

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2022] IEHC 327  
[2020 No. 74 JR]**

**BETWEEN**

**JAMES BERNARD FLANNERY, JIM NOLAN AND PATSY KEARNS AS TRUSTEES OF KEVIN'S  
GAA**

**APPLICANTS**

**AND**

**AN BORD PLEANÁLA**

**RESPONDENT**

**AND**

**TEMPELOGUE SYNGE STREET GAA CLUB, DUBLIN CITY COUNCIL AND BARRY CARROLL**

**NOTICE PARTIES**

**(NO. 3)**

**AND**

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2020 No. 66 JR]**

**BETWEEN**

**BARRY CARROLL AND BPAC PROPERTY HOLDINGS (IRELAND) LIMITED**

**APPLICANTS**

**AND**

**AN BORD PLEANÁLA**

**RESPONDENT**

**AND**

**TEMPELOGUE SYNGE STREET GAA CLUB**

**NOTICE PARTY**

**JUDGMENT of Humphreys J. delivered on Wednesday the 8th day of June, 2022**

1. In *Flannery v. An Bord Pleanála (No. 1)* [2021] IEHC 140, [2021] 3 JIC 1216 (Unreported, High Court, 12<sup>th</sup> March, 2021), I refused an application for interrogatories.
2. In *Flannery v. An Bord Pleanála (No. 2)* [2022] IEHC 83, [2022] 2 JIC 2504 (Unreported, High Court, 25<sup>th</sup> February, 2022), I granted *certiorari* of the board decision challenged in this case.
3. An issue has now arisen as to costs. The board has proposed an apportionment of costs based on a division between successful and unsuccessful grounds. That exercise was facilitated in this particular case by the fact that the No. 2 judgment itemises 45 points in a Scott Schedule, prepared with the assistance of the parties, of which 13 points were successful.
4. In relation to the three applicants whose cases were heard together, the board accepted an order for full costs in favour of the applicant in the O'Sullivan case who won all of his decided

points and accordingly dropped out of the present matter. The board proposes 57% of costs in favour of the applicant in Flannery and 50% in favour of the applicant in Carroll based essentially on a headcount of points won and lost, and excluding the matters not decided.

5. The board accepted pragmatically for the purposes of the present application that the applicant in Flannery was entitled to rely on European law so that an argument could be made that the approach to apportionment could be influenced by the Aarhus Convention. This avoids the need to discuss what is and is not covered by the Aarhus Convention which thus helpfully allows the matter to actually proceed at the present time (given the state of flux in relation to the understanding of Aarhus at the moment). But I think that such a concession was inevitable given that the action proceeded on the basis of agreement that s. 50B of the Planning and Development Act 2000 applied. The applicants relied on that agreement to advance things to this point so it would be inappropriate to attempt to resile from that now. Quite correctly the board didn't attempt such a doomed exercise.

#### **The costs provisions of the 2000 Act**

6. Sections 50, 50A and 50B of the 2000 Act deal respectively with judicial review of planning matters, supplemental provisions, and costs. As noted above, it was agreed that the matter should be approached on the basis that s. 50B applies here. Sub-section (2) provides that there would be no order as to costs in such cases, subject to sub-s. (2A) which states that "[t]he costs of proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant to the extent that the applicant succeeds in obtaining relief and any of those costs shall be borne by the respondent or notice party, or both of them, to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief." Sub-sections (3) and (4) deal with exceptions which are not relevant.
7. What is important here is that this provision is enabling rather than rigidly dictating the result. It says costs "may" be awarded in proportion to the outcome for the applicant in terms of obtaining relief, but that sort of permissive phrasing doesn't suggest that the court is bound by an absolutely fixed methodological strait-jacket.
8. It seems appropriate to consider the issue of costs here on an assumption that the 2000 Act does correctly transpose the Aarhus interpretative obligation required by EU law, and then revisit that assumption at the end.

#### **The approach to costs in the special context of environmental litigation where the winner loses on some points**

9. The starting point must be a presumption of full costs for the winning party even if they are not wholly successful on all issues.
10. In a commercial context, that is qualified by the approach in *Veolia Water UK Plc. v. Fingal County Council (No. 1)* [2006] IEHC 137, [2007] 1 I.R. 690, whereby in complex cases the court should consider whether the costs were increased by reason of additional issues being

raised which were not successful. That could in appropriate cases lead not just to a deduction from the winner's costs but a cross-order for costs against the winner on the points she lost. The *Veolia* approach is to some extent reflected in s. 169 of the Legal Services Regulation Act 2015 (see for example *Byrne v. Revenue Commissioners (No. 2)* [2021] IEHC 415, [2021] 6 JIC 1702 (Unreported, High Court, Twomey J., 17<sup>th</sup> June, 2021), *Chubb European Group SE v. The Health Insurance Authority* [2020] IECA 183, [2020] 7 JIC 0801 (Unreported, Court of Appeal, Murray J. (Whelan and Power JJ. concurring), 8<sup>th</sup> July, 2020), *Ryanair DAC v. An Taoiseach* [2020] IEHC 673, [2020] 12 JIC 3101, (Unreported, High Court, Simons J., 31<sup>st</sup> December, 2020)).

11. However, some important limitations should be noted.
12. Firstly, it should be emphasised that *Veolia* is not an approach that applies in every case of partial victory. It applies only in complex cases and only then where the losing points added in some substantial way to the costs. It has no relevance to short cases and really only starts to become a factor at all if we get beyond a two-day hearing.
13. Secondly, *Veolia* arose in a commercial context, where it is accepted that private parties may have to pay for every cent they unnecessarily impose on another private party. It does not have an automatic read-across to the totally different context of public law, still less the special context of environmental law. In public law generally there is a certain vindication of the wider interest in requiring public bodies to be put through their paces in respect of substantial grounds of challenge, regardless of the final outcome on any one ground. That is particularly so where the case is not just about a particular decision for the sole benefit or detriment of the applicant, but where broader public considerations arise either by reason of the important issues involved or of the wider interests engaged – such as the environmental concerns that can arise in challenges to development consent decisions.
14. In the latter context, the Supreme Court drew to some extent on *Veolia* in an *ex tempore* ruling in *Connelly v. An Bord Pleanála* [2018] IESC 36, [2018] 7 JIC 3002 (Unreported, Supreme Court, Clarke C.J. (O'Donnell, Dunne, O'Malley and Finlay Geoghegan JJ. concurring), 30<sup>th</sup> July, 2018). A couple of points were noteworthy in relation to that ruling.
15. Firstly, the matter doesn't seem to have been argued in great detail in the sense that there is no reference to either s. 50B of the 2000 Act or more importantly to the Aarhus Convention.
16. Secondly, *Connelly* itself seems to implicitly recognise the need for a softer version of *Veolia*, if that approach is to be applied in the environmental context, because in that ruling the Supreme Court did not introduce the possibility of the cross-order against an environmental applicant, perhaps reflective of the broad and generous approach to costs in this particular area. Nor did the board argue in the present case that there could be any form of cross-order.
17. Thirdly, the Supreme Court in para. 7 noted that the purpose of the possibility of some form of apportionment was to avoid "significantly increasing the costs and the amount of court time

and resources which require to be deployed in resolving the case” – thus expressly highlighting that the impact of costs rules on the courts system was a factor as opposed to just the impact on the other side. That impact must ultimately be judged on the basis of the effect of any given approach on the system overall rather than by viewing any one given case in isolation.

18. This is reinforced by what the court went on to say at para. 8 that: “an overly meticulous approach to identifying the precise issues or variations on issues, which were canvassed. To take that approach would be counterproductive in that it would turn every costs application into a major further hearing resulting in even more costs. In that context it is worth noting that the hearing this morning took over an hour.” That is bad enough at Supreme Court level, but it becomes hugely more complex at first instance level where elaborate procedures for leave to appeal can then be triggered.
19. A further important point in relation to *Connelly* is to examine the extent to which the applicant was unsuccessful in that particular case, which sets the context for the ruling on costs.
20. In the principal judgment, *Connelly v. An Bord Pleanála* [2018] IESC 31, [2018] 2 I.L.R.M. 453, Clarke C.J. noted that “the central issue with which the High Court was concerned, and also the central issue with which this Court is concerned on this appeal, relates to the question of whether, at least in very general terms, adequate reasons were given by the Board in its decision” (para. 1.3). On that central issue the Supreme Court reversed the finding by the High Court (Barrett J.) and found that, generally, adequate reasons had been given.
21. If one looks at the ten grounds of appeal (conveniently, for present purposes, set out in full at para. 2.3 of the principal judgment) and compares that to the result, on one view the board won on nine of them and the applicant ultimately succeeded on only one of those grounds, and even that one was expressly stated to be not the “central issue”. Yet in the costs ruling she was to get 75% of her costs.
22. We need to keep that context firmly in mind when coming to the Supreme Court’s comment in the costs ruling that parties should be discouraged from “throwing the kitchen sink into every case”, substantially qualified “by reference to the fact that an otherwise successful party should not be deprived of full costs unless it can be shown that it is clear that the raising of unmeritorious points added materially to the overall cost of the proceedings” (para. 8).
23. Discounting a winning party’s costs by reference to some unsuccessful points, particularly outside the purely commercial context, may be more appropriate (assuming it is allowed by Aarhus – an assumption I will return to) when there is a very wide gulf between the actual case and what the hearing would have looked like if it were confined to the points that got over the line.
24. To give some examples in terms of the general approach of looking to see what a hearing would have looked like on that alternative hypothesis, this was the approach I took in *In re Star Elm Frames Ltd. & Companies Act 2014* [2016] IEHC 666, [2016] 10 JIC 0313

(Unreported, High Court, 3<sup>rd</sup> October, 2016), where certain directors made losing submissions but those were made briefly and did not add to the length of the proceedings, so even though those directors were unsuccessful, I thought that no order for costs against them was appropriate (para. 48). An order for costs was made against the liquidator on foot of among other things a comparison of the actual three-day hearing with the likely much shorter half-hour hearing that would have happened but for his intervention. That comparison was specifically referred to by the Court of Appeal in affirming that order: *In re Star Elm Frames Ltd. v. Fitzpatrick* [2018] IECA 103, [2018] 4 JIC 1905 (Unreported, Court of Appeal, Peart J. (Irvine and Gilligan JJ. concurring), 19<sup>th</sup> April, 2018) at para. 38. Similarly in *N.B. v C.B.* [2020] IEHC 216, [2020] 5 JIC 0603 (Unreported, High Court, 6<sup>th</sup> May, 2020) at paras. 42 to 45 I compared the actual 7 hour hearing with the one hour that would have been consumed had the moving parties limited themselves to points they made any headway on, and discounted one-seventh of the costs of the party that carried the main event, an approach that was deemed acceptable by the Court of Appeal: *E. and F. v G. and H.* [2021] IECA 108, [2021] 4 JIC 1301 (Unreported, Court of Appeal, Whelan J. (Edwards and Ní Raifeartaigh JJ. concurring), 13<sup>th</sup> April, 2021), paras. 129 and 130. These are examples, for what they are worth, of situations where there is a wide gulf between what the hearing should have looked like and what it did look like. Such a major difference can have a costs relevance that a more modest distinction would not.

25. Returning to the Supreme Court's point about the strain on the courts system, I think there is a need to look in more detail at the issue of the workability of rules on environmental costs from a practical point of view, as that court emphasised. Nor should we overlook the benefits to the system that environmental litigation can bring. Obviously development can have benefits as well, although those are fairly well spoken for already in the caselaw and otherwise.
26. The applicants in *Flannery* argue that the general law in relation to apportionment of costs should not apply to environmental cases submitting that:

"... environmental litigation is considered to be a positive influence on society, not a negative one: the general perception that litigation should be discouraged has no place in the Aarhus Convention. Indeed, more than being a right, it is a duty of the citizen to protect and improve the environment, and access to justice must be available to her for that purpose. That duty of participation extends to all decisions affecting the environment and sustainable development. The 1992 Rio Declaration confirms that sustainable development is "an integral part of the development process and cannot be considered in isolation from it." (Principle 4.) The Brundtland Commission report says, "1. Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs." (Report of the World Commission on Environment and Development: *Our Common Future*, 1987.) The 2000 Act is an Act to secure proper planning and sustainable development (according to its long title, S9 on development plans, and S34 on grant of permission.) In the context of an environment crisis and a biodiversity crisis, facilitating

litigation that aims to promote sustainable development, even if just by ensuring that authorising authorities properly apply the law, is more than just a feelgood objective; it is an existential requirement for society. ...

It may be noted that this is not the case with litigation generally. In *SPV Osus v HSBC* [*SPV Osus Ltd v. HSBC Institutional Trust Services (Ireland) Ltd.* [2018] IESC 44, [2019] 1 I.R. 1] the Supreme Court examined whether it should be possible for a litigant to assign a claim to a third party. O'Donnell J stated that, "since the significant restriction of legal aid in the United Kingdom, it has been permitted to seek a significant uplift in fees when a successful claim has been brought on a 'no foal, no fee' basis or to enter a conditional fee agreement, but a simple percentage contingency, and moreover one taken from the successful plaintiff, remains improper, certainly in this jurisdiction." (§92.) He noted that litigation is not in itself a good thing. It is not a commodity to be traded and encouraged. Rather "it is necessary for the administration of justice. This, at its core, involves the resolution of disputes between citizens and others because those parties consider that they have been wronged, and have no other method of vindicating their rights. It would be foolish not to recognise that the practice of law is a business, but the administration of justice is not." (§94) Litigation should be engaged in as a last resort. "Litigation is not a desirable activity in itself, although preferable to the alternative. The administration of justice is a public service which is justified by the necessity of providing a method a fair resolution of disputes between parties. In civil cases, it involves the awarding of remedies by way of compensation for a wrong to the person who has been determined to have suffered that wrong. Indeed, this can be seen perhaps as a performance of the State's obligation to vindicate the rights of the citizen in the case of injustice done." (§99.)".

27. I agree that environmental litigation is not inherently a bad thing in the same sense that other litigation is in principle undesirable. It is a necessary check and balance in modern society, and particularly important given the growing importance of environmental considerations in international and EU law. Thus, like public interest law generally, it is akin to other aspects of our system that operate as a counterweight to institutional forces, so that wide standing rules and costs protection in environmental cases sit alongside principles such as protection of NGOs from victimisation under Aarhus, FOI and freedom of environmental information rules, ethics and protected disclosures legislation, constitutional freedom of the press and of civil society, mechanisms for scrutiny of decision-making such as parliamentary questions and committees – the list goes on.
28. Assuming it is permissible under Aarhus (to which we will return), the problem with a simplistic and generalised application of the possibility of discounting costs when a winning environmental litigant loses on some points is that such an approach assumes that there is no friction in getting to the point of the correct apportionment. But such an assumption is incorrect.

29. O'Donnell J. made the important point in *Quinn Insurance Limited (Under Administration) v. PricewaterhouseCoopers* [2021] IESC 15, [2021] 1 I.L.R.M. 253 at para. 10, that:

“The progress of the law often involves the reduction of complex theories, or apparently wide discretion, to clear rules which can be readily applied. This is, in general, a beneficial process. As was once said, there are many areas where it is more important that the law be clear rather than clever. If parties have a shared understanding of the manner in which the law will be applied, they can order their affairs accordingly and avoid the stress, delay, cost and uncertainty involved in legal proceedings where the outcome cannot be predicted with confidence. But the rules of thumb to which a broad discretion can be reduced must be applied with an understanding of the overall objective sought to be achieved, and for which the discretion is granted.”

30. From a first instance perspective can I be permitted to respectfully celebrate that penetrating insight. Progress must be equated with both clarity of the rules and the practicality of their implementation. One downside of the otherwise laudable common law system is that cases tend to be looked at in isolation. But one needs to consider whether any given decision makes sense in a fully joined-up systemic approach. And at the systemic level, the crucial point on which the whole present judgment turns is this - if the board can generate an argument as to why it should not pay full costs in an individual case where applicants won most of their points (as here), then it is going to be able to generate that argument in the vast majority of cases. Let's think about what that would look like.
31. First of all, this involves (as here) detailed written legal submissions from the board and from all applicants involved. It involves time being found for a hearing and brief fees and instruction fees accordingly on all sides. The court is then compelled to expend its finite physical and mental resources in grappling with the issues and in producing a judgment, which in this case is the stage we are now at. (If anyone is interested, this involved eight drafts which is somewhat more than usual.) But that's only the start of it. The judgment by design and inevitability will not please everybody so we then come to the detailed written legal submissions from the board and applicants and possibly other parties as to why there should be leave to appeal to the Court of Appeal. That then again involves finding a hearing date, brief and instruction fees on all sides, the court having to draw further from its now dwindling resources to get through a further hearing and produce a further judgment. That will result inevitably in either a full hearing in the Court of Appeal, followed no doubt by an application for leave to appeal to the Supreme Court by whoever loses there, or alternatively a leapfrog appeal to the Supreme Court regardless of the decision on whether there should be leave to appeal to the Court of Appeal. Even if the Supreme Court shuts the door on that, it requires substantial paperwork and legal engagement on both sides even to get to that point, let alone it being another item on the Supreme Court's to-do list. That's all bad enough in one case - but multiply that by the 81 cases currently live at time of writing in the Commercial Planning and SID list, a number that has been growing all the time over the past two legal years, not

to mention the other planning cases in the judicial review list, and pretty soon we might have a problem.

32. The incentives here do not favour discounting as some sort of general approach. Unlike in commercial cases, there is never going to be anything like the same level of deterrent for applicants to deter them from litigating the issue of costs all the way to the Supreme Court, Luxembourg, Strasbourg, and the Aarhus Convention Compliance Committee in Geneva if needs be, since the costs of the costs issue can never be prohibitively expensive. With rules of the game that create those sort of incentives, in the event that anybody in the board's position (or even, dare I say, in my position) were to have the conceit that, in the environmental litigation context, they could heroically reduce costs, judicial effort and hearing times and disincentivise applicants by discounting the winner's costs, they might and almost certainly will be setting themselves up for disappointment.
33. The broader context here is that environmental and planning law is highly complex compared to other areas, and imbued with an evolving overlay of EU law as well as domestic law – a context the board possibly could be tempted to highlight if asked to explain why it is not winning all its cases. But that also means that, at least while the law is in its current state of flux, applicants can be somewhat handicapped in identifying with reasonable confidence exactly what are more likely to be the winning points – albeit a difficult job in any litigation context. If anyone doubts the current state of flux in planning law, it might be educational to point out that in the last four months, the Supreme Court has granted leave to appeal to it in more cases against the board than were granted during the first four legal years of the leave to appeal system (the nine recent cases are [2022] IESCDET 21 (Hellfire), 30 (Glann Mór), 31 (Waltham Abbey), 32 (Pembroke Rd), 42 (Ballyboden), 57 (Save Cork), 66 (Heather Hill), 67 (Protect East Meath) and 68 (Enniskerry Alliance)), compared to eight cases in the years 2014-15 to 2017-18: [2016] IESCDET 29 (Grace) and 92 (Sweetman), [2017] IESCDET 19 (Sweetman), 32 (Callaghan), 57 (Connelly) and 102 (North Kerry Wind), [2018] IESCDET 61 (Fitzpatrick) and 82 (North East Pylon)).
34. The practical reality is that in cases where an applicant falls somewhat short of full success, but not so far short as to make it obvious that a discount is required (subject to whether the Aarhus interpretative obligation kicks in in that scenario), the costs saving to the board of obtaining any modest discount is outweighed by the additional costs of litigating that issue, even at first instance, let alone on appeal. The present case is such an example. The best the board could realistically hope for in the present cases (especially as there is no way that the hearing would have been less than 3 days on any scenario compared to the actual 4 days) would be something in the order of a 25% discount. But it has probably spent a fair portion of that already in litigating the discounting issue, and is going to be spending much more if it pushes that claim to the maximum on appeal. The bonus from the board's point of view is that that money would go to its own lawyers rather than to the applicants, thereby creating a disincentive to environmental litigation, which sceptics might suspect to be not be wholly disconnected from the real purpose of the exercise.



35. It's tempting to say that since the applicant in *Connelly* won 10% of her case and got 75% of her costs, anyone who wins 13.3% or more of an environmental case should get 100% of their costs. But obviously I'm not going to be that simplistic. What I would say however is that in order to justify the downsides of the discounting exercise and to overcome all of the factors that apply in the special context of environmental litigation covered by s. 50B of the 2000 Act or the Environment (Miscellaneous Provisions) Act 2011 (which are specifically and expressly excluded by the Legal Services Regulation Act 2015 s. 169(5)), a discount (assuming it is permitted by Aarhus) should normally only be considered if an applicant falls significantly short of winning the majority of her significant and decided points, best judged in the first instance with due regard to the amount of space devoted to those points in the principal judgment of the court concerned.
36. Neither applicant here is in that category. On the board's own analysis the applicants in Flannery won a majority of their decided points and the applicants in Carroll won half their decided points. That constitutes substantial success which doesn't pressingly compel the court to require any discounting especially given the costs likely to be incurred if the courts are going to be compelled to undertake such an exercise, the special context of environmental litigation, and indeed on the particular facts here the point that the applicants ran their case in an efficient manner.
37. As far as the hearing is concerned, it should be repeated that all three cases were heard in a single hearing over 4 days. That is compactness in itself, much of which is down to the requirements of recent Practice Directions in the list issued by Irvine P. which have had the overall effect of reducing hearing times, and therefore costs, very significantly. It could legitimately be said that the board can regard that saving as money in its pocket already in relation to this case among others. The best available record is that time was consumed by the applicants (including replies) is as follows:
- applicant in O'Sullivan (worth mentioning for comparison), two hours and ten minutes;
  - applicants in Flannery, three hours;
  - applicants in Carroll, one hour and fifty minutes.
38. It must be understood that that is somewhat approximate and that some slightly different calculations were offered, but the foregoing is based on the record kept by the List Registrar, combined my own note, and I think is the best available record. Lawyers who may be aware of more leisurely presentations in other cases will no doubt be struck by how compact all of the submissions on the applicants' side were. The 12-day hearing in *Joyce-Kemper v. An Bord Pleanála* [2020 No. 22 JR] would not have been that unheard-of prior to recent Practice Directions. Focused advocacy is generally effective advocacy, and shorter hearing times benefit all participants. What happened in this case, at least at the hearing, couldn't be

regarded as kitchen-sinking by any means in the sense meant by the Supreme Court in *Connelly*.

39. In fairness to the applicants, one could mention in passing that the board's submissions took almost two days by comparison. That isn't criticism obviously; no-one could have presented the board's case more skilfully or helpfully to the court than their lawyers here.
40. Finally, it's perhaps worth pointing out, especially if I am wrong about everything else, that in a multi-handed hearing, any given applicant is only responsible for the time they themselves consume. So even if one given applicant was a bit over-loquacious, which I don't accept, that didn't make much of a difference here because any one party can't be held responsible for other people's time consumption. All parties had to be present throughout given the nature of the hearing involving three cases being dealt with together. It wouldn't be fair to discount Party A's costs because of Party B's loquaciousness over which Party A had no control.
41. I appreciate that the board is also making a point about unsuccessful points raised in paperwork – the hearing isn't everything – but on the costs menu it is generally the main course. There were not so many unsuccessful points raised in paperwork as to push the applicants into a situation where the large majority of their points failed or where it would be necessary to disallow some of their costs. In the paperwork context anyway, most papers would have to be submitted in any event, such as statements of grounds, affidavits, written submissions. Maybe the content would be less complicated but much of the cost would be incurred on any scenario.
42. And before concluding under this heading it is important to record that the applicants in Flannery had a fall-back argument that in the light of the fact that Aarhus wasn't argued in the costs ruling in *Connelly*, if and insofar as discounting is envisaged by *Connelly*, this could create a breach of Aarhus. That argument now largely doesn't arise, because even applying *Connelly* here I don't think there is a compelling case for me to be required to exercise my costs discretion to demand discounting, so I don't need to consider any point not argued or decided in *Connelly* in that regard. The Flannery applicants have ensured however that things just couldn't be left as being that simple though, because I have to add that there is a complication in respect of one point to which I will now turn.

#### **The costs of the interlocutory application**

43. The failed interlocutory application in Flannery is a different matter and lends itself to being discounted from the general costs order on an application of *Connelly*. That unfortunately *does* potentially raise the question of whether such a discount would trigger an Aarhus issue that, not being argued or decided in *Connelly*, could arguably now be advanced in respect of this relatively small part of the costs. That potentially involves quite a degree of procedural complication and argument which I am not sure was wholly developed at the hearing.
44. The immediate problem for the applicants is that there isn't really much in the way of an evidential basis for this claim. But before making a final decision on that point I think it would

be desirable to have further focused submissions on what exactly would be the essential factual proofs, if any, before such a legal point could be made, if the applicant wishes to pursue this point in the light of the present judgment. The parties might endeavour to agree a sequence for short submissions on this point, preferably to be delivered before the next mention date.

**Order**

45. For the reasons outlined, the order will be as follows:

- (i). in the Flannery case, that:
  - (a). the board will be ordered to pay the applicants the costs of the proceedings including reserved costs and the costs of written submissions but excluding the costs associated with the interlocutory application;
  - (b). the application for the costs associated with the interlocutory application against the board will be adjourned;
  - (c). the parties provide further written submissions as set out in the judgment if the applicant intends to pursue the costs associated with the interlocutory application;
- (ii). in the Carroll case, that the board will be ordered to pay the applicants the costs of the proceedings including reserved costs and the costs of written submissions;
- (iii). that the cases be listed for mention only on Monday the 20<sup>th</sup> of June, 2022 to consider how to deal with the costs of the interlocutory matter in Flannery, the costs of the costs hearing, and any consequential directions.