

**THE HIGH COURT  
JUDICIAL REVIEW**

[2022] IEHC 6

[2021 No. 846 JR]

**IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT  
ACT 2000 AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING)  
AND RESIDENTIAL TENANCIES ACT 2016**

**BETWEEN**

**ENNISKERRY ALLIANCE AND ENNISKERRY DEMESNE MANAGEMENT COMPANY CLG  
APPLICANTS**

**AND**

**AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL  
RESPONDENTS**

**AND**

**CAIRN HOMES PROPERTIES LIMITED  
NOTICE PARTY**

**AND**

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021 No. 770 JR]

**IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT  
ACT 2000 AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING)  
AND RESIDENTIAL TENANCIES ACT 2016**

**BETWEEN**

**PROTECT EAST MEATH LIMITED  
APPLICANT**

**AND**

**AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL AND LOUTH COUNTY  
COUNCIL  
RESPONDENTS**

**AND**

**HALLSCOTCH VENTURE LIMITED  
NOTICE PARTY**

**JUDGMENT of Humphreys J. delivered on Friday the 14th day of January, 2022**

1. "Who speaks for Earth?" was the question famously posed by Carl Sagan (*Cosmos* (London, Book Club Associates, 1980) p. 317). Advocate General Kokott in Case C-260/11 *Edwards v. Environment Agency*, provided one answer: "the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations" (Opinion of Advocate General, 18th October, 2012, ECLI:EU:C:2012:645, para. 42).
2. But the ability of concerned NGOs and individuals to litigate on environmental matters is in practice crucially dependent on a range of preconditions. The most basic is a society that repudiates attacks on their physical security – in that regard, while I was initially minded, without in any way reflecting on causation, motive, or *mens rea*, to illustrate that possible concern by reference to a specific unsolved incident, the State have asked me not to do so in this particular judgment, and the other parties were broadly neutral on that request.

3. Another precondition is a society that accepts the respective roles of the actors involved in environmental matters, including the right of applicants to invoke rights under the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus on 25 June 1998, and related rights under Irish and EU law and the ECHR. Acceptance of such rights involves not just rejection of penalisation prohibited by the Aarhus Convention, or incitement to such penalisation and other related inchoate wrongs, but more generally repudiating applicant-shaming in cases where such rights are exercised (see *An Taisce v. An Bord Pleanála (No. 2)* [2021] IEHC 422, [2021] 7 JIC 0205 (Unreported, High Court, 2nd July, 2021), *Save Cork City Community Association CLG v. An Bord Pleanála (No. 1)* [2021] IEHC 509, [2021] 7 JIC 2802 (Unreported, High Court, 28th July, 2021), *Cork County Council v. Minister for Housing, Local Government and Heritage* [2021] IEHC 683, [2021] 11 JIC 0502 (Unreported, High Court, 5th November, 2021)).
4. An important practical condition is the availability of a sufficient pool of sufficiently expert legal practitioners willing to take on such cases. That in turn raises the delicate question of whether a hypothetical lack of normal costs recovery, resulting in a solicitor-client balance in excess of that normally arising that would be unrecoverable from the other side and that would remain owing by applicants, could either be prohibitively expensive in itself for applicants or could compromise the applicable business model to an extent that would generally tend to diminish the willingness of lawyers to act in such matters. Thankfully this issue doesn't arise in the present case so I don't have to address it further other than noting it as another aspect of the not-prohibitively-expensive issue that may need to be considered in due course.
5. What does arise in this case is the entitlement of applicants to bring proceedings without the fear of adverse costs orders or at least adverse orders that reach the level of being prohibitively expensive. The Court of Appeal has recently addressed the extent to which applicants are so liable in *Heather Hill Management Company CLG v. An Bord Pleanála* [2021] IECA 259 (Unreported, Court of Appeal, Costello J. (Ní Raifeartaigh and Pilkington JJ. concurring), 14th October, 2021), and needless to say the starting point would be one of reluctance to re-visit any such questions in the light of that recent and authoritative legal development.
6. However, the applicants here have strenuously advanced a series of fresh arguments, particularly ones of EU law, that don't seem to have been made in those terms to the Court of Appeal in *Heather Hill*. The book of authorities provided to that court in that case has been helpfully made available to me and it is clear that a number of important authorities and international materials relied on in the present case are not included. The applicants submit that the points raised by this additional material may require clarification at EU level by the CJEU. It doesn't take from the hierarchical system or the principle of *stare decisis* for applicants in a new set of proceedings, who were not involved in a previous case, to draw attention to new material, thereby in effect invoking the doctrine articulated by the Supreme Court in *The State (Quinn) v. Ryan* [1965] I.R. 70, that "a point not argued is a point not decided" (*per* Ó Dálaigh C.J. at p. 120). And indeed it is also an inescapable

feature of the European architecture that only Luxembourg's determination of an EU law point is finally determinative. So the views of *any* domestic court on interpretation of EU law could potentially be revisited on foot of a subsequent reference in a later case: see *Balscadden Road SAA Residents Association Ltd. v. An Bord Pleanála (No. 2)* [2021] IEHC 143, [2021] 3 JIC 1217 (Unreported, High Court, 12th March, 2021).

### **Facts**

7. Before the court are motions seeking orders at the outset of proceedings as to the rules that will be applicable regarding liability for costs in two challenges to two separate developments:
  - (i). in Enniskerry, the construction of 165 residential units, a child care facility and associated works at Cookstown Road, Enniskerry, Co. Wicklow in respect of which the board granted permission on 13th August, 2021; and
  - (i). in Protect East Meath, the construction of 275 apartments, a crèche and associated site works on lands adjacent to Scotch Hall Shopping Centre, Marsh Road, Drogheda, Co. Louth which is the subject of a permission granted by the board on 29th June, 2021.
  
8. While declarations are in one sense a form of substantive relief, not normally to be sought by interlocutory motion, nobody suggested that the grant or refusal of a declaration in such circumstances was inappropriate at a preliminary stage such as here. We will return later to the point made by Hogan J. in *McCoy v. Shillelagh Quarries Limited* [2015] IECA 28, [2015] 1 I.R. 627, that a determination as to special costs rules is "in the nature of a final order", but having regard to that approach it makes sense for that determination, albeit at an interlocutory stage, to be embodied in a formal and final declaration. Conceptually the entitlement to grant a final declaration regarding a procedural matter on an interlocutory motion is a more satisfying way of analysing this procedure, rather than the alternative approach of considering the present motion as a kind of front-loaded module of the substantive hearing. Admittedly the statements of grounds seek orders in relation to the application of costs rules as well as seeking *certiorari* (although that wasn't necessary because you don't need to claim interlocutory relief in a statement of grounds), but if such relief is viewed as substantive (contrary to my views) then by having a hearing on that issue one could be viewed in a sense as isolating and accelerating that aspect of the substantive case and hearing it as an initial module. To analyse the matter thus would be to suggest that in an absolutely perfect procedural world, the board and notice parties should have filed modularised statements of opposition limited to the costs declaration issue. Even if I am wrong that the present applications can be considered a valid consideration of final declaratory relief on an interlocutory motion, and thus if the hearing has to be considered as a first module of the substantive claim, I am certainly not going to hold the academic point of a lack of statements of opposition against the opposing parties. Essentially everybody acquiesced to these issues being determined by interlocutory motion and that is how I propose to proceed.

9. Environmental impact assessment (EIA) was required in the Enniskerry case, but was screened out in Protect East Meath. Appropriate assessment (AA) was not required in either case.
10. In the Enniskerry case, a pre-application consultation occurred on 9th July, 2020 at which representatives of the developer, the local authority and board were present. This resulted in an inspector's report dated 6th October, 2020 that indicated that the proposed application required amendment.
11. The amended application was submitted by the notice party on 28th April, 2021. The application included a material contravention statement that noted contravention of building heights set out in the county development plan, but asserted that this could be justified by reference to Ministerial Guidelines on *Urban Development and Building Heights*.
12. The inspector recommended that planning permission be granted subject to 20 conditions on 30th July, 2021. The board granted permission on 13th August, 2021.
13. In Protect East Meath, a pre-application consultation occurred on 23rd August, 2019 following which the inspector reported that the application required amendment. The amended application was submitted on 11th March, 2021. Ultimately, on 23rd June, 2021 the inspector recommended that planning permission be granted subject to 31 conditions. The board granted permission on 29th June, 2021.

#### **Grounds of challenge**

14. Before specifying the relevant grounds I should record that on 1st November, 2021, I adjourned the Enniskerry case generally as against the State and I made the same order in Protect East Meath on 15th November, 2021. For clarity, on 21st December, 2021 I adjourned Protect East Meath generally as against Louth County Council, which was a logical consequence of the adjournment as against the State.
15. Hence the present judgment doesn't need to deal with any of the grounds so adjourned, and is limited to the currently live grounds.
16. The applicants argue that if any part of the case is covered by special costs rules, then the entire case should be so covered, but I would reject that approach as being without basis in the caselaw, whether domestic or European. Rather the position is, as insightfully put by the notice party in Protect East Meath, that the assessment of costs rules is "like a discovery application". In other words, one has to go through the grounds on a point-by-point basis to see whether special costs rules apply under each individual heading.
17. In conducting such an exercise, it is, therefore, essential to set out the core grounds concerned (excluding grounds adjourned to a later module).
18. The relevant core grounds in Enniskerry are as follows:

#### **"Domestic law grounds**

- (i). The decision to grant planning permission dated 13th August 2021 ('the impugned decision') is invalid because the proposed development constitutes a material

contravention of Zoning Objectives R10 and R20 of the Bray Municipal District Local Area Plan 2018-2024 ('the LAP') and/or in relation to the zoning of the land contrary to the requirements of §9(6)(b) of the Planning and Development (Housing) and Residential Tenancies Act 2016 ('the 2016 Act'), further particulars of which are set out in Part 2 below.

- (ii). The impugned decision is invalid because the proposed development constitutes a material contravention of Zoning Objective OS1 of the LAP contrary to the requirements of §9(6)(b) of the 2016 Act, further particulars of which are set out in Part 2 below.
- (iii). The impugned decision is invalid as the Board erred in failing to consider that the proposed development constituted a Material Contravention of Objective R6 of the LAP and/or in the alternative, was a grant made in material contravention of the LAP that was not made in accordance with section 9(6)(c) of the 2016 Act, further particulars of which are set out in Part 2 below.
- (iv). The impugned decision is invalid as the Board erred in failing to consider that the proposed development constituted a Material Contravention of Table 7.1 of the Development and Design Standards of the Wicklow County Development Plan 2016-2022 ('the CDP') and/or or in the alternative, was a grant made in material contravention of the CDP that was not made in accordance with section 9(6)(c) of the 2016 Act, further particulars of which are set out in Part 2 below.
- (v). The impugned decision is invalid as the Board erred in failing to consider that the proposed development constituted a material contravention of Section 6 of the Development and Design Standards of the CDP in relation to Childcare facilities and/or or in the alternative, was a grant made in material contravention of the CDP that was not made in accordance with section 9(6)(c) of the 2016 Act, further particulars of which are set out in Part 2 below.
- (vi). The impugned decision is invalid as the Board erred in failing to consider that the proposed development constituted a material contravention of Objective N19 of the CDP in relation to hedgerows and/or or in the alternative, was a grant made in material contravention of the CDP that was not made in accordance with section 9(6)(c) of the 2016 Act, further particulars of which are set out in Part 2 below.
- (vii). The impugned decision is invalid in that it contravenes the requirements of section 37(2)(b)(i) of the Planning and Development Act 2000 as mandated by section 9 of the Planning and Development (Housing) and Residential Tenancies Act 2016 ('the 2016 Act') in that the Board did not identify any or any adequate basis for its conclusion that the proposed development was of strategic or national importance as required by that section and/or the Board's Order contains a material error of fact, further particulars of which are set out in Part 2 below.

- (viii). The impugned decision is invalid as the Board breached the Applicant's rights to fair procedures and reasoned decision making in its assessment of traffic impacts from the proposed development on the greater Enniskerry area, further particulars of which are set out in Part 2 below.
- (ix). The impugned decision is invalid in that it contravenes Article 12 of the Habitats Directive and/or Article 27 of the European Communities (Birds and Natural Habitats) Regulations 2011 ('the Habitats Regulations') as it failed to apply the correct legal test in respect of bat fauna that are entitled to strict protection and/or reached a conclusion that was not supported by the evidence before it and/or that was contrary to the requirements pursuant to the EIA Directive for the purposes of section 172 of the 2000 Act, further particulars of which are set out in Part 2 below."

19. The relevant core grounds in Protect East Meath are as follows:

**"DOMESTIC LAW GROUNDS**

- (i). The decision to grant planning permission dated 29th June 2021 (ABP Ref ABP-309668-21) ("the impugned decision") is invalid in that it stated that the grant of permission was in material contravention of density standards in *inter alia* Table 6.2 and Policy HC 17 of the Drogheda Borough Council Development Plan 2011-2017 ('the DBCDP'). The Statement of Material Contravention did not identify this material contravention in breach of section 8(1)(a)(iv)(II) of the Planning and Development (Housing) and Residential Tenancies Act 2016 ('the 2016 Act'). The Planning Report & Statement of Consistency (§11.2.8) contained a material error of fact which indicated that the proposed development had applied the appropriate density standards, including HC17 referring to the original version of the DBCDP . The Board's assessment for the purposes of section 37(2)(b) of the Planning and Development Act 2000 ('the 2000 Act') is therefore *ultra vires* and/or vitiated by material error and/or it took into account irrelevant considerations and/or failed to take into account relevant considerations in that it granted planning permission for development that materially contravened a provision of the development plan which was not notified to the public and/or relied on the incorrect version of the DBCDP, further particulars of which are set out in Part 2 below.
- (ii). The impugned decision is invalid because it granted planning permission for development in material contravention of the requirements of Policy HC 19 of the DBCDP (as amended). The Statement of Material Contravention did not identify this material contravention of the development plan in breach of section 8(1)(a)(iv)(II) of the 2016 Act. The Board acted *ultra vires* in breach of section 9(6)(c) of the 2016 Act in granting permission for development in material contravention of the development plan which was not notified to the public and/or without considering whether such material contravention could be justified by reference to the requirements of section 37(2)(b) of the 2000 Act, further particulars of which are set out in Part 2 below.

- (iii). The impugned decision is invalid in that granted planning permission in material contravention of the zoning objective "TCd" of the DBCDP – *to provide for a mix of new town centre activities in accordance with Docklands Area Plan* and the requirements of §§3.3.1 and 4.7 of the Drogheda Docklands Area Plan 2007 ('the DDAP'). The Board acted *ultra vires* in breach of section 9(6)(c) of the 2016 Act in granting permission for development in material contravention of the development plan which was not notified to the public and/or without considering whether such material contraventions could be justified by reference to the requirements of section 37(2)(b) of the 2000 Act, further particulars of which are set out in Part 2 below.
- (iv). The impugned decision is invalid because the Developer failed to comply with Regulation 299B(1)(b)(ii)(II)(C) of the Planning and Development Regulations 2001 ('the 2001 Regulations'), as the required statement was not submitted to the Board and therefore the Board was obliged but failed to refuse to consider the application, further particulars of which are set out in Part 2 below.
- (v). The impugned decision is invalid because the Board incorrectly found that the requirements of section 37(2)(b)(i) of the Planning and Development Act 2000 as required by section 9(6)(c) of the 2016 Act were satisfied in that the Board did not identify any or any adequate basis for its conclusion that the proposed development was of national and strategic importance as required by that section, further particulars of which are set out in Part 2 below.

#### **EUROPEAN LAW GROUNDS**

- (vi). The impugned decision is invalid in that it planning permission was granted in contravention of Article 12 of the Habitats Directive, Article 299(C)(1) of the 2001 Regulations and/or Article 27 of the European Communities (Birds and Natural Habitats) Regulations 2011 ('the Habitats Regulations') as it failed to apply the correct legal test in respect of bat fauna that are entitled to strict protection and/or the preliminary examination EIA determination was based on inadequate information submitted by the developer contrary to Article 4(4) of the EIA Directive, further particulars of which are set out in Part 2 below."
20. These core grounds are then backed up with more detailed sub-grounds, but the foregoing I think will provide a sufficient outline of the matters to which the present application relates.
  21. I should also note at this juncture that in relation to Protect East Meath, the notice party claimed that core ground 4 had no basis and did not even get off the ground, because the inspector was satisfied that there was a statement under art. 299B of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001). However, at this early stage of proceedings, such an argument can't be regarded as conclusive. It is open to the applicants to argue that the board's acceptance of the inspector's approach in holding that art. 299B was satisfied does not amount to not full compliance with the legislation, particularly having regard to *Waltham Abbey Residents Association v. An Bord Pleanála* [2021] IEHC 312, [2021] 5 JIC 1002 (Unreported, High Court, 10th May, 2021) and *Waltham Abbey Residents*

*Association v. An Bord Pleanála (No. 2)* [2021] IEHC 597, [2021] 10 JIC 0702 (Unreported, High Court, 7th October, 2021), subject to appeal. All an applicant has to do at the protective costs stage is to make out a stateable argument as opposed to one that is likely to succeed: see the judgment of Murray J. (Whelan and Noonan JJ. concurring) in *O'Connor v. Offaly County Council* [2020] IECA 72, [2020] 3 JIC 2001 (Unreported, Court of Appeal, 20th March, 2020).

22. The applicants in each case brought notices of motion returnable for 15th November, 2021 seeking declarations that special costs rules apply. The parties then completed Scott Schedules which showed considerable disagreement regarding the application of such costs rules in relation to each individual ground. In summary, and excluding matters that have been modularised for later consideration, the position is as follows:
- (i). In Enniskerry, there was disagreement on core grounds 1 to 8, but it was agreed by the board and notice party that there should be no order as to costs if the applicant loses on core ground 9. The fact that the parties weren't agreed as to the legal basis if any for that order (the board said it was agreeing to this "for pragmatic reasons") doesn't matter because I don't need to decide that.
  - (ii). In Protect East Meath, there was disagreement on core grounds 1 to 3 and 5.
  - (iii). As regards core ground 4, the board was prepared to concede no order as to costs but the notice party was not, and it maintained that stance at the hearing. Hence I do need to consider that point.
  - (iv). As regards core ground 6, the board was again prepared to concede no order as to costs but the notice party disputed that in the Scott Schedule. At the hearing however, the notice party pragmatically softened that stance and the upshot was that all parties ultimately agreed to no order as to costs if the applicant was unsuccessful on core ground 6. Thus I don't need to consider the legal basis if any for a consent order of that type.
23. It seems to me that the matters that now fall for consideration are best analysed by considering the possible headings under which special costs rules might apply as follows:
- (i). no order as to costs under s. 50B of the Planning and Development Act 2000;
  - (ii). no order as to costs under the Environment (Miscellaneous Provisions) Act 2011;
  - (iii). not prohibitively expensive costs under EU rules on public participation; and
  - (iv). not prohibitively expensive costs under the Aarhus Convention as applied to national environmental law grounds via an EU law interpretative obligation.

**Section 50B**

24. Section 50B of the Planning and Development Act 2000 provides a general rule of no order for costs if an applicant loses in proceedings to which it applies. Those proceedings are defined in sub-s. (1) as follows:



“This section applies to proceedings of the following kinds:

- (a) proceedings in the High Court by way of judicial review, or of seeking leave to apply for judicial review, of —
  - (i) any decision or purported decision made or purportedly made,
  - (ii) any action taken or purportedly taken, ...
  - (iii) any failure to take any action,  
pursuant to a statutory provision that gives effect to —
    - (I) a provision of Council Directive 85/337/EEC of 27 June 1985 to which Article 10a (inserted by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directive 85/337/EEC and 96/61/EC) of that Council Directive applies,
    - (II) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, or
    - (III) a provision of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control to which Article 16 of that Directive applies, or
    - (IV) paragraph 3 or 4 of Article 6 of the Habitats Directive; or
- (b) an appeal (including an appeal by way of case stated) to the Supreme Court from a decision of the High Court in a proceeding referred to in paragraph (a);
- (c) proceedings in the High Court or the Supreme Court for interim or interlocutory relief in relation to a proceeding referred to in paragraph (a) or (b).”

- 25. The reference to art. 10(a) of directive 85/337/EEC should now be read as a reference to art. 11 of directive 2011/92/EU as amended by directive 2014/52/EU.
- 26. A few points are noteworthy. First, the section only applies to decisions made or action or failure to take action under a statutory provision that gives effect to one of the identified provisions of four relevant directives. Insofar as the EIA directive is concerned, it only applies to provisions to which art. 11 applies - that is, to which public participation applies. That includes the full EIA process but doesn't include EIA screening: see recital 29 to the 2011 EIA directive inserted by the 2014 directive, and para. 46 of the opinion in Case C-570/13 *Gruber v. Unabhängiger Verwaltungssenat für Kärnten* (Opinion of Advocate General Kokott, 13th November, 2014, ECLI:EU:C:2014:2374).
- 27. Thus, while we only got to the screening stage in *Protect East Meath*, s. 50B can't apply to any potential EIA points in that case because full EIA was never directed. Hence while the board has conceded no order as to costs in relation to core ground 4 (the art. 299B of the 2001 regulations point), the notice party has made an issue of this, and consequently I have to decide it. Since this is only a screening issue, s. 50B doesn't apply. The Aarhus

interpretative obligation may fall for consideration however and I discuss that further later in this judgment.

28. There was full EIA in the Enniskerry case, but there is a separate problem there. Core ground 8 relating to reasons for rejecting the applicant's submissions can't be reconfigured as a public participation point because it isn't pleaded as arising from legislation giving effect to the directive. On the contrary, it is pleaded only as an administrative law point. Possibly on different pleadings s. 50B could have applied to a relief in the Enniskerry case grounded in the EIA directive, but in terms of the case as pleaded, the section doesn't apply.
29. More broadly, anything that happens in a planning application could be the subject of public participation, but s. 50B refers specifically to claims regarding "any decision ... pursuant to a statutory provision that gives effect to" the relevant directives. Thus, the section doesn't apply to a point merely because it *could* be subjected to public participation, but rather to decisions *under* the public participation provisions specifically. That conclusion seems to me to be consistent with the Court of Appeal judgment in *Heather Hill* and with the judgment of the CJEU in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* (Court of Justice of the European Union, 15th March, 2018, ECLI:EU:C:2018:185).
30. Insofar as the applicants allege failure to give adequate public notice in the statement of material contravention in core grounds 1 and 2 of Protect East Meath, and in sub-grounds under the heading of core ground 3, that submission might derive some support from the judgment in *Redmond v. An Bord Pleanála* [2020] IEHC 322, [2020] 7 JIC 0103 (Unreported, High Court, Simons J., 1st July, 2020), at paras. 38 to 40. However, analogous grounds appear to have been rejected by the Court of Appeal in *Heather Hill* as a basis for the application of s. 50B there, judging by the statement of grounds in that case which has been helpfully furnished to me.
31. That is not to say that a plea of material contravention might never obtain the benefit of special costs rules, and we will come back to that under later headings. But sticking with s. 50B specifically, a general plea of material contravention by reference to matters such as zoning doesn't, on the authority of *Heather Hill*, seem to constitute a challenge to a decision taken pursuant to legislation implementing public participation provisions within the meaning of s. 50B.

#### **The Environment (Miscellaneous Provisions) Act 2011**

32. Section 3 of the Environment (Miscellaneous Provisions) Act 2011 provides in effect that there should be no order as to costs if an applicant is unsuccessful in proceedings to which the section applies. The application of the section is set out in s. 4(1) which provides as follows:

"Section 3 applies to civil proceedings, other than proceedings referred to in subsection (3), instituted by a person—

- (a) for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition or other requirement, permission, lease or consent specified in subsection (4), or
- (b) in respect of the contravention of, or the failure to comply with, permission, lease or consent,

and where the failure to ensure such compliance with, or enforcement of, such statutory requirement, condition or other requirement referred to in paragraph (a), or such contravention or failure to comply referred to in paragraph (b), has caused, is causing, or is likely to cause, damage to the environment.”

- 33. The board in written submissions rather baldly argued that “the causation requirement is invalid per Case C-470/16 NEPPC and cannot be operated. Respectfully, this means the provision as a matter of law cannot be operated because to operate it is necessarily in the face of the legislative intention.” While that is one view of the legislation, it is not one with which I agreed in *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála (No. 5)* [2018] IEHC 622, [2018] 10 JIC 3009 (Unreported, High Court, 12th November, 2018). There, I suggested that the legislation should be regarded as valid insofar as it goes, and that the lacuna arising from the impermissibility of requiring a causative link to environmental damage be addressed by using the court’s general costs discretion to deal with cases where this was absent, in line with the spirit of the legislation. Consequently, I rejected the argument that the 2011 Act should in effect be disregarded as inoperable, and I don’t see any reason to change that view here.
- 34. A further question arose as to whether the Act applies to judicial review at all and in that regard there is a possible difference of emphasis in Court of Appeal caselaw.
- 35. On the one hand there is an *obiter* comment at para. 60 of *Heather Hill*: “[t]he proceedings listed in subs. (4), and thus the proceedings subject to the special costs rules established in s. 3, are enforcement proceedings rather than judicial review proceedings which may be brought pursuant to s. 50 of the PDA 2000”, which suggests that the 2011 Act doesn’t apply to judicial review at all.
- 36. As against that there is a longer discussion of the issue which seems to have been part of the *ratio* of the decision in *O’Connor v. Offaly County Council* where the Court of Appeal held that judicial review proceedings *could* be covered by the 2011 Act. Indeed, not only that, but Murray J. went on to hold that proceedings by way of *certiorari* (as the proceedings in *O’Connor* itself were) could come within the 2011 Act. He said at para. 29: “[m]ore importantly, however, s.4 is limited by the object of the proceedings - they must be directed to ensuring compliance with those statutory requirements or must seek to enforce them. In this regard, there is an important distinction between ss.4(1)(a) and (b). Section 4(1)(a) is, on its face, intended to be forward looking. While one might say that proceedings - and in particular proceedings by way of judicial review - which seek declaratory relief or *certiorari* ‘enforce’ or ‘ensure compliance’ with statutory requirements by correcting a past illegality, there is a critical distinction drawn within s.4(1)(a) and (b) which strongly

suggests that it was not intended that s.4(1)(a) extend this far. Section 4(1)(b) is directed to proceedings which are 'in respect of the contravention of, or the failure to comply with' the measures referred to there." And at para. 38 he added that "[c]ompliance with s. 34(1) required that the underlying invalidity be determined by the Court. Not every claim by way of judicial review will present that feature. Proceedings seeking declaratory relief in respect of an entirely historic event would not seek to ensure present compliance or enforce the legal requirement in issue in the terms expressed in s.4(1)(a). However, in this case that is precisely what the action seeks to do. The applicant's objective was, when he issued the proceedings, to preclude the continuation of an activity which - he said - was unlawful."

37. One can envisage a range of possible views as to the applicability of the 2011 Act to planning judicial reviews. Perhaps the most obvious options are:
  - (i). the 2011 Act doesn't apply to judicial review at all;
  - (ii). the 2011 Act doesn't apply to *certiorari* or any other reliefs that are dependent on *certiorari* but only to injunctions or *mandamus* insofar as such relief is independent of any backward-looking orders;
  - (iii). the 2011 Act applies to planning judicial reviews generally insofar as they seek to quash permission for, and therefore prevent, developments that cause environmental harm in the sense of alleged sub-optimal land use - this was in effect the applicant's argument here.
38. While those are all on their own terms logical and practical options capable of being easily implemented, the first two are ruled out by *O'Connor* and the third seems very wide, contrary to the spirit of *Heather Hill* and *O'Connor* itself. What then remains?
39. I appreciate that the Court of Appeal in *O'Connor* did say that seeking a declaration as to past acts doesn't attract the benefit of the 2011 Act, but without in any way taking from that illustration, it doesn't really advance the question of making the rule work in practice, because in practice generally applicants don't merely look for declaratory relief. They normally want *certiorari*, on the grounds that the permission granted facilitates a development, in breach of legal requirements, which if carried out would result in harm to the environment.
40. The question of the scope of the 2011 Act has to boil down to some rule that is capable of ready practical application. To speak generally, the law must be either practical or it must be branded as a failure.
41. The option that emerges is that, insofar as *certiorari* of development consent is concerned, the 2011 Act applies to breach of an identified statutory requirement, non-compliance with which will result in a development causing identified specific and tangible ecological harm such as impact on specific species, habitats or natural resources, above and beyond impact of a type that can be alleged in respect of any development.

42. While not perhaps the most immediately obvious answer, that interpretation does grow on one bearing in mind that one has to navigate between the different emphases of the two Court of Appeal judgments in *Heather Hill* and *O'Connor*. It involves a relationship between two elements, an approach to harm that is not totally open-ended, coupled with the requirement that, as the board put it in oral submissions, "you have to identify a statutory provision that is being contravened or requires to be enforced", and then be able to say that non-compliance with that provision will result in a negative environmental impact.
43. Thus, *certiorari* of a planning permission could attract the protection of the 2011 Act insofar as the grounds are based on an argument that breach of a specific statutory provision was committed in the course of the grant of the permission thereby facilitating a development which will, in the future, if carried out, cause specific and tangible ecological harm. Not the sort of harm that arises in every case, such as alleged sub-optimal land use by erecting a commercial building on land that would have been better developed for public uses, or the common or garden harm of replacing grass with concrete, but more tangible harms like cutting trees, removing hedgerows, causing an adverse effect on species or habitats, or causing pollution.
44. While I think that the applicants' land use arguments are too broad to attract the no-costs rule of the 2011 Act, they are potentially relevant to the argument to be addressed later as to the scope of the sphere of EU environmental law, because instruments that define land use are subjected to strategic environmental assessment (SEA) thereby invoking the concept of the sphere of EU law.
45. In that regard, insofar as the SEA directive is referred to in the proceedings here, it is only pleaded to a limited extent in *Protect East Meath* in grounds that have been adjourned generally and is not pleaded in *Enniskerry* as a ground. The fact that the SEA directive isn't a ground of challenge for any relevant purpose in the present application doesn't mean that it isn't relevant to the question of costs indirectly by reference to the definition of the sphere of EU environmental law, and we will come to that later.
46. While there might have been an interesting debate about the applicability of the 2011 Act to claims made under art. 27 of the European Communities (Birds and Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011), that is academic here because the parties were agreed as to a no-order approach in relation to the relevant grounds (ground 9 in *Enniskerry* and ground 6 in *Protect East Meath*). I don't need to be concerned about the precise legal justification if any for an order of this nature that the parties have agreed.
47. Leaving that aside, the one area where the applicants can rely on the 2011 Act as interpreted above is core ground 6 in *Enniskerry* insofar as it relates to the protection of hedgerows.
48. Objective NH19 of the County Development Plan provides as follows: "[t]o encourage the retention, wherever possible, of hedgerows and other distinctive boundary treatment in the County. Where removal of a hedgerow, stone wall or other distinctive boundary treatment is unavoidable, provision of the same type of boundary will be required of similar length

and set back within the site in advance of the commencement of construction works on the site (unless otherwise agreed by the Planning Authority).”

49. There is a statutory restriction on departure from the development plan by virtue of s. 9 of the Planning and Development (Housing) and Residential Tenancies Act 2016: see sub-s. (6)(b) and (c) in particular. The essential case made by the applicants in relation to this point is that non-compliance with s. 9 of the 2016 Act has taken place and this will have an ecological impact because the development so facilitated will cause damage to or removal of hedgerows that would not have occurred had the development plan not been contravened. In my view this comes within the scope of the 2011 Act insofar as it covers applications to address the alleged breach of statutory provisions, compliance with which would prevent future ecological harms of a specific nature.

**Grounds relating to breach of European law rules on public participation**

50. The CJEU in Case C-470/16 *North East Pylon Pressure Campaign Limited* emphasised at para. 44 of the judgment that art. 11(4) of directive 2011/92/EU regarding not-prohibitively-expensive proceedings only applies to costs relating to the part of the challenge alleging infringement of the rules on public participation. It seems to me that insofar as we are dealing with the express provisions of EU law along the lines of art. 11(4) of the EIA directive, this is adequately reflected in s. 50B of the 2000 Act and thus no separate issue arises under the directives as such. That doesn't in any way take from the interpretative obligation to which we now turn. Section 50B isn't designed to give effect to that obligation, only to express provisions of the directives (and including the habitats directive 93/42/EEC).

**National environmental law grounds under the Aarhus Convention as applied through an interpretative obligation in EU law**

51. The Aarhus Convention was adopted on 25th June, 1998 and was ratified by the European Union on 17th February, 2005. Article 9 of the convention provides as follows:

**“ACCESS TO JUSTICE**

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
  - (a) Having a sufficient interest  
or, alternatively,
  - (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.
4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.
5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate

assistance mechanisms to remove or reduce financial and other barriers to access to justice.”

52. The CJEU in *North East Pylon* said as follows at para. 57: “[c]onsequently, where the application of national environmental law — particularly in the implementation of a project of common interest, within the meaning of Regulation No 347/2013 — is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive.”
53. In Case C-240/09 *Lesoochránárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* (Court of Justice of the European Union, 8th March, 2018, ECLI:EU:C:2011:125), the CJEU stated at para. 30 that “[t]he Aarhus Convention was signed by the Community and subsequently approved by Decision 2005/370. Therefore, according to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union”.
54. Prof Francesca Martines stated in “Direct Effect of International Agreements of the European Union”, *European Journal of International Law*, 25 (2014), 129, that “since EU agreements become, from their entry into force, ‘an integral part of the European legal order’ they acquire the rank of EU law in Member States’ legal orders – *without any act of national incorporation*.”
55. Aarhus obligations appear to be particularly empathic insofar as they are applied to the EU institutions themselves: see Case T-396/09 *Vereniging Milieudefensie v. European Commission* (General Court of the European Union, 14th June 2012, ECLI:EU:T:2012:301) and Case T-9/19 *ClientEarth v. European Investment Bank* (General Court of the European Union, 27th January, 2021, ECLI:EU:T:2021:42). But even as applied to domestic actors, such obligations must be given considerable weight.
56. Clarke C.J. in *Conway v. Ireland* [2017] IESC 13, [2017] 1 I.R. 53 stated at para. 4.13: “[w]hile not providing a definitive legal interpretation of the scope of the Aarhus Convention it is, in my view, appropriate to have regard to decisions and commentaries of the compliance committee established under the Aarhus Convention for the purposes of facilitating the compliance by subscribing states with the terms of the Convention itself. That committee has taken the view that ‘national law’ relating to the environment includes EU law applicable within EU member states.”
57. An extensive view of the scope of Aarhus rights is reinforced not only by decisions of the UNECE compliance committee, as envisaged in *Conway*, but also by judgments of the UK courts. In the Belfast City Airport decision (United Nations ECE/MP.PP/C.1/2010/6/Add.2 Economic and Social Council Distr.: General 24 August 2011 Original: English: Economic Commission for Europe: Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters: Compliance Committee: Twenty-ninth meeting Geneva, 21–24 September 2010: Report of the Compliance Committee on its Twenty-Ninth meeting: Addendum Findings and



recommendations with regard to communication ACCC/C/2008/27 concerning compliance by the United Kingdom of Great Britain and Northern Ireland: Adopted by the Compliance Committee on 24 September 2010), the UNECE compliance committee held (at para. 43) as follows: "The Committee notes that the decision challenged was made in 2003, whereas the judicial review proceedings were filed in December 2006, after the Convention came into force. The fact that the decision challenged was made before the entry into force of the Convention for the United Kingdom does not prevent the Committee from reviewing compliance by the Party concerned with article 9 with respect to the decision in question. Before considering whether the Party concerned complied with the requirements of article 9, paragraph 4, of the Convention, it is necessary to establish if the case in question is dealing with an access to justice procedure covered by either paragraph 2 or paragraph 3 of article 9. Because, as established above, neither the 2008 Planning Agreement nor the 30 June 2003 determination are covered by article 6, article 9, paragraph 2 cannot be invoked in the present case. In considering whether the judicial proceedings in question are a procedure referred to by article 9, paragraph 3, of the Convention, the Committee has considered the subject of the claims brought by the communicant in the High Court. In its application for judicial review, the communicant contended that the Department of the Environment had erred in law in making its June 2003 determination under article 41 of the Planning (Northern Ireland) Order 1991. Having reviewed the documentation, including the order of the High Court dated 7 November 2007, the Committee finds that these proceedings were intended to challenge acts and omissions by a public authority which the communicant alleged to contravene provisions of the law of the Party concerned relating to the environment. The Committee thus finds that the communicant's judicial review proceedings were within the scope of article 9, paragraph 3, of the Convention".

58. The ground in question arose under art. 41 of the Planning (Northern Ireland) Order 1991. That article is headed "Applications to determine whether planning permission required" and in effect seems similar to s. 5 of the 2000 Act. The tenor of the decision of the compliance committee is that general planning judicial review questions can come within the Aarhus Convention.
59. Similarly, in *Venn v. Secretary of State for Communities and Local Government* [2014] EWCA Civ 1539, the English Court of Appeal held at para. 16 as follows: "As a consequence, it is a characteristic of the UK's approach to environmental protection that much (if not most) of the detail is contained, not in statutory regulations, but in policies, both national policies adopted by the Government (the NPPF [National Planning Policy Framework]), and local policies adopted by local planning authorities in their development plan documents. When preparing their local development plan documents local planning authorities must have regard to national policies; including the NPPF: see section 19(2)(a) of the 2004 Act [Planning and Compulsory Purchase Act 2004]. Decision makers are then required by section 70(2) to have regard to such policies; and if the policies are contained in the development plan they must be followed unless material considerations indicate otherwise: see section 38(6) of the 2004 Act (paragraph 22 of the judgment)."

60. The court went on to say at para. 17: "Given that this is the way in which the UK has chosen to implement a great deal of environmental protection 'within the framework of its national legislation', it would deprive Article 9(3) of much of its effect if a distinction was drawn between the policies, both national and local, which do relate to the environment, and the law which does not directly relate to the environment, but which requires those policies which do relate to the environment to be prepared, and then to be taken into account, and in certain cases to be followed unless material considerations indicate otherwise. It would not be consistent with the underlying purpose of Aarhus to adopt an interpretation of Article 9(3) which would, at least in the UK, deprive it of much of its effect: see paragraphs 49 and 50 of the *Brown Bear* case [Case C-240/09, *Lesoochránárske VLK v Slovenskej Republiky*] (paragraph 12 above). In the Aarhus context the UK's combination of statute and policy, with the former requiring that the latter be prepared, taken into account and in some instances followed, is properly characterised as 'national law relating to the environment.'"
61. The applicants submit that this logic is relevant to the interpretative issue insofar as that was considered in *Heather Hill*, but unfortunately it would appear that this case wasn't opened to the Court of Appeal. Indeed the applicants went as far as to submit that the way in which the English Court of Appeal addressed the matter is "entirely contrary to the way the [Irish] Court of Appeal dealt with it" – a submission that for present purposes I am merely recording rather than evaluating.
62. Similarly, in *R (Dowley) v. Secretary of State for Communities and Local Government* [2016] EWHC 2618, the court noted at para. 99 that the definition of the environment is to be given a broad meaning, citing *Venn* and *Lesoochránárske*. The decision was a grant of authority to enter onto land to conduct surveys. The court held at para. 101 that "[t]he execution of such surveys, in my judgment, relates to the environment; especially when that is given a broad meaning", and at para. 102 that "[a]ccordingly, I find that this claim, which is to the authorisation enabling those surveys to be carried out, is one that benefits from the protection of the Aarhus Convention." A wide interpretation of the environment implies a wide interpretation of national environmental law. Again this caselaw doesn't seem to have been opened in *Heather Hill*.
63. It seems to me, arising from the foregoing, that there are a number of questions of European law that are raised on foot of the new material and as a result of considering the possible implications of it as applied to the present case. These questions are as follows:
- (i). Does the interpretative obligation set out in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* whereby in proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive, apply only within the sphere of EU environmental law.

- (ii). Where an applicant challenges a decision that is subject to procedures laid down in EU environmental law, is the challenge to be considered as falling within the sphere of EU environmental law even if the grounds of challenge do not relate to EU environmental law.
- (iii). In particular, is a challenge that is not based on directive 2001/42 (the strategic environmental assessment directive), but that relates to alleged material contravention of an instrument of general application that was subject to strategic environmental assessment, to be considered as a challenge falling within the sphere of EU environmental law.
- (iv). Is a challenge to be considered as falling outside the interpretative obligation set out in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála*, either as not being one where the application of national environmental law is in issue or as not within the sphere of EU environmental law, merely because it involves classic judicial review grounds that are not environment-specific but that are raised in the context of a challenge to a development consent or other environmental issue.

64. It can perhaps be said that on one interpretation the Court of Appeal impliedly took a different view from that urged by the applicants on some of these questions, but given the new authorities and materials submitted I think a reference to the CJEU could legitimately fall for consideration here.

#### **Subsidiary issues**

65. Apart from the grounds on which the applicants might claim to be entitled to special costs rules, there are three subsidiary issues that fall for consideration:

- (i). whether the not-prohibitively-expensive rule implies no order as to costs in the absence of any statutory definition of what that concept means;
- (ii). whether and to what extent the question of no order as to costs can be determined at the outset of an application as here; and
- (iii). the costs of the costs application.

#### **Whether the not prohibitively expensive rule implies no order as to costs in the absence of defining legislation**

66. The Advocate General in Case C-260/11 *Edwards v. Environment Agency* (Opinion of Advocate General Kokott, 18th October, 2012, ECLI:EU:C:2012:645), said at para. 23 that “[n]evertheless, the discretion enjoyed by the Member States is not unlimited. The Court has already pointed out in connection with the Convention that in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. The Member States are, however, responsible for ensuring that those rights are effectively protected in each case.”

67. The applicants submit that this implies an obligation on the Member State to lay down detailed procedural rules. No legislative procedural rules have been laid down in Ireland,

although it is true that individual courts may have adopted particular approaches in caselaw (see for example *Hunter v. Nurendale Limited Trading as Panda Waste* [2013] IEHC 430, [2013] 2 I.R. 373), but not to the level where there is a clear and consistent line of authority that amounts to settled procedural rules of a detailed and foreseeable nature.

68. In Case C-530/11 *European Commission v. United Kingdom* (Court of Justice of the European Union, 13th February, 2014, ECLI:EU:C:2014:67), the CJEU said at para. 58 that “[i]t is also apparent from the foregoing that that regime laid down by case-law does not ensure the claimant reasonable predictability as regards both whether the costs of the judicial proceedings in which he becomes involved are payable by him and their amount, although such predictability appears particularly necessary because, as the United Kingdom acknowledges, judicial proceedings in the United Kingdom entail high lawyers’ fees.” In that regard I would be surprised if fees in Ireland were significantly less than those in the UK although that’s only a general impression and subject to correction.
69. The applicants place particular stress on the words “and their amount” in relation to fees, arguing that this implies that the amount of costs should also be predictable in advance if the not-prohibitively-expensive rule applies. Some support for this is said to derive from the decision of the UNECE compliance committee in its decision regarding the United Kingdom’s costs rules (United Nations ECE/MP.PP/C.1/2010/6/Add.3 Economic and Social Council Distr.: General 24 August 2011 Original: English: Economic Commission for Europe Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters: Compliance Committee: Twenty-ninth meeting: Geneva, 21–24 September 2010: Report of the Compliance Committee on its Twenty-Ninth meeting: Addendum Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland Adopted by the Compliance Committee on 24 September 2010) at para. 35 that “[t]he Committee concludes that, despite the various measures available to address prohibitive costs, taken together they do not ensure that the costs remain at a level which meets the requirements under the Convention. At this stage, the Committee considers that the considerable discretion of the courts of England and Wales in deciding the costs, without any clear legally binding direction from the legislature or judiciary to ensure costs are not prohibitively expensive, leads to considerable uncertainty regarding the costs to be faced where claimants are legitimately pursuing environmental concerns that involve the public interest. The Committee also notes the Court of Appeal’s judgement in *Morgan v. Hinton Organics* [[2009] EWCA Civ 107 (2nd March 2009)], which held that the principles of the Convention are “at most” a factor which it “may” (not must) “have regard to in exercising its discretion”, “along with a number of other factors, such as fairness to the defendant”. The Committee in this respect notes that “fairness” in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant”, albeit that that dealt with a costs regime more uncertain even than the uncertain Irish regime which also lacks any statutory definition.
70. The applicants argue by analogy with the judgment of the CJEU in Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft*

*Gmünd* (Court of Justice of the European Union, 20th December, 2017, ECLI:EU:C:2017:987), at paras. 54 and 55, that if no definition of not prohibitively expensive costs has been enacted then it would be for the referring court to disapply any rule of national procedural law that allowed costs to be awarded against an applicant. The CJEU has stressed the importance of “legal certainty” in respect of transposition that confers rights on individuals: see Case C-427/07 *Commission of the European Communities v Ireland* (Court of Justice of the European Union, 16th July, 2009, ECLI:EU:C:2009:457), para. 55.

71. The applicants’ conclusion as regards the present case is that “Ireland has not passed any law purporting to separate grounds which are not covered by [the] NPE rule and so it is left to the parties and the Court to attempt to struggle to identify grounds which are covered and those which are not. It is submitted that the party most adversely affected by this failure is a claimant”. The attempt to prepare the present judgment has done little to dispel any sympathy I might have had with the sentiment that untangling the costs rules is something of a struggle.
72. It seems to me that two additional questions of European law arise here:
  - (i). Does the general EU law principle of legal certainty as applied in the context of the interpretative obligation set out in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* whereby in proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive, have the effect that the domestic law of a member state should provide rules that are sufficiently certain so that an applicant can know prior to initiating proceedings whether the not-prohibitively-expensive rule applies and if so what the maximum amount of the not-prohibitively-expensive costs can be predicted to be in advance.
  - (ii). In the absence of provision in the domestic law of a member state providing rules that are sufficiently certain so that an applicant can know prior to initiating proceedings whether the not-prohibitively-expensive rule applies and if so what the maximum amount of the not-prohibitively-expensive costs can be predicted to be in advance, does the general EU law principle of legal certainty as applied in the context of the interpretative obligation set out in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* whereby in proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive have the effect that a domestic court should disapply national procedural rules allowing for any costs to be awarded against applicants in proceedings covered by the not-prohibitively-

expensive rule thus providing for no order as to costs if the applicants are unsuccessful.

#### **Whether special costs rules can be determined at the outset of the application**

73. It seems to be accepted by the board (whose arguments were adopted by the notice parties) that the not prohibitively-expensive-rule can and should be determined at the outset of proceedings. Hogan J. in *McCoy v. Shillelagh Quarries Limited* [2015] IECA 28, [2015] 1 I.R. 627, regarded a determination as to the application of s. 7 of the 2011 Act as “in the nature of a final order” subject to appeal. The only comment that I would add to that is the possibility that a party’s subsequent conduct might raise an issue about there being no order as to costs in the final order of the court, notwithstanding the application of the 2011 Act, due to abuse of process, but that is more a theoretical than a real concern here.
74. The jurisdiction to make a pre-emptive costs order was recognised in *Village Residents Association Ltd. v. An Bord Pleanála (No 2)* [2000] IEHC 34, [2000] 4 I.R. 321, but was commented on questioningly by O’Connor J. in *Tearfund Ireland Limited v. Commissioner of Valuation* [2020] IEHC 621, [2020] 11 JIC 2702 (Unreported, High Court, 27th November, 2020), at para. 16. O’Connor J.’s main concerns related to the enactment of the Legal Services Regulation Act 2015 which seems to have had a surprising, unintended and unsettling effect on previously understood rules in relation to costs. However, insofar as the general costs jurisdiction gives effect to EU law, it doesn’t seem to me that the 2015 Act can meaningfully be said to in any way cut back that jurisdiction, which must be capable of being applied in a way to give full effect to EU law. That includes the power to make protective costs orders at the outset of the proceedings. More generally though, I don’t think there’s a compelling imperative to read into the 2015 Act an intention to produce unexpected effects such as undermining the jurisdiction to make protective costs orders.
75. All that said, the board was keen to argue that if the not-prohibitively-expensive rule does apply, the court shouldn’t at the outset of proceedings interpret this as meaning no order as to costs, although it can do so at the end. That makes a certain amount of sense as an arguable proposition on a first reading, but it wasn’t debated in depth and I don’t need to address it right now because I amn’t finding that the not-prohibitively-expensive rule applies to anything – as stated below I am adjourning that pending guidance from Luxembourg.

#### **Costs of the costs application**

76. Following this issue being raised in the applicants’ submissions, it was accepted by the board and agreed to by the notice parties that the applicants having raised an arguable point as to their entitlement in each case to not prohibitively expensive costs, should, therefore, be entitled to the application of the not-prohibitively-expensive costs rule in relation to the costs of the costs argument, even if the applicants are ultimately unsuccessful in that argument. That is an illustration in its own way of the point that the right to an effective remedy is really the most fundamental of all rights. Rights are meaningless unless they can be enforced, so to enforce the right to argue for not-

prohibitively-expensive costs, one needs the protection of a not-prohibitively-expensive procedure in order to even make the argument.

### **Reference to the CJEU**

77. It seems to me that the questions of EU law identified in this judgment are appropriate for a reference to the CJEU under art. 267 TFEU, for the following reasons:

- (i). they haven't been definitively answered by the Luxembourg Court and aren't in the EU law sense *acte clair* or *acte éclairé*;
- (ii). they relate to the interpretation rather than application of EU law;
- (iii). given that I have already disposed of the issues in terms of domestic law (insofar as such issues arise under the 2000 and 2011 Acts), these EU law questions are necessary for the decision here; and
- (iv). in all the circumstances as set out in this judgment I propose to exercise the discretion to refer.

### **Order**

78. Accordingly, the order will be as follows:

- (i). In the Enniskerry case:
  - (a). by consent of all parties there will be no order as to costs if the applicant is unsuccessful regarding core ground 9;
  - (b). I will refuse a declaration that s. 50B of the 2000 Act applies to any of the other grounds;
  - (c). I will grant a declaration that the 2011 Act applies to core ground 6 insofar as it relates to prevention of future damage to hedgerows by reason of contravention of s. 9(6)(b) of the 2016 Act which prohibits material contravention of the development plan save on certain conditions, but will otherwise refuse such a declaration;
  - (d). accordingly there will be no order as to costs in relation to that aspect of core ground 6 if the applicant is unsuccessful unless an issue arises between now and the conclusion of the case by reference to s. 3(3)(b) or (c) of the 2011 Act; and
  - (e). as regards the grounds other than that aspect of core ground 6 and core ground 9, I will in principle refer the questions identified in the judgment to the CJEU and adjourn those issues pending the judgment of the CJEU.
- (ii). In relation to Protect East Meath:
  - (a). by consent of all parties there will be no order as to costs if the applicant is unsuccessful regarding core ground 6;
  - (b). by consent of the board there will be no order as to the costs of the board if the applicant is unsuccessful regarding core ground 4;

- (c). I will refuse a declaration that s. 50B of the 2000 Act applies to any other ground;
  - (d). I will refuse a declaration that the 2011 Act applies to any other ground; and
  - (e). as regards the grounds other than core ground 6, I will in principle refer the questions identified in the judgment to the CJEU and adjourn the remaining grounds pending the decision of the CJEU.
- (iii). And in in relation to both cases:
- (a). I will give the directions identified in *Eco Advocacy CLG v. An Bord Pleanála (No. 1)* [2021] IEHC 265, [2021] 5 JIC 2704 (Unreported, High Court, 27th May, 2021); and
  - (b). I will order by consent that if and insofar as the applicant is ultimately unsuccessful in respect of any aspect of its application for not-prohibitively-expensive costs, the rule limiting costs to the level of being not-prohibitively-expensive will to that extent apply to the costs of the costs issue.