



# THE COURT OF APPEAL

**UNAPPROVED**

Appeal Number: 2020/206

**REDACTED**

Whelan J.  
Donnelly J.  
Faherty J.

Neutral Citation Number [2023] IECA 55

**BETWEEN/**

**MEATH COUNTY COUNCIL**

**RESPONDENT**

**- AND -**

**EILEEN HENDY, FRED HENDY, GREEN ENERGY RECYCLING LIMITED,  
MARK FARRELLY, MARK FARRELLY PLANT HIRE LIMITED,  
PADRAIC MCDONNELL (T/A MCDONNELL HAULAGE),  
GERARD CONROY AND ANDREW FOX**

**APPELLANTS**

**JUDGMENT of Ms. Justice Máire Whelan delivered on the 14th day of March 2023**

## **Introduction**

1. At the outset it is to be observed that “the polluter pays” principle in the context of environmental protection law envisages that once a causal link is established between the activities in question and the damage caused to the environment the remediation of land adversely affected is to be internalised and borne by the polluter in the first instance. Causation rather than fault is the basis for liability. In ECJ decision *Commune de Mesquer v Totale France* [2008] ECR 1-04501 at para. 72 the Court observed:

*“The application of the ‘polluter pays’ principle within the meaning of the second sentence of the first subparagraph of Article 174(2) EC and Article 15 of Directive 75/442 would be frustrated if such persons involved in causing waste escape their financial obligations...”*

As the academic E. Lees correctly notes in *“The Polluter Pays Principle and the Remediation of Land”* International Journal of Law of Built Environment, Vol. 8, Issue 1 (2016), p. 9:

*“The Union institutions therefore interpret the polluter pays principle as relying on a causal link, and as requiring a complete internalisation of costs arising from such an action.”*

### **Initial proceedings – 2015 - 2017**

2. The appellants are Eileen Hendy, a widow now in her eighties and her son Fred Hendy, the first and second named appellants in the above-entitled proceedings (the Hendys). It is necessary to consider in some detail the litigation background and pre-litigation history to arrive at some understanding of how the current state of affairs giving rise to the issues in this appeal came about. On the 11<sup>th</sup> September, 2015 proceedings were instituted by Meath County Council (“the Council”) pursuant to the Waste Management Act 1996. It was grounded on affidavits sworn by Anne Marie Casey on the 1<sup>st</sup> September, 2015 and Declan Grimes and Larry Whelan sworn on the 9<sup>th</sup> September, 2015. It had its first return date before the High Court on the 2<sup>nd</sup> November, 2015. On the 24<sup>th</sup> November, 2015 affidavits were sworn by Fred Hendy and Eileen Hendy. Subsequently on behalf of the appellants Cecil Shine of Minerex Environmental Ltd (“Minerex”) filed an affidavit on the 14<sup>th</sup> December, 2015. Further affidavits were sworn by Anne Marie Casey and Cecil Shine respectively on the 11<sup>th</sup> February, 2016 and 5<sup>th</sup> April, 2016. Meanwhile on the 5<sup>th</sup> September, 2016 the second named appellant Fred Hendy was charged with 10 separate offences

pursuant to the Waste Management Acts returnable before the Circuit Court. He ultimately spent time in custody between 26<sup>th</sup> November, 2019 and 2<sup>nd</sup> March, 2020.

3. Throughout 2016 it would appear that the appellants had retained a firm of solicitors. However, on the 4<sup>th</sup> October, 2016 the appellants purported to serve a notice of discharge on the said firm. On the 10<sup>th</sup> October, 2016 the said solicitors applied to the High Court to come off record and were granted liberty to do so. The Council's motion pursuant to ss. 57 and 58 of the Waste Management Act, 1996 as amended came before the High Court on the 18<sup>th</sup> October, 2016. There was no appearance by or on behalf of the appellants.

4. By his order Noonan J. directed that the first and second named appellants discontinue the unauthorised holding, recovery and disposal of waste at the lands comprised in Folio [REDACTED] County Meath. The said order and its import are considered as appropriate in greater detail hereafter

5. Thus, the appellants' ill-judged litigation strategy of ignoring the hearing resulted in the High Court proceeding to make determinations and orders without any input by or on their behalf. On the 19<sup>th</sup> October, 2016 the court made the orders sought against the appellants in terms proposed by the Council. The proceedings were struck out as against the fourth, fifth, sixth, seventh and eighth named respondents. An order for costs previously made against the third named respondent was vacated and the proceedings against the said company were struck out with no further order.

#### **Pre-litigation events**

6. At some stage prior to 2012 it appears that a very substantial volume, perhaps as much as 70,000 tons of waste, was dumped in two landfill sites on the farm holding in Folio [REDACTED] County Meath. It appears that the Council carried out an inspection on or about the 23<sup>rd</sup> November, 2012 and identified two substantial landfills. Thereafter on the 10<sup>th</sup> December, 2012 the Council served notice pursuant to s. 55 of the Waste Management Act, 1996 on the

appellants. It further appointed Declan Grimes to conduct a Tier 1 assessment which was completed in or about October, 2013. The Tier 1 report assessed the sites as being Class A high risk in accordance with the Environmental Protection Agency (EPA) Code of Practice (COP). Thereafter at the behest of the Council a Tier 2 assessment was carried out in 2014 by URS (now AECOM) and a report in respect of same was furnished on the 12<sup>th</sup> January, 2015. Both reports identified the presence of two unregulated landfills within the property. Preliminary assessments indicated that each contained a mixture of construction and demolition waste together with municipal waste. Landfill A, the smaller of the two sites, was estimated to comprise approximately 2,846 cubic metres. The Council identified the presence of asbestos fibres and asbestos containing materials (ACMs) in the waste body. In respect of Landfill B, the larger of the two sites, it was estimated to comprise approximately 32,328 cubic metres.

7. The appellants' own experts on the 9<sup>th</sup> December, 2015 assessed Landfill A thus:

*“The risk prioritisation exercise presented in the Tier 2 study concludes that overall this body of waste represents a LOW risk as defined in the Code of Practice Environmental Risk Assessment for Unregulated Waste Disposal Sites [2, p. 46; 6].”*

As regards Landfill B the appellant's own experts in the said 2015 report observed:

*“Several soil parameters were found to be locally elevated above the relevant GAC protective of Human Health ... Noticeably mercury and asbestos fibres were found to be exceeding the GAC with the highest frequency in the Tier 2 study. These were encountered at shallow depth.”*

8. The expert evidence collated on behalf of the Council in 2015 concluded;

*“Within Landfill A, the majority of soil parameters do not pose a direct risk to human health; however material was identified by the laboratories being typical of asbestos cement (ACM) ... and asbestos fibres were reported ...”*

*“Exceedences (sic) in Landfill B of the Generic Acceptance Criteria (GAC) protective of human health were detected for a number of soil samples, indicating a potential risk to human health. In addition, material identified by the laboratory as being typical of asbestos cement (ACM) was identified at six locations within the Landfill B waste body.*

*Soil leachate analytical results from both Landfill A and Landfill B exceeded the groundwater GAC protective of surface water and/or groundwater. ... Analytical results from monitoring wells within Landfill A and Landfill B showed a number of exceedences (sic) of the GAC protective of surface water and groundwater. A number of exceedences (sic) were also detected in the groundwater samples from outside and down-gradient of the waste bodies, indicating that leachate generated from within the waste body may be impacting groundwater quality outside of the landfills’ footprints.”*

The report continued:

*“Landfill A has a Risk Classification of LOW, while Landfill B has a Risk Classification of HIGH. However this classification does not incorporate consideration of the potential risk to human health e.g. asbestos containing materials (ACM) present within the waste body in both Landfill A and Landfill B. Consequently, based on the information collected as part of the Tier 2 Site Investigation, the overall risk posed to human health is considered HIGH at both Landfill A and Landfill B.”*

9. The report then proceeds to set forth six distinct options for remediation. The costs perforce were estimates only. It is noteworthy for instance that at p. 10 of the report of the 29<sup>th</sup> July, 2015 AECOM observed:

*“Disposal costs are based on the assumption that the waste to be managed comprises approximately 25% inert waste, 50% non-hazardous waste and 25% hazardous waste, due to the presence of asbestos material in excess of 0.1% weight by weight (WT/WT).”*

**10.** Option 1 proposed the excavation of the entire waste mass estimated by the Council as 2,846 cubic metres at Landfill A and approximately 32,328 cubic metres from Landfill B. The estimated cost was €6,140,000. Various permutations were thereafter considered, the least expensive being option 5 which proposed installing a capping system and long term passive LFG management at an estimated cost of €2,320,000. This appears to be the option that had been preferred by the Hendys. The intervening options varied in expense and potential effectiveness in redressing the serious pollution subsisting on the lands.

**11.** A valuation of the lands was carried out on behalf of the Council. This had indicated the acreage at 263 acres approximately and suggested a valuation of between €8,000 and €10,000 per acre. The estimated value was suggested to be between €2,104,000 and €2,630,000. It appears that the area of ground covered by Landfill A and Landfill B amounted in total to approximately 3 acres of the 253/258 acres holding.

#### **No Appeal of 2016/2017 Orders**

**12.** The appellants never appealed against the said order or any part thereof. Furthermore, although Clause 10 of the second Schedule provided that the applicant Council and the appellants had “liberty to apply”, the appellants never sought to apply in respect of the terms of the said order thereafter. Much of the subsequent difficulties and complications that emerged are referable to the stratagem adopted by the appellants in October 2016 whereby they elected not to engage with the court and to simply ignore the hearing.

**13.** In the first instance difficulties were encountered in effecting service of the said orders on the appellants. A subsequent order was obtained from Noonan J. on the 20<sup>th</sup> June, 2017

granting an application for substituted service of the order of the 19<sup>th</sup> October, 2016 on the appellants and extending time for the works specified in the said order “*be extended for a period of three months from the date of service*”. A curiosity is that the said order appears to have been perfected on “9-12-2016” which presumably is a typographical error and should read “2017”? At all events nothing much turns on this point insofar as it would appear that service of the said order of the 19<sup>th</sup> October, 2016 was ultimately effected upon both Eileen Hendy and Fred Hendy on the 28<sup>th</sup> July, 2017 and accordingly they had three months from the said date to comply with their respective obligations pursuant to the October 2016 order. That time would have elapsed by the end of October 2017.

**Proximate background to appeal**

**14.** This matter comes before this court by way of an appeal against the orders of the High Court (Humphreys J.) made on the 31<sup>st</sup> July, 2020 and perfected on the 17<sup>th</sup> August, 2020 and the judgment of that court delivered on the 14<sup>th</sup> September, 2020. Said orders were made on foot of a notice of motion issued by the Council on the 24<sup>th</sup> April, 2020 seeking firstly a declaration that the first and second named appellants were in contempt of court for failure to comply with the 2016/2017 orders of Noonan J. The said non-compliances were particularised by reference to the terms of the orders particularly those made by Noonan J. on the 19<sup>th</sup> October, 2016 which had, *inter alia*, required the said appellants within a timeframe of 12 weeks to discontinue the holding, recovery and disposal of waste at lands situate at [REDACTED], County Meath and comprised in Folio [REDACTED] together with certain consequential and ancillary orders.

**15.** In addition, the motion brought by the Council sought liberty to issue an order for attachment and/or committal to prison of each of the appellants for failure to comply with the said orders and if necessary an order directing the Commissioner of An Garda Síochána to attach the appellants and to bring them before the High Court. An order for committal of

the appellants to prison “*for such period as to be determined by this Honourable Court for failure to comply with the Orders ...*” was also sought. In light of the events which transpired in the High Court and the terms of the notice of appeal and the arguments at the appeal hearing before this court, of particular relevance was the relief sought at para. 5 of the said notice of motion “*... an order pursuant to Order 44 Rule 4 and 5 and/or the inherent jurisdiction of this Honourable Court, for a fine to be imposed on the first and/or second named Respondent in lieu of imprisonment for failure to comply with the Orders of this Honourable Court dated 19<sup>th</sup> October, 2016 and 20<sup>th</sup> June, 2017.*”

**16.** In the alternative the Council sought “*an order pursuant to Order 42 Rule 31 requiring the Applicant or some other person appointed by the Court, to carry out such remediation of the lands, as far as is practicable, at the cost of the first and second named Respondent and the expenses so incurred to be ascertained in such manner as this Honourable Court may direct.*” To an extent this latter relief resonates with s. 58 of the Waste Management Act, 1996, as amended, and in particular calls to mind s. 58(4) which provides:

“(4) (a) *Where a person does not comply with an order under subsection (1), a local authority, as respects its functional area, or the Agency, may take any steps specified in the order to mitigate or remedy any effects of the activity concerned.*

(b) *The amount of any expenditure incurred by a local authority or the Agency in relation to steps taken by it under paragraph (a) shall be a simple contract debt owed by the person in respect of whom the order under subsection (1) was made to the authority or the Agency, as the case may be, and may be recovered by it from the person as a simple contract debt in any court of competent jurisdiction.*”

**17.** Section 58(1) provides:

“(a) *Where, on application by any person to the appropriate court, that court is satisfied that another person is holding, recovering or disposing of, or has held,*



*recovered or disposed of, waste, in a manner that is causing, or has caused, environmental pollution, (or section 34 or 39(1) to be contravened, that court may make an order requiring that other person to do one or more of the following, that is to say:*

*(i) to discontinue the said holding, recovery or disposal of waste within a specified period, or*

*(ii) to mitigate or remedy any effects of the said holding, recovery or disposal of waste in a specified manner and within a specified time.”*

**18.** As is evident the orders made by the High Court and which are the subject matter of this appeal were made in circumstances where there was a sustained and protracted non-compliance with the 2016/2017 enforcement orders hitherto made by the High Court.

**Declaration of Contempt 27 July 2020**

**19.** The Council’s motion seeking, *inter alia*, attachment and committal was returnable before the High Court on the 13<sup>th</sup> July, 2020 and thereafter adjourned and an aspect of same came on for hearing on the 27<sup>th</sup> July, 2020. On that date Humphreys J. granted a declaration that the appellants were “...*in Contempt of Court for failing to comply with the Orders of this Court made herein on the 19<sup>th</sup> day of October 2016 and on the 20<sup>th</sup> day of June, 2017* [Mr. Justice Noonan]

*(a) That the first and second named Respondent have failed, within the time frame provided by the Orders, to discontinue the holding, recovery and disposal of waste at the lands, situate at [REDACTED] County Meath (the lands) and comprised in Folio [REDACTED], as required at paragraph 1 of the Order of Mr. Justice Noonan, dated 19<sup>th</sup> October, 2016, where waste continues to remain on the lands.*

- (b) *[They] have failed to discharge, despite request, the costs incurred by the Applicant in performance of detailed site investigations and the production of reports and discharge of costs incurred by the Applicant in respect of the consultants appointed by the Applicant to carry out such investigations and production of reports in the sum of €112,785.56 as required at paragraph 2 of the Order of Mr Justice Noonan, dated 19<sup>th</sup> October, 2016 and these costs remain outstanding.*
- (c) *The [appellants] have failed to ensure the works and other steps of remediation have been carried out, as set out in the Third Appendix to the Second Schedule and in accordance with the times indicated in the schedule as amended by Order dated 20<sup>th</sup> June, 2017, as required at paragraph 3 of the Order of Mr. Justice Noonan dated 19<sup>th</sup> October, 2016 (i) – (vii) both inclusive).*
- (d) *The [appellants] have failed to submit jointly or at all the documents specified in paragraph 5 of the Second Schedule of the Order within the time frame specified, to the [EPA]... which said documents included, inter alia, a Method Statement, report of updated environmental assessment and a report on proposed Health and Safety Strategy, as required by paragraph 4 of the Order of Mr Justice Noonan dated 19<sup>th</sup> October, 2016... ”*

### **The Property**

20. Before progressing further, it is necessary to consider briefly some operative facts and circumstances relevant to the litigation and the current enforcement proceedings. The Council in their application exhibited a copy Folio [REDACTED] of the Register County of Meath. It discloses that the first appellant, widowed mother of the second appellant, is registered full owner as tenant in common of eight undivided one ninth shares in the said lands which comprises a substantial farm holding variously described as of approximately 253/258 acres.

The second named appellant, Fred Hendy is not a registered owner of the said lands. It would appear that a third party, namely his late father, being the spouse of Eileen Hendy continues to be registered as tenant in common of one undivided one ninth share in the lands. It appears that on the 12<sup>th</sup> March, 2009 a lien was registered on the Folio in favour of Ulster Bank Ireland Limited. The current status of the said lien is not clear and there appears to have been no evidence before the court in relation to same. On the 23<sup>rd</sup> August, 2012 an inhibition was registered on the Folio providing “*no registration under a disposition by or transmission from the registered owner is being made without the consent of Greenwire Limited ... for the period as specified in Instrument ...*”. Thus, it would appear that in addition to the one ninth undivided share in the property other third parties may have rights, interests or incumbrances in respect of same.

**21.** There is no suggestion that the late Mr. Hendy bore any responsibility for the wrongful acts of unauthorised holding, recovery, disposal or unauthorised user of the land for waste and the storage of waste and accordingly, it goes without saying that his or his estate’s one ninth undivided share is not amenable to interference in the context of enforcement of orders against the appellants or either of them. There is no evidence as to who his legal personal representative or representatives (if any) may be or as to whether he died testate or intestate. It was stated in court that he was deceased though it is not identified when his demise may have occurred. He came to be registered as full owner of one undivided one ninth share on the 9<sup>th</sup> January, 1981. It is noteworthy that the Council does not seek any specific order against his estate nor the conversion of the said share into monies nor could such an order be sought or indeed obtained without at the very least notice being served upon his legal personal representative, in light of Order 15 r. 13 RSC, or a grant of administration being obtained for the purposes of orders being sought capable of binding the estate. The evidence before the court was that the registered owner of eight undivided one ninth shares, Eileen

Hendy, the first named appellant, and her son the second appellant farmed the lands. Further, the family home of the first appellant is situated on the lands and she resides there with one of her children. The second appellant's family home is also situated on the said lands and he resides there with his spouse and children. His legal title, if any, to same is unclear.

22. As stated above, it is significant that as of the 27<sup>th</sup> July, 2020 the court had declared that both appellants were in contempt of court for failing to comply with the orders previously made by the High Court on the 19<sup>th</sup> October, 2016 and/or the 20<sup>th</sup> June, 2017. The said order declaring the appellants to be in contempt did not differentiate between the first and second named appellants although a close reading of the original 2016 order made by Noonan J. very clearly distinguished between the aspects of orders directed towards each. It certainly would appear that in the curial part of the 2016 order the first appellant, Eileen Hendy, is the subject of each of six orders therein made and further she alone was directed to make available her lands in Folio [REDACTED] of the Register of County Meath for access to the Council and its representatives. Her compliance with this latter obligation is acknowledged by Declan Grimes in his affidavit sworn on the 13<sup>th</sup> March, 2020 at para. 7 thereof. As observed hereafter, there does not appear to be any appeal by or on behalf of the appellants from the said order of the 27<sup>th</sup> July, 2020 or any part thereof. That is a significant factor and accords with the stance adopted by counsel for the appellants at the substantive hearing of the Council's motion on the 31<sup>st</sup> July, 2020 where it was acknowledged that there had been non-compliance with the orders made on the 19<sup>th</sup> October, 2016.

#### **Obligations under 2016 Order**

23. It is noteworthy that in the second schedule to the 2016 orders certain predicate steps and actions were directed to be taken. The first eight steps in the second schedule are directed exclusively towards "*the Second Named Respondent*" being Fred Hendy. None of the said eight measures appear to impose any obligation on the first appellant. With regard

to the obligations specified at Clause 9 of the second schedule an aspect, namely “*payment by the First and Second Named Respondent and each of them of the annual costs of such monitoring*” did impose joint obligations on Eileen Hendy and Fred Hendy.

**24.** Clause 1 of the Second Schedule of the 2016 order tends to suggest that the matters specified in the first appendix to the Second Schedule, insofar as they particularise the matters which the written method statement is required to address, must perforce impose obligations on Fred Hendy alone and not upon his mother Mrs. Eileen Hendy.

**25.** With regard to the particulars and findings recited in the order and subtending the declaration that Eileen Hendy was in contempt of court one such basis identified is to be found at Clause D in the order declaring the appellants to be in contempt made on the 27<sup>th</sup> July, 2020:

*“the first and second Respondents named have failed to submit jointly or at all the documents specified in paragraph 5 of the Second Schedule of the Order within the time frame specified, (sic) to the Environmental Protection Agency (EPA) in order for the EPA to consider and decide whether any licence, permit, authorisation, permission, approval or consent is required in order to carry out the actions or any actions to be carried out ..... have not yet been compiled or received by the EPA or the Applicant as required by paragraphs 1, 2, 3 and 4 of the Second Schedule of the Order of the 19<sup>th</sup> October, 2016 within the time frame specified or at all.”*

**26.** It is difficult to understand why the Council considers itself entitled to an order for the committal of Eileen Hendy for contempt of court for non-compliance with the said paras 1, 2, 3 & 4 of the second Schedule to the order of the 19<sup>th</sup> October, 2016 when each of the said clauses are directed solely and exclusively to Fred Hendy and same are not directed to and do not appear to impose any obligations upon Eileen Hendy at all. For example, the Second Schedule at para. 4, for instance, provides:

*“The Second Named Respondent shall deliver copies of each document specified in Part I of the Second Appendix hereto to each party specified in Part II of the Second Appendix hereto not later than sixteen weeks from the date of the Order herein.”*

(emphasis added)

A consideration, in turn, of Part 2 of the second appendix identifies the parties who were to receive copies of the said documents from the second named respondent as follows:

- (1) The applicant (*i.e.*, the Council).
- (2) The EPA.
- (3) The first named respondent *i.e.*, Eileen Hendy.(emphasis added)

So, the obligations were imposed on Fred Hendy, *inter alia*, *vis á vis* Eileen Hendy and no obligations were imposed upon her so far as the second Schedule to the order in question is concerned, or at least the version of same that has been put before this court in this appeal would so suggest.

27. It is suboptimal that declarations have been made in the High Court that Mrs. Eileen Hendy is in contempt of court for failing to comply with any aspect or specified term of orders which do not appear to impose any direct obligation upon her in the first place and, indeed, appear to confer rights upon her to receive documentation “*specified in Part I of the Second Appendix*”, if it be the case.

### **Events from 2017 onwards**

28. On the 29<sup>th</sup> November, 2017 Messrs. Regan McEntee Solicitors for the Council served the Hendys with details regarding costs and requesting compliance with the relevant court orders. A further request for payment was served on the 29<sup>th</sup> August, 2018. On the 30<sup>th</sup> August 2018 Fred Hendy responded indicating that he had engaged Minerex to provide advices in regard to compliance and certain [REDACTED] evidence concerning him was also provided. On the 8th October, 2018 a letter was received from the first appellant Eileen

Hendy outlining her personal and [REDACTED] circumstances. Following from an inspection of the lands on or about 5<sup>th</sup> December, 2018 by Declan Grimes on behalf of the Council, on the 11<sup>th</sup> February, 2019 a notice of motion issued by the Council seeking the attachment and committal of both appellants. It was grounded on the affidavit of Declan Grimes sworn on the 29<sup>th</sup> January, 2019. Ample opportunity was provided to the appellants to effect compliance with the orders. They failed to do so.

**The first motion for attachment -3<sup>rd</sup> March 2020**

29. The said motion was returnable before the High Court [Mr. Justice Humphreys] in respect of which the court delivered a judgment on the 3<sup>rd</sup> March, 2020 and made orders granting liberty to the Council to issue a further notice of motion and identifying the specific reliefs which might be sought. The court further directed that the first and second appellants would file affidavits of means and submit any other evidence they wished to (*sic*) by way of defence with liberty to the Council to file replying affidavits thereafter. By then Fred Hendy had pleaded guilty to certain offences and had been remanded in custody from in or about the 26<sup>th</sup> November, 2019 and indeed had remained in custody until the 2<sup>nd</sup> March, 2020. The High Court had directed that Fred Hendy be produced from Cloverhill Prison for the substantive hearing of the motion if still in custody and that Eileen Hendy attend in person for the substantive hearing of the motion and in the event that Fred Hendy was at liberty on the date of the substantive hearing “*he must also attend*”. A written judgment was delivered on the 3<sup>rd</sup> March, 2020. The said order of the court was perfected on the 9<sup>th</sup> June, 2020.

30. There has been no appeal by either side against the judgment and orders of the court of the 3<sup>rd</sup> March, 2020. In the said judgment at para. 12 the court had noted that:

*“.... The Council was seeking ‘...not so much an order for the immediate imprisonment of the respondents, but for an inquiry into whether or not the respondents are going to comply with the order of Noonan J. That seems to me to*

*be an unnecessarily roundabout way of dealing with this issue. The normal way for the court to be satisfied that orders are not being complied with is for the moving party to actually seek attachment or committal, or both, (or, I could add, some other coercive order such as a financial one). There is no particular necessity (at least in general) for a free-standing inquiry into whether a party intends to comply with an order, independently of an application for something specific to happen on foot of such an inquiry, such as attachment or committal.”*

The court went on to identify what it considered to be the “*correct process for a coercive order in respect of a civil contempt*” and proceeded to make orders accordingly. It is worth reflecting that the initial approach of junior counsel for the Council embodied a fair deal of pragmatism and prudence, and as events transpired, may well be considered to have offered the best prospect of this serious infringement of environmental law being resolved in a manner most beneficial to the public interest.

### **Second motion for attachment and committal**

**31.** Armed with the judgment and orders of the 3<sup>rd</sup> March, 2020 the Council issued the notice of motion the subject of this appeal on the 24<sup>th</sup> April, 2020 returnable for the 13<sup>th</sup> July, 2020. There is some dispute as to when the firm, O’Connell Clarke Solicitors, came on record for the appellants. The appellants contend it was on the 5<sup>th</sup> March, 2020 when a report obtained from Minerex on behalf of the Hendys dated the 19<sup>th</sup> July, 2019 came to hand. It is not necessary to resolve that dispute in the context of this appeal. I conclude that there can be no doubt but that from the date of service of the notice of motion of the 24<sup>th</sup> April, 2020 both appellants were on notice that one of the reliefs being sought was an order pursuant to O. 44, rr. 4 and 5 of the Rules of the Superior Court (“RSC”) and/or the inherent jurisdiction of the High Court “*for a fine to be imposed on the first and/or second named Respondent in lieu of imprisonment for a failure to comply with the Orders of this Honourable Court dated*



19<sup>th</sup> October, 2016 and 20<sup>th</sup> June, 2017.” The said notice of motion and grounding affidavit of Declan Grimes with exhibits attached were served on O’Connell Clarke on the 8<sup>th</sup> May, 2020 and no issue is raised in respect of the said service. An affidavit of David McEntee sworn on the 25<sup>th</sup> May, 2020 was also furnished. Given the clarity of the judgment and order of the 3<sup>rd</sup> March, 2020 and the clarity of the reliefs being sought including, *inter alia*, at relief 5 of the notice of motion of the 24<sup>th</sup> April, 2020 which had been served over 11 weeks prior to the ultimate hearing date of the 31<sup>st</sup> July, 2020, it is difficult to understand how the appellants could be surprised when the issue of a fine came to be considered on that date.

### **Events in July 2020**

**32.** On the 21<sup>st</sup> July 2020 a site meeting and joint inspection took place attended by experts on behalf of both sides. On the 22<sup>nd</sup> July Regan McEntee communicated with the appellants’ advisers O’Connell Clarke. On the 24<sup>th</sup> July the appellants’ Expert Report was submitted to Regan McEntee for their consideration. The Council communicated expressing dissatisfaction with the appellants’ engineer’s report and, in my view perfectly reasonably, requesting a timeline for the proposed works and requiring that same was to be provided in advance of the adjourned hearing date 27<sup>th</sup> of July. There is no evidence that the timeline as sought was provided in advance of the hearing on the 27<sup>th</sup> July, 2020. At all events, as outlined above, at the said hearing Humphreys J. made an order declaring the appellants to be in contempt of court for failing to comply with the 2016/2017 orders previously made by Noonan J. and the terms of said orders found to have been breached by the appellants are recited in detail on the face of the said order. The said order remains unchallenged and unappealed.

**33.** That fact notwithstanding, as outlined hereafter, it is doubtful whether in fact it was open to the court to make a declaration that Mrs. Eileen Hendy was in contempt of court in regard to the specific terms recited at Clause D of the said order of the 27<sup>th</sup> July, 2020. As

already stated, the second Schedule to the order of the 19<sup>th</sup> October, 2016 (of which the terms of Clause D of the declaration of contempt of court appears to form part) appears to be directed solely toward Fred Hendy. That aspect of the 2016 order makes reference to three documents identified in the second appendix to the second Schedule, Part 1 of the October 2016 order namely Document 7 – Method Statement, Document 8 – Report of Updated Environmental Assessment, and Document 9 – Report on Proposed Health and Safety Strategy. However, the said documents relate back to the second Schedule and in particular Clause 5 of the second Schedule which is exclusively directed towards the second named appellant. Indeed it would appear that one of the parties on whom the documentation in question was to be served included the first named appellant as well as the Council and the EPA. No specific argument was directed towards this issue at the appeal hearing however. Indeed, the declaration that the appellants are in contempt was never appealed. The appellants were clearly aware on the 27<sup>th</sup> July, 2020 that the balance of the motion was being adjourned for hearing to the 31<sup>st</sup> July, 2020. Although it does not appear on the face of the order, it is clear from the Transcript of proceedings on the 27<sup>th</sup> July, 2020 that the High Court granted liberty to the appellants to “*put in replying affidavits by close of business on Thursday.*” They ought to have availed of that opportunity.

### **Hearing on 31 July 2020**

**34.** A significant issue at the appeal hearing concerned the refusal of the trial judge to grant an adjournment as repeatedly sought by counsel for the Hendys. The second major aspect concerned claims on behalf of the appellants of an alleged compromise of the issues between the parties. It is noteworthy that the papers and documentation available to this court indicate that as of the 29<sup>th</sup> June, 2020, approximately a month before the hearing, Regan McEntee Solicitors for the Council wrote to their counterparts “*without prejudice*” concerning a potential meeting at the Four Courts scheduled for the 2<sup>nd</sup> July, 2020. On the latter date

negotiations did take place between the parties and a new environmental engineer was introduced on behalf of the appellants, namely Mr. Pat O'Donnell, Consulting Environmental Engineer. Further, without prejudice communication took place from O'Connell Clarke to Regan McEntee on the 10<sup>th</sup> July, 2020 including a preliminary report from the said Pat O'Donnell which stated that a detailed plan was expected "*within 4 weeks*". Such a timeframe would of course take the matter beyond the return date of the 13<sup>th</sup> July, 2020. On the 10<sup>th</sup> July Regan McEntee responded stating that the communication "*does not reflect the agreement on the 2<sup>nd</sup> July, 2020*" and indicating that the contempt proceedings would proceed. However, on the return date the matter was clearly adjourned for two weeks to the 27<sup>th</sup> July, 2020.

**35.** Counsel for the appellants repeatedly asserted at the hearing on 27 July 2020 to having negotiated a concluded settlement or agreement with the Council on behalf of his clients "*I'll be prosecuting that particular agreement*". It appears that no such proceedings were ever brought however. His stance was strenuously contested on behalf of the Council. The judge's assessment was that it constituted a "*... kind of misunderstanding...*". In the intervening days before the hearing of the motion, affidavits of means were sworn on behalf of both appellants and served on the Council's solicitors. Significantly, no proceedings of any kind were instituted purporting to seek specific performance or enforcement of a compromised settlement between the parties. On the eve of hearing after close of business, solicitors for the appellants sent by way of email a letter setting forth their understanding of the terms of the alleged compromise said to have been concluded between the parties and seeking that the matter be adjourned out of the list the following day, calling upon the Council to honour the terms of the alleged compromise. The transcript attests to the highly charged atmosphere of the hearing.

**36.** It is necessary to recall that Counsel on behalf of the appellants on the 27<sup>th</sup> July, 2020 had informed the High Court that non-compliance with the orders “... *was conceded at all times on the last occasion. There’s no doubt but that we haven’t complied with the orders...*”. It was further contended that “... *compliance with the order is in fact impossible for our client...*” (p. 10, line 16/17). Counsel further states “*I have really conceded that I am not in compliance with the order as outlined.*” (p. 10, lines 28, 29). Notwithstanding the appellants’ unequivocal acknowledgment that compliance with the orders had not taken place and that same was “*impossible*” it had been contended that the court ought to hear the Hendys’ expert evidence on the basis that it had been agreed with the Council and a compromise had been achieved which “*involved a satisfactory remediation of the site*”. (p. 11, lines 12, 13). On the 27<sup>th</sup> July, 2020 the trial judge had made clear that the appellants were free to file any affidavits they wished for the hearing on the 31<sup>st</sup> July including, *inter alia*, pertaining to the alleged compromise “... *I am not telling you what you can and can’t put in your affidavits, anything you want.*” (p. 11, lines 19, 20). He further stated “*and [counsel] can put in replying affidavits by close of business on Thursday.*” Said counsel reiterated to the court “*I am still of the view that I have an agreement with the Council and I am of a view that I will be prosecuting that particular agreement...*” (p. 12 lines 3/4). That assertion was roundly contested on behalf of the Council. However no affidavit was put before the court whether by the legal representatives or otherwise asserting that a compromise of the litigation had been achieved by the parties or setting out alleged terms of same.

**37.** As of the date of the substantive hearing before the High Court the appellants were in clear and sustained breach of the terms of the 2016. Compliance with the directions in the said order had been extended from the date of service of the subsequent order of the 20<sup>th</sup> June, 2017 for a period of three months thereafter. Hence said service having been effected

on the 28<sup>th</sup> June, 2017, it was incumbent on both appellants to comply with their respective obligations and directions under the order at the latest by the end of September 2017. Thus almost three years had elapsed by the time the judgment of the High Court was delivered in mid-September 2020. The appellants do not contest that they were in contempt of court for failing to comply with their respective obligations under the 2016/2017 orders and as outlined above the declaration to that effect of the 27<sup>th</sup> July, 2020 is not appealed.

***Orders of the 31<sup>st</sup> July, 2020***

**38.** At the conclusion of the hearing of the Council's contempt motion on the 31<sup>st</sup> July, 2020 the court refused the application on behalf of the appellants to have the matter adjourned for further evidence. It was further ordered pursuant to the inherent jurisdiction of the High Court that the appellants "*... jointly and severally pay to the Applicant Meath County Council a fine in the sum of €6,260,000.00 in lieu of imprisonment for failure to comply with the Orders of this Court dated 19<sup>th</sup> October, 2016 and 20<sup>th</sup> June, 2017*". It was further ordered that:

*"...the said fine do stand charged on any assets of the First and Second Named Respondents and that the Applicant do have liberty to register this Order as a charge over the assets of the First and Second Named Respondents and to exercise a power of sale over the whole or any part of such assets provided that*

- (a) One ninth part of any proceeds of the sale of the lands contained in Folio [REDACTED] representing the interest of the estate of the late Fred Hendy Senior will be held by the Solicitor for the Applicant pending further directions of the Court; and*
- (b) The contaminated parts of the lands in the said Folio [REDACTED] shall not be sold unless and until the waste has been removed therefrom".*

It was further ordered that –

*“...the First and Second Named Respondents and each of them be restrained from dealing in any way whatsoever with their lands or any property representing the proceeds of the lands.”*

**39.** The order continues:

*“In the event that the Applicant Meath County Council is satisfied that the lands have been remediated and that the cost of remediation together with any cost due to the Applicant in the proceedings and any interest thereon is less than the amount actually recovered from the First and Second Named Respondents  
IT IS ORDERED that the applicant do return any such surplus balance to the said Respondents”*

An order for costs was made in favour of the Council and the court granted *“liberty to the applicant to apply regarding attaching any further income or assets of the Respondents and liberty to seek a further listing for cross-examination of the Respondents or either of them”*.

### **Judgment**

**40.** The judgment of the High Court was delivered on the 14<sup>th</sup> September, 2020 rejecting the appellants’ contention that the matter had been settled and noting that the Council’s *“main concern is to remediate the lands”*. The court went on to observe at para. 7:

*“There are basically two ways that can be done. The respondents can remediate it, and can possibly be imprisoned until they organise that, or alternatively the council can remediate the lands with some form of recourse to the respondents’ assets to do so.”*

The court noted that of approximately 253 acres *“... a total of 3 acres are contaminated”* and that *“A large amount of the lands are available for sale”*. The court observed that the affidavits of means filed on behalf of the appellants had referred to the lands as being worth €665,000. The court observed at para. 9 that:

*“The affidavits of means do however indicate that there are no mortgages or charges on the lands.”*

It will be recalled that there was a lien in favour of a bank and an inhibition registered on the Folio. Neither were addressed in the Affidavit of Means of Eileen Hendy. The judgment did not engage with the fact that the second named appellant Fred Hendy had no interest registered on the said Folio. At para. 10 the options advanced on behalf of the Council were outlined as follows:

- “(i) As regards imprisonment, one could generally look at alternative options before getting to that.*
- (ii) Alternatively ... the council or a party directed by the court should remediate and charge the lands with the cost of remediation.*
- (iii) The court could order a fine, payable to the council rather than the State which would then be charged on the land and the proceeds used for remediation (the preferred option).*
- (iv) The court could grant an injunction restraining the respondents from dealing with the land and*
- (v) Liberty to apply [was sought] if, for example, further inquiries indicated that there were additional assets.”*

**41.** The judgment noted at para. 11 that it was contended on behalf of the appellants that:

*“...the remediation might end up being less than what was ordered by Noonan J. ... there should be a hearing as to what was to be done. The problem with that submission is that the order of Noonan J. doesn't direct the council to do anything. It is an order against the respondents requiring them to take a series of steps. Therefore, if the council for whatever reason think that a different form of*

*remediation is necessary, they aren't precluded by the order of Noonan J. from forming such a view.*" (emphasis added)

The remarks of the judge are surprising insofar as he had already made an order on 31 July 2020 which did not direct or expressly empower the Council to do anything. The judgment rejected the appellants' request for further time and seeking further affidavits to be filed on their behalf, observing: "*The demand for a further hearing is unfortunately an exercise in playing for time*". The trial judge was of the view that;

*"... property rights and rights to personal liberty are subordinate to the requirement to comply with court orders, which the respondents haven't done."* (para. 13).

It was observed at para. 14:

*"The most effective order and the one that is most appropriate in all the circumstances is ... [option] of a fine payable to the council by the respondents to be charged on the lands to fund the remediation. The fact that the costs of remediation are probably going to be in excess of the respondents' means is irrelevant."*

The judge appears not to have accepted the veracity of the Affidavits of Means albeit that the Council implicitly did by neither cross-examining the appellants on same nor seeking to file any replying affidavit disputing same. He continues at para. 14 –

*"I've obviously considered the evidence as to the respondents' assets and the evidence as to the cost of compliance with Noonan J.'s order, which is considerably greater. But the fact that it is greater does not provide a defence, or a basis to dilute fixing the respondents with the costs of the remediation. Such an order ensures that whatever assets they have will be available, whereas an order artificially limited to my estimation of their present assets would not. It goes without saying that they can't be imprisoned for failure to pay the balance of the fine since their assets have been exhausted."* (emphasis added)



The court emphasised that –

*“... the fine I am ordering in this case is coercive rather than punitive, in the sense that the purpose of the fine is not to punish the respondents for their 3-year-long contempt of court by failing to comply with Noonan J.’s order, but to ensure that the remediation actually happens. As the respondents have squandered the opportunity to do that themselves, I am ordering that the remediation will be done on the direction of the council. I will ensure that the coercive aspect is built into the order, however, by requiring the council to return any balance to the respondents if the remediation can be achieved within the scope of monies recovered from the respondents, making due allowance for the council’s entitlement to costs and interest.”* (para. 15) (emphasis added)

Unfortunately, no term of the Order as perfected provides that “... *that the remediation will be done on the direction of the council*” nor are they authorised to do so directly .

### **The notice of appeal**

42. The appellants’ prolix and repetitive appeal is very extensive, identifying thirty distinct grounds and seeks an order setting aside the whole of the order of Humphreys J. Further, they seek an order setting aside the decision of the High Court judge not to recuse himself and an order remitting the case to the High Court with a direction that the matter be heard by another judge. To a significant extent the Grounds of Appeal comprise narrative and discrete issues are difficult to disentangle.

### **Grounds 1 – 5 inclusive**

43. These grounds recite the proceedings being for attachment and committal arising from the orders made by the High Court in October 2016 and June 2017 in respect of proceedings brought by the Council pursuant to s. 57 of the Waste Management Act, 1996 requiring the restoration of an illegal landfill site on the appellant’s lands. It is acknowledged that no

appeal was brought against the orders of Noonan J. of the 19<sup>th</sup> October, 2016. In the Council's notice it is observed that at no stage was the October 2016 order appealed, nor did the appellants apply to vary or have it set aside.

**Grounds 6 to 10 inclusive**

44. Ground 6 seeks to draw a distinction between the roles and conduct of each appellant *"the landfill on the site was entirely operated by the first named appellant"*. Eileen Hendy is said to have an interest in the lands but was not involved in the operation of the landfill. Ground 6 also asserts significant [REDACTED] issues with specific reference to the appellant Fred Hendy – an issue which will be considered later.

Ground 7 states:

*"...It is estimated that the works to the lands would cost in the region of €6-10 million. This is far beyond the means of the appellants. Thus, compliance with the order was not possible."*

45. It is accepted that the appellants have not complied with the terms of the order of the 19<sup>th</sup> October, 2016. Ground 8 recites that Fred Hendy had been prosecuted on indictment in the Circuit Court in Trim when 10 charges were preferred against him pursuant to the Waste Management legislation on the 5<sup>th</sup> September, 2016. He was remanded in custody pending sentence between the 26<sup>th</sup> November, 2019 and the 2<sup>nd</sup> March, 2020. The Council in its Response at para. 33 observed:

*"The so called eleventh hour intentions of the Appellants, as aptly described by the Learned Trial Judge, must also be viewed in the factual context, as referenced by the Appellants at paragraph 8 of their notice of appeal..."*

46. Hence the belated activities of the appellants in purporting to endeavour to comply with the orders of October 2016 are framed as being primarily motivated in achieving a

satisfactory outcome to the criminal proceedings and the sentence to be imposed on Fred Hendy.

47. Ground 9 reiterates that the “*costs of the restoration vastly exceed their means*” which is, in part at least, a reprise of Ground 7. It stated:

*“A statement of means has been filed and it demonstrates that the applicants’ assets on full value, are less than half of the costs of the lowest estimate for the restoration required. This is not disputed.”*

It is further asserted –

*“This is also predicated on the sale of every asset, including the family homes, and, the lands upon which the landfill is located. This creates an obvious difficulty with the land valuation and any possible sale.”*

Ground 10 narrativises the initial motion seeking attachment and committal which was ultimately struck out for technical reasons in March 2020. Properly understood therefore, Grounds 7 and 9 assert impecuniosity as the basis for inability to comply with the orders of 2016. Ground 6 in effect contends for the proposition that each of the appellants ought to be dealt with separately having due regard to the distinct distinctions in their conduct and involvement in respect of the property in question and the illegal dumping and illegal landfill in question.

#### **Grounds 11 to 16 inclusive**

48. Ground 11 rehearses that the appellants “*sought fresh legal representation and their current solicitors came on record on the 5<sup>th</sup> day of March, 2020.*” It is stated that they also engaged their own Environmental Consultants, Minerex. However it is clear that Minerex were acting for the appellants as long ago as 2015 and that the appellants had dispensed with their services prior to the hearing in October 2016 and indeed had retained a new expert, Pat O’Donnell, Earth Science Partnership, ahead of the hearing before the High Court in July

2020. The retainer of Minerex was stated to have been “*to inspect the site and consider alternative solutions that might have been affordable to the appellants.*” Unfortunately, by the appellants’ litigation strategy of dispensing with their solicitors in 2016 some weeks ahead of the original hearing date and not attending in court and therefore not engaging with the process or putting before the court the alternative solutions being proposed by Minerex the orders were made based on the evidence that was available and before the court at the original hearing. Since neither of the appellants appealed the October, 2016 orders at any time thereafter or availed of the right to re-enter same, they stand and are binding.

**49.** Grounds 13, 14 and 15 are directed towards asserting an alleged compromise or settlement between the Council and the appellants and narrativises a settlement meeting having been arranged on the 2<sup>nd</sup> July, 2020. Ground 14 “*Agreement was reached at this settlement meeting in respect of an alternative restoration plan*”. Ground 15 asserts “*The appellants considered that the matter was settled, and set about implementing the settlement terms.*” A settlement is also asserted at Ground 24.

**50.** The Council is adamant no such settlement was concluded. The Council accepts that a *without prejudice* meeting took place but is adamant that “*no final concluded agreement was reached, as not only was the Appellant’s (sic) environmental consultant not present, but Counsel for the Appellants had indicated that in advance of the return date of the 13<sup>th</sup> July, their environmental consultant would need to attend on the lands and carry out requisite investigations.*” It is to be inferred from the Council’s perspective that the failure to provide a timeline and a schedule for the proposed remediation works in advance of the 13<sup>th</sup> July, 2020 led to a breakdown in the *without prejudice* negotiations.

**51.** Paragraph 14 of the Response to the Notice of Appeal the Council states:

“*The Court, [on 13<sup>th</sup> July, 2022], was also expressly advised of the circumstances for the adjournment, namely that the Appellants had been engaging with the Council*

*and that talks were ongoing. The Court agreed to adjourn for hearing the proceedings on the 27<sup>th</sup> July, 2020, but indicated to the parties that if the talks “struck gold” that the hearing date could be vacated. The Appellants had their legal representative in court on that occasion. Accordingly, the Appellants were at all times fully aware that the case was listed for hearing on the 27<sup>th</sup> July, 2020.”*

### **Ground/s of Appeal 16**

52. There are two Grounds bearing the number “16”, both primarily directed to the alleged compromise of the litigation. The first recites correspondence of the 24<sup>th</sup> July, 2020 received by the appellants from the Council by email at 18.20:

*“This correspondence made reference to the agreement that had been reached, however, it expressed dissatisfaction with the appellants’ engineer’s indication that further site investigations were required. This correspondence did not dispute the appellants’ engineer’s requirements, and made reference to the fact of an agreement in terms of the restoration of the site. However, the correspondence made reference to a failure to provide a timeline in respect of the works and demanded same in advance of the hearing on Monday the 27<sup>th</sup> July, 2020. Compliance with this request was impossible having regard to the reasonable requirements of the appellants’ engineer.”*

The second “Ground 16” records that when the matter came on for hearing in the High Court on the 27<sup>th</sup> July, 2020:

*“The Council indicated that they wished to proceed with the hearing. The appellant (sic) objected on the basis that the application had been settled, and that the appellants had complied with the terms of the settlement.”*

**53.** The Transcript of the 27<sup>th</sup> July, 2020 makes the position very clear. In their response at para. 16 the Council state in relation to events on Monday the 27<sup>th</sup> of July, 2020 before the High Court thus:

*“The Appellants’ Counsel indicated that it was his ‘understanding’ that the case had been ‘effectively’ settled and that there had been without prejudice communications between the parties. The Respondent advised the Court that the matter had not been settled and that the Appellants (sic) Counsel was well aware that proceedings were proceeding. The Court indicated it was not inclined to listen to without prejudice discussions. ... The Court then heard further submissions from the Appellant’s (sic) Counsel ... that his clients were not in a position to comply with the orders because they did not have the means. ... the Court noted that despite the Courts (sic) directions on the 3<sup>rd</sup> March, 2020 no affidavit of means or affidavit by way of defence had been filed by the Appellants. On the application of the Appellants, and also to enable the Court to obtain a complete copy of all the exhibits in the substantive proceedings, the Court adjourned the balance of the hearing of the contempt proceedings in respect of any consequential orders ... [to] be made on foot of the court’s finding that the Appellants had been declared to be in contempt of the Order... The Court adjourned the balance of the case for hearing in respect of any consequential orders ... until Friday the 31<sup>st</sup> July, 2020, allowing the Appellants to submit any evidence by way of defence in advance of that date.”*

**54.** The key issue emerging in Grounds of Appeal 11 – 16 (inclusive) is the alleged concluded compromise or settlement of the entire litigation between the parties prior to the 27<sup>th</sup> of July 2020. I conclude below for all the reasons stated hereafter that the existence of a concluded and binding compromise of the litigation as between the parties is not established by the appellants and all grounds of appeal asserting a compromise fail.

## **Grounds 17-20**

**55.** Grounds of Appeal 17 and 18 (in part) are also directed towards the asserted settlement, it being stated that the appellants wrote an open letter to the Council on the 30<sup>th</sup> July, 2020 outlining their position in relation to the settlement. *“The terms of the settlement were set out, and the Council was called upon to honour the settlement terms and not proceed with its motion.”* (Ground 17).

**56.** The stance of the Council is outlined in para. 17 of its response:

*“At the close of business on the 30<sup>th</sup> July, 2020 the evening before the resumed hearing, at approximately 18:07 the Respondent received a 7 page letter from the Appellants, purporting to set out the Appellants (sic) understanding of the without prejudice meetings between the parties and requesting that the resumed contempt proceedings listed for hearing the following morning be adjourned.”*

The Council contends that it did not have an opportunity to reply in detail to the appellants’ said letter but that correspondence had been sent to them on the 30<sup>th</sup> July *“indicating that the matter will be proceeding on the 31<sup>st</sup> July, 2020.”*

**57.** The Council contests Ground 18 wherein the appellants contend that the trial judge erred in refusing an application for an adjournment on the 31<sup>st</sup> July, 2020. The appellants’ objection to proceeding was said to be *“on the basis that the matter had been settled and that the appellants had been devoting their entire energies over the previous weeks setting about giving effect to the terms of the settlement.”* It was further asserted that:

*“... given that the matter had been settled, the appellants did not have time to prepare for, and/or defend the application for attachment and committal. The appellants had filed an affidavit of means in the days preceding the hearing as this had been drafted before the case had been settled, but no substantive affidavits had been filed in the*

*application before the Court outlining either the circumstances of the applicants, the proposals for remediation that the appellants could in fact give effect to.”*

It was on that basis and for that asserted reason that an adjournment was sought. The Council asserts that the trial judge did have regard to correspondence dated the 30<sup>th</sup> July and the terms thereof “...*this letter was expressly considered by the Court*”.

**58.** Ground 19 agitates the application for an adjournment that was made to the High Court judge on the 31<sup>st</sup> July, 2020. This is reiterated at **Ground 21** of the Notice of Appeal and also **Grounds 22** and **24**. It is complained that the High Court made no separate ruling on the application for the adjournment moved on the 31<sup>st</sup> July, 2020. It is complained that the Council had indicated to the trial judge:

*“.. that the order that was being sought by the Council was an order enabling the Council itself to remediate the lands. Again, this was objected to by the appellants. This was objected to on the basis that this was the first the appellants where (sic) hearing of this application and while such relief was sought on the motion, there was nothing on affidavit whatsoever about what was proposed in this regard. ... Moreover, the appellant questioned whether or not the Council intended giving effect to the full order of restoration directed or, the less expensive remediation proposal that formed part of the settlement.”*

Thus these Grounds of Appeal are premised primarily on the assertion that the litigation between the parties had been settled and that an adjournment ought to have been granted in such circumstances for the reasons identified by counsel for the Hendys at the hearing. Additionally, it is separately contended that the appellants had insufficient time to prepare for and effectively defend the application in the Council’s attachment and committal motion.



**Grounds 19 (part), 20 and 21 – asserted right of appellants to remediate**

59. In part, Ground 19 is directed towards the issue that the Council had sought an order enabling it to remediate the lands and identifying various bases for the appellants' objections to this proposed course of action.

(a) *“This was the first the appellants where (sic) hearing of this application”*

(b) *“There was nothing on affidavit whatsoever about what was proposed in this regard.”*

(c) The lands were still in the ownership of the applicant *“... and as such, if some other proposal was envisaged, the basis and terms of which needed to be clearly set out on affidavit in order that the appellant could address same. This had not occurred.”*

(d) The appellant questioned whether or not the Council *“intended giving effect to the full order of restoration directed or, the less expensive remediation proposal that formed part of the settlement.”*

60. Ground of Appeal 20 continues this theme asserting: -

*“It was submitted on behalf of the appellants that it was highly unlikely that the Council intended to give effect to the order of Mr. Justice Noonan to a cost of in excess of €6 million, particularly in circumstances where the Council had agreed a lesser remediation with the appellants.”*

Ground 20 narrativises aspects of the Transcript of the hearing of the 31<sup>st</sup> July, 2020 recalling that: -

*“The appellant submitted that if the restoration of the lands was to be given effect to at a level other than prescribed by the Court orders, that the appellants ought (sic) be given an opportunity to carry out the work. In particular, the appellants argued*

*that they ought be permitted to give effect to the terms of the settlement that had been reached with the Council.”*

**61.** Ground 21 again recalls the arguments advanced to the High Court judge seeking for an adjournment “... *in order for a full exchange of affidavits to occur, including affidavit evidence supporting the application made by the Council.*”

**62.** The above aspects of Grounds 19, 20 and 21 are directed towards contesting the entitlement of the Council to carry out the works of remediation on the lands and contending that the appellants themselves ought to be given an opportunity to carry out any works which the Council proposed to do that may fall short of the works ordered by the High Court in October 2016. It is also suggested that the appellants were surprised or taken by surprise insofar as the proposal emerged that the Council would assume the works which had remained unperformed for approximately three years.

**Grounds 21 (balance of), 22, 23**

**63.** These Grounds are directed towards contesting the fine imposed by the court: -

*“The Court also explored the possibility of the imposition of a fine instead of imprisonment. ... there was nothing said on affidavit about the imposition of a fine, or on what basis it might be calculated, levied or paid.”*

**64.** It is to be observed in passing that the complaints regarding the fine are, at the level of principle, difficult to understand. The matter was clearly flagged by the High Court in its judgment of the 3<sup>rd</sup> March, 2020 for example at para. 15(iii) where the court observed that:-

*“Finally there is the question of the appropriate order, if any, on foot of any finding of contempt, which includes, but is not limited to the custodial orders referred to in O. 44, but may include financial orders as well; and in particular if there is no capacity to comply, or limited capacity, the court may have to confine itself to non-custodial options, such as orders addressed to assets.”*

At para. 14(c) of the said judgment the court contemplated the Council particularising “*the possible financial orders that could be made as an alternative to imprisonment or alternatively seek such other orders by way of enforcement as are appropriate*”. Furthermore, from and after service of the motion for attachment and committal of the 24<sup>th</sup> April, 2020 the appellants could have been in no doubt but that a fine was one of the reliefs in contemplation in circumstances where relief no. 5 seeks in the alternative “*an order, pursuant to Order 44 Rule 4 and 5 and/or the inherent jurisdiction of this Honourable Court, for a fine to be imposed on the first and/or second named in lieu of imprisonment for failure to comply with the orders of this Honourable Court dated 19<sup>th</sup> October, 2016 and 20<sup>th</sup> June, 2017.*”

**65.** Ground 22 is directed towards the fact that the fine as ordered stood charged on any assets of the first and second named appellants and complains that the Council could exercise a power of sale over any or all of their assets. Ground 23 asserts:

*“The appellants had no anticipation whatsoever that such an order might be made. Nothing in such terms had been sought by the Council. The appellants had no or no proper opportunity to address either the imposition of a fine, the amount of any fine, or the terms of its enforcement.”*

#### **Ground 24**

**66.** Ground 24 is referred to above and rehearses once more issues regarding the alleged compromise of the litigation, the refusal of the adjournment, alleges surprise and objects to the manner in which the trial judge exercised his discretion. Otherwise it is largely narrative.

#### **Ground 25**

**67.** This ground contends that the finding of the trial judge that the actions of the appellants in respect of a remediation and attempts to find alternatives were “*meaningless*” was unduly harsh and was wrong in fact and law.

*“The appellants were in an impossible position. They were subject to an order that they simply could not comply with. The costs of same was outside their reach. The learned trial judge erred in concluding that the appellants had done nothing.”*

It was further contended that:

*“..given that the order of the Court could not be complied with by the appellants, they could not partially commence the restoration, or, do something other than that was directed without the agreement of the Council. This they had set about procuring.”*

**Ground 26** asserts that the Order contemplates that a different (and less costly presumably) remediation could be effected and asserts that the appellants ought to have been given the opportunity to effect such works in the first place.

**Ground 27** offers the alleged settlement of the litigation as a reason for failing to file any affidavits apart from the affidavits of means of the appellants.

**68. Ground 28** contends that the trial judge erred in finding, at para. 13 of his judgment, that the appellants’ *“constitutional property rights and rights to fair procedures were not engaged”* and that such rights were subordinate to the obligation to comply with court orders. These Grounds do not entirely accurately reflect the observations of the trial judge. For instance, at para. 12 of his judgment in regard to putting in a further affidavit the judge had specifically noted that *“even the (No. 1) judgment [3 March 2020] specifically allowed the respondents to put in affidavits by way of defence, which they did not do. On top of endless previous chances to put in affidavits in these proceedings, the order of the 27<sup>th</sup> July, 2020 was a final opportunity which wasn’t taken.”*

**69.** Neither did the judgment state as is contended at Ground 28 that the appellants’ rights to fair procedure were not engaged. Paragraph 13 of the judgment states:

*“Unfortunately, property rights and rights to personal liberty are subordinate to the requirement to comply with court orders, which the respondents haven’t done.”*

That observation was made where, having fully heard the matter on the previous Monday the 27<sup>th</sup> July, 2020 in the presence of counsel, the judge had granted, unopposed, an order declaring that the first and second named appellants were in contempt of court for failing to comply with the relevant 2016/2017 Orders. That order was never appealed. Separately the judge at para. 13 states:

*“Their rights to fair procedure aren’t infringed either, because there have been multiple opportunities to put forward any kind of a legally valid defence or to comply with Noonan J.’s order. Unfortunately they haven’t done either.”*

Thus the judge did not find that the appellants’ rights to fair procedures were not engaged but rather he found on the evidence that the said rights were not infringed and identified clearly the reasons for his finding. Otherwise **Grounds 28/29** emphasised the impossibility of compliance with the orders of the court by the appellants. It is asserted that the judge *“... proceeded on the basis that the non-compliance arose out of wilful disregard for the Court orders.”* At para. 13 of the judgment the judge pointed out that the appellants had had various opportunities over time to advance any legally valid defence that they wished to do so. That is demonstrably so since the relevant motion had issued the previous April and had been served promptly. It is regrettable that at no time did either of the appellants exercise the *“liberty to apply”* granted by the High Court in October 2016 at para. 10 of the second schedule which extended to both appellants.

### **Ground 30**

**70.** It is contended that the trial judge erred in holding that his order was coercive and that he was ordering that the restoration be done at the direction of the Council.

*“...What is meant by this is unclear. The order is directed at the appellants. There was no obligation on the Council to give effect to the order. The Council have no power to give effect to the order. They have no entitlement to enter on the appellants’ lands to restore the site. They are neither directed nor empowered to do so. The portion of the lands that needs to be restored also cannot be sold until it is restored. It is not clear how this can be done. In fact, the lands are not severable from the remainder of the family farm. They cannot be restored independently. The order as drafted cannot, and will not enable the restoration of the lands. Furthermore, the appellants remain under an obligation to restore the lands under the original order. Those orders are not vacated. The appellants remain under the same obligation, this has not changed notwithstanding the imposition of a €6,200,000 fine. This is unjust, disproportionate, and does not in fact achieve the end intended.”*

The Council contend that it is entitled on foot of the order to *“enter onto the lands for the purposes of restoring the site and the Appellants are expressly restrained by virtue of the within order from dealing with the lands and by analogy preventing the council from entering onto the lands to restore same.”* The Council expressed difficulty in understanding *“... the appellants’ contention, as contained at paragraph 30, that the Order of the learned trial judge is unclear as to how the lands with the waste cannot be restored independently.”* It is contended that the order *“... will enable the restoration of the lands as envisaged by the Learned Trial Judge.”* It is contended on behalf of the Council that the fact that the original order of October, 2016 was not vacated *“is neither unjust or disproportionate as the order of the Learned Trial Judge post dates the order of Judge Noonan and as such once the Appellants (sic) lands are sold and remediated, the Appellants will no longer be obliged to remediate same.”*

## **Written Submissions of the Parties**

### **Appellants' arguments**

71. The appellants argue at great length regarding the possibility of alternative solutions to the litigation. Details concerning the “without prejudice negotiations” are rehearsed in detail. The Council’s notice by way of response to the appeal is parsed and analysed. It is contended that para. 13 of same “... *refers to an agreement as having been reached.*” However, I am satisfied that that is not the case.

72. Arguably at para. 34 of the appellants’ submissions, the kernel of the difficulty underpinning the assertion that a compromise had been reached between the parties is identified or it is stated:

*“... it seems that the entire settlement effort of these proceedings unravelled on the failure of the appellant’s engineer to produce a report soon enough after the inspection, notwithstanding the good reasons for not doing so.”*

Without a doubt the parties were very close to agreement as of the 30<sup>th</sup>/31<sup>st</sup> July 2020. It is no part of the considerations herein as to whether the Council behaved reasonably or unreasonably in insisting upon the time frame identified by it. As is acknowledged at para. 34 of the appellants’ submission, the timeframe - which I am satisfied was a critical term in any agreement - “... *had never been agreed*”. As outlined further hereafter at best there was evidence of an agreement to agree subject to certain aspects and modalities being addressed. There was no conclusive evidence before the High Court judge which warranted a finding that a concluded agreement existed which was specifically enforceable as between the parties.

### **Alleged unfairness or lack of Procedural justice**

The appellants’ submissions contend that the trial judge in the exercise of his discretion in refusing the application for an adjournment had failed to afford fair procedures to them.

However, a review of the Transcript in the context of the overall events and the history of non-compliance by the appellants satisfy me that there is no such failure established in the instant case for the reasons, *inter alia*, hereinafter stated. The submissions expound at length on the appellants being taken by surprise at the application on behalf of the Council that it should be granted an order enabling it to carry out the remediation work. However, that contention is wholly unconvincing since the relief was sought in the notice of motion and furthermore had been alluded to by the trial judge in March 2020 in the earlier judgment.

**73.** It was contended on behalf of the appellants relying on the approach of the Supreme Court in *Dublin City Council v McFeely & Ors.* [2012] IESC 45, [2013] 1 ILRM 40 that a meticulous observation of procedural justice is to be observed where an application for a committal is brought given the nature of the procedures involved. Further, it was asserted that the trial judge gave insufficient weight to the fact that it was impossible for the appellants to comply with the orders. In that regard reliance was placed on *Laois County Council v Hanrahan* [2014] IESC 36, a decision of the Supreme Court.

**74.** Paragraphs 67 and 68 of the appellants' submissions state: -

*“At paragraph 11 of the Court’s judgment the Court finds that while the appellants are bound by the Court order, the Council are not directed by that order to take any steps. However, the Court finds that the Council may take steps in respect of the lands itself. By implication, it is submitted that the Court finds that the Council are entitled to form the view that a different form of remediation might be necessary. It further seems that this could be done without a hearing, or reapplication to Court.”*

The appellants contend that the judge fell into error in adopting this approach and since the lands are beneficially owned by Mrs. Hendy *“the appellants ought first to have an opportunity to give effect to it.”*



75. The issue of inability to pay/impossibility of compliance is raised in the context of a contention that the trial judge fell into error insofar as he proceeded on the basis that non-compliance with the orders arose out of a wilful disregard on the part of the appellants for the court orders. It was asserted that *“in circumstances where the Order of the Court cannot be complied with, it is not appropriate to impose a penal sanction.”* It was accepted, however, that the trial judge was correct in finding at para. 14 of the judgment that compliance with his order was not possible and that as a result, in light of the jurisprudence, imprisonment as a coercive means should not be resorted to.

76. The appellants contend that once inability to pay was demonstrated, the trial judge ought to have moved to a consideration of the alternative restoration proposals being advanced on behalf of the appellants. *“This ... had the potential to achieve the objective of the 1996 Act in that it would have resulted in an environmentally satisfactory solution.”* However, this matter was proceeding based on the affidavits and in accordance with Order 40 there was simply no affidavit evidence before the court to that effect. The matter was proceeding on affidavit and apart from the Affidavits of Means, no affidavits in support of such a contention or at all were put before the court by the Hendys.

77. The appellants complain that *“...the court moved to impose a fine that was as impossible for the appellants to pay as the original court order was to perform.”* With regard to the fine the complaint centres on the fact that:

*“No evidence as to the Council’s intentions in this regard or the appropriate level of fine was tendered. The appellant had no opportunity to properly address the appropriate amount either evidentially or by way of submission. It is also clear that the appellants will not be able to pay the fine as levied. The question as to what is to occur in the inevitable event that the fine cannot be paid arises. This will*

*immediately give rise to a further application for a committal rising (sic) from the failure of the appellants to pay.”*

The appellants contend that even were all the lands to be sold “... *there will be a shortfall of in the region of €3 million. This will have to be paid by the Council.*”

**78.** At para. 77 of the submissions the appellants distil their substantive objections in the following terms: -

*“...the learned trial judge indicated that he was ordering that the restoration be done at the direction of the Council. What is meant by this is unclear. The order is directed at the appellants. There is no obligation on the Council to give effect to the order. The Council have no power to give effect to the order. They have no entitlement to enter onto the appellants’ lands to restore the site. They are neither directed nor empowered to do so. The mechanism by which this is to be achieved is uncertain.”*

**79.** It is contended that the lands “*that needs (sic) to be restored*” - which I take to mean Landfill A and Landfill B - are not severable from the remainder of the farm. “*They cannot be restored independently*”. Further, it was contended that the appellants remain under an obligation to restore the lands under the original order.

#### **Council’s submission**

**80.** The Council’s submissions at para. 24 identify its understanding of the fine of €6,260,000 in lieu of imprisonment: -

*“The proceeds of the fine will enable the Council to fund remediation works on the lands, in default of the failure of the Appellants themselves (over a three-year period) to carry out the works and other steps of remediation. In circumstances where the Appellants have not remediated the lands, then the Council must do so and the High Court judge did not err in making his Order dated 31<sup>st</sup> July, 2020.”*

It is contended at para. 26 *“The imposition of a fine was to ensure that the land, which contains a significant amount of mixed waste, including hazardous waste is remediated.”*

*“27. While the Order imposes a fine on the Appellants, it equally entitles the Council to sell the Appellants’ assets in order to realise the fine so imposed. As stated before the High Court in evidence and submissions, only 3 acres of the Appellants (sic) lands contain waste and, as such, the remainder of the lands are severable from the remainder of the wastelands. The Appellants are expressly restrained from dealing with the lands. In these circumstances, it is difficult to understand the Appellants contention, as advanced at paragraph 30 of the Notice of Appeal, that the order made on 31<sup>st</sup> July 2020 is unclear as to the manner in which the lands containing waste cannot be restored independently. In the Council’s submission, the Order made on 31<sup>st</sup> July 2020 will enable the restoration of the lands pursuant to the Orders made by the High Court (Noonan J.) on 19<sup>th</sup> October 2016 and 20<sup>th</sup> June 2017.”*

It is asserted that *“... there was no impediment to the High Court imposing a fine greater than the value of the Appellants’ assets”* (para. 30).

### **The Law**

**81.** The Supreme Court in *Keegan & Anor v de Búrca* [1973] IR 223 observed:

*“Civil contempt usually arises where there is a disobedience to an order of the court by a party to the proceedings and in which the court has generally no interest to interfere unless moved by the party for whose benefit the order was made. Criminal contempt is a common-law misdemeanour and, as such, is punishable by both imprisonment and fine at discretion, that is to say, without statutory limit, its object is punitive: see the judgment of this court in *In Re Haughey* [1971] IR 217...”*

**The power to impose a fine for contempt of court**

**82.** As was held by Lindley L.J. in *Seaward v Paterson* [1897] 1 Ch 545, civil contempt serves two distinct purposes, the enforcement of an order of the court as between the parties to the litigation by way of civil execution and separately the penal or coercive jurisdiction to be exercised by the court in the public interest to ensure compliance with the terms of an order. Lindley L.J., speaking for the court, observed: -

*“The Court, unless it is to become useless, must deal with such questions in the interest of the public, bearing in mind that the greater the power it possesses the more caution it is necessary to use in exercising it.”*

**83.** *Borrie and Lowe: The Law of Contempt* (4th edn, Butterworths, 2010) suggest that an erroneous presumption that a court had no power at common law to impose a fine in respect of contempt committed by disobeying court orders stemmed from a statement of Lord Selborne LC made in the course of a House of Lords debate on the “*Contempt of Court Bill*” in 1883 where he had suggested that the power to punish contempt in the civil jurisdiction was confined to imprisonment and not by fine. The authors observe at para. 6.59:

*“Whatever the historical basis may have been for the statement, Lord Selbourne’s reasoning is not appropriate to modern courts, especially when it is remembered that courts of civil jurisdiction can impose a fine in respect of criminal contempt committed, for example, by the publication of an article tending to prejudice the proceedings before such courts or by interrupting court proceedings.”*

**84.** The English High Court in *Phonographic Performance Limited v Amusement Caterers (Peckham) Limited* [1964] Ch 195 rejected the arguments that the power of the court to impose a fine was limited exclusively to cases where criminal contempt was established and that there was no power to impose a fine for civil contempt other than pursuant to the express terms of a Statute. Having considered decisions including *British Motor Trade Association*

*v Hewitt* (English High Court, reported in the Times June 1<sup>st</sup> 1951) and *Multiform Displays Limited v Whitmarley Displays Limited (no. 3)* [1957] RPC 137, Cross J. concluded that in a case of civil contempt the court had power to impose a lesser penalty than committal. Cross J. observed:

*“It is true that there are only two cases which the industry of counsel has found in in which the case of civil contempt the court in which in the case of civil contempt the court has imposed a fine instead of committing the defendants to prison. In British Motor Trade Association v Hewitt, The Times, June 1<sup>st</sup> 1951 Wynn Parry J. imposed fines on two defendants who were guilty of contempt of court for disobeying an order of Roxburgh J. instead of sending them to prison, because one of them (although the judge thought he deserved a prison sentence) produced medical evidence to say that his health would be affected if he was sent to prison, and the judge thought in the circumstances that he ought to treat both directors alike. The question whether he has such jurisdiction to fine in a case of civil contempt may well never have been argued. The other case was Multiform Displays Limited v Whitmarley Displays Limited (No. 3) 1957 RPC 137 where Lloyd – Jacob J. imposed fines on two directors of a company against whom proceedings for contempt were being brought, instead of sending them to prison.”*

Cross J. observed at p. 201 –

*“I think the court must have power, in the case of civil contempt, to impose the lesser penalty of a fine.”*

Elsewhere in the judgment he had observed:

*“I cannot see the logic of saying that in a case of civil contempt the court has no alternative to sending the defendants to prison.”*

**85.** There is undoubtedly some penal element involved in committing a person to imprisonment for failure to comply with the terms of court order. The mere fact that fines are not specifically referred to in the RSC in the context of Orders 43, 44 and 45 could not preclude the court from imposing a fine since same operates as a lesser sanction than committal for breach or non-compliance of the orders of the court. Certainly from the 1960s onwards the courts across common law jurisdictions increasingly imposed fines *in lieu* of committal or sequestration for civil contempt. The courts on occasion taking a view that sequestration ought not to be ordered where the livelihood of innocent persons would be affected by the sequestration of companies' assets for contempt of a court order. The decision of Stamp J. in *Steiner Products Limited & Anor v Willy Steiner Limited* [1966] 1 WLR 986 is illustrative of the approach. In that case the court imposed a fine of £150 on the contemnors in lieu of sequestration of the company's assets for wilful breach of the orders of the court.

**86.** Lord Denning in *In Re W(B) (an Infant)* [1969] 2 Ch 50 at p. 56 observed:

*“Imprisonment is not the inevitable consequence of a breach. The court has a discretion to do what is just in all the circumstances. It can reduce the length of the sentence or can impose a fine instead. It may indeed not punish at all. It all depends on how serious is the breach, how long has the man behaved himself, and so forth.”*

**87.** The Australian High Court in *A.M.I.E.U v Mudginberry Station Party Limited* (1986) 161 CLR 98 at 113 – 115 held that the court had power to impose a daily fine for the purposes of securing compliance by the respondent with the terms of the order. That decision is also authority for the proposition that sequestration is available as a means of executing an order imposing a fine.

**The position of the Irish Courts regarding the imposition of a fine for contempt of court**

**88.** The Irish courts have imposed fines in lieu of committal for contempt as is clear from decisions such as *Irish Shell Limited v Ballylynch Motors Limited and Morris Oil Company Limited* [1997] 3 JIC 0503. There, the President of the High Court imposed a fine of £1,000 on each of three directors of the second defendant company which he had found was in contempt of court.

**89.** In *Sligo Corporation v Carton Bay Construction Limited & Anor* [2001] IEHC 94 an order of attachment and sequestration was sought against the respondents in relation to a failure to comply with certain works ordered by the High Court in connection with the completion of a housing estate. The approach adopted ultimately by the trial judge was to make the requested order of sequestration against the directors personally with an indication that the court would discharge same in the event that the directors paid a sum of £120,000 to the applicant corporation. *Irish Shell Limited v Ballylynch* was cited in the said case. *Phonographic Performances Limited* was cited with approval in *Dublin City Council v McFeely & Ors* [2013] 1 ILRM 40.

**90.** Kelly J., as he then was, in *Curley v Galway Corporation* [2001] IEHC 53 found that the respondent was in breach of a previous court order and made further order in relation to the illegal use of a dump imposing a fine of £50,000. He observed:

*“As the contempt which has been proved here is a civil contempt, the object of making either of the orders sought is coercive. By making such orders it is hoped that the developer will be coerced into complying with the injunctions.”*

The applicant had sought sequestration of the assets of the respondent and the evidence established breaches and non-compliance with planning legislation and waste management obligations in the operation of a dump. Kelly J. declined to make the order for the sequestration of assets or committal of the City Manager to prison, noting that the newly

appointed incumbent as City Manager had come to court and expressed contrition in respect of past failures and had given various undertakings to the court under oath.

**91.** Where non-compliance with the terms of orders of the court occurs, the main sanctions are to be found, *inter alia*, in Orders 43 and 44 RSC and include sequestration, attachment and committal. The provisions of the RSC do not exhaustively define the powers of a court to make such orders as are considered proportionate and reasonable to ensure compliance with its orders and respect for court processes. Where the court is satisfied, having regard to the terms of the order in question and the wilful and contumacious conduct of a contemnor, that the injury to the public interest arising from non-compliance requires that it be made clear precedent demonstrates that the options available to the court includes the right to impose a fine. In general, injury to the public interest must be deemed to be involved in the breach of all court orders to a greater or lesser extent.

**92.** The power of the High Court Judge to impose a fine in lieu of imprisonment for contempt does not appear to be in contention. Such a power is well-established in this jurisdiction, particularly over the past quarter of a century or so as outlined above. In *Competition Authority v Licensed Vintners Association & Ors* [2009] IEHC 439, which concerned an application for committal for contempt of court or in respect of the breach of an undertaking, McKechnie J. considered that the position adopted by Keane J. (as he then was), in *National Irish Bank Limited v Graham* [1994] 1 IR 215 was correct. McKechnie J. observed at para. 26 of his judgment: -

*“There is little doubt in my mind that in proceedings of a criminal or quasi-criminal nature the standard must be that of beyond reasonable doubt. Contempt, either civil or criminal, is a misdemeanour, and on a committal application, a person can be deprived of his liberty, in some situations for as long as it takes to achieve*



*compliance. The imposition of a fine is an option as well as the forcible taking of possessions.”*

**93.** In *Dublin City Council v McFeely*, the High Court had determined that the appellant was guilty of contempt of court for failing to comply with certain orders and had imposed a prison sentence of three months together with a fine of €1,000,000. The strong words of Hardiman J. in *Dublin City Council v McFeely*, particularly at para. 90 are directed as much towards a citizen who is fined “*a huge sum of money*” as towards the citizen who is being summarily imprisoned. Hardiman J. further stated as follows:

*“Everyone threatened with imprisonment for contempt, whether protestor, picketer or property developer, is entitled in the public interest, to a meticulous observation of procedural justice, all the more so since the nature of the procedures deprive him of the right to trial by jury.”*

Hardiman J.’s observations call for careful analysis and the precise language is worth recalling.

**94.** The Supreme Court decision in *Laois County Council v Hanrahan & Ors.* [2014] 3 IR 143 is also of relevance. The Supreme Court clearly acknowledged at para. 59 of the judgment that: -

*“i) It will normally be a matter for the court to decide of its own motion whether the case is one which justifies the imposition of punishment, which may be a fine or a term of imprisonment, although there may be cases involving matters of purely private interest, where the court may be invited to exercise the jurisdiction.”*

### **Quantum of Fine**

**95.** The object of the court order where civil contempt is established is primarily but not necessarily exclusively coercive. This principle must inform the consideration of the court

as to quantum of the fine. Keane C.J., in *Flood v. Lawlor* [2002] 3 I.R. 67, having reviewed the judgment in *Keegan v. de Búrca* observed at pp.79/80:

*“...while the decision suggests that there may be some room for a difference of view as to whether a sentence imposed in respect of civil contempt is exclusively – as distinct from primarily – coercive in its nature in civil proceedings generally, I am satisfied that where, as here, the proceedings are inquisitorial in their nature and the legislature has expressly empowered the High Court to secure compliance with the orders of the tribunal, it cannot be said that a sentence imposed in respect of a contumelious disregard of the orders of the tribunal and the High Court is coercive only in its nature. The machinery available for dealing with contempt of this nature exists not simply to advance the private, although legitimate, interests of a litigant: it is there to advance the public interest in the proper and expeditious investigation of the matters within the remit of the tribunal and so as to ensure that, not merely the defendant in this case, but all persons who are required by law to give evidence, whether by way of oral testimony or in documentary form, to the tribunal comply with their obligations fully and without qualification.”*

Those observations are relevant by analogy where, here, the enforcement stems from serious violation of the environmental code which exists to advance and protect the public interest in protection of environment and public health and welfare. Thus the sanction imposed by way of fine must not be so exorbitant as to constitute the imposition of a disproportionate or retributive sanction or that operates upon the contemnor as a pure penalty.

**96.** In my view, where the legislature has expressly empowered the Court to secure compliance with the Orders made pursuant to the Waste Management Act 1996, as amended, in the first instance the court should endeavour to operate the statutory framework which has the constitutional imprimatur of the legislature. Where deviation from the statutory scheme



### **Monies paid as a fine are not recoverable**

**99.** In *Con-Mech Limited v Amalgamated Union of Engineering Workers* [1974] IRLR 2 Sir John Donaldson MR, delivering judgment as President of the National Industrial Relations Court, observed concerning a fine imposed in pursuance of the powers of the court to enforce its own judgments or orders that:

*“A sequestration order is quite different from a fine. If someone is fined the money is lost to him forever. If his assets are sequestered the money remains his but he cannot use it. The money stays in the sequestrator’s possession until the court orders what shall be done with it. The man can come to the court at any time and ask for the money to be returned to him, but if he does so the court will require some explanation for his conduct.”*

### **The amount of a fine**

**100.** In *Con-Mech* Sir John Donaldson observed that in deciding the amount of a fine the court is entitled to consider the conduct of the respondent including an established history of disregarding other orders made by the court in different litigation. In arriving at the amount of fine to fix and levy the court had regard to the fact that the fine itself might not be the only monetary penalty which would be sustained by the respondent *“in addition there will be the costs of the sequestration and the complainants might in due course make good a claim to compensation for any losses which it is suffering.”* The court ordered a fine of £75,000 payable forthwith out of monies held by sequestrators.

**101.** Here, the amount of the fine imposed by order of the court is €6,260,000. In the course of the earlier hearing on the 27<sup>th</sup> July, 2020 at page 8 of the Transcript the judge had enquired *“isn’t there a presumption to remove all the waste?”* (line 28). The judge further enquired *“How much is option 1”*. The court was informed on behalf of the Council that it was €6,138,000. This sum broadly equates with Table 4A of the Remedial Options Assessment

of the 29<sup>th</sup> July, 2015 which had been put before the High Court in the making of the original 2016 orders wherein Option 1 was formally approved by the court in respect of the excavation and removal of all waste to licenced facilities with the disposal costs presumptively based on 25% inert material, 50% non-hazardous and 25% hazardous material. The figure specified at that time was €6,140,000.

### **Ability to pay**

**102.** In general, where a fine is imposed in lieu of committal for contempt, the fine should bear some relationship to the individual contemnor's means and have clear regard to their assets. In assessing the appropriate amount of a fine the authorities and authors including Borrie and Lowe, suggest that account must be taken of the damage done to the public interest by the conduct in question in the failure to comply with subsisting court orders as well as the gravity of the contempt. Megaw P. in *Re Agreement of Mileage Conference Group of Tyre Manufacturers Conference Limited* [1966] 2 All ER 849 at p. 862 observed:

*"...where the injunction or undertaking is given in litigation ... as representing the public interest, and an individual or a company, the court, in imposing a financial penalty, may take into account, in addition to other factors, the injury to the public interest which must be deemed to be involved in the breach."*

Megaw P. also observed:

*"Questions as to the bona fides of the persons who are in contempt, and their reasons, motives and understandings in doing the acts which constitute the contempt of court, may be highly relevant in mitigation of the contempt. ... The extent of such mitigation must, however, depend on the circumstances of the particular case, and the evidence adduced."* (p. 862)

**Obligation to separately assess each contemnor**

**103.** It is doubtful whether a court is entitled to impose a fine jointly and severally upon two or more contemnors as occurred in the instant case. Certainly, neither the Council nor the court identified any authority supporting the existence of such a jurisdiction. The decision in *McMillan Graham Printers Ltd v RR (UK) Ltd* [1993] 21 L S Gaz.R 40 CA makes clear that in determining the amount of a fine to be imposed in contempt proceedings the court is required to consider and have regard to the individual and distinct circumstances and means of each alleged contemnor separately and determine the amount of any fine accordingly.

**Meticulous observation of procedural justice**

**104.** The judgment of the Supreme Court (Denham C.J.) in *McFeely* [2015] 3 IR 722 at para. 57 reviewing the facts noted that on the 17<sup>th</sup> November, 2011 the High Court had ordered that it was satisfied the appellant had been guilty of contempt for a failure to comply with certain undertakings previously given to the court on the 17<sup>th</sup> October, 2011, and had ordered the appellant be committed to prison for a period of three months and to pay a fine in the sum of €1,000,000 before a specified date. The Supreme Court had to consider whether or not the appellant could lawfully be imprisoned and levied with a fine of €1,000,000 for alleged contempt of court on the facts presenting. Hardiman J. observed at para. 88 - 90:

*“[88] It is essential that the courts should possess power to punish in a summary manner contempt of the court or of the courts' orders. If the courts did not possess this power then a person who had lawfully obtained relief from a court might find himself or herself unable to enforce that relief.*

*[89] But the exercise of this power must, in my opinion, always be a matter of last resort, embarked on with manifest caution and great reluctance. This is because the*

*contempt of court procedures have the potential to deprive a citizen of his or her liberty, not to mention property, without their being accorded the elaborate but very necessary protections normally provided by the procedures of a criminal trial.*

*[90] If a citizen could be summarily imprisoned, or fined a huge sum of money, without all proper meticulous attention being paid to the procedures which exist for his protection, then the liberties of citizens generally would be undermined. Everyone threatened with imprisonment for contempt, ... is entitled to in the public interest, to a meticulous observation of procedural justice, all the more so since the nature of the procedure involved deprives him of the right to trial by jury. It is important that the court order allegedly breached should be indicated with absolute clarity and precision in the motion for attachment and committal and that the evidence alleged to establish breach of that order should be led in proper form after due and timely service of the motion for attachment and committal."*

**105.** The observations of Hardiman J. are particularly significant in light of the fact that there is no limit to the amount of a fine which the High Court can impose as an alternative to a committal where civil contempt is established. The greater the fine the higher the obligation for meticulous compliance with all appropriate procedural requirements.

**106.** The conventional approach for a fine imposed in respect of contempt of court which remains unpaid is for the applicant to apply to court seeking leave to issue a writ of sequestration to obtain payment.

**Treat contemnors separately**

**107.** It was necessary in the context of an application to the High Court for the exercise of its coercive power to compel compliance with orders, that the court have proper regard to the distinct and separate circumstances and factual matrix pertaining to each of the two alleged contemnors. In the instant case the appellants are Eileen Hendy, a widow now in

her eighties and her son Fred Hendy. All of the evidence suggests that Fred Hendy was the key actor in regard to the events which gave rise to the institution of proceedings by way of an originating notice of motion on the 11<sup>th</sup> September, 2015 pursuant to s. 57 of the Waste Management Act, 1996 as amended, requiring the discontinuance forthwith of the unauthorised holding, recovery and/or disposal of waste on the lands specified situate in County Meath.

**108.** After the appeal hearing an up-to-date copy of the Folio encompassing Landfill A and Landfill B was furnished. It was printed on the 3<sup>rd</sup> September, 2019 and Part 2 of the said Folio continues to show Fredrick William Hendy (the spouse of Eileen Hendy) who is now deceased and never was a party to these proceedings as full owner as tenant in common of one undivided one ninth share in the holding. This indicates that the estate of the said Frederick William Hendy is beneficially entitled to the said share. As such his estate holds a distinct share or notional proportion of one ninth of the entire, albeit that the said land has not been divided up physically. There is no evidence establishing that the successors in title to the late Frederick William Hendy or the person or persons who may be entitled to be registered as full owner of the one undivided one ninth share have any liability for the wrongful acts complained of which culminated in the orders made in the High Court pursuant to s. 57 of the Waste Management Act, (as amended), in October 2016. Thus, care must be taken, in the context of any orders being made that either directly or consequentially impact or affect the lands in the said Folio, that the share or interest of the estate of Frederick William Hendy therein is not diluted or adversely dealt with without at least putting the estate on notice and affording them an opportunity to be heard. Furthermore, with regard to the Folio it is important to have regard to the registered incumbrances and it is clear that there is a burden on Part 3 whereby a lien was registered on the 12<sup>th</sup> March, 2009 prior to any orders of the High Court having been made. There is no evidence as to whether the lien





[REDACTED]

**111.** It is noteworthy that a document was received by Declan Grimes of the Council on the 10<sup>th</sup> December, 2019 which appears to make reference to “Fred Hendy” at various points throughout. However the signature to the said letter is not that of Fred Hendy but of one “*Kathleen Mary Hendy*”. In his earlier judgment in March, 2020 the trial judge ascribed authorship of the said communication to the second named appellant. However, there appears to have been no basis for that particular assertion. It would appear that the appellant Fred Hendy was in prison at the time of the said letter was posted. The trial judge stated:

*“On the 4<sup>th</sup> December, 2019 the second named defendant appears to have written a scandalous letter to the council, a copy of which has been produced, demanding €365 million from the relevant council official. The tone of that letter is grandiose and threatening and it certainly does nothing for the second named defendant’s position.”*

**112.** No effort was made by either side to correct this significant initial adverse finding by the trial judge. There is no suggestion however that the trial judge weighed the writing of that letter as an adverse factor in exercising his discretion concerning Mr Hendy.

**113.** Before making an order purporting to effectively confer a power of sale in respect of a dwelling house on the Council in the context of committal proceedings, an assessment of the circumstances of Mr. Fred Hendy’s family and the practical consequences of the sale – such as the immediate risk of homelessness – ought to have been made by the trial judge for the purposes of ensuring the proportionality of the proposed orders. There is no evidence that Mr Hendy’s wife was even aware of the application or its potential consequences for her and the dependant children. That was a significant factor which warranted being weighed in the balance by the trial judge but was ignored.

**114.** The farm itself is run on a partnership basis 50/50 between the parties but it appears the income is received by Mr Hendy. A valuation as at the 1<sup>st</sup> January, 2018 was expressed to be €639,471 with out-buildings valued at €59,856. This appears to pertain to quotas and other entitlements but excluding the dwelling houses on the holding. The practical consequences of the order as made deprives Fred Hendy of his sole source of income, terminates his livelihood, extinguishes his sole means of supporting his family, the means of earning income as a farmer into the future. It also results in the loss of his family home the eviction of his wife and children from their home.

**ii. Eileen Hendy**

**115.** In her affidavit of means Eileen Hendy values her own family home at €250,000. She resides there with at least one member of her family. She is described as an unemployed widow. The valuation placed by her on the farm holding is €2,104,000. This was not contested by the Council. Elsewhere however there is a valuation attached to her affidavit of means which was one previously relied upon by the Council in the 2016 proceedings being a valuation of Sherry Fitzgerald which valued the lands at between €8,000 and €10,000 per acre and at a holding of 263 acres of agricultural land the holding was valued at between €2,104,000 and €2,630,000. It is not clear on the face of the valuation whether in fact the three acres comprised in Landfill A and Landfill B were included but the assumption is that they were not, given the non-marketability in the circumstances. Furthermore, it is inferred from the absence of any reference to structures, buildings or the like that the dwelling houses of both appellants were excluded from the said valuation.

**116.** In the case of Eileen Hendy, it is acknowledged in the affidavit of Declan Grimes sworn in the context of the within application on the 13<sup>th</sup> March, 2020 that she had made her lands available for access by the Council as required by the 2016 order. It is complained that she and Fred Hendy had:

*“failed to submit jointly or at all the documents specified in paragraph 5 of the Second Schedule of the Order within the timeframe specified to the Environmental Protection Agency (EPA) in order for the EPA to consider and decide whether any licence, permit, authorisation, permission, approval or consent is required in order to carry out the actions or any actions to be carried out by suitably qualified personnel on behalf of the Second named respondent specified in the Third Appendix...”*

However, as stated above, it appears from the face of the order of October 2016 that Mrs. Eileen Hendy was to be one of the recipients of the said documentation rather than the provider of same. Insofar as the affidavit of Declan Grimes identifies wrongdoing on her part relative to that aspect of the order as para. 7 of his said affidavit of the 13<sup>th</sup> March, 2020 tends to suggest, it appears to be erroneous. In my view this approach falls well short of the obligation for meticulous compliance with procedural obligations ordained by Hardiman J. in *McFeely*. However the other aspects in the initial and curial part of the order specifically directed towards Eileen Hendy have not been complied with, as was implicitly acknowledged when the declaration of committal was made on the 27<sup>th</sup> July, 2020. In a letter to the Council dated the 5<sup>th</sup> October, 2016 Eileen Hendy indicated that she was “*very stressed about all this landfill stuff*” and sets out details regarding [REDACTED]

**117.** Thus at its height, the uncontested evidence before the High Court as to the valuation of the lands comprised in Folio [REDACTED], County Meath in the First Schedule to her value affidavit of means Eileen Hendy asserts a land valuation of €2,104,000. However, she also separately deposed to an estimation of valuation of her dwelling home. It would appear therefore that the court was dealing with an asset in the agricultural land comprising between 253 - 263 acres in respect of which Eileen Hendy held a registered ownership of eight one ninth undivided shares. Fred Hendy held no interest in the Folio concerned.

**No cross examination of the Hendys**

**118.** It is noteworthy that with regard to the affidavits of means in respect of the appellants, both were filed on the eve of the hearing. No notice of intention to cross-examine either party was served, nor was an adjournment sought to facilitate such cross-examination or to seek leave to file replying affidavits. Therefore, *prima facie*, the Council must be taken to accept the veracity and accuracy of the matters deposed to therein. Thus it was the case that

the orders made by the trial judge were made in the context of a disclosure with regard to means, income and respective circumstances of the appellants that were not contradicted or disputed by the Council notwithstanding that it had been mentioned to the court in the course of the hearing on the 31<sup>st</sup> July that the Council had a more up to date valuation which had not been exhibited or put into evidence.

**119.** It was not open to the trial judge to proceed on an implicit basis that he did not accept the veracity of the Affidavits of Means which were not disputed by the Council.

#### **The treatment of the one-ninth share**

**120.** There was no evidence (or enquiry) as to the identity of the beneficial owners of the one ninth undivided share which appears to comprise part of the estate of the deceased registered owner Frederick William Hendy. There is no valid legal basis identified by the Council, or the court, for subjecting the said share to any coercive orders or which otherwise established that the court was entitled to overreach that registered ownership. I am not satisfied that there was any effort on the part of the Council, whether pursuant to O.15 r. 13 RSC or otherwise, to put on notice or ascertain any party who might have any estate or interest in the said share such that they might be heard prior to the making of an order adversely affecting same. Such a party might be the legal personal representative or executor of the said estate or the party or parties entitled to be registered as full owner in the event that the estate remains unadministered.

#### **The alleged compromise**

**121.** The criteria to be established where it is asserted that a concluded compromise of litigation has occurred has been identified in a number of decisions including in particular *Mespil Limited v Capaldi* [1986] ILRM 373 and likewise in *McGarth v Independent Newspapers (Ireland) Limited* [2004] 2 IR 425 at 430. In *McGarth*, Gilligan J. identified the following factors as “*central requirements of a valid compromise*”:

- “1. *consideration exists;*
2. *an agreement can be identified which is complete and certain;*
3. *the parties intend to create legal relations.*”

**122.** At best, as far as the present case is concerned, the evidence points to an agreement to conclude an agreement. It is clear that the negotiations had advanced to a very substantial extent and it may well be that the only outstanding issue was the duration of time required for the purposes of the appellants’ expert providing a report and whether one month was sufficient or whether same could be delivered within a lesser period of time acceptable to the Council. It is regrettable that the parties didn’t manage to “*meet in the middle*” or adopt a pragmatic approach in that regard. However it is clear that they did not. No evidence has been identified which would demonstrate that the state of negotiations between the parties were such as to demonstrate that a concluded agreement had been reached prior to the conclusion of the hearing on the 31<sup>st</sup> July, 2020.

**123.** The Grounds of Appeal are replete with repeated assertions that the litigation and all material issues as between the parties had been the subject of a concluded agreement binding upon the Council. Such assertions are to be found, *inter alia*, at Grounds 13, 14, 15 16, 17, 18, and 20 of the notice of appeal and further are alluded to in other Grounds of Appeal. Repetition does not convert an assertion into a fact.

**124.** However, having carefully reviewed the papers and documentation submitted in respect of this appeal, I am satisfied that there was no, or insufficient, probative evidence before the trial judge that could have entitled him to so conclude, in the teeth of the strenuous denial on the part of the Council, that the litigation, and, in particular, the motion for attachment and committal which had issued in April 2020 had been compromised. The Transcript of the 27<sup>th</sup> July, 2020 makes clear that the assertion that the parties had reached a

compromise was also advanced on behalf of the appellants when the matter was being opened to the court *cf* p. 3, lines 14 & 23 for instance.

*“...I haven’t filed an affidavit because until last Friday evening I understood this matter was settled by agreement.”*

This statement implicitly acknowledges that from “*Friday evening*” it was understood that there was indeed no concluded agreement between the parties. This was repeated later at p. 8, lines 11/12 of the Transcript. It was very evident from the clear statements of the trial judge that he was not satisfied that there was sufficient evidence before him to satisfy him that a concluded agreement had been reached between the parties to resolve all matters that were before the court.

**125.** The court had proceeded on 27 July 2020 to make a declaration that the appellants were in contempt of court in accordance with para. 1 of the notice of motion. That was not challenged or contested and not appealed. The judge had proceeded to state:

*“I will adjourn the balance of the reliefs sought to Friday.”*

The trial judge twice made clear that it was a matter for the appellants to put in such affidavits as they saw fit:

*“I am not telling you what you can and can’t put in your affidavits, anything you want.”* (lines 19/20)

And again at lines 28/29 the court made clear that the appellants could put in “*replying affidavits by close of business on Thursday.*” Beyond the two affidavits of means, no affidavit was sworn by either appellant or by their instructing agents be they solicitor or counsel asserting that a concluded agreement or compromise to the litigation had been reached and exhibiting the terms of same and identifying whether orders were or were not required and in particular identifying the basis on which the appellants contended that such



a settlement had been reached of a kind which was binding on the parties or operated to ground a claim that the court was estopped from proceeding to hear the committal motion.

**126.** It certainly would appear that there was no settlement agreement had between executed by the parties, nor does it appear that there was agreement with regard to the orders as might be made in regard to the committal proceedings in the context of the asserted compromise. It would appear that one or more legal advisors on behalf of the appellants truly believed that there was a compromise, and to some extent there is evidence that the negotiations had progressed extensively.

**127.** However, it is apparent from the documentation that the time frame within which works might be carried out was of supervening importance to the Council. That was to be expected in circumstances where they were discharging significant obligations and enforcing measures calculated to protect the environment and public health from the deleterious impact of the landfill on Mrs. Hendy's lands.

**128.** There is little doubt but had there been a concluded agreement intended to be binding and enforceable some evidence of that would have been adduced on affidavit at the hearing on the 31<sup>st</sup> July, 2020. That was not done. It is to be inferred that there were either circumstances of latent ambiguity or mutual misunderstanding - or both - in the sense alluded to by the Supreme Court in the decision in *Mespil Limited v Capaldi* [1986] ILRM 373 obtaining, such that when the matter came on for hearing on the 31<sup>st</sup> July, the absence of any evidence of consensus *ad idem* having been put in appropriate form by way of affidavit before the trial judge entitled him to conclude that the asserted accord or concluded agreement contended for by the Hendys had not been established. Accordingly he was entitled to proceed to hear the balance of the case and ascertain and determine the reliefs sought as he had indicated he would do at the hearing the previous Monday the 27<sup>th</sup> July, 2020 (p. 11 of Transcript, line 23). In that circumstance, I am satisfied that none of the

sundry Grounds of Appeal contending for a binding compromise or settlement have been established.

**The application for an adjournment**

**129.** An adjournment was sought on behalf of the appellants and same was refused by the trial judge (p. 32, line 2). I am not satisfied that any clear basis is identified by the appellants which would warrant this court interfering with the exercise by the trial judge of his discretion in regard to that application. It was to be inferred from submissions made the previous Monday on behalf of the appellants that they were aware that the asserted compromise of the litigation had not been accepted by the Council or the Court at that stage. Hence they had ample opportunity to put their position on affidavit. Indeed negotiations around a compromise would not have precluded the preparation of detailed affidavits having regard to the nature and extent of the orders and reliefs being sought by the Council in their very detailed notice of motion.

**Wide discretion**

**130.** Order 36, rule 34 provides:

*“The Judge may, if he thinks it expedient for the interests of justice, postpone or adjourn at trial for such time, and upon such terms, if any, as he shall think fit.”*

*Delany and McGrath on Civil Procedure*, (4<sup>th</sup> edn, Round Hall, 2018) at para. 22.28 observe:

*“This rule confers a wide discretion and there are a variety of reasons why a court might decide to grant a postponement or adjournment including the illness of a party or witness...”*

Of course in each case a balancing exercise is to be carried out between urgency and efficiency on the one hand and the ensuring that fair procedures take place on the other. The exercise of his discretion by the trial judge to refuse the adjournment is essentially a matter within the discretion of a trial judge, as was observed by Keane J. (as he then was) in *R.B. v*

*A.S. (Nullity: Domicile)* [2002] 2 IR 428 at p. 447. Another judge might have come to a different view. That is not the test.

**131.** With regard to the issue of adjournment this court has considered and reviewed the law in that regard and the parameters within which a trial judge is to exercise discretion in *Promontoria (Oyster) DAC v Greene* [2021] IECA 93 wherein Collins J. posited that although significant weight must be accorded to the decision of the trial judge, on the other hand the decision to grant or to refuse an adjournment is not immune from appellate review. It is incumbent on the High Court judge to exercise his or her discretion judicially and within constitutional parameters. The judgment carries out a succinct analysis of the key authorities which emphasise the importance of fairness citing the decision of Sedley L.J. in *Terluk v Berezovsky* [2010] EWCA 1345 where he had observed:

*“... The test to be applied to a decision on the adjournment of proceedings is not whether it lay within the broad band of judicial discretion but whether, in the judgment of the appellate court, it was unfair.”*

Collins J. considered other jurisprudence including the decision of the High Court in *Lawlor v Geraghty* [2011] 4 IR 486 where Kearns P. suggested that intervention is warranted by an appellate court where the decision maker has not acted judicially or has failed to employ fair procedures or *“where there is a real, manifest or potential prejudice to the applicant.”* Collins J. concluded that *“... for appellate intervention to be warranted, any unfairness must be significant and that any assessment of unfairness must not focus narrowly on the interests of the party seeking the adjournment but must also be sensitive to the interests of the other party or parties and wider considerations of the proper administration of justice.”*

**132.** On balance, having reviewed the Transcript of the hearing before the trial judge on Monday the 27<sup>th</sup> July, 2020, I am satisfied that the appellants could have been under no illusion but that the trial judge, having granted a declaration that both appellants were in

contempt on the said date, intended to proceed to hear the balance of the case and might grant the necessary reliefs and orders on the following Friday. The appellants could not have been taken by surprise in that regard. Accordingly, the various Grounds of Appeal directed towards impugning the exercise of his discretion by the trial judge to refuse the adjournment, including, *inter alia*, as specified at Grounds 18 and 19, 21, 22, 24 & 27 and otherwise alluded to in several of the other Grounds of Appeal, are not established.

### **Analysis of Orders made**

#### ***First aspect***

**133.** The High Court firstly ordered;

*“... pursuant to the inherent jurisdiction of the Court that the First and Second Named Respondents do jointly and severally pay to the Applicant Meath County Council a fine in the sum of €6,260,000.00 in lieu of imprisonment for a failure to comply with the Orders of this Court dated 19<sup>th</sup> October 2016 and 20<sup>th</sup> June 2017”*

#### **Joint and several liability**

**134.** In the first instance a concerning feature of the order is that the court imposes joint and several liability on the first and second named appellants without any separate assessment or evaluation in the judgment as regards their relative culpability and their respective and distinct means and circumstances. It is a fundamental requirement before fixing the terms of a fine for contempt that the actual means and circumstances of each individual contemnor is to be taken into account and evaluated by the court. In the instant case, there had been affidavits before the court from the time of institution of the 2015 proceedings outlining the distinct respective acts or omissions alleged as against the appellants.

**135.** Put simply, the mother was the registered owner of eight undivided one ninth shares in the lands. The son was the party primarily responsible for the placing of the deleterious waste on the lands. Thus, there were distinct and separate factual matrices surrounding their

respective conduct in light of the relevant Directive and case law, as well as the legislation. Each had distinct obligations under the 2016/2017 orders. The court was correct to have regard to the high value and importance placed by the State on the necessity for compliance with environmental law. A core value of the Treaty of the Functioning of the EU (TFEU) itself, to be found in Art. 191, is the guiding principle that environmental policy at EU level in this regard shall be based on the principle that “*the polluter should pay*”. Ireland has significant obligations, *inter alia*, pursuant to Art. 4 of Directive 75/466/EC and with Art. 13 of Directive 2008/98/EC in that regard. The nature and extent of that obligation has been the subject of a fair deal of a jurisprudence emanating from the CJEU including Case C-3909 *Commission v Portugal*. Further, the Waste Framework Directive reiterates the said principle and imposes obligations on EU Member States regarding, *inter alia*, the prevention and remediation of environmental damage to take steps to recover the costs of non-compliance together with the costs of remediation measures in respect of pollution.

**136.** Hence, I am satisfied that the trial judge was entitled to have a heightened concern for the continuing non-compliance with court orders and to the state of affairs obtaining in regard to the Hendys as of the 31<sup>st</sup> July, 2020. However, he erred in failing to give separate and distinct consideration to each individual in turn in the context of their respective circumstances, their respective conduct and their respective means which had been deposed to by them in accordance with the direction of the court previously made and in respect of which the said affidavits of means were not contested and no notice of intention to cross-examine had been served and no application had been made to the court on behalf of the Council for leave to cross-examine either.

**137.** The distinct obligations of each individual contemnor were required to be clearly and distinctly specified in the order of the court, intended to be coercive in nature imposing obligations for compliance. One contemnor cannot be, in general, liable for the defalcations

of another. The tenor and terms of the order must be sufficiently clear such that each has clarity and certainty with regard to the separate obligations that are being imposed by the court upon them individually to exert coercive force to secure compliance with orders hitherto made by the court. The distinct breaches obligations of each individual contemnor were not clearly and distinctly specified in the 31 July 2020 order of the court.

**138.** The fine is payable to the Council pursuant to the order. The legislature has laid down clear statutory provisions to be found, *inter alia*, in sections 56 – 58 of the Waste Management Acts, in regard to consequences of non-compliance with enforcement orders. There is clear authority for the proposition that where a fine is imposed the money is lost forever. It is by no means clear that any argument or authority was identified to the trial judge in support of a proposition that the Council had capacity to receive a “fine” properly understood in the context of this matter and the issues arising, in the sum of €6,260,000. There should be a clear basis for the figure and clear reasoning identifying how the figure is calculated as regards each contemnor individually and the fine imposed on each contemnor must be separately specified. In substance, it would appear that the court was, by the tenor of its order, effecting some form of sequestration order without the normal formalities having been followed in accordance with the RSC and the authorities.

**139.** The quantum of the fine of €6,260,000 is derived from the affidavit of Anne Marie Casey, Senior Environmental Scientist employed by AECOM which was in turn engaged by the Council to investigate the two landfills. She deposed that the option costing the said sum involved the excavation and removal of all waste to a licenced facility which would require no future site management. Her affidavit indicates that option 1 scored highest in remedial options appraisal and was consistent with the EPA Code of Practice.

**140.** It is noteworthy that counsel on behalf of the Council acknowledged to the court that the actual costs of the remedial works could vary ultimately and much would depend on the

level of hazardous waste as might be actually found. In the course of the hearing the trial judge observed that this had presented a difficulty with ascertaining the quantum of the fine. There is no clarity as to the principles applied by the court to resolve the said difficulty.

**141.** The question arises as to whether the quantum of the fine jointly and severally imposed upon the appellants amounts, in the particular circumstances of this case, to a penalty of such a nature or amount as to constitute the imposition of a punishment of such severity as to operate as an impermissible sanction for the contempt in the circumstances. In the first instance, assistance can be obtained from the majority decision of the Supreme Court in *Laois County Council v Hanrahan* [2014] IESC 36, [2014] 3 IR 143, which identified the principles informing the exercise of the jurisdiction to punish where civil contempt is established (it has in the instant case) of page 162 – 163: -

(i) *“It will normally be a matter for the court to decide of its own motion whether the case is one which justifies the imposition of punishment, which may be a fine or a term of imprisonment, although there may be cases involving matters of purely private interest, where the court may be invited to exercise the jurisdiction.”*

(ii) *“The circumstances justifying the imposition of punishment will almost always include an element relating to the public interest, including the vindication of the authority of the court.”*

(iii) *“A court should impose committal by way of punishment as a last resort. The contempt must amount to serious misconduct involving flagrant and deliberate breach of a court order. Mere inability to comply will not amount to serious misconduct.”*

**142.** It is particularly in regard to this element that a distinct evaluation of each of the appellants was called for. In the case of Mrs. Hendy, although aged, she had a not insubstantial interest in the lands where both landfills lay. There would appear not to have

been any evidence before the courts in 2016/2017 suggesting that she was directly or actively involved in the landfill activities. Her income appears to have been represented by a non-contributory old age pension disclosed in the Fifth Schedule to her affidavit of means. The full value of the lands disclosed in her said affidavit in the First Schedule (excluding her family home) was €2,104,000 which represents approximately one third of the fine imposed upon her. Her family home is valued at €250,000. Hence the imposition of the fine upon her represents multiples of her entire assets and estate.

**143.** In the case of Fred Hendy it is not in contest that he is not the registered owner of the lands. He claims an interest in his family home at a valuation of €150,000. His income from the farm holding is very modest. In respect of those figures the Council and the court were bound by same in circumstances where the Council elected not to cross-examine either appellant. Additionally, in the case of Mr. Hendy there are [REDACTED] [REDACTED] which forms part of Exhibit DG 1 of the affidavit of Declan Grimes, sworn on the 13<sup>th</sup> March, 2020. [REDACTED]

**144.** Objectively on the available evidence there are no prospects of the appellants or either of them ever being in a position to discharge the “fine” imposed by the court and made payable to the Council. As a matter of law a fine in its totality is irrecoverable by the payor. It is not open to a trial judge, without more, to speculate that a contemnor’s assets are worth more than the evidence indicates - particularly where such evidence has been accepted by the applicant who seeks enforcement of an order.

**145.** It is noteworthy in the decision of McKechnie J. in *Laois County Council v Hanrahan* [2014] IESC 36, [2014] 3 IR 143 he observed at pp. 181 – 182 contrasting the key indicia of criminal contempt with those of civil contempt, that in the case of the latter the objective is:



*“... to bring about compliance on the part of the defaulter by invoking its persuasive powers: if such should involve a prison sentence, the term thereof will be indefinite, which is entirely consistent with and designed to further this coercive objective. Once the default has been remedied or is no longer in issue, which may result from due compliance or by a withdrawal of the application, the committal order ceases to have effect.”*

In his analysis McKechnie J. suggests that given the nature of a court’s intrinsic interest in a civil contempt in securing due compliance with the orders made the court does have jurisdiction to exercise both coercive and punitive powers, but that only conduct which might properly be characterised as “*serious*” or “*outrageous*” or “*wilful*” or “*deliberate*” or as constituting a “*gross affront*” to the integrity of the court will justify a punitive intervention.

#### **Conclusion on fine**

**146.** In my view, the quantum of the fine imposed jointly and severally upon the appellants, notwithstanding the distinctive features of their respective circumstances, amounts to a disproportionate, punitive and indeed retributive intervention and entirely penal sanction not warranted in circumstances where there is a significant evidential deficit that the defaults on the part of each appellant resulted from contumaciousness, deliberate or outrageously gratuitous conduct on the part of either in defying or failing to comply with the order. Moreover, there is some evidence that Mrs. Hendy in a limited way did in part at least comply with elements of the 2016 order such as facilitating entry upon the lands by an official on behalf of the Council, and as such might be characterised as “... *the fumbling incompetence that may occur where an accused is precipitated into the public glare and alien complexity of courtroom procedures...*” – to quote from Henchy J. in *State (Healy) v Donoghue* [1976] 1 IR 325 at 354.

**147.** In my view, the principle of proportionality was engaged including in light of the decision in *Walsh v Minister for Justice and Equality* [2019] IESC 15. The key judicial objective is to devise an outcome that is proportionate in all the circumstances. The uncontested evidence is that the property owned by Mr. Hendy is valued at €150,000 it constitutes his family home where his spouse and children reside with him. An order directing his joint and several liability to pay €6,260,000 by way of fine is wholly disproportionate where there was clear evidence that he did not have such sum nor any prospects of ever discharging same and where that that figure represented almost 40 times the value of his dwelling.

**148.** The order as made consigns the appellants and each of them to the impossibility in perpetuity of ever satisfying the said order. It is wholly out of proportion in light of uncontested evidence with regard to their respective means. It operates as the exercise of an excessively punitive and indeed retributive power in light of the uncontroverted evidence demonstrating that neither of the appellants have ever been in a financial position from the date of the 2016/2017 orders onwards to discharge the said sum for the purposes of the carrying out of the works as required by the 2016 Order on costings estimated on behalf of the Council. Therefore their failures could not be characterised as either “wilful” or “contumacious” as same are properly understood in the context of contempt.

**149.** Given the approach of the Council in neither disputing or contradicting the Affidavits of Means nor serving notices to cross-examine, the reasonableness or otherwise of the quantum of the fine imposed must be measured against the affidavits of means of the appellants. The judge erred in speculating otherwise. The fine, in respect of which sum the appellants bore joint and several liability to pay to the Council, represented several multiples of the respective assets of the parties. As such, the fine was grossly excessive, entirely penal in effect and amounts to a retributive and expropriative sanction where neither appellant

could have any prospect of ever discharging. It was imposed without regard to the practical consequences for each of the appellants namely they would be reduced to destitution yet still continue in perpetuity to be in breach of same. Neither appellant had any prospect in perpetuity of ever discharging the fine and were thus precluded by their circumstances from any foreseeable prospect of ever purging their contempt. In the realms of criminal law it is to be recalled that since Magna Carta, as explained by Blackstone, *Commentaries on the Laws of England, 1769*, Book IV, Chapter 29 (Reprint by Chicago Press 1979, p.372) even in the case of conviction for a serious crime, a free man was not to be subjected to a fine of such magnitude “...*salvo contenmento suo: et mercator eodem modo...salvo wainagio suo*” - translated as “...so great as to imperil his estate or... endanger a trader’s merchandise or the wainage of a small farmer.” It is worthy of note that this principle is broadly reflected in Irish criminal law now in the provisions of the Fines (Payment and Recovery) Act, 2014, for instance, Part 2, s. 5.

**150.** Whilst the trial judge may have taken a view that the appellants bore no risk of imprisonment in the event that they should fail to pay the fine imposed, that may well represent the law in the jurisdiction of England and Wales where the matter is governed by legislation. However, in the event of the inevitable default which confronted the Hendys it was still open to the Council to bring fresh proceedings seeking their committal to imprisonment for contempt for continuing breach of the 2016/2017 orders and I am not satisfied, and no authority has been identified by the Council in that regard, that the Council would be precluded from bringing such an application or that the court would be precluded from making an order for committal in such circumstances, depending on the prevailing events or facts obtaining at the time of the application.

**151.** The burden rested with each of the appellants as contemnors to demonstrate that compliance with the order for each was impossible and beyond their respective capacities

and means. The clear evidence before the High Court confirmed that that was so. The Affidavits of Means demonstrated that the defaults were neither wilful nor contumacious.

**152.** It is worth noting in this regard the final two sentences of para. 14 of the judgment where the trial judge observed: -

*“Such an order ensures that whatever assets they have will be available, whereas an order artificially limited to my estimation of their present assets would not. It goes without saying that they can’t be imprisoned for a failure to pay the balance of the fine once their assets have been exhausted.”*

Thus the trial judge impermissibly appears to disregard the uncontested and undisputed evidence before the court as to their means.

**153.** In arriving at the appropriate penalty, having regard to the uncontested finding that each of the appellants was in contempt of court, the trial judge had a broad discretion which should be exercised having due regard to the relative circumstances of the parties including the different aspects of the orders of 2016/2017, which had been directed towards each of the appellants and the extent to which each had complied. For instance, it is clear that Mrs. Hendy had facilitated the Council going on the lands and indeed the affidavit of Mr. Grimes so acknowledges.

### **Second aspect**

**154.** The second aspect of the order provides: -

*“...IT IS ORDERED that the said fine do stand charged on any assets of the First and Second Named Respondents and that the Applicant do have liberty to register this Order as a charge over any assets of the First and Second Named Respondents and to exercise a power of sale over the whole or any part of such assets provided that*

- (a) *One ninth part of any proceeds of the sale of the lands contained in Folio [REDACTED] representing the interest of the estate of the late Fred Hendy Senior will be held by the Solicitor for the Applicant pending further directions of the Court and*
- (b) *The contaminated parts of the lands in the said Folio [REDACTED] shall not be sold unless and until the waste has been removed therefrom”.*

Thus, the fine is charged on the “*assets of the First and Second Named Respondents*”.

**155.** There is an inherent contradiction between the initial part of the order and sub clause

(a). The initial part of the order is confined to the assets of the first and second named appellants and not to the share or interest in the estate of the late Frederick Hendy Snr. However sub clause (a) appears to empower the Council to effect a sale and disposition of the entirety of the lands in the Folio including interests and shares which do not constitute assets of either the first or second named Appellants. No parts or shares are excluded. Thus, sub clause (a) is inconsistent with the initial part of this aspect of the order quoted above.

**156.** The implicit conferral of a power of sale on the Council in respect of the one ninth part or share of the wholly innocent estate of the late Frederick Hendy Snr. without knowledge or notice to the estate cannot stand. The estate was not a party to these proceedings. No part of an order in respect of contempt of court can be made such as would directly trench on the property rights of the estate and the parties entitled thereto. It is to be inferred from sub clause (a) that the trial judge envisages the sale by the Council of the entirety of the lands in Folio [REDACTED] County Meath rather than eight/ninth parts only. No provision is made for any application in regard to partition pursuant to the Land and Conveyancing Law Reform Act, 2009, as amended or for such other order or direction as may be appropriate to preserve and vindicate the property rights of innocent parties in and over the 1/9<sup>th</sup> undivided share of the lands in question. The net effect of sub clause (a), as Hilary Biehler outlines at Chapter 20

of *Equity and the Law of Trusts in Ireland* (7<sup>th</sup> ed., Round Hall, 2020) is that with effect from the date of the making of the order, in light of the decision *Re Henry's Estate* [1893] 31 LRIR 158 at 165, a conversion in equity has taken effect and the rights of the estate of the deceased co-owner have been converted into personalty without any notice to the estate or any opportunity being afforded for the estate of the innocent party – a non-contemnor - being heard prior to the said order being made.

**157.** I am not satisfied that there was any evidence before the court that the trial judge had the power to make in substance what amounts to an absolute order of conversion on the application of the Council against an innocent co-owner of lands, or his estate, in respect of whom no order whatsoever has ever been sought or made in the context of the within proceedings.

**158.** With regard to sub section (b) the sale of same is prohibited “*unless and until the waste has been removed therefrom*”. It is unclear as to whether this part of the order is directed towards the appellants or towards the Council. Assuming for the moment that the order is directed solely against the appellants it has the effect of sterilising the subject lands and rendering them inalienable even for any legitimate purpose in and towards satisfaction of the first aspect of the order - namely the fine. Therefore, it operates to preclude the appellants, or primarily Mrs. Hendy, from selling any part of the lands for the purpose of the satisfaction of the fine imposed or compliance with the 2016 orders which evidently continue in full force and effect binding both appellants.

**159.** A further difficulty is there is no clarity as to who is to determine and how is it to be determined that “... *the waste has been removed therefrom*”.

**160.** The order makes no provision at all permitting the Council, its servants, agents or nominees to go upon the lands to carry out any works whatsoever. The order is not framed within the ambit of the statutory scheme to be found, *inter alia*, in section 58 of the Waste

Management Act, 1996 as amended which provides significant procedural and evidential guardrails in connection with the balancing of the respective rights of parties where remedies are granted by the court concerning the unauthorised holding, recovery or disposal of waste. If it was envisaged by the court that the performance of the works of the removal of the waste was to be effected by or on behalf of the Council in the context of sub clause (b) the order has signally failed to say so but was required to do so. No specific entitlement has been conferred on the Council enabling it to go upon the lands for any purpose, including *inter alia*, mitigating or remedying the deleterious impact of the conduct found to have occurred on the holding.

**Third aspect**

**161.** The third element of the order provides: -

*“AND IT IS ORDERED that the First and Second Named Respondents and each of them be restrained from dealing in any way whatsoever with their lands or with any property representing the proceeds of the lands”.*

This order is made in the context of two uncontested affidavits of means sworn by the appellants deposing to their respective means and circumstances. In substance, this aspect precludes the appellants or either of them – particularly Mrs Hendy - from taking any step to raise money or deal with any interest they have in the property for that purpose.

The order is thus expropriative in effect and if enforced reduces the appellants to penury and destitution. Within the order itself this provision creates an insuperable obstacle to the appellants from meaningfully endeavouring to discharge even a small fraction of the joint and several fine imposed upon them.

**Fourth aspect**

**162.** The order continues: -

*“In the event that the Applicant Meath County Council is satisfied that the lands have been remediated and that the cost of remediation together with any costs due to the Applicant in the proceedings and any interest thereon is less than the amount actually recovered from the First and Second named Respondents*

*IT IS ORDERED that the applicant do return any such surplus balance to the said Respondents.”*

Endeavouring to understand the import of this element of the order it appears to envisage that the Council itself might not necessarily be the party carrying out the remediation. However, para. 24 of the Council’s written submissions state that “... *where the Appellants have not remediated the lands, then the Council must do so ...*” The Order does not authorise the Council to go upon the lands or do any works thereon, however. It cannot have been in contemplation under this aspect of the order that the lands would be remediated by or on behalf of the appellants since the earlier part of the order restrains them from dealing “*in any way whatsoever*” with the lands and imposes a charge to the value of the fine over “*any assets*” of either appellant. It appears to envisage that should there be a shortfall between the costs of remediation on the one hand (together with costs due to the Council and interest thereon) and the amount actually recovered from the appellants on the other, such “*surplus balance*” would be returned “*to the said Respondents*”. Such an approach appears to be fundamentally inconsistent with the nature of a fine in law and is more in the nature of an approach involving sequestration.

**163.** It is noteworthy that no distinction is made on the face of the order as between the farmlands and the dwelling houses/homes of the appellants which are places of abode for members of their respective immediate families including, in the case of Fred Hendy, children.



**164.** A significant element is that nowhere within the order does it say that remediation is to be carried out by the Council or at its direction. No obligation whatsoever is imposed upon the Council with regard to carrying out any remediation. Neither is it obliged, if works were to be undertaken by it, to opt for Option 1. Given the public interest in remediation it is imperative that some minimum level of remediation be carried out which satisfies the public interest in securing the expeditious mitigation so that risk to public health and welfare are abated expeditiously.

### **Conclusion**

**165.** In the instant case, the conduct of the appellants is to be deprecated and it is clear that they have been in ongoing breach of orders of the court. They have not appealed the declaration of the High Court granted on the 27<sup>th</sup> July, 2020 that they were, and each of them was, in contempt of court.

However, I conclude that there is force in the appellants' arguments that the cumulative impact of the orders is impermissibly expropriative and disproportionately penal for all the reasons stated above.

**166.** The procedural justice emphasised by the Supreme Court in *Dublin City Council v McFeely & Ors.* [2013] 1 ILRM 40 by Hardiman J. and Denham C.J. must not be lost sight of. In the instant case, in my view, meticulous attention to procedure was regrettably not followed in circumstances where third parties, including the estate of the deceased tenant in common of the property, were made the subject of orders without correct procedures being complied with. This resulted, by the operation of the orders, in the conversion without notice of the vested property rights of an innocent third party or parties contrary to their constitutional rights and contrary to Art. 1 of the First Protocol of the European Convention on Human Rights.

**167.** I have indicated above a variety of infirmities, inconsistencies and deficits in the orders as made. The cumulative impact of the orders includes that the Council has no obligation to carry out any works. The appellants are precluded from carrying out any works and are ordered jointly and severally to pay a fine the quantum of which demonstrably, in light of the uncontested evidence with regard to their means, is wholly impossible for either to ever comply with.

**168.** Insofar as the trial judge envisaged that a repayment of monies could be effected from the proceeds of a fine that appears to be contrary to any authority.

**169.** In the circumstances, it has not proved possible to frame an alternative order, and thus it is in the interests of justice for all the reasons stated above to discharge and set aside all of the orders of the court and remit the matter to the High Court where a different judge can re-exercise the jurisdiction to include any relevant remedy pursuant to the Waste Management Act, 1996 as amended for the purposes of procuring an expeditious remediation of the contaminated parts of Folio [REDACTED] known as Landfill A and Landfill B. For the reasons stated above, the order of the trial judge is to be discharged and set aside forthwith.

### **Costs**

**170.** Having regard to the very serious evidence before the court with regard to general non-compliance by the appellants and each of them to the extent of their respective limited ability with the terms of the 2016 order, the appellants, notwithstanding the tenor of the orders to be made herein, are not entitled to their costs. If either party contends for a different order as to costs submissions to be made in writing, not later than 21 days after the date of circulation of this judgment and any response to same being delivered within a further 21 days. Same to be in each case no longer than 2,000 words. The court will consider same and give its ruling thereafter.

**Publication**

**171.** Given that this judgment necessarily refers to information pertaining to the personal circumstances of the appellants and each of them, including [REDACTED], no part of the judgment in its current form is to be published pending further direction of the court without all necessary and appropriate redactions being effected. The parties are afforded 14 days from date of delivery of this judgment to put in writing to the court their proposals as to any aspect or part of this judgment they contend should be redacted ahead of publication of same.

**Mediation**

**172.** Given the history of the litigation and the gravity of the issues it is in the interests of both parties and in the public interest that the parties should give consideration to endeavouring to expeditiously resolving this issue by means of mediation to be effected within 12 weeks of date of delivery of this judgment.

**173.** Donnelly and Faherty JJ. have authorised me to state that they concur with this judgment.