**THE SUPREME COURT**

**[Appeal No: 314/11 & 482/11]**

**Clarke C.J.**
**O'Donnell J.**
**Dunne J.**

**BETWEEN/**

**VOLKMAR KLOHN**

**APPELLANT**

**AND**

**AN BORD PLEANÁLA**

**RESPONDENT**

**AND**

**THE GENERAL COUNCIL OF THE BAR OF IRELAND,**
**THE LAW SOCIETY OF IRELAND AND THE ATTORNEY GENERAL**

**NOTICE PARTIES**

**Judgment of Mr. Justice Clarke, Chief Justice, delivered the 3rd of August, 2021.**

## 1. Introduction

1.1 This case has had an extremely long history as can be seen from the fact that there have already been three judgments of this Court (see, *Klohn v. An Bord Pleanála & ors* [2017] IESC 11, *Klohn v. An Bord Pleanála & Anor* [2019] IESC 66, and *Klohn v. An Bord* Pleanála [2021] IESC 30), together with two judgments of the Court of Justice ("CJEU"), (see, *Klohn v. An Bord Pleanála* (Case C-167/17) (ECLI:EU:C:2018:833) and *VK v. An Bord Pleanála* (Case C-739/10) (ECLI:EU:C:2021:185))

1.2 It is worth commenting that it is unfortunate that proceedings which are concerned with the question of whether the process for conducting litigation in certain environmental fields is prohibitively expensive should themselves have generated so many hearings both in Ireland and in Luxembourg, with the consequence of greatly adding to costs. However, each of those steps was necessitated by virtue of uncertainty about the interaction of national and European Union law in this area as demonstrated, for example, by the fact that the CJEU in its first judgment differed somewhat from the opinion of the Advocate General on that reference, with the Court, this time in agreement with the Advocate General, in the second reference distinguishing the position concerning representation by a lawyer who is not qualified in a relevant member state, without an accompanying national lawyer, as between Ireland and some other jurisdictions.

1.3 Be all that as it may, the Court now has to reach final conclusions on the substantive appeal in light of the judgment of the CJEU on the first reference. This judgment should be read in conjunction with, in particular, the judgment of this Court which led to the first reference, for the way in which the issues arose on the original hearing of the appeal in this case are set out in full in that judgment.

1.4 Written submissions were exchanged between the parties and an oral hearing followed. It seems appropriate to start, therefore, by referring to the issues which appeared to lie between the parties as a result of that process.

**2. The Issues**

2.1 There was, in my view, a relatively significant measure of agreement between the parties which it is appropriate to record. Counsel for the respondent ("the Board") accepted that Mr. Klohn's appeal to this Court must be allowed. It is clear from the judgment of the CJEU on the first reference in these proceedings that the costs of Mr. Klohn, which were ordered against him in the underlying environmental proceedings which he lost, must be assessed on a not prohibitively expensive ("NPE") basis. It was also accepted that the costs determined by the Taxing Master as being due by Mr. Klohn on foot of the original order for costs made by the High Court in those underlying proceedings, would not meet the test for NPE as developed in the jurisprudence of the CJEU. Thus it was accepted that the assessment of the Taxing Master must be overturned. It must be recalled that Mr. Klohn sought a review of the original decision of the Taxing Master of June 24, 2010, which fixed those costs at a sum of the order of €86,000. The High Court described Mr. Klohn as having sought an order of *certiorai* but, in any event, that Court declined to alter the assessment of the Taxing Master and Mr. Klohn appealed to this Court. It is accepted that the decision of the Taxing Master must now be overturned.

2.2 The next issue is as to whether it would be appropriate for this Court, in the particular circumstances of this case, to itself determine what, if any, level of costs ought be awarded against Mr. Klohn, so as to meet the NPE criteria as identified in the jurisprudence of the CJEU. Ordinarily, the order which would be made in circumstances such as this, where a decision of an expert person or body is overturned, would be that the matter would be remitted back to the person or body concerned so as to enable an appropriate decision to be made in accordance with the principles identified by the Court in overturning the decision concerned. It follows that the ordinary order which might be made in a case such as this would be to remit the matter back to the Taxing Master unless this Court felt that it can deal with the matter itself.

2.3 However, there are particular circumstances which, in my view, justify this Court in addressing the quantum of costs itself. First, both parties agreed that the Court should take that course of action. It should be said that this was a most sensible approach on both sides. Remitting the matter back would further delay this process and could only add further to the costs of what already must have been most expensive litigation. Given the irony that these proceedings are about ensuring that litigation of a certain category is not prohibitively expensive, incurring additional costs, if same could be avoided, would make perfect sense.

2.4 To that practical consideration can be added the fact that the normal reason why matters are remitted back in appropriate cases is that it is the body concerned, rather than the courts, which have jurisdiction to make orders or decisions in the area in question. In many cases a court, quashing a measure adopted by a lower court or administrative body, would not have jurisdiction to make a decision of the type which was successfully challenged. For example, a court cannot grant or refuse a planning permission. If a court were to quash a decision granting planning permission, it cannot itself make a decision refusing a permission, for that is a matter within the competence of the relevant planning

authorities. It may be that a consequence of the decision of the court is that the planning authority in question might have little option but to refuse permission, but that does not change the fact that the court cannot itself make a decision providing for such a refusal.

2.5 However, this is a review of taxation which has come to this Court on appeal from the High Court. A court can, in certain circumstances, measure costs. This is not, therefore, a case where the Court would have no jurisdiction whatsoever to make an order of the type concerned. It would, for example, have been open to the High Court, at the conclusion of the original environmental challenge brought by Mr. Klohn, to have measured costs. There may very well have been very good reasons in practice, to which I will return shortly, why that should not have been done, but the High Court would have had jurisdiction. Likewise, if the High Court, on the review of taxation, had been persuaded that the Taxing Master was in sufficient error to overturn the original assessment, that court could have substituted its own view if it considered it appropriate so to do.

2.6 The reason, of course, why courts rarely exercise the jurisdiction to measure costs is that judges do not have particular expertise in the measurement of costs. That is the expertise of taxing masters or, since recent changes were introduced, legal costs adjudicators. However, here again, this case is different. The assessment which must be carried out in this case must be on the basis of the costs being NPE in light of the jurisprudence of the CJEU. In that context, the obvious advantage which a legal costs adjudicator has over a court in the assessment of costs is not so marked or clear cut.

2.7 In those very unusual circumstances, I consider that it would be appropriate for the Court to accept the parties' invitation to address the question of costs itself.

2.8 Thus far, I do not understand the parties to be in any disagreement. It is agreed that the original determination of the Taxing Master must be overturned and that this Court should itself address the question of the amount, if any, of costs which should be awarded.

2.9 Thereafter, it appeared to me that, as a result of the written submissions and the oral argument, there were four issues between the parties.

2.10 The first concerned the regard which this Court should have, in assessing whether the proceedings as a whole were NPE from Mr. Klohn's perspective, to the costs paid by Mr. Klohn to his own lawyers. Those costs were of the order of €32,000. It was accepted by counsel for the Board that the Court must, in light of the decision of the CJEU in *Edwards & Pallikaropoulos v. Environment Agency & Ors*. (Case C-260/11) (ECLI:EU:C:2013:221), have regard to those costs in determining whether the costs of the proceedings as a whole were NPE from Mr. Klohn's perspective. Counsel did accept that, as a matter of principle, it might be appropriate, in certain circumstances, for a court to assess the costs which must be ordered against an unsuccessful applicant, in those categories of environmental cases to which the NPE regime applies, at zero, having regard to the costs already incurred by the party concerned in paying for their own reasonable representation. Counsel did argue that it would not be appropriate to adopt such a

position on the facts of this case but nonetheless, helpfully, accepted that it would be within the Court's overall remit to reach such a conclusion in an appropriate case.

2.11 Thus, insofar as an issue was raised on behalf of Mr. Klohn to the effect that the costs which he himself incurred in the underlying environmental proceedings should be taken into account in an overall assessment of the costs which he should now pay (including for the purposes of arguing that those costs should be zero), there was no disagreement in principle between the parties. It was, however, submitted on behalf of Mr. Klohn that, in any event, the costs should be assessed at zero while, as already noted, the Board took the position that some sum should be awarded. That question of quantification is one of the issues to which it will be necessary to turn.

2.12 However, there were suggestions in the submissions made on behalf of Mr. Klohn that two further matters ought be dealt with by the Court. The first was an implicit suggestion that an order ought be made providing for the payment of some of Mr. Klohn's own costs, which order, it was said, would be required so as to render the overall proceedings NPE. A question arises, to which it will be necessary to turn, whether that matter is properly before this Court and whether the Court has, therefore, jurisdiction to deal with it.

2.13 A second matter mentioned, and relied on in oral submissions, was a contention that the Court could award damages to Mr. Klohn for breach of his rights under European Union law, which breach was said to have occurred by the making of the original order for costs against Mr. Klohn and its assessment by the Taxing Master in a sum of the order of €86,000. The costs order was, of course, sought by the Board, which is an emanation of the State, and the quantum urged on the Taxing Master was also pursued on the basis of the case made by the Board. The question also arises as to whether that matter is properly before this Court at this stage.

2.14 Finally, there are issues concerning the costs of the appeal itself. It is accepted on behalf of the Board that Mr. Klohn, being successful, is entitled to his costs in general terms. However, there were two caveats to that acceptance. The first concerned the costs of the issues which arose concerning the entitlement of Ms. Ohlig to represent Mr. Klohn on this appeal without being accompanied by a lawyer ordinarily qualified to practise in Ireland. Obviously those matters were ultimately resolved in favour of Mr. Klohn's contention that he should be entitled to instruct Ms. Ohlig. However, the Board argues that, while it initially raised a question in that regard, it did not adopt a position on, or actively participate in, either the hearing before this Court on that issue or that before the CJEU. On that basis it was said that it would be inappropriate to award those costs against the Board.

2.15 Given that the Board adopted that position, the Court felt it appropriate to invite counsel for the Attorney General to attend the hearing for the purposes of dealing with that question. The Attorney General and the other notice parties had been involved only in the representation issue. The Attorney General was, therefore, a party to the hearing on the representation issue both before this Court and before the CJEU. Counsel for the Attorney General submitted that the proper approach was to have regard to the fact that

it was the Board that raised the issue of representation such that, the issue having been raised and being open to doubt, it was inevitable that there would have to be some form of hearing so that the issue could be resolved. In that context it was suggested that this was one of those issues which arise in the context of litigation, not necessarily due to the fault of either party, but where the issue has to be resolved and where the costs of resolving the issue in question might be regarded as part of the ordinary costs of the proceedings so that they could, in an appropriate case, be awarded against whichever party to the proceedings led to the issue having to be resolved. This approach, it was said, was appropriate at least when the position of the party, in whose favour costs generally were to be awarded, was sustained on the issue concerned.

2.16 The second caveat was the suggestion that this Court should not award Mr. Klohn his full costs of the appeal having regard to the principles set out in *Veolia Water UK Plc & Ors. v. Fingal County Council* [2006] IEHC 137, [2007] 2 I.R. 81 and subsequent cases. In that context it is suggested that Mr. Klohn did not succeed on all points. As the other issues raised have a potential bearing on the quantification of the costs against Mr. Klohn, which the Court will have to assess, I propose dealing with those issues first.

**3. Mr. Klohn's own costs**

3.1 As noted earlier, there is no dispute between the parties but that Mr. Klohn's own costs must be taken into account in assessing whether the proceedings as a whole were prohibitively expensive. The issue with which I am now concerned is as to whether the Court should make an appropriate form of order which would provide for the reimbursement of some of Mr. Klohn's own costs and, in particular, whether this question is a matter which is now properly before this Court. In that context, it must be recalled that the CJEU, at para. 71 of its judgment on the first reference in this case, placed a caveat on the obligation of this Court to interpret national law in conformity with Art. 10a of Directive 85/337 in ruling on the amount of costs to be paid. That caveat is expressed by the phrase "insofar as the force of *res judicata* attaching to the decision as to how the costs are to be borne, which has become final, does not preclude this, which it is for the national court to determine".

3.2 Thus, in its ruling in this case, the CJEU recognised that the doctrine of *res judicata* can legitimately stand in the way of the application of European Union law in certain circumstances. In so doing, the CJEU was following its own well-established jurisprudence. For example, in *Impresa Pizzarotti v. Comune di Bari* (case C-213/13) ( ECLI:EU:C:2014:2067), the CJEU said the following at para. 58 of its judgment:

> *"…(A)ttention should be drawn to the importance, both in the legal order of the European Union and in national legal systems, of the principle of res judicata. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that connection can no longer be called in to question".*

3.3 It is also clear from the judgment of the CJEU in that case that the fundamental principles of the law of the European Union do not require a matter which has become *res judicata* to be reopened by a national court even where it is clear that European Union law was misapplied or wrongly interpreted in the case in question.

3.4 It follows that it is, as the CJEU said in the first reference in this case, for this Court to determine the extent of the application of the principle of *res judicata* in Irish law to the issues now before the Court. To the extent that any matter may, in accordance with national law, be *res judicata*, then that issue cannot be reopened even if it might be argued that the resolution of the issue concerned was inconsistent with European Union law in some respect.

3.5 It is, of course, correct to say that the High Court, in considering the costs of the underlying environmental case, had a discretion either not to award costs against Mr. Klohn or, indeed, to order costs in his favour even though he lost. I do not rule out the possibility that the requirement to ensure that relevant proceedings are NPE might, in appropriate case, require a court to make some form of order in favour of an unsuccessful party. I would, however, leave that question to be decided in a case where that proposition was pursued at the appropriate time before the High Court and given full consideration in that court prior to an appeal ultimately coming to this Court.

3.6 However, even if there might be an obligation on a trial court to make such an order in an appropriate case, that cannot avail Mr. Klohn if the issue is now *res judicata* as a matter of national law. That is precisely what the CJEU said in answer to the third question posed by this Court in the first reference.

3.7 In my view, any question of there being an obligation on the Board to pay costs to Mr. Klohn is defeated by the principle of *res judicata*. When the High Court decided to award costs against Mr. Klohn and in favour of the Board, it made a potentially final decision against the proposition that the Board should make a contribution to Mr. Klohn's costs. No appeal against that decision was taken so that, to again use the language of the CJEU in this case, "the time limit in that regard" has long since expired. It has been definitively determined that Mr. Klohn is not entitled to any contribution towards his own costs from the Board. That decision has become final and is covered by the principle of *res judicata*. It cannot arise in the current application which simply involves a review of the taxation of the costs which were awarded against Mr. Klohn.

3.8 Attention was drawn on behalf of Mr. Klohn to the judgment of Smyth J. in *Kavanagh v. Ireland & ors* [2007] IEHC 389, in which it was intimated that any question of costs being prohibitively expensive could be raised in the taxation process. I do not doubt that this is a correct proposition in law, not least because of the judgment of the CJEU in this case. However, the role of a taxing master or, nowadays, a legal costs adjudicator is confined to assessing the amount of costs to be paid in accordance with a court order. The comments of Smyth J. cannot be understood to mean that, in the taxation or adjudication of costs, the order of a court can be reversed by requiring sums to be paid in the opposite direction to that determined by the court. Those comments can, and do, mean that the

adjudication process may very well have to depart from the norm in assessing the costs to be paid so as to ensure that they are NPE. As noted earlier, that may include, in an appropriate case, assessing the costs to be paid at zero. However, the only time at which an argument can be made that an applicant is actually entitled to receive some or all of their costs, so as to ensure that the proceedings as a whole are NPE, is at the time when the relevant court makes its final decision on the principle of the question of costs. Thereafter, the only issue which is still alive is one of quantification through the taxation/adjudication process, with the possibility of an onward review by the courts. It is only that quantification process that remains alive in these proceedings. All other aspects of the matter were the subject of a final decision when the order of McMahon J. in the underlying environmental proceedings was made. That order became final, and subject to the principle of *res judicata*, when it was not appealed.

3.9 What is before this Court on this occasion is a review of taxation. This Court has jurisdiction to ensure that the amount assessed is NPE and that can include, if the Court is persuaded that it is necessary, an assessment at zero. However, there is no issue before this Court concerning the obligations of the Board to potentially have to pay money to Mr. Klohn in respect of the costs which he incurred. That remains the case even if it should ultimately be determined by the courts that there may be an obligation, in some cases, to make a form of order in favour of an unsuccessful applicant in respect of that applicant's own costs so as to ensure that the proceedings as a whole are NPE.

3.10 For those reasons, I am of the view that this Court is not seized of any issue concerning Mr. Klohn's own costs save, importantly, that the fact that he has paid those costs must be taken in to account in reaching an assessment as to whether any particular amount of costs which might now be directed to be paid by him breaches the NPE principle.

**4. Damages**

4.1 As noted earlier it is suggested that this Court might now award damages to Mr. Klohn by reason of what is said to be a breach of his European Union rights by the manner in which the Board sought costs and had same initially assessed in a sum of approx. €86,000. In addition, reliance is placed on the fact that, for a time, there was a judgment mortgage registered against his lands based on the original taxed costs.

4.2 It is important to emphasise that both as a matter of national law (see, *Glencar Exploration PLC v. Mayo County Council (No. 2)* [2001] IESC 64, [2002] I.R. 84) and as a matter of European Union law under the principles developed since *Francovich & Bonifaci & Ors. v. Italian Republic* (Joined Cases C-6/90 and C-9/90) (ECLI:EU:C:1991:428), there can be circumstances where a party may be entitled to damages as a result of harm caused by a measure which is ultimately found to be invalid. However, it is equally clear that it does not automatically follow, either in national or in European Union law, that a finding of invalidity in respect of any measure necessarily carries with it an entitlement to damages. Additional matters need to be established by evidence whether the claim is pursued in national law or as a matter of European Union law.

4.3 It must also be recalled that there was never a final and binding order against Mr. Klohn for the payment of the sums assessed by the Taxing Master. Those sums have, at all material times since their original assessment, been under review, whether by the High Court or by this Court. In addition, there have remained, even until now, some issues of importance as to the proper approach. As already analysed, the CJEU recognised that the principle of *res judicata* could release a national court from an obligation to interpret national measures in conformity with European Union law if the requirement so to do would mean reopening a matter which had been finally decided. The precise application of that requirement is only clarified by the delivery of judgment in this case.

4.4 It follows that any claim to damages would need to be carefully explored on the basis of evidence for the purposes of determining whether the criteria set out, for the award of damages in cases involving invalid measures, whether in national law or in the case law of the CJEU, had been met. No claim to damages has ever been put forward before a trial court in any aspect of these proceedings. A claim to damages was not part of the issues which were before the High Court in the decision which is under appeal to this Court. This Court is not, therefore, seized of any claim in respect of damages and it does not appear to me that there is any legitimate basis for this Court considering whether the criteria identified in either national or European Union case law, for the award of damages in respect of a measure which is overturned, are present.

4.5 It is said that it would place an excessive burden on Mr. Klohn if he were now required to commence separate proceedings in the event that he should be advised that he has a sustainable claim for damages. It was suggested that making such a requirement of Mr. Klohn would be to deprive him of an effective remedy. However, there is no reason in principle why proceedings claiming damages could not have been brought at the same time as the review by the High Court of the taxation of costs in this case. Such proceedings could easily have been arranged to travel with the review of taxation so that all issues could have been determined at the same time. Had that procedure been adopted, there would have been no reason why, had the High Court rejected the claim for damages, a contemporaneous appeal to this Court could not have been brought on the damages issues. Again, all issues could have been determined by this Court at the same time. There was, therefore, no reason why Mr. Klohn could not have raised any issue concerning damages in parallel with the review of taxation process. There is, therefore, no basis, in my view, for suggesting that the enforcement of any European Union rights to damages which he might theoretically enjoy, has been made excessively difficult in accordance with the case law of the CJEU. The only reason why this Court is not now seized of any question concerning damages is because Mr. Klohn chose not to bring a claim in damages in conjunction with his review of taxation.

4.6 In those circumstances it does not seem to me that this Court should consider the question of damages for the Court is not seized of that issue. It follows, in turn, that, with the exception of the questions concerning the costs of this appeal which have already been noted, the only matter outstanding is the quantification of the costs to be ordered against Mr. Klohn.

**5. The Quantification of Costs**

5.1 As already noted, this Court proposes to assess the amount of costs which should be determined to be paid by Mr. Klohn on foot of the original order made by McMahon J. For the reasons already addressed, that assessment can involve one where the amount assessed is zero.

5.2 Counsel for the Board did suggest that the Court could have regard to the amount of costs which Mr. Klohn paid to his own lawyers for, it was suggested, he must have regarded those costs as reasonably payable and thus, it was said, NPE. I am afraid I cannot agree with that submission. As was pointed out on behalf of Mr. Klohn, the costs which a party pays to its own lawyers arise from the contractual arrangement entered into by that party with those lawyers. The amounts to be paid are either those agreed or, if there is a dispute about the amount, those which may be fixed after an adjudication process. Such costs do not, however, provide a basis for assessing the further costs that might need to be paid to a successful party arising from an order for costs in the proceedings.

5.3 It is clear from the jurisprudence of the CJEU in cases such as *Edwards* that the overall assessment of the level of costs which may be NPE involves both an objective and a subjective element. A very wealthy party might well be able to afford a very large sum in costs but that does not necessarily mean that the sum concerned might be considered NPE if it could act as a significant deterrent to that party bringing proceedings. Thus, there may be an objective limit on the amount of costs which can properly be awarded in proceedings to which the NPE regime applies. However, it is also clear that the subjective position of the particular applicant must also be taken into account.

5.4 At the time when the review of taxation was before the High Court, Mr. Klohn swore an affidavit dated March 31, 2011. In that affidavit he said that he was a man of ordinary means being an organic small scale horticultural grower in the west of Ireland. He also exhibited a medical card which he held. He also exhibited the land certificate in respect of those lands. The Court was told at the hearing that Mr. Klohn was now retired.

5.5 In those circumstances, it would appear that paying a sum in excess of €30,000 towards his own costs would have represented a significant personal burden. Given that it is agreed that the fact that he had to pay those costs can properly be taken into account in determining the level of costs which can now be assessed against him, in a manner which renders the proceedings as a whole NPE, it seems to me that those costs could only be assessed at a very modest sum. To do otherwise would be to fail to take into account Mr. Klohn's own personal circumstances. I would, however, for the future, indicate that any party arguing that significant regard should be had to their personal circumstances in applying the subjective element of the test identified by the CJEU, should make a much more detailed disclosure of those circumstances than has occurred in this case so as to enable the subjective factor to be taken fully into account.

5.6 In those circumstances I would propose €1,250 as the appropriate amount of costs to be awarded against Mr. Klohn. It is important to acknowledge that the amount fixed by the

Taxing Master, of the order of €86,000, represented, it would appear, sums actually expended by the Board in successfully defending the underlying proceedings. The Board will, therefore, be at a loss of almost all of those monies. However, such a consequence seems to me to be mandated by European law.

5.7 I now turn to the cost of the appeal.

**6. Costs**

6.1 I propose to deal with the *Veolia* issue first. It is true that Mr. Klohn has not succeeded on some of the points raised at this hearing. However, it has been made very clear in the jurisprudence since *Veolia* that the Court should only deprive an otherwise successful party 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. I am not persuaded that any of the issues raised on behalf of Mr. Klohn, on which he has not been successful, have had such an effect. There had to be an initial appeal hearing followed by a reference to the CJEU, followed by a further hearing to finalise the amount of costs to be paid in light of the decision of the CJEU. At the end of the day, Mr. Klohn has been successful. I am not persuaded that any of those steps would have been less expensive had the points raised by Mr. Klohn, on which he has not succeeded, been left out of the equation. I do not, therefore, see any basis, under the *Veolia* principles, for reducing the costs to which Mr. Klohn is entitled.

6.2 It is then necessary to consider the question of the costs associated with resolving the issue as to whether Mr. Klohn was entitled, as he wished, to instruct Ms. Ohlig. He clearly succeeded on that issue. I also agree with the submission made by counsel for the State that it was the fact that the question was raised by the Board that led to this matter having to be considered and referred to the CJEU. While it is true that the Board did not take any position before this Court on that question and did not participate before the CJEU, it nonetheless became a matter which had to be determined in the context of this appeal once it was raised.

6.3 In those circumstances, I do not see that the costs associated with those questions, including the reference to the CJEU in that regard, should be excluded from the costs to be awarded to Mr. Klohn and against the Board.

6.4 I would, therefore, propose that Mr. Klohn should be awarded the full costs of the appeal to this Court, including the costs associated with the hearing concerning representation and the costs associated with the two references to the CJEU. In addition, it seems to me to follow that Mr. Klohn is entitled to the costs of the review before the High Court, for it is clear that the central arguments which were made on his behalf on that occasion have been demonstrated to be correct.

**7. Conclusions**

7.1 It was agreed on behalf of both Mr. Klohn and the Board that, in light of the judgment of the CJEU in the first reference in this appeal, the decision of the Taxing Master, assessing the costs which Mr. Klohn was to pay to the Board at €86,000, had to be overturned. For the reasons set out earlier in this judgment, and in particular having regard to the fact

that both parties urged that the Court should take such a course of action, I would propose that the Court should itself measure the amount of costs.

7.2 Those costs must be assessed in a way which renders the overall costs of the proceedings, including the costs which Mr. Klohn incurred in his own representation, as being NPE in accordance with the jurisprudence of the CJEU. For the reasons analysed earlier, I would propose that those costs should be measured in the sum of €1,250.

7.3 I have also set out the reasons why I do not consider that any question of the Board having to pay a sum to Mr. Klohn in respect of his own costs was before the Court on this appeal. That question was finally determined against Mr. Klohn when the original order of McMahon J. in the underlying environmental proceedings was made. That question is now *res judicata* and, in accordance with the answer given by the CJEU to the third question posed in the first reference by this Court, European Union law does not require such matters to be reopened.

7.4 In addition, I have set out the reasons why I do not consider that any potential claim for damages under European Union law is before this Court.

7.5 Finally, I have set out the reason why I consider that Mr. Klohn is entitled to the full costs of the appeal to this Court (including the costs associated with the two references to the CJEU), is also entitled to the costs of the review of taxation before the High Court and why the Board should be liable for all of those costs.

7.6 In summary, I propose that the Court should allow the appeal and substitute the sum of €1,250 for the assessment of the Taxing Master under review. I also propose that the Court should award Mr. Klohn the full costs of this appeal in accordance with the preceding paragraph.