

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 349

[2020 No. 22 JR]

**IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS
AMENDED**

BETWEEN

SABRINA JOYCE-KEMPER

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

IRISH WATER DAC

NOTICE PARTY

(No. 5)

JUDGMENT of Humphreys J. delivered on Friday the 10th day of June, 2022

1. In *Joyce-Kemper v. An Bord Pleanála (No. 1)* [2020] IEHC 477, [2020] 9 JIC 2301 (Unreported, High Court, 23rd September, 2020), Allen J. refused a recusal application in relation to the present proceedings, which are a challenge to a grant of planning permission to Irish Water made on 11th November, 2019 for the construction and operation of a sewerage scheme and waste water treatment plant at Clonsbaugh in North Dublin, as well as a two metre diameter marine outfall pipe through which treated effluent will be discharged into the sea off Silver Strand beach in Portmarnock.
2. The applicant appealed to the Court of Appeal [Record No. 2020/166] against the recusal decision. That appeal was due to be heard on 26th November, 2020, but just before that hearing, Allen J. gave judgment in the substantive application. As that was in favour of the applicant the recusal appeal was rendered otiose.
3. In that judgment, *Joyce-Kemper v. An Bord Pleanála (No. 2)* [2020] IEHC 601, [2020] 11 JIC 2402 (Unreported, High Court, 24th November, 2020), Allen J. quashed the planning decision at issue here, but only on one of the grounds raised by the applicant.
4. In *Joyce-Kemper v. An Bord Pleanála (No. 3)* [2021] IEHC 281, [2021] 4 JIC 2704 (Unreported, High Court, 27th April, 2021), Allen J. decided to remit the matter back to An Bord Pleanála.
5. In *Joyce-Kemper v. An Bord Pleanála (No. 4)* [2022] IEHC 25, [2022] 1 JIC 2106 (Unreported, High Court, 21st January, 2022), Allen J. awarded 25% of the cost to the applicant against the board minus the costs of the recusal and remittal applications, with no order as to costs against the State.

6. I am now dealing with the question of leave to appeal in respect of the costs issue. That question was transferred to me following Allen J.'s elevation to the Court of Appeal.

Brief procedural history

7. The *ex parte* application in the proceedings was originally opened before Meenan J. on 14th January, 2020. It was then transferred to the Strategic Infrastructure Development List.
8. By order of Simons J. of 23rd January, 2020 it was directed that the leave application be made on notice and the court raised the question of a possible telescoped hearing. Ultimately eight days were set aside for a telescoped hearing and the hearing that actually took place went on for twelve days before Allen J. from 7th July, 2020 to 24th July, 2020. That gave rise to the judgments referred to above.
9. It is possibly worth noting that the changes and improvements to the Commercial Planning and Strategic Infrastructure Development List introduced by recent Practice Directions issued by Irvine P. have had the result that hearings are now generally in the three to four-day range, that telescoping of cases no longer normally occurs and that leave applications are dealt with normally on the Monday following the case being initiated or shortly thereafter
10. All of this came too late for this applicant which is a shame from her point of view. All that goes to show that there is a beauty in concision, and there are benefits for all involved.

Legal principles applicable to certification

11. The requirement for leave to appeal derives from s. 50A(7) of the Planning and Development Act 2000. The caselaw in that regard is well established and is referred to in the parties' submissions, and was recently helpfully summarised by Barniville J. in *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2022] IEHC 231, [2022] 4 JIC 2601 (Unreported, High Court, 26th April, 2022).

The applicant's questions

12. The applicant proposed ten questions of law of exceptional public importance and in addition two questions which she wanted referred to the CJEU. So in effect there were twelve questions for consideration as a basis for taking the matter further. I will refer to the latter two for simplicity as questions 11 and 12.
13. In essence the applicant's submissions broke down into three basic issues:
 - (i). The circumstances for discounting costs envisaged by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 36, [2018] 7 JIC 3002 (Unreported, Supreme Court, Clarke C.J. (O'Donnell, Dunne, O'Malley and Finlay Geoghegan JJ. concurring), 30th July, 2018) should be interpreted in a restrictive way and were not satisfied here.
 - (ii). If *Connelly* applies here, the discounting of costs here was excessive.

- (iii). If discounting as applied here is permissible, that is in breach of the Aarhus Convention on a basis not argued in *Connelly*.

Issue I - Whether Connelly applies

14. The first set of points refers to whether the *Connelly* discounting approach applies here. I agree with Allen J. that it does, not on any kind of automatic basis but in circumstances where an applicant falls significantly short of winning a majority of her significant points, or where there is a discrete hearing of an interlocutory issue on which she failed (see *Flannery v. An Bord Pleanála (No. 3)* [2022] IEHC 327 (Unreported, High Court, 8th June, 2022)). Both aspects apply here. The applicant sought to challenge this in a number of ways.

Whether the applicants losing points were substantial (questions 1 and 2)

15. Question 1 provides as follows:

“Is it an *inevitable result* of a telescoped hearing of a judicial review leave application and judicial review that there could be no determination that any of the applicant’s pleaded grounds were ‘substantial’ or ‘not substantial’ until the judgment is delivered, as the Trial Judge found at paragraph 18 of his judgment, and if so is it the case that telescoped hearings are by their nature incompatible with the ‘not prohibitively expensive’ and ‘timely access to justice’ rules in the Aarhus Convention as transposed into EU Law and therefore incompatible with EU Law?”

16. The question is based on the premise that the applicant would be better off for costs purposes with an unsuccessful but substantial point than with an unsuccessful but insubstantial point. Allen J.’s reading, and mine, is that *Connelly* involves a distinction between the successful and the unsuccessful points, not a distinction as between degrees of lack of success. The applicant contends that that is incorrect.

17. Question 2 provides as follows:

“In circumstances where a Court is granting an order in favour of an applicant quashing a permission what remedy exists for such applicant in respect of a finding by the High Court that other pleaded grounds of judicial review are ‘insubstantial’? Is it necessary (or possible) for such applicant to seek leave to appeal through the identification of a point of law of exceptional public importance in an application to the same judge for leave to appeal such grounds? If so, is same compatible with the NPE rules under national and EU law? If not, can the lack of success in respect of such grounds inform the decision of the Court in respect of costs?”

18. Insofar as the question of an applicant’s remedy is concerned, there was some discussion at the hearing of the present application as to the extent to which this extended to the remittal decision. The board accepted in an abstract sort of way that there had to be a remedy for an applicant in relation to a remittal decision, which would apply if an applicant thought that there should not be a remittal or alternatively that there should be remittal to a different point in

the process. They suggested that the *certiorari* and the remittal were in effect a single order, which I think makes a fair bit of sense on a first reading. The board was however somewhat non-committal about whether the applicant was precluded from raising a point in the appeal-of-remittal context just because it had been rejected at the substantive stage. The argument against such preclusion is that there cannot be some sort of one-way system whereby an applicant can be disadvantaged on appeal because she wins *certiorari* although not on all grounds. That would mean an applicant would be handicapped in an appellate context if they win at first instance compared to somebody who loses at first instance and thus can seek to appeal everything.

19. The remedy is to seek leave to appeal to the Court of Appeal in relation to any substantive decision or to seek leapfrog appeal to the Supreme Court or both. However, that is constrained in practice where an applicant wins. Normally in such a case the winning side is waiting for the respondent to seek to appeal and then, as an applicant, one can seek to cross-appeal. Since the respondent did not appeal the substantive order, the question of cross-appeal did not arise.
20. The alternative option would be to seek leave to appeal of the remittal decision. Barniville J. noted in *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2022] IEHC 231, [2022] 4 JIC 2601 (Unreported, High Court, 26th April, 2022), that the issue of leave to appeal a remittal order had never previously arisen (para. 1), so maybe one can't be critical of the applicant here for being uncertain as to the procedure. That said, the questions in that rather fact-heavy case seemed to relate to the remittal issue alone rather than to an attempt to raise the sort of point that the applicant seems to be saying she should have a remedy about here, namely that the substantive judgment was wrong in some way that means that remittal shouldn't happen at all or should be to a different point in the process.
21. If the premise is that such an applicant must have a remedy, then a court considering leave to appeal of a remittal decision could legitimately take the view that while a remittal to a particular point in the process followed logically from the ground on which the substantive case was decided, there might nonetheless be a legitimate question appropriate for appeal as to whether a separate and wider point should have been decided in favour of the applicant which would have militated against remittal at all or would have suggested remittal to an earlier point in the process.
22. The adoption of such an approach would imply that an applicant does have some sort of remedy albeit indirectly by seeking leave to appeal against remittal a decision. Even if remittal follows from the substantive judgment, the leave to appeal process allows one to propose an assumption that the remittal judgment and, therefore, by necessary implication, the substantive judgment, might not be correct. I do not think it is necessary or appropriate to force applicants to seek exotic further options like asking for declarations even if they win or requiring them to engage in any other form of procedural contortion in order to create an appealable order. Arguing that there is a remedy is one thing but, if I understand matters

correctly as of time of writing, the applicant hasn't applied to the court for leave to appeal the remittal decision.

23. All that said, the existence of such a remedy would not help her in relation to the *Connelly* argument if it is correct that the relevant distinction in *Connelly* is not between substantial and insubstantial points, but between winning and losing points.

Whether "unmeritorious" in *Connelly* means unsuccessful (questions 3, 4 and 9)

24. Question 3 provides as follows:

"What is the relationship between an *unmeritorious* ground within the meaning of the term as used by the Supreme Court in *Connelly v An Bord Pleanála* (ex-tempore, High Court, Clarke C.J., 30th July 2018) and the *success* of a ground? Was the Trial Judge correct in his finding at paragraph 76 of the judgment that only test of *merit* is whether a point was won or lost, or is Humphreys J. correct in his observation at paragraph 5 of *Reid (No. 2)* that a point can reach the threshold for a substantial ground, even though it does not reach the threshold for success?"

25. Various terms may be used to describe the weight or substance of a party's points or the lack of such substance. I could attempt to arrange these on an ascending scale as follows:

- (i). The Northern Irish Court of Appeal recently used the term "plain nonsense" to refer to something that makes no sense in either legal or any other terms (*Department of Finance, Land and Property Services v. Foster* [2022] NICA 19 per Treacy L.J. at para. 2).
- (ii). An unstateable point (not specifically defined in Murdoch and Hunt's *Dictionary of Irish Law*, 6th ed. (Dublin, Bloomsbury, 2016)) is one that is perhaps grammatically coherent, but makes no sense in legal terms.
- (iii). A frivolous or vexatious point is one which, while possibly technically stateable is "futile, or misconceived or hopeless" either on the facts of the particular case or generally (*R. v. North West Suffolk* [1997] EWCA Civ 1575 cited in Murdoch and Hunt's *Dictionary of Irish Law*, 6th ed. at p. 740).
- (iv). A point that is not arguable (for the purposes of judicial review) is one which may not be technically frivolous or vexatious, but which cannot be advanced for legal reasons (similar to time, standing or acquiescence) or is so infirm that it is not appropriate for grant of leave to seek judicial review.
- (v). A point that is not substantial is one that may be arguable, but is one in relation to which only trivial or tenuous grounds can be advanced such that it does not meet a substantial grounds threshold.

- (vi). And finally we get to unsuccessful points that a court reaches and rejects, and unsuccessful points that it upholds.
26. Thus, a point may be stateable, arguable and substantial, but can fall short of being successful.
27. Essentially the applicant argues that where *Connelly* refers to an “unmeritorious” point that must be equated to something close to frivolous.
28. “Meritorious” is not defined in Murdoch and Hunt, but the *Shorter Oxford English Dictionary*, (Oxford, OUP, 1973) Vol. 2 at p. 1310, defines the first meaning of meritorious as “Of actions: Productive of merit; serving to earn reward; esp. in *Theol.*, said of good works, penance, etc.” The primary meaning of “meritorious” implies that a point that has merit is one that would earn the maker of the point a reward in the sense of some positive outcome. There is in fairness a secondary meaning along the lines of not being so wholly lacking in merit as to be not worth arguing. Examples of the use of that sort of secondary sense of “meritorious” include the Northern Irish Court of Appeal judgment in *Foster* as well as by Jackson L.J. in the report *Review of Civil Litigation Costs: Final Report, December 2009*, p. 310.
29. With those terminological distinctions noted, I need to make the point that the question posits a false dichotomy between *Joyce-Kemper (No. 4)* and *Reid v. An Bord Pleanála (No. 2)* [2021] IEHC 362, [2021] 5 JIC 2705 (Unreported, High Court, 27th May, 2021). In *Joyce-Kemper (No. 4)* Allen J. considered that “unmeritorious” in *Connelly* means unsuccessful. I agree. *Reid (No. 2)* does not contradict that; it only points out for this purpose that points may be substantial but not successful.
30. Question 4 is:
- “Is the correct approach to exercising the discretion to award costs in s.50B of the Planning and Development Act, 2000 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, as determined by the Trial Judge in paragraph 70 of the judgment?”
31. That in effect seems to me to be a repeat of the essence of question 3 and again seeks clarification of what is envisaged by the Supreme Court’s decision in *Connelly*.
32. Question 9 provides that:
- “Is there a difference in costs terms between grounds that are substantial but ultimately unsuccessful and grounds that are found simply to be unsubstantial? If so, is there an onus on an applicant for leave to seek judicial review to identify substantial grounds and to advance only such grounds, as found by the Trial Judge in paragraph 88 of the judgment? Can members of the public be penalised in a successful case (and after a full hearing) for advancing grounds that are ultimately found to not be substantial, and how does this sit with the requirement in EU law that members of the public must have

access to judicial procedures to challenge acts and omissions which contravene provisions of its national law relating to the environment that are fair, equitable, timely and not prohibitively expensive.”

33. Again, that seems to me to be a repeat in essence of questions 3 and 4.

Issue II – the methodology of the discount

34. Some of the applicant’s questions are directed towards the methodology of the discount, on the assumption that discounting is permissible. While not stating this outright in the questions, the implication is that a 25% award of costs is too low in circumstances such as those here, even assuming that discounting is permissible.

Whether an applicant who obtains a relief should get the full costs of all points directed to that relief (question 5)

35. Question 5 provides as follows:

“If this is correct, how is such success to be measured? By reference to the reliefs pleaded (but not pursued at hearing) or by reference to the relief in fact pursued and obtained? In the instant case the only relief actively pursued was obtained.”

36. This question seems to be an attempt to interpret the methodology to be used under *Connolly* and the relevance of the relief granted. I am not sure that it is a totally necessary question because it is clear in *Connolly* that the grant of relief alone isn’t decisive.

Methodology for apportionment (question 6)

37. Question 6 provides as follows:

“Alternatively, is success to be measured by reference to the grounds pleaded, pursued and/or those that were successful? Is it appropriate to consider this issue numerically or by reference to the time spent at hearing? Are grounds of opposition to be similarly considered (such as the issue based locus standi opposition point dropped by the respondent after over a day at hearing)?”

38. The methodology in accordance with *Connolly* is to compare what actually happened with what would have happened if the winner had only advanced the points they won. That isn’t mechanical and it wasn’t mechanical in *Connolly* itself. If there is a wide gulf between the two, there may be a discount, but as *Connolly* itself indicates that is not mathematically proportionate – the applicant in *Connolly* won 10% of the case and got 75% of the costs. In *Flannery (No. 3)* I considered that there should be no discounting unless an applicant won substantially less than half her substantial points, or lost a discrete interlocutory hearing. Nonetheless I am not sure one could call the methodology something that is completely settled.

The relevance of the non-issuing of declarations (question 7)

39. Question 7 provides as follows:

“In circumstances where an applicant has been successful in obtaining *certiorari*, is *certiorari* the full extent to which an applicant may succeed in obtaining relief, with any declaratory relief considered to be a redundant duplicate relief as described in Practice Direction HC107, or was the Trial Judge correct to conclude, as he did at paragraph 71 of the judgment that “the applicant’s success was limited” because although she secured the Order of *certiorari* which she sought, she did not obtain any of the declarations which she sought even though these were not actively (or at all) pursued?”

40. The point reflected in Practice Direction HC107 (leaving aside whether it has a formal application here) is relevant to this because it highlights that elaborate declarations are generally unnecessary. If you get *certiorari* you do not need declarations, and if you are refused *certiorari* there won’t be any basis for declarations. There are occasional exceptions, but they very much are exceptions. The logic compels the conclusion that it shouldn’t really be hugely relevant to costs that an applicant does not achieve any declaratory reliefs. I see the reference to not getting declarations more as a passing comment by Allen J. rather than being anything on which the order actually turns, although the point possibly feeds into the methodology argument.

Issue III – The Aarhus arguments that were not raised in Connelly

41. The applicant then turns to arguments of breach of EU law and the Aarhus Convention that were not raised in *Connelly*. She now argues that the discounting allowed by *Connelly* would give rise to a breach of EU law.

Alleged conflict with EU law (questions 8 and 10 to 12)

42. Question 8 provides as follows:

“Is the object of the cost protection provisions of Article 11 of the EIA Directive (as transposed by s.50B of the Planning and Development Act, 2000, as amended) “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”, as determined by the Trial Judge at paragraph 70 of his judgement, or are Article 11 and s.50B to be interpreted to the fullest extent possible in such a way that persons should not be prevented from seeking, or pursuing a claim for, a review by the courts by reason of the financial burden that might arise as a result and if so has that been achieved in this case?”

43. Question 10 provides as follows:

“The judgment, by ordering payment by the losing party of 25% of (a part of) the legal fees payable by the applicant to her own advisers, has ensured a solicitor-client balance of more than €225,000 that is unrecoverable from the other side notwithstanding the applicant’s success and that will remain owing by the Applicant. Is this in breach of the not prohibitively expensive rule in terms of the financial burden on the Applicant and to

what extent should a risk that the willingness of lawyers to act in such matters could be diminished as a result (as identified by Humphreys J. in *Enniskerry Alliance*) be factored into the consideration of not prohibitively expensive?"

44. The applicant also proposes what I am calling questions 11 and 12, which are as follows:
- "Does the obligation in Case C-530/11 for the national court to make sure that the resulting financial risk for the claimant is included in the court's assessment of whether or not the proceedings are prohibitively expensive, mean that the court must make sure that any obligation on the claimant to pay part of their own lawyer's fees is not prohibitively expensive particularly in circumstances where the applicant has been successful in obtaining relief?"
- "In an adversarial legal system where costs are inherently high and normally a costs follow the event rule applies, are the NPE requirements of EU law (and in particular Article 11 EIA) met if costs awarded to successful applicants are limited only to points that were ultimately successful?"
45. The applicant submits that we need to turn to the Aarhus interpretative obligation which wasn't argued in *Connelly*. Indeed there is no reference in *Connelly* to the Aarhus Convention at all. So insofar as the applicant launches Aarhus arguments, notwithstanding a decision of the Supreme Court, those points attract the doctrine articulated by that court in *The State (Quinn) v. Ryan* [1965] I.R. 70, that "a point not argued is a point not decided" (*per* Ó Dálaigh C.J. at p. 120).
46. Article 9(4) of the Aarhus convention provides that judicial-type review procedures "shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible."
47. The CJEU decided in Case C-167/17 *Klohn v. An Bord Pleanála* (Court of Justice of the European Union, 17th October, 2018, ECLI:EU:C:2018:833), that the requirement of the EIA directive (85/337/EEC as amended) implementing Aarhus to the effect that certain judicial proceedings in environmental matters must not be prohibitively expensive does not have direct effect, but where that article has not been transposed by a Member State, the national courts of that Member State are nonetheless required to interpret national law to the fullest extent possible, once the time limit for transposing that article has expired, 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 that article, by reason of the financial burden that might arise as a result.
48. The applicant's essential argument can be rephrased in the following way:

- (i). the not-prohibitively-expensive rule applies not just to liability to the other side but also to one's own side's costs (Case C-260/11 *Edwards v. Environment Agency* (Court of Justice of the European Union, 11th April, 2013, ECLI:EU:C:2013:221) and Case C-530/11 *European Commission v. United Kingdom* (Opinion of Advocate General Kokott, 12th September, 2013, ECLI:EU:C:2013:554));
 - (ii). a large solicitor-client liability such as would arise in respect of a partial costs order would be a breach of that rule and thus of the Aarhus convention;
 - (iii). lack of deterrence in practice doesn't equate to the costs not being prohibitive for the purposes of EU law (Case C-530/11 *European Commission v. United Kingdom* (Court of Justice of the European Union, 13th February, 2014, ECLI:EU:C:2014:67), para. 50.
 - (iv). there is no domestic legislation effectively preventing the imposition of prohibitively expensive solicitor-client liability on an environmental applicant;
 - (v). in the absence of legislation there is a failure in transposition of Aarhus which has the effect that, notwithstanding that this aspect of Aarhus is not directly effective, the court must apply an interpretative obligation to implement Aarhus insofar as possible (Case C-167/17 *Klohn v. An Bord Pleanála*);
 - (vi). the net result of that obligation is that in the absence of such legislation, a respondent to an environmental judicial review that is an emanation of the State must be required to pay full costs notwithstanding the normal exercise of the costs discretion provided by domestic law and procedure, in order to avoid such solicitor-client liability arising;
 - (vii). whether an applicant seeks declarations as to non-transposition or not is irrelevant as the interpretative obligation can be enforced against the board as an emanation of the State;
 - (viii). whether an applicant has challenged the whole or any part of the costs system or not is irrelevant because she is not looking for a declaration, but rather is looking for existing costs discretion to be construed in the most favourable sense.
49. On the one hand, applicants calling for restrictions on what applicants' solicitors can charge by way of solicitor-client liability could be a case of being careful what you wish for. But that said, it's easier to bridle at the applicant's punchline here than it is to say why exactly the reasoning is incorrect.
50. If the logic has a weakness it may be in the area of what precise facts need to be proved before this argument can be made. The board and the State complain that the precise extent

of the applicant's liability has not been established, which may be an arguable point although on any view we know that there is an extremely high solicitor-client liability.

51. The complaint is also made that the applicant is impugning a regime that she sought to invoke at the outset of the proceedings. I do not see that as a fatal objection because the respondents did not rely on any express or implied assurance that the applicant was not going to challenge that regime. They did not alter their position in reliance on an assurance that the regime was not going to be challenged in some way that would make it unjust for the applicant to raise this point now. More fundamentally though, the applicant is not in fact challenging the regime as a primary submission, but is rather arguing how the costs discretion should be exercised.
52. The question then is as to what is the legal consequence of any argument that the Aarhus Convention is thereby being infringed. There seem to be only three types of consequence:
 - (i). to enforce the Aarhus rules as directly effective;
 - (ii). to declare that there has been non-transposition; or
 - (iii). to construe national law in such a way as to ensure Aarhus compliance insofar as possible.
53. Under the first heading, the Aarhus obligations are not sufficiently clear, precise and unconditional as to give rise to direct effect: see Case C-543/14 *Ordre des barreaux francophones et germanophone v. Conseil des ministres* (Court of Justice of the European Union, 28th July, 2016, ECLI:EU:C:2016:605) and Case C-167/17 *Klohn v. An Bord Pleanála*.
54. Under the second heading regarding non-transposition, the applicant has not made any such claim in the statement of grounds or sought a declaration to that effect. Thus, there isn't any basis for prosecuting that point in these proceedings either in this court or an appeal. The court simply isn't seized of the issue, much like the Supreme Court in *Klohn v. An Bord Pleanála* [2021] IESC 51, [2021] 8 JIC 0302 (Unreported, Supreme Court, Clarke C.J. (O'Donnell and Dunne JJ. concurring), 3rd August, 2021), at para. 4.6.
55. Returning then to the question of an interpretative obligation the applicant's argument does seem arguable and is certainly important, although on one view it applies equally if an applicant loses hands down because she can still claim that being left with a solicitor-client balance is a breach of Aarhus such that a respondent must pay the costs. It's easier to complain about that conclusion as well than it is to see why it doesn't follow.
56. Insofar as a reference to the CJEU at this late stage is concerned, I don't think that a leave to appeal application is normally an appropriate vehicle for a reference. If reference there is to be, it would be rather better to deal with it when making the decision itself rather than the purely satellite process as to whether the decision should be appealed. That may arise in certain situations, but it is not something one would automatically gravitate to. I am not obliged to refer such a question as the High Court is not a court of last resort since 2014

because the Supreme Court can always grant leave to appeal: see Case C-99/00 *Lyckeskog* (Court of Justice of the European Union, 4th June, 2002, ECLI:EU:C:2002:329).

Impact on other cases of granting leave to appeal

57. All that said, the applicant's three essential questions are individually and collectively significant. I would try to reformulate them along these lines:
- (i). whether *Connelly* should be interpreted on the basis that discounting, insofar as it is permissible, can be considered if an applicant's points are not just unsuccessful but are ones that should not have been argued;
 - (ii). whether *Connelly* should be interpreted on the basis that discounting, insofar as it is permissible, should be applied to a more limited proportion of the costs rather than to something approaching a proportionate deduction;
 - (iii). whether the *Connelly* approach should be nuanced to take into account the Aarhus Convention, so that no solicitor-client balance should arise until such time as legislation is enacted to prevent prohibitive solicitor-client charges in environmental litigation.
58. These are in my view points of law of exceptional public importance and ones where it is desirable in the public interest that there be clarification.
59. I did have some feelings of hesitation about granting leave to appeal, but after some introspection I think that I can make a stab at identifying the underlying reasons for that.
60. The first problem is the impact on all other cases of there being an issue of this nature before the appellate courts. There must be a practical system that will allow other cases to be processed. I think that such a system can be devised. Pending the resolution of this matter on appeal, where an applicant wins in a future case, but not on all points, the court in deciding on costs can make its own adjudication of whether *Connelly* requires discounting and if so how much. If a discounted order is to be made, the court can then award the applicant that amount, and rather than as normal make no order as to the balance, simply adjourn that with liberty to apply after this point is clarified – unless any given applicant is seeking a reference on that point which takes us to the next issue.
61. The second problem which in a way is more intractable arises in relation to the third reformulated question. Sure, the appellate courts can readily clarify the first two questions, but in relation to the last one, since we are talking about clarification of a Supreme Court decision by reference to EU law issues, the definitive clarification can only be given by the CJEU, unless the point is *acte clair*. I am not absolutely sure that it is, but I don't think that the grant of leave to appeal in this case automatically precludes consideration of a reference of this point either at all or more particularly in some other case.

62. Overall I am just about persuaded that the downsides of leave to appeal can be managed such that it can be said that the statutory criteria are satisfied here. But while the applicant will therefore be getting leave to appeal, I would respectfully suggest to the parties that they might consider giving the Supreme Court the opportunity to consider a leapfrog application in this matter given that that court is currently endeavouring to address the question of environmental costs more generally.

Order

63. For these reasons the order will be as follows:

- (i). the application for leave to appeal is granted on the basis of the reworded questions set out in the judgment which are certified for the purpose;
- (ii). the order to that effect will be perfected forthwith to facilitate the parties in relation to any other procedural steps; and
- (iii). I will list the matter for mention on Monday the 20th day of June, 2022 to deal with costs of the leave to appeal application and for any consequential or other matters.