



# THE COURT OF APPEAL

**UNAPPROVED**

Neutral Citation Number [2021] IECA 259  
Court of Appeal Record Number 2019/204

**Costello J.  
Ní Raifeartaigh J.  
Pilkington J.**

**BETWEEN**

**HEATHER HILL MANAGEMENT COMPANY CLG AND GABRIEL  
MCGOLDRICK**

**APPLICANTS/  
RESPONDENTS**

**- AND -**

**AN BORD PLEANÁLA**

**APPELLANT**

**- AND -**

**BURKEWAY HOMES LIMITED**

**NOTICE PARTY**

**JUDGMENT of Ms. Justice Costello delivered on the 14th day of October 2021**

## **Introduction**

1. This case raises the question of the correct interpretation of s. 50B of the Planning and Development Act 2000, as amended, and in particular whether a litigant is entitled to the benefit of the protective costs provisions therein with regard to all grounds of the litigant's challenge to certain types of planning decision even though *only some and not all* of the grounds of challenge relate to environmental matters. This is a matter which has

been the subject of consideration by at least seven different High Court judges in the past, but the trial judge in the present case sought to distinguish the conclusions reached in those cases and reached a different conclusion in the case before him, holding that the provisions applied to the entirety of the proceedings in the case before him, notwithstanding that only some of the grounds for challenge involved environmental matters. He did so on the basis of what he considered to be the plain and ordinary meaning, or literal interpretation, of the language used in the relevant subsection. The key question is whether he was correct in this conclusion. The primary issue before the court is therefore one of statutory interpretation of s. 50B. It has, for obvious reasons, far-reaching implications for awards of costs in many planning cases.

**2.** The appeal is in respect of the order of the High Court granting the applicants a Protective Costs Order (“PCO”) in respect of all of the costs of the proceedings. The applicants challenged the decision of An Bord Pleanála (“the Board”) dated 16 November 2018, and notified to the applicants on 19 November 2018, to grant permission to the notice party for development on a greenfield site in Barna, County Galway, including 197 residential units (to include housing and ten apartment blocks) and related development. The proposed development was to be accessed via the Cnoc Froaigh development, in respect of which the first named applicant is the residents’ management company (“Heather Hill”) and where the second named applicant (“Mr. McGoldrick”) resides with his family. The development comprised strategic housing development within the meaning of the Planning & Development (Housing) and Residential Tenancies Act 2016 (“PD(H)A 2016”); the application for permission was made under s. 4 of that Act and the decision of the Board was made under s. 9.

**3.** By order of the High Court (Barniville J.), of 17 January 2019, the applicants were granted leave to apply for judicial review of the decision of the Board. The statement

required to ground an application for judicial review pleaded sixty-four grounds upon which it was alleged that the decision was unlawful, *ultra vires* the powers of the Board, null and void and of no legal effect.

4. The applicants sought PCO in their statement of grounds. By letter dated 30 January 2019, solicitors for the applicants wrote to solicitors for the Board and for the notice party requesting that they accept that the provisions of s. 50B of the Planning and Development Act 2000 (as amended) (“the PDA 2000”) applied to the entire proceedings, thereby affording the applicants protection against any award of costs against them. They each replied accepting that the provisions of s. 50B applied to those grounds which related to the Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (“the Habitats Directive”), set out in paras. E.24-E.34 of the statement of grounds. They also accepted that the section applied to one ground relating to flooding, pleaded at para. E.50 of the statement of grounds. Neither accepted that the applicants were entitled to costs protection in respect of the remaining grounds asserted in the statement of grounds, referred to as the “disputed grounds”.

5. On 31 January 2019, the High Court directed that the solicitors for the applicants set out the basis upon which the applicants said that s. 50B applied to the totality of the proceedings, *i.e.* why they were entitled to a PCO in respect of the disputed grounds. This was done by letter dated 4 February 2019, to which I shall return. On 5 February 2019, the solicitors for the Board and for the notice party each replied rejecting the arguments of the applicants and reiterating their previous positions.

6. Heather Hill issued a motion on 13 February 2019 seeking the following relief:-

“1. *An order that section 50B of the Planning and Development Act 2000, as amended, applies to the within proceedings;*

2. *An order pursuant to section 7 of the Environment (Miscellaneous Provisions) Act 2011, as amended, that section 3 and 4 of the said Act apply to the within proceedings;*
3. *An order pursuant to Order 99 of the Rules of the Superior Courts 1986, as amended, and/or pursuant to the inherent jurisdiction of the court, limiting the sum to which the applicants and/or each of them, shall be liable in the event that the applicants and/or each of them, are unsuccessful in obtaining relief in the within proceedings.”*
7. The motion also sought further and other orders and costs.
8. In his affidavit sworn to ground the motion, Mr. McGoldrick explained that the scale of the costs risk involved in the application for a PCO to himself and his family was prohibitive. He said he could not take the risk of applying for a PCO in respect of the disputed grounds and, accordingly, he had no alternative but to abandon his application for relief on the disputed grounds. Therefore, only Heather Hill proceeded with the motion.
9. The High Court (Simons J.) directed the parties to file written submissions. They each did so on 15 February 2019. The motion was heard on 21 February and 8 March, and a written judgment was delivered by the trial judge on 29 March 2019 granting Heather Hill an order pursuant to s. 50B of the PDA 2000 in respect of the entire proceedings.
10. The Board appealed the decision to grant a PCO. The substantive judicial review proceedings were determined by the High Court in favour of Heather Hill in December 2019. The court quashed the decision to grant planning permission and ordered the Board to pay the costs of Heather Hill. A certificate for leave to appeal in the substantive proceedings was refused and leave to appeal directly to the Supreme Court was also refused. Due to the systemic implications of the decision of the High Court on the

application for a PCO, the Board maintained its appeal against the decision of 29 March 2019, notwithstanding the conclusion of the underlying proceedings.

### **The application for a PCO**

11. The applicants' solicitors set out the basis for its argument that it was entitled to a PCO in respect of the disputed grounds in the letter of 4 February 2019. They did not argue that because *some* of the grounds for judicial review undoubtedly attracted the special costs rules in s. 50B that therefore the rules applied to the *proceedings as a whole*. They justified the claim to a PCO by reference to grounds advanced for judicial review and asserted, by reference to the grounds, that the disputed grounds came within the provisions of s. 50B.

12. The letter says the Board failed properly to apply the 2009 Flood Risk Guidelines and this led to:-

*“... a contravention by the Board of Article 4(3) of the Treaty on the Functioning of the European Union, in that the decision undermines and fails to advance the State's objective – and obligation – under the Floods Directive (in particular Article 7 thereof) to reduce flooding.”*

The letter said that leading up to this failure under EU law are failures of:-

- “- Error of law;*
- Failure to consider relevant material*
- Consideration of irrelevant material*
- Fair procedures and natural justice*
- Rationality”*

These are all classic grounds for judicial review under national law and are not particular to planning or environmental law.

**13.** The applicants claimed that the Board’s decision authorised an allocation of population in excess of a zoning and development plan (paras. E.35-44) and involved building on lands zoned for open space, and land zoned at risk from flooding (paras. E.56-61):-

*“It therefore constitutes an inadvertent material contravention of the County Development Plan and Bearna Local Area Plan. The issues of population and flood zoning fall squarely within the field of national and European environment law.”*

**14.** The applicants elaborated that the special costs rules applied to the disputed grounds on the basis that:-

*“Questions relating to appropriate assessment and Habitat Regulations (S.I. No. 477 of 2011) are now clearly covered by S. 50B of the Planning and Development Act 2000 as amended by ss. 29(a)(iv) and (b) of the Planning and Development (Amendment) Act 2018.*

*Questions relating to floods are matters of substantive national and European environmental law covered by the Floods Directive (2007/60). The applicants are entitled to raise procedural irregularities where these result in the substantive decision being in contravention of national and European environmental law (and which is subject to the requirement of conforming interpretation by the national courts.)*

*Questions relating to the zoning and population are matters of substantive national environmental law. The applicants allege error of fact and/or law, and irrationality, and are entitled to do so (and these matters are also subject to the requirement of conforming interpretation by the national courts).”*

**15.** The applicants said that they were entitled to costs protection by virtue of Article 9(3) and (4) of the Aarhus Convention as interpreted by the CJEU in Case C-470/16, *North East Pylon Pressure Campaign Ltd. & Sheehy v. An Bord Pleanála & Ors.* (“*North East Pylon*”). They challenged the decision of the Board on the basis that it contravenes national environmental law on both substantive and procedural grounds and thus they come within the scope of Article 9(3).

**16.** In written submissions dated 15 February 2019, they contended that all of the grounds advanced in the proceedings concerned matters of national or EU environmental law. Having regard to the decision of the CJEU in *North East Pylon*, they submitted that:

- (a) the court is obliged to apply s. 50B of the PDA 2000, and/or;
- (b) the court is obliged to interpret national rules and procedures in order to give full effect to Article 9(3) and (4) of the Aarhus Convention, in particular though “*the medium of sections 3, 4 and 7 of the Environment (Miscellaneous Provisions) Act 2011*”, and/or;
- (c) the court may, in the exercise of its discretion pursuant to Order 99 of the Rules of the Superior Courts, impose an outer costs limit on any liability of the applicants in the event they are unsuccessful in the proceedings.

**17.** Heather Hill advanced its case by reference to the grounds upon which it sought judicial review. It did not argue that if the impugned decision is made pursuant to a statutory provision that gives effect to any one of the four EU directives listed in s. 50B that the section applied regardless of the grounds upon which the decision was impugned.

**18.** In para. 24 of its written submissions it argued:-

“... *it is not the case that one looks at the grounds and asks merely, are they substantive environmental law or merely procedural? Procedure is specifically open*

*to challenge. Instead, one looks at the substance of the case and asks: is it, in substance, an environmental case. If it is, all grounds are necessarily covered.”*

19. This argument was based upon the decision of the Supreme Court in *Conway v. Ireland* [2017] IESC 13, [2017] 1 I.R. 53, and not on a statutory interpretation of s. 50B.

### **The judgment of the High Court**

20. The judge identified the issue for decision as, whether the special costs rules under s. 50B of the PDA 2000 or Part 2 of the Environmental (Miscellaneous Provisions) Act 2011 apply “*by reference to the grounds*” advanced by the applicants, or whether they apply to the entirety of the proceedings. He held that the “*criteria triggering the special costs rules under Irish domestic legislation are directed to the nature of the decision being challenged in the judicial review proceedings*” (emphasis in the original). If the impugned decision is made pursuant to a statutory provision that gives effect to any one of the four EU directives listed in s. 50B:

- (i) the Public Participation provisions of the EIA Directive,
- (ii) the Strategic Environmental Assessment Directive (“the SEA Directive”),
- (iii) the Industrial Emissions Directive, or
- (iv) Article 6(3) or (4) of the Habitats Directive,

then the special costs rules apply. This was not an argument which Heather Hill advanced in its application, though it adopted the point once it was raised by the judge.

21. He noted that the impugned decision in this case was made pursuant to s. 9 of the PD(H)A 2016. This established a special procedure in respect of “*strategic housing development*” as defined. Strategic housing development planning permission is distinct from either (1) a conventional planning permission under s. 34 of the PDA 2000, or (2) a strategic infrastructure development permission under s. 37G of the PDA 2000. The Board



recorded that it completed an environmental impact assessment in relation to the proposed development and concluded that the effects on the environment of the proposed development by itself, and in combination with other development in the vicinity, would be acceptable. It also completed a screening for appropriate assessment for the purposes of the Habitats Directive. It accepted and adopted the screening determination carried out in the inspector's report and the Board was satisfied that the proposed development, either individually or in combination with other planned projects, would not be likely to have a significant effect on the relevant European sites in view of the site's conservation objectives, and that a Stage 2 appropriate assessment was not therefore required.

**22.** The trial judge analysed the grounds of challenge to the decision. The first group of grounds of challenge raised issues under the Habitats Directive. It was accepted by all parties that these grounds came within the scope of s. 50B and attracted the special costs rules. He then turned to the disputed grounds.

**23.** The second group of grounds alleged a material contravention of the Development Plan and, in particular, it was alleged that the decision was contrary to s. 9(6) of the PD(H)A 2016. The third group of grounds related to an alleged circumvention of ministerial guidelines issued in 2009, entitled the "Planning System and Flood Risk Management Guidelines for Planning Authorities". It also alleged, at para. E.50 of the statement of grounds, that the Board's decision was contrary to the provisions of the EU Floods Directive. It was agreed that this ground came within the scope of s. 50B. The final group of grounds related to an allegation that the consent of the landowner to the making of the application for planning permission had not been properly obtained. Thus, the disputed grounds were the second, third and fourth groups of grounds, save in respect of para. E.50.

**24.** The core of the trial judge's decision is set out in paras. 33, 38-40 as follows:-

*“33. It is clear from the structure of section 50B (as amended) that the qualifying criteria for costs protection under the section are directed to the type of decision or action which is the subject of the judicial review proceedings. The costs protection then applies to the ‘proceedings’. There is no reference whatsoever in section 50B to the ‘grounds’ of challenge.*

...

*38. As appears from the passages from the judgment in Case C-470/16 North East Pylon cited above, the CJEU refer to ‘arguments’ or ‘pleas’ alleging infringement of the rules on public participation. These terms equate to what are described under domestic law as the ‘grounds’ for judicial review. Crucially, there is nothing in the statutory language employed under section 50B which restricts the benefit of the special costs rules to prescribed categories of grounds. Indeed, there is no reference whatsoever to ‘grounds’ in section 50B. Rather, section 50B refers to ‘proceedings’ simpliciter.*

*39. The omission of any reference to the grounds of challenge under section 50B cannot be ignored in interpreting the provisions. This is especially so given that the immediately preceding section, section 50A, expressly refers to ‘grounds’. More specifically, section 50A(3)(a) provides that the High Court shall not grant section 50 leave unless it is satisfied inter alia that there are ‘substantial grounds’ for contending that the decision or act concerned is invalid or ought to be quashed. Section 50A(5) provides that no ‘grounds’ shall be relied upon in the application for judicial review other than those determined by the court to be substantial under subsection (3)(a). Had the Oireachtas intended to impose different costs rules in respect of different categories of grounds with the same ‘proceedings’, then the term ‘grounds’ would have been carried forward into section 50B.*

*40. I am satisfied, therefore, that the special costs rules apply to all of the costs of proceedings which seek to question the validity of a decision made pursuant to a statutory provision – such as section 9 of the PD(H)A 2016 – which gives effect to article 6(3) of the Habitats Directive.”*

**25.** He held that the decision under review was a decision to grant development consent pursuant to the provisions of s. 9 of the PD(H)A 2016. Section 9 imposes obligations on the Board in respect of both the EIA Directive and the Habitats Directive. Section 9(1)(b) obliges the Board to consider an environmental impact assessment report or a Natura impact statement, where required, and which may be submitted to the Board pursuant to s. 8(2). Section 9(2) requires the Board to have regard, *inter alia*, to whether the area or part of the area is a European site, or whether the proposed development would likely have an effect on a European site. He then concluded at para. 35:-

*“It follows that, on its natural and ordinary meaning, section 9 of the PD(H)A 2016 is a ‘statutory provision’ that gives effect to inter alia paragraph 3 of article 6 of the Habitats Directive. Section 50B is triggered where the statutory provision pursuant to which the impugned decision is made gives effect to any one of the four EU Directives specified. It is thus sufficient to attract the special costs rules that section 9 gives effect to article 6(3) of the Habitats Directive.”*

**26.** The judge considered the various judgments of the High Court where s. 50B had been previously construed and applied. In all of the cases, *JC Savage Supermarket Ltd. & Becton v. An Bord Pleanála & ors.* [2011] IEHC 488; *Kimpton Vale Developments Ltd. v. An Bord Pleanála* [2013] IEHC 442, [2013] 2 I.R. 767; *McCallig v. An Bord Pleanála (No. 2)* [2014] IEHC 353; *SC SYM Fotovoltaic Energy SRL v. Mayo County Council* [2018] IEHC 245; *Merriman v. Fingal County Council* (Unreported, High Court, Barrett J., 17 May 2018) ; and *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála (No.*

5) [2018] IEHC 622, no judge of the High Court construed s. 50B in the way Simons J. construed it, and indeed some expressly concluded that the section only applied to those grounds of judicial review which came within the scope of the four directives. For a variety of reasons, which I shall consider more fully later in this judgment, the judge concluded that there was no discrepancy between his approach and these earlier decisions.

**27.** At para. 65, he expressed “*some doubts as to whether the full rigour of the principle of precedent can be applied to the costs of environmental litigation*”. The first reason for this conclusion is the fact that the underlying legislation has been amended on a number of occasions. Secondly, he said that the case law of the CJEU is continuing to evolve. Thirdly, by reason of the fact that leave to appeal to the Court of Appeal is required, this has the practical effect that guidance from the appellate courts is not as readily available as in other areas of the law. Finally, the High Court must be mindful of its obligation as a national court to seek to give effect to EU law. He therefore concluded that a judge may on occasion be required to decline to follow an earlier High Court judgment in order to comply with the principle of conforming interpretation.

**28.** He concluded that the natural and ordinary meaning of s. 50B meant that the special costs rules apply to the entirety of the proceedings as they seek judicial review of a decision made pursuant to a statutory provision which gives effect to, at the very least, one of the four directives as specified in s. 50B.

**29.** He went on to consider whether the interpretation of s. 50B should be informed by the provisions of the Aarhus Convention. He noted that the effect of the decisions of the CJEU in *North East Pylon* and in Case C-664/15 *Protect Natur* was that proceedings which allege a contravention of national environmental law will benefit from the interpretative obligation, notwithstanding that those proceedings do not allege an infringement of the public participation provisions of the Aarhus Convention. He was

satisfied that all of the issues raised – save with the single exception of the issue of landowner consent – came within “*the subset of the subset of national environmental law which comes within a field of EU environmental law.*” This was because the applicants’ case was predicated on an allegation that the Board’s decision was reached contrary to s. 9(6) of the PD(H)A 2016. This is “*undoubtedly*” a provision of national law relating to the environment and, in particular, to town planning. Therefore, he held that the section fulfils the criteria identified by the Aarhus Compliance Committee and endorsed by the Supreme Court in *Conway v. Ireland*. The Supreme Court held that a “*law relating to the environment*” for the purposes of Article 9(3) of the Aarhus Convention is to be determined as a matter of substance rather than form. Section 9(6) can properly be said in a “*material and realistic way, to relate to the environment*”, in the words of Clarke J. (as he then was) in *Conway*. In addition, the trial judge said that “[*s]ection 9 ensures that the objectives of the SEA Directive are achieved by requiring An Bord Pleanála, as the competent authority for the purposes of granting an application for development consent for strategic housing development, to have regard to the development plan.*”

**30.** In relation to the grounds of challenge advanced in respect of the “Flood Risk Management Guidelines” he said that the gravamen of the complaint was that the Board and its inspector erred in their interpretation and application of the statutory guidelines. He said that this amounted to an allegation of a contravention of a provision of national environment law, s. 9(2)(b). Those statutory guidelines relate to a field covered by EU environmental law, namely the assessment and management of flood risk (see, Directive 2007/60/EC). He therefore concluded that s. 9 of the PD(H)A 2016 represented a provision of national environmental law in a field covered by EU environmental law. The interpretative obligation identified in *North East Pylon* therefore applied to the proceedings

which allege contravention of s. 9. The court was accordingly required to interpret s. 50B so as to ensure that the special costs rules apply to such proceedings.

**31.** In relation to the Environment (Miscellaneous Provisions) Act 2011, he adopted the approach of Humphreys J. in *North East Pylon (No. 5)*, but as this is not the subject of the appeal it is not necessary to consider it further.

### **The special costs regime**

**32.** In order to understand the issues raised in this appeal it is necessary to trace the origin and development of PCOs and the special costs rules applicable in planning and environmental proceedings.

**33.** The costs of litigation in the Superior Courts is governed by O. 99 of the Rules of the Superior Courts and s. 169 of the Legal Services Regulation Act 2015. The starting point is that costs are in the discretion of the court and that, normally, costs follow the event. Thus, a party who seeks to challenge a decision, for example, to grant planning permission, runs the risk that, if they do not succeed, the (considerable) costs of the respondent and the notice party may be awarded against them. This may act as a powerful disincentive to members of the public bringing otherwise meritorious challenges to decisions affecting the environment.

**34.** The issue of public participation in decision-making on environmental issues was recognised as a matter of international concern and the Aarhus Convention was adopted in response to some of those concerns in 1998. This is the starting point of special costs rules in relation to environmental litigation.

### ***The Aarhus Convention***

**35.** The Aarhus Convention is a United Nations sponsored convention, the full title of which is: “*The Convention on Access to Information, Public Participation in Decision-*

*Making and Access to Justice in Environmental Matters.*” As Hogan J. records in *Kimpton Vale*, at para. 11, Ireland signed the Convention on 25 June 1998 and ratified it on 20 June 2012. The European Union is a party to the Convention and it formally approved the Convention by Council Decision 2005/370/EC on 17 February 2005.

**36.** The aim of the Aarhus Convention is to improve public participation in environmental decisions. Parties to the Convention, of whom Ireland is one, agreed that the public must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters. In Article 1, each party to the Convention agreed to guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of the Convention. In Article 2(4), “[t]he public” is defined as “*one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups.*” In Article 2(5), “[t]he public concerned” is defined as “*the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.*”

**37.** Article 4 is concerned with the right of access to environmental information and Article 5 is concerned with the collection and dissemination of environmental information.

**38.** Article 6 is headed “*Public participation in decisions on specific activities*”. The article applies to activities listed in Annex I. These are major infrastructural and other developments such as mineral, oil and gas refineries, nuclear power stations and, developments for the production and processing of metals; they cover developments in the mineral industry and the chemical industry, such as installations for the production of cement, asbestos, glass, chemical installations for the production of basic organic and

inorganic chemicals, pharmaceutical products, explosives, waste management and waste water treatment plants of a particular capacity, railways, motorways, airports, pipelines, quarries, opencast mining, overhead electricity power lines and installations for the storage of petroleum, petrol chemical or chemical products of a certain capacity. This is not an exhaustive list. In addition, para. 20 of Annex 1 extends to any activity not covered by paras. 1-19 where *“public participation is provided for under an environmental impact assessment procedure in accordance with national legislation”*. Thus, the obligations assumed by parties to the Convention extend to those major projects outlined in Annex 1, *but no further*. If the provisions of national law require an EIA in respect of projects which do not come within the scope of Annex 1, then the obligations under the Convention apply to such projects also. Importantly, the obligations in the Aarhus Convention do not apply to all projects having a potential impact upon the environment. This is clear from the provisions of Article 6(1)(b) which requires that the parties to the Convention *“[s]hall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions”*.

**39.** Article 9 addresses the issue of access to justice:-

*“... ”*

*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.*

...

*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.*” (emphasis added)

**40.** By Article 9(2), each party agrees to ensure that members of the public concerned, having a sufficient interest, have access to a review procedure before a court, and/or another independent and impartial body, to challenge the substantive and procedural legality of any decision, act or omission which comes within the provisions of Article 6. Thus, in Ireland, a member of the public who has participated in a planning process may appeal a decision of a planning authority to An Bord Pleanála, which will review these substantive decisions. Such a member of the public also has a right to apply for judicial review in relation to the procedural legality of such a procedure, act or omission. Article 9(2) is primarily concerned with the right of the public concerned to review consent decisions, acts or omissions.

**41.** Article 9(3) requires each party to the Convention to ensure that 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*”. There may be qualifying criteria established by national law in this regard. This provision is without prejudice to the review procedures referred to in para. (2). This is primarily directed towards enforcement procedures by the public concerned, rather than the making of consent decisions by public authorities.

**42.** Article 9(4) requires that the procedures referred to in paras. (1), (2) and (3) “*shall provide adequate and efficient remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive*” (emphasis added). This is the origin of the special costs regime in the context of environmental litigation. It was acknowledged by Hogan J. in *Kimpton Vale*, at para. 15, that the Aarhus Convention does not form part of domestic law. In *Conway v. Ireland*, at para. 9, Clarke J., speaking for the

Supreme Court, held that, as a matter of Irish constitutional law, the Aarhus Convention cannot, save to the extent that it may be “*determined by the Oireachtas*’, become part of *Irish domestic law*.”

43. In 2003, the EU implemented part of the Aarhus Convention by adopting 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 Directives 85/337/EEC and 96/61/EC (the “Public Participation Directive 2003”). The “not prohibitively expensive” requirement of Article 9(2) and (4) of the Aarhus Convention was transposed into EU law by Article 3(7) of the Public Participation Directive 2003. This inserted Article 10a into Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (“Public Participation Directive 1985”). It provides:-

*“Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:*

- (a) having a sufficient interest, or alternatively,*
- (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,*

*have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.*

*Member States shall determine at what stage the decisions, acts or omissions may be challenged.*

*What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.*

*The provisions of this Article 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.*

*Any such procedure shall be fair, equitable, timely and not prohibitively expensive.*

*In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.”*

**44.** The interaction between the Aarhus Convention and the Public Participation

Directives was considered in *Conway*. In paras. 18 and 19 Clarke J. held:-

*“[18] As can be seen article 11<sup>1</sup> of the codified Directive 2011/92/EU provides, insofar as relevant to the issues which arise in this case, that there be a review procedure to challenge the substantive or procedural legality of decisions, acts or omissions subject to the Public Participation Directives which procedure, amongst other things, cannot*

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<sup>1</sup> Formerly Article 10a. Directive 85/337/EC was codified in 2011 by Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (“the EIA Directive”).

*be prohibitively expensive. Article 9 of the Aarhus Convention is somewhat differently worded although the broad objective is clearly the same. Article 9.2 is concerned with decisions where article 9.3 is concerned with acts and omissions by private persons and public authorities. Both provide for the necessity of a review procedure which, in accordance with article 9.4, must, amongst other things, not be prohibitively expensive.*

*[19] Of some relevance to this case is the fact that the acts or omissions referred to in article 9.3 of the Aarhus Convention are those which are said to ‘contravene provisions of ... national law relating to the environment’. On the other hand, article 11 of the codified Directive 2011/92/EU refers to acts or omissions ‘subject to the public participation provisions of this Directive’. It is possible that there might be an issue, therefore, as to the scope of the types of acts or omissions which are covered by, respectively, article 9.3 of the Aarhus Convention or article 11 of the Public Participation Directives.”*

**45.** For the purposes of this judgment, it is important to note that Article 10a requires member states to ensure that members of the public concerned may challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the EIA Directive. Such procedure is required to be fair, equitable, timely and not prohibitively expensive.

***Section 50 of the PDA 2000***

**46.** The Planning and Development Act 2000 consolidated and reformed the earlier planning legislation. Section 50 of the PDA 2000, as originally enacted, governs applications for judicial review in respect of a decision by a planning authority or the Board on an application for permission, or on any appeal or referral, or under ss. 179, 175 or Part XIV of the Act. The Act makes no reference to the costs of the proceedings. This

means that the ordinary rules established in O. 99 of the Rules of the Superior Courts apply to the proceedings. Section 50 was amended by s. 12 of the Planning and Development (Amendment) Act 2002, and again by the Planning and Development (Strategic Infrastructure) Act 2006. The scope of s. 50 was extended to “*any decision made or other act done by – (a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act.*” There was no amendment in relation to the costs of the proceedings.

**47.** Ireland, in accordance with its obligations as a member state, was required to give effect to the special costs provisions of the Public Participation Directive 2003. The PDA 2000 was passed and amended but there was no provision dealing with costs and, specifically, there were no special costs rules enacted to ensure that legal challenges by the public concerned, to decisions, acts or omissions subject to the Public Participation Directives, were not prohibitively expensive.

**48.** The EU Commission was not satisfied that the ordinary costs regime, giving judges discretion whether or not to make costs orders against unsuccessful applicants for judicial review, met the requirements of Article 10a.

**49.** In Case C-427/07 *Commission v. Ireland*, on 16 July 2009, the CJEU ruled that Ireland had not properly implemented the provisions of Article 3(7) of the Public Participation Directive 2003 (inserting Article 10a into the Public Participation Directive 1985). The ordinary judicial discretion to award or deny costs to a successful party, or the exceptional jurisdiction sometimes to award a proportion of costs to an unsuccessful party, did not suffice to ensure that such legal challenges were not prohibitively expensive. At para. 93 of the judgment the court held:-

*“Although it is common ground that the Irish courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred*

*by the unsuccessful party to be borne by the other party, that is merely a discretionary practice on the part of the courts.”*

***Section 50B of PDA 2000***

**50.** In 2010, the Oireachtas passed the Planning and Development (Amendment) Act 2010 (“PD(A)A 2010”). Section 3 inserted a new s. 1A into the PDA 2000 which expressly stated that various EU directives set out in the section were transposed into Irish law by the PDA 2000 as follows:-

*“1A. – Effect or further effect, as the case may be, is given by this Act to an act specified in the Table to this section, adopted by an institution of the European Union or, where appropriate, to part of such an act.*

***TABLE***

*Council Directive 75/440 EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States*

*Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds*

*Environmental Impact Assessment Directive*

*Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment*

*Habitats Directive*

*Major Accidents Directive*

*Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy*

*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*

*Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EC*

*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 Directives 85/337/EEC and 96/61/EC*

*Directive 2006/11/EC of the European Parliament and of the Council of 15 February 2006 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community*

*Birds Directive.*”

**51.** In addition, in light of the decision in *Commission v. Ireland*, the Oireachtas passed s. 33 of the PD(A)A 2010 which inserted a new section into the PDA 2000 establishing special rules for costs. This is s. 50B. The section, as originally enacted, provided as follows:-

“(1) *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, or*
  - (iii) *any failure to take any action,*
- pursuant to a law of the State 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*
- (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).*
- (2) *Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts and subject to subsections (3) and (4), in proceedings to which this section applies, each party (including any notice party) shall bear its own costs.*
- (3) *The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so—*
  - (a) *because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,*
  - (b) *because of the manner in which the party has conducted the proceedings,*  
*or*
  - (c) *where the party is in contempt of the Court.*
- (4) *Subsection (2) does not affect the Court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.*
- (5) *In this section a reference to 'the Court' shall be construed as, in relation to particular proceedings to which this section applies, a reference to the High Court or the Supreme Court, as may be appropriate."*

As I shall discuss more fully, this original section has since been amended in 2011 and 2018.

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

**52.** The following year, the Environment (Miscellaneous Provisions) Act 2011 was enacted. The long title to the Act of 2011 declares that one of the objects of the Act is “*to give effect to certain Articles in the*” Aarhus Convention. It will be recalled that the

amendments the previous year were to give effect to obligations under EU law. Section 8 of the Act of 2011 provides that the court shall take judicial notice of the terms of the Aarhus Convention. The long title to the Act of 2010 made no such reference and had no equivalent to section 8.

**53.** The Act of 2011 both amended s. 50B and applied special costs rules to certain proceedings in addition to those to which s. 50B applied. The Act substituted subs. (2) as originally drafted and inserted a new subs. (2A) into s. 50B. The two subsections read:-

*“(2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986) and subject to subsections (2A), (3) and (4), in proceedings to which this section applies, each party to the proceedings (including any notice party) shall bear its own costs.*

*(2A) The costs of the 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 act or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief.”*

**54.** This reproduced the new default position to proceedings within the scope of s. 50B that each party to the proceedings, including any notice party, was to bear their own costs. But, the Act also allowed for the successful applicant to be awarded its costs, notwithstanding this new default rule, to the extent that the applicant obtained relief and the costs were to be borne by the respondent or notice party, or both of them, to the extent that their respective acts or omissions contributed to the applicant obtaining relief. This reflected the more usual approach to costs in our system which otherwise had been ousted

by the provisions of s. 50B as originally enacted, while still retaining protection for applicants in environmental litigation from prohibitively expensive costs orders.

**55.** In addition to amending s. 50B, s. 4 of the Act of 2011 extended the rule that costs of the proceedings are to be borne by each party to civil proceedings *brought for the purpose of ensuring compliance with, or enforcement of, a statutory requirement or condition or other requirement* attached to a licence, permit, permission, lease or consent, or proceedings brought in respect of alleged contravention of, or failure to comply with, such licence, permit, permission, lease or consent, where the failure or contravention or failure to comply *“has caused, is causing, or is likely to cause, damage to the environment.”*

Section 4 applies to various licences granted under s. 83 of the Environment Protection Agency Act 1992, the Local Government (Water Pollution) Act 1977, the Water Services Act 2007, a waste collection permit or a waste licence granted under the Waste Management Act 1996, other licences granted under various acts and *“a permission or approval granted pursuant to the Planning and Development Act 2000”*.

**56.** Section 3 establishes a new rule in respect of the costs of proceedings to which the section applies. Each party (including any notice party) is to bear its own costs notwithstanding anything contained in any other enactment or in the relevant rules of court. The general rule is subject to subss. (2), (3) and (4) which provide as follows:-

*“(2) The costs of the proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant, or as the case may be, the plaintiff, to the extent that he or she succeeds in obtaining relief and any of those costs shall be borne by the respondent, or as the case may be, defendant or any notice party, to the extent that the acts or omissions of the respondent, or as the case may be, defendant or any notice party, contributed to the applicant, or as the case may be, plaintiff obtaining relief.*

*(3) A court may award costs against a party in proceedings to which this section applies if the court considers it appropriate to do so –*

*(a) where the court considers that a claim or counter-claim by the party is frivolous or vexatious,*

*(b) by reason of the manner in which the party has conducted the proceedings, or*

*(c) where the party is in contempt of the court.*

*(4) Subsection (1) does not affect the court’s entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.”*

**57.** Thus, in proceedings governed by the section, the default rule is that each party bears their own costs; there is a possibility that a successful applicant or plaintiff may be awarded their costs against a respondent, defendant or notice party as the case may be, to the extent that the applicant or plaintiff “*succeeds in obtaining relief*”.

**58.** In addition, the court may award costs against a party in proceedings, if it considers it appropriate so to do, by reference to that party’s conduct. If the claim or counterclaim is frivolous or vexatious, if the manner in which the party has conducted the proceedings or if the party is in contempt of court, the jurisdiction is engaged. This is unrelated to the success or otherwise of the applicant or plaintiff in the proceedings.

**59.** Subsection (4) recognises that the court’s entitlement to award costs in favour of a party in a matter of exceptional public importance and where, in the special circumstances of the case, it is in the interests of justice so to do.

**60.** The 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.

**61.** Finally, it should be noted that s. 7 enables a party to proceedings to which s. 3 applies, and which attracts these special costs rules, to apply to court for a determination that s. 3 applies to those proceedings. An application under s. 7(1) is by a motion on notice to the parties concerned. It is also open to the parties to the proceedings at any time to agree that s. 3 applies to those proceedings.

**62.** Section 50B was further amended by s. 29 of the Planning and Development (Amendment) Act 2018, with effect from 22 October 2018. It substituted the words “statutory provision” for “law of the State” in subs. 1(a), thereby limiting the scope of s. 50B. It added a fourth directive to the list in para. (a):-

*“(iv) paragraph 3 or 4 of Article 6 of the Habitats Directive”.*

**63.** It inserted a subsection defining statutory provision as follows:-

*“(6) In this section ‘statutory provision’ means a provision of an enactment or instrument under an enactment.”*

These amendments were enacted by the Oireachtas in response to the decisions of the High Court interpreting section 50B (as amended).

### **Case law on the application of special costs rules**

**64.** There have been a number of cases where the interpretation of the various iterations of s. 50B have been considered. As previously mentioned, none of the judges who considered the section interpreted it in the manner adopted by the trial judge in these proceedings. While this is of some significance, it is by no means determinative of the

issue. This is the first occasion that the section has been interpreted by an appellate court and it is therefore necessary to consider in detail the prior authorities.

*JC Savage*

**65.** The first occasion when the High Court had to consider the new special costs rules enacted in s. 50B was *JC Savage*. It is a case of considerable importance in considering the interpretation of s. 50B because Charleton J. engaged in a detailed examination of the matter. In that case, the notice party was granted planning permission to develop a supermarket in Swords, County Dublin. It was a condition of the permission that a revised car park layout and a revised landscaping scheme be agreed in writing with the planning authority prior to commencement of the development. The applicants were a neighbour and the owner of a nearby existing supermarket. They commenced judicial review proceedings claiming that the decision breached s. 34(5) of PDA 2000 and was *ultra vires*. Leave to commence the proceedings was granted, and the notice party and the Board filed opposition papers. Upon receipt of these papers, the solicitors for the applicants wrote to the parties indicating that they were withdrawing the case. The Board did not seek costs or any other order apart from the striking out of the case. The notice party sought its costs under the normal rules applicable where a plaintiff or an applicant discontinues proceedings. The applicants sought to rely upon s. 50B as a defence to this application for costs by the notice party. It was in this context that Charleton J. in the High Court construed the section.

**66.** He commenced by tracing the legislative history of s. 50 and s. 50B. He noted that the new section was necessitated by Ireland's obligations under EU law, in particular Article 10a of the Public Participation Directive 1985 as inserted by Article 3(7) of the Public Participation Directive 2003.

**67.** The applicant argued that s. 50B of the PDA 2000 went further than was required by the state's obligations under EU law. It argued that in *Commission v. Ireland*, the CJEU ruled that Article 10a of the Public Participation Directive 1985 was not implemented merely through the ordinary form of judicial discretion in the award, or denial, of costs to a successful party or the exceptional jurisdiction sometimes to award a proportion of costs to an unsuccessful party. It argued that this jurisdiction no longer applied to planning cases. It asserted that the Oireachtas was careful to amend the PDA 2000 so as to remedy the defect identified in *Commission v. Ireland*, and it contended that the law went further and amended the entirety of Irish planning law, whereby s. 50B is now the costs provision for every planning judicial review.

**68.** Charleton J. engaged in a thorough discussion of the applicable rules of statutory interpretation before proceeding to apply the rules to the proper interpretation of s. 50B of the PDA 2000. He concluded as follows:-

*“4.0 The legislative history of s. 50B includes the prior forms of s. 50 of the Act of 2000 and the amendments thereto before that new section was introduced and the decision of the European Court of Justice of 16th July 2009 in case C-427/07, Commission v. Ireland. Nothing in that legislative history shows any intention by the Oireachtas to provide that all planning cases were to become the exception to the ordinary rules as to costs which apply to every kind of judicial review and to every other form of litigation before the courts. The immediate spur to legislative action was the decision of the European Court of Justice in case C-427/07. Nothing in the judgment would have precipitated the Oireachtas into an intention to change the rules as to the award of costs beyond removing the ordinary discretion as to costs from the trial judge in one particular type of case. Specified, instead, was litigation that was concerned with the subject matter set out in s. 50B(1)(a) in three sub-paragraphs:*



*environmental assessment cases, development plans which included projects that could change the nature of a local environment, and projects which required an integrated pollution prevention and control licence. By expressing these three, the Oireachtas was not inevitably to be construed as excluding litigation concerned with anything else. Rather, the new default rule set out in section 50B(2) that each party bear its own costs is expressed solely in the context of a challenge under any 'law of the State that gives effect to' the three specified categories: these three and no more. There is nothing in the obligations of Ireland under European law which would have demanded a wholesale change on the rules as to judicial discretion in costs in planning cases.*

*4.1 The circumstances whereby the State by legislation grants rights beyond those required in a Directive are rare indeed. Rather, experience indicates that the default approach of the Oireachtas seems to be 'thus far and no further'. There can be exceptions, but where there are those exceptions same will emerge clearly on a comparison of national legislation and the precipitating European obligation. Further, the ordinary words of the section make it clear that only three categories of case are to be covered by the new default costs rule. I cannot do violence to the intention of the legislature. Any such interference would breach the separation of powers between the judicial and legislative branches of government. The intention of the Oireachtas is clear from the plain wording of s. 50B and the context reinforces the meaning in the same way. The new rule is an exception. The default provision by special enactment applicable to defined categories of planning cases is that each party bear its own costs but only in such cases. That special rule may exceptionally be overcome through the abuse by an applicant, or notice party supporting an applicant, of litigation as set out in s. 50B(3). Another exception set out in s. 50B(4) provides for*

*the continuance of the rule that a losing party may be awarded some portion of their costs 'in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.'*" (emphasis added)

**69.** Charleton J. held that the meaning of the section was clear from the plain wording at s. 50B and that the context reinforced this meaning. The special costs rules apply to a defined category of "*planning cases*" and not to all planning litigation. Yet his interpretation, based on the plain words of the section, differs to Simons J.'s interpretation, likewise based upon the plain reading of the section. Charleton J. held that the section applied to litigation "*that was concerned with the subject matter set out in s. 50B(1)(a) in three sub-paragraphs*" and no more. Simons J. did not address this finding in his judgment. He noted that the development was subthreshold and so did not come within the scope of the EIA Directive. He correctly observed that the High Court was not asked to decide – and did not decide – the separate question as to whether the costs of the proceedings might be apportioned between EIA and non-EIA grounds. He referred to the fact that the decision was based on the original version of s. 50B (though without commenting that from its first iteration it refers to "proceedings" rather than "grounds"). He observed that the section was amended by the Environment (Miscellaneous Provisions) Act 2011 which, in some respects, introduced a more generous regime than that required by EU law.

**70.** Charleton J. concluded that s. 50B did not apply to the litigation before him as it "*did not concern a project which required an environmental assessment*" and therefore was not one of the three categories specified in s. 50B(1)(a), and so the costs must be judged according to the ordinary principles. In view of the circumstances where the applicant had notified the respondent and notice party more than six weeks prior to the trial date that it was withdrawing the case, in the exercise of his discretion, he awarded the notice party one

third of its costs, including the costs of the motion. For completeness sake, I should record that Charleton J. noted the enactment of the Act of 2011, but that it was commenced after the institution of the proceedings before him and so it did not apply to those proceedings.

### ***Shillelagh Quarries***

**71.** The second case to consider the provisions of s. 50B arose some eight months later in *Shillelagh Quarries Limited v. An Bord Pleanála* [2012] IEHC 402. In a telescoped hearing pursuant to s. 50A(2)(b) of the PDA 2000 (as amended), Hedigan J. in the High Court refused leave to seek judicial review of a decision of An Bord Pleanála. The Board applied for its costs *against* the *unsuccessful* applicant and Hedigan J. considered the provisions of s. 50B. He held as follows:-

*“This amendment was made in order to meet Ireland's obligations under EU law as determined by the European Court of Justice on the 16th July, 2009. ... The obligation is that, in certain planning cases, in order to ensure access to Court to challenge decisions, the general public must have a cost effective way of doing so. Such review should be fair, equitable, timely and not prohibitively expensive. Section 50B attempts to do this by providing that in such cases, the default order that costs follow the event is set aside and save for limited exceptions, no order as to costs should be made.”* (emphasis added)

**72.** He shared Charleton J.’s view of the intention of the Oireachtas in enacting the provision and of its limited application. He expressly adopted the judgment of Charleton J. in *JC Savage* by quoting paras. 4.0 and 4.1 in full. The provision was enacted to meet Ireland’s obligations under EU law as determined in *Commission v. Ireland*. It applied only to certain planning cases. The Board and the notice party argued that the proceedings before Hedigan J. did not come within the class of case covered by s. 50B and that, consequently, the ordinary rules of costs applied, and the normal order should apply for

costs following the event. Hedigan J. rejected this argument and said that “[t]he project was one which required an environment impact assessment. Upon that basis it falls within the limited class of cases envisaged by s. 50B. Thus pursuant to s. 50B(2) the respondent and the notice party should bear their own costs.”

**73.** The judgment was not based upon an interpretation of the section which differed to that of Charleton J.; Hedigan J. did not analyse the issue further and he based his decision on the project, rather than the impugned decision. That being so, I do not believe that this decision can be said to be authority for the proposition that the fact that the project required an environmental impact assessment was sufficient to attract the costs provisions of s. 50B to the entire proceedings, or that the inclusion of a ground, or grounds, of challenge based upon one of the named directives is sufficient to attract the provisions of s. 50B to the entire proceedings. The Act of 2011 was not discussed in the judgment and it is clear from the substantive judgment that the proceedings did not come within the scope of that Act.

#### ***Kimpton Vale***

**74.** The next judgment to grapple with the section was *Kimpton Vale Developments Ltd. v. An Bord Pleanála* [2013] IEHC 442, [2013] 2 I.R. 767. The notice party sought security for costs against the applicant. The applicant argued that it should not have to provide security for costs as it would not be required to meet any award of costs if it failed in its application because s. 50B applied to the proceedings. The default rule was each party would bear their own costs and so no security for costs should be ordered. In a very learned, comprehensive judgment, Hogan J. sought to disentangle the increasingly complex web of legislation in the area of special costs rules. He held that the answer to the question before him turned on the extent to which the Aarhus Convention had been transposed into domestic law and the extent to which the Oireachtas elected to modify the costs rules in respect of those categories of planning and environmental cases which would

not otherwise come within the scope of the Convention. He noted that the Oireachtas had never specified that the Aarhus Convention actually forms part of the domestic law of the state, but that the long title to the Environmental (Miscellaneous Provisions) Act 2011 declared that one of the objects of the Act is “*to give effect to certain articles in the Convention*” and that s. 8 provides that the court shall take judicial notice of the terms of the Convention. He said that this compels “*the conclusion that the relevant provisions of the Act of 2011 should be interpreted in a manner which best gives effect to the corresponding provisions of the Convention. Thus, for example, the new costs rules contained in ss. 3, 4, 5 and 21 of the Act of 2011 were obviously designed to give effect to Article 9 of the Convention.*” He held that Article 9(4) of the Convention requires that remedies should not be prohibitively expensive and “[t]o that extent, therefore, the Act of 2011 must be taken as having gone somewhat further than the changes previously effected to s. 50B”.

**75.** He noted that the decisions of *JC Savage* and *Shillelagh Quarries* interpreted s. 50B as “*simply giving effect to specific European Union obligations in the area of environmental impact assessment, access to public information regarding planning matters and integrated pollution licenses following the decision of the European Court of Justice in Commission v. Ireland.*”

**76.** He then considered the changes effected to the costs rules by the Act of 2011. He noted that the Oireachtas, by enacting s. 4, “*clearly went further than that which was required by article 6 (and, by extension, annex 1) of the Convention in that the new rules apply to all types of enforcement actions in the planning and environmental sphere, and not simply those whose ambit would come within annex 1*”.

**77.** *JC Savage* and *Shillelagh Quarries* each considered s. 50B as originally enacted. Section 21 of the Act of 2011 amended s. 50B by substituting a new subs. (2) and by

inserting subs. (2A). Hogan J. noted that the amendments to s. 50B by s. 21 of the Act of 2011 did not address the question of the scope of the application of the section.

**78.** Having considered the interaction between the Aarhus Convention, EU directives, amendments to national legislation, and case law, he reconsidered the entire issue as a matter of first principles. At paras. 40-41 he said:-

*“40. Second, the language of s. 50B (as introduced by the Act of 2010) is broad enough to apply to judicial review proceedings seeking to quash any type of planning decision. The amendments to s. 50B were effected by s. 33 of the Act of 2010 which is contained in Part II of that Act. But s. 1(2) of the Act of 2010 provided that Part II of that Act should be collectively cited and construed with the Act of 2000 and the amendments thereto. The effect of the collective citation and interpretation clause is that the Act of 2000 and the subsequent amendments thereto are all deemed to be the equivalent of one Act, in this instance, the Act of 2000.*

*41. ... as the challenge is to a decision taken pursuant to the Act of 2000 and as it is that Act which is deemed by s. 1(2) of the Act of 2010 to be the Act that gives effect to the three Directives in question, the literal language of s. 50B(1)(a) might suggest that the new ‘no costs’ default rule thereby introduced applied to all judicial review proceedings involving a challenge to the validity of a decision taken under the Act of 2000, irrespective of whether it involved a decision taken under the authority of the three Directives or otherwise.” (emphasis added)*

**79.** However, having expressed his own view considering the matter from first principles, he acknowledged the decision of Charleton J. in *JC Savage*, which he described as “*a powerful application of the standard mischief rule and the presumption against unclear changes in the law*”. He did not conclude that the literal interpretation he advanced must apply in light of the prior decision of the High Court. In accordance with

the principle of *stare decisis*, he followed the decision in *JC Savage*. He noted in passing that “[o]ne might also question why, if the Oireachtas sought to apply such a far reaching change in the law to all categories of judicial review proceedings challenging decisions of planning authorities, it did so in this rather indirect and complicated fashion.” There is considerable force in this observation.

**80.** Hogan J. pointed to the anomalies which will arise where an applicant seeks to challenge a decision of a planning authority which does not attract the special costs rules under s. 50B on the one hand, and on the other hand, where the party brings enforcement proceedings in respect of a development erected in violation of the terms of a planning permission under the Act of 2011, which does attract these special costs rules. He also adverted to the fact that even *within* judicial review proceedings “*there may well be difficulties in ascertaining when the new costs rules begin and end.*” He envisaged judicial review proceedings involving claims which partially fall within the three nominated categories in s. 50B and those which partially fall without. He was not of the view that if any part of the claim came within the three nominated categories in s. 50B then the entirety of the proceedings were subject to the provisions of s. 50B.

**81.** The trial judge in the present case noted that Hogan J. chose not to dissent from the judgment of Charleton J. in *JC Savage*, but he then proceeded to adopt a very similar interpretation of the section as that ultimately rejected by Hogan J., namely the literal interpretation focussed upon the word “proceedings”. He did not address Hogan J.’s questioning why such a far-reaching change in the law as to costs should be effected in “*this rather indirect and complicated fashion*”. As predicted by Hogan J., the interpretation of s. 50B in the judgment of Simons J. is very far-reaching and the manner in which this far-reaching change (if it be correct) has been achieved is indirect and complicated.

**82.** It is necessary to pause and consider the consequences of the interpretation favoured by the trial judge, if correct. It would not merely apply to cases where some of the grounds relate to environmental issues and others do not. It would also require the application of the protective costs regime to many cases where *none* of the grounds of challenge relate to the environment, simply because the decision in question is made under an Act which gives effect to one of the specified environmental Directives (including the PDA itself). Even a relatively modest extension to a house (provided it is not exempted development on the grounds that it is subthreshold) will require a screening assessment under the Habitats Directive. A grant of planning permission in such a case would be a decision pursuant to a statutory provision that gives effect to the Habitats Directive within the meaning of s. 50B on Simons J.'s construction of s. 50B. Therefore, any application for judicial review of such a decision, regardless of the *grounds* of challenge, comes within s. 50B and therefore attracts the special costs rules. The proceedings need not involve any contravention of national law relating to the environment within the meaning of Article 9(3) of the Aarhus Convention, nor any infringement of Article 11 of the EIA Directive, or any of the other specified directives. For instance, if the challenge was based upon an allegation of objective bias, nevertheless the provisions of s. 50B would apply to the proceedings on the basis of Simons J.'s analysis.

**83.** As we shall see from the judgment of the CJEU in *North East Pylon*, neither EU law nor the Aarhus Convention require Ireland as a state to establish special costs rules of this breadth. As the trial judge fairly acknowledged, his interpretation of the law was based solely on his interpretation of the section as a matter of *domestic* law, which was based upon what he said was the plain and everyday meaning of s. 50B(1)(a). It is significant, therefore, that in reaching his conclusions he did not address either the fact of



Charleton J.'s interpretation of the section, nor Hogan J.'s observations and this part of his analysis in *Kimpton Vale*.

***McCallig***

**84.** The next case to consider s. 50B was *McCallig v. An Bord Pleanála (No. 2)* [2014] IEHC 353. In his first judgment ([2013] IEHC 60), Herbert J. dealt with the substantive judicial review application. The second judgment was concerned with the costs of the proceedings. One issue was whether the amendments effected to s. 50B by s. 21 of the Act of 2011 applied to proceedings which had commenced and were pending at the time the amendment was commenced. Herbert J. held that the provisions did not apply retrospectively. He quoted with approval the passage in *JC Savage* in paras. 4.0-4.2. As in *JC Savage*, the losing party sought to rely upon the provisions of s. 50B to resist orders for costs being made against them. In this case, the losing parties were the respondent and the second notice party. They argued that the “proceedings” in the case were “*by way of judicial review of a decision or purported decision made pursuant to one of these three specific categories and, therefore, each party should bear that party’s own costs of the entire proceedings*”. This is the interpretation of s. 50B accepted by Simons J. in this case. The successful applicant before Herbert J. argued to the contrary. She submitted that s. 50B(2) applied only to that specific part of her challenge to the decision of the respondents as was based on environmental impact assessment grounds and, that the provisions of O. 99 of the Rules of the Superior Courts applied to the other distinct and severable grounds of her challenge. These were based solely on a breach of the planning permission requirements of s. 34(i)(a), as applied by s. 37(i)(b) of the PDA 2000, and of Article 22(2)(g) of the Planning and Development Regulations 2001 (as amended). At paras. 43 and 44 Herbert J. held:-

*“43. In the written replying submission of the applicant she expressly identified two bases for her challenge to the decision of the respondents to grant planning permission to the second notice party. At para. 1.4 of this replying submission the applicant stated that, ‘the primary basis for the challenge...is that the decision was made in breach of the requirements of s. 34(i) as applied by s. 37(i)(b) of the 2000 Act’. At para. 5.1 of that submission the applicant referred to:-*

*‘Another group of grounds upon which [the applicant] bases her challenge to the validity of the decision, relates to the failure of the respondent to ensure that the likely significant effects of the proposed development on environmental matters were assessed prior to the development consent being given contrary to the provisions of Council Directive 85/337/EC as amended by Council Directive 97/11/EC and, Council Directive 2003/35/EC and contrary to Irish planning legalisation.’*

*The particular environmental matters identified by the applicant were, the likely significant impact of the proposed development on flora and fauna and in particular avifauna and also on the cultural heritage of the area which is an important Gaeltacht.*

*44. In my judgment ‘proceedings’ as used in s. 50B(1) only refers to that part of judicial review proceedings which challenge a decision made or action taken or a failure to take action pursuant to one or more of the three categories therein specified. ‘Proceedings’ is not defined in the Act of 2010, in the Planning and Development Act, or in the Interpretation Act 2005. It is not a term of legal art and where undefined its meaning falls to be established by reference to the context in which it is used, (see *Minister for Justice v. Information Commissioner [2001] 3 I.R. 43 at 45: Littaur v. Steggles Palmer [1986] 1 W.L.R. 287 at 293 A-E*). In my*

*judgment it cannot be considered that the legislature intended so radical an alteration to the law and practice as to costs as to provide that costs in every judicial review application in any planning and development matter, regardless of how many or how significant the other issues raised in the proceedings may be, must be determined by reference only to the fact that an environmental issue falling within any of the three defined legal categories is raised in the proceedings. Such a fundamental change in the law and practice as to awarding costs is not necessary in order to comply with the provisions of the Directive. It would encourage a proliferation of judicial review applications. Litigants would undoubtedly resort to joining or non-joining purely planning issues and environmental issues in the same proceedings so as to avoid or to take advantage of the provisions of s. 50B(2). This is scarcely something which the legislature would have intended to encourage.”*

(emphasis added)

**85.** The High Court awarded the successful applicant the costs relating to that part of her claim in respect of which she was successful and which did not concern any environmental impact assessment issue. Herbert J. did so pursuant to the provisions of O. 99. He expressly rejected the proposition that the provisions of s. 50B applied to the entire costs of every judicial review application where an environmental issue falling within any of the three defined legal categories is raised in the proceedings. He approached the assessment of costs by reference to the grounds upon which the challenge was brought.

**86.** The trial judge criticised the decision in *McCallig* as being unsatisfactory. He said that Herbert J. adopted “*an artificial interpretation of the term ‘proceedings’*. In effect, the term is treated as if it meant ‘grounds for judicial review’”. He also objected to the judgment on the grounds that it takes as its starting point “*an assumption as to what the legislative intent would be*” with little, if any, analysis of the statutory language. He also

said that *McCallig* appears to have been decided without giving proper weight to the interpretative obligation imposed on a court by the requirements of the Aarhus Convention and EU law. He concluded that *McCallig* may have been decided *per incuriam* on this point and concluded that it did not represent good law.

**87.** Two of his reasons for reaching this conclusion do not seem to me to bear scrutiny. The fact that Herbert J.'s finding that the provisions of the Act of 2011 did not have retrospective effect may be inconsistent with the subsequent decision of the CJEU in Case C-167/17 *Klohn* is not relevant to the correct interpretation of s. 50B as a matter of national law. Second, as is clear from the decision of the CJEU in *North East Pylon* (discussed below), the interpretative obligation imposed by Article 9 of the Aarhus Convention extends to national environmental law. Herbert J. awarded the successful applicant her costs in respect of the "*primary basis*" of her challenge that the decision was made "*in breach of the requirements of s. 34(i) as applied by s. 37(i)(b) of the 2000 Act*". There is nothing in the judgment which indicates that the impugned decision contravened provisions of Irish national law "*relating to the environment*" within the meaning of Article 9(3) of the Convention. Herbert J. applied the provisions of s. 50B to the grounds of challenge relating to the EIA and Public Participation Directives, so no issue of interpretative obligation arose in respect of these grounds for judicial review.

**88.** The trial judge criticised Herbert J. as taking as his starting point an assumption as to what the legislative intent would be. It seems to me that this is not what occurred. Herbert J. followed the decision of Charleton J. in *JC Savage* in circumstances where Charleton J. had engaged in a detailed analysis of the legislative intent. If the trial judge's criticism can be applied to *McCallig*, it must equally be applied to *JC Savage*. I do not accept that Charleton J. proceeded upon an "*assumption*" as to the legislative intent, as is clear from his "*powerful*" analysis, to use the words of Hogan J. Herbert J. adopted the analysis of

Charleton J. as a statement of the law, so I cannot agree with the trial judge's criticism of Herbert J. in this regard.

**89.** Finally, Simons J. held that Herbert J. gave an "*artificial*" interpretation of the term "proceedings". He said the contextual analysis of ss. 50A and 50B, which he conducted in paras. 38 and 39 (quoted in para. 24 above), leads to the conclusion that had the Oireachtas intended to impose different costs rules in respect of different categories of grounds in the same proceedings then the term "grounds" would have been carried forward into s. 50B. In other words, he rejected Herbert J.'s construction of s. 50B, in part, at least, by construing it by reference to s. 50A.

**90.** When Herbert J. came to construe the meaning of "proceedings" in s. 50B he noted that it was not defined and that it was not a legal term of art, and that it therefore fell to be construed in the context in which it was used. Once he concluded that the term "proceedings" fell to be construed in the context in which it was used, it was at least open to him to construe it in the manner in which he did. Simons J. was of the view that this approach was not open to him because the plain and ordinary meaning of "proceedings" was clear, based upon his contextual reading of ss. 50A and 50B. But, just as Hogan J. would have reached a different construction of the section to that of Charleton J. had he been the first High Court judge called upon to construe the section, so too is Herbert J.'s construction of "proceedings" in the context of s. 50B not so egregious as to be dismissed as artificial without at least acknowledging the legitimacy of his approach to the task of construing the section. Further, in his construction of s. 50B and his rejection of Herbert J.'s construction of the section, Simons J. did not address the approach to the construction of the section adopted by Charleton and Hogan JJ. In my judgment, a detailed engagement with all three judgments and, in particular, with these alternative constructions

of the section, was required before the High Court could dismiss the prior judgments, and in particular *McCallig*, as being decided *per incuriam*.

91. For these reasons, I am not satisfied that the trial judge was correct to hold that the decision of *McCallig*, in relation to the proper construction of s. 50B, was reached *per incuriam*. Which of the two conflicting interpretations of the section reflects the true intention of the Oireachtas will be considered further below.

### ***Conway v. Ireland***

92. Chronologically, the next case where the Aarhus Convention and the Public Participation Directives arose for consideration was *Conway v. Ireland* [2017] IESC 13, [2017] 1 I.R. 53. The Supreme Court considered whether the proceedings engaged the Aarhus Convention or the Public Participation Directives at all, where it was alleged that there was a breach of a statutory obligation pursuant to s. 17 of the Roads Act 1993, “to secure the provision of a safe and efficient network of national roads”. It is not a decision on s. 50B or any of the provisions of the Act of 2011. The plaintiff brought an application seeking legal aid pursuant to the Aarhus Convention and/or the Public Participation Directives. The Supreme Court dismissed the application on the basis that the claim did not amount to an allegation of an act or omission by a public authority in relation to national environmental law and therefore was not one that engaged either the Aarhus Convention or the Public Participation Directives. Clarke J. (as he then was) delivered the judgment of the court. He referred to the *Implementation Guide* (2nd edn., 2014) to the Aarhus Convention. At para. 63 of the judgment he held:-

“... the question of whether a national law may be a ‘law relating to the environment’ for the purposes of article 9.3 of the Aarhus Convention must be determined as a matter of substance rather than as a matter of form. It does not matter if the legislation in question deals with other questions or has a title implying

*that its principal focus may be matters other than environmental provided, importantly, that the measure sought to be enforced can properly be said, in any material and realistic way, to relate to the environment.”*

**93.** Having analysed the proceedings as formulated by the plaintiff “*even allowing some latitude in their interpretation*” they did not involve a challenge “*based on environmental law*”. On this basis, he was not satisfied that either the Aarhus Convention nor the Public Participation Directives were engaged, and the application for legal aid was refused.

**94.** It is thus a matter for the court to assess, as a matter of substance rather than mere form, whether the provisions of the Aarhus Convention or the Public Participation Directives are engaged in the proceedings. This necessarily involves an analysis both of the pleadings and the impugned decision. It is relevant to the approach of the court to the question of the application of s. 50B to proceedings before it.

#### **The decision of the CJEU in *North East Pylon***

**95.** In 2016, in the case of *North East Pylon Pressure Campaign Limited v. An Bord Pleanála (No. 2)* [2016] IEHC 490, Humphreys J. referred a series of questions to the CJEU concerning the determination of the costs in the proceedings before him. The High Court had rejected an application for judicial review of the development consent process for the installation of the North South electricity interconnector. The CJEU gave its decision in Case C-470/16 on 15 March 2018. At para. 35, the CJEU said that the second question referred was as follows:-

*“By its second question, the referring court asks, in essence, whether, where an applicant raises both pleas alleging infringement of the rules on public participation in decision-making in environmental matters and pleas alleging infringement of other rules, the requirement that certain judicial procedures not be prohibitively*

*expensive laid down in Article 11(4) of Directive 2011/92 applies to the costs relating to the challenge in its entirety or only to the costs relating to the part of the challenge concerning the rules on public participation.”*

**96.** At para. 36, the court held that a *literal* interpretation of Article 11(1) indicates that its scope is limited to costs relating only to the aspect of a dispute which concerns the public’s right to participate in decision-making in accordance with the detailed rules laid down by the directive. The court confirmed the conclusion by a *contextual* reading of the Article. The court continued:-

*“39. Thus, by making, in Article 11(1) of Directive 2011/92, an express reference solely to the public participation provisions of that directive, the EU legislature must be regarded as having intended to exclude from the guarantee against prohibitive expense challenges based on any other rules set out in that directive and, a foriori, on any other legislation, whether of the European Union or the Member States.*

...

*42. Thus, since the EU legislature intended simply to transpose into EU law the requirement that certain challenges not be prohibitively expensive, as defined in Article 9(2) and (4) of the Aarhus Convention, any interpretation of that requirement, within the meaning of Directive 2011/92, which extended its application beyond challenges brought against decisions, acts or omissions relating to the public participation process defined by that directive would exceed the legislature’s intent.*

*43. Where, as is the case of the leave application which led to the main proceedings concerning the determination of costs, a challenge brought against a process covered by Directive 2011/92 combines legal submissions concerning the rules on public participation with arguments of a different nature, it is for the national court to distinguish – on a fair and equitable basis and in accordance with the applicable*



*national procedural rules – between the costs relating to each of the two types of arguments, so as to ensure that the requirement that costs not be prohibitive is applied to the part of the challenge based on the rules on public participation.*

*44. It follows from the foregoing that the answer to the second question is that, where an applicant raises both pleas alleging infringement of the rules on public participation in decision-making in environmental matters and pleas alleging infringement of other rules, the requirement that certain judicial procedures not be prohibitively expensive laid down in Article 11(4) of Directive 2011/92 applies only to the costs relating to the part of the challenge alleging infringement of the rules on public participation.”*

**97.** The judgment of the court rejected the opinion of the Advocate General who was of the opinion that the not prohibitively expensive rules must apply to the proceedings in their entirety. Thus, as a matter of EU law, the requirement that certain judicial proceedings not be prohibitively expensive, laid down in Article 11(4), applies solely to the part of the challenge alleging infringement of the rules on public participation. Of necessity, this involves a national court analysing the grounds of challenge in order to determine whether all, some or none of the grounds attract the not prohibitively expensive rules.

**98.** The High Court also asked for guidance as to whether its interpretative obligations arising under Article 9(3) and (4) of the Aarhus Convention applied to those aspects of a dispute which were not covered by Article 11 of the EIA Directive. The court held that the requirement that certain judicial procedures not be prohibitively expensive must be regarded as applying to procedures challenging a development consent process on the basis of national environmental law as well as EU environmental law. The court held:-

*“56. Therefore, if the effective protection of EU environmental law, in this case Directive 2011/92 and Regulation No 347/2013, is not to be undermined, it is*

*inconceivable that Article 9(3) and (4) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law (see, by analogy, judgment of 8 March 2011, Lesoochránárske zoskupenie, C-240/09, EU:C:2011:125, paragraph 49).*

*57. Consequently, 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.*

*58. It follows from the foregoing that the answer to the fourth and fifth questions is that Article 9(3) and (4) of the Aarhus Convention must be interpreted as meaning that, in order to ensure effective judicial protection in the fields covered by EU environmental law, the requirement that certain judicial procedures not be prohibitively expensive applies to the part of a challenge that would not be covered by that requirement, as it results, under Directive 2011/92, from the answer given to the second question, in so far as the applicant seeks, by that challenge, to ensure that national environmental law is complied with. Those provisions do not have direct effect, but it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with them.” (emphasis added)*

**99.** Thus, a challenge to an impugned decision or procedure aimed at ensuring that national environmental law is complied with and which is not covered by the terms of Article 11 of the EIA Directive, will attract the interpretative obligations arising from Article 9(3) and (4) of the Aarhus Convention. The provisions do not have direct effect,

but it is for the national court to give an interpretation of national procedural law which is consistent with them, and to do so to the fullest extent possible.

### **Decisions applying *North East Pylon***

#### ***Fotovoltaic***

**100.** In *SC SYM Fotovoltaic Energy SRL v. Mayo County Council* [2018] IEHC 81, Barniville J. delivered a judgment on the provisions of s. 50B. He reviewed the preceding cases, including *JC Savage* and *McCallig*. He noted that Herbert J. in *McCallig* had ruled that s. 50B(2) applied to the costs of those parts of the applicant's claim which concerned EIA issues, but that the ordinary non-EIA grounds advanced were governed by the ordinary principles contained in O. 99 of the Rules of the Superior Courts. He indicated that he would adopt the approach of Herbert J. in *McCallig* but for the opinion of the Advocate General in *North East Pylon*, which suggested that where at least one ground of challenge attracted the not prohibitively expensive costs rules, that it should apply to the proceedings as a whole. On the basis that there might be a conflict between *McCallig*, which he intended to follow, and the forthcoming judgment of the CJEU, he adjourned his decision until the CJEU delivered judgment in the *North East Pylon* case.

**101.** Following delivery of the judgment in *North East Pylon* by the CJEU, Barniville J. delivered a further judgment on the costs ([2018] IEHC 245). He concluded that the costs order which he had been disposed to make, as explained in his earlier judgment, was the appropriate order to make and was consistent with the judgment of the CJEU in *North East Pylon*. He held that the not prohibitively expensive rules applied in relation to Ground (1) as that was potentially based upon an EIA. He held that Grounds (2) and (3) were purely national law grounds and therefore did not attract the special costs rules. He noted that the CJEU confirmed that:-

*“48. ... it is only in relation to those grounds which allege infringement of the rules on public participation in this field that [the not prohibitively expensive] requirement in Article 11(4) applies and that that rule applies only to the costs relating to the part of the challenge alleging infringement of those rules.*

...

*49. I do not accept that I am required to apply the [not prohibitively expensive] requirement to the entirety of the proceedings just because one of the grounds raised may attract the benefit of that provision. That would be contrary to the approach endorsed by the CJEU in North East Pylon.”*

**102.** He agreed with the dicta of Charleton J. in *JC Savage* regarding the intention of the Oireachtas in enacting s. 50B. At para. 50 he held:-

*“... I accept the submission advanced by [the notice party] that s. 50B should not be interpreted as having a wider or more expansive meaning than is required by Article 11(4) of the Directive 2011/92, as that provision has been interpreted by the CJEU in North East Pylon.”*

**103.** He then considered whether the interpretative obligation to apply Article 9(3) and (4) of the Aarhus Convention to those parts of the proceedings which were not covered by Article 11(4) of the EIA Directive, insofar as the applicant was seeking to ensure that national environmental law complied with those provisions of the Aarhus Convention, arose in respect of Grounds (2) and (3). At para. 60 he held as follows:-

*“It is particularly notable that in setting out its analysis and in answering the fourth and fifth questions referred by the High Court in North East Pylon, the CJEU referred on a number of occasions to the context being the application of ‘national environmental law’ and the aim of the proceedings which attract the benefit of the [not prohibitively expensive] provisions being to ensure that ‘national environmental*

*law' is complied with. The analysis set out and the answer given to those questions is expressly set out and provided in that context. Neither the analysis nor the answer given imposes any requirement on national courts to apply the requirement that judicial proceedings not be prohibitively expensive to any part of a challenge which would not be covered by the [not prohibitively expensive] requirement in Article 11(4) which does not involve the application of 'national environmental law'. In my view, the obligation contained in the answer given by the CJEU to the fourth and fifth questions referred by the High Court (Humphreys J.) does not oblige me to apply the [not prohibitively expensive] provisions of Article 9(4) of the Aarhus Convention to those parts of a challenge which raise purely national law questions which are not concerned with national environmental law, or its application, as is the case here, where those parts concerned an alleged failure to comply with fair procedures and an alleged failure to provide adequate reasons (grounds (2) and (3)). In my view, there is nothing in the judgment of the CJEU in North East Pylon and, in particular, in the answer which it gave to the fourth and fifth questions referred which would require me to apply the provisions of Articles 9(3) and 9(4) of the Aarhus Convention and, in particular, the requirement contained in the latter provision that certain judicial procedures not be prohibitively expensive to grounds (2) and (3) raised by the applicant in these proceedings. I do not believe that the obligation to apply a conforming interpretation of national procedural law in the circumstances addressed by the CJEU in its analysis of and answer to the fourth and fifth questions referred applies in relation to those two grounds which do not concern the application of national environment law or its application." (emphasis added)*

**104.** Applying the decision of the Supreme Court in *Conway*, he concluded that neither of Grounds (2) or (3) came within the ambit of environmental law for the purposes of Article

9(3) of the Aarhus Convention. Neither did they amount to an allegation of any act or omission by a public authority of a contravention of national environmental law. Thus, the grounds could not benefit from the provisions of Article 9(3) or (4) of the Aarhus Convention. Accordingly, he decided that, as the applicant had failed in his application, and the special costs rules only applied to Ground (1) and O. 99 applied to Grounds (2) and (3), that the notice party was entitled to the costs in respect of Grounds (2) and (3) against the applicant and he made an order that the applicant pay two-thirds of the costs to the notice party.

**105.** The trial judge distinguished the present case from *Fotovoltaic* on the grounds that the decision under challenge was a decision pursuant to s. 5 of the PDA 2000, whether the particular acts were “development” or “exempted development”. It did not involve a development consent. This distinction is true, so far as it goes, but the case was brought pursuant to s. 50 of the PDA 2000, and Barniville J. was invited to order that each party should bear their own costs on the basis that s. 50B applied to the proceedings. Thus, he addressed the application of the section and the complex special costs rules in two judgments. Simons J. does not address Barniville J.’s analysis of s. 50B, the approval of the decision of the *JC Savage* and *McCallig*, nor the analysis of the interpretive obligation arising from Article 9 of the Aarhus Convention.

### ***Merriman***

**106.** Two weeks later, the High Court (Barrett J.) gave judgment in *Merriman v. Fingal County Council* (Unreported, High Court, 17 May 2018) on the costs of an unsuccessful application for judicial review of a decision made pursuant to s. 42 of the PDA 2000 for an extension of the duration of the planning permission in question. Barrett J. said that the interpretation of s. 50B was “informed” by Article 11(4) of the EIA Directive and by the legislative intent that underpins s. 50B. He held that this was to give effect to the costs

aspects of Article 11 “*and no more, i.e. s. 50B does not seek to ‘gold plate’ Article 11*”. The authorities cited for this proposition were *JC Savage* and *McCallig*. He approached the question of the costs of the proceedings by analysing whether the proceedings were proceedings to which Article 11 of the EIA Directive applied. Secondly, he considered the interpretative obligation of national courts in respect of national environmental legislation deriving from Article 9(3) of the Aarhus Convention. He analysed the arguments in the proceedings by reference to EU law arguments and arguments on constitutional and/or European Convention on Human Rights grounds. The latter category of arguments did not represent a contest on the basis of national environmental law and thus, could not come within the protection of either Article 9(3) or (4) of the Aarhus Convention and, therefore, the costs in respect of these grounds was “*governed exclusively by reference to O.99/RSC*”. In relation to the first named respondent and the first notice party, he made no order for costs in relation to the EIA Directive related portion of the proceedings. He ordered the applicants to pay their costs in relation to the non-EIA related portion of the proceedings. Applying the interpretative obligations identified by the CJEU in *North East Pylon* to grounds relating to national environmental law, he ordered that the applicants pay the costs in relation to the Habitats Directive related portion of the proceedings, but that these costs should be diminished costs in order not to be prohibitively expensive.

**107.** The applicant applied for a certificate for leave to appeal under s. 50A(7) of the PDA 2000 in relation to the issue whether the court was entitled to make an issue-based determination in respect of the costs. Barrett J. gave judgment on 21 December 2018 (2018 IEHC 763) and held at para. 3 that:-

*“There is no uncertainty presenting in the applicable law:*

*(1) it is settled case-law that a court should distinguish between (a) aspects of proceedings covered by the ‘not prohibitively expensive’ (NPE) requirement in*

*Art. 11(4) of the EIA Directive and (b) aspects of proceedings outside that Art. 11 but possibly within Art. 9(4) of the Aarhus Convention (Case C-470/16 North East Pylon Pressure Campaign Limited (‘NE Pylon (EU)’)).*

*(2) the scope of Art. 11 is confined to aspects of proceedings based on the public participation rules laid down in the EIA Directive (see, e.g., NE Pylon (EU), paras. 36-42).*

*(3) in identifying the applicable costs rules a court may divide up a case by reference to the issues raised (NE Pylon (EU), para. 43).*

*(4) it is clear from the preceding paragraphs in the judgment in NE Pylon (EU) that the reference, in para. 43 of that judgment, to ‘the rules on public participation’ refers to the EIA Directive’s rules on public participation.*

*(5) the distinction previously made by the court between (a) EIA public participation arguments (Art. 11(4), EIA Directive applicable), (b) other European Union environmental law requirements (Art. 9(4), Aarhus Convention applicable), and (c) arguments not based on European Union or national environmental law, is consistent with the case-law of the European Court of Justice (CJEU) and also with, e.g., SC SYM Fotovoltaic Energy SRL v. Mayo County Council [2018] IEHC 245.*

*(6) the notion that it is impossible, in these proceedings, to separate out constitutional/ECHR grounds from European Union law grounds is belied by the fact that these respective grounds were (a) identified separately in the applicants’ statement of grounds, (b) argued separately at hearing by reference to different case-law, and (c) considered separately by this Court in its initial judgment (which disaggregates the constitutional from the European).”*

**108.** For these reasons, he refused a certificate on this point.



**109.** Simons J. said that there was no inconsistency between the judgment of Barrett J. and his judgment. In *Merriman*, the decision under challenge was not a development consent, but rather was an application under s. 42 of the PDA 2000 to extend the duration of a planning permission. It was not a decision “*for the purposes of either the EIA Directive or the Habitats Directive*”. This analysis fails to explain or engage with Barrett J.’s approach to the award of costs in the judicial review proceedings. If Simons J. was correct in the distinction he drew between a decision made pursuant to s. 42 and a development consent, then it is difficult to see how s. 50B applied at all in *Merriman*. Further, he fails to address Barrett J.’s statement that the approach “*is settled law*”, or to explain how both Barrett J. and the other judges in the High Court erred in their approach to s. 50B, and the interpretative obligations arising from Article 9 of the Convention, other than his own literal interpretation of the section. If Simons J.’s interpretation is correct, the application of the special costs rules is so wide that the interpretative obligation will rarely, if ever, arise; and so the exercise conducted by the other judges of the High Court was unnecessary, as they ought simply to have applied the provision of s. 50B to the entirety of the proceedings once the decision under challenge had been taken pursuant to a provision giving effect to at least one of the specified directives, even if none of the grounds of challenge were based on a failure to comply with the requirements of one of the directives.

***North East Pylon (No. 5)***

**110.** Following the judgment of the CJEU in *North East Pylon*, the matter came back before the High Court. Humphreys J. delivered a detailed judgment on the costs of the proceedings in *North East Pylon (No. 5)* ([2018] IEHC 622). He held that the starting point is that costs follow the event, but noted that the principle can be modified in a number of ways. He first referred to *Veolia Water UK plc v. Fingal County Council (No. 2)* [2006] IEHC 240, [2007] 2 I.R. 81. Having applied the *Veolia Water* approach, insofar

as there was an overall balance of costs “*left over*” as against an unsuccessful environmental litigant, he would then proceed to consider national and EU based special costs rules, and the court’s discretion under O. 99 of the Rules of the Superior Courts. Applying a *Veolia Water* approach, he concluded that the grounds upon which the applicants were successful and the grounds upon which they lost essentially balanced out, and he made no order as to costs as against the State. As regards the costs between the unsuccessful applicant for leave and the notice party, he analysed how much of the applicant’s challenge related to public participation or national environmental law in fields covered by EU law or Article 9 of the Aarhus Convention. He held that “*the scope of s. 50B applies to three categories of challenge*”. The one relevant to the instant case was Article 10a of the Public Participation Directive 1985 (Article 11 of the EIA Directive) conferring a right of access to a review procedure to “*challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive*”. At para. 29 he held:-

“... *Insofar as the application was a challenge relating to the public participation provisions of the 2011 directive, then s. 50B applies. Therefore, reading s. 50B in the light of para. 1 of the curial part of the CJEU judgment in the present case which applies the not-prohibitively-expensive rule to the procedure by which it is to be determined whether or at what stage the development consent is to be challenged, the appropriate order is no order relating to the parts of the case identified above that relate to public participation.*”

**111.** In case there were points which fell outside s. 50B as he construed it, he considered the impact of the principle that costs should not be prohibitively expensive as regards other issues falling within the field of EU environment law. At para. 32 he concluded that:-

*“... the not-prohibitively-expensive rule applies (to the fullest extent that it is possible to read national law to that effect) to challenges based on national environmental law within the field of EU environmental law even if the challenges do not relate to the public participation rules.”*

**112.** He noted, however, that there may be points which have no relevance at all to EU law or to national environmental law and was of the opinion that *“if there is a balance of costs on non-EU law points that have no relevance at all to EU law, an award of costs on the non-EU law points against an applicant should only be considered if the points really added anything significant to the length of the hearing”*. What is significant for the purposes of this judgment is that he recognised that non-EU law and non-environmental law points could result in an award of costs against an unsuccessful applicant.

**113.** Simons J. observed that the proceedings in *North East Pylon (No. 5)* concerned an application for development consent pursuant to s. 182B of the PDA 2000. At the time the proceedings were instituted, the consent application had yet to be decided and the proceedings concerned the conduct of an oral hearing before the Board. There was no final decision pursuant to a law of the state giving effect to the EIA Directive. He acknowledged that Humphreys J. *“appeared to accept”* that s. 50B does contemplate the apportionment of costs.

**114.** The approach of Simons J. is incompatible and inconsistent with the reasoning and the decision of Humphreys J., and it is not clearly addressed. The alleged distinction, that it concerned a challenge to a decision during the process but prior to the making of a development consent decision, is an unconvincing distinction from the point of view of principle. Section 50B refers to a decision, not to a final decision. If Simons J.’s analysis is correct, it implies that s. 50B does not apply to a procedural step leading to a final decision to grant or refuse development consent, which would seem to be contrary to both

Article 11(4) of the EIA Directive and Article 9(5) of the Aarhus Convention. Further, Humphreys J.'s reference to *Veolia Water* principles requires a parsing of the grounds of challenge. If Simons J. is correct, all that is required is to identify whether the decision impugned was made pursuant to a statutory provision which gives effect to – in the sense that it is required to comply with the requirements of – one of the (now) four directives, in which case a *Veolia Water* type analysis is otiose.

### **The 2018 amendment of s. 50B**

**115.** As noted above, section 50B was further amended by s. 29 of the Planning and Development (Amendment) Act 2018, with effect from 22 October 2018 by substituting the words “statutory provision” for “law of the State” in subs. 1(a), thereby limiting the scope of s. 50B and adding a fourth directive to the list in para. (a):-

“(iv) *paragraph 3 or 4 of Article 6 of the Habitats Directive*”.

It is a well-established that the Oireachtas is presumed to know the law. The decisions of the High Court up to *Fotovoltaic* and *Merriman* had been delivered before the Act of 2018 was passed and the amendment commenced. The amendment had the effect of limiting the scope of s. 50B and ruling out the argument set out by Hogan J. in *Kimpton Vale*. It must be presumed to have proceeded on the basis of the construction of s. 50B consistently adopted by the High Court since *JC Savage*. The fact that the Oireachtas limited the scope of s. 50B and the implication, if any, of this amendment to the interpretation of s. 50B requires to be considered. This must include consideration of the fact that, in this context, the Oireachtas failed to avail of the opportunity to correct the (alleged) misinterpretation of the section by a series of judges of the High Court, which, on Simons J.'s analysis of the true intention of the legislature, had occurred since 2011.

### **The appeal**

**116.** The Board appealed the decision of the High Court on the grounds that the trial judge had erred in concluding that the scope of s. 50B was determined by reference to the proceedings in their entirety, rather than by reference to those parts of the proceedings which relate to a determination taken for the purpose of giving effect to one of the four identified directives. The logic of the decision of the High Court is that all decisions taken under the PDA 2000 or PD(H)A 2016 attract the special costs regime created by s. 50B of the PDA 2000, as every decision requires a screening for appropriate assessment and screening for environmental impact assessment, irrespective of the basis upon which a decision is challenged. The Board submitted that the trial judge had held that the interpretation of s. 50B was a matter of national law and therefore erred when he approached the obligation to interpret domestic law in a manner consistent with EU law. His conclusions on the interpretations of s. 50B do not flow from the manner in which the CJEU has interpreted the obligations arising from the requirement that certain judicial procedures not be prohibitively expensive. But the consequence is that the interpretation advanced by the trial judge is not required for the purposes of complying with the obligations of EU law.

**117.** The Board argued that the trial judge erred in law in holding that s. 9 of the PD(H)A 2016 is a “*statutory provision*” that gives effect to, *inter alia*, Article 6(3) of the Habitats Directive. The Board argued that s. 50B of the PDA 2000 was not “*triggered where the statutory provision pursuant to which the impugned decision is made gives effect to any one of the four EU Directives specified*”.

**118.** It also alleged that the trial judge erred in law in his consideration of the meaning of a decision in s. 50B by rejecting the submission that a single decision of the Board may

comprise different elements for the purpose of complying with the obligation to undertake screening for appropriate assessment and/or environmental impact assessment.

**119.** The Board said the trial judge erred in the manner in which he considered the interaction between national law and EU environmental law when complying with the interpretive obligation arising from Article 9 of the Aarhus Convention. It argued that he erred in determining that the issues in the case (save the landowner consent issue) all fell within the subset of national environmental law within a field of EU environmental law, and for this reason the applicants were entitled to a CPO in the manner envisaged in *North East Pylon (No.5)* and *Conway*. The challenges to the decision in the disputed grounds were “*framed*” by reference to national law concepts of administrative law and were determined by reference to obligations arising under national law, rather than by reference to any concepts of EU environmental law.

### **Discussion**

#### ***The trial judge’s approach to precedent in respect of s. 50B***

**120.** When the trial judge came to consider the application for a PCO, seven judges of the High Court had considered the section and the application of the special costs rules to proceedings brought by way of judicial review. As is apparent from the discussion above, at least some, if not all, proceeded on the basis that the special costs rules established in s. 50B applied solely to those grounds of challenge which invoked one of the three, or four, directives specified in the section; they did not construe the section in the same manner as the trial judge construed it. Herbert J. considered and rejected the precise argument upon which the trial judge determined the application. Barniville, Barrett and Humphreys JJ. all accepted and followed the judgment in *McCallig* in the months preceding the judgment of the trial judge. In *Kimpton Vale*, Hogan J. expressly acknowledged the obligations of *stare*

*decisis* and declined to follow the construction of the section he might have adopted had he been the first judge of the High Court to construe the section.

**121.** The doctrine of *stare decisis* plays an important role in ensuring, as far as possible, consistent and uniform interpretation of the law and of statutory provisions in particular. This fulfils the vital role of bringing clarity and consistency to the law, which benefits all and helps to avoid, or at least reduce, unnecessary litigation. Conflicting interpretations of statutory provisions by judges of the High Court are to be avoided if possible, and then only if there are substantial reasons for believing that the initial judgment was wrong.

**122.** I cannot agree with the trial judge's observation that the doctrine of *stare decisis* applies with less rigour to the costs of environmental litigation insofar as he expressed that as a general, unqualified statement. That statement, without qualification, is overbroad. Obviously, the precedential value of a decision is lessened if its reasoning depends upon the wording of a provision which is subsequently amended. The court will apply the statute as amended; if the amendment means that the precedent is no longer applicable, then it no longer governs the interpretation or construction of the provision, and the court must construe the current version of the statute in question, giving due weight to the changes effected by the legislature. If, on the other hand, the amendment does not affect the provision under consideration, which has previously been construed, the mere fact of subsequent amendments to other provisions does not detract from the precedent value of the earlier decisions as to the construction of the unamended provision. They remain persuasive precedents.

**123.** Law is always evolving so the mere fact that new decisions will be handed down by the CJEU does not mean "*that the precedent value of earlier judgments will be weaker than in other areas of law.*" Again, the trial judge's statement in this regard is overbroad. National courts are bound to give effect to new decisions which emerge from the CJEU in

relation to EU law. This is not inconsistent with the doctrine of *stare decisis*, and neither is it a reason not to follow decisions of national courts construing national legislation, *unless the differing interpretation is required by reason of a decision of the CJEU*. The trial judge acknowledged that his construction of s. 50B was not required by EU law, in light of the decision in *North East Pylon*. His decision was based on his interpretation of the legislation as a matter of national law. As such, this reason for disregarding the precedent value of earlier case law is unpersuasive.

**124.** Thirdly, the trial judge said the fact that there are restrictions on appealing decisions of the High Court in the area of planning and environmental law means that guidance from the appellate courts is not as readily available as in other areas of the law. Therefore, decisions of the High Court could more readily be departed from by other High Court judges. This, to my mind, does not justify a refusal to follow precedent. It is important to note, in this regard, the decision in *Merriman*. Barrett J. was asked to certify a case for appeal on the precise grounds which found favour with the trial judge in this case.

Barrett J. refused on the basis that the issue was settled law, but it was open to him to have granted leave to appeal. This shows that the requirement to obtain leave is not a bar to appellate courts giving guidance in appropriate cases if leave to appeal is granted. I would not regard the requirement to obtain leave to appeal a decision of the High Court as a reason for applying the doctrine of *stare decisis* less rigorously than in other areas of law.

**125.** His final reason for questioning the precedential value of decisions in the area of planning and environmental law stems from the obligation on all national courts to apply EU law, even on its own motion, in order to comply with the principle of conforming interpretation. This is true where the conforming principle arises and where it is necessary to give effect to EU law. However, if it does not arise, then the obligation has no relevance to the doctrine of *stare decisis* and the precedent value of prior decisions on national law. I



shall consider the issue of conforming interpretive obligations arising from the Aarhus Convention later in this judgment.

**126.** In my judgment, the reasons advanced by the trial judge for failing to abide by persuasive earlier decisions of the High Court are not sufficient to justify his decision so to do, and he erred in failing so to do. His concern that there was no authoritative decision of an appellate court on the proper construction of s. 50B could have been met by the grant of a certificate of leave to appeal, if required. I should also add that it is of some concern that the point upon which he reached his decision was not initially raised by Heather Hill, but was introduced into the case by the trial judge against the weight of precedent to the contrary and then adopted by counsel for Heather Hill.

***Section 50B: a literal reading?***

**127.** The trial judge's interpretation of s. 50B is not required for the purposes of complying with the requirements of EU law. His analysis is based solely on the rules applying to statutory interpretation, without regard to the requirements of EU law. Subsequently, he considers issues of interpretative obligations derived from the Aarhus Convention and EU law, but they do not inform the initial exercise of statutory construction.

**128.** As is apparent from the discussion of the legislative history and the judgments applying s. 50B, there now exists conflicting decisions of the High Court as to the correct interpretation of the section. The fact that seven High Court judges have reached conclusions as to the meaning of the section different to that which the trial judge said reflects the literal meaning of the section strongly suggests that the interpretation of the section is not straightforward, nor is it to be resolved by recourse to the "*natural and ordinary meaning*" of the words used in the section. In *McCallig*, Herbert J. pointed out that the word "proceedings" was not defined in either the section, the PDA 2000 or the

Interpretation Act 2005, and said that its meaning falls to be established by reference to the context in which it is used. Simons J. contrasted the use of the word “grounds” in ss. 50 and 50A, with “proceedings” in s. 50B. He concluded in para. 39:-

*“... Had the Oireachtas intended to impose different costs rules in respect of different categories of grounds with[in] the same ‘proceedings’, then the term ‘grounds’ would have been carried forward into section 50B.”*

In *Kimpton Vale*, Hogan J. gives support to the interpretation of the word “proceedings” in s. 50B as applying to all of the proceedings, regardless of the grounds upon which judicial review of the impugned decision is sought, if ones focus is solely upon s. 50B and the word “proceedings”. In my judgment, the word “proceedings”, read literally, means simply that, but that does not mean that the correct interpretation of the section is that of the trial judge.

**129.** In *DPP v. Brown* [2018] IESC 67, [2019] 2 I.R. 1, the Supreme Court analysed the task of construing a statutory provision. McKechnie J., speaking for the court, held:-

*“94. The primary route by which the intention of the legislature is ascertained is by ascribing to the words used in the statute their ordinary and natural meaning. Thus it is this ‘literal approach’ which is first in line when it comes to statutory interpretation. It stands to reason that in construing the text chosen by the legislator, the first consideration is to give the words used their natural meaning. Provided that they are clear and unambiguous, the judge’s role is at an end, and the words should be given their plain meaning.*

*95. Of course, the task of ascribing ordinary meaning is not as simple as it first appears. What is meant by the ‘ordinary’ or ‘natural’ meaning of a word may differ depending on whether one consults a dictionary or the man on the street. Words may have legal meanings but also ‘ordinary’ meanings. The natural meaning of a word can*

*also vary greatly depending on the context in which it appears. 'Context' in this regard may require the one interpreting the legislation to consider the immediate context of the sentence within which the word is used; the other sub-sections of the provision in question; other sections within the relevant Part of the Act; the Act as a whole; any legislative antecedents to the statute/the legislative history of the Act, including on occasion Law Reform Commission or other reports; and perhaps even the mischief which the Act sought to remedy. With each avenue of remove, the natural meaning of the word may, or may not, begin to shift. As eloquently put by Black J. in People (Attorney General) v. Kennedy [1946] I.R. 517 ("People (AG) v. Kennedy"):*

*"A small section of a picture, if looked at close-up, may indicate something quite clearly; but when one stands back and views the whole canvas, the close-up view of the small section is often found to have given a wholly wrong view of what it really represented.*

*If one could pick out a single word or phrase and, finding it perfectly clear in itself, refuse to check its apparent meaning in the light thrown upon it by the context or by other provisions, the result would be to render the principle of ejusdem generis and noscitur a sociis utterly meaningless; for this principle requires frequently that a word or phrase or even a whole provision which, standing alone, has a clear meaning must be given a quite different meaning when viewed in the light of its context." (p. 536)*

96. *If ambiguity should remain, and the literal approach results in uncertainty, then it will be necessary to have regard to the purposive approach. Such an interpretive technique permits the Court to go beyond the pure text of the statute and to consider the intended objective of the Oireachtas and the reason for the statute's enactment. In most cases, the same meaning will be arrived at using the purposive method as it would*

*by using the literal approach; thus the former can function as a useful cross-check for the latter. Occasionally it may be necessary to depart from the literal approach where to apply it would defeat the clear object and purpose of the legislation: see section 5 of the Interpretation Act 2005 and Irish Life and Permanent plc v. Dunne [2016] 1 I.R. 92 at pp. 106-107). ...*

*97. In any event, it is clear that, as part of the literal approach, the task for the judge is to construe the words used by reference to the Act as a whole, rather than in isolation. As put by Lord Bingham of Cornhill in R (Quintavalle) v. Secretary of State for Health [2003] 2 AC 687:*

*“8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. ... The court’s task, within the permissible bounds of interpretation, is to give effect to Parliament’s purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.”*

*Lord Millett put it similarly: “[i]n construing a statute the task of the court is to ascertain the intention of Parliament as expressed in the words it has chosen. The*

*Parliamentary intention is to be derived from the terms of the Act as a whole read in its context” (para. 38).*

98. *The same interpretive approach is utilised in this jurisdiction: the law reports abound with judges making reference to the need to interpret Acts of the Oireachtas a whole. In her judgment in C.K. v. Northern Area Health Authority [2003] 2 I.R. 544, McGuinness J. noted that it is well settled law “that the individual sections of a statute should be interpreted in the context of the statute as a whole” or indeed in the context of a number of statutes which are to be construed together, where that is so provided by the Oireachtas (p. 559). To similar effect, in Crilly v. T. & J. Farrington Ltd. [2001] 3 I.R. 251, Murray J., as he then was, observed that regard should be had to the statute as a whole:*

*“Manifestly, however, what the courts in this country have always sought to ascertain is the objective intent or will of the legislature. This is evident for example from the rule of construction according to which when the meaning of the statute is clear and definite and open to one interpretation only in the context of the statute as a whole, that is the meaning to be attributed to it ...”*  
*(p. 295)*

*Such approach was recently adopted by Clarke C.J. (with whom MacMenamin J., Dunne J., O'Malley J. concurred) and O'Donnell J., dissenting, in their judgments in J.G.H. v. Residential Institutions Review Committee [2017] I.E.S.C. 69 (see paras. 5.13 to 5.16 of the judgment of Clarke C.J. and paras. 4, 6 and 30 of the judgment of O'Donnell J.)*

99. *Accordingly, that is the approach which must be utilised in the construction of the relevant statutory provisions. The question is what is the ordinary and natural meaning*

*of the words used in the context in which they appear, that context including, inter alia, the scheme of the 1997 Act as a whole.*” (emphasis added)

**130.** Section 50B deals with the costs of judicial review proceedings brought under the PDA 2000. The preceding sections, ss. 50 and 50A, are concerned with making an application for judicial review. An applicant must seek leave to bring judicial review proceedings upon *grounds* set out in the statement of grounds. In these sections, the Oireachtas’ intention was to ensure that leave to seek judicial review is only given in cases with grounds of challenge which the High Court accepts are “substantial grounds”. But once leave is granted, upon substantial grounds, the *proceedings* may be brought against the respondent (and notice party). It is at this point that an applicant is potentially exposed to costs in respect of the *proceedings*, based on the permitted grounds. It is this potential exposure to costs, which could be prohibitively expensive, which required an amendment of the regime governing costs. Approaching the analysis from this perspective, it is possible to discern a distinction between the grounds upon which an applicant is given leave to seek judicial review and the proceedings pursued, pursuant to such leave. The context may explain the change in the language between the sections. It is appropriate to consider the construction of s. 50B in the context of the Act as a whole, and not simply in contrast with ss. 50 and 50A.

**131.** It is not disputed that s. 50B was inserted following the decision in *Commission v. Ireland*. The legislative history of the section strongly suggests that the intention of the Oireachtas was to comply with Ireland’s obligations following the decision in *Commission v. Ireland*, but there is no reason to assume that it was intended to go much further than what was required by those obligations and to introduce a radical, far-reaching amendment to the costs regime in this area. In this regard, it is important to note that both the Aarhus Convention and Article 11 of the EIA Directive requires that the “procedure” to which

Article 9 of the Aarhus Convention and Article 11 of the EIA Directive apply shall not be prohibitively expensive. This was transposed by the Oireachtas as “proceedings”, being the nearest appropriate equivalent to the word “procedure”, rather than in contradistinction to “grounds” upon which a party may be given leave to seek judicial review.

**132.** It is thus equally possible to view the matter as Barniville J. did in para. 50 of *Fotovoltaic*, where, following the reasoning of Charleton J. in *JC Savage*, he accepted:-

*“... the submission advanced by [the notice party] that s. 50B should not be interpreted as having a wider or more expansive meaning than is required by Article 11(4) of Directive 2011/92, as that provision has been interpreted by the CJEU in North East Pylon.”*

It will be recalled that Hogan J. observed that it was difficult to comprehend why, if such had been the intention of the Oireachtas, it had chosen to effect such a radical change to the costs regime applying to judicial review of planning and environmental decisions, in such a complicated and unclear manner.

**133.** The different decisions of the High Court are of assistance but are not binding on this court; however, I am satisfied, based upon my reading of the section and the conflicting decisions of the High Court, that the true construction of the section cannot be derived from a plain and ordinary meaning of the section as contended by the trial judge. This court must therefore commence its own construction of the section in accordance with the requirements firstly of the Interpretation Act 2005 and, thereafter, of the relevant canons of statutory interpretation as recently restated in *Brown*.

#### ***The Interpretation Act 2005***

**134.** Section 5(1) of the Interpretation Act 2005 provides:-

*“5(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) –*

- (a) *that is obscure or ambiguous, or*
- (b) *that on a literal interpretation would be absurd or would fail to reflect the plain intention of –*

- (i) *... the Oireachtas*

...

*the provision shall be given a construction that reflects the plain intention of the Oireachtas ... where that intention can be ascertained from the Act as a whole.”*

(emphasis added)

**135.** Section 50B was enacted by the Planning and Development (Amendment) Act 2010. Section 3 of that Act amends the PDA 2000 by inserting a new s. 1A which I have quoted in para. 50 above. It expressly states that “[e]ffect or further effect, as the case may be” is given by that Act to the twelve directives set out in that section. These include the three directives specified in s. 50B, as originally enacted by the Act of 2010.

**136.** The significance of this section for the construction of the PDA 2000 was highlighted in *An Taisce/The National Trust for Ireland v. McTigue Quarries Limited & Ors.* [2018] IESC 54, when the Supreme Court considered the provisions of the PD(A)A 2010.

MacMenamin J., speaking for the court, held at para. 29 that:-

*“29.... the legislature did seek to make the statutory intent behind the PD(A)A 2010 crystal clear, beginning from its first provision. Thus, by inserting a new section 1A in the [PDA 2000] through s. 3 of the PD(A)A 2010, it was made clear that:*

*‘Effect or further effect, as the case may be, is given by this Act to an act specified in the Table to this section, adopted by an institution of the European Union or, where appropriate, to part of such an act.’*

*Beneath s. 1A is a table which includes eleven different categories of EU legislative instruments, including the EIA Directive and the Habitats Directive. Thus, insofar as*



*national law is concerned, the Court must proceed on the basis that the intent behind this statute was to give effect to the EIA Directive. The interpretative questions in this case must be seen from this starting point.*” (emphasis added)

**137.** This section was not quoted in any of the prior case law which I have considered, but it is clearly relevant to the task before this court.

**138.** MacMenamin J. held that the court was required to interpret this national statutory provision in accordance with the intention of the Oireachtas under s. 5 of the Interpretation Act 2005. The issue for consideration was whether a literal reading of s. 177O(1) meant that the grant of a substitute consent was to be treated as if it were a grant of planning permission under s. 34 of the PDA 2000. At paras. 71-73 MacMenamin J. held:-

*“71.... But, even on a literal interpretation, this raises a question: if this interpretation is correct, why does the section provide that a development being carried out shall be deemed to be authorised development? The section does not simply say it shall be ‘an authorised development within the meaning of s.34’ ....*

*72. In interpreting s.177O, and the PD(A)A 2010 as a whole, a court should have regard to the overall framework and scheme of the Act. (cf. the recent judgment of O'Malley J., for this Court, in Cronin (Readymix) Ltd. v. An Bord Pleanála and Ors. [2017] IESC 36; [2017] 2 I.R. 658, para. 47). What does that framework and scheme tell the reader? The words are consistent only with a legislative intention to comply with the EIA Directive. It is not consistent with a literal interpretation which would permit the quarry continuing in operation without appropriate conditions as to that operation for perhaps years to come. The Interpretation Act, 2005 makes clear the approach a court should adopt. Section 5 of the Interpretation Act, 2005 provides:*

*‘In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) -*

(a) *that is obscure or ambiguous, or*

(b) *that on a literal interpretation would be absurd or would fail to reflect the plain intention of –*

*(i) in the case of an Act to which paragraph (a) of the definition of 'Act' in section 2 (1) relates, the Oireachtas, or*

*(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,*

*the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.' (Emphasis added)*

73. A literal interpretation of the section would not 'reflect the plain intention of the Oireachtas', as the legislative intention can be ascertained from the Act as a whole. The PD(A)A 2010 is to give effect to the EIA Directive. These were the words of the legislature." (emphasis added)

The court, accordingly, rejected the literal meaning of the section as not representing the "plain intention of the Oireachtas".

**139.** *McTigue* concerned s. 177O and not s. 50B. However, the Supreme Court has thereby indicated, nonetheless, a more general approach as to how a court is to approach the construction of any section of the PD(A)A 2010: the starting point is that the intention behind the statute was to give effect to the listed directives, including the EIA Directive. Furthermore, when interpreting s. 50B, the court should have regard to the overall framework and scheme of the Act so that intention can be ascertained from the Act as a whole. This is consistent with s. 5(1) of the Interpretation Act 2005. The starting point should be that the special costs rules in s. 50B are to give effect to Article 11 of the EIA Directive, the SEA Directive, the Industrial Emissions Directive and, since 2018, Article

6(3) and (4) of the Habitats Directive. This is consistent with the decision of Charleton J. in *JC Savage*<sup>2</sup> and the cases which followed it.

**140.** In *Cronin (Readymix) Limited v. An Bord Pleanála* [2017] IESC 36, [2017] 2 I.R. 658, the Supreme Court also considered whether the literal reading of a section of the PDA 2000 resulted in the correct construction of the provision in question. The applicant had argued for an interpretation of s. 4(1)(h) of the PDA 2000 based on the natural and ordinary meaning of the words in the subparagraph. O'Malley J., speaking for the court, rejected this approach in para. 47 of her judgment and held:-

*“The issue, then, is whether the plain intention of the Oireachtas can be ascertained. In my view it can. I agree with the argument of counsel for the Board, as summarised in paras. 30 to 32 above, that the effect of the High Court judgment would be to render exempt a range of developments far in excess of the intention of the Oireachtas. One must bear in mind the overall framework and scheme of the 2000 Act, with the many considerations that come into play in the planning process, and look at the context of the provision in question within that framework. I think it is manifestly unlikely that the intention was to render exempt all works carried out on any existing structure, including unlimited extensions in size, subject only to considerations of visual appearance (and subsequent considerations arising from any intensification of use). Nor do I consider that the words used in the section compel the court to the conclusion that this is the meaning of the section.”*

**141.** In my judgment, these words could apply with equal force to the contention that the special costs rules provided in s. 50B apply to all proceedings by way of judicial review in their entirety, so long as the review is of a decision made, or purportedly made, pursuant to a statutory provision that gives effect to one of the directives, or parts of the directives, set

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<sup>2</sup> Charleton J. was one of the members of the Supreme Court in *McTigue*.

out in the section, even if there is no allegation of a failure to comply with the requirements of one of the four directives. This interpretation extends the special costs rules far wider than the Oireachtas plainly intended, in my judgment, for the reasons I discuss further below. The overall scheme of the Act does not compel the court to this conclusion.

**142.** In both *Cronin* and *McTigue*, the Supreme Court looked at the effect of a literal interpretation of the section under consideration in each of those judgments and rejected the contention that the literal interpretation represented the actual intention of the Oireachtas. In *McTigue*, the court rejected the literal interpretation advanced by the applicant as it would permit a quarry to continue to operate without appropriate conditions regulating the operation, potentially for years to come. In *Cronin*, the court rejected the literal interpretation which would render exempt all works carried out to an existing structure, no matter how great the extension, subject only to considerations of visual appearance.

**143.** In *McTigue*, one of the reasons why MacMenamin J. rejected the literal interpretation of the section was to ask the rhetorical question: why, if a substitute consent was to be construed as if it were a grant of planning permission, did s. 177O not simply say that a substitute consent shall be an authorised development within the meaning of s. 34, but rather said that it would be deemed to be an authorised development? A similar question could, with equal force, be asked in this case. If the Oireachtas intended that all applicants would benefit from the special costs rules in cases of judicial review of any decision, act or omission (or purported decision, act or omission) of a planning authority or An Bord Pleanála, regardless of the basis for such challenge, why did the section not simply say so? Why adopt the cumbersome formulation of linking proceedings and particular Directives?

***The trial judge's interpretation logically extends beyond applications under the 2016 Act***

**144.** Turning to the application of these principles and authorities to s. 50B, the first issue to be addressed is whether s. 50B is obscure or ambiguous; or whether a literal interpretation of the section would be absurd or would fail to reflect the plain intention of the Oireachtas. The section applies to proceedings in the High Court (or on appeal) by way of judicial review, or seeking leave to apply for judicial review, of any decision or purported decision made or purportedly made, or any action taken or purportedly taken, or any failure to take any action pursuant to a statutory provision that gives effect to one of the four listed directives. As regards the EIA Directive, s. 50B is confined to a provision to which Article 10a (now Article 11) applies; while, as regards the Habitats Directive, s. 50B applies to a provision which gives effect to Article 6(3) and (4) of the Habitats Directive. It does not apply to decisions, acts or omissions pursuant to a statutory provision that gives effect to the other provisions of the EIA Directive or the Habitats Directive; it is limited to decisions, acts or omissions pursuant to a statutory provision that gives effect to those particular articles of those directives.

**145.** The PD(A)A 2010 was enacted to give effect to, *inter alia*, the Habitats Directive; yet s. 50B as originally enacted by that Act did not apply to the Habitats Directive. As originally enacted, the section applied to proceedings in respect of any decision or purported decision “pursuant to a law of the State” that gave effect to a provision of the EIA Directive, to which Article 10a applied, to the SEA Directive and to the Industrial Emissions Directive. As s. 3 of the PD(A)A 2010 amended the PDA 2000 by inserting s. 1A, any proceeding in the High Court by way of judicial review of a decision given pursuant to the PDA 2000 was a decision “pursuant to a law of the State” that gives effect to the directives listed in that section (see, *McTigue*). Section 50B was always limited to the public participation provisions of the EIA Directive. It did not apply to a decision

which gave effect to any other provisions of the EIA Directive. The limitation of the scope of s. 50B to those provisions which give effect to Article 10a (subsequently Article 11) of the EIA Directive, was underscored by the amendment in 2018 which replaced the phrase “law of the State” with “statutory provision”. This means that, notwithstanding the fact that the PDA 2000 gives effect to the directives set out in s. 1A of that Act, not all decisions, actions or failure to take action pursuant to the PDA 2000 come within the scope of s. 50B. The intent of the Oireachtas was to confine the scope of s. 50B to a limited cohort of proceedings.

**146.** The substitution of the words “statutory provision” was effected by s. 29(a)(i) of the Planning and Development (Amendment) Act 2018. Section 29(a)(iv) inserted the reference to paras. (3) and (4) of Article 6 of the Habitats Directive into s. 50B for the first time. Article 6(3) of the Habitats Directive provides as follows:-

*“6(3). Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.”*

**147.** Planning authorities are obliged to screen plans and applications for planning permission to assess whether the proposed plan or project requires appropriate assessment of its possible implications for special areas of conservation. It was submitted by counsel for the Board that every plan and application for development consent of any kind requires

a screening for appropriate assessment. A literal reading of s. 50B, following the insertion of Article 6(3) of the Habitats Directive, would result in the application of the special costs rules to *all* proceedings by way of judicial review, or of seeking leave to apply for judicial review, of a decision or purported decision made or purportedly made, or any action taken or purported taken, or any failure to take action in relation to any project or plan which must be subject to screening for appropriate assessment in accordance with Article 6(3).

Counsel for the Board submitted that this cannot have been the intention of the Oireachtas.

**148.** I accept the force and validity of this submission. The interpretation of the section by the trial judge leads to the proposition that an application for judicial review of a decision, or purported decision, which is made pursuant to *any* statutory provision which gives effect to the public participation requirements of the EIA Directive or Article 6(3) of the Habitats Directive (for example), attracts the special costs rules, *even if no ground of challenge is based upon an alleged infringement of those provisions or any of the statutory provisions giving effect to those provisions*. The trial judge's interpretation, logically, is not confined to the Act of 2016. For example, if an applicant for judicial review sought to challenge a decision to grant planning permission for an extension to a private house which required planning permission on the grounds of objective bias by the decision maker, the application would be subject to screening for appropriate assessment and, therefore, the impugned decision would be one taken pursuant to a provision giving effect to Article 6(3) of the Habitats Directive. If the trial judge's literal construction of s. 50B reflects the intention of the Oireachtas, these proceedings will be subject to the special costs rules. I do not believe this to be the correct interpretation.

**149.** If the Oireachtas had intended to apply the special costs rules to all proceedings by way of judicial review, or of seeking leave to apply for judicial review of any application for planning permission, it would have been very simple to so state. The section could

simply have stated that it applies to all proceedings in the High Court by way of judicial review, or seeking leave to apply for judicial review of any decision, action or failure to take action, without referring to the four specific directives to which the statutory provision gives effect.

**150.** As was pointed out by Hogan J. in *Kimpton Vale*, if the Oireachtas intended such a far-reaching change in the law to *all* categories of judicial review proceedings challenging decisions of planning authorities, it is difficult to understand why it did so in such an indirect and complicated fashion. As Hogan J. pointed out, there is a “*presumption against unclear changes in the law*” when a court is construing a statute.

**151.** It begs the question why *in the very section which inserted the reference to the Habitats Directive*, the Oireachtas limited the scope of the provision by replacing the words “a law of the State” with the words “statutory provision”. The Oireachtas availed of the opportunity presented by the enactment of the Act of 2018 to tighten the scope of s. 50B by substituting the words “statutory provision” for “a law of the State”. It did so in the context of several decisions of the High Court which construed s. 50B as applying only to those grounds of judicial review which concerned the three directives, and not to those grounds which fell outside those parameters. Had the Oireachtas intended that the special costs rules should apply by reference to the *decision* being impugned rather than the *grounds of challenge*, it is difficult to understand why the Oireachtas failed to take the opportunity to amend the section to make this intent clear if those earlier decisions had failed to give effect to the intention of the Oireachtas, which is the unavoidable conclusion from Simons J.’s construction of the section.

**152.** In my judgment, a literal interpretation of s. 50B, as propounded by the trial judge, fails to reflect the plain intention of the Oireachtas within the meaning of s. 5(1)(b) of the Interpretation Act 2005, as ascertained from the Act of 2000 as a whole. It is notable that



the trial judge's attention was not apparently drawn to s. 5 of the Interpretation Act 2005, nor to the decisions in *McTigue* or *Cronin*, though it must be acknowledged that neither of these directly addressed s. 50B. *McTigue* establishes that the express intention of the Oireachtas in enacting the PD(A)A 2010, which inserted s. 50B into the PDA 2000, was to give effect, *inter alia*, to the EIA Directive, the SEA Directive, the Industrial Emissions Directive and the Habitats Directive. Section 50B applies only to the public participation provisions of the EIA Directive and, originally, it did not apply to the Habitats Directive at all. To my mind, this confirms, if there were any doubt, that the intent of the Oireachtas in enacting s. 50B was to give effect to the obligations of the state to rectify its failure properly to transpose the Public Participation Directives and, in particular, Article 10a of the EIA Directive following the decision in *Commission v. Ireland*, and no more. In the words of Barrett J., it did not provide for a "gold plate" special costs rule so far in excess of that required by either the Aarhus Convention or EU law.

**153.** This interpretation is reinforced by established canons of statutory interpretation. First, the trial judge's interpretation conflicts with the presumption against radical amendments, as pointed out by Herbert J. in *McCallig* (see also, Dodd, *Statutory Interpretation in Ireland* (Bloomsbury Professional, 2008), paras. 4.110-4.112). Second, the literal interpretation of the section would render largely superfluous subparas (I), (II) and (III), which suggests the literal interpretation does not reflect the intention of the legislature. When interpreting a statute, a court is required to give meaning, if possible, to all the words used by the Oireachtas. The presumption is that words are not used in a statute without a meaning and are not tautologous or superfluous (see, *County Council of the County of Cork v. Whillock* [1993] 1 I.R. 231 and *Goulding Chemicals Limited v. Bolger* [1977] I.R. 211).

**154.** Finally, as I have highlighted, it is open to the court to consider the effect of the proposed interpretation to assist in determining whether this reflects the intention of the Oireachtas as expressed in the provision under consideration in the context of the Act as a whole.

**155.** This interpretation of s. 50B is consistent with the obligations of a national court interpreting legislation enacted for the purposes of complying with EU law. In Case C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentación SA*, the CJEU held that national courts are obliged, so far as possible, to construe existing provisions of national law in conformity with relevant provisions of EU law under the principle of consistent interpretation. The duty of consistent interpretation applies in the context of disputes between two purely private parties concerning their mutual rights and obligations. Both the CJEU and the trial judge recognise that it is open to member states to adopt a more favourable costs regime than that required by the Public Participation Directives if the state chooses. The trial judge's interpretation of s. 50B goes far further than EU law requires, as is clear from the decision in *North East Pylon*. The decision of the CJEU in *North East Pylon* makes clear that the obligation to have not prohibitively expensive procedures applies only to the costs relating to the part of the challenge alleging infringement of the rules on public participation. Applying the *Marleasing* principles, and acknowledging that "proceedings" in s. 50B reflects the word "procedure" in Article 11 of the EIA Directive, and Article 9 of the Aarhus Convention, the provision should be interpreted in the manner in which the CJEU has interpreted the obligation under the directive, *i.e.* as extending only to the claims or pleas, or in this case "grounds" (as the term is used in domestic judicial review proceedings), which allege infringement of the rules on public participation.

**156.** For all of these reasons, I would allow the appeal of the Board in relation to the proper construction of s. 50B of the PDA 2000.

**The “decision” for the purposes of section 50B**

**157.** Separate from the main argument discussed above, the Board argued that the word “decision” in the section applied to the individual decisions reached in the process of making the decision on the application for development consent. Just as in the High Court, the Board did not press its appeal on the meaning of “decision” in s. 50B to any great extent. In written submissions, it argued that the word “decision”: *“can be read as relating to the decision taken on an appropriate assessment or environmental impact assessment and, therefore, the section applies to that specific decision (rather than the entirety of the decision to grant development consent).”* It pointed to the fact that the Board is required to make a decision on appropriate assessment, environmental impact assessment and whether the proposed development is in accordance with proper planning and sustainable development of the area concerned. It argued that these are *“discrete elements”* which combine to make up the overall decision on development consent. It submitted that *“[s]ection 50B can be read as applying to each discreet decision taken by the Board and would therefore only apply to those specific decisions taken for the purpose of compliance with the Directives named in the section.”*

**158.** The trial judge dealt with this argument in paras. 73 to 82 of his judgment and concluded that the s. 50B “decision” impugned is the decision to grant planning permission pursuant to s. 9 of the PD(H)A 2016. He rejected the Board’s argument that the term “decision” in s. 50B was to be interpreted as encapsulating *“sub-decisions”*. I agree with the analysis and conclusion of Simons J. and would affirm his decision on this point for the reasons he advances. I would also add that I agree with the submission of Heather Hill that

an environmental impact assessment is a process that informs the ultimate decision of whether to grant consent (see, *Klohn v. An Bord Pleanála* [2008] IEHC 111, [2009] 1 I.R. 59). It follows that there is no identifiable “*sub-decision*” under the EIA Directive and thus is incapable of being separated out from the development consent decision.

**159.** For these reasons, I would refuse the appeal on this ground.

### **National environmental law**

**160.** A further issue raised in the appeal was whether, apart from allegations of breaches of the public participation rules, the applicants nonetheless were entitled to the benefit of the special costs rules based on the obligation of the court to give effect “to the fullest extent possible” to the provisions of the Aarhus Convention. The trial judge considered the interpretative obligation arising from Article 9 of the Aarhus Convention. He referred to the decisions of the CJEU in *North East Pylon* and *Protect Natur* and noted that the practical consequence was that proceedings which allege a contravention of national environmental law will benefit from the interpretative obligation, notwithstanding that those proceedings do not allege an infringement of the public participation provisions of the Aarhus Convention. He approved of the statement by Humphreys J. *North East Pylon* (No. 5) at para. 32:-

*“32. The upshot is that the not-prohibitively-expensive rule applies (to the fullest extent that it is possible to read national law to that effect) to challenges based on national environmental law within the field of EU environmental law even if the challenges do not relate to the public participation rules. Thus there is no need to get unduly caught up in classifying challenges as relating to public participation only as opposed to national environmental law within the EU law field more generally because ultimately both come to the same thing. As regards the rider that national*

*law should be read to this effect 'to the fullest extent possible', this is not a problem for Ireland as the discretion arising from O. 99 is sufficiently flexible that it can always be read in an EU law-compatible manner."*

**161.** In deciding whether a challenge is based on “*national environmental law within the field of EU environmental law*” he followed the decision of the Supreme Court in *Conway*. *Conway* held that whether a national law may be a “*law relating to the environment*” for the purposes of Article 9(3) of the Aarhus Convention must be determined as a matter of substance rather than as a matter of form. Provided the measure sought to be enforced can properly be said, in a material and realistic way, to relate to the environment, then it comes within the scope of Article 9(3) of the Aarhus Convention.

**162.** The disputed grounds related to the development plan and an allegation that the decision involved a material contravention of the zoning objectives of the development bill. He held that Heather Hill’s case was that the decision of the Board was reached contrary to s. 9(6) of the PD(H)A 2016. This section was “*undoubtedly*” a provision of national law relating to the environment. He therefore held that the section fulfils the criteria identified by the Aarhus Compliance Committee, and endorsed by the Supreme Court in *Conway*. In determining whether to grant permission under s. 9, the Board is required to consider the proper planning and sustainable development of the area in which it is proposed to situate the development. Section 9 also relates to fields covered by EU environmental law and under s. 9 the Board, as competent authority, is subject to obligations in respect of both the EIA Directive and the Habitats Directive.

**163.** Separately, the trial judge held that the Board is required to have regard to the provisions of the development plan for the area (s. 9(2)(a)). As a development plan constitutes a “*plan*” or “*programme*” for the purposes of the SEA Directive, the making of a development plan is subject to assessment for the purposes of the SEA Directive. In

circumstances where the content of plans or programmes influence “*subsequent*” decision-making in respect of “*individual*” development projects, the trial judge held that it was essential that an assessment should be carried out at an earlier stage of the making of the plan or programme which sets the framework for development consent. He concluded that s. 9 ensures that the objectives of the SEA Directive are achieved by requiring the Board, as competent authority, to have regard to the development plan.

**164.** In addition, and separately, he held that the grounds of challenge advanced in respect of the “Flood Risk Management Guidelines” relate to national environmental law in a field covered by EU environmental law. Under s. 9(2)(b) of the PD(H)A 2016, the Board is required to “*have regard to*” any guidelines issued by the Minister under s. 28 of the PDA 2000. He held that the gravamen of the complaint made by Heather Hill at E.49 is that the Board and its inspector erred in their interpretation and application of the statutory guidelines. This, he held, is an allegation of a contravention of a provision of national environmental law in relation to a field covered by EU environmental law, namely the assessment and management of flood risk.

**165.** He therefore concluded that s. 9 of PD(H)A 2016 represents a provision of national environmental law in a field covered by EU environmental law which attracts the interpretative obligation, identified by the CJEU in *North East Pylon*, to “*proceedings which allege a contravention of section 9*”. This means that the disputed grounds (save that relating to landowner consent) are entitled to the benefit of the not prohibitively expensive requirement in Article 9 of the Aarhus Convention. This requires the court, in turn, to interpret s. 50B in a manner which gives effect to this interpretative obligation. In addition, it precludes a restrictive interpretation of s. 50B as contended for by the Board.

***The appeal***

**166.** The Board appealed in respect of this conclusion also. It submitted that the disputed grounds related to compliance with s. 9(6) of the PD(H)A 2016, *i.e.* whether the development materially contravened the Galway County Development Plan and whether there was compliance with a justification test contained in the Flood Risk Management Guidelines. The challenge was framed by reference to national law concepts of administrative law and were determined by reference to the obligations arising under national law, rather than by reference to any concepts of EU environmental law. The Board submitted that, following *North East Pylon*, the not prohibitively expensive rule will apply to that part of a challenge that seeks to ensure compliance with national environmental law. The Board submitted that the disputed grounds do not come within the framework of national environmental law within the field of EU environmental law. The Board referred to the fact that in *Fotovoltaic*, Barniville J. found that the not prohibitively expensive rules did not apply to grounds relating to breaches of fair procedures or adequacy of reasons (grounds (2) and (3)).

**167.** Separately, the Board argued that the High Court erred in holding that the fact that a development plan is a “plan” or “programme” for the purposes of the SEA Directive means that a challenge to a *development consent decision* on the basis of a *failure to comply with a development plan* comes within the framework of national environmental law in the field of EU environmental law. The Board accepted in its written submissions to the High Court that the interpretative obligation placed on the courts of member states to give effect, to the fullest extent possible in national procedural law, to the right to bring proceedings at a cost that is not prohibitive, applies to challenges that are based on grounds of national environmental law within the field of EU environmental law. It argued that, in light of the decision in *North East Pylon*, the assessment must be made by reference to the grounds of

challenge and not to whether the decision is a decision within the field of national environmental law within the field of EU environmental law.

***Discussion***

**168.** In *North East Pylon*, the CJEU set out the interpretative obligations on national courts in respect of pleas which do not allege breaches of the public participation requirements of Article 11 of the EIA Directive. At para. 49, the court held:-

*“... the requirement that certain judicial procedures not be prohibitively expensive laid down in the Aarhus Convention must be regarded as applying to a procedure such as that at issue in the main proceedings, in that it is intended to contest, on the basis of national environmental law, a development consent process.”* (emphasis added)

**169.** The challenge to the development consent process is on the basis of national environmental law, not on the basis of national law. This means that the basis of the challenge is relevant to the not prohibitively expensive rules and, further, in order to avail of those rules, the challenge must be on the basis of national *environmental* law. It is not sufficient that there are proceedings challenging a development consent process which gives effect to national environmental law. The basis for the challenge has the potential to attract the not prohibitively expensive rules and it is for the national courts to determine whether the rules apply by reference to the basis for challenge.

**170.** At para. 57 the court held:-

*“... 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.”* (emphasis added)



**171.** Again, the emphasis is on whether the application of national environmental law is at issue. In other words, in dispute in the proceedings.

**172.** In *Conway*, the Supreme Court addressed the issue whether a statute which, on its face, was not concerned with environmental law, nonetheless could be considered to be an environmental law measure within the meaning of the Aarhus Convention. It was in that context that the Supreme Court said that the court must look to the substance rather than the form. *Conway* is relevant to determining whether a measure is a measure of national environmental law.

**173.** I agree with the trial judge that s. 9 of the PD(H)A 2016 is a measure of national environmental law and that the impugned decision was taken pursuant to s. 9(6) of that Act. However, that does not determine the question whether the not prohibitively expensive rules arising under Article 9(3) and (4) of the Aarhus Convention apply to these proceedings.

**174.** The critical distinction is between the *basis* for the challenge to the decision and the *decision under challenge*. The CJEU, in paras. 49 and 57, makes clear that a challenge to a development consent process is not sufficient to attract the not prohibitively expensive rules set out in Article 9 of the Aarhus Convention. The grounds upon which the challenge is brought are key. I therefore agree with Barniville J.'s analysis of *North East Pylon* of the obligations on a national court. In para. 60 of *Fotovoltaic* he held:-

*“... Neither the analysis [of the CJEU] nor the answer given imposes any requirement on national courts to apply the requirement that judicial proceedings not be prohibitively expensive to any part of a challenge which would not be covered by the [not prohibitively expensive] requirement in Article 11(4) which does not involve the application of ‘national environmental law’. In my view, the obligation contained in the answer given by the CJEU to the fourth and fifth questions referred*

*by the High Court (Humphreys J.) does not oblige me to apply the [not prohibitively expensive] provisions of Article 9(4) of the Aarhus Convention to those parts of a challenge which raise purely national law questions which are not concerned with national environmental law, or its application, as is the case here, where those parts concerned an alleged failure to comply with fair procedures and an alleged failure to provide adequate reasons...”.*

**175.** A similar approach was taken by Barrett J. in *Merriman*. The trial judge did not address the approach of *Fotovoltaic* or *Merriman* in relation to the interpretative obligation. I prefer their analysis to that of the trial judge for the reasons I have set out.

**176.** In the disputed grounds, the applicants alleged that the decision involved a material contravention of the development plan/irrational allocation of population at grounds E.35-44 based on an allegation that the Board misinterpreted the “Core Strategy Table’s” allocations of population. As a result the Board “*erred in law, misdirected itself in law, acted (sic) took into account irrelevant considerations and/or misunderstood or overlooked relevant material and/or acted irrationally, such as to vitiate the decision of the Board.*”

The other disputed ground concerned an allegation that the Flood Risk Assessment Guidelines were not applied (E.45-55). It was alleged that the Board and its inspector erred in their interpretation and application of the relevant guidelines, contrary to fair procedures and natural and constitutional justice. It is said that the Board failed to have regard to evidence of flooding provided by the applicants, and it thereby failed to have regard to relevant material, and acted irrationally and unreasonably. They also alleged material contravention of land use zoning objectives contrary to s. 9(6) of the PD(H)A 2016, in that parts of the development footprint encroach upon lands zoned for open space/recreation and amenity, and constrained land use, and breach “Objective CCF6” (innappropriate development on flood zones). They pleaded that by not following the

correct procedures when approving the development, the Board acted *ultra vires* and contrary to natural and constitutional justice.

**177.** These allegations are not “*on the basis of national environmental law*” nor do they “*put in issue the application of national environmental law*”. The applicants invited the court, on classic grounds of judicial review, to quash a decision. The legal basis for the allegation that the decision was *ultra vires* or contrary to natural and constitutional justice was not based upon the application of national environmental law.

**178.** Therefore, I do not agree that the disrupted grounds attract the “not prohibitively expensive” costs rules under the interpretative obligation to apply Article 9 of the Aarhus Convention to the widest extent possible. It also follows that the restrictive interpretation of s. 50B contended for by the Board is not precluded. I would allow this ground of appeal also.

**179.** Separately, I agree with the submissions of the Board that it was not open to the trial judge to have recourse to the SEA Directive in the circumstances of this case. The fact that a development plan constitutes a “plan” or “programme” within the meaning of the SEA Directive is relevant to whether the development plan has been lawfully adopted. But if there is no challenge to the development plan, only a challenge to a decision to grant planning permission which allegedly involved a material contravention of the development plan, this does not involve a challenge *based upon the SEA Directive*, and it does not thereby become a challenge based on national environmental law within the meaning of the decision of the CJEU in *North East Pylon*.

### **Conclusion**

**180.** The intention of the Oireachtas when enacting s. 50B of the PDA 2000 was to comply with the obligations of the state to transpose the provisions of Article 10a of the

Public Participation Directive 1985, following the decision of the CJEU in *Commission v. Ireland*. The state was required to introduce special costs rules for proceedings which alleged a breach of the public participation provisions of Article 10a in order that such proceedings should not be prohibitively expensive. In *North East Pylon*, the CJEU held that the obligation that procedures should not be prohibitively expensive applied to the pleas alleging such breaches, but not to other pleas in the same proceedings which raised other grounds of challenge. The intention of the Oireachtas was to give effect to the obligations arising under EU law and not to extend the special costs rules far wider than required to fulfil this obligation. The special costs rules apply to those grounds of challenge which allege a breach of the requirements of the directives specified in s. 50B(1), but not to any other grounds for judicial review in the proceedings which are not so based.

**181.** The “decision” referred to in s. 50B does not refer to the elements making up the decision so as to limit the application of the special costs rules challenges to elements of the decision under challenge. While a decision to grant planning permission may entail an environmental assessment or a screening for an appropriate assessment, this does not result in each such individual decision being a “decision” for the purposes of s. 50B.

**182.** Where the application of national environmental law is at issue in proceedings, or a decision is challenged on the basis of national environmental law, the courts of member states are required to interpret provisions of national procedural law to the fullest extent possible, consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that such proceedings are not prohibitively expensive. The interpretative obligation does not apply to proceedings or grounds of challenge where the application of national environmental law is not in issue or the decision is not challenged on the basis of national environmental law.

**183.** Ní Raifeartaigh and Pilkington JJ. have read and approved this judgment. In accordance with agreement between the parties prior to the hearing of the appeal, there shall be no order as to costs against the respondent to the appeal.