail about some of the matters that have already been addressed.

**26.** The plaintiff’s submissions pointed out that an expert other than a court-appointed joint expert is best conceptualised as an assessor under section 59 of the Supreme Court of Judicature Act 1877 and Order 36, rule 41 of the Rules of the Superior Courts (as inserted by S.I. No. 254 of 2016).

**27.** The council’s motion was taken in stages. The decision in principle to appoint an expert and directions on some modalities of work were dealt with first, followed by the identity of the expert.

**28.** The appointment by the court of an expert either on its own motion or from a list supplied by the parties is a necessary adjunct to the judicial process and not a formal procurement process. Nonetheless it should be reasonably clear that objective criteria are being applied; and any candidate not favourably considered should have available to her a reason for that outcome. Conversely, there is a public interest in data minimisation regarding the identity of persons being considered for the role for the obvious reason that publicity would be a disincentive to participation in any quasi-competitive process. However while the process began as quasi-competitive, it ended by agreement, so such detailed reasons no longer arise.

**29.** The agreed candidate was Ove Arup & Partners Ireland Limited, trading as Arup. Mr Sean Mason went through the issues addressed in the fourth affidavit of Mary Cahill. It is proposed that a team comprising Sean Mason, Engineer and Project Director, Gerry Baker, Senior Hydrogeologist, Jenny Lightfoot, geo-environmental specialist and Christopher Newton, chartered geologist, would provide assistance to the Court. All these experts have experience in complex landfill remediation projects. Mr Mason was the lead on remediation of the Irish Glass Bottle site and dealt with legacy landfills and related projects including Greystones marina and Arklow river flood defence works, Alexandra Basin redevelopment, and on numerous quarries, with experience in contaminated soils. Mr Gerry Baker had experience in landfill projects and modelling of impact of contamination on receiving groundwaters. Ms Jenny Lightfoot was involved in Liverpool festival gardens remediation and had extensive experience in dealing with the EPA. Another expert was involved in a number of projects including the Glass Bottle site. Should any issues arise regarding EIA or AA, Arup could call on suitably ecologically qualified colleagues. Arup were familiar with the brief for the expert and referred to the need for an outcome acceptable to both parties. They would act independently of

the council notwithstanding that they did other work for the council on other projects. Mr Mason had availability although was on call for the Metrolink oral hearing.

**30.** He referred to the terminology of ensuring and guaranteeing removal of waste but indicated that indemnities would apply and that normal professional insurance would not cover a "guarantee". As regards going beyond EPA requirements his reading was that the court order was that if material was placed on site as waste it should be removed, but could be reused if uncontaminated. As regards timelines, the draft plan would need to be ratified and then translated to works and technical specifications. Under cross-examination he made the point that work with the council was through public procurement procedures. Indirectly he was engaged with the council as a sub-contractor on the Greystones marina and was previously involved in the Arklow flood scheme which was a direct appointment by the council. In that capacity his point of contact was an official outside the waste section. His interface to date with the law agent was about obtaining judgments and preparing for giving evidence, not discussing the legal issues. He has checked with the team that none had involvement with Whitestown and didn't have knowledge of previous involvement with Wicklow waste section. He did not have any particular knowledge of the court duties of an expert. Mr Mason was based in the Dublin office and would be in a position to maintain continuity. He understood the requirement that anything brought as waste should be removed.

**31.** At the end of his evidence the plaintiff indicated that there was no particular objection to the appointment of Arup.

**32.** Both Arup and the other potential candidate were excellent, although all witnesses could have presented greater demonstration of knowledge of the forensic duties of a court expert. The tie-breaker was the plaintiff's attitude – the plaintiff didn't object to Arup whereas it expressed no such neutrality about the other candidate. No detailed rationale for that approach was articulated other than perhaps the scale of Arup which the plaintiff considered to be an asset, despite it actively working for this particular council.

**33.** As I said in the No. 8 judgment, the court would get involved in picking the expert only in default of agreement by the parties, so when agreement arrived, the matter was taken out of my hands. So the cross-examination of the other witnesses was basically unnecessary, and could have been avoided altogether had the plaintiff acted in more efficient manner. I will come back to that.

**34.** As regards the issue of lack of demonstration of knowledge of the forensic context, that is not an irremediable problem.

**35.** In that regard, in order to assist the parties and structure the compilation of their views, an initial draft statement of expert's duties, drawing on the leading textbook, Mark Tottenham et al., *A Guide to Expert Witness Evidence* (Bloomsbury, 2019), chapter 3, was sent to the parties for comment on 14th February 2024. After some exchanges with the parties, a revised version was agreed. The contractual terms are set out in Schedule I to this judgment. The summary of duties, as approved by the court, appears as Schedule II to this judgment. Any minor changes of layout or wording in the attached can readily be incorporated in the final contract before signature.

**36.** While there is a lot of caselaw in relation to experts, not all precisely consistent, and not all of it referred to in Schedule II, I have reviewed as much of it as has come to my attention from a reading of the relevant parts of Mr Tottenham's book and from the submissions of the parties and it seems to me that Schedule II reflects the most persuasive views in caselaw regarding a summary of the essential duties of the experts.

**37.** Following the finalisation of the list of duties and the contractual terms, the terms of engagement including these duties are to be formally agreed to by Arup who, subject to that, will stand appointed.

**38.** The next step will be for the assessor to advise on the balance of the remediation plan and the timescale for full remediation. Obviously the decision remains with the court but in principle it would be desirable if the expert, once appointed, would liaise with both sides with a view to narrowing the issues and reporting to the court.

## **Issue 2 - Unawarded costs of the proceedings to date**

**39.** The plaintiff's first motion regarding costs seeks the following primary relief:

"An Order that the Defendant doth pay the Plaintiff's costs in these proceedings from 19 July 2017 to 28 September 2022, to include reserved costs and the costs of entry into the Commercial List, to be adjudicated by the Legal Costs Adjudicator in default of agreement."

**40.** The plaintiff's second costs motion seeks:

"1. An Order that the Defendant doth pay the Plaintiff's costs in these proceedings from the 23rd day of March, 2023 to the date of such Order, to include reserved costs in relation to that period, to be adjudicated by the Legal Costs Adjudicator in default of agreement.

2. Such further or other Order as to this Honourable Court doth seem fit and meet.

3. An Order providing for the costs of and ancillary to this application."

**41.** As to costs, the position is:

(i) costs before 19th July 2017 have already been disposed of;

- (ii) costs from 19th July 2017 to 28th September 2022 are the subject of the plaintiff's first motion;
- (iii) as noted above, costs from 28th September 2022 to 21st March 2023 have already been awarded to the plaintiff; and
- (iv) costs after 22nd March 2023 are covered by the plaintiff's second costs motion.

**42.** To assist in addressing the costs, the parties helpfully prepared a Scott schedule on costs as follows (colour coding omitted):

<b>NO</b>	<b>DATE MOTION ISSUED</b>	<b>RETURN DATE</b>	<b>CALLOVER/ FOR MENTION/ HEARING</b>	<b>RESULT/ OUTCOME</b>	<b>AFFIDAVITS</b>	<b>PLAINTIFF'S POSITION</b>	<b>DEFENDANT'S POSITION</b>
1			19 July 2017	Remediation Order (Judgment No. 4)			...
2					17 May 2019. Affidavit sworn by Marc Devereux for Defendant	Costs should follow costs of remediation Order and be awarded to the Plaintiff.	Items 2, 3, 4 and 5 are connected and should be dealt with together. Matter listed at the Court's motion. Purpose of affidavit was to update Court on progress since Order. Given that the court directed the listing and no substantive order made, the parties should bear their own costs in respect of items 2, 3, 4 and 5.
3			20 May 2019	For mention to review compliance with Order of 19 July 2017 Defendant directed to file Affidavit	Affidavit of Bernadette Guinan sworn 23 May 2019 for Defendant	Costs should follow costs of remediation Order and be awarded to the Plaintiff	Matter adjourned on 20 May 2019 so that defendant could file affidavit from environmental consultant to set out steps taken since appointment.
4					Affidavit of Anne Stokes sworn 24 May 2019 on behalf of Plaintiff	Costs should follow costs of remediation Order and be awarded to the Plaintiff.	
5			27 May 2019	Remediation plan progress update.		Costs should follow costs of remediation Order and be awarded to the Plaintiff	Matter adjourned until 26 July 2019, in circumstances where COA hearing on 23 July 2019.
6			26 July 2019	Adjourned pending Court of Appeal Decision		Costs should follow costs of remediation Order and be	Matter listed for mention. No order made, other than to adjourn

NO	DATE MOTION ISSUED	RETURN DATE	CALLOVER/ FOR MENTION/ HEARING	RESULT/ OUTCOME	AFFIDAVITS	PLAINTIFF'S POSITION	DEFENDANT'S POSITION
						awarded to the Plaintiff	... proceedings until 18 November 2019. Appropriate order is that parties bear their own costs.
7					Second Affidavit of Marc Deveraux sworn on 8 November 2019 for Defendant	Costs should follow costs of remediation Order and be awarded to the Plaintiff.	Items 7 and 8 are connected. Purpose of affidavit was to update court on developments since previous listing.
8			18 November 2019	Remediation plan progress update.		Costs should follow costs of remediation Order and be awarded to the Plaintiff	No substantive order made on foot of this listing. Matter adjourned until 15 June 2020 in anticipation of draft remediation plan being available in May 2020. Appropriate order is that parties bear their own costs.
9					Third Affidavit of Marc Deveraux for Defendant sworn 12 June 2020	Costs should follow costs of remediation Order and be awarded to the Plaintiff.	Items 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 are all related. Affidavit filed in context of Defendant's application to have Court approve DQRA tools as part of Tier 3 Risk Assessment under EPA Code of Practice.
10					Second Affidavit of Bernadette Guinan sworn 15 June 2020 for Defendant	Costs should follow costs of remediation Order and be awarded to the Plaintiff.	Affidavit set out update as to site investigation and report and set out background to decision to undertake a Tier 3 risk assessment and request for DQRA approval.
11			15 June 2020	Order granting liberty to the Defendant issue		Motion not pursued and	Court directed that Defendant

NO	DATE MOTION ISSUED	RETURN DATE	CALLOVER/ FOR MENTION/ HEARING	RESULT/ OUTCOME	AFFIDAVITS	PLAINTIFF'S POSITION	DEFENDANT'S POSITION
				and serve Notice of Motion on Plaintiff by 16 June 2020 and the Plaintiff has liberty to issue and serve a Replying Affidavit to said Motion by 30 June 2020. Matter adjourned for mention to 6 July 2020.		adjourned generally on application of Defendant; costs should follow that event and be awarded to the Plaintiff.  Further or in the alternative, costs should follow costs of remediation Order and be awarded to the Plaintiff	... issue Motion formally seeking an order approving DQRA tools.
12					Affidavit of Raymond Stokes sworn 30 June 2020 for Plaintiff	Motion not pursued and adjourned generally on application of Defendant; costs should follow that event and be awarded to the Plaintiff.  Costs should follow costs of remediation Order and be awarded to the Plaintiff.	
13	16 June 2020	6 July 2020		Motion seeking Order for Court approval of modelling tools for qualitative risk assessment in accordance with the EPA Code of Practice adjourned on consent.		Motion not pursued and adjourned generally on application of Defendant; costs should follow that event and be awarded to the Plaintiff.  Costs should follow costs of remediation Order and be awarded to the Plaintiff.	Motion returnable to 6 July 2020. Adjourned to allow Defendant to consider and reply to affidavits filed by the Plaintiff (affidavits of Ray Stokes and Dr. Ted Nealon)
14					Affidavit of Dr Ted Nealon sworn 30 June 2020 for Plaintiff	Motion not pursued and adjourned generally on application of Defendant; costs should follow that event and be	



NO	DATE MOTION ISSUED	RETURN DATE	CALLOVER/ FOR MENTION/ HEARING	RESULT/ OUTCOME	AFFIDAVITS	PLAINTIFF'S POSITION	DEFENDANT'S POSITION
						awarded to the Plaintiff. Costs should follow costs of remediation Order and be awarded to the Plaintiff.	...
15					Third Affidavit of Bernadette Guinan sworn 22 July 2020 for Defendant	Motion not pursued and adjourned generally on application of Defendant; costs should follow that event and be awarded to the Plaintiff. Costs should follow costs of remediation Order and be awarded to the Plaintiff.	Responding to affidavit of Mr. Stokes and Dr. Nealon. Explains why EPA Code of Practice should be followed and best practice involves carrying out Tier 3 risk assessment and approval of DQRA tools. However, notes Plaintiff's opposition to Council's approach, despite previously seeking assurance that Code of Practice would be followed. Indicates that a risk assessment can be incorporated into draft remediation plan, in view of Plaintiff's change of position and that relief sought in Motion not needed.
16					Fourth Affidavit of Marc Deveraux sworn 17 July 2020 for Defendant	Motion not pursued and adjourned generally on application of Defendant; costs should follow that event and be awarded to the Plaintiff. Costs should follow costs of remediation	Responding to affidavits filed on behalf of the Plaintiff (Stokes and Nealon)

NO	DATE MOTION ISSUED	RETURN DATE	CALLOVER/ FOR MENTION/ HEARING	RESULT/ OUTCOME	AFFIDAVITS	PLAINTIFF'S POSITION	DEFENDANT'S POSITION
						Order and be awarded to the Plaintiff.	...
17					Replying Affidavit of Dr Ted Nealon sworn 24 July 2020 for Defendant	Motion not pursued and adjourned generally on application of Defendant; costs should follow that event and be awarded to the Plaintiff. Costs should follow costs of remediation Order and be awarded to the Plaintiff.	
18			27 July 2020	Defendant's motion not pursued and adjourned generally on application of Defendant with costs reserved		Motion not pursued, and adjourned generally on application of Defendant; costs should follow that event and be awarded to the Plaintiff.  Costs should follow costs of remediation Order and be awarded to the Plaintiff. Re	Relief sought in motion not pursued, because Plaintiff's affidavits made clear they were resiling from insistence that EPA Code of Practice be adhered to.  Appropriate order in respect of items 9 to 18 is that the parties bear their own costs.
19					Affidavit of Mary Cahill sworn 16 April 2021 for Defendant	Costs should follow costs of remediation Order and be awarded to the Plaintiff.	Items 19 to 29 are related and arise on foot of the submissions received in response to draft remediation plan circulated in November 2020.  In particular, NPWS request for AA to be undertaken (contained in submission from the Minister for Tourism, Culture, Arts, Gaeltacht, Sports and

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							... Media dated 15 March 2021 on the (first) draft remediation plan.
20			19 April 2021 - Remote	The matter was adjourned for mention to 17 May 2021. The Judge encouraged everyone to work on practical steps.		Costs should follow costs of remediation Order and be awarded to the Plaintiff.	Matter adjourned to the SID List on 17 May 2021, for mention, to allow opportunity for Defendant and Fehily Timoney to meet with the NPWS and the EPA in order to discuss the NPWS's request that a full NIS be prepared and an AA undertaken.
21			17 May 2021 - Remote	An Order was made by the Court directing that the matters be listed on 26 July 2021 and that the Defendant to complete Step 7 of the No. 4 Judgement delivered herein by circulating a revised Remediation Plan by that date. Liberty to apply.		Costs should follow costs of remediation Order and be awarded to the Plaintiff.	The Court requested attendance of the NPWS arising from its request for NIS/AA.
22			26 July 2021 - Remote	The Court highlighted its concerns about delay, and directed that a one page summary of the various steps to be taken by the Council (further to Steps 6 and 7 set out in his Judgment) should be prepared. Matter was adjourned to 29 July 2021.		Costs should follow costs of remediation Order and be awarded to the Plaintiff.	
23					Affidavit of Raymond Stokes sworn 29 July 2021 for Defendant	Costs should follow costs of remediation Order and be awarded to the Plaintiff.	Raising complaints as to content of draft remediation plan. Unnecessary where Judgment No.4 provided a facility for Plaintiff to make submissions on content of draft

NO	DATE MOTION ISSUED	RETURN DATE	CALLOVER/ FOR MENTION/ HEARING	RESULT/ OUTCOME	AFFIDAVITS	PLAINTIFF'S POSITION	DEFENDANT'S POSITION
							... plan – which Plaintiff did.  Mr. Stokes' affidavit sought to complain about need for AA
24			29 July 2021 – Remote	An Order was made that the Defendant complete the biodiversity surveys required for the preparation of a Natura Impact Statement (NIS) as required by Minister for Tourism, Culture, Arts, Gaeltacht, Sports & Media (NPWS) pursuant to Regulation 42(19) and Regulation 2011 by 17 December 2021. Matter adjourned for mention on 11 October 2021.		Costs should follow costs of remediation Order and be awarded to the Plaintiff.	This was necessitated in light of Department's request for AA to be undertaken.
25			30 September 2021	Judgment No. 6			
26					Fifth Affidavit of Bernadette Guinan sworn 30 September 2021 for Defendant	Costs should follow costs of remediation Order and be awarded to the Plaintiff.	Responding to complaints made in affidavit of Ray Stokes.
27			11 October 2021 – Remote	Matter adjourned for mention for three weeks with direction that submissions be made within two weeks regarding each step in the timetable.		Costs should follow costs of remediation Order and be awarded to the Plaintiff.	
28					27 October 2021 – Plaintiff's Submissions filed.	Costs should follow costs of remediation Order and be awarded to the Plaintiff.	Plaintiff questioning, inter alia, the need for AA and why position of NPWS only came to light so long after the Order.
29			1 November 2021 – Remote	An Order was made that interim directions be made as per [17] of the No. 6 Judgment without prejudice to the date for compliance of the existing Order and any further applications that any party might bring in due course with liberty to any		Costs should follow costs of remediation Order and be awarded to the Plaintiff.	In respect of the matters in 19-29, the Council accepts that they relate to issues relating to indicative timeline (particularly steps 6 and 7 of the

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				party to the proceedings to apply in that regard. Also, an Order that the Minister for Housing, Local Government and Heritage be added as a Notice Party to the proceedings herein.			<p>...</p> <p>indicative timeline in Judgment No.8 and the impact on same following NPWS request for NIS/AA). As such, Plaintiff is entitled to costs, although these should be limited in circumstances where there were no formal motions before the Court and matters were disposed of by way of brief hearings.</p> <p>The costs of the affidavit of Ray Stokes (item 23) and Plaintiff's submissions (item 28) should be not be awarded to the Plaintiff.</p>
30	14 April 2022	25 April 2022 – Remote		Motion for entry to Commercial List.		Costs should follow costs of remediation Order and be awarded to the Plaintiff.	<p>30, 31, 32 and 33 are related. Costs have been made costs in the cause. No "cause", meaning parties should bear their own costs.</p> <p>If costs do fall to be dealt with, Council should be awarded costs for reasons set out hereunder, given that it was obliged to bring the Motion and having regard to Plaintiff's unnecessary opposition to same. Alternatively, parties should</p>

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							<p>...</p> <p>bear their own costs.</p> <p>Motion was required in light of indication from Courts Service that Humphreys J. no longer in a position to deal with case in SID List, but that it was open to parties to apply via Commercial List for the case to return to the SID List. Otherwise, case would transfer to Chancery List. Defendant considered that Humphreys J. was best placed to deal with the outstanding issues relating to Order.</p> <p>Plaintiff unnecessarily opposed application for entry, filed affidavit opposing same raised a procedural impediment (application to enter coming after final order in proceedings). Plaintiff insisted on motion running, before ultimately agreeing to order to admit to Commercial List/SID List, in circumstances where McDonald J. indicated that if Plaintiff continued resistance to application, he</p>

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							... would ask Irvine P. to direct that the matter be sent back to Humphreys J in light of his previous involvement.
31					Affidavit of Bronagh Sawey, sworn 4 May 2022 for Defendant	Costs should follow costs of remediation Order and be awarded to the Plaintiff.	See Item 30. Affidavit on behalf of Plaintiff opposing entry into Commercial List.
32			9 May 2022 - Remote	Order made by McDonald J entering proceedings in the Commercial List and transferring to the Commercial Planning and SID List, with an Order that the costs of the motion be costs of the cause.		Costs should follow costs of remediation Order and be awarded to the Plaintiff.	See Item 30
33			23 May 2022 - Remote	Matter put back to 4 October 2022 for mention with liberty to apply in the meantime.		Costs should follow costs of remediation Order and be awarded to the Plaintiff.	See item 30.  For mention listing following entry into SID List.  The appropriate order is for parties to bear their own costs.
34			3 October 2022 - Remote	Matter adjourned to 24 October 2022. Court allowed two weeks for the Plaintiff to notify the Council of any additional matters they wanted included in the Scott Schedule. Court asked EPA and NPWS to furnish their list of issues to the Council within two weeks.		COSTS AWARDED FROM 28 SEPTEMBER 2022 TO 21 MARCH 2023 BY ORDER OF 16 MARCH 2023 (Judgment No.9)	Items 34-46 are linked and have already been dealt with by the Court.  Per §29(iii) of Judgment No.9: "the plaintiff be awarded costs for the period 28th September, 2022 to 21st March, 2023 as against the defendant, <u>including costs associated with the No. 7 and No. 8 judgments and any costs</u>

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							... <u>reserved in relation to that period</u> ". [emphasis added]  This includes the costs of the costs application (items 43 and 45)
35			24 October 2022 – Remote	Order made that the Notice Party excused from participating in the proceedings with liberty to apply and an Order fixing matter for hearing on 14 November 2022 at the end of the Commercial Planning List.		COSTS AWARDED FROM 28 SEPTEMBER 2022 TO 21 MARCH 2023 BY ORDER OF 16 MARCH 2023 (Judgment No.9)	See item 34
36			14 November 2022 – Remote	Order made that the Second Named Notice Party be excused from further participation with liberty to apply; Court directed any Order on foot of the Defendant's application to approve draft Remediation Plan without prejudice to existing Orders and a deadline of 19 January 2024.		COSTS AWARDED FROM 28 SEPTEMBER 2022 TO 21 MARCH 2023 BY ORDER OF 16 MARCH 2023 (Judgment No.9)	See item 34
37			2 December 2022	Judgment No. 7			See item 34
38			5 December 2022 – Remote	Adjourned for mention to 24 January, 2023		COSTS AWARDED FROM 28 SEPTEMBER 2022 TO 21 MARCH 2023 BY ORDER OF 16 MARCH 2023 (Judgment No.9)	See item 34
39			12 January 2023	Submissions from Defendant		COSTS AWARDED FROM 28 SEPTEMBER 2022 TO 21 MARCH 2023 BY ORDER OF 16 MARCH 2023 (Judgment No.9)	See item 34
40			20 January 2023	Submissions from Plaintiff		COSTS AWARDED FROM 28 SEPTEMBER 2022 TO 21	See item 34



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						MARCH 2023 BY ORDER OF 16 MARCH 2023 (Judgment No.9)	...
41			24 January 2023 – Remote	Submissions by both parties. Judgment reserved to 21 March 2023.		COSTS AWARDED FROM 28 SEPTEMBER 2022 TO 21 MARCH 2023 BY ORDER OF 16 MARCH 2023 (Judgment No.9)	See item 34
42			21 March 2023	Judgment No. 8 issued. Order issued and proceedings adjourned to the Commercial Planning and Environment List on 2 October 2023 to confirm timely implementation of the directions as of that point.			See item 34
43			14 April 2023	Plaintiff's Submissions		Costs should follow costs of remediation Order and be awarded to the Plaintiff.	See item 34 Plaintiff's written submissions sought to have "all costs" awarded to Plaintiff. These submissions are covered by the order on foot of Judgment No.9.
44			20 April 2023	Plaintiff's Submissions		Costs should follow costs of remediation Order and be awarded to the Plaintiff.	Not clear what this relates to. Defendant was not served with any submissions dated 20 April 2023.
45			24 April 2023	Court directed appearance with agreed dates to discuss costs.		Costs should follow costs of remediation Order and be awarded to the Plaintiff.	See item 34
46			25 April 2023	Court directed costs application listed for 5 May 2023. Liberty for EPA to bring motion		Costs should follow costs of remediation Order and be awarded to the Plaintiff.	See item 34
47			5 May 2023	Plaintiff makes application for costs;		Costs should follow	The Court dealt with costs

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				adjourned on application of Defendant.		costs of remediation Order and be awarded to the Plaintiff.	... relating to the approval of the remediation plan on this date. This is covered by the award of costs in Plaintiff's favour on foot of Judgment No.9.
48	18 May 2023	22 May 2023		Motion issued by EPA for an Order amending the proposed Order of 21 March 2023 by inserting a provision or requirement that any reliance by Wicklow County Council on Section 56 of the Waste Management Act 1996 for the disposal of waste from Whitestown at licenced landfills is conditional upon a licence review application being made to the Agency etc.	<p>Affidavit of David Pollard sworn 17 May 2023 with exhibit DP1</p> <p>Affidavit of Bernadette Guinan (unsworn)</p> <p>Affidavit of Ted Nealon together sworn 2 June 2023 with exhibits TN1 to TN6</p> <p>Affidavit of David Pollard sworn 27 June 2023 with exhibit DP1</p> <p>Second Affidavit of Ted Nealon sworn 12 July 2023</p> <p>Third Affidavit of Ted Nealon sworn 5 October 2023 with exhibit 3TN1</p> <p>Second Affidavit of Mary Cahill sworn 6 November 2023 with exhibits "2MC1" and "2MC2"</p> <p>Affidavit of Ted Nealon sworn 16 November 2023</p>	<p>Costs should follow the event of concession by the Defendant.</p> <p>Further or in the alternative, costs should follow costs of remediation Order and be awarded to the Plaintiff.</p>	<p>The EPA motion was adjourned generally, including the issue of costs.</p> <p>However, there was no concession on the part of the Defendant. The Defendant's position was fully set out on affidavit, as to its surprise at the EPA's issue concerning the issue of section 56 powers to direct licenced waste operators to accept waste excavated from the site. This was flagged in the draft remediation plan submitted to the Court and not raised by the EPA, which sought to be excused from the hearing into approval of the remediation plan.</p> <p>The Plaintiff never raised any issue with the use of section 56 powers at the hearing of the application to approve the remediation plan.</p>

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					<p>Third Affidavit of Mary Cahill sworn 21 November 2023 with exhibits 3MC1 to 3MC3</p> <p>Affidavit of Ted Nealon sworn on 23 November 2023 with exhibits TN1 to TN3</p> <p>Affidavit of David Pollard sworn 27 November 2023</p>		<p>...</p> <p>Ultimately, the EPA agreed to adjourn the motion generally, in circumstances where the Council said it would tender for space within the constraints of existing licensed capacity. This avoided the possibility of further delays in dealing with the motion and allowed the Council to proceed with the steps required on foot of Judgment No.8.</p> <p>Plaintiff used motion to ventilated issues which strayed well beyond EPA motion and, essentially, sought to reargue Court's decision to approve remediation plan in part.</p> <p>Appropriate order is that parties bear their own costs. However, if Plaintiff has entitlement to costs (not accepted), it lies against EPA.</p>
49	31 May 2023	12 June 2023		Motion issued by WCC in respect of the independent expert appointment	<p>Affidavit of Bernadette Guinan together with Exhibit sworn 31 May with exhibit BG1</p> <p>Affidavit of Bronagh Sawey sworn</p>	<p>Costs should follow the event of concession by the Defendant.</p> <p>Further or in the alternative, costs</p>	<p>There was no "[concession]" on the part of the Defendant. It brought the application to have the independent expert appointed.</p>

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					<p>8 June 2023</p> <p>Seventh Affidavit of Bernadette Guinan sworn 3 July 2023 with exhibits 7BG1 to 7BG4</p> <p>Eighth Affidavit of Bernadette Guinan sworn 25 July 2023 with exhibit 8BG1</p> <p>Third Affidavit of Ted Nealon sworn 5 October 2023 with exhibit "3TNI" Booklet of Exhibits</p> <p>Second Affidavit of Mary Cahill sworn 6 November 2023 with exhibits "2MC1" to "2MC2"</p> <p>Affidavit of Sandra Casey sworn 16 November 2023 with exhibits A and B</p> <p>Fourth Affidavit of Mary Cahill sworn 24 November 2023 with exhibits "4MC1" and "4MC2"</p> <p>Fifth Affidavit of Mary Cahill sworn 30 November 2023 with exhibit "5MC1".</p>	<p>should follow costs of remediation Order and be awarded to the Plaintiff.</p>	<p>...</p> <p>Whilst the appointment of the independent expert arises from Judgment No.8, the appropriate order is no order as to costs, in circumstances where the Plaintiff ultimately agreed to the appointment of one of the Defendant's proposed experts. This agreement occurred, without explanation, after the Court had heard from the Defendant's other expert (...).</p> <p>Accordingly, the Defendant's expert was appointed on the Defendant's concession.</p> <p>It should be noted that affidavits sworn on behalf of the Plaintiff stayed well beyond the issue relating to appointment of independent expert. In the event that the Plaintiff is entitled to costs re appointment of independent expert, the order should exclude costs in respect of Dr. Nealon's affidavit.</p>

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50	15 June 2023	26 June 2023		Motion issued by Applicant in respect of costs from 19 July 2017 to 28 September 2022	Notice of Motion of dated 15 June 2023  Affidavit of Bronagh Sawey together with Exhibit sworn 13 June 2023 with Exhibit BS1	Costs should follow costs of remediation Order and be awarded to the Plaintiff.	... This Motion is listed on 17/18 April and issue as to costs should be determined on foot of the outcome.
51			12 June 2023	EPA motion and Plaintiff's costs motion adjourned to 26 June for mention		Costs should follow the event of concession by the Defendant.  Further or in the alternative, costs should follow costs of remediation Order and be awarded to the Plaintiff.	See item 48
52			26 June 2023	The matter was administratively adjourned to 3 July 2023 by the Court (email from Registrar)		Costs should follow the event of concession by the Defendant.  Further or in the alternative, costs should follow costs of remediation Order and be awarded to the Plaintiff.	No costs arise in the context of an administrative adjournment, where neither party obliged to attend court.
53			3 July 2023	EPA applied for and granted adjournment		Costs should follow the event of concession by the Defendant.  Further or in the alternative, costs should follow costs of remediation Order and be awarded to the Plaintiff.	See item 48
54			17 July 2023	The matter was adjourned for one week to 24 July 2023		Costs should follow the event of	See item 48

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				as Defendant informed the Court they received an Affidavit and wanted time to consider same.		concession by the Defendant.  Further or in the alternative, costs should follow costs of remediation Order and be awarded to the Plaintiff.	...
55			24 July 2023	Motions adjourned at request of Defendant.		Costs should follow the event of concession by the Defendant of the EPA motion.  Further or in the alternative, costs should follow costs of remediation Order and be awarded to the Plaintiff.	See item 48
56			2 October 2023	Listing to confirm timely implementation of the directions as at that point. The matter was adjourned for two weeks on consent.		Costs should follow the event of concession by the Defendant of the EPA motion.  Further or in the alternative, costs should follow costs of remediation Order and be awarded to the Plaintiff.	See item 48  Principal issue outstanding was EPA motion.
57			16 October 2023	Defendant applied for and granted adjournment.		Costs should follow the event of concession by the Defendant of the EPA motion.  Further or in the alternative, costs should follow costs of remediation Order and be	See item 48  Principal issue outstanding was EPA motion.

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						awarded to the Plaintiff.	...
58			6 November 2023	Plaintiff sought adjournment to address recent Affidavit and Affidavit due from EPA. The Court sought to manage the motions efficiently.		Costs should follow the event of concession by the Defendant of the EPA motion.  Further or in the alternative, costs should follow costs of remediation Order and be awarded to the Plaintiff.	See item 48  Principal issue outstanding was EPA motion.
59			20 November 2023	Adjournment for one week on consent following correspondence from Defendant dated 17 November 2023 setting out proposed revised timelines to accommodate waste removed from the site, and proposing that the EPA's application could be adjourned generally with liberty to re-enter should any issue arise in the future.		Costs should follow the event of concession by the Defendant of the EPA motion.  Further or in the alternative, costs should follow costs of remediation Order and be awarded to the Plaintiff.	See item 48  Principal issue outstanding was EPA motion.
60			27 November 2023	EPA motion adjourned generally with liberty to re-enter; EPA excused.		Costs should follow the event of concession by the Defendant of the EPA motion.  Further or in the alternative, costs should follow costs of remediation Order and be awarded to the Plaintiff.	See item 48
61			4 December 2023	Hearing on scope of function of independent expert.		Costs should follow costs of remediation Order and be awarded to the Plaintiff.	See item 49
62			15 January 2024	Listed for mention but not called.		Costs should follow costs of remediation	No costs arise

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						Order and be awarded to the Plaintiff.	...
63			22 January 2024	Court directed that the procedures in Step 10 of Mary Cahill's Third Affidavit were to be carried out by 31 March 2024 and adjourned the matter to ascertain availability of nominees for independent expert.		Costs should follow costs of remediation Order and be awarded to the Plaintiff.	See item 49
64			29 January 2024	The Court heard evidence from Carol Connery and Eleanor Boland. Scott Schedule as to costs directed. Liberty to make request for discovery.		Costs should follow costs of remediation Order and be awarded to the Plaintiff.	See item 49
65			12 February 2024	Evidence was heard from Sean Mason. Listing of matters for the 16th of April. Directions as to contempt motion, costs motion, Scott Schedule, duties of expert document, and discovery.		Costs should follow costs of remediation Order and be awarded to the Plaintiff.	See item 49

### Categories of costs issues

**43.** The 65 separate costs issues break down into the following categories:

- (a) reviews of compliance with remediation order;
- (b) the Council's methodology motion, which was adjourned generally with liberty to re-enter on the application of the Council on the 27th of July 2020;
- (c) the motion for entry into the Commercial List, in which costs were made costs of the cause on the 9th of May 2022;
- (d) the EPA motion, which was adjourned generally with liberty to re-enter on the 27th of November 2023 when the Council conceded the issue advanced by the EPA;
- (e) the Council's motion to appoint an independent expert and related issues;
- (f) costs of the Plaintiff's contempt application;
- (g) costs of the costs applications; and
- (h) matters falling outside the present applications.

### Category A – review of compliance

**44.** Category A covers Items 2-12 and Items 19-29. In broad terms, we go back to the polluter pays principle and the question of whether the costs reasonably arose out of the original pollution. Pollution ought to give rise to remediation which may give rise to court applications to review compliance with that. All of that should properly be visited on the polluter, in this case the defendant.

**45.** The council basically accepts that as follows:

"16. On the basis of the rationale for awarding the Plaintiff costs in Judgment No.9, the Council would accept that these hearings were follow-ons from the primary remediation order made in July 2019 and that on the assumption that that was the 'event' which the Plaintiff won, the costs of the progress hearings should follow that event. However, the Council submits that any order awarding the Plaintiff the costs of those hearings should emphasise for adjudication purposes that the hearings were brief and were of the nature of 'for mention' matters.

17. The Plaintiff on occasion filed affidavits in respect of these for mention listings. A list of the affidavits filed is set out in Exhibit BS1 of the affidavit of Bronagh Saway, the Plaintiff's solicitor, sworn on 13 June 2023. None of these affidavits was directed by the



Court and it is not entirely clear to what purpose they were intended to be put. It is submitted that the Plaintiff's affidavits were unnecessary. They never grounded any motion brought by the Plaintiff, although the Court invited the Plaintiff on more than one occasion to bring such application as it saw fit. The Council submits that any order for costs in respect of progress hearings should exclude affidavits prepared on behalf of the Plaintiff, which were never directed and were not prepared for any particular purpose, other than to complain about the Council's perceived inaction or use of incorrect methodology in its remediation approach."

**46.** Whether costs should be allowed at a level appropriate to mentions or hearings is a matter for legal costs adjudication. However such costs properly include the affidavits filed by the plaintiff as it is reasonably necessary for a plaintiff to put forward its position on affidavit in such a situation. Mr Nealon's affidavit for example could not be said to be entirely irrelevant, especially given certain factors to which we will now come. Indeed generally (although I am not sure whether it is strongly disputed under other headings) costs will include costs of the affidavits delivered, for the avoidance of doubt.

**Category B – the council's abandoned methodology motion**

**47.** Category B covers Items 13-18. There are many situations where, if a party brings a motion and then effectively withdraws it or fails to pursue it, for reasons within that party's control, the costs incurred by other parties should be paid by that party. There may be reasons to depart from that in a particular case but no compelling reasons to that effect arise here.

**48.** The council's submission is:

"18. It is contended in the Plaintiff's submissions that the Council embarked on a 're-investigation approach...in defiance of the Judgments of the Court'. Against this, Ms Guinan's third affidavit set out a clear basis as to why a site investigation was appropriate and as to why the environmental consultants considered that a Tier 3 report was necessary. This was in the context of the consultants proceeding on the basis that the approach in the EPA Code of Practice for Unregulated Waste Disposal Sites should be followed. This approach had been demanded by the Plaintiff, whose solicitors sought confirmation in February 2020 that the Code of Practice would be adhered to in the remediation. There then followed a scenario that once the Council flagged its intention to undertake a Tier 3 risk assessment and seek Court approval of the Detailed Quantitative Risk Assessment (DQRA) tools that it intended to employ in that regard, the Plaintiff complained that it was completely unnecessary. Whilst Ms. Guinan's third affidavit confirmed that the step could be bypassed and the consultants could proceed to the finalisation of the draft remediation plan, which would include a risk assessment, it is clear from the affidavits filed by the Council around this issue that the Council found itself in a 'Catch 22' situation: it considered that it is bypassed the Tier 3 element of its own motion, it would face criticism from the Plaintiff, but that if it sought to undertake the process, it would be equally subjected to the criticism of embarking on an unnecessary exercise.

19. Against that background, it is submitted that the appropriate step would be to make no order as to costs on the application to approve the DQRA tools."

**49.** This cannot be accepted. First of all, the timeline set out involves significant omission. The order for remediation was made on 19th July 2017. The council's failure to operationalise that properly between July 2017 and February 2020 can't be explained by a letter from the plaintiff in February 2020.

**50.** I had already made clear that delaying remediation to conduct further investigation was a non-runner given that there had already been much investigation and a lengthy trial. What I said at para. 302(i) of the No. 3 judgment was:

"(i) A first option is that of requiring further investigation. Such a decision would be a cop-out at this stage and would only set the scene for a further round of litigation. More fundamentally, no matter what the situation, further testing can always be suggested in any such case. The council in the sister case of Fenton successfully argued against the submission that further testing was an answer there (pp. 69-70). In the present case a further round of investigation would be a fool's errand. It would not alter the nature of the risk arising from the fixed characteristics of the site. The cry of 'no remediation without further testing' is simply another clause of the polluters' charter."

**51.** The council, I'm afraid, effectively ignored that for the first couple of years thereafter. So instead of following the game plan clearly laid out by the court by getting off to a flying start on the light turning green, the council steered off the track on the first lap and into the pits, where they lamented the fact that it was going to take a long time to get going again. Talk about losing momentum – the fact that they did so on "expert advice" is irrelevant. The effect of that approach was to delay remediation massively – so much so that almost seven years on from the remediation order, absolutely no waste whatsoever has been removed. Not a shovel-full. Nothing.

**52.** The result of that is that we are coming up to seven years from an order for total and complete remediation which should have been completed months ago. That can't be without significant consequences, even if for today's purposes such consequences are only in terms of costs.

**53.** The council accepts the "fact that Fehily Timoney have not had regard to historical data obtained from the site in the preparation of its risk assessments" (third affidavit of Ms Guinan of 22nd July 2020). I have elsewhere pointed out the dissimulatingly rhetorical status of the term "historical data". It sounds superficially impressive if one was fortunate enough to be fresh to this. But firstly the court had already dealt with that issue. And secondly and more philosophically, all data immediately becomes historic once it is obtained – the present has a poignant habit of becoming the past. If the objective is to chase "non-historic data" then we are truly in pursuit of a crock of gold at the end of a rainbow that is always just another horizon away. The whole approach of effectively disregarding the decisions of the court made after a lengthy trial was irredeemably flawed from the outset and, even leaving aside any rule of law issues, could have been predicted to result in massive delay, which is of course exactly what happened.

**54.** And thirdly let's not get too abstract - nothing has been removed. So on the facts here there's nothing "historical" about previous investigations which showed the presence and extent of waste.

**55.** The fact that the EPA code was mentioned in the court's judgment (e.g., No. 3 judgment para. 5) does not nullify the express finding that implementation should not be delayed pending further data.

**56.** The council rather faintly suggests that a "line" in the No. 3 judgment about no more investigation is "carrying a lot of weight". But that wasn't a throwaway comment. It was not only part of the *ratio* but even more critically it went to the curial part of the decision as to what order would be made. It was a rejection of an order sought by the council to put a hold on remediation pending further investigation. To dismiss that as just a "line" borders on nihilism – can a court not even be allowed to make a decision without being told later that it was only a line?

**57.** But the council is right about one thing – that factor going to the order *did* carry a lot of weight. I saw it at the time as central to the overall order made and as absolutely indispensable to any prospect of completing remediation within the period allowed. I suppose that has been proved correct.

**58.** The fact that the court was informed years later doesn't take away from the critical point that the judgment wasn't being followed. The court certainly wasn't informed of this between July 2017 and the review date of May 2019. Spending two years acting contrary to a judgment and keeping one's head down about it is sub-optimal, on any view. And of course there was then much further delay before things got remotely back on track.

**59.** The affidavit of Mark Devereaux filed on 24th May 2019 says at para 3 that:

"3. The purpose of this affidavit is to update this Honourable Court as to the progress that has occurred in relation to the proposed remediation of the Whitestown site since the proceedings were last before the Court in July 2017."

**60.** Whatever else that is, it certainly isn't any kind of timely reporting about departures from the court's decision. If the council had come back to court shortly after the judgment of July 2017 and said that the consultant had suggested no remediation without further investigation, it would have had to face the problem that I had already expressly and decisively rejected that. People can decide for themselves how much traction that argument would have got had the council been courageous enough to come back to try their luck on that, prior to the delay taking place. But, of course, the council didn't do that. Instead they let a lot of time pass, brought a motion a couple of years later, and then effectively abandoned the proposal when the inevitable storm clouds started to gather.

**61.** Even if they had come back to court, merely telling the court something isn't enough – a court normally makes orders only when someone makes an application. The council didn't apply for any amendment to the process directed by the order.

**62.** The fact that the judgment envisaged that work which inevitably would involve engagement of a consultant doesn't create a situation whereby the council can on the advice of the consultant engage in a process that was expressly rejected by the judgment.

**63.** The plaintiff says this is "one of the most investigated pieces of land on the island" (see affidavit of Raymond Stokes filed on 30th June 2020 para. 14). It says the council's decision to re-survey the site was to act as if it was *terra incognita*. That's the context – no wonder I was sceptical about more data gathering. Indeed the logic remains – the 2020 data (gathered to overcome the problem of historical data) is now itself historical, so maybe let's have more investigation, on the council's logic. Any such data will also instantly become historical, so let's keep going with site investigations until hell freezes over or Whitestown dump is remediated, whichever first occurs.

**64.** The plaintiff submits, persuasively, that the only options are as follows (and the council didn't disagree, although they did protest that there was an absence of any intention to differ from the court's decisions – something the plaintiff no doubt can reserve its position on):

- (i) the consultant wasn't briefed properly;
- (ii) the consultant disregarded the brief and the council, being aware of that, failed to cry halt;
- (iii) the consultant disregarded the brief and the council failed to notice this;
- (iv) the council and consultant together decided to do something that was contrary to the court's judgment, and failed to inform the court for almost 2 years; or
- (v) what the council and consultant did was fully compatible with the judgments of the court.

**65.** We can rule out option (v). That's a non-starter – I have explained that above. And no matter which of options (i) to (iv) apply, there is significant responsibility on the part of the council. Any one of those four options was egregiously wrong from the start.

**66.** Nobody should have to re-iterate what has already been decided. Further site investigation was already ruled out in 2017 for good and solid reasons, mainly the total lack of need for that given the extensive prior investigation, and the inevitable huge delay it would cause. Both reasons remain valid and have remained valid at all material times.

**67.** The overall relevance of the foregoing is that, whether one looks at it on the basis of the mere fact of abandoning the motion, or on the basis that the motion and the process of further investigation and delay leading up to it was inconsistent with express findings in the court's No. 3 judgment, the costs under this heading must be awarded to the defendant.

#### **Category C – Commercial List**

**68.** Category C covers Items 30-33. These were made costs in the cause by order of McDonald J. on 9th May 2022. The case had already been heard and decided at that point (see the No. 4 judgment) and we were at the stage of enforcing the order, albeit with the procedural wrinkle that the unimplemented parts of the order may require directions as we go. So ordering that costs would be costs in the cause after the case has been decided can only mean that the costs should be determined at the end of the proceedings. It is not clear to me that it is necessary or even appropriate for another judge to revisit the order of McDonald J., but for the avoidance of doubt I will expressly order that the parties can re-enter the issue of costs of this issue once the substantive proceedings (i.e., not including any residual costs issues) are resolved or on consent of the parties, whichever is earlier.

#### **Category D – EPA motion**

**69.** This covers Items 48-49 and 51-60. As the council submits:

"if it is the case that the 'event' would have been the EPA succeeding in its motion (or the Council successfully resisting it), then no 'event' has occurred so as to warrant an award of costs."

**70.** The bringing of the EPA motion was proximately occasioned by the EPA failing to get involved in the process at an earlier stage and then bringing the motion. The council aren't responsible for that. Normally, although there are exceptions, one party wouldn't be liable for costs occasioned by an application made by another party. Given that the motion itself has been adjourned, the best thing to do with the question of those costs is to adjourn those generally with liberty to re-enter them pending a final order on the EPA motion.

#### **Category E – independent expert**

**71.** Category E covers Items 61-65. While I don't criticise anybody, there is no doubt that the issue of the independent expert could have been dealt with much more efficiently.

**72.** At the level of broad generality, the costs of the expert are ultimately attributable to the underlying pollution and the need to address it. That suggests that the plaintiff should get the costs under this heading and I will do that with one exception. The council accepts the general principle but says that it should be disappplied:

"37. The Council accepts that the appointment of the independent expert flows from the approval of the remediation plan. Thus, on the basis of Judgment No.9, the Plaintiff ought to get the costs of the application, unless there are special reasons for departing from that default position. It is submitted that the Plaintiff's belated acceptance of one of the Council's nominees forms the basis for departing from the rule. Significant court time was taken up examining the [first candidate] representatives, which would have been avoided had the Plaintiff indicated a willingness to agree to Arup as the independent person, in circumstances where the Council first set out its proposals in Mary Cahill's fourth affidavit sworn on 24 November 2023. In that scenario, if the Plaintiff is entitled to costs, the Veolia Water principles should apply: had the Plaintiff indicated its agreement to Arup in a timely manner, the application could have been dealt with sooner and in a single Court sitting rather than two court sittings. In the Veolia Water scenario, the Plaintiff would be deprived of the costs

caused by the unnecessary elongation of the application, meaning that when a balance exercise is applied, the appropriate order on this application is that the parties should bear their own costs.”

**73.** As regards item 64 (the unnecessary cross-examination), the plaintiff could have focused its mind much earlier and indicated a provisional willingness to favour Arup, subject to certain evidential clarifications, prior to the cross-examination of the other candidate’s witnesses, thereby saving cost and effort in general and the cross-examination of the other candidate in particular.

**74.** I fear that I didn’t succeed in stimulating any real understanding by Brownfield of the difficulty under this heading so I will have a final go at explaining it. Firstly, there wasn’t anything wrong with the cross-examination in itself. It was perfectly competent on its own terms. And it would have been helpful to the court - had it been necessary for any decision I had to make. The problem was not with the cross-examination as such but with the fact that it occurred in a complete strategic vacuum. The plaintiff didn’t apply its mind to what its overall attitude was to the identity of the expert before deciding to cross-examine the representatives of the first candidate. Had thought been applied first, the indication of conditional consent to Arup could have been made and the first hearing could have been saved.

**75.** This wasn’t a case where negotiations were ongoing and a party has to play hardball until agreement is reached, when it becomes smiles and handshakes all of a sudden and the court offers its thanks and congratulations. Negotiations hadn’t even begun when the plaintiff rose to put the first witnesses through their paces.

**76.** Nor was this a case where the plaintiff’s attitude markedly changed (for example, if the plaintiff was sympathetic to one candidate but then changed its mind because some advantage favouring the other candidate was discovered for the first time in the witness box) in a way that was causatively based on the cross-examination of the first candidate. The latter exercise was pugnacious in the time-honoured manner from beginning to end – and certainly by comparison with the relatively softball questioning of Mr Mason throughout. That isn’t a criticism of cross-examining counsel. But having sat through it all, and seen and heard the cross-examinations, the plaintiff wasn’t looking for problems with Arup, and wasn’t looking for good points with the other candidate. There’s a sense in such situations that you get what you go looking for, by and large.

**77.** The cross-examination of the first set of witnesses was a waste of time in that context. Had the plaintiff simply indicated its attitude earlier, that exercise need never have taken place. However, rather than order costs against Brownfield as sought by the council I will err on the side of the polluter pays principle and the Aarhus Convention and make no order as to those costs. I am also conscious that in the end of the day the plaintiff did effectively agree to an order, and one should try not to disincentivise agreement. But nor should one incentivise unnecessary objection. On balance, no order as to item 64 is the appropriate order.

**78.** On a side note, it would also have been helpful to have had notice of the conditional agreement to Arup, which I only found out about at the end of cross-examination. Context is always useful, and declining to share context for no good reason, as here, affects the way that a court absorbs evidence. For example, if that titbit about agreement had been shared with me (as it was with the defendant) I wouldn’t have been mentally comparing the answers throughout the evidence to the first set of witnesses’ answers, because that wasn’t a necessary exercise. Of course the plaintiff wasn’t trying to be unhelpful - it’s more a question of perspective. Indeed counsel in the present case have been very helpful, which I appreciate, and which is saying a lot because that is in the context of a List where a high level of helpfulness to the court is the norm. So that’s not criticism, just part of the court’s ongoing educational mission. It’s just one more illustration of the concept in advocacy that it’s never too soon to tell the court what you want. However that’s by the way, it isn’t relevant to the present costs issue.

#### **Category F – costs of the contempt**

**79.** These were not included in the Scott schedule but it was agreed that the court could indicate a default order which the parties would be free to argue against in the usual way, and I do that below.

#### **Category G – costs of the costs**

**80.** This is included at item 50 and it was again agreed that the court could indicate a default order.

#### **Category H – items falling outside the present exercise**

**81.** Item 1 has already been dealt with as have items 34 to 47.

#### **Issue 3 – Contempt-related matters**

**82.** The plaintiff’s contempt motion seeks the following reliefs:

“1. A Declaration that the Defendant is in contempt of the Order of this Honourable Court of the 19th day of July, 2017 by failing to remove to a licensed waste disposal facility all waste and all soil or other materials contaminated or potentially contaminated by such waste from all areas of the site at Whitestown, Baltinglass in the County of Wicklow including

areas that are already the subject of attempted remediation and to appropriately fill and landscape the site with inert matter sourced elsewhere and to return possession of the site to the Plaintiff within a period of 78 months from the date of the said Order.

2. In the alternative to the foregoing, an Order recording the finding that the Defendant is in contempt of the Order of this Honourable Court of the 19th of July, 2017 by failing to remove to a licensed waste disposal facility all waste and all soil or other materials contaminated or potentially contaminated by such waste from all areas of the said site including areas that are already the subject of attempted remediation and to appropriately fill and landscape the site with inert matter sourced elsewhere and to return possession of the site to the Plaintiff within a period of 78 months from the date of the said Order.

3. If necessary, an Order that the Chief Executive of Wicklow County Council attend in person for the hearing of this application.

4. An Order of attachment and committal of the Chief Executive of Wicklow County Council pursuant to Order 44 Rules 1 and/or 2 and Order 42 Rule 8 of the Rules of this Honourable Court and/or pursuant to the inherent jurisdiction of this Honourable Court for breach of the Order of this Honourable Court of the 19th day of July, 2017 by failing to remove to a licensed waste disposal facility all waste and all soil or other materials contaminated or potentially contaminated by such waste from all areas of the said site including areas that are already the subject of attempted remediation and to appropriately fill and landscape the site with inert matter sourced elsewhere and to return possession of the site to the Plaintiff within a period of 78 months from the date of the said Order.

5. In the alternative to the foregoing, such Order as to this Honourable Court doth seem fit to require the Chief Executive of Wicklow County Council to show cause for and to purge the Defendant's contempt of the Order of this Honourable Court of the 19th day of July, 2017.

6. Such further or other relief of a fine, sequestration of assets or otherwise as to this Honourable Court doth seem fit and meet pursuant to Order 44 Rules 4 and 5 of the Rules of this Honourable Court and/or pursuant to the inherent jurisdiction of this Honourable Court.

7. An Order pursuant to sections 57 and 58 of the Waste Management Act, 1996 varying the Order of the 19th of July, 2017 by substituting an Order requiring the Defendant to remediate the Whitestown site the subject of these proceedings by the removal to a licensed waste disposal facility or facilities all waste and all soil or other materials contaminated or potentially contaminated by such waste from all areas of the said site including areas that are already the subject of attempted remediation and to appropriately fill and landscape the site with inert matter sourced elsewhere to ensure that there is no remaining waste on the site within a specified period from the date of the Order by carrying out specified steps by the dates to be provided in such Order.

8. An Order requiring the Defendant to comply with each and every requirement of such remediation plan as this Honourable Court shall approve, subject to such variation of the plan as this Honourable Court may order, but in every respect subject to the overriding requirements of the Order sought at paragraph 7 above and in particular the steps to be carried out by the dates thereby specified.

9. In the alternative to the reliefs sought at paragraphs 7 and 8 above, an Order pursuant to Order 42 Rule 31 providing for the Plaintiff or some other person appointed by the Court to carry out such remediation of the said site the cost of the Defendant and the expenses so incurred to be ascertained and to be paid in such manner as this Honourable Court may direct.

10. If necessary, an Order deeming good the service of the Order of the 19th of July, 2017 on the Chief Executive of Wicklow County Council and on the Defendant.

11. Such further or other or consequential relief by way of Order or direction as to this Honourable Court doth seem fit and meet to ensure that its Orders are upheld.

11. An Order providing for the costs of and ancillary to this application to be measured on the highest scale by this Honourable Court or in the alternative to be adjudicated at such scale by the Legal Costs Adjudicator in default of agreement.

12. Liberty to apply."

**83.** While Order 44 speaks in terms of attachment and committal and doesn't specifically refer to declarations or findings of contempt, the court must have a broad range of options at its disposal. Sometimes immediate attachment of a contemnor is appropriate. But there may be situations where the court wishes to be able to proceed up a ladder of escalation where that is appropriate, beginning with findings, proceeding if appropriate to declarations, and then perhaps ultimately making formal orders. One can also note that for a corporate defendant, attachment is not a direct option, but one can make orders for fines, sequestration or receivership for example, or a moving party can add, or

seek relief against, a natural person who is responsible for the governance of the respondent. Orders ultimately leading potentially to attachment and committal can be made against that person. Adding the person as a defendant first is best as it reduces procedural complication.

**84.** The plaintiff was naturally dismissive of technical defences in terms of contempt. But it seems to me there are at least two reasons to give those defences some attention - the difficulty of reversing the contempt process once it gets going and the level of uncertainty in this area of the law.

**85.** One point needs to be noted at the outset which is that once the court sets off down the contempt road, it may not be all that easy to turn back. If, for example, a steadfast contemnor ends up being committed for civil contempt, one might find oneself months or even years later with ongoing detention and no readily available off-ramp. It's only stating the obvious to say that that is not a theoretical problem for the legal system in general. Obviously that's not going to arise in this particular case but it is a danger with the area generally.

**86.** Some sort of appreciation of that danger is embedded in the partly unwritten folk wisdom of the courts, which possibly explains why courts can be surprisingly attached to the need for certain otherwise pointless technicalities being complied with prior to addressing the merits of any contempt application. One can argue against that of course but there is no perfect answer.

**87.** Another piece of folk wisdom is that contempt law is a bit of a minefield. Writing a lifetime ago as Donal O'Donnell S.C., the current Chief Justice said that regular differences of view between court levels on the issue of contempt is "indicative of an area where the law is unsettled and unpredictable" ("Some reflections on the law of Contempt", (2002) 2 *Irish Judicial Studies Institute Journal*, p. 87.) The area isn't any more settled and predictable now, which is another reason why a court might feel attracted to ensuring that the technicalities are complied with.

**88.** All that said, one can't get too carried away with such technicalities. A more bracingly robust view is set out in *Laois County Council v. Scully* [2007] IEHC 212, [2009] 4 I.R. 488, [2007] 1 JIC 2304 by Peart J. which is worth quoting at length:

"Mr Bland submits that to commit the respondents for a breach of the order in the circumstances of this case and in the light of the way the order has been drawn would amount to an unlawful deprivation of liberty in circumstances where they are charged with unspecified breaches of an Order that does not direct them to do or not to do any act or thing. He urges also that if the order has been perfected in a way which does not direct the respondents to do anything, then they cannot be the subject of an application for committal for breach thereof, and that it is irrelevant that there may be a failure to have complied with the intent of the order. He refers to *Iberian Trust Limited v. Founders Trust and Investment Co Ltd* [1932] All ER 176 per the judgment of Luxmore J. at p.179 as already referred to above.

Ms Butler urges the Court to adopt the approach taken by Lord Woolf in *Nichols v. Nichols*, and not to permit the Court's order to be frustrated by the sort of technical arguments being put forward by the respondents. She points to the fact that the respondents cannot be in any ignorance of what was required to be done by them in order to comply with the Court's order dated 7th April 2006 since it was made by reference to a document negotiated between their own advisers and the applicant Council. In effect she states that it was a consent order. Ms. Butler has referred to a number of cases in England which have followed the new approach taken in *Nicholls v. Nicholls* [[1997] WLR 314], such as *Re: Scriven* [2004] EWCA Civ. 683, *Olk v. Olk* [2001] EWCA Civ. 1075, and *Tuohy v. Bell* [2002] 3 All ER 975. All of these cases deal with committal orders made following breach, rather than the order which was breached. There is no need to refer to these in any detail. Ms. Butler submits that the strength of authority in England deriving from these cases supports the view that the time has come for a robust attitude to be adopted to applications for committal here, where no prejudice to the contemnor has been shown to exist from any procedural or technical defect in either the order of the Court dated 7th April 2006 or the Notice of Motion served in order to ground the application for attachment and committal for breach thereof. While she has not been able to point to any similar authority in this country, she has referred to a passage from the judgment of Finnegan P. (as he then was) in *Shell E & P Limited v. McGrath and others* [2006] IEHC 108 where the learned judge [said]:

'Where the interests of justice of the public in general is engaged or where there is a gross affront to the Court, it would be appropriate for the court to proceed of its own motion to ensure that its orders are not put at nought. I am satisfied that such a power must be inherent in the courts. In the words of Judge Curtis-Raleigh: 'The law should not be seen to sit by limply while those who defy it go free and those who seek its protection lose hope'.

Ms. Butler points to the largely technical nature of the defects in the order which have been found by this Court to have occurred, and even though some exist in the order itself of which the respondents are said to be in breach of, she submits that nevertheless there is no reason

why the Court's approach to the present application should be any less effective than that advocated by Lord Woolf in *Nicholls v. Nicholls*, given the absence of any prejudice to those respondents.

... The order as perfected included that

'The works set forth in the document referred to in Paragraph 2 hereinbefore mentioned be carried out in accordance with the document headed 'Remedial Action Plan' document reference number GC52 save that the deadline for the completion of the said works be the 29th day of September 2006 and that this document be received and filed and made a rule of Court and attached hereto as a Schedule'.

The respondents now say that they are not bound by this order since they are not specifically directed to do anything.

In my view such a statement is an affront to the dignity of the court, and a direct challenge to the authority of the Court, being a blatant attempt to avoid complying with the requirements of the Remedial Action Plan which they agreed to and agreed to form the basis of the Court's order. It cannot for one moment in my view be contended by the respondents, given their involvement in the preparation of the document, that they were or are unaware of precisely what they had to do in order to comply with the order. The matter had been put back specifically so that what was to be done would be presented to the Court on the basis of consensus between the parties Court's [*sic*]. There is no possibility that the respondents have been taken in any way by surprise or been prejudiced by any frailty in the way in which the order made by the Court has been reflected in the perfected order. ...

By the time the respondents sought legal representation from their present legal team, when the application for attachment and committal was commenced, the only response was to make submissions to the effect that because of the manner in which the Court's order was drawn, they appeared to have been directed to do nothing and that they could not therefore be held to have breached the order.

It is in such circumstances that this Court now considers that this is not acceptable and that to accede to such a submission is to enable the respondents to escape their responsibilities on grounds which are specious, disingenuous and amounting to an abuse of process and an affront to the dignity of the court.

It seems to me that the change of direction announced by *Nicholls v. Nicholls* was because of the supremacy of interests other than those merely of the contemnors, where no prejudice could realistically be argued to exist to the contemnor. The point is made that there are interests at stake other than those of the contemnor. There is the interest of the victim, and there is also the interest of justice and the authority of the Court. Those were family law proceedings. In such proceedings there can be the interest of children at stake which may take precedence over mere technical objection.

In the present case there are interests at stake which in my view should take precedence over mere technical errors which cause no prejudice, real or otherwise, to the respondents. There is the authority of the Court. There is also the point made by Ms. Butler that these proceedings arise in the first place as a result of the Waste Directive which has been given effect in this jurisdiction, and as a result has placed obligations under European law on this State, and this Court is part of the mechanism by which those obligations are fulfilled.

For this Court to stand by idly by allowing these respondents to claim the benefit of some infelicity in the manner in which the order of the court has been prepared and perfected, even though these do not cause any prejudice to the respondents would permit a situation to exist where this State fails to honour its international obligations in the very important matter of environmental pollution, and to allow form to triumph over substance, and therefore over justice.

The scale of the respondents pollution of the lands in question is truly enormous as has been detailed in the earlier judgment of this Court, and is not denied by the respondents."

**89.** I totally agree with all those sentiments of course, and the critical question as Peart J. effectively identifies is that of the objective interests for whose benefit the order was made. If such interests are not prejudiced by adherence to technicalities, then one has the option of a more cautious approach to ensure every formality is observed. On the other hand, if such objective interests will be so prejudiced, then the technicalities must give way to the substance and therefore to justice, as Peart J. puts it.

**90.** Applying that here, the completion of remediation isn't going to be significantly delayed if I require the plaintiff to observe all of the procedures before going down the contempt route.

**91.** The contempt motion is said to be grounded on an affidavit of service which wasn't put on ShareFile until mid-way through the hearing. The operative part of that reads as follows:

"3. In or around February 2024, I was requested by the Plaintiff's solicitors to personally serve the High Court Order dated 19 July 2017 with Penal Endorsement on the Chief

Executive of Wicklow County Council at County Buildings, Whitegates, Wicklow Town, A67FW96.

4. On Monday 19th day of February 2024 at 10.00am, I called to the aforesaid address and personally served the Defendant by delivering unto and leaving with one Emer O’Gorman, Chief Executive of Wicklow County Council a true copy the High Court Order dated 19 July 2017 with Penal Endorsement.

5. I say that at the time of such service the said Emer O’Gorman identified herself to me.”

**92.** What isn’t disputed is that the order of court that was said to be breached wasn’t served until after the time for compliance had expired. Indeed it looks as if the attempt to serve wasn’t even commenced until the day after the time for observance of the order had expired. That is unfortunately inconsistent with the wording of the penal endorsement under O. 41 r. 8 RSC, which is meant to warn the addressee to comply prior to the date specified in the order: *Century Insurance Company Ltd v. Larkin* [1910] 1 I.R. 91.

**93.** Sam Collins B.L. in *Enforcement of Judgments* 2nd Ed. (Dublin, Round Hall, 2019) helpfully summarises the caselaw as follows:

“5-52 In *J. O’G. v Governor of Cork Prison* [[2006] IEHC 236, [2007] 2 I.R. 203 at 215], Peart J. held that ‘[t]here can be no doubt about the absolute necessity to comply in every respect with the terms of the wording of the penal indorsement set forth in the current Rules, whether in the Circuit Court or the High Court’.

15-53 In *Ulster Bank Ireland Ltd v Whitaker* [[2009] IEHC 16], Clarke J. observed as follows in relation to the requirement for a penal endorsement [at [4.2]]:

‘Such a memorandum [as set out in Ord.41 r.8 RSC] has often in the past been referred to as a penal endorsement. The sequestration of the assets of a person for failure to obey an order is a form of enforcement. It is clear from Halsbury’s Laws of England Vol. 9, under the heading Civil Contempt, that amongst the forms of enforcement that can be used, in an appropriate case, to enforce a court order which is not obeyed is an order of sequestration. It is clear from [*Hampden v Wallis* [(1884) 26 Ch. D. 746.]], that even where it is permissible to serve an order on a solicitor (such as an order for discovery in a case such as this) the order must contain the relevant endorsement. In the circumstances I am satisfied that, in order that a party may be subject to a form of enforcement such as attachment, committal or sequestration or, indeed, a fine in lieu, arising out of a failure to comply with an order for discovery, it is, in the ordinary way, necessary that the order concerned should contain what is now described as a memorandum in the form set out in O. 41, r. 8 of the Rules of the Superior Courts.’

15-54 Clarke J. confirmed that ‘orders such as sequestration or attachment and committal are only to be utilised by the court in a clear case’[ [2009] IEHC 16 at [4.4].] and that, where it is sought to enforce an order by way of an application for sequestration, ‘it is necessary that the order sought to be enforced must contain the relevant endorsement.’ [[2009] IEHC 16 at [4.7]]

15-55 It is clear that when dealing with an application for coercive relief on foot of a mandatory order, the court has no discretion to dispense with the requirement for a penal endorsement. [*Ulster Bank Ireland Ltd v Whitaker* [2009] IEHC 16 at [4.5] and [4.7] per Clarke J.; *H. v Governor of Wheatfield Prison* [2011] IEHC 492 at [17], where Hogan J. held that ‘in the ordinary course, compliance with Ord. 41 r.8 is mandatory’. See also *Hampden v Wallis* (1884) 26 Ch. D. 746.]

15-56 Regarding orders requiring a person to refrain from doing an act (or prohibitory orders), Clarke J. held as follows in *Ulster Bank Ireland Ltd v Whitaker* [[2009] IEHC 16 at [4.5]]:

‘The second question which arises is as to whether there are circumstances in which it is appropriate for a court to consider an application for sequestration (or attachment and committal in an appropriate case) notwithstanding the absence of the relevant memorandum. The relevant jurisprudence [Clarke J. referred to *Churchman v Joint Shop Stewards Committee of the Workers of the Port of London* [1972] 3 All E.R. 603 and *Husson v Husson* [1962] 3 All E.R. 1056. See also *Murphy v Willcocks* [1911] 1 I.R. 402] ... seems to support the view that the court retains a discretion to allow enforcement, even where a properly endorsed order has not been served, but only in cases where the order requires abstinence from the doing of an act and where the court is satisfied that the person concerned knew of the order, either by being present when it was made or being properly notified of its terms.’

15-57 In *H. v Governor of Wheatfield Prison* [[2011] IEHC 492 at [17]], Hogan J. held as follows:



'Order 41, r.8 RSC requires that the relevant court order must contain a penal endorsement (i.e., a specific warning that the defendant is liable for potential imprisonment) where it [is] sought to invoke the coercive contempt jurisdiction of this Court. While the court has a discretion to dispense with this requirement in cases where the defendant is required by court order to refrain from committing a specific act, in the ordinary course, compliance with Ord. 41. r. 8 is mandatory: see generally [*Hampden v Wallis* [(1884) 26 Ch. D. 746]] and [*Ulster Bank Ireland Ltd v Whitaker* [[2009] IEHC 16]]. Thus, in the latter case, Clarke J. refused to take any coercive step such as sequestration of assets in the absence of the relevant penal endorsement. Whitaker is a powerful reminder of the imperative necessity of adhering to all procedural pre-requisites to the exercise of the contempt jurisdiction.'

15-58 In *Van Dessel v Carty*, [[2018] IEHC 626 at [34], see also *Reynolds v McDermott* [2014] IEHC 219 at [67]] Allen J. observed that the defendant's committal was sought pursuant to his breach of 'a prohibitive order to which O.41 r.8 has no application. If authority were required for this proposition it is to be found in *Murphy v Willcocks* [1911] 1 I.R. 402.'

15-59 Although the text of Ord.41 r.8 RSC appears to require a penal endorsement for all mandatory judgments and orders, it is clear from the decision in *Ulster Bank Ireland Ltd v Whitaker* that the absence of such an endorsement will not be fatal to an application for relief other than contempt-based remedies. In that case, Clarke J. held as follows [[2009] IEHC 16 at [4.6]]:

'It is, of course, the case that in the vast majority of circumstances the appropriate step to take when a party fails to comply with an order for discovery is to seek to take appropriate measures within the proceedings such as the striking out of a plaintiff's claim or a defendant's defence. Those procedural remedies can, of course, be enforced without taking the much more drastic step of seeking attachment, committal or sequestration. There is no need to include a penal endorsement in order to seek to invoke those procedural remedies.'"

**94.** So even accepting that on the balance of the not-entirely consistent caselaw, service (preferably personal) of an order with a penal endorsement prior to expiry of the time for compliance is not essential for a purely prohibitive order, and is not absolutely essential even for a mandatory order, such service is at least desirable for any contempt application and particularly in relation to a mandatory order.

**95.** The attempt to seek remedies against the Chief Executive is even more flawed. Yes in theory O. 42 r. 27 RSC does allow a person against whom obedience may be enforced to be liable to the same process for enforcing obedience as if she were a party. But the concept of the same process involves the prior service of an order endorsed with the penal endorsement – that wasn't attempted here in relation to the Chief Executive in her own capacity (separate from the agreed acceptance of service on behalf of the council) at all. Even accepting that a third party doesn't absolutely need to be added as a defendant first, it is preferable if it can be done, provided that is possible without unduly prejudicing the objective interests for the benefit of which the substantive order was made. That wasn't attempted here either.

**96.** The plaintiff suggests loosely that elements of the contempt matter could be dealt with even without the necessary service but we need to go through the reliefs individually.

**97.** Reliefs 1 and 2 are expressly limited to contempt so don't arise given the lack of proper prior service:

"1. A Declaration that the Defendant is in contempt of the Order of this Honourable Court of the 19th day of July, 2017 by failing to remove to a licensed waste disposal facility all waste and all soil or other materials contaminated or potentially contaminated by such waste from all areas of the site at Whitestown, Baltinglass in the County of Wicklow including areas that are already the subject of attempted remediation and to appropriately fill and landscape the site with inert matter sourced elsewhere and to return possession of the site to the Plaintiff within a period of 78 months from the date of the said Order.

2. In the alternative to the foregoing, an Order recording the finding that the Defendant is in contempt of the Order of this Honourable Court of the 19th of July, 2017 by failing to remove to a licensed waste disposal facility all waste and all soil or other materials contaminated or potentially contaminated by such waste from all areas of the said site including areas that are already the subject of attempted remediation and to appropriately fill and landscape the site with inert matter sourced elsewhere and to return possession of the site to the Plaintiff within a period of 78 months from the date of the said Order."

**98.** Relief 3 is adjectival to there being a proper relevant application before the court, which is not the case. Insofar as reliefs 7 and 8 will remain live, the attendance of the chief executive has not as yet been shown to be necessary for that, but that can be adjourned to await any developments in relation to those reliefs. Relief 3 provides:

"3. If necessary, an Order that the Chief Executive of Wicklow County Council attend in person for the hearing of this application."

**99.** Reliefs 4 to 6 are also tied to the contempt issue and so more properly require prior proper service in advance of the expiry of the time limit for compliance:

"4. An Order of attachment and committal of the Chief Executive of Wicklow County Council pursuant to Order 44 Rules 1 and/or 2 and Order 42 Rule 8 of the Rules of this Honourable Court and/or pursuant to the inherent jurisdiction of this Honourable Court for breach of the Order of this Honourable Court of the 19th day of July, 2017 by failing to remove to a licensed waste disposal facility all waste and all soil or other materials contaminated or potentially contaminated by such waste from all areas of the said site including areas that are already the subject of attempted remediation and to appropriately fill and landscape the site with inert matter sourced elsewhere and to return possession of the site to the Plaintiff within a period of 78 months from the date of the said Order.

5. In the alternative to the foregoing, such Order as to this Honourable Court doth seem fit to require the Chief Executive of Wicklow County Council to show cause for and to purge the Defendant's contempt of the Order of this Honourable Court of the 19th day of July, 2017.

6. Such further or other relief of a fine, sequestration of assets or otherwise as to this Honourable Court doth seem fit and meet pursuant to Order 44 Rules 4 and 5 of the Rules of this Honourable Court and/or pursuant to the inherent jurisdiction of this Honourable Court."

**100.** Relief 7 is:

"7. An Order pursuant to sections 57 and 58 of the Waste Management Act, 1996 varying the Order of the 19th of July, 2017 by substituting an Order requiring the Defendant to remediate the Whitestown site the subject of these proceedings by the removal to a licensed waste disposal facility or facilities all waste and all soil or other materials contaminated or potentially contaminated by such waste from all areas of the said site including areas that are already the subject of attempted remediation and to appropriately fill and landscape the site with inert matter sourced elsewhere to ensure that there is no remaining waste on the site within a specified period from the date of the Order by carrying out specified steps by the dates to be provided in such Order."

**101.** That is by no means an implausible suggestion but it requires more detailed further consideration as to the basis of any time extension. I deal with the options below, and I think the best approach is to adjourn para. 7 for more detailed consideration.

**102.** Relief 8 is:

"8. An Order requiring the Defendant to comply with each and every requirement of such remediation plan as this Honourable Court shall approve, subject to such variation of the plan as this Honourable Court may order, but in every respect subject to the overriding requirements of the Order sought at paragraph 7 above and in particular the steps to be carried out by the dates thereby specified."

**103.** That can also be adjourned pending the parties' positions on the question of a long-stop date extension.

**104.** Relief 9 is:

"9. In the alternative to the reliefs sought at paragraphs 7 and 8 above, an Order pursuant to Order 42 Rule 31 providing for the Plaintiff or some other person appointed by the Court to carry out such remediation of the said site the cost of the Defendant and the expenses so incurred to be ascertained and to be paid in such manner as this Honourable Court may direct."

**105.** That would be a radical *volte face* in the approach to date, and I don't think the threshold for any order under that heading has been met as yet.

**106.** Relief 10 is:

"10. If necessary, an Order deeming good the service of the Order of the 19th of July, 2017 on the Chief Executive of Wicklow County Council and on the Defendant."

**107.** There is no necessity to deem service good in the sense of the motion. Service was not effected until the long stop date had expired so even assuming that it needed to be deemed good, an order to that effect doesn't solve the plaintiff's problem.

**108.** Relief 11 is:

"11. Such further or other or consequential relief by way of Order or direction as to this Honourable Court doth seem fit and meet to ensure that its Orders are upheld."

**109.** I am all for ensuring that the court's orders are upheld, and I think the best way to manage that is for the twin tracks set out in this judgment to be followed, namely progressing the report of the assessor and debating the question of a possible extension of time. So relief 11 can also be adjourned pending more detailed submissions.

- 110.** There is a second relief 11 (which I will call 11a) which is:  
 "11. An Order providing for the costs of and ancillary to this application to be measured on the highest scale by this Honourable Court or in the alternative to be adjudicated at such scale by the Legal Costs Adjudicator in default of agreement."
- 111.** Costs as sought at 11a are as set out below under the heading of costs of the present issues.
- 112.** Relief 12 is:  
 "12. Liberty to apply."
- 113.** That can certainly be provided for.
- 114.** In such circumstances I consider that the appropriate order is to adjourn reliefs 3, 7, 8 and 11, grant relief 12 and otherwise dismiss the contempt motion.
- 115.** Thus the contempt consequences of the council's failure to comply with the order don't need to be addressed at this point. That doesn't amount to any form of endorsement of such non-compliance or acceptance of its various excuses. The plaintiff set out its objections to those potential excuses, which fell essentially into two categories. Firstly, the dog-ate-my-homework category, which the plaintiff classifies as ranging from the claim of having done their best, having good intentions, seeking a fool's pardon for any misunderstanding of the order, intending to get around to it in due course like St Augustine of Hippo (*Confessions* (c400 CE) (1961, Harmondsworth, Penguin) (Penguin Classics, tr. By R.-S. Pine-Coffin) Book VIII, Ch. VII, p. 169), and so on. Talk about a polluter's charter – if these kind of inadequate responses are enough to deter a court from enforcement of its order then other alleged contemnors need to be taking notes. The second category of excuse, the weightiest by far, is one based on non-compliance being outside the control of the defendant. A court would need to give serious consideration to sifting through the different phases of non-compliance and trying to distinguish between elements that were genuinely outside the control of a defendant and those that were not.
- 116.** That exercise can be considered in the context of the adjourned parts of the motion or any other relevant application. In the meantime the long-stop date must continue to be treated as having expired for all purposes (so any specific directions are without prejudice to that).
- 117.** If we are going to look at extending the long-stop date, there would seem to be three options in that regard. A first option is a short, technical extension, say of 2 weeks, to allow service of the order to be formally effected prior to the expiry of the long-stop date as so technically extended. That could be seen as artificial and also wouldn't preclude the council from arguing that periods of the delay were beyond its control.
- 118.** A second option is an extension that is limited to such periods of delay as were determined to be beyond the reasonable control of the council. That would afford the council credit for time expired which it had little choice about, while also giving the plaintiff the opportunity to properly serve the order prior to the extended long stop date. That would involve the court in looking at the lapse of time and separating the blameworthy (if any) from the non-blameworthy (if any).
- 119.** A third option would be to extend the long-stop date on the basis of disregarding all delay to date and working out how long it will take to complete the remediation assuming we start now from where we are. That gives the defendant a windfall benefit for any avoidable lack of speed to date.
- 120.** For the avoidance of doubt, the second scenario, which one could not rule out *a priori*, would be that timelines for the various remaining steps would be set out, but the long-stop date would be extended not to the end of those steps (which would effectively excuse all delay to date), but only insofar as delays up to now were genuinely outside the control of the council. That would leave option the possibility of a further contempt application in due course, which possibility might, on one view, concentrate the mind. But I note that option just for clarity if it assists and will await the parties' proposals in due course.
- 121.** If we are going down the road of considering an extension of time, it would be worthwhile to prepare a Scott schedule setting out all of the various stages of the delay to date and the parties' positions as to the degree of the council's responsibility for each of these. Ideally such a Scott schedule would have various columns for each step, the date of intended compliance, the date of actual compliance, the number of additional months at each stage by which the process fell behind (so that the following step would begin say X months behind, and ended X+Y months behind, and one would then need to record the figure of Y for that particular step), and then two columns for a summary of the respective narrative positions of the parties as to the extent of council responsibility.
- 122.** In addition to the issued motion, Ms Stokes for the plaintiff suggests further orders in her latest affidavit:  
 "Brownfield has been advised that the following proposed Orders are worthy of consideration as being consistent with that Order and necessary to secure the imperative of remediation of the site in accordance with the Order of the 19th of June, 2017 as soon as reasonably practicable:

(1) An Order pursuant to Order 42, rules 27 and 31 of the Rules of the Superior Court directing the Chief Executive of Wicklow County Council within three weeks to provide a written report outlining all steps taken by the said Council to comply with the Order dated the 17th day of July 2017, said report to be verified on Affidavit.

(2) An Order pursuant to Order 42, rule 37 directing the said Chief Executive on such date as may be deemed appropriate to attend at this Honourable Court to be examined on oath in respect of any questions arising from the aforementioned report as may be deemed necessary and appropriate.

(3) An Order pursuant to Order 42, rules 27 and 31 of the Rules directing the Chief Executive personally to oversee compliance with the Order dated the 17th day of July 2017 and to provide reports every three months (hereinafter 'the Stage Reports') to update the Court as to the progress made until such time as the Order has been complied with to the satisfaction of the Court, said Stage Reports to be verified on Affidavit.

(4) An Order directing the expert or experts appointed by this Honourable Court to:

a. review the remediation plan within six weeks to report on the adequacy of the said plan to secure the purpose of the Order of the 19th of June, 2017 with regard to the three issues of Areas A to C, Areas D to G and in-filling as identified in Judgment No.8 of this Honourable Court of the 21st of March, 2023.

b. review the Stage Reports and within four weeks of receipt of same report on whether they adequately reflect the progress made in compliance with the Order of 17 July 2017.

c. as and when necessary to attend on site to review the progress made and provide a written report on each such site visit.

d. answer any written questions as put to the expert by either party arising from any report provided in accordance with this Order.

58. Brownfield has been advised that Orders such as the above are required to concentrate the mind of the Council at the highest level on the necessity of complying with an Order of the High Court, and would provide a framework by which remaining phases of the remediation project can be delivered effectively and expeditiously. We understand that the other alternatives are to put the remediation in the hands of either the enforcing party or under the direct supervision of this Honourable Court. Twenty three years after the 'discovery' by the Council of this dump in 2001, Brownfield respectfully suggests that the Council cannot be allowed to continue to dither and dally any longer without supervision or accountability."

**123.** I by no means discount these reliefs but they would need to be sought by formal notice of motion on affidavit, replied to, and then properly discussed and considered. The liberty to apply can be used for that purpose if Brownfield is so minded.

#### **Costs of the present issues**

**124.** Unless a party otherwise promptly applies, the default costs order I would suggest on issues 1 to 3 as set out in this judgment is as follows:

- (i) Issue 1 – the present judgment resolves any outstanding questions about the expert that arise from the cost items in Category E. As the plaintiff gets the costs of Category E with an identified exception, any costs of Issue 1 not included in the Scott schedule and disposed of by this judgment will be awarded to the plaintiff.
- (ii) Issue 2 - The plaintiff has prevailed on a bit more than two and a half of the three substantive categories of contested costs that I am actually deciding (A, B and E in part). The other two substantive categories will be adjourned (C and D) but they did not take up much time overall. A reasonable attempt to reflect all of that as well as the findings in the judgment would be an award of 80% of the costs of the costs issues to the plaintiff.
- (iii) Issue 3 - As the matter is still to a limited extent ongoing, the costs of the contempt motion should be reserved.

#### **Current status of motions**

**125.** Having regard to the foregoing I will treat the motions at (ii) to (iv) in the list of motions earlier in this judgment as being finally disposed of by this judgment and the consequent order. So going forward the only live motion is the contempt motion at (i), but only insofar as concerns the specific reliefs not being dismissed. If any party wants to make any other application at a future time they should bring a fresh motion.

#### **Order**

**126.** The order made on 19th April 2024 was that the 2020 proceedings be adjourned generally with liberty to re-enter.

**127.** For the foregoing reasons, it is now ordered that:

- (i) the terms of appointment of the assessor and document setting out the duties of an expert and assessor are approved, as set out in the Schedules to this judgment;

- (ii) subject to acceptance of those terms, Ove Arup & Partners Ireland Limited, trading as Arup, be appointed as an independent assessor under section 59 of the Supreme Court of Judicature Act (Ireland) 1877 and/or Order 36, rule 41 RSC (as inserted by S.I. No. 254 of 2016) and/or the inherent jurisdiction of the court;
- (iii) the reliefs at paragraphs 3, 7, 8 and 11 (first para. so numbered) of the contempt motion be adjourned for mention to the next listing date pending submissions by the parties on the issues relating to the long-stop date identified in the judgment;
- (iv) the other reliefs in the contempt motion not otherwise dealt with in this order be dismissed;
- (v) the costs of the proceedings up to today's date not already finally disposed of by court order be disposed of as follows:
  - a. the plaintiff be entitled to the costs (including the costs of written submissions and certifying for two counsel in respect of all relevant court applications) of Categories A, B and (other than in relation to Item 64) E as against the defendant;
  - b. for the avoidance of doubt such costs will include the costs of affidavits on behalf of the plaintiff;
  - c. there be no order as to the costs of Item 64;
  - d. the parties have liberty to re-enter the issue of costs of Category C once the substantive proceedings (i.e., not including any residual costs issues) are resolved or on consent of the parties, whichever is earlier.
  - e. the costs of category D be adjourned generally with liberty to re-enter;
- (vi) unless any party applies otherwise by written legal submission within 14 days from the date of this judgment, the foregoing order be perfected forthwith thereafter on the basis that:
  - a. there be an order for costs (including the costs of written submissions and certifying for two counsel in respect of all relevant court applications) to the plaintiff against the first named defendant in respect of
    - i. the costs of such issues regarding the expert disposed of by this judgment as are not included in the Scott schedule (if any);
    - ii. 80% of the costs of the costs issues; and
  - b. the costs of the contempt issues be reserved;
- (vii) there be liberty to apply; and
- (viii) the matter be listed for mention on Monday 10th June 2024 with the potential agenda being:
  - a. directing timelines for the immediate next steps in the remediation plan insofar as it has been approved;
  - b. arrangements for the expert to advise on whether or not to approve the balance of the remediation plan;
  - c. fixing timelines (whether binding or indicative) for all remaining steps in the process;
  - d. considering whether and if so how to extend the long-stop date;
  - e. any other issues arising from the live paragraphs of the defendant's contempt motion;
  - f. any other issues arising under the liberty to apply; and
  - g. the parties' proposals for the sequence and timing of addressing the foregoing issues insofar as they arise, preferably on a one-at-a-time basis in some pre-determined order, if possible.

**SCHEDULE I - TERMS OF APPOINTMENT OF EXPERT**

THE HIGH COURT  
[2008 No. 56 SP]  
Between/

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

Appointment of Arup as Assessor  
in respect of

WHITESTOWN REMEDIATION PROJECT PURSUANT TO ORDER DATED 19 JULY 2017  
(the "Project")

SCHEDULE OF TERMS OF APPOINTMENT

1. APPOINTMENT

1 The High Court has appointed ARUP, an independent expert, as Assessor (hereinafter "the Assessor"), to assist it with matters relating to the Project as identified by the High Court in *Brownfield Restoration Ireland Limited v Wicklow County Council* (No. 8) [2023] IEHC 137 and *Brownfield Restoration Ireland Limited v Wicklow County Council* (No. 10) [2023] IEHC 712, and ARUP has accepted the appointment on the basis of the following Terms of Appointment.

2. SERVICES

1. The Assessor shall 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;

3. DUTIES

The following shall be the main duties of the Assessor in assisting the court on foot of their appointment (based on the document attached to the Schedule hereto, entitled "Duties of Experts", which the Plaintiff and Defendant have agreed and the court has approved as constituting the main duties of an independent expert who has been appointed as an assessor by the court under Order 36, Rule 41 RSC) :

[Text of duties set out here with citations removed]

4. EXTENT OF LIABILITY

1 The Council agrees to indemnify and hold harmless the Assessor against and in respect of any and all actions, proceedings, claims, demands, judgments, costs, expenses that arise as a result of the performance by the Independent Expert of the duties or any actions undertaken by them on foot of its appointment by the High Court, save that the Council shall have no liability to indemnify and hold harmless the Assessor in the event of any fraud or criminal wrongdoing on their part in undertaking their duties or any other actions.

5. PAYMENTS

1. The Council shall pay to the Assessor such sums as are properly due to them on foot of their appointment as approved by the High Court from time to time, based on the hourly rates set out in the following table:

Arup Employee – name or position [details provided]	Hourly rate
--	-------------

2. Payment of each amount due [less any due deduction of withholding tax] shall be made within 30 days after the High Court approves payment, provided the Assessor has proved that they have a current tax clearance certificate from the Revenue Commissioners.

#### 6.DISPUTES

1. In the event of any disputes or differences between the parties to the proceedings in any way concerning and/or relating to the Assessor and/or the Assessor's functions under the Order appointing them, the same shall be determined by the High Court.

**SCHEDULE II - AGREED AND APPROVED LIST OF DUTIES OF INDEPENDENT EXPERT APPOINTED AS ASSESSOR UNDER ORDER 36, RULE 41 RSC**

**PART A – GENERAL DUTIES OF EXPERTS**

**1. Duty of truthfulness**

In oral and written evidence and reports.

**2. Duty to comply assist the court**

Order 39, Rule 57(1) RSC

“It is the duty of an expert to assist the Court as to matters within his or her field of expertise. This duty overrides any obligation to any party paying the fee of the expert.”

This duty should be acknowledged in any written reports, as required by rule 57(2) (a).

**3. Duty of independence from the parties**

Any opinion must be the expert’s own independent opinion, reached without reference to the interests of any party and without any attempt to persuade the court of the case of any party: see *Cala Homes (South) Ltd & Ors v. Alfred McAlpine Homes East Ltd* [1995] EWHC 7 (Ch), *Emerald Meats Ltd v. Minister for Agriculture* [2012] IESC 48, *Byrne v. Ardenheath* [2017] IESC 293.

**4. Duty to ascertain or investigate the relevant facts or to clearly inform the court where this has not been possible**

Thus if an expert is only giving a provisional opinion based on limited facts, she is obliged to make this clear.

Comply with the following or make explicit any non-compliance:

1. ensure that she has been given a full factual background;
2. determine and make explicit whether postulated facts are supported by objective facts;
3. interview all appropriate witnesses, or ensure that she has received their accounts of the issue in question;
4. conduct a thorough examination of the subject matter of the expertise
5. keep a record (such as a note, a photograph or photocopy) of any material fact that might be disputed at a later stage;
6. ensure that all material facts are included in his or her written report or otherwise disclosed to court and all parties, including those that do not support her own conclusions.

**5. Duty to identify what her expertise is and apply that expertise in a professional and informative manner**

Provide an explanation of his or her specialised knowledge, as it relates to the case, in an informative and unbiased manner.

If a particular question falls outside the expert’s own specialist knowledge, he or she should make it clear to the court and the parties (*Connolly v. Kelly* 1995 WJSC-HC 1940, [1995] 6 JIC 1501) and should not offer opinion on such matters.

Provide her evidence/report to the court in a manner likely to be informative to the court.

Disclose the facts, assumptions and scientific methodology on which their evidence is based where any of these could reasonably be in dispute.

Identify any relevant secondary materials/ academic textbooks/ academic papers relied on and an indication of whether these represent generally applied principles in the field of study.

Identify where any proposition relied on is contested by other schools of thought if they apply to the issue and if so provide an explanation.

Where statistical probability is relied upon to explain certain findings, a clear presentation of the statistics without exaggeration or over-complication.

Distinguish between matters of fact and opinion.

Any opinion must be firmly grounded in the facts of the case and the expert’s own specialisation.

The expert must take reasonable care in the preparation of any oral or written evidence or report

*Davie v Magistrates of Edinburgh* [1952] S.C. 34:

“Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence”.

See also *Re Glaxo Group Ltd* [2009] IEHC 277 and *James Elliot Construction Ltd v. Irish Asphalt Ltd* [2011] IEHC 269.

**6. Duty to keep conclusions under review**

The duty to provide an objective unbiased opinion applies throughout the trial process.



Any opinion must be subject to revision where new information comes to light and any such revision must be disclosed.

*Anglo Group plc v. Winther Brown and Co. Ltd* [2000] EWHC Technology 127, Toulmin, J.:

"An expert should be ready to reconsider his opinion, and if appropriate, to change his mind when he has received new information or has considered the opinion of the other expert. He should do so at the earliest opportunity."

Quoted in *Kenneally v De Puy International Ltd* [2016] IEHC 728.

**7. Duty to co-operate with other parties and experts to the extent directed by the court**

*Anglo Group plc v. Winther Brown and Co. Ltd* [2000] EWHC Technology 127, Toulmin, J.:

"He should co-operate with the expert of the other party or parties in attempting to narrow the technical issues in dispute at the earliest possible stage of the procedure and to eliminate or place in context any peripheral issues. He should co-operate with the other expert(s) in attending without prejudice meetings as necessary and in seeking to find areas of agreement and to define precisely arrears of disagreement to be set out in the joint statement of experts ordered by the court."

Quoted in *Kenneally v De Puy International Ltd* [2016] IEHC 728.

**8. Duty of disclosure**

The expert witness must set out any financial and economic interests relating to the case.

Any matters adverse to the proposed conclusions should be disclosed

**PART B - ADDITIONAL DUTIES OF COURT-APPOINTED EXPERT**

**9. Duty to act only pursuant to the directions of the court**

**10. Duty not to communicate with any party without simultaneously including all other parties**