

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 25
[2020 No. 22 JR]

BETWEEN

SABRINA JOYCE KEMPER

APPLICANT

AND

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

RESPONDENTS

AND

IRISH WATER DAC

NOTICE PARTY

JUDGMENT of Mr. Justice Allen delivered on the 21st day of January, 2022

Introduction

1. This is my judgment on the question of the costs of a long running judicial review of a decision made by An Bord Pleanála (“*the Board*”) on 11th November, 2019 under s. 37G of the Planning and Development Act, 2000 to grant permission to Irish Water for the development of a large strategic infrastructure project called the Greater Dublin Drainage Project.
2. The applicant contends that one or other of the Board and the State respondents should be ordered to pay all of her costs. The Board acknowledges that the applicant has been partly successful against it and so should have some of her costs. The State respondents submit that, as far as they are concerned, the applicant was unsuccessful and that as between the applicant and those respondents there should be no order as to costs.

Background

3. For the reasons given in a long judgment delivered on 24th November, 2020 ([2020] IEHC 601) I concluded that the decision of the Board had been shown by the applicant to have been legally flawed and that it must be quashed.
4. The applicant had sought judicial review of the Board’s decision on a very large number of grounds which called for an examination of the pre-application consultation between May, 2008, when Fingal County Council published a Strategic Assessment for the Greater Dublin Strategic Drainage Scheme and 20th June, 2018 when the planning application was made; the appointment of the Inspector and Board members who dealt with the application; the approach by the Board to the assessment of the proposed development; the public and statutory consultation, including the engagement between the Board and the Environmental Protection Agency; and the reasons given for the decision. Besides, the applicant sought to make the case that there had been a failure on the part of the State to correctly transpose Article 2 of the EIA Directive into Irish national law.
5. Following close case management and the filing of comprehensive written submissions the application for judicial review was heard by way of a telescoped hearing over three weeks in July, 2020.

6. The hearing, which had been fixed for ten days, was interrupted at the start of what was to have been the third day when counsel for the applicant indicated that he wished to make a recusal application. On what was to have been the fourth day of the hearing I heard the recusal application and the submissions of the respondents and notice party in relation to it. For the reasons given in an *ex tempore* judgment late that afternoon I refused to recuse myself and resumed the substantive hearing on the following day. On 23rd September, 2020 I delivered a written judgment ([2020] IEHC 477) in which I reprised and slightly elaborated on the reasons I had given for declining to recuse myself.
7. The applicant appealed to the Court of Appeal against the refusal of the recusal application. The appeal was assigned an early hearing date for 26th November, 2020 but was not pursued by the applicant.
8. My decision on the substantive application was that the applicant had made out her case on one ground, only, which was that the Board had failed to correctly identify and comply with the obligation imposed on it by art. 44 of the Waste Water Discharge (Authorisation) Regulations, 2007 as amended by the Waste Water Discharge (Authorisation) (Environmental Impact Assessment) Regulations, 2016 to seek the observations of the Environmental Protection Agency on the likely impact of the proposed development on waste water discharges.
9. Following the delivery of my judgment I adjourned the matter for mention to allow the parties an opportunity to consider it. The first question to be addressed was whether any of the parties wished to make an application for leave to appeal. None of them did.
10. The next question to be decided was whether, and if so the basis upon which, the matter might be remitted to the Board. That question was argued on 16th March, 2021 and was the subject of a further a written judgment delivered on 27th April, 2021 ([2021] IEHC 281). In very broad terms, the Board and Irish Water submitted that the single flaw in the process identified by the judgment of 24th November, 2020 could be addressed and remedied by remitting the matter for reconsideration by the Board at the point at which the process had been shown to have gone wrong. The applicant submitted that the decision of the Board should simply be quashed. For the reasons then given, I found that the decision of the Board dated 11th November, 2019 should be quashed and that Irish Water's application dated 20th June, 2018 should be remitted to the Board for reconsideration from the point at which the Inspector's report was submitted to the Board. As against the State respondents, the judicial review application was dismissed.
11. The question of the costs of the proceedings was first listed for hearing on Friday 25th June, 2021, with directions for the exchange of written submissions in the meantime. In accordance with the court's directions, the applicant's submissions were filed on 1st June, 2021, the State respondents' on 18th June, 2021 and the Board's on 22nd June, 2021.
12. One of the arguments made in the applicant's written submission was that she was facing a substantial "financial burden" arising from the proceedings if she could not recover her costs in full. In their written submissions the respondents had countered that there was

no evidence before the court as to the cost of the proceedings to the applicant, specifically that there was no evidence that a limited order for costs would have the consequence that the proceedings would be prohibitively expensive for the applicant. It was suggested in the Board's submissions, indeed, that the court might infer from the fact that the applicant was represented by solicitors and two counsel that she has been able to secure legal services on a *pro bono* or contingency basis, or similar.

13. Counsel for the applicant could scarcely credit that the respondents were serious in their objection, but when it was clear that they were, sought an adjournment to file an affidavit setting out her means and addressing her liability for costs. In principle, the applicant ought not to have sought to make an argument for which there was no evidential basis and in practical terms she could and should have addressed the deficit when it was pointed out in the respondents' submissions but the court, with considerable reluctance, acceded to the application and adjourned the hearing for which the respondents and the court had prepared.
14. On 6th July, 2021 the applicant swore a short affidavit in order "*to set out my own financial means in so far as same applies to the issue of costs*". The applicant deposed that she had instructed her solicitors in December, 2019 and that her solicitors had briefed counsel on her behalf. She deposed that she was furnished with a s. 150 notice – that is a notice under s. 150 of the Legal Services Regulation Act, 2015 – in relation to fees and charges and:-

"... was advised in clear terms of my liabilities and the potential costs of judicial review proceedings which might run for a number of days could be over €300,000 plus VAT at 23% and outlay. I say that this was an issue of great concern to me as I did not then, nor do I now have access to large sums of money to discharge such liabilities. I was however working at that time and there was considerable public support for my case which included some fundraising mostly by crowd funding through the internet."

15. The applicant went on to describe her family and employment circumstances, including the impact on her employment, and on her fundraising plans, of the COVID-19 restrictions. She has sworn that she is fully liable for the costs of the proceedings, which run to many hundreds of thousands of euro, but does not have the means to discharge them, and that she does not have the means to pay any shortfall in her legal costs. The applicant has exhibited a statement released by the compliance committee of the United Nations Economic and Social Council on 2nd September, 2020 on the application of the Aarhus Convention during the COVID-19 pandemic and the economic recovery phase, but not her s. 150 notice.
16. While the applicant referred to her fundraising, she did not disclose how much had been raised. That deficit was partly addressed by an affidavit filed on behalf of the State respondents which exhibited a printout from one crowdfunding website which suggested that €42,247 had been raised of a target of €90,000. The printout indicates that any

unused legal funds would be distributed to four charities, which the webpage suggests would be impacted by the Greater Dublin Drainage Project going ahead.

The applicant's submissions

17. The applicant's written submissions recall that the application for judicial review was first moved in the judicial review list on 14th January, 2020, when it was transferred to the Strategic Infrastructure List, where it was managed over the following months. Notably, when the matter first appeared in the SID list on 23rd January, 2020 Simons J. directed that the leave application should be made on notice, and that the applicant should canvas the views of the respondents and Irish Water as to the possibility of a telescoped hearing. When the case next came into the list on 6th February, 2020 the respondents and Irish Water confirmed that the proceedings were subject to the costs rule under s. 50B of the Planning and Development Act, 2000, and consented to a telescoped hearing.
18. The first point made in applicant's written submission is that one consequence of the telescoped hearing was that there was no determination that any of the applicant's grounds were not substantial until judgment was delivered on 24th November, 2020. That was the inevitable result of the telescoped hearing. The applicant submits that, ordinarily, grounds considered insubstantial are dealt with early in the process; that the need for a full hearing in respect of all of the grounds was through no fault of the applicant; and that the manner in which the application was dealt with considerably increased the costs of the proceedings.
19. Starting at the end, it is not explained why or how the telescoped hearing is said to have increased the costs. The suggestion that the procedure adopted increased the number of grounds does not withstand even superficial scrutiny. The hearing was conducted by reference to the applicant's statement of grounds presented to the court on 14th January, 2020 and while there was some suggestion along the way that there might be an application to amend the grounds, in the event there was no such application. The applicant observes that the court did not elect to exercise its jurisdiction to amend the grounds, but that jurisdiction was never invoked. The number of grounds never changed.
20. Various, it is argued that the court ought to have weeded out the insubstantial grounds long before it did, and that an appeal against the rejection of most of the grounds advanced as insubstantial is not possible as any such appeal would necessarily be moot having regard to the fact that the permission was going to be quashed on the basis found. It seems to me that logically, any complaint that the court did not earlier identify grounds as insubstantial must be premised on an acceptance that those grounds were, in fact, insubstantial, and so, logically, ought not to have been advanced in the first place. At the hearing of the application in July, 2020, all of the grounds were vigorously pressed. I cannot imagine that they would have been any less vigorously pressed on any earlier *ex parte* application, or – as directed by Simons J. on 23rd January, 2020 – on an *inter partes* leave application. Absent any basis on which it could be said that the time that would have been spent at a separate leave hearing would have been less than the time spent at the telescoped hearing, I cannot see how it can be said that the telescoped hearing added to the costs.

21. In any event, the procedure which was adopted was adopted by consent. While the applicant recalls that the telescoped hearing was first canvassed by the court as a possibility and that the respondents and the notice party consented to it, the truth is that it was adopted by consent of all the parties. The applicant having consented to, or at the very least acquiesced in, the procedure adopted, it is not now open to her to complain that there was no advance determination of the substantiality of the grounds. In any event, I see no legal or rational basis for the assertion that the applicant had a right to be told sooner that most of her grounds were devoid of substance.
22. As to the suggestion than an appeal against the rejection of the grounds which were insubstantial – or the ground which was found to have been substantial, but which was rejected on the merits – would be moot, it seems to me that this is an oblique attack on the substantive decision. The applicant launched a root and branch attack on the Board's decision to grant permission for the project. If the decision was to be quashed, the grounds on which the decision might be quashed were always going to be relevant to the question of remittal: whether at all, or to the point in the process to which the application might be remitted. All of the parties were given an opportunity to consider the substantive judgment and to make any application they might have been advised for leave to appeal. I do not accept that the respondents' resistance to an order that they should pay all of the applicant's costs potentially penalises her in respect of grounds which she cannot appeal. Nor do I accept that any appeal for which leave might have been applied would necessarily have been moot because the decision was going to be quashed on the sole ground on which it was quashed. The applicant's object was to put Irish Water back to the drawing board. The identification of a substantial, and ultimately meritorious, ground at a much earlier stage in the planning process might have achieved that. I do not accept that, in principle, a decision that an administrative measure should be quashed on one ground necessarily means that a question of whether it should be quashed on any other ground is moot. I accept that the applicant would have had a difficult task in seeking leave to appeal against the rejection of any of her grounds as insubstantial but it makes no sense to me to contemplate that instead of leave to appeal – for which she did not apply, and which, if she had applied, would probably have been refused – she should have her costs of making the several arguments which she did not make out.
23. The applicant submits that she has been successful and is therefore entitled to the costs of the proceedings.
24. Under the heading "*Not prohibitively expensive rule*" the applicant's written submission moves from the Aarhus Convention, to the EIA Directive, to the IPPC Directive, to the Charter of Fundamental Rights of the European Union, to the requirement that the provisions of Directives must be implemented with unquestionable binding force and with the specificity, precision and clarity required to satisfy the need for legal certainty, to the observation in the judgment of the CJEU in Case C-260/11 *Edwards and Pallikaropoulos v. Environment Agency* that proceedings must not be so expensive that the costs threaten to prevent them from being conducted, to a submission that:-

"Had the applicant in these proceedings been aware in advance of a likely cost burden in relation to insubstantiality of grounds that knowledge may well have prevented the taking of a case which she subsequently won. Similarly, had she been told at an earlier stage in the proceedings of the court's assessment of the substantiality of certain of her grounds she could have decided not to pursue that part of her case."

25. The fairly thinly veiled suggestion is that the court was somehow at fault for failing to point out that the applicant was unlikely to be awarded the costs of pursuing issues on which she might fail, or, perhaps, for failing to point out to the applicant earlier that there was no substance in much of the case that was being argued on her behalf. I can easily see that the applicant might not have pursued grounds which she might have been advised – by those whose place it was to advise her – were insubstantial. I do not see how the applicant might have been deterred from pursuing the point on which she ultimately won by being told that there was no substance to all or most of her other grounds.

26. The judgment of the CJEU in *Edwards*, it is said, establishes that the NPE costs requirement concerns all the costs arising from participation in judicial proceedings and must be assessed as a whole, taking into account all the costs borne by the party concerned. The cost of proceedings, it is said, must neither exceed the financial resources of the person concerned nor appear to be objectively unreasonable. From these observations the applicant moves to the submission that:-

"If the applicant, having been successful in her proceedings, may only recoup some small portion of her costs, then, the procedures are not compliant with the NPE rule as interpreted in Edwards. ...

It is the applicant's position, in circumstances where she was granted the relief of certiorari sought, can only be awarded her full costs by application of domestic law pursuant to s. 50B of the Planning and Development Act, 2000, as amended; however, should this court believe otherwise and if the findings of the CJEU in Case C-530/11 Commission to United Kingdom are not acte clair with respect to the issue of ensuring that the costs of the claimant's own legal bills should not be prohibitively expensive, the applicant would support a reference to the CJEU in that regard."

27. In the same breath, the applicant submits that she is entitled under Irish law to an order for all of her costs and floats the suggestion that the Directives might not have been correctly transposed into domestic law. In circumstances in which the primary submission is that the applicant is entitled under s. 50B to the order which she seeks, it is unsurprising that she has not identified what provisions of EU law might not have been transposed.

28. There was agreement from the outset that these proceedings are governed by the costs regime laid down by s. 50B of the Planning and Development Act, 2000. This, as the

respondents correctly submit, displaces s. 169(1) of the Legal Services Regulation Act, 2015 and the applicant is not entitled to rely in the alternative on the Act of 2015.

29. Section 50B of the Act of 2000, as amended, provides, insofar as is material:-

"(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.

(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."

30. As I have said, it was agreed at the outset that these proceedings are proceedings within the meaning of section 50B(1) of the Act of 2000. The applicant in her written submissions relied on the decision of the High Court in *Heather Hill Management Company CLG v. An Bord Pleanála* [2019] IEHC 186, which, shortly after this application was argued, was overtaken by the judgment of the Court of Appeal [2021] IECA 259: but in this case there was no argument as to the scope of the costs protection available to the applicant.

31. The applicant submits that she has been entirely successful in obtaining relief and so is entitled to her costs. She goes further, arguing that even if she had failed she would have been entitled to a process with legal certainty, predictability and to have been not prohibitively expensive in all aspects, including her own costs. Anything else, it is submitted, would place an unacceptable barrier before members of the public concerned in environmental cases. Citing Case C-167/17 *Klohn v. An Bord Pleanála* and Case C-470/16 *North East Pylon Pressure Campaign* the applicant submits that s. 50B must be interpreted in such a way that persons should not be prevented from seeking, or pursuing a claim for, a review by the courts, which falls within the scope of Article 9 of the Aarhus

Convention by reason of the financial burden that might arise. The applicant submits that:-

"If domestic law on the protection of an applicant from a costs claim from other parties applies to the entire proceedings, it would be counterproductive for the same laws not to facilitate an award of the costs of the entire proceedings to an applicant."

32. But the issue in this case is not whether Irish law does not enable or facilitate an award of costs to an applicant but rather whether such an award should automatically follow the granting of the relief sought.
33. At the oral hearing of the costs application, counsel maintained the applicant's primary submission that there should be an order for all of her costs but acknowledged – as had been pointed out in the respondents' written submissions – that, as counsel put it, there was authority against the proposition, principally a judgment of the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 36 and more recently the judgment of the Supreme Court in *Klohn v. An Bord Pleanála*, which was delivered on 3rd August, 2021 [2021] IESC 51.
34. In an exchange of correspondence following the judgments delivered on the substantive application and the remittal issue, the Board's solicitors had taken the position that while the applicant had succeeded, she had done so to a limited extent and that while she was entitled to some costs, she ought not be awarded all of her costs. In the applicant's written submissions the Board's position in relation to costs appears to have been misunderstood as being that the court should revisit its previous judgments and determine on a point by point basis the grounds on which the applicant had succeeded and failed and limit the costs to the point on which she had succeeded. If it was not clear in the Board's solicitors' correspondence, it was in the respondents' written submissions, that this was not the basis on which the Board was urging that the question of costs should be approached.
35. What the Supreme Court said in *Connelly* was that:-

*"6. On the question of costs the Court would wish to emphasise strongly that it is important for parties generally to recall that the starting point for a consideration of costs in any case must be the result. Ultimately Ms. Connelly won the case and successfully resisted the appeal. It is neither necessary nor appropriate, in the context of costs, to attempt to parse and analyse in detail all of the issues which may have been canvassed in the course of proceedings or appeals and identify the number of issues on which one or other party might be said to have succeed in whole or in part. Rather the overall approach, identified in *Veolia Water* and confirmed on many occasions since, is that the starting point has to be to decide whether the plaintiff or applicant has to come to court to achieve something which they could not otherwise have achieved or whether a defendant or respondent had to come to court to resist a claim found to be unmeritorious. The applicant in this*

case clearly falls into the category of a party who had to come to court in order successfully to have the permission granted quashed.

7. What the Veolia jurisprudence suggests, however, is two things. First it is important to discourage parties from, as it were, throwing the kitchen sink into every case thus significantly increasing the costs and the amount of court time and resources which require to be deployed in resolving the case. Just because a party turns out to have one good point does not justify raising a large number of unmeritorious points.

8. However, that proposition needs to be qualified by reference to the fact that an otherwise successful party should not be deprived of full costs unless it can be shown that it is clear that the raising of unmeritorious points added materially to the overall cost of the proceedings. In making that assessment it will rarely be appropriate to attempt either a very precise calculation of the extent to which costs may have been increased or, indeed, an overly meticulous approach to identifying the precise issues or variations on issues, which were canvassed. To take that approach would be counterproductive in that it would turn every costs application into a major further hearing resulting in even more costs. In that context it is worth noting that the hearing this morning took over an hour.

9. Rather a broad brush approach should be adopted to identify whether, and if so to what general extent, it can be said that it is clear that significant areas of the case, adding materially to the cost, were run and lost.

10. Applying that approach to the facts of this case the Court feels that it cannot ignore the fact that there were a number of significant issues raised (not least those connected to the EIA) which must undoubtedly have added materially to the costs of the High Court and added somewhat to the costs in this Court and on which Ms. Connelly failed. But at the same time the Court has to acknowledge that Ms. Connelly succeeded in the proceedings in the High Court as she obtained the only actual relief sought being to quash the planning permission and also succeeded on the appeal. It would be totally counterproductive to attempt to now ask the High Court judge to assess costs on the basis of the issues on which Ms. Connelly ultimately succeeded by comparison with those on which she has ultimately failed. Rather it is appropriate that the Court should do the best it can in all the circumstances and therefore the Court proposes to award Ms. Connelly 75% of the costs of both the High Court and of the appeal to this Court."

36. As it was put by the Supreme Court in *Klohn*, the authorities are consistent and clear that an otherwise successful party should only be deprived of full costs where it is clear that they have raised unmeritorious issues which have had the effect of materially increasing the costs of the process.
37. I pause here to observe that the approach taken by the Supreme Court in *Connelly* in a planning case was not obviously the same as the test propounded in *Veolia Water*.

Specifically, it was not spelled out in *Connelly* that in assessing the extent to which unmeritorious arguments had added materially to the overall costs, the court should take into account the extent to which the costs of the overall unsuccessful parties were increased by reason of the issues on which they succeeded. It may come to be argued in another case that to do so would be to undermine the scheme of s. 50B but all that I need to say in this case is that the height of the respondents', specifically the Board's, argument was that the applicant should not be awarded the costs of the many issues – said to have been unmeritorious – on which she failed, and which were said to have added significantly to the overall costs. It was not submitted that there should be any allowance in respect of the Board's or the State respondents' costs of dealing with those issues.

38. As I have said, at the oral hearing counsel for the applicant recognised that there is clear authority against the proposition that in planning cases a successful applicant is entitled to all of the costs but went on to submit that even if the court were to approach the question of costs on the *Veolia* or *Connelly* basis, the test was not met. It was submitted that this was not a case in which entirely specious or unmeritorious grounds were raised and pursued. All of the grounds, it was said, were serious grounds. Counsel did not understand it to be suggested by any of the parties, or by the court, that anybody was wasting anybody's time.
39. The parties to the costs application are the applicant, the Board and the State respondents. It was clear from the applicant's written and oral arguments that she wanted an order for all of her costs but it was not clear – indeed it was not said, until the court raised the question at the end of counsel's oral submission – whether the costs order was sought against the Board or the State respondents.
40. The State respondents were said to have been party to the costs application because the applicant maintained that if she did not recover her costs from either the Board or the State, that the State would be in breach of its obligations under the Aarhus Convention and the EIA Directive. I tried to tease this out with counsel, but I am compelled to confess that I could not be brought to understand why the State was involved. Counsel acknowledged that it was the Board which was the primary target, and that the applicant would be content with a full costs order against the Board. The suggestion was that if s. 50B could be construed and applied in a way which limited the applicant's costs, the State would be liable for any shortfall by reason of its failure to correctly transpose the not prohibitively expensive rule. Counsel denied that his submission was that the court, on a costs application, might first decide that the not prohibitively expensive rule had not been correctly transposed and then make a costs order against the State by way of *quasi Francovich* damages so that she would recover against the State costs to which she was not entitled against the Board. I could not see on what conceivable basis I might have properly approached the case in that way, and I could not see either what costs order might properly have been made against the State respondents, against whom the applicant had failed. Neither could I understand the basis on which it was suggested that

the Board might be ordered to pay the applicant's costs of her failed claim against the State respondents.

The State respondents' submissions

41. The State respondents' position was more straightforward.
42. The default position under s.50B(2), it was said, is that the parties in planning judicial review proceedings should bear their own costs. That default position, it was said, is modified by s. 50(2A) which contemplates that the costs "*or a portion of such costs, as appropriate*" may be awarded to the applicant "*to the extent that the applicant succeeds in obtaining relief*" and that such costs should be borne by the respondent or notice party to the extent that their actions or omissions contributed to the applicant obtaining relief. The power of the court to award costs, it was submitted, was discretionary and the express jurisdiction to award a portion of the costs was inconsistent with an entitlement to an award of all of the costs. The applicant having accepted at the outset that the costs would be governed by s. 50B(2) was not entitled to try to "*read up*" the provision to guarantee full costs.
43. As far as the State respondents were concerned, it was submitted, no relief had been obtained against them, nor could it be said that any action or omission on their part had contributed to the applicant obtaining relief.
44. The written submissions filed, and the oral argument made, on behalf of the State respondents carefully addressed the authorities relied on by the applicant but counsel stood on the argument that the liability for costs was governed by s. 50B(2) and that the discretion of the court to make an order for costs against the State respondents was simply not engaged.

The Board's submissions

45. The Board's position was similarly relatively straightforward.
46. The substantive hearing, it is said, took eleven and a half days: a record in the SID and commercial planning list. The substantive judgment grouped the applicant's grounds into eleven areas of challenge. The single ground on which the applicant succeeded accounted for a small portion of the pleadings, the written submissions and the time taken at hearing. The recusal application accounted for an additional two days. Substantial time was devoted to the applicant's claim against the State respondents, which was unsuccessful. The hearing and judgment on Irish Water's remittal application – which was supported by the Board – were necessitated because the applicant opposed that application.
47. The Board argues that applicant's submission that she was entirely successful is wrong. It points to the several declarations sought by the applicant, all of which were refused. It points also to the fact that the applicant did not obtain the precise relief which she sought, which was *certiorari simpliciter*, without remittal.

48. Citing *Veolia Water* and *Connelly* the Board urges the court to take a broad brush and generous approach which, it is submitted, would be reflected in an award of 25% of the costs of the proceedings, excluding the recusal and remittal applications.
49. The Board submits that, by contrast with non-environmental cases, the applicant is not liable for the respondents' costs in respect of all of the grounds and arguments on which the applicant was unsuccessful.
50. The Board contests the proposition that the applicant is entitled to her costs under the not prohibitively expensive rule. The NPE rule, it is said, does not entitle the applicant to his or her costs irrespective of the outcome.
51. Like the State respondents, the Board contests the proposition that the default position is that costs should follow the event. It also points to s. 50B(2) of the Act of 2000 which says that notwithstanding anything in O. 99 of the Rules of the Superior Courts (and subject to the following subsections) in proceedings to which that section applies, each party shall bear its own costs. The Board points also to the discretionary power to award the costs or a portion of the costs to an applicant to the extent that the applicant succeeds in obtaining relief.
52. Section 50B, it is submitted, represents the State's transposition of the NPE rule into domestic law. Not only has the applicant failed to challenge s. 50B but she has invoked it against the respondents.
53. The Board submits that the applicant's emphasis on the fact that the hearing was a telescoped hearing is misplaced. In principle, it is said, it is not the role of the court to help an applicant to weed out insubstantial from substantial grounds. Rather it is incumbent on the applicant to put forward only grounds which she considers to be substantial. The Board points to the express power given to the court by s. 50A(2) of the Act of 2000 to direct a telescoped hearing and recalls that although the possibility of a telescoped hearing was first of all identified by the court, it was not opposed by any of the parties. In any event, it is said, the court gave a direction for an *inter partes* leave application which, it is said, would have taken if not as long, then almost as long as the telescoped hearing and would have led to a further hearing on the points which were found by the court to be substantial.
54. As to the costs of the recusal application, the Board submits that there should be no order. While it was suggested that there might be an argument to be made that s. 50B does not cover recusal applications, the Board makes clear that it is not making any such argument in this case. Similarly, the Board recalls that the concession made at the outset of this case that the costs were covered by s. 50B had been made having regard to the decision of the High Court in *Heather Hills*, which was at that time under appeal. The Board likens the recusal application to an interlocutory application, and points to the distinction drawn in *Usk & District Residents Association Ltd. v. Environmental Protection Agency* [2007] IEHC 30 between applications which are made as part of the ordinary and necessary process of litigation, on the one hand, and applications which do not form part

of the ordinary process and may therefore be regarded as, in a sense, elective, on the other.

55. It was submitted that the question of costs was entirely covered by s. 50B of the Act of 2000; that there was no free standing obligation on the part of the State to provide legal aid or indemnity; and that nothing in the case law relied on by the applicant supported the proposition that an applicant who had succeeded on one of many grounds was entitled to the full costs of judicial review proceedings.

Discussion and decision

56. This was an application by way of judicial review for a variety of orders in relation to a decision of An Bord Pleanála made on 11th November, 2019 to grant permission for a development consisting of a new wastewater treatment plant, sludge hub centre, outfall pipeline and regional biosolids storage facility in County Fingal and the City of Dublin.
57. The first relief sought was an order of *certiorari* quashing the decision but the applicant also sought declarations that the decision was *ultra vires* and contrary to the EIA and Habitats Directives, that the decision lacked sufficient reasons and was contrary to fair procedures, and a declaration that the EIA Directive had not been properly transposed.
58. The sixth relief claimed by the applicant in her statement of grounds was an order pursuant to s. 50B of the Planning and Development Act, 2000, as amended by s. 3 of the Environmental (*sic.*) (Miscellaneous Provisions) Act, 2011 with respect of the costs of the application.
59. By order of the court (Simons J.) made on 23rd January, 2020 the parties were directed to indicate in writing in advance of the next case management listing on 6th February, 2020 whether they would be contending that the proceedings were subject to the costs rules under ss. 168 and 169 of the Legal Services Regulatory Act, 2015 and O. 99 of the Rules of the Superior Courts, or the costs rule in s. 50B of the Act of 2000. It was agreed that the proceedings would be subject to the rules on section 50B. It was further then agreed that the costs would be dealt with without distinction between the environmental and non-environmental grounds which the applicant sought to advance.
60. With the benefit of hindsight, the concession made by the respondents – which was made on the basis of the judgment of the High Court *in Heather Hills*, which was then under appeal and later reversed by the Court of Appeal – may have been a very valuable concession as far as the applicant is concerned but the respondents have not attempted to resile from it. The applicant, by contrast, seeks to revisit the agreement in relation to costs with a view not only to keeping the costs protection in respect of the grounds on which she has failed but to fixing the respondents with the costs of those issues.
61. As has been pointed out by the Board, the applicant seeks at the end of the case to attack the provision which she invoked at the start.
62. The central tenet of the argument made on behalf of the applicant is that as a matter of EU law she is entitled to the costs of the proceedings, irrespective of the outcome. That

proposition is plainly at variance with s. 50B of the Act of 2000 and so the applicant seeks to build an argument on the text of the Aarhus Convention and various dicta of the CJEU, and to a lesser extent of the Supreme Court.

63. The applicant acknowledges, as she must, that the CJEU has decided that the requirement that judicial review proceedings in environmental matters must not be prohibitively expensive does not have direct effect. See Case C-167 *Klohn v. An Bord Pleanála* and Case C-543/14 *Ordre des Barreaux Francophones*. Because the argument is at variance with s. 50B, the applicant seeks to argue that s. 50B does not effectively transpose the not prohibitively expensive rule. Apart altogether from the applicant's failure to juxtapose EU law and Irish law and analyse the requirements of the former and the effects of the latter so as to identify the alleged gap, it is not permissible to seek to mount a challenge to transposition in the context of a costs application. If, in this case, one were to contemplate, for the sake or argument, that there was a failure to transpose, the court could not possibly contemplate fixing the Board with a liability for costs that it does not have under Irish law. Or under EU law, for that matter.
64. Nor, it seems to me, could I possibly contemplate – on a costs application – fixing the State respondents with the costs of an unsuccessful claim that they had failed to correctly transpose Article 2 of the EIA Directive by deciding that they had failed to correctly transpose, and then, in practical terms, by giving direct effect to what the applicant would argue is required by Article 11(4) of the EIA Directive or Article 15a of the IPPC Directive.
65. It makes no sense to me that an applicant should mount a prohibitively expensive case and then – irrespective of the outcome – seek to recover her costs against the respondents on the basis that otherwise the failed challenge would have been prohibitively expensive. Logically is probably not the right word, but effectively, the proposition is that elaborate and time consuming proceedings which would otherwise be prohibitively expensive can only be rendered not prohibitively expensive if the applicant's costs are payable by the respondents.
66. In view of the agreement between the parties in this case as to the applicable costs rules, there was no argument as to the distinction between environmental and non-environmental grounds and the applicant's submission did not engage with that issue. But even if the applicant's argument were to be limited to environmental grounds, it would boil down to the proposition that the applicant's entitlement to costs would depend on his or her advancing sufficient unmeritorious grounds to make the case otherwise prohibitively expensive. The applicant's argument does not engage with the distinction between substantial and insubstantial grounds but since in this case the vast majority of the grounds advanced were found to have been insubstantial, the proposition can only be that irrespective of merit or substance the applicant must have the costs provided only he or she can make the proceedings sufficiently expensive.
67. In my view, the applicant's submission flies in the face of Article 3 of the Aarhus Convention which expressly provides that the requirement to ensure that persons exercising their rights in conformity with the provisions of the Convention shall not be

penalised, persecuted or harassed in any way for their involvement does not affect the powers of national courts to award reasonable costs in judicial proceedings.

68. The applicant has not, as she contends, had a complete success. She did secure an order of *certiorari* which was the first of the reliefs claimed but she did not secure any of the declarations sought. Moreover, it is clear that the applicant's success in obtaining the order of *certiorari* which she obtained must be measured by reference to the grounds on which she sought to condemn the order of the Board. Without rehearsing the detail, the case made by the applicant was that at every stage between the initial planning application and the decision of the Board to grant permission, the process was flawed. Inevitably, success or failure by the applicant in relation to each of the grounds was going to go to the stage in the process at which, if at all, the application could be remitted to the Board. The earlier that the applicant could show that the process had gone wrong, the less the prospect was that the application might be remitted. I am not to be thought to be in any way critical of the applicant when I say that what she set out to achieve was to have the whole application pulped. She fell far short of that.
69. The ground on which the decision was set aside – that the Board had not consulted with the Environmental Protection Agency as required by Irish law – was one element of a much broader argument that there must be a joined-up, coordinated interaction between consent givers where there is a multi-staged development consent, which did not succeed. Of the eleven areas into which the applicant's myriad grounds were grouped, she succeeded on one narrow ground in one of the areas.
70. The authorities are quite clear that in general the approach to the question of costs originally formulated in *Veolia Water* should be applied also in planning cases. Whether the approach to planning cases and the approach to complex private law litigation is precisely the same is, perhaps, less clear. In *Khlon* and *Connelly* the starting point was taken to have been that the applicant had succeeded and the issue identified was whether the applicant's costs should be reduced by reference to issues on which the applicant had failed and which had added materially to the costs of the proceedings. On one view, the discretion in s. 50B to award costs is limited in the first place to such costs or portion of the costs as is appropriate to the extent to which the applicant has succeeded in obtaining relief, and then to whichever or both of the respondent or the notice party to the extent that its or their actions or omissions have contributed to the applicant obtaining relief. The default position being that the parties should bear their own costs, it seems to me that it is at least arguable that the correct exercise of the jurisdiction is to start by identifying the extent of the applicant's success and to make an award of costs to that extent, and to the extent that the respondent's or notice party's action or omission contributed to that success, rather than identifying the fact of success and then assessing whether the costs were materially increased by grounds and arguments which were run and lost. Whichever approach is taken, it seems to be that the object is the same. The object is to do justice to the parties by fashioning an order which will have the result that the successful applicant will be paid, and that the respondent will pay no more than, the

costs properly and necessarily incurred by the applicant in achieving the result which he or she has achieved.

71. It cannot be gainsaid that this was a complex case. There is no issue between the applicant and the Board that the applicant was not the winning party. At the same time, it cannot be gainsaid that the applicant has not succeeded on all issues which were argued. It seems to me that whatever way the case is approached, the starting point is to identify the extent of the applicant's success. On any view, the applicant's success was limited. She did secure the order of certiorari which she sought. She did not obtain any of the declarations which she sought.
72. Applying the *Veolia Water approach*, the first step is to consider whether the costs of the parties were increased by virtue of the applicant having pursued the issues on which she was not successful. It seems to me that they unquestionably were, and, indeed, that the applicant's principled arguments as to her entitlement to an order for all of her costs are based on an acceptance that they were. In my view it could not sensibly be suggested that a challenge to the decision of the Board focussed on, and limited to, the Board's statutory obligation under art. 44 of the Waste Water Discharge (Authorisation) Regulations, 2007 could not have been heard and determined in a fraction of the time taken at hearing. Similarly, such a challenge would have necessitated only a tiny fraction of the evidence and arguments, written and oral, which the court was in fact required to consider.
73. The direct evidence point on which the applicant succeeded was four or five pages of letters and e-mails. The total evidence adduced was so voluminous that a dedicated website had to be set up to accommodate it. In the event the parties were able to abstract from the virtual haystack day books which were comfortably accommodated in one folder each. There were ten folders of authorities in a case which turned, in the end, on the correct construction of a statutory instrument.
74. The first leg of the *Veolia Water* analysis is that the successful party should be confined to those costs necessarily and properly incurred in achieving the result. It seems to me that if the point on which the applicant ultimately succeeded had been correctly identified and isolated, it is difficult to see how the case could not have been disposed of in one day, certainly in two. In the background, the assembly and analysis of all of Irish Water's research, submissions and reports would not have been necessary. Nor would the detailed analysis of the procedures followed by the Board and the analysis and, on the applicant's side, criticism, and on the respondents' and notice party's side, justification of the Inspector's report. Truly, this was a case in which, as Clarke C.J. put it in *Connelly*, the applicant threw in the kitchen sink.
75. Starting with *Veolia Water*, the jurisprudence consistently speaks of the costs having been increased by the raising of "unmeritorious" points. Counsel for the applicant submits that a point if not necessarily unmeritorious just because it is lost. Rather, it is said, the question is whether the overall losing party can show that in relation to the issues which the overall winning party lost, he was wasting the court's time. Counsel for the

respondents, however, submit that the only test of merit is whether a point was won or lost.

76. It seems to me that the respondents' submission must be correct. While Clarke C.J. in *Connelly* at paras. 7 and 8 spoke of "unmeritorious points", he contrasted, at para. 7, "one good point" with "a large number of unmeritorious points", and, at para. 9, distilled the test as being that a broad brush approach "should be adopted to identify whether, and if so to what general extent, it can be said that it is clear that significant areas of the case, adding materially to the cost, were run and lost." Similarly, in *Klohn*, at para. 6.1, Clarke C.J. formulated the test as being whether it is clear that the otherwise successful party had raised unmeritorious issues which have had the effect of materially increasing the costs, but in the same paragraph expressed his conclusion as being that he was not persuaded that any of the various steps in the process would have been any less expensive if Mr. Klohn had left the points on which he did not succeed out of the equation.
77. As counsel for the Board pointed out, the identification of points as simply good or bad, or winning or losing is illustrated by the judgment of the Supreme Court in *Connelly*. In that case the applicant had succeeded in the High Court on all grounds. She succeeded also in the Supreme Court, but not on all grounds, and there was an adjustment as to the costs to which she was entitled in both courts. In circumstances in which the applicant had won below on those grounds on which she lost above, it could not be said that the grounds on which the costs adjustment was made were vexatious, or a waste of time. They were just not winning arguments.
78. The applicant's argument as to what points can be considered in deciding the question of costs is also, it seems to me, inconsistent with scheme of s. 50B, not least the discretion to make an award of costs in a case where the court considers that a claim or counterclaim is frivolous or vexatious. The starting point is that in planning cases the parties should bear their own costs. Except in a case of exceptional public importance, the discretion of the court to make an award of costs in favour of an applicant is engaged by the applicant's success. The discretion of the court to make an award of costs against an applicant is only engaged in a case which the court considers to be frivolous or vexatious, or by misconduct. The rule protects an applicant from the consequences which would otherwise follow from advancing a challenge which not only fails but is judged not to be substantial. Frivolous and vexatious claims are dealt with separately.
79. The applicant does not clearly engage with the fact that the vast majority of her grounds were dismissed as not being substantial grounds: that is, not reasonable, arguable, or weighty. Various, as I have said, the applicant appears to complain that the insubstantial grounds were not weeded out by the court and that she could not appeal. The respondents do not contend that the grounds which were rejected were frivolous or vexatious and do not seek to draw any distinction between those grounds which were rejected as not having been shown to have been substantial and those on which, although substantial, the applicant failed.

80. I am satisfied that the correct approach is to ask whether the costs were significantly increased by the raising and pursuit of grounds and arguments on which the applicant simply failed.
81. The second leg of the analysis propounded in *Veolia Water* is to contemplate that the award of costs in favour of the overall successful party should take into account the additional costs incurred by the unsuccessful party in relation to whatever portion of the hearing (encompassing preparation as well as time spent at trial) which were attributable to the issues on which the overall winning party was unsuccessful. In this case, the Board does not contend that there should be any set off against the costs which the applicant should have in respect of the additional costs which it incurred in meeting the arguments on which she failed. This position is said to be taken "*pursuant to s. 50B, of course...*". I am content to leave over to a case in which it may be argued any issue as to whether the application of the *Veolia Water* approach is tempered by section 50B.
82. The recusal application is acknowledged by the applicant to have been a separate and discrete point but it was submitted that while the application was refused, it could not fairly be said that it was unmeritorious. The applicant asserts an entitlement to the costs of the failed recusal application on the basis that it was necessary to vindicate her entitlement to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. I do not understand. The applicant made a recusal application which, for the reasons given at the time, failed. The applicant does not suggest that because the recusal application was refused she did not have a fair and public hearing by an independent and impartial tribunal or that somehow or other the making and refusal of the recusal application had the result that the tribunal was independent and impartial when otherwise it would not have been. No less to the point, the applicant had, and availed of, a right of appeal but in the end abandoned her appeal.
83. I am satisfied that the recusal application was either an unmeritorious point which materially added to overall costs of the proceedings, or an issue which had nothing to do with the respondents and did not in any way contribute to the applicant obtaining relief, or the extent to which she succeeded in obtaining relief.
84. The remittal application was said by the applicant to have been a necessary component of the overall outcome and should not be looked at as adversarial, or judged on the basis of the outcome, good, bad or indifferent. I cannot accept that. It was clear from the substantive judgment that the applicant had succeeded to the extent that she had succeeded, and that she had failed to the extent that she had failed. If the remittal application could be said to have been a necessary component of the overall outcome, the final orders were always going to be dictated by the findings of the court on the substantive application. Long before the remittal application was heard, the parties were invited to consider and declare their positions in relation to remittal. Irish Water and the Board declared their position to be that the substantive judgment had identified a single flaw in the process that could be addressed and remedied. The applicant declared her position to be that the order should simply be quashed. The issue was argued and

decided against the applicant. It most certainly was an adversarial hearing and the applicant did not on that occasion obtain the relief which she sought, which was that the planning application should not be remitted.

85. The applicant now argues that she was entitled to offer a view on whether, and if so the point at which, the application was to be remitted and should not be punished for having done so. I disagree. To be sure the applicant was entitled to be heard on the remittal application but the issue is not whether the applicant should be punished for doing anything. Rather the question is whether she should be rewarded for opposing an application which was eventually decided to have been well founded and thereby adding to the respondents' and notice party's costs.
86. I am satisfied that the arguments offered on behalf of the applicant on the remittal application are to be viewed either as unmeritorious arguments which have significantly added to the overall costs of the proceedings, or that the outcome of that issue did not contribute to the extent to which the applicant succeeded in obtaining relief. Those costs – on either side – would not have been incurred if the applicant had accepted the proposal of the respondents and the notice party as to remittal to the Board.
87. I find that there is no substance to the applicant's complaints that the costs were increased by the direction for a telescoped hearing. On the applicant's case, she was advised from the outset that her case would be enormously expensive. The suggestion that the case might have been less expensive if the normal judicial review procedures had been followed takes no account of the fact that it was not an ordinary judicial review but an application for judicial review on myriad grounds of a major strategic infrastructure project. Nor does the argument take into account the fact that on the first listing in the Strategic Infrastructure and Commercial Planning list the court directed, pursuant to s. 50A(2) of the Act of 2000 that the leave application should be conducted on an *inter partes* basis. Nor does it take into account the fact that the applicant at least acquiesced in the direction for a telescoped hearing.
88. So much of the applicant's argument as is premised on the failure of the court to identify earlier in the process that there was no substance to the vast majority of the grounds relied on is misplaced. The onus is on the applicant to identify substantial grounds and to advance only such grounds. Moreover, long and ever in advance of the hearing in July, 2020 the applicant had the respondents' and the notice parties' affidavits, intended statements of opposition, and written submissions.
89. The applicant now plaintively submits that had she been aware in advance of the likely cost burden in relation to insubstantiality of grounds that might have prevented her taking a case which she subsequently won. The evidence is that the applicant was made aware of the potential costs burden of the case. I accept the argument that the applicant might decided not to pursue part of her case if she had known earlier of the court's assessment of the sustainability of certain of her grounds. In that respect the applicant in this case is in no different position than any applicant or plaintiff in any other case. They will all say, with the benefit of hindsight, that they would not have brought their case, or

would not have brought the case which they brought, if they had known that it would fail. The argument goes nowhere.

90. The fact is that the court was not asked sooner than it was to assess the substance of the grounds advanced by the applicant. However, in the time between the commencement of the proceedings and the opening of the hearing, the applicant well knew the grounds on which her application would be resisted and could have reviewed the merit and sustainability of the grounds initially advanced. If she did not, she should have. If she did, she nevertheless decided to press ahead on all grounds. The court, of course, cannot know what advice the applicant had but, in principle, if she persisted in grounds which she had been advised were insubstantial she cannot complain, and if she was advised that all of the grounds would be determined to be substantial and were likely to succeed, she cannot be heard to complain that the court did not decide the case sooner than it was asked to.
91. The premise of the application now before the court is that the applicant is liable to pay her lawyers for all of their work. That may be so, but I cannot forbear to observe that a litigant of ordinary phlegm – even if of extraordinary means – if presented with an enormous bill for the shortfall in the amount recoverable from his vanquished opponent in a case which succeeded to a very limited extent would start by raising an eyebrow, and then examine closely the advice given before the costs were run up. Even as between solicitor and own client, the fact that work has been done or time spent on a case is not conclusive of the client's liability to pay. As to the costs payable by the applicant in this case, the evidence is that she is a person who is not now and never was in a position to pay the sort of fees which her lawyers could hope to recover from the respondents on foot of an order for costs. Whatever the arrangements may be between the applicant and her lawyers, they have manifestly not been an impediment to her litigating.
92. As to the costs of the transposition issue – that is to say the issue as to the transposition of the consultation obligations under the EIA Directive as opposed to the transposition of the NPE rule under the EIA Directive – I am satisfied that the State respondents cannot conceivably be liable for the applicant's costs. That element of the claim failed, so the discretion under s. 50B(2A) is simply not engaged. The application for costs against the State respondents must be refused. There is no application by the State respondents for their costs.
93. If I may say so, I found it just slightly peculiar that the court was asked by the Board to look at the costs of the transposition issue differently to the costs of the recusal and remittal applications. While it is true that the transposition claim was argued as part of – or perhaps in the middle of – the substantive application, the applicant's case was that it was an alternative application which would arise only if she were to fail on the other grounds. However, I do not believe that it makes any difference whether, as far as the Board is concerned, it is viewed as an unmeritorious application which significantly added to the costs of a twelve day substantive hearing, or a more or less standalone dispute to

which the Board was not party. On no view can the Board be liable for the applicant's costs of that element of the dispute.

94. Whether taking a liberal view of that portion of her costs which should be awarded to the applicant to the extent that she has succeeded in obtaining relief, or taking a broad brush and generous approach to a case in which the applicant, although she has succeeded in part had greatly added to the costs by raising and pursuing arguments on which she has failed, I am satisfied that the Board's open offer to pay 25% of the applicant's costs was more than reasonable. The measurement of the applicant's costs as a percentage rather than by reference to the time taken at hearing takes into account the assembly and analysis of a huge amount of evidence and authorities directed to issues on which the applicant did not succeed, as well as the greatly prolonged hearing. It also takes into account the various directions hearings some of which can fairly be said to have been a necessary part of the process but some of which were necessitated by the breadth and volume of the case advanced.
95. For the avoidance of doubt I want to say that I am satisfied an award of 25% of the applicant's costs also takes into account the *locus standi* issue. That, it may be recalled, was an issue as to the applicant's entitlement to raise on her judicial review application issues which she had not raised in the planning process. While on one view it could certainly be said that the *locus standi* issue did not go to the issue on which the applicant ultimately succeeded, nevertheless it was raised by the respondents and accounted for one of the hearing days before it was abandoned.
96. The Board's proposal is perhaps broad brush, perhaps fairly rough and ready, for it contemplates that the applicant will have a percentage of the costs of the transposition claim which – apart from the fact that it failed – the Board had nothing to do with. That said, the measurement of the costs which an overall unsuccessful litigant should pay in terms of a percentage will always, on one view, fix the paying party with a percentage of the costs of dealing with issues on which it has succeeded.
97. I am persuaded that the offer made and the order proposed by the Board will be just and fair to the applicant and will provide to the applicant a proportionate indemnity in respect of her costs in respect of the issues on which she has succeeded.
98. There will be an order for adjudication of the applicant's costs of the proceedings, excluding the recusal and remittal applications, and for payment by the Board of 25% of those costs when ascertained. The costs of the abortive costs hearing on 25th June, 2021 were reserved. Those costs are directly attributable to an evidential deficit on the applicant's side and must accordingly be excluded also.
99. Provisionally, my view is that the applicant having achieved no more than was offered by the Board in open correspondence a long time ago, there should be no order as to the costs of the costs application but I will list the case for mention on 3rd February, 2022 in case either the applicant or the Board wish to contend that the order should be otherwise.

100. There will be no order as to the applicant's costs against the State respondents who, for the avoidance of doubt, are excused from any further attendance.