THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 150 J.R.]

BETWEEN

NORTH EAST PYLON PRESSURE CAMPAIGN LTD

AND

MAURA SHEEHY

APPLICANTS

AND

AN BORD PLEANÁLA, THE MINISTER FOR COMMUNICATIONS, ENERGY AND NATURAL RESOURCES, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

EIRGRID PLC

NOTICE PARTY

(No. 5)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 30th day of October, 2018

1. The question here is that of the costs of an unsuccessful judicial review leave application aimed at challenging the grant of development consent. The project at issue is the North/South electricity interconnector, a major project of common interest.

2. This is the seventh judgment or determination on this matter and the fifth at High Court level. On 12th May, 2016, I refused leave in the present proceedings, *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála (No. 1)* [2016] IEHC 300 [2016] 5 JIC 3008 (Unreported, High Court, 12th May, 2016), in relation to a challenge to an ongoing process before An Bord Pleanála prior to that body making a decision on the impugned application. On 29th July, 2016 in *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála (No. 2)* [2016] IEHC 490 [2016] 7 JIC 2935 (Unreported, High Court, 29th July, 2016) I referred a number of questions regarding costs to the CJEU. Following the board's decision giving consent to the impugned project, a second set of judicial review proceedings were instituted [2017 No. 151 J.R.] and on 22nd August, 2017, in *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála [(No. 3)]* [2017] IEHC 338 (Unreported, High Court, 22nd August, 2017), Barrett J. rejected the substantive judicial review challenging that decision of the board. On 19th October, 2017 in Case C-470/16 *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála*, Advocate General Bobek issued his opinion on the reference. On 11th January, *2018 North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála [(No. 4)*] [2018] IEHC 3 (Unreported, High Court, 11th January, 2018), Barrett J. refused leave to appeal to the Court of Appeal against his judgment on the substantive application. On 15th March, 2018, the CJEU gave judgment in case C-470/16 *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála*. On 25th June, 2018 the Supreme Court granted leave to bring a leapfrog appeal to that court (*North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála* [2018] IESCDET 82). That appeal was heard by the Supreme Court on 15th October, 2018 and judgment has been reserved. Meanwhile, the costs of the substantive action have also been adjourned by Barrett J. by agreement between the parties. The basis for that agreement appears to be that the parties are awaiting the outcome of costs on the leave application.

3. I have received helpful submissions from Mr. Esmonde Keane S.C. and Mr. Michael O'Donnell B.L., who also addressed the court (with Mr. Conleth Bradley S.C. and Mr. Christopher Hughes B.L.) for the applicants, from Mr. Brian Foley B.L. (with Ms. Emily Egan S.C.) for the board, from Mr. Rory Mulcahy S.C. (with Ms. Gráinne Gilmore B.L.) for the State respondents, and from Mr. Jarlath Fitzsimons S.C. (with Mr. Brian Murray S.C. and Mr. Stephen Dodd B.L.) for EirGrid. At the conclusion of the hearing on 30th October, 2018 I delivered an *ex tempore* ruling that there would be no order as to costs, indicating that there would be a written judgment later which would be the definitive version (the written version is in any event always the definitive one whether the parties are reminded of that specifically or not); and I now take the opportunity to formalise matters in a written judgment that somewhat develops the reasoning for the conclusion then announced.

The applications currently before the court

4. I am dealing in the present judgment with the costs of the leave application, as distinct from the costs of the extended process relating to the costs hearing itself, which latter dimension includes the reference to Luxembourg. The applicants seek costs against all other parties. The State does not seek its costs and requests no order as to costs. The board and EirGrid apply for their costs against the applicants, although in EirGrid's case the application is for partial costs only.

The starting point

5. The starting point in any application in our system must be that costs follow the event: *Dunne v. Minister for the Environment* [2007] IESC 60 [2007] 1 I.L.R.M. 264 [2008] 2 I.R. 775. As the present question relates to the costs of a leave application, and as leave was refused, I start from the premise that the applicant did not carry the event. However, the principle that costs follow the event can be modified in a number of ways:

> (a) by the *Veolia Water* approach (see *Veolia Water UK Plc v. Fingal County Council (No. 2)* [2006] IEHC 240 [2007] 2 I.R. 81);
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> (b) by domestic legislation, where more specific rules apply, such as the Environment (Miscellaneous Provisions) Act 2011 and s. 50B of the Planning and Development Act 2000, interpreted as appropriate in accordance with EU law;
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> (c) by EU-based rules on costs in environmental matters, including the obligation to interpret national environmental legislation in accordance with the Aarhus Convention; and

(d) in the discretion of the court under O. 99 of the Rules of the Superior Courts, albeit that the court is not entirely at large in that regard.

6. To deal with the costs applications in a structured manner, having identified the appropriate starting point, I should then firstly apply the *Veolia Water* approach and following that, insofar as an overall balance of costs is left over as against an unsuccessful environmental litigant, I can consider the national and EU-based rules and the court's discretion.

The *Veolia Water* approach

7. In *Veolia Water UK Plc v. Fingal County Council (No. 2*) Clarke J., as he then was, noted at para. 2.2 that "*it is incumbent on the court, at least in complex cases, to at least give consideration as to whether it is necessary to engage in a more detailed analysis of the precise circumstances giving rise to such costs having been incurred before awarding costs. Furthermore, it seems to me to be incumbent on the court to attempt to do justice to the parties by fashioning, where appropriate, orders of costs which do more than simply award costs to the winning side".*

8. The *Veolia Water* approach may fall for consideration if the proceedings come into the category of being a complex case. They have no particular relevance to a common-or-garden one-day action. Here the proceedings are manifestly sufficiently complex so as to engage the *Veolia Water* approach.

9. I then turn to identifying the winner or loser on the various sub-issues that arose in the leave application, which I can conveniently classify as follows:

(i). **Does s. 50 of the Planning and Development Act 2000 apply?** The applicant submitted that it did apply and I held to the contrary. The applicant thus lost that particular sub-issue, albeit that it was not a particularly major issue in the overall.

(ii). **Are the applicants' complaints arguable?** The applicant was successful on that question. EirGrid and the board did, to a greater or lesser extent, make submissions which, however phrased, had the effect that they were contending otherwise, insofar as they argued on the merits. The State was not involved in that issue.

(iii). **Does the board have jurisdiction to determine the issues complained of by the applicant?** The applicant was unsuccessful on that issue. In particular, I upheld the board's submissions in that regard and, insofar as they were adopted by EirGrid, the latter's submissions also.

(iv). **Does the bias issue have to be raised before the decision-maker?** This was a point raised unsuccessfully by EirGrid. The applicant was successful on that point given that the alleged structural bias arose from legislation rather than from the particular conduct of the decision-maker. In fairness, again this was not a major issue in the overall context.

(v). **Was the applicant out of time, including as regards the conduct of the oral hearing, the validity of the application and the designation of the board as a competent authority?** The applicant was successful on the time issue. All other parties were unsuccessful, albeit that the State's involvement was limited by reference to the ministerial designation as being the only point that they got involved in.

(vi). **Was the application premature?** The applicant lost on that point, and that question was determinative of the event overall as regards the leave application. The State did not get involved in that issue.

(vii). **Should the application be refused on the basis of discretion?** That point was made unsuccessfully by the board and again the applicants were successful on that issue.

(viii). **Should an injunction be granted? The applicants lost on that issue.** The other parties successfully resisted the injunction, although again I note the State was not involved under this heading.

10. Applying a *Veolia Water* approach, the points on which they won occupied a broadly similar amount of time to those on which the applicants lost and only a modest balance would arise in favour of the other parties, and no balance at all in favour of the State in the sense that the State lost the one point it did contest, namely whether the applicant was out of time to challenge the designation of the board as a competent body.

11. As regards the State, in the exercise of the O. 99 discretion, balancing the costs of the issue that the applicants won against the State with the fact that the leave application overall was unsuccessful and bearing in mind the reasonable approach as to costs adopted by Mr. Mulcahy, I will make no order as to costs.

12. Assuming then that some balance of costs, although perhaps modest, are payable by the applicant to the board and EirGrid on a pure *Veolia* approach, the issue then is to what extent national and EU law modifies that outcome such that the applicants should not be required to pay costs.

Environment (Miscellaneous Provisions) Act 2011

13. I made the point in the No. 2 judgment at para. 4 that the interpretation of the 2000 and 2011 Acts was linked to the interpretation of EU law. There is no entirely satisfactory way to separate the issues for the purposes of exposition and presentation of the reasoning for the order being made here, but the parties can take it that I have considered all the issues together and I am separating them primarily for explanatory purposes.

14. Section 4 of the 2011 Act provides that the costs rules in s. 3 of that Act apply to proceedings to ensure compliance with or enforcement of a statutory requirement or a condition attached to a licence or similar document where that has caused, is causing or is likely to cause environmental damage. In *McCoy v. Shillelagh Quarries Ltd.* [2015] IECA 28 [2015] 1 I.R. 627 at para. 28, Hogan J. concluded that this should be read disjunctively and that the reference to "*statutory requirement*" was free-standing and separate from the question of compliance with conditions of a licence or document.

15. In this case, the proceedings do relate to the enforcement of statutory requirements. All of the points raised can go back directly or indirectly to a statutory requirement, other than possibly the argument regarding the ministerial designation. Section 3(3) of the 2011 Act says that "*a court may award costs against a party in proceedings to which this section applies if"* certain conditions apply. That wording implies that if those conditions do not apply, and inferentially if sub-s. (2) does not apply, and expressly if sub-s. (4) does not apply, then the default order is no order as to costs. The exceptions are where the application is frivolous or vexatious,

where the litigation is conducted in an inferentially improper manner or whether there was contempt of court. These considerations do not apply here. Sub-section (2) does not apply as that requires the applicant to succeed. Sub-section (4) only applies if there are exceptional circumstances.

16. However, the section goes on to contain a condition of environmental damage. Insofar as the not-prohibitively-expensive rule is concerned, it is clear from the judgment of the CJEU in the present case that such a qualification is not compatible with EU law. The consequent status of the 2011 Act is one of the knottier aspects of the present application, and I should say that while I maintain the result that I communicated to the parties on 30th October, 2018 to the effect that the Act should not be treated as invalid, I have taken the opportunity since then to give further consideration to how that conclusion impacts on the manner in which the court should exercise its costs jurisdiction in cases not covered by the Act, which I now set out.

17. Merely because something is unlawful does not mean that it is invalid in the sense of a nullity – *A. v. Governor of Arbour Hill* [2006] IESC 45 [2006] 4 I.R. 88 [2006] 2 I.L.R.M. 481 being a prime example. Applicants in particular (albeit not these applicants) sometimes assume that any legal flaw is to be equated to a legal death sentence (see *Krupecki v. Minister for Justice and Equality (No. 2)* [2018] IEHC 538 [2018] 10 JIC 0112 (Unreported, 1st October, 2018), (para. 32)), but that is not always the case. In the present context, simply because the 2011 Act is in contravention of EU law as elucidated by the CJEU in the present case does not mean that it should be treated as null and void.

18. There are a number of possible ways to respond to a legal flaw in primary legislation or other instruments of general application. One option obviously is invalidation in full. Severance of an offending word, phrase or sub-provision is another option where appropriate. Reading down the text to reduce it to lawful dimensions, without excising language or striking it down, is another, and is generally a preferable option to that of partial or complete invalidation. Where an interpretative option presents itself, that is normally a far more proportionate reaction by the judicial branch than wielding a red pen through the work of the legislature, a matter I discussed in more detail in *Krupecki (No. 2)* (see also Kevin C. Walsh in "Partial Unconstitutionality", 85 *N. Y. U. L. Rev*. 738, (2010)). A rarefied alternative option is that of "*reading up*" the statute, where it is unduly limited in scope, by applying it to situations not encompassed by its precise language. *McKinley v. Minister for Defence* [1992] 2 I.R. 333 presents an example of this relatively unusual situation. The present case is closer to *McKinley* in the sense that one is faced with a statute that is unlawfully under-inclusive insofar as it covers only cases with a link to environmental damage, a distinction which the legislature is not entitled to make.

19. In the present case, the language of ss. 3 and 4 of the 2011 Act is such that the link to environmental damage is so embedded in the phrasing of the section that it cannot be excised by normal severance or overcome by interpretative reading-down. It is not, on this specific wording, simply a discrete condition that can be disregarded or crossed out. That leaves a limited number of other options. One is striking down the sections, which would be disproportionate if there are other alternative approaches. A second is reading-up the sections to interpret them in a manner beyond their terms; an approach which gives one some cause for hesitation, given the direct interference with the work of the legislature that is necessarily involved. The final and best option to deal with an under-inclusive statute where there is a parallel source of discretion to achieve the same result is to leave the statute in place, unlawful as it is, covering the cases that it does cover, and to use the general jurisdiction of the court as to costs to apply a similar approach to any cases that are not within the wording of the statute. That jurisdiction as to costs would have to be exercised in a manner consistent with the spirit of the statutory provision, given that it is not permissible to discriminate on the basis of a link to environmental damage. Doing so here would require a no-order-as-to-costs outcome for all or virtually all of the applicant's case.

20. In one sense the 2011 Act goes formally beyond the bare bones of the not-prohibitively-expensive rule in the sense that it defines how that rule is to be applied, and thus to that very limited extent that it endeavours to put statutory flesh on the bones of that rule by prescribing a default order of no order as to costs.

21. If the 2011 Act did not exist, one would still conclude that the not-prohibitively-expensive principle might normally require no order as to costs. Such a perspective would thus remain the case even in situations where the 2011 Act does not apply.

22. However if I am right in my conclusion above that the court's discretion as to costs should be exercised to achieve a result compatible with the spirit of the 2011 Act, to avoid a distinction that is prohibited by EU law, then the court is *required* to make no order if that would have been the result under the 2011 Act but for the condition of environmental damage.

23. Declining to regard the 2011 Act as invalid certainly does not mean that court cannot make no order where the 2011 Act does not apply. It just means that the 2011 Act *stricto sensu* applies where environmental damage is a potential issue. In the present case, the alleged statutory breaches were not breaches that, as such, were linked to environmental damage in the 2011 Act since. Thus the 2011 Act does not apply as such but that does not preclude a no-order outcome applying the not-prohibitively-expensive rule. Such a result is compelled here since the Act would have applied but for the condition of environmental harm, but even if I am wrong about that, a no-order outcome might normally be, and here would be, the best way to give effect to the not-prohibitively-expensive principle insofar as it applies, and is by no means precluded by the non-application of the 2011 Act.

24. What are now ss. 3 and 4 of the 2011 Act were introduced in the Oireachtas at Dáil Report Stage on 21st July, 2011. When moving those sections, the sponsoring Minister, Mr. Hogan, said *"the purpose of the amendment is to enhance environmental protection by improving access to justice in existing environmental cases by removing the risk for the applicant or plaintiff having to pay costs for all parties to proceedings if they are unsuccessful"*. The long title of the 2011 Act states that the purpose of the Act is *inter alia* to give effect to the Aarhus Convention. Mr. Mulcahy submits that this refers specifically to art. 9(3). The causation requirement is obviously problematic in that context. The upshot is that the 2011 Act does not give effect to its stated purpose in the light of the judgment of the CJEU, and in particular contains a condition that is contrary to EU law. The Oireachtas might need to give attention to that issue and I will return to that later in this judgment.

How much of the applicants' challenge relates to public participation, national environmental law in fields covered by EU Law, or art. 9 of the Aarhus Convention?

25. I summarised the categories of complaint made in the leave application at para. 135 of the No. 1 judgment. Those were essentially:

A. The conduct of the hearing by the board;

B. Non-compliance with legislation, specifically;

1. The authority of EirGrid to prosecute the application;

2. The inadequacy of the Environmental Impact Statement and Natura Impact Statement;

3. Non-compliance with arts 22 and 23 of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001); and

C. Conflict of interest between the role of the board in deciding on development consent and its role following the impugned ministerial designation of 4th December, 2013.

26. In relation to those grounds of challenge, the position as it relates to European law is as follows:

(i). Ground A relates in substance to public participation, in particular insofar as it relates to amendment of the proposal for development consent, which inherently relates to a participation issue.

(ii). Ground B1 is concededly domestic. However, that is minor as an aspect of the case overall.

(iii). As regards ground B2, the inadequacy of the EIS and NIS is clearly EU law based. The second-named applicant in her grounding affidavit at para. 10 specifically linked defects in the process under this heading to breach of the public participation rules.

(iv). Ground B3 is concededly domestic but again minor.

(v). Ground C is somewhat hybrid. However, the CJEU in the judgment on the reference noted that the implementation of a project of common interest within regulation 347/2013 was a context where the objectives of art. 9(3) and (4) of the Aarhus Convention should be applied, so the court clearly had points such as this one in mind in the context of setting an EU law context for analysis of costs of the challenge.

27. The court's reference to national environmental law in fields covered by European environmental law at paras. 57 and 58 suggested the link with European law need not necessarily be as direct as a case where the rights relied on are confined to ones conferred by EU law, which might be an interpretation arising from para. 56 taken in isolation. It is sufficient for the purposes of the rule enunciated by the CJEU if the grounds of challenge relate to a field covered by EU environmental law. Barniville J., in *SC Sym Fotovoltaic Energy SRL v. Mayo County Council* [2018] IEHC 245 (Unreported, High Court, 4th May, 2018), to which I will refer, seems to have taken that broader view. Separately from the foregoing, the applicants' points do come within arts. 9(3) and (4) of the Aarhus Convention.

Section 50B of the Planning and Development Act 2000
28. Section 50B of the 2000 Act imposes a default rule of no order as to costs for proceedings to which it applies. The scope of s. 50B applies to three categories of challenge, the relevant one here being ones relying on provisions of the EIA directive 85/337/EEC that are subject to art. 10a of that directive. Following the codification of the 1985 directive by directive 2011/92/EU, this provision became art. 11 of the 2011 directive and the reference in s. 50B must be construed as referring to that replacement provision. Article 10a of the 1985 directive and art. 11 of the 2011 directive referred to 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".*

29. As noted above, the case substantially related to the public participation rules. 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. That may potentially leave only a very modest balance of costs, if any, when one discounts the matters to which no order applies and when one has first applied the *Veolia Water* approach.

The EU law principle that costs should not be prohibitively expensive as it applies to national environmental law
30. If I am wrong that the majority of the applicants' points are public participation points, I need to consider the impact of the principle that costs should not be prohibitively expensive as regards other issues falling within the field of EU environmental law. The judgment of the CJEU in the present case establishes firstly that the not-prohibitively-expensive rule in directive 2011/92/EU only applies to challenges alleging infringement of the EU law rules on public participation (para 2. of the curial part of the judgment). That of course is not the end of the matter because para. 3 goes on to say that " *Article 9(3) and (4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, 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 in point 2 of the present operative part, 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."*

31. As Advocate General Bobek points out in his opinion in Case C-167/17 *Klohn v. An Bord Pleanála* at para. 27, and in the present case at para. 33, "*principles of effectiveness and effective judicial protection generally require that proceedings are not prohibitively expensive*" drawing on paras. 55 to 58 of the judgment of the CJEU in C-470/16 *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála.* That applies to points that are within the field of EU environmental law even if they go beyond the public participation rules. Thus the court refers at para. 58 of the judgment in the present case to the principle that the national court should give national procedural law an interpretation which "*to the fullest extent possible, is consistent with*" the Aarhus Convention, specifically arts. 9(3) and (4). It is clear that art. 9(3) of Aarhus includes a purely domestic law challenge, providing as it does for procedures "*to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment".* It is fair to say that the language in the judgment of the CJEU at paras. 54 to 58 is not necessarily totally consistent, referring variously to rights derived from EU law, to the field of EU environmental law and separately to national environmental law. Nonetheless, the CJEU judgment in this case does specifically note that this is a challenge to a project of a common interest which is in an EU law context, as noted by the court itself at para. 57. Insofar as these concepts are to be reconciled I would read the concept of "*the fields covered by EU environmental law*" as being the operative one (indeed it is the one referred to in para. 3 of the curial part of the judgment) and as being wider than a situation where the rights asserted are purely those created by EU law. If a point arises where this comes into dispute and would make a difference to the outcome, it might be that a further reference to the CJEU will be necessary on this and perhaps other issues.

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.

Effect of the not-prohibitively-expensive rule

33. In written submissions, the board argued that Irish legislation was contrary to EU law, contending that insofar as legislation required a no-order outcome in certain circumstances, this breached the entitlement of respondents to obtain their costs on a not-prohibitively-expensive basis. However, Advocate General Bobek's opinion in *Klohn* noted that it was within a member state's discretion to allow for a no order rule: see para. 53. That is not directly addressed in the judgment in *Klohn* but the judgment is not inconsistent with such an approach. I do not accept the board's submission in this regard and I consider that a no order outcome is perfectly consistent with the not-prohibitively-expensive principle, both as regards the discretion of the State, broadly defined as including both the legislature and the judicial arm of the State, and also for purely pragmatic reasons.

34. Overall there is a severe danger of creating significant additional costs by engaging in an exercise of attempting to quantify not-prohibitively-expensive costs. Clarke J. in *Veolia* stressed the need for practicality and avoiding over complexity in costs issues, for example noting, as I referred to above, that the *Veolia Water* approach should only apply to complex cases and that at para. 2.14 it "*may not be appropriate in more straightforward litigation".* He went on to say that "*the fact that such an additional issue was raised should only affect costs where the raising of the issue could, reasonably, be said to have affected the overall costs of the litigation to a material extent*". That emphasis on practicality and pragmatism is crucial to any workable application of the not-prohibitively-expensive rule going forward. As Mr. Fitzsimons conceded, there must be "*room for a pragmatic approach*" and in certain circumstances he accepted that "*there may be no fundamental difference between not-prohibitively-expensive and no order*".

35. In *Merriman v. An Bord Pleanála* (Unreported, High Court, 17th May, 2018), Barrett J. distinguished between points relating to rights (such as fair procedures) that were based on EU law and points driving at the same conclusion that were based on the Constitution and the ECHR, as applied by the European Convention on Human Rights Act 2003. He said as regards the latter that they "*do not present a contest on the basis of* 'national environmental law'*… thus cannot come within the protection of arts. 9(3) and (4) of the Aarhus Convention"*. The approach of Barrett J. in *Merriman* thus was:

> (i). A rigid distinction between points to which the not-prohibitively-expensive rule applies and other points which nonetheless drive at the same conclusion, on the basis of the national instruments relied on in making the point, and treating constitutional and ECHR based arguments as part of the latter;
>
> (ii). An award of costs of the non-EU law points against the applicant; and
>
> (iii). An award of costs of the EU law points against the applicant on a not-prohibitively-expensive basis to be determined at a later stage.

36. I would respectfully suggest that this is an overly complex approach that may defeat the objective of minimising costs. First of all, as EU law has primacy even over the Constitution, the court must interpret all domestic law, and indeed the Constitution itself, in a manner compatible with EU law (see, as to the constitutional aspect, *Lanigan v Governor of Cloverhill Prison* [2017] IEHC 23 [2017] 1 JIC 2304 (Unreported, High Court, 23rd January, 2017) and *Lanigan v Governor of Cloverhill Prison* [2018] IECA 40 (Unreported, Court of Appeal, 8th February, 2018)(para. 31)). Therefore one would have to reject the concept that a rigid distinction can be drawn between for example fair procedures and rights points that arise from EU law and the same points arising from the Constitution and national law, as suggested in *Merriman*. Since national law and the Constitution must be read as giving effect to EU law, where they apply to matters covered by EU law, there is no meaningful distinction between a rights-based argument that arises under one heading or the other since all of them must be viewed as either giving effect to, or compatible with, EU law. That is assuming that the right in question is one that is in substance reflected in EU law itself (such as to good administration, which must include fair procedures) rather than being a right that has no EU counterpart. The latter situation could invoke the distinction set out in para. 2 of the curial part of the reference in the present case.

37. Secondly, and perhaps more fundamentally, 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. That is consistent with the point made by Clarke J. in the slightly different but related context of para. 2.14 of *Veolia*.

38. Finally, for practical purposes and equally importantly, it is counterproductive and potentially creates further costs for a court to award not-prohibitively-expensive costs against an applicant given that there will then be further significant costs incurred in determining what those costs are. Applying a not-prohibitively-expensive approach should normally involve making no order as to costs. An award of not-prohibitively-expensive costs would normally be hugely outweighed by the sheer cost of calculating costs in the current Irish court process. Even a single further hearing as to what those costs should be would outweigh what would be the ultimately quantified not-prohibitively-expensive costs in most cases. Thus the court should lean in favour of making no order as to costs where the not-prohibitively-expensive rule applies to minimise the costs burden overall. If departing from that, the approach would have to involve measuring costs at a modest level, but as I say that approach is fraught with complexity as it would have to take into account the applicants' means, possible evidence from costs accountants from all sides and so forth. Such considerations presumably inform s. 50B of the 2000 Act and ss. 3 and 4 of the 2011 Act. That is independent of the conclusion I refer to elsewhere in this judgment that the court is *required* to apply the 2011 Act by analogy in exercising its costs jurisdiction in order to overcome the distinction drawn in the that Act in a manner contrary to EU law.

39. A somewhat simpler approach arose in *SC Sym Fotovoltaic Energy SRL v. Mayo County Council* [2018] IEHC 245 (Unreported, High Court, 4th May, 2018) where Barniville J. analysed the case as involving three points, the first being an EIA point and the two others being purely national grounds that were not "*within the ambit of environmental law for the purposes of Article 9 (3) of the Aarhus Convention*" (para. 65). Barniville J. pragmatically, if I may respectfully say so, made no order as to the EIA point (rather than adopting the more complex alternative of awarding not-prohibitively-expensive costs) and made an order that the applicant pay two-thirds of the costs. It was clear from the context that the national points were a significant part of the case and almost by definition added materially to the length of the hearing. That is not the case in the present application where the vast bulk of the application related to EU law points.

40. The court leaning towards no-order where the not-prohibitively-expensive rule applies ties in with the approach set out in an earlier section of this judgment which allows the court to refrain from declaring ss. 3 and 4 of the 2011 Act as invalid, but only on the basis that the court's discretion as to costs would be exercised in a manner compatible with the principles of the 2011 Act as if it applied. Doing so here requires no order in relation to either all or the vast majority of the applicants' case. In the present case, to the extent to which the not-prohibitively-expensive principle applies, the appropriate order having considered all the possible alternatives is that no order as to costs should be made in order to give effect to that principle in the most pragmatic manner, even apart from the need to apply the 2011 Act by analogy in order to avoid creating a distinction that is contrary to EU law. The points to which that principle does not apply were minor in the overall context and did not significantly add to the length of the application and it would not in the present circumstances be just or appropriate to award costs against the applicant in that regard.

41. If I could be forgiven a postscript on this issue on a practical note, there are many areas that could benefit from a default rule, but where the absence of some default consideration leaves open room for endless argument and waste of time and costs. In some such areas, the laying down of a default rule can have a marvellously salutary effect in preventing court time being wasted by disputes that in the end can normally be resolved by the default order. An example I have in mind is the default rule laid down by the Supreme Court that the court should lean towards no order where a case becomes moot due to an event outside the control of either party (see *Cunningham v. President of the Circuit Court* [2012] IESC 39 [2012] 3 I.R. 222, *Godsil v. Ireland* [2015] IESC 103 [2015] 4 I.R. 535 and *Matta v. Minister for Justice and Equality* [2016] IESC 45 (Unreported, Supreme Court, 26th July, 2016) (MacMenamin J.)). Such a default position is extremely helpful from a practical day-to-day point of view. In practice the application of that rule has allowed very many costs disputes to be decided quickly and easily, and has headed off many more such potential disputes from being litigated in the first place. In my very respectful view, apart from any legal considerations discussed above, a default rule, such as that the court should lean towards no order in challenges based on national environmental law or otherwise within the scope of the not-prohibitively expensive principle, would itself save an enormous amount of inconvenience and expense for parties and the court. In the absence of a default rule, costs will have to be litigated every time, with a considerable wasted expenditure of scarce judicial resources.

Constitutional principle that proceedings should not be prohibitively expensive
42. There was some brief discussion at the hearing which touched on whether there is an implicit constitutional requirement that litigation should not be prohibitively expensive. That is clearly an issue which has wide ramifications for financing litigation generally and would have required further focused argument. In view of the conclusions I reach here I do not need to go down the route of exploring that question.

Discretion
43. If I am wrong in relation to the foregoing and if a balance of costs was otherwise payable to the applicants, I would also take into account certain matters to which I can legitimately have regard under O. 99. Firstly, there is the confused state of the law regarding the issue of time and prematurity, which I discussed at length in the No. 1 judgment and is referred to by Advocate General Bobek. To that extent a certain clarification of the law was achieved, and furthermore this clarification related to systemic issues.

44. Secondly, while the applicants did lose the event on leave they did bring the benefit of certain rulings into the substantive hearing in their second judicial review.

45. The third discretionary element is the loss of a certain amount of court time that was occasioned by very late vacating of court dates occasioned by non-compliance with directions of the court by EirGrid in particular. That is not a criticism of anybody but is just a statement of fact that a certain amount of court time was wasted, so it would not be appropriate to entirely disregard that when considering discretionary factors. That impacted more on other litigants rather than these applicants because it meant that time that might otherwise have been made available to litigants was in fact simply wasted, so while it is not a reason to give the applicants costs such a situation might in principle be a reason, and in the present circumstances would be a reason, not to make an order of costs in favour of parties that had given rise to that waste of court time. In particular, there was a difficulty with a first hearing date because I was informed by counsel for EirGrid that an updated version of the Scott Schedule would be circulated. More significantly on 30th April, 2018 I fixed an alternative date of Friday, 8th June, 2018, but on 5th June, 2018, due to late submissions most immediately on behalf of EirGrid, although that may have been a knock on effect of late submissions by other parties, an application was made for an adjournment. Given that that application was made so close to the hearing date, there was a waste of court time on the 8th June, 2018. So without in any way unduly blaming anybody, and indeed I want to take the opportunity to thank all of the lawyers involved in this complex case for their great assistance, that is nonetheless a factor that it would be proper and appropriate to take into account because late vacation of court dates does impact negatively on other blameless litigants that would otherwise be able to avail of court time.

46. Having regard to all of the circumstances including all of the matters referred to in this judgment I would have exercised any residual discretion, if it was necessary so to do, in favour of awarding no order.

Summary
47. To attempt to summarise, without taking from the more specific terms of the judgment:

(i). Given the complexity of the proceedings, the *Veolia Water* approach applies here. The individual issues on which the applicants won are substantially similar in terms of time expended to those on which the applicants lost leaving at worst, from the applicants' point of view, only a modest balance of potential costs.

(ii). Sections 3 and 4 of the 2011 Act are contrary to EU law but that does not mean they must be treated as invalid. A preferable approach is to apply those sections to the cases covered by their language, thus excluding the present case, but on the basis that the court should take their policy into account in implementing the not-prohibitively-expensive rule and in exercising the discretion as to costs, so as to produce a similar result as if those sections did apply but for the link to environmental damage.

(iii). Virtually all of the applicants' case is covered by the not-prohibitively-expensive rule arising from EU law, the Aarhus Convention as applied by EU law, and s. 50B of the 2000 Act.

(iv). Insofar as the not-prohibitively-expensive rule applies, the appropriate order in general, and certainly here, is no order to costs.

(v). Insofar as any modest balance would otherwise arise, the non-EU points did not add significantly to the length of the hearing so no order would be appropriate as regards those points.

(vi). The upshot is that the appropriate order overall is no order as to costs, even without exercising discretion under O. 99.

(vii). If I am wrong in that regard and insofar there is any balance of costs remaining against the applicants, which I do not accept, I would exercise discretion under O. 99 to make no order having regard to all of the circumstances of the case.

Order

48. For these reasons, the order made on 30th October, 2018 was that there will be no order as to costs in relation to the leave application and the injunction, up to and including the judgment refusing leave. I will hear from counsel on a date to be fixed as to the costs of the exceptionally complex costs hearing itself, including the reference to Luxembourg.

49. I might be forgiven for taking the opportunity to draw renewed attention to the fact that s. 50B of the 2000 Act and ss. 3 and 4 of the 2011 Act do not fully give effect to the not-prohibitively-expensive principle that applies in all national environmental challenges within fields covered by EU environmental law. I might therefore respectfully suggest that consideration be given to amalgamating those various sections together with whatever further clarifications or provisions as are required by the not-prohibitively-expensive principle, as interpreted by the CJEU in the present case, into a single statutory provision, in order to avoid confusion going forward. I might also suggest that consideration be given to ensuring that the not-prohibitively-expensive rule is implemented in the most practical way possible, which for the reasons set out in the judgment might generally be a default no-order-as-to-costs rule where the applicant is unsuccessful in pursuing an issue of national environmental law, with any other points raised only affecting costs if they materially add to the length of proceedings.