AN CHÚIRT UACHTARACH
THE SUPREME COURT

Record No.: S:AP:IE:2022:000003

[2022] IESC 43

O'Donnell C.J.
O'Malley J.
Woulfe J.
Hogan J.
Murray. J.

BETWEEN

HEATHER HILL MANAGEMENT COMPANY CLG AND

GABRIEL MCGOLDRICK

APPLICANTS/ APPELLANTS

- AND -

AN BORD PLEANÁLA

RESPONDENT

- AND –

BURKEWAY HOMES LIMITED

NOTICE PARTY

- AND -

THE ATTORNEY GENERAL

NOTICE PARTY

JUDGMENT of Mr. Justice Brian Murray delivered on the 10th of November 2022

I THE BACKGROUND

Introduction

1. In a period of a little over a decade, the provisions intended to give effect to the '*not prohibitively expensive'* requirements of the Aarhus Convention (which I refer to throughout this judgment as 's. 50B' and 'EMPA') have generated at least thirty-five reserved judgments of the High Court, four decisions of the Court of Appeal, three references to the Court of Justice of the European Union, one judgment of that Court (so far) and, now, this decision of this Court.

2. Many of the problems addressed in these cases (including this one) arise from disputes around questions of definition and of scope – as to the categories of action that are intended to benefit from the facility extended by s. 50B and EMPA and, within those proceedings, whether the cost protection enabled by these provisions applies to all, or only parts, of the claims thus advanced. This is a recurring difficulty in an area of the law in which multiple and overlapping grounds of legal complaint are commonly grounded in lengthy and involved pleadings. Litigation around those questions has generated a wide and at points complex range of arguments and counter arguments and has prompted differing analyses of the domestic statutory provisions, together with - at points opaque - interpretations by the CJEU of aspects of relevant provisions of EU law.

3. The assessment I undertake here of some of these authorities and the range of contentions advanced by the parties in the light of them is necessarily lengthy. My conclusion can, however, be shortly expressed. The effect of the provisions of s. 50B is that all of the grounds agitated in challenges to the validity of decisions to grant development consent under s. 9 of the Planning and Development (Housing) and Residential Tenancies Act 2016 ('PD16'), benefit from this protection. The same applies to challenges to the validity of similar decisions under s. 34 and 37 of the Planning and Development Act 2000 ('PDA'). That conclusion follows not merely because this is the effect of the literal construction of s. 50B – the first point of contact in any exercise in statutory interpretation – but also because the respondent in contending otherwise has not advanced any persuasive alternative analysis of the text, and has failed to identify any clear and convincing argument based upon the legislative context that would displace this literal construction. Moreover, this is the interpretation that renders s. 50B and EMPA consistent with each other, and that aligns both with the '*not prohibitively expensive'* provisions of the Aarhus Convention which, collectively, these provisions were intended to implement. It is also the conclusion that will in many cases match with the State's obligations under European law.

The proceedings

4. In these proceedings the applicants challenged the validity of a decision of 16 November 2018 of An Bord Pleanála ('the Board' or 'the respondent'). The decision purported to grant permission to the notice party for a large-scale residential development on a site in Barna, County Galway. The proposed development was to be accessed via another development ('Cnoc Froaigh') of which the first named applicant

('Heather Hill' or 'the applicant') is the residents' management company. The second named applicant resides at Cnoc Froaigh. The proposed project comprised strategic housing development within the meaning of PD16. The application for permission was made under s. 4 of that Act and the decision of the Board was made under s. 9.

5. On 17 January 2019 the applicants were granted leave to apply for judicial review of this decision of the Board. They pleaded (and were granted leave in respect of) 64 separate grounds. These fell into four broad categories.

6. The first comprised grounds arising under Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('*the Habitats Directive*') and/or Article 42 of the European Communities (Birds and Natural Habitats) Regulations 2011, SI 477 of 2011. In this regard, it was alleged that the screening exercise conducted by the Board was flawed. In particular, it was claimed that the documentation furnished by the notice party developer was deficient, as a result of which it was said that it was not capable of providing the Board with sufficient information to enable it to conduct a lawful screening exercise and/or to justify the conclusions drawn from the screening exercise that was conducted. In the same context it was alleged that the Board and its inspector erred in law in misinterpreting and/or misapplying the provisions of domestic legislation and/or Article 6(3) of the Habitats Directive. Related to this were a number of grounds which alleged that mitigation measures were unlawfully taken into account for the purposes of the screening exercise.

7. The second set of grounds alleged a material contravention of the county development plan and of local plans. Complaint was made that the decision authorised an allocation

of population within the subject development in excess of that permitted by the zoning provided for in the development plan. It was claimed that the decision was therefore contrary to s. 9(6) of PD16. The applicants said that the decision was based on an interpretation of the population allocation as and between different zoned areas in the county development plan that had no basis in law, was without precedent and was so irrational as to be unreasonable. It was pleaded that for these reasons the Board '*has erred in law, misdirected itself in law, ... took into account irrelevant considerations and/or misinterpreted or overlooked material and/or acted irrationally so as to vitiate the decision of the Board'*. There was also a distinct claim that objectives relating to development on flood zones were contravened and that the development involved the building of roads, paths and bridges contrary to local and county development plans. This was also all said to be contrary to s. 9(6) of PD16.

8. The third category related to an alleged circumvention of Ministerial Guidelines issued in 2009 and entitled the '*Planning System and Flood Risk Management Guidelines for Planning Authorities'*. The applicants claimed that the development was in an area at high or moderate risk of flooding, and that these guidelines mandated the application of a '*justification test*'. No such test, it was said, had been submitted with the planning application and, it was contended, by acting on the information that was provided the Board erred in its interpretation and application of those guidelines. It was also alleged, at paragraph E.50 of the Statement of Grounds, that the Board's decision had failed to reduce flood risk, instead increasing it, and was therefore contrary to the provisions of Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks ('*the Floods Directive'*) and, in particular, Article 7 thereof.

9. The final group of grounds arose from a contention that the consent of the landowner to the making of the application for planning permission had not been properly obtained. It was claimed in this regard that the entire beneficial ownership of lands over which access to the development was to be obtained was vested in Heather Hill, and that it had never consented to the making of the application. Therefore, it was pleaded, the application for permission was invalid and could not have been lawfully considered, determined or granted by the Board.

The PCO

10. One of the reliefs claimed by the applicants in their Statement of Grounds was a 'Protective Costs Order' or 'PCO'. This is a pre-emptive order, the effect of which is to provide that claimants will not be liable for the costs of proceedings if they fail in their claim. There are three possible legal bases for such an order relevant to this appeal. The first is s. 50B of PDA. The second arises from ss. 3, 4 and 7 of the Environment (Miscellaneous Provisions) Act 2011, as amended ('*EMPA*'). The third arises from Order 99 of the Rules of the Superior Courts ('*RSC'*) and/or the inherent jurisdiction of the court which, it is suggested, confers a jurisdiction to make such orders.

11. Following the grant of leave, the applicants' solicitors wrote to the solicitors for the Board and the notice party requesting their agreement to a PCO and asking that they accept that s. 50B applied to the entire proceedings. The solicitors for both the Board and the notice party agreed that a PCO could be granted in respect of those grounds relating to the Habitats Directive (Grounds E.24 to E.34 of the Statement of Grounds).

In their written submissions before the High Court the Board stated that it was willing to accept that the not prohibitively expensive rules should apply to para. E.50 of the Statement of Grounds. The Court of Appeal judgment (at para. 4) records the Board and notice party as accepting that s. 50B applied to this latter ground, and the High Court judgment proceeds on a similar basis. Neither the Board nor notice party accepted that a PCO should be granted in relation to the remaining grounds in the Statement of Grounds ('*the disputed grounds'*).

12. On 13 February 2019 Heather Hill issued a notice of motion seeking orders (a) that s. 50B applies to these proceedings, (b) pursuant to s. 7 of EMPA that s. 3 and 4 of that Act applies to these proceedings, and (c) pursuant to Order 99 of the RSC, as amended, and/or pursuant to the inherent jurisdiction of the court, limiting the sum to which the applicants shall be liable in the event that they were unsuccessful in obtaining relief in these proceedings.

13. This motion was brought only by Heather Hill: the second applicant said that the scale of costs involved was such that he could not afford to take the risk of applying for a PCO in respect of the disputed grounds.

The progress of the PCO application

14. The application was opposed by the Board and by the notice party. The resulting dispute between the parties reduced itself to whether (as Heather Hill contended) s. 50B applied to enable a PCO to be issued in relation to all of the grounds in the proceedings and, if not, whether EMPA or Order 99 provided a basis for the relief claimed, or

whether (as the Board and the notice party argued) the special costs rules enabled by s. 50B applied only to the agreed grounds (the provisions of EPMA and of Order 99 being, it was contended, not applicable in the circumstances of the case).

15. In a decision dated 29 March 2019 ([2019] IEHC 186), Simons J. concluded that s. 50B applied to all of the grounds in the proceedings. He also decided, if he were wrong in this regard, that having regard to the language of EMPA, costs protection under that legislation was subject to the restriction that it applied only where a failure to ensure compliance with or enforcement of a statutory requirement has caused, is causing or is likely to cause damage to the environment. However, he was of the view that this would represent an incomplete implementation of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('*Aarhus*'). The solution that commended itself to Simons J. was to use the court's general jurisdiction as to costs under Order 99 to apply an approach similar to the costs protection enabled by EMPA, to cases that were not within the wording of that Act.

16. Thereafter, in December 2019, the substantive judicial review proceedings were decided in favour of the applicants. The decision to grant planning permission was quashed and the Board was ordered to pay the applicants' costs. A certificate for leave to appeal in the substantive proceedings was refused, as was an application for leave to appeal directly to this court. Nonetheless, and owing to the systemic implications of the decision of the High Court, the Board maintained its appeal of Simons J.'s decision to grant a PCO.

17. That appeal was determined by the Court of Appeal on October 14 2021 ([2021] IECA 259). The court reversed the decision of Simons J. It concluded that the special costs rules in s. 50B were intended to apply to those grounds of challenge which alleged a breach of the requirements of the Directives specified in that provision, but not to any other grounds in the proceedings that were not so based on those Directives. While it acknowledged an obligation to interpret national law in certain circumstances so as to afford costs protection in other classes of environmental litigation, the Court of Appeal decided that those circumstances did not apply to the disputed grounds as these did not involve issues of '*national environmental law*'. The provisions of EMPA, it said, did not apply to proceedings in which relief was sought by way of judicial review, seemingly adopting the position that EMPA was not an issue in the appeal.

18. In a determination of 30 May 2022 ([2022] IESCDET 66) leave was granted to Heather Hill to appeal this decision. Thereafter, the Attorney General was granted liberty to appear in the appeal as a notice party.

The issues

19. The focus of all parties to this appeal was upon s. 50B. I shall start with and concentrate upon it. However, the meaning and effect of that provision cannot be considered wholly in isolation from EMPA and, potentially, of Order 99. I will address EMPA, and mention Order 99, later.

20. Beginning with s. 50B, the case seems to present a net issue of statutory construction. That provision exempts certain proceedings from the normal rules governing the award

of costs. The proceedings to which the section applies are defined as '*proceedings ... by way of judicial review ... of any decision ... purportedly made ... pursuant to a statutory provision that gives effect to ... paragraph 3 or 4 of Article 6 of the Habitats Directive'*. This might mean one of two things. First, as Simons J. held and as Heather Hill contends, that once proceedings challenge a decision made pursuant to a statutory provision which implements paragraph 3 or 4 of Article 6 of the Habitats Directive, or any of the other EU measures listed in the provision ('*the listed Directives'*), they are within the section. This, it is common case, is the literal – or at least the *most* literal – interpretation of the section.

21. Second, as the Court of Appeal found and as the Board and the Attorney General argue, that the provision (at least originally) operated only in relation to grounds of challenge arising under the listed Directives. Grounds sought to be agitated in the proceedings that do not depend on these provisions were not, on this argument, captured by the section. This is both a context-driven and purpose orientated interpretation: what is the point to listing specific provisions of the various Directives if all that is required is that the proceedings – irrespective of the grounds on which they were based – challenge a decision made pursuant to a measure that in some way gives effect to one of these Directives? On the basis of this construction, it is said, all proceedings by way of judicial review challenging the validity of decisions granting development consent would be the subject of the special costs rule. If that was the intention, the argument runs, it could have been said far more simply and, indeed, it has been asked why the Oireachtas would have wished to introduce such a far-reaching change to the law governing such costs in the first place?

22. So stated, the case involves the relatively straightforward claims of two competing constructions of the language appearing in s. 50B. However, a complication arises from the intrusion into that exercise of asserted requirements of both international law and of EU law (and, for that matter, the point of connection between the two). The parties agree that both introduce interpretative obligations that must be brought to bear on s. 50B but disagree as to how widely these extend. The end point of the argument advanced by the Board and the Attorney General (and accepted by the Court of Appeal) is that the EU law obligations go no further than requiring that cost protection be applied to challenges based upon national environmental law insofar as it implements requirements of EU law. The applicants contend (and Simons J. agreed) that EU law requires that s. 50B be interpreted, if possible, more broadly and as capturing any proceedings in which issues of national environmental law are relied upon, at least if those issues arise in a field covered by EU environmental law (which, in itself, should be interpreted as having a wide application). This, it is suggested, means that the provision must be given a broader remit of the kind contended for by Heather Hill. Similar – and as I will explain at points intersecting – arguments are advanced by either side based on the provisions of Aarhus. I will begin there.

II THE LEGAL FRAMEWORK

The Aarhus Convention and Directive 2003/35/EC

23. The Aarhus Convention was made under the auspices of the United Nations Economic Commission for Europe and it was signed by Ireland on 25 June 1998. It was ratified by the State on 20 June 2012. Article 3(1) of the Convention imposes a general obligation on the contracting parties to give effect to its provisions:

> '*Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the ... access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.*'

24. Following the order in the title of the Convention, Article 5 addresses the collection and dissemination of environmental information, Articles 6, 7 and 8 different aspects of public participation in decision making and Article 9 access to justice. Article 6 (public participation in decisions on specific activities) and Article 9 are linked in the text. Article 6(1)(a) provides that each party shall apply the provisions of the Article with respect to decisions on whether to permit proposed activities listed in Annex 1. That Annex lists 19 categories of project – of a kind that would usually be substantial in scale and which might be reasonably thought to have significant environmental effects.

Paragraph 20 of Annex 1 refers to '*[a]ny activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.*' Article 6(1)(b) provides that the contracting states shall, in accordance with its national law, also apply the provisions of that Article to '*proposed activities not listed in Annex 1 which may have a significant effect on the environment'*.

25. Article 6 is then picked up in Article 9(2):

> *'Each Party shall, within the framework of its national legislation, ensure that* ***members of the public concerned***
>
> *(a) Having a sufficient interest*
>
> *or, alternatively*
>
> *(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,*
>
> *have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of* ***any decision, act or omission*** *subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.'*

(Emphasis added).

26. The difference between Articles 9(2) and 9(3) – and indeed the different responses of the EU legislator to these two articles – assumed some importance in this appeal, so the contrast between, and respective scope of, these provisions should be noted. While Article 9(2) mandates the availability of review procedures for those having an interest in a decision, act or omission captured by Article 6 (and indeed where provided for by national law, and other relevant provisions of the Convention), Article 9(3) is not limited to projects of the kind specified in Annex 1 or Article 6(1)(b) of the Convention and provides for a broader (and, as it has been interpreted, overlapping) right, vested in all members of the public, and governed by the phrase '*national law relating to the environment'* :

> *'In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law,* ***members of the public*** *have access to administrative or judicial procedures to* ***challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment****.'*

(Emphasis added).

27. The requirement that review procedures be '*not prohibitively expensive'* ('NPE') is introduced by Article 9(4), and is applied to the procedures identified in *both* Article 9(2) and 9(3):

> *'In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely* ***and not prohibitively expensive.*** *Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.'*
>
> (Emphasis added).

28. The European Union is a party to the Convention, and formally approved it on 17 February 2005 (Council Decision 2005/370/EC). Before Aarhus was so adopted, measures required to incorporate Article 9(2) of the Convention into Community Law were adopted by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC ('*the 2003 Public Participation Directive*'). That Directive described itself as contributing to the implementation of the obligations arising under Aarhus, and transposed the NPE requirement of Article 9(2) and (4) of the Aarhus Convention into EU law (although it did not precisely replicate the language used in these provisions). To this end, Article 3(7) of the 2003 Public Participation Directive inserted Article 10a (now Article 11 of

the codified Directive 2011/92/EU) into Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment ('*1985 Public Participation Directive*'). It provides, as relevant here:

> *'Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:*
>
> *(a) having a sufficient interest, or alternatively,*
>
> *(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,*
>
> *have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive…*
>
> ***Any such procedure shall be fair, equitable, timely and not prohibitively expensive ….** '*
>
> (Emphasis added).

29. Article 4(4) introduced a similar provision (Article 15a) into Directive 96/61/EC concerning integrated pollution prevention and control ('*the IPPC Directive'*) (later codified in Directive 2008/1/EC, Article 15a of its predecessor is mirrored in Article 16

thereof). The IPPC Directive was then absorbed into Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (recast) (‘*the Industrial Emissions Directive’)*, which has been variously described as having repealed and as having recast, the IPPC Directive, and Article 25 of which now reflects the text of Article 16 of the latter. Both provisions as originally introduced and indeed as subsequently restated, reflect the import of Article 9(2) – but not Article 9(3) – of Aarhus.

30. In Council Decision 2005/370/EC it was noted that the legal instruments then in force did not cover fully the implementation of the obligations arising under Article 9(3) of Aarhus, continuing :

> ‘*Consequently, [the] Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations.’*

31. The terms of the 2003 Public Participation Directive created an issue in this jurisdiction insofar as (until 2010) no specific provision was made in Irish law for costs in any form of environmental proceedings. In Case C-427/07 *Commission v. Ireland* ECLI:EU:C:2009:457, the Commission contended that Ireland had failed to properly implement these provisions of the 2003 Public Participation Directive, the State arguing in response that the discretionary power of the courts to exempt a party from costs orders arising from Order 99 RSC was sufficient to enable effect to be given to the

Directive. That provision was described by the CJEU as giving rise to '*merely a discretionary practice'* which, it was found, did not suffice to ensure that such proceedings were not prohibitively expensive for the purposes of Article 10a. It is to be noted that the CJEU described the NPE obligation broadly (at para. 92) :

> '*As regards the fourth argument concerning the costs of proceedings, it is clear from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35,* ***that the procedures established in the context of those provisions must not be prohibitively expensive. That covers only the costs arising from participation in such procedures****. Such a condition does not prevent the courts from making an order for costs provided that the amount of those costs complies with that requirement.'*
>
> (Emphasis added).

The first iteration of s. 50B

32. The CJEU delivered its judgment in *Commission v. Ireland* on 16 July 2009. On 28 September 2010, the provisions of s. 33 of the Planning and Development (Amendment) Act 2010 ('*PD10'*) came into force (Planning and Development (Amendment) Act 2010 (Commencement) (No. 2) Order 2010) (S.I. No. 451/2010). That Act made amendments to a number of different provisions in PDA, so – beyond that – there is no particular theme to the legislation as a whole. What is relevant for present purposes is that s. 3 inserted a new s.1A into PDA declaring that effect, or

further effect, is given by that Act to a variety of EU Directives, including the 2003 Public Participation Directive. It also introduced (through s. 33) a new provision, s. 50B.

33. To put that provision in context, s. 50 of PDA as enacted provided that the validity of a decision of a planning authority on an application for a permission or a decision of the Board on any appeal or referral could not be questioned other than by way of an application for judicial review under Order 84 RSC. Section 50 then made provision regulating such an application, including the time within which it must be brought. Section 50A (inserted by s.13 of the Planning and Development (Strategic Infrastructure) Act 2006) tightened the conditions for the grant of leave to seek judicial review of the decisions in question, imposing a '*substantial grounds'* requirement for the grant of leave in proceedings to which s. 50 applied and also mandating that applicants have a '*substantial interest'* in the matter the subject of the application (as I explain later, in order to implement Aarhus, this had to be subsequently amended). Section 50A, it might be observed, uses the term '*grounds'* in the sense relevant to this appeal twice: it provides that leave to apply for judicial review shall not be granted unless the court is satisfied that there are '*substantial grounds'* for contending that the decision is invalid or ought to be quashed (ss.(3)(a)) and states that where leave is given '*no grounds shall be relied upon … other than those determined by the Court to be substantial'* (ss.(5)).

34. The effect of the new s. 50B was that in proceedings to which the provision applied, each party should bear its own costs (ss. 2). Certain exclusions from that general rule were acknowledged in cases of exceptional public importance, or where proceedings

were frivolous, vexatious or had been misconducted (ss. 3 and 4). The section was stated to apply to proceedings thus described:

‘(a) proceedings in the High Court by way of judicial review, or of seeking leave to apply for judicial review, of—

(i) any decision or purported decision made or purportedly made,

(ii) any action taken or purportedly taken,

(iii) any failure to take any action,

pursuant to a law of the State that gives effect to—

(I) a provision of Council Directive 85/337/EEC of 27 June 1985 to which Article 10a (inserted by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directive 85/337/EEC and 96/61/EC) of that Council Directive applies,

(II) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, or

(III) a provision of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control to which Article 16 of that Directive applies; or

(b) an appeal (including an appeal by way of case stated) to the Supreme Court from a decision of the High Court in a proceeding referred to in paragraph (a);

(c) proceedings in the High Court or the Supreme Court for interim or interlocutory relief in relation to a proceeding referred to in paragraph (a) or (b).'

35. It is notable that s. 50B makes no reference to s. 50 or s. 50A. Clearly, it is not limited to challenges to decisions under PDA. It is also to be observed that as originally enacted, the provision conferred a potential benefit on *all* parties to those proceedings to which it applied in as much as – apart from the exceptional circumstances referred to – *no* party could obtain costs from the other.

36. It would not be unreasonable to think, having regard to the timing of PD10, that it was – at least in part – a response to the decision of the CJEU in *Commission v. Ireland*, and the fact that two of the three measures specifically referred to in the provision expressly incorporated the '*not prohibitively expensive'* requirement would support this suggestion. As against that, PD10 includes in its list of Directives one provision – Directive 2001/42/EC – which makes no reference to NPE and the marginal note is

broadly framed (‘*Costs in Environmental Matters’*). The provision went further than the 2003 Public Participation Directive required by providing not for NPE, but for no order as to costs and, as I have just noted, extended the benefit of this to all parties. Moreover, while Article 10a was expressly directed to a review procedure ‘*to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive*’, the legislature in s. 50B chose to use different – and seemingly broader – language. The terms of s. 50B on its face applied relief from the costs of proceedings by way of judicial review simply of decisions made ‘*pursuant to a law of the State’* giving effect to one of the three Directives in issue. It is to be noted that this approach was adopted in a context in which relevant assessments under Directives 85/337/EEC and 2001/42/EC are integrated with decisions addressing other issues arising in the development consent process.

37. It followed that, literally construed, an inquiry as to whether costs relief was or was not available under s. 50B was resolved by (a) identifying the law pursuant to which the impugned decision was made, (b) determining whether that ‘*law’* was one that ‘*gives effect to’* one of the named Directives and (c) concluding that if the answer to (b) is in the affirmative, the costs of ‘*the proceedings’* are borne by each party in accordance with ss. 2. The section as enacted did not expressly envisage the costs being divisible by issue and did not immediately lend itself to the conclusion that it actually addressed itself only to the costs of those *parts* of proceedings which expressly relied upon the Directives referred to. In fact it did not expressly require that the proceedings themselves raise grounds under the Directives at all: the focus was on the ‘*law’* on foot of which the decision was made.

38. There is no surprise in the use of the verb '*effect'* in s. 50B, but it must be noted again that s.1A as inserted by s. 3 of PD10 decrees that PDA (and it speaks to the statute as a whole) gives '*effect or further effect'* to *inter alia* two of the Directives referenced in s. 50B itself. Generally, the consequence of s.1A is that PDA must be interpreted, at least in the case of doubt, so as to align the statute with the Directives in question (see *An Taisce v. McTigue Quarries Ltd. and ors* [2018] IESC 54 at paras. 72 to 75, [2019] 1 ILRM 118). The coincidence of expression in ss.1A and s. 50B PDA as inserted by the same amending Act means that PDA is a '*law of the State'* for the purposes of the latter section so that, literally construed, a challenge to a decision made under that Act (and that implied *any* section of that Act) enjoyed cost protection.

Slovak Brown Bear

39. Six months after the commencement of s. 33 PD10, CJEU delivered its judgment in Case C-240/09 *Lesoochranárske zoskupenie v. Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-01255 ('*Slovak Brown Bear'*). At that point, Article 9(3) of Aarhus was incorporated into EU law only in its application to institutions of the European Union (Regulation (EC) No. 1367/2006). The issue in *Slovak Brown Bear* – which arose from a reference for a preliminary ruling from the Slovakian Supreme Court – was whether Article 9(3) should be construed as having direct effect within a Member State's legal order. That question arose in a context where the applicant had sought in proceedings before the domestic courts to rely upon the requirements of Article 9(3) in order to assert standing. The applicant wished to initiate proceedings to appeal a decision granting a hunting association's application for permission to derogate from the protective conditions accorded to the brown bear. This

squarely presented the question of whether CJEU itself had jurisdiction to determine whether the provisions of an international agreement such as Aarhus had direct effect.

40. Advocate General Sharpston answered that question in the negative, on the basis that the Union had not adopted legislation in order to incorporate Article 9(3) into European Union law. The fact, she said, that the specific proceedings involved a species that appeared on the protected list under the Habitats Directive was not sufficient for this purpose. She concluded that were the position otherwise the question of where jurisdiction in any particular case lay as between the national court and CJEU would depend on whether a species for which a specific licence was sought was listed in the Directive; this, she said, would lead to fragmentation of the interpretation of Article 9(3).

41. Stressing that because Aarhus had been signed by the Community and subsequently approved by Decision 2005/370, the provisions of the Convention form an integral part of the legal order of the European Union, the CJEU found that it had jurisdiction to give preliminary rulings concerning the interpretation of such an agreement. Because Aarhus was concluded by the Community and all Member States on the basis of joint competence, the court had power to define which obligations the Community had assumed and which remained the sole responsibility of the Member States.

42. The CJEU phrased the general test as follows (at para. 36) :

> '*a specific issue which has not yet been the subject of EU legislation is part of EU law, where that issue is regulated in agreements concluded by the European*

> *Union and the Member State* ***and it concerns a field in large measure covered by it.'***
>
> (Emphasis added)

43. It followed that the particular question of whether the CJEU had jurisdiction to determine whether Aarhus had direct effect was dependant on whether the EU had '*exercised its powers and adopted provisions in the field covered by Article 9(3) of the Aarhus Convention…'*. The court disagreed with the Advocate General insofar as she had decided that the EU had not exercised its powers and adopted provisions in the field covered by Article 9(3). Because the proceedings concerned a species listed in Annex IV(a) to the Habitats Directive and was therefore subject to a system of strict protection from which derogations may be granted only under the conditions laid down in the Directive, the dispute in the proceedings fell '*within the scope of EU law'*. Where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law, the court said, it was appropriate that CJEU have jurisdiction to interpret the measure uniformly '*whatever the circumstances in which it is to apply.'* Therefore, the CJEU concluded it *had* jurisdiction to interpret Article 9(3).

44. While it was found by the court in the exercise of the resulting jurisdiction that, in fact, Article 9(3) was not directly effective, this was not the end of the matter. The principle of effectiveness of national procedural remedies dictated that national courts were required, as regards a species protected by the Habitats Directive, to interpret the

national procedural rules '*in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention'* (at para. 50).

45. The effect of the decision in *Slovak Brown Bear* is summarised in one text, as follows (S. Kingston et. al. '*European Environmental Law'* (Cambridge, 2017 at pp.232 to 233)):

> '*This strong version of the duty of consistent interpretation effectively obliges national courts, therefore, to achieve via interpretative means the aims of this aspect of the Aarhus Convention in the absence of applicable EU legislation on access to justice, unless this would require a contra legem interpretation of national law.*
>
> *Moreover, while the Slovak Brown Bear case itself involved a question of standing of environmental NGOs, its implications are far broader, extending to any national procedural rule which is open to interpretation in conformity with Article 9(3),* ***as long as the case at hand falls within the scope of EU law. This would include, for instance, rules in relation to costs, where such rules make access to environmental justice impossible or excessively difficult.'***
>
> (Emphasis added).

46. While the decision in *Slovak Brown Bear* may not have been predicted, it meant that from the point at which the next legislative developments in Ireland occurred it was

clear that the interpretative obligation arising as a matter of EU law extended to require that domestic law be construed '*to the fullest extent possible'* so that it gave effect to NPE as provided for in Articles 9(2) and 9(3) of Aarhus, at least in relation to proceedings arising in a zone regulated by EU law.

The pre-2018 cases and EMPA

47. At the time PD10 was enacted, the State had not ratified Aarhus, and the Convention did not feature in the first judicial analysis of s. 50B, that of Charleton J. in *JC Savage Supermarket Ltd. & Becton v. An Bord Pleanála & ors*. [2011] IEHC 488 ('*JC Savage'*). There, the applicant withdrew proceedings in which it had sought judicial review of a decision of the respondent granting planning permission to the notice party for a shopping centre development. The case as pleaded hinged on a '*points of detail'* argument. The notice party sought its costs, while the applicant contended that s. 50B prevented costs from being awarded against it, arguing that the section had gone further than EU law required so that s. 50B was '*the costs provision for every planning judicial review'*.

48. Charleton J. disagreed: in his view s. 50B was introduced to give effect to Article 10a of the 1985 Public Participation Directive, and the decision in *Commission v. Ireland*. He said that nothing in that judgment would have precipitated the Oireachtas into changing the rules as to the award of costs beyond removing the ordinary discretion as to costs from the trial judge in one particular type of case. He said that the new default rule set out in s. 50B(2) that each party bear its own costs is expressed solely in the context of a challenge under any '*law of the State that gives effect to*' the three specified

categories: those three and no more. There was nothing in the obligations imposed on Ireland by European law that would have demanded a wholesale change on the rules as to judicial discretion in costs in planning cases. The scope of s. 50B, he said, was limited to '*litigation that was concerned with the subject matter set out in s.50B(1)(a) in three sub-paragraphs'* (at para. 4.0). He thus framed the operation of the provision by reference to its '*subject matter'*, focussing on the nature of the project in question: '*as this litigation did not concern a project which required an environmental assessment'* the ordinary rules applied (at para. 4.2).

49. By the time of the judgment in *JC Savage*, s. 50B had been amended by the provisions of EMPA. While the Act is noticed in Charleton J's judgement, his analysis is directed to the original version of s. 50B, presumably because that was the provision in force at the time the proceedings in that case were commenced (the relevant provisions of EMPA took effect on 23 August 2011, Environment (Miscellaneous Provisions) Act 2011 (Commencement of Certain Provisions) Order 2011 S.I. No. 433/2011). The amendments did not affect the conditions governing the application of the section: a new s. 2A was included, and ss.(2) adjusted to refer to it. The new s. 2A provided that an applicant could obtain costs of proceedings to which the section applied '*to the extent that the applicant succeeds in obtaining relief',* thereby depriving respondents to such proceedings of the cost protection they had enjoyed under the first iteration of the provision.

50. The Long Title to EMPA indicated that the Act was intended to '*to make provision for costs of certain proceedings'* but also:

> '*... to give effect to certain Articles of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark on 25 June 1998 and for judicial notice to be taken of the Convention.'*

51. Sections 3 and 4 made separate provision for the costs of certain environmental proceedings. I will return to those provisions later. As I have already noted, after EMPA took effect the State (in June 2012) ratified the Aarhus Convention.

52. In *Shillelagh Quarries Limited v. An Bord Pleanála* [2012] IEHC 402, ('*Shillelagh*') Hedigan J. approved the judgment of Charleton J. in *JC Savage*, and re-iterated that s. 50B was introduced to meet the State's obligations under EU law having regard to the decision in *Commission v. Ireland.* In that case, the proceedings were brought by a quarry owner who unsuccessfully challenged the refusal of the respondent to grant permission for its proposed development. The project was one requiring an environmental impact assessment and, Hedigan J. said, '*[u]pon that basis is falls within the limited class of cases envisaged by s. 50B'* (at para. 5). The decision, it might be noted, did not address the grounds of challenge in the proceedings themselves, the court seemingly operating on the basis that – as on one view Charleton J. had suggested – it was the nature of the project in issue that determined the application of the section.

53. In *Kimpton Vale Developments Ltd. v. An Bord Pleanála* [2013] IEHC 442, [2013] 2 IR 767, (*'Kimpton Vale*') Hogan J. was concerned with an application not for costs *per se*, but rather for security for costs as enabled in the case of a corporate claimant by s. 390 of the Companies Act 1963. The applicant had challenged a decision of the Board

which purported to determine that the construction of fences on the applicant's property did not constitute exempted development. The security for costs application raised the question of whether the applicant could ever be liable for costs, and that in turn depended on whether s. 50B applied to proceedings. While Hogan J. concluded that s. 50B did not apply, he did so solely on the basis that he was bound by the decision of Charleton J. in *JC Savage.* Had the matter been *res integra* he would have reached a different conclusion. He explained why at paras. 39 to 41 of his judgment:

> *'First, it seems clear from the terms of the [Aarhus] Convention that the requirements of Article 9(4) apply to proceedings involving an application for judicial review of planning decisions where the underlying decision came within the scope of Annex 1 of that Convention.*
>
> *Second, the language of s. 50B (as introduced by the 2010 Act) is broad enough to apply to judicial review proceedings seeking to quash any type of planning decision. The amendments to s. 50B were effected by s. 33 of the 2010 Act which is contained in Part II of that Act. But s. 1(2) of the 2010 Act provided that Part II of that Act should be collectively cited and construed with the 2000 Act and the amendments thereto. The effect of the collective citation and interpretation clause is that the 2000 Act and the subsequent amendments thereto are all deemed to be the equivalent of one Act, in this instance, the 2000 Act.*
>
> *Here it is important to note that the judicial review proceedings seek to impugn a decision taken (or purportedly taken) under the Act of 2000.*

> *Nevertheless, as we have just seen, having regard to the collective citation and construction provisions of s. 1(2) of the Act of 2010, it was the Act of 2000 which is deemed in law to have been the mechanism whereby the three European Union Directives were transposed into national law. It is for this reason, therefore, that the present challenge is to the validity of an administrative decision taken "pursuant to a law of the State that gives effect to" the three Directives to use the language of the passerelle provisions of s. 50B(1)(a) of the Act of 2000. In other words, as the challenge is to a decision taken pursuant to the Act of 2000 and as it is that Act which is deemed by s. 1(2) of the Act of 2010 to be the Act that gives effect to the three Directives in question, the literal language of s. 50B(1)(a) might suggest that the new "no costs" default rule thereby introduced applied to all judicial review proceedings involving a challenge to the validity of a decision taken under the Act of 2000, irrespective of whether it involved a decision taken under the authority of the three Directives or otherwise.'*

54. The conclusion Hogan J. would have reached if not constrained by the authority of *JC Savage* was based on a strictly literal interpretation of the provisions. He explained (at para. 44):

> *'In my view, for the reasons I have already endeavoured to set out, the bare language of s. 50B(1)(a) is sufficiently broad enough to embrace the application of all judicial review proceedings of planning decisions, even if the method of doing this – via the passerelle clause ("... pursuant to a law*

> *of the State that gives effect to.....") in the sub-section – is unusual and indirect. If, however, this view were correct and the language of the subsection was deemed to be sufficiently clear, then it would be unnecessary to look any further to the underlying purposes of the subsection.'*

55. It is, I think, notable that none of these three cases addressed the issue that is central to this appeal – the contention that s. 50B applies only to those *grounds* of a challenge that implead the three Directives recited in s. 50B(1)(a). That question first directly arose in *McCallig v. An Bord Pleanála (No. 2)* [2014] IEHC 353 ('*McCallig'*). There, the applicant had two categories of complaint arising from the grant of planning permission, one relating to a failure to properly assess the likely significant effects of the proposed development on the environment in breach of the EIA Directive, and the other arising from her claim that a portion of her lands were wrongfully included in the application for, and grant of, permission. The case is a curious one because it was the applicant who was contending for a limited reading of s. 50B while the notice party argued for the *broader* interpretation. The position of the developer notice party (and said at para. 42 of the judgment to have been adopted by the Board – the local authority notice party took no part in the proceedings) was summarised by the judge as follows (at para. 42):

> '*the 'proceedings' in the instant case were by way of judicial review of a decision or purported decision made pursuant to one of these three specific categories and, therefore, each party should bear that party's own costs of the entire proceedings.'*

56. That oddity arose in a context where the applicant succeeded in part of her case, but the notice party contended that s. 50B applied to the entire action (not just that part of the case addressing EIA) and therefore that no order for costs could be made against it. I have already noted that EMPA introduced a facility for a successful applicant to obtain some or all of its costs, but that provision post-dated the institution of the proceedings (although it was in force by the time the opposition papers were filed in the case). A significant part of the judgment is directed to the court's conclusion that the facility to award costs in a s. 50B case introduced by EMPA did not apply to proceedings commenced before that legislation was enacted. Herbert J. decided that the amended provision did not, for that reason, apply in the case.

57. As to the scope of s. 50B as enacted, Herbert J. chose the narrower interpretation for these reasons (at para. 44):

> *'In my judgment "proceedings" as used in s. 50B(1) only refers to that part of judicial review proceedings which challenge a decision made or action taken or a failure to take action pursuant to one or more of the three categories therein specified. "Proceedings" is not defined in the Act of 2010, in the Planning and Development Act 2000, or in the Interpretation Act 2005. It is not a term of legal art and where undefined its meaning falls to be established by reference to the context in which it is used, (see Minister for Justice v. Information Commissioner [2001] 3 I.R. 43 at 45: Littaur v. Steggles Palmer [1986] 1 W.L.R. 287 at 293 A-E). In my judgment it cannot be considered that the legislature intended so radical an alteration to the law and practice as to costs as to provide that costs in every judicial review*

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

NEPPC and subsequent cases

58. In *NEPPC and anor. v. An Bord Pleanála and ors (No.2)* [2016] IEHC 300, Humphreys J. was called upon to address the application of, *inter alia,* s. 50B in proceedings in which the applicants had unsuccessfully sought to challenge on a variety of grounds different aspects of the development consent process for the North South Interconnector, a project involving the erection of a network of electricity pylons from County Meath through to the border with Northern Ireland. The project had been determined to be a Project of Common Interest for the purposes of Regulation 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure. The challenge raised a wide range of complaints, including that the environmental impact statements and Natura 2000 impact statements

were defective, that parts of the development consent process were unlawful, that the application did not comply with the provisions of national planning law, and that the requirements of a fair hearing were infringed *inter alia* on account of a bias on the part of the Board.

59. Humphreys J. referred a number of questions to CJEU arising from the interrelationship between the successor to Article 10a, Article 11(4) of Directive 2011/92 ('Article 11(4)'), the Aarhus Convention, and the provisions of Irish law implementing same. One of those questions addressed the scope of the requirement in Article 11(4) that the procedure provided for there not be prohibitively expensive. Another addressed the scope of the NPE obligation under Article 9(3) of Aarhus. A question was also raised as to whether it was open to a Member State to provide in legislation for exceptions to the rule that environmental proceedings not be prohibitively expensive where no such exception is provided for in the Directive or in Aarhus.

60. While it will be necessary to return in more detail to the resulting decision in Case C-470/16 *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála* ECLI:EU:C:2018:185 ('*NEPPC'*), for present purposes five propositions can be taken from the judgment of CJEU in that reference. Three of these followed from the decision in *Slovak Brown Bear* :

(i) Where an applicant raises both pleas under Article 11(4) of the Directive alleging infringement of the rules on public participation and pleas alleging infringement of other rules, the NPE requirement applies only

to the costs relating to the part of the challenge alleging infringement of the rules on public participation (at para. 44).

(ii) Aarhus is '*an integral part of the EU legal order'* as to the interpretation of which CJEU has jurisdiction to give preliminary rulings (at para. 46).

(iii) Article 9(4) as applied to Article 9(3) of Aarhus did not contain unconditional or sufficiently precise obligations capable of directly regulating the legal position of individuals (at para. 52).

(iv) However, there will be certain circumstances in which national courts applying national environmental law will be required to give an interpretation to national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention (at paras. 57, 58 and 66(3)).

(v) Aarhus seeks to apply NPE to challenges aimed at enforcing environmental law in the abstract, without making such protection subject to the demonstration of any link with existing or potential damage to the environment (at para. 64). Member States cannot therefore derogate from NPE for proceedings in respect of which there is no link between the alleged breach of national environmental law and damage to the environment.

61. The High Court addressed s. 50B having regard to the decision of CJEU in *NEPPC* in two further decisions before the final amendment to s. 50B. In *SC SYM Fotovoltaic Energy SRL v. Mayo Co. Co. No.3* [2018] IEHC 245 ('*SC SYM*') the court was concerned with the costs of an unsuccessful application to extend time so as to challenge the validity not of a development consent, but of a decision made pursuant to s. 5 PDA determining whether particular acts constituted a '*development'* requiring permission, or whether it comprised exempted development. The proceedings the applicant sought to bring had involved three broad issues – a claim that the use of the s. 5 procedure was not appropriate because an EIA was required as a matter of law, a fair procedures argument based on the failure of the respondent council to notify the applicants of the application for a s. 5 declaration and the contention that there had been a failure to give proper reasons for the impugned decision. The applicant argued that the court should look at the question of costs from the point of view of whether the litigation in general concerned a project which required an EIA and, that as it did, no order as to costs should be made. It further contended that NPE applied to each of the three grounds in the proceedings, arguing that Article 9(3) and 9(4) of Aarhus applied to those parts of the proceedings that did not arise under the Public Participation Directives, and that a conforming interpretation should be applied to. s. 50B so as to capture those grounds. The notice party (which was seeking its costs) contended that the court should adopt the approach signalled by Herbert J. in *McCallig* and apply NPE only to the public participation ground of challenge, granting the notice party its costs in respect of the fair procedures and reasons arguments.

62. Noting the judgment of CJEU in *NEPPC*, Barniville J. determined that costs protection under s. 50B applied only to the EIA grounds raised by the unsuccessful applicant. He

felt that s. 50B should not be interpreted as having a wider or more expansive meaning than required by Article 11(4). Insofar as the CJEU had suggested an obligation to adopt a conforming interpretation of national law with Aarhus, this only applied to '*national environmental law'*. The arguments as to fair procedures and reasons, Barniville J. found, were purely national law questions which were not concerned with national environmental law or its application. He said that to apply NPE to the entirety of the proceedings just because one of the grounds might attract the benefit of that provision would be contrary to the approach endorsed by CJEU in *NEPPC* (at para. 49).

63. Barniville J. proceeded from there to consider the distinct question of whether he was obliged to apply, by means of a conforming interpretation of national procedural law, Articles 9(3) and 9(4) of Aarhus to those parts of the proceedings that would not be so covered to the extent that the applicant was seeking to ensure that national environmental law was complied with. He concluded that insofar as the issues of fair procedures and reasons were concerned, these were '*purely national law grounds'* and did not fall within the description '*national environmental law'*. It is to be noted that the judgment appears to proceed on the basis that *had* these arguments raised issues of '*national environmental law'*, they would have been covered by the interpretative obligation. On that basis he made an order in favour of the notice party for the recovery of two-thirds of its costs, this representing the court's assessment of the costs attributable to the '*purely'* national law grounds.

64. In *Merriman and ors. v. Fingal Co. Co. and ors* (Unreported High Court 17 May 2018) ('*Merriman'*), Barrett J. noted, but did not comment on, the judgment of Barniville J.

in *SC SYM*. There, the applicant had unsuccessfully challenged a decision under s. 42 PDA, which enables an extension of the duration of a permission. In the course of his judgment, Barrett J. observed that the purpose of s. 50B was to give effect to the costs aspect of Article 11(4) and no more. He concluded that certain EIA arguments made in the case before him came within that provision and, thus, the costs protection provided for under s. 50B applied to those grounds. He also concluded that while the Habitats Directive was not mentioned in s. 50B, it was a '*law relating to the environment'* for the purposes of Article 9(3) of Aarhus and, thus, within the fourth proposition I have extracted above from the decision in *NEPPC*.

65. Arguments, however, based upon the applicant's asserted constitutional right to be heard and property rights under the Constitution and the ECHR, did not fall within this description. In the course of his judgment, Barrett J. observed as follows (at para. 10):

> '*It does not appear that a law can properly be considered a 'law relating to the environment' when such law (i) neither in substance nor form relates to the environment per se, but (ii) can nonetheless be sought to be brought to bear in what might loosely be described as environmental law proceedings.'*

66. For that reason, the court made no order as to costs in relation to the EIA Directive portion of the proceedings, directed the applicants to pay the costs of the non-EIA related portion of the proceedings and ordered that the applicant pay *some* of the costs in relation to the Habitats Directive related portion of the proceedings. He directed that

these fell within the NPE principle, suggesting further submissions as to how the consequent reduction to those costs might be calculated.

PD18

67. The decision of the CJEU in *NEPPC* was delivered in March 2018. I think it fair to say that at the point at which the Oireachtas introduced further changes to s. 50B *via* the Planning and Development (Amendment) Act 2018 ('*PD18*') four months later, the case law disclosed diverse approaches by High Court judges to the interpretation of the provision, some relating cost protection to the nature of the project in question and/or envisaging such protection provided the proceedings involved the listed Directives, some adopting the position that costs could be split according to issues that did and those that did not engage the public participation grounds in those Directives, with one judge adopting the position that the section might be interpreted literally so as to include *all* planning challenges. The decision of the CJEU had made it clear that insofar as Article 11(4) was concerned, costs could be split for the purposes of NPE as between those grounds engaging the Public Participation Directive and those that did not, while it was also clear that an interpretative obligation arose in relation to at least some grounds engaging '*national law relating to the environment*'. The two most recent High Court cases had suggested in the light of *NEPPC* that a conforming interpretation could operate so as to *extend* NPE beyond grounds arising from the three Directives listed in s. 50B(1)(a) provided the grounds involved national law relating to the environment. One of those cases envisaged NPE as operating *vis a vis* grounds relating to the Habitats Directive to *reduce* costs – although no clear methodology was identified as to how that reduction would be effected.

68. It should also be noted that although Barrett J. did not refer to the decision of CJEU of 8 November 2016 in Case C-243/15 *Lesoochranárske zoskupenie VLK v. Obvodný úrad Trenčín* ECLI:EU:C:2016:838 ('*LZ2*'), the conclusion he reached in *Merriman* reflected the outcome of that case. There, the CJEU decided that decisions adopted by national authorities within the framework of Article 6(3) of the Habitats Directive fell within Article 9(2) of Aarhus *irrespective* of whether they related to one of the specific activities identified in Annex 1 to that Convention (at para. 57). This conclusion was reached on the basis that decisions of this kind were envisaged by Article 6(1)(b) of Aarhus as they involved assessment by the competent authorities before any authorisation of an activity, as to whether that activity is likely to have significant effects on the environment. That meant that the rights that could be relied upon in an action covered by Article 9(2) of Aarhus included rules of national law flowing from Article 6 of the Habitats Directive.

69. That was the context in which s. 29 of PD18 made two substantive changes to s. 50B. First, the reference to '*law of the State'* in s. 50B(1)(a) was replaced with the words '*statutory provision'*, and a new ss.(6) inserted to the effect that this meant '*a provision of an enactment or instrument under an enactment'*. On any view, this was a limiting change, so that it was not sufficient that the challenged decision be made under a statute giving '*effect'* to the various listed Directives, instead constraining the scope of the section to decisions taken under the particular sections of the Act in question.

70. Second, a new clause, (IV) was inserted into s. 50B(1)(a), referencing paragraphs 3 and 4 of Article 6 of the Habitats Directive. Counsel for the applicant in these proceedings

suggested in his oral submissions that this was introduced on account of the decision of the CJEU in *LZ2*.

71. The consequence was that as of the date of the institution of these proceedings, s. 50B read (in material parts) as follows:

> *'(1) This section applies to proceedings of the following kinds:*
>
> *(a) proceedings in the High Court by way of judicial review, or of seeking leave to apply for judicial review, of—*
>
> *(i) any decision or purported decision made or purportedly made,*
>
> *(ii) any action taken or purportedly taken,*
>
> *(iii) any failure to take any action,*
>
> *pursuant to a statutory provision that gives effect to—*
>
> *(I) a provision of Council Directive 85/337/EEC of 27 June 1985 to which Article 10a (inserted by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to*

public participation and access to justice Council Directive 85/337/EEC and 96/61/EC) of that Council Directive applies,

(II) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, or

(III) a provision of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control to which Article 16 of that Directive applies, or

(IV) paragraph 3 or 4 of Article 6 of the Habitats Directive; or

(b) an appeal (including an appeal by way of case stated) to the Supreme Court from a decision of the High Court in a proceeding referred to in paragraph (a);

(c) proceedings in the High Court or the Supreme Court for interim or interlocutory relief in relation to a proceeding referred to in paragraph (a) or (b).

(2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (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.'*

72. Shortly after the coming into effect of these provisions of PD18, Humphreys J. addressed the implications of the CJEU decision in *NEPPC* in his judgment in *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála & ors (No. 5)* [2018] IEHC 622 ('*NEPPC 5'*). He decided that the majority of the grounds in that case were '*public participation points',* and applied s. 50B to those grounds. He concluded that that left '*a very modest balance of costs'* and that because these did not add significantly to the length of the hearing, it would be appropriate to make no order as to costs.

73. As to the costs arising from the grounds that were *not* public participation points, Humphreys J. detected a difference of language throughout different paragraphs of the CJEU decision, concluding that the effect of the judgment was to impose an interpretative obligation in respect of grounds in national law within the field covered by EU environmental law even if those points went beyond the public participation rules. He classified the approach adopted by Barrett J. in *Merriman* as involving a distinction between points relating to rights (such as fair procedures) that were based on EU law and points driving at the same conclusion that were based on the Constitution

and ECHR. He said (at para. 36) '*one would have to reject the concept that a rigid distinction can be drawn between … fair procedures and rights points that arise from EU law and the same points arising from the Constitution and national law, as suggested in Merriman.*'. Humphreys J. expressed the view that the approach adopted by Barrett J. to the allocation of costs and the application of the NPE rule was '*overly complex'* (at para. 36), preferring what he discerned as the '*somewhat simpler approach'* adopted by Barniville J. in *SC SYM* (at para. 39).

III SECTION 50B: THE HIGH COURT, THE COURT OF APPEAL AND THE AFTERMATH

Section 50B: the High Court judgment

74. The High Court judgment operated on the basis that the Board's case was that the special costs rules provided for in s. 50B and/or EMPA was confined to (i) grounds alleging an infringement of any one of the four Directives identified under s. 50B, or (ii) grounds which allege a contravention of the provisions of national law relating to the environment within the field of EU environmental law. It be noted that this is *not* the interpretation adopted in *JC Savage, Shilleleagh Quarries, Kimpton Vale,* or *McCallig* (the latter of which had limited the provision to grounds relating to the Directive), and that the second limb of the formulation arose from the CJEU decision in *NEPPC*.

75. The first basis on which Simons J. accepted the contention that the special costs provisions in s. 50B applied to the entirety of these proceedings was rooted in a combination of a strictly literal interpretation of the language used in s. 50B, and the provisions of s. 9 PD16.

76. Section 9 imposes obligations on the Board in respect of both the EIA Directive and the Habitats Directive. Section 9(1)(b) obliges the Board to consider, where required, an environmental impact assessment report or Natura 2000 impact statement, or both that report and that statement, as the case may be, submitted to the board pursuant to s.

8(2) of that Act. Section 9(2) requires the Board, in considering the likely consequences of a proposed development for proper planning and sustainable development, to have regard *inter alia* to whether the area or part of the area is a European site or whether the proposed development would have an effect on a European site. It follows, Simons J. said, that on its natural and ordinary meaning s. 9 of PD16 is a '*statutory provision'* that gives effect to *inter alia* para. 3 of Article 6 of the Habitats Directive.

77. From there, Simons J. turned to the language in s. 50B insofar as it refers to '*proceedings ... by way of judicial review ... of any decision ... purportedly made ... pursuant to a statutory provision that gives effect to ... paragraph 3 or 4 of Article 6 of the Habitats Directive'*. He emphasised two features of this language. First, that the section focusses on '*proceedings'* and that there is no reference in s. 50B to '*grounds'* of challenge. Noting the references to '*grounds'* in s. 50A PDA, Simons J. observed that had the Oireachtas intended to impose different costs rules in respect of different categories of grounds within the same '*proceedings*', the term '*grounds*' would have been carried forward into s. 50B (at para. 39). Second, he said that the '*criteria triggering the special costs rules under Irish domestic legislation are directed to the nature of the <u>decision</u> being challenged in the judicial review proceedings'* (at para. 3).

78. Simons J. then reasoned as follows. In these proceedings, the applicants sought judicial review of a decision made pursuant to s. 9 of PD16. Section 9, in turn, was a provision which gives effect to, at the very least, one of the four Directives specified in s. 50B. Therefore, in the view of Simons J., the special costs rules under s. 50B applied to the entirety of the proceedings, and thus to all grounds of challenge. He helpfully

summarised the conclusion he felt followed from this at the commencement of his judgment (at para. 3):

> '*Where, as in this case, the impugned decision is made pursuant to a statutory provision that gives effect to any one of the following four EU Directives, namely (i) the public participation provisions of the EIA Directive; (ii) the Strategic Environmental Assessment Directive; (iii) the Industrial Emissions Directive; or (iv) article 6(3) or (4) of the Habitats Directive, then the special costs rules apply'*.

79. The fact, Simons J. held, that Ireland could, consistent with EU law, and having regard in particular to the decision of CJEU in *NEPPC* have confined costs protection to the costs associated with individual grounds of challenge was not determinative. This was not what the Oireachtas had done. Here, again, Simons J. emphasised the use in s. 50B of the word '*proceedings'* rather than '*grounds'*. Some of the High Court decisions I have earlier addressed were distinguished (*SC SYM* and *Merriman* because they concerned challenges to decisions made under different provisions) and *McCallig* was found to no longer represent good law. Generally, in this context, Simons J. observed that '*too rigid an application of the principle of precedent might produce an incorrect result'* in the context of the law governing the costs of environmental litigation (at para. 72).

80. Simons J. proceeded, in the event that he was wrong in the conclusion he had reached insofar as based solely upon national law, to consider the effect of the Aarhus Convention. In this regard he emphasised that the costs rules under neither the

Convention nor the EU Directives implementing the same have direct effect in the domestic legal order. Instead, these generate an '*interpretative obligation'* on the part of a national court. That obligation is subject to the principle of *contra legem.*

81. As evident from its terms as quoted above, Article 9(4) of the Convention requires that the procedures provided for by Articles 9(2) and (3) thereof incorporate adequate and effective remedies that are, *inter alia,* not '*prohibitively expensive'*. While Article 9(2) had been given a narrow interpretation, confined to proceedings which allege an infringement of the public participation provisions, Simons J. said that Article 9(3) has been given a broader scope. The consequence is that proceedings which allege a contravention of national environmental law will benefit from '*the interpretative obligation'* although those proceedings did not allege an infringement of the public participation provisions of the Aarhus Convention.

82. The difference between the parties, Simons J. noted, related to the trigger for the interpretative obligation, that is whether it was sufficient that a contravention of national environmental law *simpliciter* be alleged, or whether the obligation was restricted to a subset of that law arising only in the field of EU environmental law. Deciding that it was not necessary to resolve that issue, Simons J. concluded that the issues in these proceedings – save for those relating to landowner consent which he felt were *de minimis* – all fell into that subset of national environmental law which comes within a field of EU environmental law.

83. In this regard, Simons J. attached some importance to the decision in *Conway v. Ireland* [2017] IESC 13, [2017] 1 IR 53 ('*Conway'*). There, he concluded, the Supreme Court

had held that the question of whether a national law may be a '*law relating to the environment'* for the purposes of Article 9(3) of the Convention must be determined as a matter of substance rather than form (at para. 93). In this case, the applicants' challenge was predicated on an allegation that the Board's decision was reached contrary to s. 9(6)of PD16. This, Simons J. held, is a provision of national law relating to the environment and in particular to town planning. The section regulates the grant of development consent for strategic housing development. One of the principal considerations to be taken into account in determining a consent application under s. 9 is the proper planning and sustainable development of the area in which it is proposed to situate the development.

84. Section 9, he said, relates to fields covered by EU environmental law. It imposes obligations on the Board, as the competent authority, in respect of both the EIA Directive and the Habitats Directive. It regulates the role of the development plan in the development consent process. The development plan constitutes a '*plan'* or '*programme'* for the purposes of the Strategic Environmental Assessment Directive (Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment) and s. 9 ensures that the objectives of that Directive are achieved by requiring the Board, as the competent authority for the purposes of granting an application for development consent for strategic housing development, to have regard to the development plan.

85. Similarly, Simons J. concluded that the grounds of challenge advanced in respect of the flood risk management guidelines also related to national environmental law in a field covered by EU environmental law, that is the assessment and management of flood risk.

86. Because the court was required to apply the interpretative obligation in construing s. 50B this meant, Simons J. held, that the court must, subject to the *contra legem* principle '*seek to interpret section 50B so as to ensure that the special costs rules apply to such proceedings'*. He continued (at para. 104):

> *'The interpretation posited earlier in this judgment, i.e. to the effect that section 50B will apply to all of the costs of proceedings which question the validity of a decision made pursuant to section 9 would achieve this result. By contrast, the narrower interpretation advocated for by An Bord Pleanála and the Developer, which would require this court to give an artificial interpretation to the term "proceedings" and "decision" must be rejected. Such arguments run counter to the interpretative obligation, by seeking to invite the court to depart from the natural and ordinary meaning of the statutory language precisely for the purpose of restricting the category of cases which would benefit from the special costs rules.'*

87. For these reasons, Simons J. ordered as follows:

> '*that the costs of the within proceedings in their entirety are subject to section 50B of the PDA 2000. This declaration applies to all of the grounds of challenge.'*

Section 50B: the Court of Appeal judgment

88. The reasons for the decision of the Court of Appeal to allow the Board's appeal against the making of that order were given in a judgment of Costello J., with whom Ní Raifeartaigh J. and Pilkington J. agreed. She noted and examined the decisions in *JC Savage*, *Shillelagh Quarries*, *Kimpton Vale* and *McCallig*. She said that between these and the later decisions to which I have referred, seven judges had come to a conclusion at odds with that reached by Simons J., while in *Kimpton Vale* (where Hogan J. would have come to a similar decision to that reached by Simons J.) he acknowledged the precedent binding him and declined to construe the judgment in the manner he would have had he been the first High Court judge to construe it.

89. From there, Costello J. considered the judgment of the CJEU in *NEPPC,* emphasising two features of the decision. First, she noted that the Advocate General in that case had been of the opinion that the '*not prohibitively expensive'* rules must apply to the proceedings in their entirety, but that the CJEU had rejected that conclusion. Instead, the decision was that as a matter of EU law, the requirement that certain judicial proceedings not be prohibitively expensive as provided for in Article 11(4) of the Public Participation Directive, applies solely to the part of the challenge alleging infringement of the rules on public participation. However, and second, a challenge to an impugned decision or procedure aimed at ensuring that national environmental law is complied with, and which is not covered by the terms of Article 11 of the EIA Directive, will attract the interpretative obligations arising from Article 9(3) and (4) of the Aarhus Convention. These provisions do not have direct effect, and it is a matter for the national court to give an interpretation of national procedural law which is consistent with them and to do so to the fullest extent possible. Costello J. said that Article 9(3)

was '*primarily directed towards enforcement procedures by the public concerned, rather than the making of consent decisions by public authorities*' (at para. 41).

90. Costello J. considered the decisions of the High Court in *SC SYM*, *Merriman* together with the judgment of Humphreys J. in *NEPPC 5*. Costello J. interpreted the judgment of Humphreys J. in *NEPPC 5* as recognising that what she described as '*non-EU law and non-environmental law points'* could result in an award of costs against an unsuccessful applicant (at para. 112). The judge was critical of Simons J.'s treatment of these cases.

91. Nonetheless, Costello J. accepted that literally construed s. 50B had the meaning attributed to that provision by the trial judge: the word '*proceedings'* she said, read literally, means simply '*all of the proceedings, regardless of the grounds upon which judicial review of the impugned decision is sought'* (at para. 128). That did not, however, mean that the trial judge's interpretation of the provision was the correct one. In deciding that it was not, she reasoned from the starting point that in interpreting the legislation it was necessary to place the words used by the legislature in the context in which they appear, including the scheme of the Act as a whole (referring to *The People* (*DPP*) *v. Brown* [2018] IESC 67, [2019] 2 IR 1 ('*Brown'*)), and that in the case of any ambiguity the court should afford the legislation an interpretation that reflected the plain intention of the Oireachtas, where that intention can be ascertained from the Act as a whole (referring to s. 5 of the Interpretation Act 2005). Moreover, Costello J. noted two cases – *An Taisce/The National Trust for Ireland v. McTigue Quarries Limited & Ors*. [2018] IESC 54, [2019] 1 ILRM 118 and *Cronin (Readymix) Limited v. An Bord Pleanála* [2017] IESC 36, [2017] 2 IR 658 – in which this Court had applied similar

principles in rejecting a literal interpretation of provisions of PDA. Having regard to these principles, Costello J., in a careful and detailed judgment, reasoned as follows.

92. First, she stressed the use of the word '*grounds'* in s. 50A of the Act, as contrasted with the '*proceedings'* referred to in s. 50B. This suggested a distinction between the grounds upon which an applicant is given leave to seek judicial review, and the proceedings pursued pursuant to that leave.

93. Second, she observed that the legislative history of the provision strongly suggested that s. 50B had been introduced to comply with the State's obligations as identified in the decision of the CJEU in *Commission v. Ireland*. However, there was – Costello J. said – no reason to assume that it was intended to go further than what was required by those obligations and to introduce what she described as '*a radical, far-reaching amendment to the costs regime in this area'* (at para. 131).

94. Third, from the decision in *An Taisce/The National Trust for Ireland v. McTigue Quarries Limited & Ors*. Costello J. deduced the proposition that because s. 3 of PD10 amended PDA by inserting into the latter the new s.1A which, as I have earlier noted, expressly states that '*[e]ffect or further effect, as the case may be'* is to be given to twelve named Directives, the statute should be construed having regard to this intention. This meant that the starting point in construing s. 50B is that it is intended to give effect to the four Directives named in it. On this basis, the interpretation arrived at by the trial judge extended the special costs rules far wider than the Oireachtas intended.

95. The conclusion reached from a reading of the authorities was, the Court of Appeal judgment concluded, that it should inquire why – if the Oireachtas intended that all applicants would benefit from the special costs rules in cases of judicial review of any decision, act or omission (or purported decision, act or omission) of a planning authority or An Bord Pleanála, regardless of the basis for such challenge – the section did not simply say so rather than adopt the cumbersome formulation of linking proceedings and particular Directives.

96. Fourth, Costello J. found that the trial judge's interpretation extended beyond applications under PD16. It led to the conclusion that an application for judicial review of a decision, or purported decision, which is made pursuant to any statutory provision which gives effect to the public participation requirements of the EIA Directive or Article 6(3) of the Habitats Directive (for example), attracts the special costs rules, even if no ground of challenge is based upon an alleged infringement of those provisions or any of the statutory provisions giving effect to those provisions. The example was given of an applicant for judicial review who sought to challenge a decision to grant planning permission for an extension to a private house which required planning permission on the grounds of objective bias by the decision maker. The application would be subject to a screening for an appropriate assessment and, therefore, on the basis of the reasoning of the trial judge, the impugned decision would be one taken pursuant to a provision giving effect to Article 6(3) of the Habitats Directive, therefore coming under s. 50B. If this was the intention of the Oireachtas, the section could have stated that it applies to all proceedings in the High Court by way of judicial review, or seeking leave to apply for judicial review of any decision, action or failure to take action, without referring to the four specific Directives to which the statutory provision

gives effect. The literal interpretation of the section would render largely superfluous parts of s. 50B. This, Costello J. believed, suggested that the literal interpretation did not reflect the intention of the legislature.

97. Fifth, the Court of Appeal felt it important to note that both the Aarhus Convention and Article 11 of the EIA Directive requires that the '*procedure*' to which Article 9 of the Aarhus Convention and Article 11 of the EIA Directive applies, shall not be prohibitively expensive. Costello J. understood that this was transposed by the Oireachtas as '*proceedings*', being the nearest appropriate equivalent to the word '*procedure'*, in contradistinction to '*grounds*' upon which a party may be given leave to seek judicial review.

98. Sixth, and referring to the judgment of Hogan J. in *Kimpton Vale*, Costello J. said that if the Oireachtas intended such a far-reaching change in the law to all categories of judicial review proceedings challenging decisions of planning authorities, it is difficult to understand why it did so in such an indirect and complicated fashion. There is, she noted, a presumption against unclear changes in the law to be applied when a court is construing a statute.

99. Seventh, the construction urged by the appellant begged the question why in PD18, which inserted the reference to the Habitats Directive, the Oireachtas limited the scope of the provision by replacing the words '*a law of the State*' with the words '*statutory provision'*. She noted that the Oireachtas had availed of the opportunity presented by the enactment of PD18 to tighten the scope of s. 50B by making this change. It did so in the context of several decisions of the High Court which construed s. 50B as applying

only to those grounds of judicial review which concerned the listed Directives, and not to those grounds which fell outside those parameters. Had the Oireachtas intended that the special costs rules should apply by reference to the decision being impugned rather than the grounds of challenge, the Court of Appeal felt that it was difficult to understand why it failed to take the opportunity to amend the section to make this intent clear if those earlier decisions had failed to give effect to its intention.

100. The Court of Appeal agreed with the trial judge that s. 9 of PD16 is a measure of national environmental law and that the impugned decision was taken pursuant to s. 9(4) of that Act. This was not of itself dispositive of whether it attracted the '*not prohibitively expensive*' rule, however. The disputed grounds did not attract this protection as there is a critical distinction between the basis for the challenge to the decision, and the decision under challenge. The disputed grounds, Costello J. said, were ones on which the court was invited to quash a decision on classic judicial review grounds such as that the decision was *ultra vires*, or contrary to natural and constitutional justice. These were not based on the application of national environmental law.

101. Separately the Court of Appeal was of the view that it was not open to the trial judge to have recourse to the SEA Directive in the manner he had. The fact that a development plan is a plan or programme for the purposes of that Directive is relevant to whether the development plan has been lawfully adopted, but where there was no challenge to the development plan itself and merely a challenge to a decision to grant planning permission which was alleged to involve a material contravention of the development plan, this was not a challenge based on the SEA Directive and therefore not a challenge based on national environmental law.

102. Thus, the court concluded, the special costs rules apply to those grounds of challenge which allege a breach of the requirements of the Directives specified in s. 50B(1) but not to any other grounds for judicial review in the proceedings which are not so based. While a decision to grant planning permission may entail an environmental assessment or a screening for an appropriate assessment, this does not result in each such individual decision being a '*decision*' for the purposes of s. 50B. The interpretative obligation does not apply to proceedings or grounds of challenge where the application of national environmental law is not in issue or the decision is not challenged on the basis of national environmental law.

Later cases

103. Following delivery of the judgment of the Court of Appeal, a series of judgments have been delivered in other cases addressing NPE, some of which have in turn been appealed to this Court: *Enniskerry Alliance v. An Bord Pleanála and Project East Meath v. An Bord Pleanála Nos. 1, 2 and 3* [2022] IEHC 6, [2022] IEHC 337 and [2022] IEHC 338, *Save Roscam Peninsula CLG v. An Bord Pleanála* [2022] IEHC 202, and *Jennings v. An Bord Pleanála* [2022] IEHC 249. All but the last of these judgments was delivered by Humphreys J., and appeals are pending on certain aspects of the orders in those cases. These cases, between them, have disclosed a myriad of further issues arising from the interpretation of s. 50B and of the relevant provisions of EMPA. These include whether s. 50B could apply to cases arising from a screening rather than a full Environmental Impact Assessment ('EIA'), whether the provision was applicable where there was a full EIA but public participation grounds were not pleaded

as being in issue, how points that might have been (but were not) pleaded as public participation grounds should be treated and what level of '*environmental damage'* was required before the provisions of EMPA were applicable.

104. Humphreys J. has also referred a number of questions to the CJEU in *Enniskerry Alliance v. An Bord Pleanála and Project East Meath v. An Bord Pleanála* and *Save Roscam Peninsula CLG v. An Bord Pleanála*. Together with issues around the operation of *stare decisis* upon the making of references to the CJEU, those questions are (to paraphrase somewhat) directed to whether:

(i) the NPE interpretative obligation applies only within the sphere of EU environmental law,

(ii) any such requirement applies simply because a challenged decision is subject to procedures laid down in EU environmental law,

(iii) a challenge that is not based on the Strategic Environmental Assessment Directive but relates to alleged material contravention of an instrument of general application that was itself subject to SEA is within the sphere of EU environmental law,

(iv) a challenge based on '*classic judicial review grounds'* is part of national environmental law and whether national environmental law includes national law relating to sustainable development.

(v) the principle of legal certainty requires member states to provide rules as to NPE that will allow a litigant to know whether and in what amount NPE will apply and/or whether NPE means no order as to costs and/or whether an express legislative rule providing for no order as to costs must be extended to claims subject to the EU interpretative obligation, but not subject to that express rule.

IV READING THE STATUTE

Interpretation

105. In its 1999 Consultation Paper on '*Statutory Drafting and Interpretation: Plain Language and the Law'* (LRC-CP14-1999), the Law Reform Commission observed a contrast between judges '*who construe a statute in order to ascertain the intention of the legislature and those who construe a statute in strict accordance with its words and drafting'* (id. at para. 1.033). The Commission noted, in particular, various statements in *Inspector of Taxes v. Kiernan* [1981] IR 117, *Howard and ors. v. Commissioners of Public Works* [1994] 1 IR 101, and *DPP (Ivers) v. Murphy* [1999] 1 IR 98 as disclosing these differing approaches to the ascertainment of legislative intent. While the broader based analysis was by then firmly in the ascendant, the case law subsequent to the 1999 Consultation Paper presents the occasional instance of a narrow and literal construction that eschewed in the case of seemingly precise and unambiguous language, any broader consideration of legislative context. Indeed, one such decision (*Board of Management of St. Molaga's School v. Minister for Education* [2010] IESC 57, [2011] 1 IR 362) was referred to by Hogan J. in support of the analysis he had suggested in *Kimpton Vale.* There, Denham J. (as she then was) said where the literal meaning is clear, unambiguous and not absurd there was no necessity - indeed she said it would be wrong - to use other canons of construction to interpret sections of a statute.

106. The oft-cited judgment of Black J. in *The People (Attorney General) v. Kennedy* [1946] IR 517, 536 shows that the proposition that sometimes even the process of *identifying*

ambiguity in a statutory provision requires an understanding of context, is hardly a new one (see for example *McCann v. Ó Culacháin (Inspector of Taxes)* [1986] IR 196, 201). It is fair to say, however, that since the decision of this Court in *St. Molaga's School* the more recent cases both give that background an additional prominence and, furthermore, define the '*context'* that is relevant for this purpose in a strikingly broad way. The most significant decisions are now *Brown*; *Minister for Justice v. Vilkas* [2018] IESC 69, [2020] 1 IR 676; *Dunnes Stores v. The Revenue Commissioners* [2019] IESC 50, [2020] 3 IR 480; *Bookfinders Ltd. v. The Revenue Commissioners* [2020] IESC 60; and *The People (DPP) v. AC* [2021] IESC 74, [2021] 2 ILRM 305 (*'Vilkas', Dunnes Stores', 'Bookfinders'* and '*AC'* respectively). The judgment of McKechnie J. in *Brown* provides a good summary that is reflected in the other decisions: indeed, it was cited at some length and relied upon in the course of the judgment of the Court of Appeal in this case. The essential points he made were as follows :

(i) The first and most important port of call is the words of the statute itself, those words being given their ordinary and natural meaning (at paras. 92 and 93).

(ii) However, those words must be viewed in context; what this means will depend on the statute and the circumstances, but may include '*the immediate context of the sentence within which the words are used; the other subsections of the provision in question; other sections within the relevant Part of the Act; the Act as a whole; any legislative antecedents to the statute/the legislative history of the Act, including ... LRC or other*

reports; and perhaps ... the mischief which the Act sought to remedy' (at para. 94).

(iii) In construing those words in that context, the court will be guided by the various canons, maxims, principles and rules of interpretation all of which will assist in elucidating the meaning to be attributed to the language (see para. 92).

(iv) If that exercise in interpreting the words (and this includes interpreting them in the light of that context) yields ambiguity, then the court will seek to discern the intended object of the Act and the reasons the statute was enacted (at para. 95).

107. On the specific issues in that case McKechnie J. dissented, but the basic proposition has been restated since: in his judgment (with which O'Donnell, MacMenamin, O'Malley and Finlay Geoghegan JJ. agreed) in *Dunnes Stores* (at paras. 64 to 66 – '*context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that*'): and in *Bookfinders* (at para. 53, per O'Donnell J. approving paras. 62 to 72 of the judgment in *Dunnes Stores* and with whom Clarke C.J., MacMenamin, Charleton and O'Malley JJ. agreed): '*[a] literal approach should not descend into an obdurate resistance to the statutory object, disguised as adherence to grammatical precision'* (at para. 56). Ambiguity will thus arise because on its face the text is clearly susceptible to more than one meaning, but it may also be contextual, so that seemingly clear words can, when placed in situation, bear a construction not always evident from the language alone: as McKechnie J. stated

in his judgment in *Vilkas* (see paras. 85 to 87) (and with which Clarke C.J., O'Donnell, MacMenamin and O'Malley JJ. agreed) ('*[c]onsideration of the context forms a part of the literal approach'*).

108. It is also to be noted that while McKechnie J. envisaged here two stages to an inquiry – words in context and (if there remained ambiguity), purpose – it is now clear that these approaches are properly viewed as part of a single continuum rather than as separated fields to be filled in, the second only arising for consideration if the first is inconclusive. To that extent I think that the Attorney General is correct when he submits that the effect of these decisions – and in particular of *Dunnes Stores* and *Bookfinders* – is that the literal and purposive approaches to statutory interpretation are not hermetically sealed. Indeed McKechnie J. later suggested as much in *Brown* (at para. 95) (and see more recently *O'Sullivan v. Ireland* [2019] IESC 33, [2020] 1 IR 413, 443 per Charlton J.) and *Dunnes Stores* ('*subject matter .. and the object in view ... will inform the meaning of the words, phrases or provisions in question'*).

109. It is curious that, notwithstanding these decisions and statements, and despite the ubiquity of issues of statutory interpretation in modern litigation, both submissions of counsel and decisions of some courts show on occasion a dogged adherence to the refrain that a literal interpretation of a statutory provision is departed from so as to consider broader questions of statutory purpose and context only where the construction yielded by that literal analysis is '*ambiguous or absurd'*. That, in fact, was the proposition advanced by the applicant in this case. In part, this may be a consequence of a misunderstanding as to the effect of s. 5 of the Interpretation Act 2005, to which I will turn shortly. What, in fact, the modern authorities now make clear is that with or

without the intervention of that provision, in no case can the process of ascertaining the '*legislative intent*' or the '*will of the Oireachtas*' be reduced to the reflexive rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted.

110. The decision in *AC* is both a very good, and the most recent, example of this analysis. Section 25 of the Non-Fatal Offences against the Person Act 1997 enabled the production in the course of the prosecution of offences involving the causing of harm to a person, of a certificate purporting to be signed by a medical practitioner and relating to an examination of the person said to have been so harmed. When produced in accordance with the section, the certificate was admissible as *prima facie* evidence of '*any fact thereby certified*'. The issue was whether this meant what it appeared to say, so that a medical practitioner could sign such a certificate attesting to an examination undertaken by another doctor, thereby enabling the certificate to be admitted as *prima facie* evidence of its contents, or whether it was limited to proof by a doctor of their own medical records and of examinations conducted under their supervision.

111. O'Donnell C.J. (with whose judgment MacMenamin, Charleton, O'Malley and Woulfe JJ. agreed) explained the ambit of the literal approach (or as he framed it '*the plain meaning approach*') in terms similar to those adopted by McKechnie J. in the cases to which I have referred earlier. It would be wrong, he said, to isolate the critical words and consider if they have a plain or literal meaning in the abstract. Instead '*if, **when viewed in context, having regard to the subject matter and the objective of the legislation,** a single, plain meaning is apparent, then effect must be given to it unless it*

would be so plainly absurd that it could not have been intended' (at para. 7) (emphasis added). The section, he held, was ambiguous and required additional words to make its meaning clear beyond dispute: '*certification'* implied that the person was in a position to authoritatively state the truth of some fact or matter. Viewed in the light of the purpose of the provision – including the fact that it was intended to enable the admission of evidence against an accused in a criminal trial – it was properly limited in scope to situations in which the medical practitioner certified the record of an examination they personally carried out or which was carried out under their supervision. Were the position otherwise, as the judgment put it, a general practitioner in the West of Ireland could certify an examination conducted by a neurosurgeon in Dublin, an outcome that could not credibly be expected without far greater regulation within the legislation. Charleton J. arrived at a similar conclusion, observing '*the state of the law prior to the enactment and the purpose of the enactment are indispensable instruments for construction as well as the requirement that a court give to legislation its ordinary meaning'* (at para. 24).

112. I stress these features of the process of statutory interpretation here because there is both some merit to the suggestion in the Court of Appeal judgment that the High Court judge applied an overly literal interpretation to s. 50B, and (as I explain later) at the same time substance in the applicant's contention that the Court of Appeal pushed its analysis of the context too far from the moorings of the language of the section. The debate reveals an obvious danger in broadening the approach to the interpretation of legislation in the way suggested by the more recent cases - that the line between the permissible admission of '*context'* and identification of '*purpose'*, and the impermissible imposition on legislation of an outcome that appears reasonable or

sensible to an individual judge or which aligns with his or her instinct as to what the legislators would have said had they considered the problem at hand, becomes blurred. In seeking to maintain the clarity of the distinction, there are four basic propositions that must be borne in mind.

113. First, '*legislative intent*' as used to describe the object of this interpretative exercise is a misnomer: a court cannot peer into minds of parliamentarians when they enacted legislation and as the decision of this court in *Crilly v. Farrington* [2001] 3 IR 251 emphatically declares, their subjective intent is not relevant to construction. Even if that subjective intent could be ascertained and admitted, the purpose of individual parliamentarians can never be reliably attributed to a collective assembly whose members may act with differing intentions and objects.

114. Second, and instead, what the court is concerned to do when interpreting a statute is to ascertain the legal effect attributed to the legislation by a set of rules and presumptions the common law (and latterly statute) has developed for that purpose (see *DPP v. Flanagan* [1979] IR 265, at p. 282 per Henchy J.). This is why the proper application of the rules of statutory interpretation may produce a result which, in hindsight, some parliamentarians might plausibly say they never intended to bring about. That is the price of an approach which prefers the application of transparent, coherent and objectively ascertainable principles to the interpretation of legislation, to a situation in which judges construe an Act of the Oireachtas by reference to their individual assessments of what they think parliament ought sensibly to have wished to achieve by the legislation (see the comments of Finlay C.J. in *McGrath v. McDermott* [1988] IR 258, at p. 276).

115. Third, and to that end, the words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about. The importance of this proposition and the reason for it, cannot be overstated. Those words are the sole identifiable and legally admissible outward expression of its members' objectives: the text of the legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when a statute is passed. In deciding what legal effect is to be given to those words their plain meaning is a good point of departure, as it is to be assumed that it reflects what the legislators themselves understood when they decided to approve it.

116. Fourth, and at the same time, the Oireachtas usually enacts a composite statute, not a collection of disassociated provisions, and it does so in a pre-existing context and for a purpose. The best guide to that purpose, for this very reason, is the language of the statute read as a whole, but sometimes that necessarily falls to be understood and informed by reliable and identifiable background information of the kind described by McKechnie J. in *Brown*. However - and in resolving this appeal this is the key and critical point - the '*context*' that is deployed to that end and '*purpose*' so identified must be clear and specific and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language.

Section 5 of the Interpretation Act

117. In his judgment in *AC* Woulfe J. focussed on the provisions of s. 5 of the Interpretation Act 2005, to which reference was made in both the Court of Appeal judgment in this case, and in the course of oral submissions before this Court. The section, as it happens, features only in passing in the recent judgments to which I have earlier referred, possibly because many of these were concerned with provisions that were arguably penal in nature (such legislation being excluded from the section).

118. Section 5 is as follows:

> *'(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—*
>
> *(a) that is obscure or ambiguous, or*
>
> *(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—*
>
> *(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or*
>
> *(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,*

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

119. The terms of the provision present, squarely, the question of whether (and if so, when and how) it affects the power of the court in construing any statutory provision to take account of the '*context'* as described in the decisions I have just outlined. To understand that issue – noted for some time in the texts (see Dodd *Statutory Interpretation in Ireland* (2008) at para. 10.21-10.22; 10.31-10.37) – it is necessary to say something about the origin of the section.

120. In the Law Reform Commission Consultation Paper on '*Statutory Drafting and Interpretation: Plan Language and the Law'*, the Commission suggested the enactment of a provision of this kind so as to expressly enable the admission of identified extrinsic aids to the interpretation of legislation, that purpose necessarily demanding the identification of *when* this would be possible (see LRC-CP14-1999 at p. 93 to 94). The underlying objective was to ensure '*that statutes should be interpreted in accordance with their ordinary meaning in the light of their object and purpose'* (*id.* at p. 122). The version ultimately recommended by the Commission in its Report differed slightly from that proposed in the Consultation Paper but was very similar in its first part to what is now s. 5 (see LRC-61-2000 at p. 89). That provision as suggested by the Law Reform Commission enabled a departure from the literal interpretation of a section in the four situations now identified in s. 5, '*provided that'* the intention of the Oireachtas could be gathered from the Act as a whole (it will be noted that s. 5 uses less restrictive language '*where that intention can be ascertained from the Act as a whole …'*). The provision

was viewed by the Commission as, broadly, reflecting the pre-existing law, although the fourth situation referred to – the literal interpretation defeating the intention of the Oireachtas – was viewed as a '*slight change'* from the common law position. The recommendation, the Commission felt, introduced '*a moderately purposive approach'* which reflected the existing '*best practice'* (see p.19 of the Report).

121. However, the Law Reform Commission recommendation followed this provision with a second proposed section which provided that notwithstanding anything in the preceding provision, the court could have regard to what were termed '*extrinsic aids to construction'* in circumstances of ambiguity, obscurity, absurdity or where a literal interpretation failed to reflect the plain intention of the Oireachtas. These were exhaustively listed and included international agreements referred to in an Act, Law Reform Commission publications, or legislation in the same area. The list also included certain parliamentary materials, the admissibility of which was subsequently (at least generally) out-ruled by the decision in *Crilly v. Farrington.*

122. In s. 5, the Oireachtas adopted the first part of the Commission's recommendation, but not the second. So, having been proposed as a gateway for the admissibility of a variety of identified aids to the ascertainment of parliamentary intent, the provision as enacted - while a portal to the same destination - leaves the means of carriage unspecified beyond the question-begging reference to '*the Act as a whole'*. That presents an obvious issue insofar as many canons of construction depend on resort to material extraneous to the statute itself, including the pre-existing law, statutes that are *in pari materia* with the legislation under consideration and, as this exercise in interpreting s.

5 itself shows, material such as Law Reform Commission reports or what Murray J. in *Crilly v. Farrington* referred to as an Act's *'legal historical context'* (at p.291).

123. In considering the extent to which s. 5 has precluded resort to these interpretative aids, there are three key points. First, the section is engaged only where there is obscurity, ambiguity, absurdity or a failure to reflect the plain intention of the Act when viewed as a whole. There is an unfortunate circularity here, but I can see nothing that displaces the approach adopted in the cases I have addressed above, whereby in identifying ambiguity or for that matter obscurity, regard is had to the overall statutory context as defined by McKechnie J. in *Dunnes Stores.* This will involve a consideration of the words in the section, the section when viewed in the light of the Act, the Act when viewed in the light of any relevant history, the well-established canons of construction and, if necessary, the purpose of the provision.

124. In this case, to take that example, it may well be said that s. 50B is clear and lacking any textual ambiguity, and that indeed was how to begin when the trial judge approached the provision. But while the words of a statute are the first '*port of call'* in the formal exercise in statutory interpretation, many judgments today (including this one) begin by putting the provision being construed in its place, and there is both good and obvious reason for that. Thus, to properly understand s. 50B it is necessary to at least take account of Article 10a/Article 11 and the decision in *Commission v. Ireland.* It is also – as I explain later – helpful to have regard to the approach adopted by the courts to the splitting of legal costs in judicial review proceedings prior to the enactment of the legislation or for that matter the generally applicable rules governing the award of costs following '*the event'*. None of these are evident from '*the Act as a whole'* if

that phrase is construed narrowly, but I cannot see that they are properly excluded from considering whether, when viewed in that context, the legislation admits of more than one meaning even if, on its face, the words themselves seem at first glance to be clear. As I have earlier noted Woulfe J. in *AC* quoted with approval the view that '*ambiguity'* for the purpose of the provision could arise where there was doubt as to the scope of the intended application of the provision (at para. 49).

125. Second, if that is so, it makes very little sense to say that when determining '*the plain intention of the Oireachtas'* in cases that *do* meet the threshold of obscurity, ambiguity, absurdity or where the language does not reflect that '*plain intention'*, the court cannot look to the same contextual material. If a provision is '*ambiguous'* or '*obscure'* the statute '*as a whole'* may provide little enlightenment as to what was intended. Often, as I have noted, such cases are resolved by looking outside the statute under consideration to other statutes *in pari materia* with the Act being interpreted, or legislative precursors to the provision in question. Some of the well-established maxims of interpretation – a number of which I refer to in the course of this judgment – envisage consideration of the pre-existing law, or extraneous material such as Law Reform Commission reports or international treaties in seeking to determine or attribute a legislative intent. On one view, if s. 5 is the only legal mechanism by which a court in interpreting a provision can step outside the strict language of the provision being construed, all of these aids to statutory interpretation have been removed by a sidewind. This would not only represent the dramatic abolition of a basket of well established rules, but would itself mean that s. 5 had operated in many cases to prevent the courts from giving any legal effect to legislative measures: how often can obscurity, ambiguity

or absurdity be remedied *only* by reference to the text of the obscure, ambiguous or absurd statute ?

126. Third, any such principle would introduce a wholly bizarre anomaly: s. 5 does not apply to provisions that '*relate[] to the imposition of a penal or other sanction'*. Yet, as the decisions in *Dunnes Stores, Bookfinders* and *Brown* strongly suggest *all* of this contextual material can be consulted in construing such statutes. To *exclude* them from consideration in the construction of statutes that are *not* penal and thus hold that legislation to a stricter rule of construction than is applied to '*penal'* legislation would represent a most surprising outcome.

127. These three factors compel the conclusion that two phrases in s. 5 – the '*plain intention*' of the Oireachtas and '*the Act as a whole'* – should be viewed as combining to define the object of the exercise of interpretation envisaged by the provision, requiring that the intent ultimately settled on be reconcilable with the Act as a whole, but as leaving the specific matters that may otherwise be taken into account in identifying that intent to be addressed by the courts on a case by case basis and in accordance with the pre-existing jurisprudence. In other words, the language of the provision requires that the '*plain intention'* be evident from the legislation as a whole but does not in itself limit the other matters to which regard can be had in identifying and confirming that intention.

128. That construction of s. 5 implements the purpose of the provision which was, simply, to make it clear that the plain intention of the Oireachtas in promulgating an Act is ascertained by its language viewed in context having regard to the object of the

legislation. While the meaning of the language used in a provision remains the focal point of any exercise in statutory interpretation, textual or contextual ambiguity or obscurity as well as the production of absurdity or undermining of an identifiable legislative intent will enable the taking into account of broader considerations to ascertain and implement the legislator's intention. To that extent, s. 5 is of assistance in providing legislative grounding for and confirmation of the approach that is today taken by the courts (and had been taken by some judges for a very long time). As the Law Reform Commission Consultation Paper makes clear, this was required in a context in which some of the judicial decisions suggested unease in looking beyond the language of the provision. Section 5 puts it beyond doubt that the approach suggested in those decisions does not represent the correct interpretative method. As matters have transpired, the courts have independently of s. 5 arrived at the same point. It follows that while there are unresolved issues around some aspects of this provision (see the comments of McKechnie J. in *AWK v. Minister for Justice* [2020] IESC 10 at paras. 45 to 50) it does not change the basic analysis to be undertaken when interpreting a statute, at least insofar as relevant to this case. And, critically, it leaves no room for doubt but that the words used in the legislation are the primary reference point in the exercise.

V SECTION 50B: TEXT AND CONTEXT

The Text

129. Here, the text *is* clear – at least on the face of the matter – and indeed it will be noted that the Court of Appeal was of the view that literally construed the provision had the meaning attributed to it by Simons J. To recap, the operation of s. 50B in relation to any given set of proceedings is defined by three conditions, and one consequence. The conditions are (a) that the proceedings comprise an application for judicial review or for leave to seek judicial review, (b) that the decision of which judicial review is sought is made pursuant to a statutory provision, and (c) that the statutory provision is one which '*gives effect'* to one of the four named Directives. The consequence is that '*each party to the proceedings ... shall bear its own costs'*. Viewed in this way, there is no doubt – for the reasons explained by Simons J. – but that s. 9 of PD16 comes within this literal description and, therefore, it follows that, on its face, no order for costs can be made against an unsuccessful applicant bringing proceedings in which a decision made pursuant to that provision is challenged.

130. As I have noted, throughout the submissions of the Board and the Attorney General, and in the judgment of the Court of Appeal it is suggested that the text of the provision bears the construction (a) that the provision is applicable only to proceedings that raise grounds of challenge that engage one of these four listed Directives and (b) that the only costs that are covered by the special rule are those attributable to those grounds. It will be noted that this involves the addition of not one, but two, distinct (if

interdependent) qualifications to the seemingly clear terms of the section. Moreover, both the High Court and Court of Appeal appear to have believed it to have been accepted that there may be a further qualification to be grafted on to the provision arising from the requirement that the provision be construed in harmony with the requirements of the decision in *NEPPC.*

131. The second aspect of the construction entails not merely the substitution for a term that is used in s. 50B (‘*its own costs’*), of additional language (‘*its own costs of the grounds arising from the Directives specified in paras, (I), (II), (III) or (IV) of ss. (1)(a)’*), but the interpolation into the section of a wholly different *concept* from that actually provided for, in the shape of splitting the grounds for the purposes of such allocation. It is striking in this respect that while ss.(2) speaks of ‘*its own costs’* without qualification, ss. 2(A) draws a clear and sharp distinction between ‘*[t]he costs of proceedings’* and ‘*a portion of such costs, as are appropriate’.*

132. The contention that a section which is on its face targeted at proceedings challenging a decision is actually concerned with just certain grounds of challenge in those proceedings, presents similar difficulties. At one point in the Court of Appeal judgment it was suggested that the distinction between the ‘*grounds’* referred to in s. 50A PDA and the ‘*proceedings’* referred to in s. 50B supported this interpretation, and indeed at another it was proposed that the Oireachtas had used the term ‘*proceedings’* as a domestic law surrogate for the ‘*procedures’* referred to in Article 9 of Aarhus. I do not find either proposition convincing.

133. If anything, the reference in s. 50 to '*grounds'* and the absence of any such reference in s. 50B reinforces the omission of any linking of costs and grounds in the latter provision. That was the point made by Simons J. and in this regard, I think, he was correct. There is certainly no basis on which it could be said that the intention to import such a distinction can be attributed to the legislature. It is to be recalled that as of 2010 the splitting of costs as between issues in public law proceedings was novel. While there had been cases in which judges had awarded costs by reference to issues, the introduction of a general practice to that end occurred only in 2006 *via* the decision in *Veolia v. Fingal County Council (No. 2)* [2006] IEHC 240, [2007] 2 IR 81. Until that decision the view was that '*the event'* was a prize in which the winner took all, even if it had lost many of the grounds on which it sought to challenge a decision ultimately found to be unlawful. Even then, *Veolia* appeared to have had but a limited range: aspects of the judgment of Clarke J. (as he then was) suggested that cost splitting should only take place in cases of complexity, and indeed that was how the decision was widely understood. All of this has been changed by the provisions of ss.168 and 169 of the Legal Services Regulation Act 2015 (the text of which no longer uses the term '*the event*') and which enables the splitting of costs in any case in which the '*winner'* has not been '*entirely successful'*, but this was not the general position adopted to the legal costs in judicial review proceedings at the time of the enactment of the 2010 Act.

134. While the Board and the Attorney General repeatedly submit that the intention of the Oireachtas was that s. 50B would be limited to the extent required by Article 11 and point to the fact that under the latter provisions the splitting of costs by issue and ground was envisaged, this appears an equally unlikely benchmark of legislative intent as I have explained it earlier. Putting to one side the fact that Directive 2001/42/EC ('*the*

SEA Directive') is one of the listed Directives and yet it was neither mentioned in the 2003 Public Participation Directive nor had an express NPE provision of its own, it was only *after* the decision of CJEU in *NEPPC* that it was apparent that Article 11 read in the light of Article 9(2) of Aarhus actually limited NPE to grounds alleging infringement of the rules on public participation in decision making. Indeed, the proposition was sufficiently unclear before that to provoke the Advocate General to reach the opposite conclusion. It was never suggested in Case C-427/07 *Commission v. Ireland* that NPE was limited to complaints arising from breach of the public participation provisions of an EIA under Article 6 of Aarhus: I have noted earlier that the relevant part of the judgment in that case (para. 92) referred to costs arising from participation in '*the procedures established in the context of*' Article 11 - these being the review procedures before *inter alia* a court of law to challenge the legality of the decision (Article 4(4) of the 2003 Public Participation Directive). In those circumstances I do not think it can be easily concluded that the effect of the legislation in 2010 was to introduce this distinction in the manner suggested by the Board. The proposition attributes remarkable powers of prediction to Parliament.

135. Neither do I see that there is any warrant for concluding that the word '*proceedings*' was used in the provision in a special sense to reflect the provisions of Aarhus. The '*review procedures*' referred to in Article 9 of Aarhus to which the NPE rules apply are properly described as '*proceedings*' in Irish law, but it requires a very significant leap to move from there to the conclusion that in using that term the Oireachtas intended it to mean only specified grounds arising in those proceedings.

136. Two further, and related, arguments based on the text are advanced by the respondent and the Attorney General. First, as enacted, s. 50B referred to any '*law'* giving effect to the named Directives. Therefore, if the literal construction urged here by the applicant were correct, it meant that in actuality what the Oireachtas had done when it first enacted s. 50B in 2010 was to apply NPE to *all* challenges to planning decisions, as all such decisions will be made under PDA and it is an Act which (per s. 1A) gives *effect* to one or more of Directives identified in s. 50B(1). Had that been the intention, it is argued, this could and would have been executed in a more direct way. Therefore, the argument runs, the interpretation urged by the applicants of the section as it stood since PD18 cannot be correct as it depends on the same essential analysis of the provision.

137. Second, it is from there contended that it would make little sense that in 2018 the Oireachtas would *both* remove the reference to '*laws'* giving effect to the listed Directives and replace it with '*statutory provisions'* and at the same time *include* for the first time paragraphs 3 and 4 of Article 6 of the Habitats Directive as a separate triggering EU provision. As it was put in oral argument, the inclusion of these provisions of the Habitats Directive means that *all* challenges to planning permissions are added to the list of those that benefitted from cost protection: the Habitats Directive provides for an appropriate assessment either to be made, or for a planning application to be screened for appropriate assessment. And, as it was further argued, it is clear from the first of these changes that the Oireachtas clearly believed that it was *narrowing*, not extending cost protection when these amendments were effected.

138. The problem with these arguments is that they fail to explain *why* the Oireachtas enacted the 2018 amendments in the form it did. There was a suggestion that the replacement of the reference to '*laws'* was effected to ensure that the interpretation mooted by Hogan J. in *Kimpton Vale* was avoided. If that was the intention, however, it was a strange and dangerous way to go about achieving it. By replacing '*laws*' with '*statutory provisions'*, the Oireachtas may have limited the scope of the section, but it maintained the structure whereby costs were determined by reference to '*proceedings'* brought to challenge a particular category of decision, rather than by reference to particular grounds of challenge. It is to be recalled that the end point of the Board's argument is that s. 50B as it stood only afforded cost protection for grounds in judicial review proceedings that concerned the listed Directives. If the legislature intended to copper-fasten that, the change from '*law of the State'* to '*statutory provision'* would not have displaced the basis for Hogan J.'s conclusion that the provision applied to all proceedings challenging decisions without any necessary linkage to grounds based on the listed Directives.

139. Heather Hill did propose a reason for such a change. It explained that by retaining the reference to '*laws'* there was a risk that s. 50B could be interpreted as extending to challenges having nothing to do with core planning or environmental matters – for example if decisions were made under provisions of PDA dealing with internal administrative matters such as the appointment of persons to the Board. That was avoided by limiting the scope of the provision to cases in which the impugned decision was made under one of the specific sections implementing the relevant Directives.

140. If that were so, then far from confirming that the Oireachtas never intended the section to operate whenever a challenge was brought to a decision made on foot of a statutory provision giving effect to one of the Directives, and irrespective of the grounds of challenge, the amendment suggests that this was exactly what it *was* doing. Thus viewed, the purpose of the change was to limit the challenge to decisions relating to planning or environmental matters rather than to capture every decision made under the planning or environmental legislation.

141. Aside from suggesting that the change was animated by the comments of Hogan J. in *Kimpton Vale,* the Board never tendered a convincing response to this proposition, and neither the Board nor the Attorney General proffered any explanation for the replacement of the reference to '*laws'* with '*statutory provision'* in this way: if the Oireachtas did so to '*narrow'* the scope of the section this – at least – suggests that it believed it to be potentially '*too broad'* as originally enacted. The only plausible reason it might have been thought too broad was that *any* challenge to *any* decision made under the Acts in question was captured by the provision as enacted. What it replaced that with, was a provision which implied that *any* challenge to *any* decision made under a *relevant section* of those Acts was caught. It did not therefore resolve the problem it is said to have sought to address. So, it is hard to conclude that this was, in fact, the problem it sought to address.

142. I have noted that the Board argues that on the applicant's construction of the provision all planning decisions were already captured, and therefore there was no need to include any reference to the Habitats Directive in PD18. Related to this is the proposition – which found favour with the Court of Appeal – that on the applicant's case the iteration

of the individual Directives was superfluous, as the effect for which the applicant contended could have been obtained by simply relating the cost exemption to challenges under the relevant provisions of PDA.

143. Two points must be noted in this regard. First, assessments made under the EIA and Habitats Directives are integrated into a decision-making process which deals with a range of matters relevant to the grant of development consents (the position under the IPPC Directive is different). It is not difficult to see why it might have been thought that the parsing of costs by reference to different components of that process would be unwieldy, and hard to see why if that had been the intention this was not – having regard to the then novelty of that division of costs in domestic law and lack of clarity as to whether this was permitted in EU law at all – expressly stated.

144. Second, the Board's argument is plausible only if one assumes that the section was concerned solely with decisions made under PDA. In fact, it is not and could never have been so intended. I have already remarked on the fact that s. 50B does not refer to s. 50 or s. 50A. Decisions made under other legislation affecting the environment also had to be brought within NPE. The examples given by the applicant included the Environment Protection Agency Act, the Waste Management Act, the Foreshore Acts, the Gas Act and the Minerals and Petroleum Acts. This could have been achieved by amending each of these Acts, or it could have been achieved through the structure adopted in s. 50B. And, as I have noted already, the effect of *LZ2* was that decisions made under the Habitats Directive fell within NPE. It was appropriate to expressly mention Articles 6(3) and (4) of that Directive in the revised section so as to ensure that *all* legislation implementing the Directive was specifically captured.

145. For this reason, the inclusion of the specific Directives – either in the section as originally enacted, or in the 2018 iteration – was not necessarily superfluous. The meaning could, of course, have been communicated in a different way but that is not the point. Having regard to the manner in which the Oireachtas determined to frame the provision, there is *an* explanation for the iteration of the Directives, *an* explanation for the change from '*law'* to '*statutory provision'* and *an* explanation for the inclusion of Articles 6(3) and 6(4) of the Habitats Directive.

The legislative context and history, and the argument as to absurdity

146. On this construction - as was noted in the course of the hearing - proceedings may enjoy the benefit of the protection even though the impugned decision engages none of the Directives, and/or even though the challenge presents no issue around the Directives. This, I think, is the point at which it can legitimately be said that the provision potentially suffers from an ambiguity, not in the narrow sense that the words are unclear, but because the respondent credibly argues that the context shows that the purpose of the s. 50B was limited to the implementation of the State's obligations under the 2003 Public Participation Directive and that, effectively, the provision can and must be read down so as to align it with that objective, and no more. That argument is buttressed by the contention that because the courts had in a number of decisions following the enactment of the section and before the 2018 amendment interpreted s. 50B in this way, it is to be assumed that those decisions correctly reflected the legislative intent as, otherwise, the Oireachtas when amending the provision would not have maintained it in the form it did. Any other construction – it is argued – would be

'*absurd'*. This proposition was not advanced in an understated way: it would be (it was said) '*perverse'* to read s. 50B as passed in 2010 as providing for cost protection for all planning judicial reviews when the only way one can reasonably read the provision is that the Oireachtas was selecting particular grounds for which there would be cost protection.

147. It follows from what I have said earlier that – at least in a context where the respondent can advance an interpretation of s. 50B based on its text and supporting at least some of this – it is proper to take account of these considerations in reaching the correct interpretation of the provision. The support for the argument is in no sense insubstantial; it derives from the fact of the obligation imposed by the 2003 Public Participation Directive; from the timing of the 2010 Act having regard to the decision in *Commission v. Ireland*, from the fact that s. 3 of the 2010 Act specifically interposed the list of Directives into PDA, and from the consideration that the section specifically incorporated reference to some of these provisions.

148. Obviously, all of these features of the legal context leave no doubt but that the Oireachtas intended to implement the Public Participation Directives *via* s. 50B. None of them, however, provide a substantial counterpoint to the conclusion suggested by the language of the section that this was not *all* it did. For reasons I have earlier explained, in those cases in which a court feels it necessary to step outside the four corners of a statute to reduce the apparent and literal scope of a legal provision by reference to '*context'*, it must have some identified and coherent reason for concluding that the legislature wished to achieve less than the plain meaning of the language it used would entail. While the Board's written legal argument in this case was presented with

elegance and erudition and while the oral argument was advanced by its senior counsel with enviable skill, the terminus of that argument can be bluntly stated: the legislation makes it clear that s. 50B was intended to implement European law - *why* would the Oireachtas have wished to go any further and introduce complete costs protection for all applicants in all planning cases?

149. The State made the same point with slightly different emphasis: the clear intention was to implement the 2003 Public Participation Directive, it said, so it was a matter for the applicant to explain why the Oireachtas would have gone so far beyond the requirements of Article 9(2). The analysis, the Attorney General argues, must start with the CJEU's interpretation of the Convention and must identify how the text of the Irish transposition is so different to produce an interpretation departing from that adopted in *NEPPC.*

150. Both propositions ignore the primacy of the text. That, contrary to the Attorney General's argument, is where the analysis must start. Without answering the actual question arising from the language of the section – why would it have *not* have wished to go further – the court is being asked not merely to rewrite the section (not in itself without precedent) but to do so based on its perception of what the Oireachtas ought, as a matter of policy, to have sensibly wished to achieve. Some may have a view that it is not fair on planning authorities or those developing their property to have to face litigants who can pursue cost free litigation against them while they face both consequent delay in their own development *and* a potential liability for their opponent's costs if they lose in their defence of the claims. On that view any requirement mandated by European law that NPE should apply ought to be limited strictly to that demanded

by EU law. Others may feel that environmental litigation is so important that this is an acceptable burden to impose on respondents as the price of – even small scale or domestic – development. Within each of those positions there may be layer upon layer of additional policy arguments pointing one way or the other. Viewed one way it is easier to have a blanket rule, development will take place faster if everyone knows where they stand on costs within an uncertain and developing framework of EU law, and litigation promotes clarity in environmental law which is, itself, an economically desirable objective. On another view, a no cost rule will encourage baseless litigation and will result in legal action being used as a risk-free means of achieving ulterior and improper objectives and so forth. The court has been provided with nothing beyond the text of the statute that tells it that one, or the other, or some variant of, these views animated the Oireachtas in passing the Act. It may be that we could make a fairly good guess. And that, in truth, is what the Board and the Attorney General suggest: the Oireachtas had to align the law in Ireland with the decision in *Commission v. Ireland* and there is no common-sense reason it would have either imposed a greater burden on respondents or given more applicants in planning cases a risk free run at litigation, than it had to. Therefore, the court should conclude that it did not do so.

151. But even if the court could approach the statute in this way (and it cannot) the assumption that underlies the argument is false. While the overall legal context as defined by Aarhus and EU law present some interpretative challenges of its own they - at the very least – push the conclusion in the direction of the applicant's case. I address these issues next. But looking at the matter purely as a matter of national policy, the State has clearly decided that the appropriate way in this jurisdiction to implement NPE is a no cost rule (as opposed to a rule that limits or enables the quantification of costs),

and having done so there are strong reasons why it might conclude that a blanket rule is the easiest, most certain and (ultimately) least costly mechanism by which these debates can all be avoided. A consideration of *SC SYM, Merriman* and *NEPPC 5* shows that, and how, the combined effect of the interpretation of s. 50B urged by the respondent here and the decision of the CJEU in *NEPPC* results in a sequence of distinctions – between grounds that do and do not engage the Participation Directives, between grounds that do and do not engage national environmental law, and between those that do and do not engage national environmental law within the field of EU law and, for that matter, a significant potential theatre of argument around how, exactly, the '*field covered by EU law'* is to be defined. This case, alone, involved a sixty four paragraph Statement of Grounds, forty one paragraphs of which were directed to the legal objections to the decision. Even if the law were clear as to what was and was not captured by cost protection, the detachment of one overlapping ground from another is an involved exercise presenting its own debate around the dominant issue arising from each paragraph of pleading. Remembering that this forensic analysis may have to be conducted and the relevant legal distinctions applied to it before the case even begins and without the clarity brought by a full hearing on the merits, the application of any distinction of the kind disclosed by these disputes is potentially difficult, time consuming and itself costly.

152. Thus, even if the references made by Humphreys J. proceed and are determined by the CJEU, and even if all the questions asked by him are comprehensively answered, there will inevitably remain debates at the margins around categories that are not necessarily clear-cut and which unavoidably present issues of characterisation that will be case specific. When combined with the power to make pre-emptive cost orders, these

distinctions mean that potentially before a case can begin, the time and resources of the parties and of the court have to be expended on resolving which issues do and do not engage cost protection as defined by these various issues of categorisation (with the potential for these decisions to be appealed). I do not know if that consideration influenced the form the legislation ultimately assumed, but I certainly cannot see how a construction of s. 50B which avoids all of this is '*absurd'* or '*perverse'*. As it happens, the very fact that the Oireachtas determined *not* to introduce a mechanism for *limiting* costs (as opposed to simply determining that no costs would attach to proceedings under s. 50B) suggests to me that the concern to avoid unnecessary complication in and around the process of applying NPE in a given case may well have been a real one.

153. The legislative history of the provision was also deployed in another, different way. By the time the Oireachtas came to enact the 2018 amendments, it is said, the courts had interpreted the provision in accordance with the construction urged here by the Board and by the Attorney General. Therefore, the presumption must be that this interpretation reflected the meaning intended by the Oireachtas, as otherwise it would not have maintained the same structure when it amended the Act.

154. This is an attractive argument. It is underpinned by a sensible principle, reflected in the analogous presumption explained by Griffin J. in *Cronin v. Youghal Carpets (Yarns) Ltd.* [1985] IR 312, at p. 321:

> '*It is a well established principle to be applied in the consideration of an Act that, where a word or expression in an earlier Act has received a clear judicial interpretation, there is a presumption that the subsequent Act which*

> *incorporates the same word or expression in a similar context should be construed so that the word or expression is interpreted according to the meaning that has previously been ascribed to it, unless a contrary intention appears.'*

155. However even this – slightly different – proposition involves '*an interpretative approach rather than a binding rule'* (per O'Donnell J. in *MAK v. The Minister for Justice and Equality* [2018] IESC 18, [2019] 1 IR 217 at para. 17) and, most importantly, arises only where there is an interpretation that has been '*generally and consistently followed to date'* (per Fennelly J. in *Clinton v. Dublin City Council* [2006] IESC 58, [2007] 1 IR 272 at para. 61).

156. This envisages a body of case law that is clear, coherent, authoritative and firmly settled. As of 2018 that cannot have been said of the interpretation of s. 50B. While all of the High Court cases had reached the conclusion that s. 50B applied only to litigation relating in some way to the listed Directives, the basis for – and consequence of – that view differed, with convincing claims made by one judge that this was not the proper meaning of the provision at all.

157. To recap, Charleton J. in *JC Savage* had directed his attention to whether litigation was '*concerned with the subject matter set out in s.50B(1)(a)'*, at least leaving open the possibility that the application of the no cost rule was determined by the substance of proceedings as a whole, rather than based upon a fragmentation of the grounds within the proceedings. Hedigan J. in *Shillelagh Quarries Limited v. An Bord Pleanála* appeared to operate on the basis that the critical question was whether a *project* required

an EIA. Hogan J. in *Kimpton Vale* followed *JC Savage*, but would, if unfettered by authority, have concluded that the bare language of s. 50B(1)(a) was sufficiently broad to embrace '*the application of all judicial review proceedings of planning decisions'* (at para. 44). Herbert J. in *McCallig* (where the argument advanced by Heather Hill in this case was sufficiently strong– at least the judgment suggests – for the *Board itself* to rely upon it) had built on the judgment of Charleton J. to propose '*issue splitting'* the costs, relating the special cost rule to questions in the case and applying it only to '*that part of judicial review proceedings which challenge a decision made or action taken or a failure to take action pursuant to one or more of the three categories therein specified'* (at para.44). The decision of the CJEU in *NEPPC* concluded both that cost splitting was permissible, but that the requirement that certain judicial procedures not be prohibitively expensive applies – at least in some circumstances – to the part of a challenge that is not covered by Article 11(4) insofar as the applicant seeks to ensure that national environmental law is complied with. As I explain alter, the CJEU envisaged this arising only '*in the fields covered by EU environmental law'.* As Humphreys J. noted in *NEPPC 5*, even as between the judgments of Barniville J. in *SC SYM* and of Barrett J. in *Merriman* there were differences of approach – although both concluded that in fact s. 50B operated to provide cost protection in relation to grounds that did not engage the listed Directives.

158. Putting to one side the short period of time between the first of these cases and the enactment of the 2018 Act, and ignoring the (in my view, highly significant) fact that no appellate court had ever ruled on these issues, I cannot see here a settled clear determination of the legal issue central to this case – that s. 50B envisaged cost splitting

by reference to issues arising from the listed Directives – that would generate any presumption of the kind envisaged by these cases.

The presumption against unclear or radical changes in the law

159. In both *McCallig* and the Court of Appeal judgment in this case, reference was made to '*the presumption against radical amendments*'. In this jurisdiction, that principle is generally related to the decision of a Divisional High Court in *Minister for Industry and Commerce v. Hales* [1967] IR 50. There, it was determined that the provisions of s. 3(3) of the Holidays (Employees) Act 1961 (which enabled the making of Regulations providing that any class of worker would be entitled to avail of various rights under the Act) did not empower the making of a statutory instrument covering insurance salesmen (who were contractors, not employees). Henchy J. approved a statement from p. 78 of Maxwell on '*Interpretation of Statutes*' :

> '*Presumption against Implicit Alteration of Law. One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters, outside those limits, the law remains undisturbed. It is in the last degree improbable the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law, without expressing its intentions with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either*

> *their widest, their usual or their natural sense, would be to give them a meaning other than that which was actually intended. General words and phrases, therefore, however wide and comprehensive they may be in their literal sense, must usually be construed as being limited to the actual objects of the Act.'*

160. I cannot but think that this principle is sometimes now applied beyond its proper limits. One would expect that every statute '*changes*' the law, and the limitations of language are such that it often happens that it can be said a law lacks clarity. Few statutes do not in some shape or form impinge upon rights (and in particular property rights) or effect alterations to the general law that cannot be described from someone's perspective as significantly departing from the pre-existing legal assumptions. There is no presumption against any of this. What there is, as the quoted passage shows, is a presumption that imprecise language will not be interpreted so as to impose significant changes to the pre-existing law particularly '*where the change is contrary to the actual objects of the Act*'. To that might be added a related presumption that legislation will be strictly construed when it interferes with vested rights.

161. Where this has happened, however, it can be easily spotted. In *Hales* itself, for example, the section referred to '*workers'* (defined in the singular in the Act as '*a person who is employed'*), assumed that they had '*workers' organisations'* acting on their behalf (which the self-employed persons in question did not), and operated to confer the power to extend to those persons some rights in contexts which were evidently not capable of ready application to the self-employed who determined how and when they undertook the tasks provided for in their contract (such as the length of their working day, their

rights to '*short day[s]*' or '*non working day[s]*'). So, in that context Henchy J. said (at p. 76 to 77):

> '*I cannot believe that the power to effect such radical and far-reaching changes in the law of contract was intended, or should be deemed to have been intended, by a loosely drafted sub-section in an Act that has declared its purpose and scope to be otherwise*'.

162. In this case, it might be argued that the legislation affects the rights of those who are respondents in proceedings to which the provision applies. Before the Act such persons might have enjoyed at least the expectation that they could apply for their costs if they successfully defended the claims against them, and they might say that the legislation should be strictly construed so as to maintain the status quo to the greatest extent possible having regard to the language of the section. But even if such a case could be made (and I express no view here as to the extent to which such an expectation has any legal effect) the fact is that there can be no doubt but that here the court is concerned with legislation which clearly and on any view effects radical changes to the law. That was the whole point. So, the argument is not as much that there should be an assumption that s. 50B did not radically change the law, but rather that the radical change in the law which it did introduce should be more limited than the language used to express it suggests. The language in the provision is not lacking in clarity, and the object for which the respondent contends is not supported by the text of the legislation. The respondent's argument therefore seeks to read down clear words by reference to an asserted but unsubstantiated purpose, not to interpret unclear language having regard to an object evident from the text. The presumption deployed is simply of no application

where a major change in the law is clearly envisaged by the language used in the provision in question (and see *Farrell v. Attorney General* [1998] 1 IR 203, 226 per Keane J.).

VI AARHUS AND EMPA

Three canons of interpretation

163. Both sides deploy Aarhus and related case law of the CJEU in support of their positions. The applicant says that these combined to create an '*interpretative obligation'* the effect of which is that all, or most, of the grounds agitated in these proceedings fall within NPE with the result that s. 50B should be read so as to give effect to that obligation. The Board and the Attorney General, in contrast, say that the CJEU decision in *NEPPC* shows that Aarhus envisages, and EU law enables, a splitting of costs by reference to issues and grounds, and that properly construed that obligation only arises in relation to challenges based upon a narrowly defined concept of '*national environmental law.'* The court, they argue, should interpret s. 50B so as to align it with these features of the European legal landscape.

164. Aarhus is in this sense relevant in three similar and related, but different ways. First, as an international Convention ratified by the State the court should strive to ensure that legislation purporting to give effect to the Convention has done so. Second, the European Union is a party in its own right to Aarhus and, to that extent, the Convention forms part of the corpus of European law, which – as *Slovak Brown Bears* and *NEPPC* show – produces an interpretative obligation of its own by virtue of the State's obligation to comply with the requirements of EU law. Third, but more specifically, the Public Participation Directives were introduced to give effect to Aarhus and, it follows, an understanding of the Convention is critical to the scope of EU law governing

NPE, and the distinct interpretative obligation arising insofar as the provisions of Article 11(4) are concerned.

165. It is useful to untangle these separate mechanisms when seeking to apply the analysis they entail. The third is not in controversy and can be passed from – save to note that the decision of CJEU leaves no room for doubt but that insofar as the application of Article 11 (formerly Article 10a) is concerned, cost splitting by reference to public participation grounds is clearly permissible. In this section I will concentrate on the implications of the first of these principles, and in the following section, I will consider the relevance of the second.

The scope of Aarhus

166. I have quoted the relevant provisions of Aarhus earlier. In summary, Article 9(4) applies NPE to two different forms of review procedure as described in Articles 9(2) and 9(3). Generally speaking, Article 9(2) operates where there is a challenge to the legality of a '*decision, act or omission*' as to proposed activities that may have a significant effect on the environment and/or is subject to an environmental impact assessment procedure as reflected in Annex One and Article 6(1)(b) of Aarhus. Persons with an interest or maintaining an impairment of a right must be allowed to challenge the substantive or procedural legality of such a decision. Article 9(3) in contrast does not refer to '*decisions*' and expressly extends to activities of private persons. It requires that the public have access to procedures to challenge '*acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*'.

167. Some features of the dividing line between Articles 9(2) and 9(3) can be easily drawn: Article 9(2) does not extend to proceedings seeking to enforce environmental laws against individuals or commercial undertakings, nor would it be relevant to legal action taken in respect of a development that did not have a *significant* environmental effect as envisaged by Annex One and Article 6(1)(b). But given the broad definition of '*public authority'* in Article 2 of Aarhus, it is harder on the face of the provisions to discern what would be covered by Article 9(2) that is not covered by Article 9(3).

168. The decision of the CJEU in *NEPPC* provides some guidance in this regard. There (at least on one view) it suggested that Article 9(4) insofar as it applied to Article 9(2) was limited to challenges that related to the public participation provisions. That conclusion might be thought to be in the teeth of the language in Article 9(2) itself, and indeed the Advocate General reached the opposite conclusion, saying of Article 9(2) '*[t]he right of challenge is ... linked to decision making processes capable of impacting the environment rather than specifically to alleged infringements of the right of [public] participation only'* (at para. 73 of his Opinion). Bearing in mind that construed literally Article 9(2) extends to *any* ground on which the legality of a consent to a project to which it applies, the court's explanation for the view it adopted is cryptic (indeed, the Aarhus Implementation Guide suggests that Article 9(2) extends *inter alia* to permit conditions that fail to meet applicable standards, and fail to consider nature or environmental standards, stressing both the substantive and procedural legality provided for – *see* p. 167).

169. Having referred to Articles 9(2) and 9(4) of Aarhus, the CJEU said (paras. 41-43).

'*Indeed, these provisions themselves refer, in order to define the scope of the challenges which should not be prohibitively expensive, to challenges directed against any decision, act or omission 'subject to the provisions of Article 6' of that Convention, that is to say, subject to certain rules on public participation in decision-making in environmental matters, without prejudice to the possibility for national law to provide otherwise by extending that guarantee to other relevant provisions of that Convention.*

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

Where ... a challenge brought against processes covered by Directive 2011/92 combines legal submissions concerning the rules on public participation with arguments of a different nature, it is for the national court to distinguish – on a fair and equitable basis and in accordance with the applicable national procedural rules – between the costs relating to each of the two types of arguments, so as to ensure that the requirement that costs not be prohibitive is applied to the part of the challenge based on the rules on public participation.'

170. At the same time as it may have contracted the apparent scope of Article 9(2), the CJEU in *NEPPC* gave Article 9(3) an expansive interpretation, finding that Articles 9(3) and (4) had the effect that NPE '*must be regarded as applying to a procedure such as that at issue in the main proceedings, in that it is intended to contest, on the basis of national environmental law,* ***a development consent process'*** (emphasis added). This reflects the interpretation suggested in the Aarhus Implementation Guide (at pp.197-199).

171. In point of fact, the most obvious apparent differences between the provisions is that unlike Article 9(2), Article 9(3) does not expressly apply to challenges to '*decisions'*, so that it might at first seem that it functions only in proceedings concerned with operational acts or failures, and that while Article 9(3) specifically limits the legal actions to which it refers to those engaging '*national law relating to the environment',* Article 9(2) does not include this phrase. Nonetheless, the CJEU's conclusion in *NEPPC* may be explicable by reference to the narrow scope it gave Article 9(2), and the fact that a decision is, on any ordinary use of language, an '*act'*. Overall, the effect of that decision (which must be viewed by member states as an authoritative interpretation of the Convention in cases that are in the field of EU law) is that while Article 9(2) is narrower in scope than a literal construction of the provision might initially suggest, Article 9(3) is broader than it might at first blush appear. The combined effect of the provisions as thus interpreted is that NPE under Aarhus extends to any proceeding insofar as based on national environmental law challenging a development consent process – irrespective of whether it comes within Article 9(2) as CJEU has interpreted that provision: as the matter was put by CJEU in *NEPPC*, Article 9(3) applies to the part of the challenge that would not be covered by the requirements

of Article 11 of Directive 2011/92 '*insofar as the applicant seeks, by that challenge, to ensure that national environmental law is complied with'* (at para. 58).

Section 50B and the implementation of Aarhus

172. That overlap is important in considering the Irish provisions. This is because at the heart of the case made by the Board and Attorney General is the proposition that the Oireachtas sought to give effect to the Article 9(4) NPE obligation insofar as it related to Articles 9(2) and 9(3) through two distinct measures – s. 50B in relation to Article 9(2), and ss. 3,4 and 7 of EMPA as regards Article 9(3). The basic point is that in giving effect to NPE for decisions captured by Article 9(2), s. 50B represents a complete implementation because it will operate to apply the no cost rule to proceedings challenging the validity of decisions, actions or omissions to act on grounds arising from the listed Directives. While it was not accepted that Article 9(3) applied to decisions granting or refusing development consent, it was argued (a) that the types of grounds which the respondent has sought to have excluded from s. 50B do not comprise '*national environmental law'* and (b) that EMPA implements the obligation under Article 9(3).

173. I will return to EMPA later. However, looking first at s. 50B in isolation, if that provision is to be interpreted in the manner contended for by the respondent and the Attorney General, and accepted by the Court of Appeal, s. 50B does not effect a complete implementation of Article 9(4) as it applies NPE to challenges to decisions granting development consent. Even if one assumes that Article 9(2) is subject to the limitations suggested by the CJEU in *NEPPC,* there is nothing in Article 9(3) to warrant

a limitation of NPE by reference to '*grounds'* that invoke either the listed Directives, or other provisions of EU law. Insofar as the criterion of '*national law relating to the environment'* is a clear requirement of Article 9(3), and insofar as that provision applies to the challenge the subject of these proceedings, the respondent and Attorney General are in error in seeking to contend that the grounds in this case arising from the alleged material contravention of the development plan, the contravention of Ministerial guidelines regarding flood risk management, or the issues of landowner consent are other than issues of national law relating to the environment. For the reasons I have explained, these grounds would not be covered by Article 11(4), but they are clearly within Article 9(3).

174. It is convenient to explain why this is so by reference to the findings of the Court of Appeal. It said that the question of whether a challenge is based on national environmental law must be determined as a matter of substance rather than of form, concluding that the test was whether '*the measure sought to be enforced can properly be said, in a material and realistic way, to relate to the environment'*. If so, Costello J. said, the proceeding came within Article 9(3). She explained this conclusion as follows (at para. 177):

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

175. While I can fully understand the pragmatic sense of this statement, it is my view that in this regard, the court fell into error. The concept of '*national law relating to the environment'* referred to in Article 9(3) is autonomous and intended to be given a broad, not a strict, interpretation as evident – if nothing else – from the use of the wide and general term '*relating to'*. Clarke C.J. in *Conway v. Ireland* explained the phrase by reference to the Aarhus Convention Compliance Committee guidance concluding that the test was whether the '*provision in question somehow relates to the environment'* (at para. 62). This is best understood by reference to the contrast Clarke C.J. drew with legislation governing roadways: the mere fact that they can have an environmental impact and that the purpose of environmental legislation may frequently be directed towards protecting health and safety does not mean that all road traffic legislation or all health and safety legislation can be regarded as coming within the ambit of environmental law for the purposes of Article 9(3) (at para. 66). These may, in a remote sense, impact upon the environment, but that does not mean that they '*relate to the environment'* in the sense of regulating conduct for environmental purposes. The disputed grounds, by contrast, do: the legal rules giving rise to those grounds determine how decision makers must address processes that are both intimately connected with the environment and are intended to ensure that decisions having that connection are reached in accordance with law. The fact that the same principles are applied to other types of statutory decision-making does not change this.

176. But more fundamentally, while the law governing judicial review of administrative action comprises a distinct body of principle, it is ultimately parasitic upon specific decisions usually made pursuant to identified statutory regimes. The '*classic grounds*

of judicial review' - the taking into account of irrelevant considerations, the failure to take into account relevant considerations, acting unreasonably, fettering discretion, failing to afford fair procedures and so forth - all operate on the basis that to obtain legal validity a decision reached pursuant to a power granted by statute must comply with these requirements. They are intended to enable the proper functioning of the statutory scheme to which they are applied and are not an end in themselves. In each instance the grounds on which judicial review may be granted are thus adjectival, being dependent upon and an inherent part of each statutory regime to which they are applied. When the statutory scheme to which they are attached is itself part of the State's environmental law, it follows that these '*judicial review grounds'* arise from that same body of law. Each of the grounds in issue here were part of the State's environmental law.

177. This is well demonstrated by an example from this case. A decision adopted under PD16 and applying guidelines issued under s. 28 PDA is in breach of that provision if the decision maker misdirected itself in law, took into account irrelevant considerations or departed from fair procedures. Grounds asserting a material contravention of the development plan (under s. 9) or misinterpretation of the flood risk guidelines, arise from measures that relate to the environment. An error in the interpretation or application of these provisions may well be properly described as invoking a '*classic ground of judicial review'* but it is a breach of laws that relate to the environment, not of any independent source of law. It is to be noted that this reflects decisions of the Aarhus Convention Compliance Committee (to which Clarke C.J. as I have already noted had regard in the course of his judgment in *Conway* (at para. 61) in which it has been determined both that judicial review grounds arising from national laws relating

to the environment fall within Article 9(3) (Communication ACCC/C/2008/33 24 September 2010) and that Article 9(3) applied to town planning permits (Communication ACCC/C/2005/11). Similar conclusions were reached in a decision of 24 September 2010 (Communication ACCCC/C/2008/27), concerning the consent process for development at Belfast City Airport. It also reflects the analysis adopted by the English courts ('*[i]n the Aarhus context the UK's combination of statute and policy, with the former requiring that the latter be prepared, taken into account and in some instances followed, is properly characterised as 'national law relating to the environment'*, *Venn v. Secretary of State for Communities and Local Government* [2014] EWCA Civ. 1539 at para. 17 per Sullivan LJ).

178. It follows that *had* the State legislated *via* s. 50B so as to limit the issues to which NPE would apply to those grounds of challenge to planning decisions based upon substantive breaches of national environmental law as the Board and the State have defined that concept, and *had* there been no other implementing measure, the State would have failed to give effect to Article 9(4) of Aarhus.

Treaty obligations and statutory interpretation

179. In the course of his judgment in *Crilly v. Farrington* (at p. 291) Murray J. (as he then was) explained as follows:

> '*For a very long time principles of common law concerning the interpretation of statutes which give effect to international treaties permit the courts to interpret such a statute in the light of the meaning of relevant*

> *provisions of the treaty concerned. No doubt this is in part because the intention of the national legislature is clear – to give effect to provisions of the treaty in domestic law – and the objective consequence of that intent can be clarified or ascertained, where necessary, by reference to the meaning of the relevant of the provisions of the treaty, itself a legal instrument. There is also the consideration that contracting parties to international agreements should seek, as far as possible, to give uniform effect to its provision in domestic law.'*

180. The principle has been noted in *O'Domhnaill v. Merrick* [1984] IR 151, at p. 159 (per Henchy J.), and p. 166 (per McCarthy J.), and indeed by Herbert J. in the course of his judgment in *McCallig* (at para. 26). The Irish authorities are helpfully considered by Dr. Fennelly in his monograph *'International Law in the Irish Legal System'* (Dublin 2014) (at paras. 2.100-2.110). Clearly, any such method of interpretation must primarily respect the provisions of Article 29.6 of the Constitution: international agreements such as Aarhus do not form part of the domestic law of the State '*save as may be determined by the Oireachtas',* and to that extent the role of the court when it seeks to interpret legislation giving effect to such a treaty is to execute the decision of the Oireachtas to implement the agreement only to the extent that the Oireachtas has so determined. That is why this approach does not enable the over-riding of the clear words of an Act, but also why '*if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred'* (*Salomon v. Commissioners of Customs and Excise* [1967] 2 QB 116, at p. 143 (per Diplock L.J)).

181. While it is sometimes said that that principle is a '*weak'* one, I do not think this is an accurate description. Its strength depends on the provisions of the international agreement in question, the relationship these bear to the text of the Act and the relationship that text bears to the other interpretative considerations to which I have earlier referred. Clarke J. (as he then was) put the rule as follows (*Sweeney v. Governor of Loughran House Open Centre* [2014] IESC 42, [2014] 2 IR 732 at para. 2.6):

> '*... in seeking to interpret Irish statutes which have been put in place so as to enable Ireland to comply with obligations under international treaties, the courts will strive, if possible, to ensure that Irish implementing legislation is interpreted in a manner consistent with the international law obligations undertaken by Ireland by entering into the treaty concerned'*

182. All of this assumes that the legislation under consideration was, in fact, intended to implement the provisions of an international agreement in the first place. This follows from the fact that the rule of construction operates by reference to assumed legislative intent; if the court cannot conclude that the intention was to implement the treaty then (save, perhaps, where the agreement in question has become part of customary international law) it has no basis for using the international agreement to interpret the statute.

183. While it is entirely possible that the Oireachtas did have Aarhus in mind when PD10 was originally enacted, there is nothing before the court that would justify it in concluding that, objectively, there was an intention, when enacting it, to implement Aarhus. The Convention is not mentioned in the text or Long Title, the State had not

ratified the Convention when the legislation was enacted and (until 2011) there was no provision in statute law for judicial notice to be taken of Aarhus. But s. 50B was thereafter amended twice – once by legislation which expressed itself as directed to the implementation of certain parts of Aarhus and was clearly enacted with a view to the ratification of the Convention, and once after ratification had occurred.

184. So, the Long Title to EMPA identifies its objects as being (a) to make amendments to a variety of statutes, (b) to make provision for costs of certain proceedings (c) to give effect to '*certain provisions'* of Aarhus, and (d) for judicial notice to be taken of that Convention. As I explain shortly it seems clear that Part 2 of EMPA is directed to the implementation of Article 9(4) of Aarhus insofar as it applies to Article 9(3), as well as Article 9(1) (which deals with proceedings to obtain access to information on the environment). Part 5 of that Act includes twenty seven sections addressed to a variety of provisions of PDA: indeed EMPA provides that PDA and Part 5 of EMPA shall be cited together. Two sections of Part 5 address Aarhus, s. 20 which changes the definition of the standing requirements in s. 50A from '*substantial interest'* to '*sufficient interest'*, and s. 21 which makes the changes to s .50B to which I have earlier referred and the effect of which was to allow costs be recovered *by* an unsuccessful applicant (not, it should be observed, itself a requirement of Aarhus). So, the legislation pursuant to which these amendments to s. 50B were made post-dated and was intended to implement Aarhus, and of course further amendments were made to s. 50B in 2018.

185. In these circumstances, it would make little sense to say that while EMPA falls to be construed by reference to a presumed intent to implement Aarhus, s. 50B is to be construed without reference to the Convention. By 2011, the clear intent was that

between the two provisions, complete effect would be given to the NPE provisions of the Convention. The conclusion that the '*certain provisions'* of Aarhus to which EMPA in its Long Title declared effect was being given included the NPE provisions of Article 9(4) is irresistible insofar as the legislation both amends s. 50B and introduces a distinct set of rules governing costs of certain proceedings. It is impossible to avoid the conclusion that the reason the Oireachtas did not make specific provision in EMPA to give effect to NPE in respect of Article 9(2) is that it adopted the view that it had already done so *via* s. 50B. Therefore, the court must look both at EMPA and s. 50B together, and the court is entitled to construe the two codes having regard to the proposition that given that by these provisions the State intended to implement Article 9(4) insofar as it introduced NPE, it is to be assumed that it intended to do so fully. Moreover, it is to be stressed that the two sets of provisions, are *in pari materia*, and must be construed by reference to each other.

EMPA

186. Section 3(1) of EMPA provides that subject to certain exceptions that are not relevant to this appeal, '*in proceedings to which this section applies, each party (including any notice party) shall bear its own costs'*. Subject to an exclusion that is also not relevant here, the scope of s. 3 is defined in s. 4(1) of the Act, as follows:

> *'Section 3 applies to civil proceedings … instituted by a person –*
>
> *(a) for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition or other requirement specific*

in or attached to a licence, registration, permit, permission, lease, notice or consent specified in subsection (4), or

(b) in respect of the contravention of, or the failure to comply with such licence, registration, permit, permission, lease, notice or consent,

and where the failure to ensure such compliance with, or enforcement of, such statutory requirement, condition or other requirement referred to in paragraph (a), or such contravention or failure to comply referred to in paragraph (b) has caused, is causing or is likely to cause, damage to the environment.'

(c) The 'permissions' referred to in s. 4(1)(a) and iterated in s. 4(4) include 'a permission or approval granted pursuant to the Planning and Development Act 2000'. The phrase 'damage to the environment' as it appears in s. 4(1) is elaborated upon in two further sub sections of s. 4. 'Damage' as defined in s. 4(5) includes 'any adverse effect on any matter specified in paragraphs (a) to (i) of subsection (2)'. 'Damage to the environment' includes damage to inter alia air, water, soil, land, landscape, biological diversity, health and safety of persons and conditions of human life (s. 4(2)).

187. The view took hold that EMPA was concerned only with '*enforcement'* proceedings, and that it followed that actions by way of judicial review were not within its scope. That assumption is reflected in the decision of the Court of Appeal in this case and, I

assume, followed from the fact that while s. 50B was concerned with judicial review proceedings (reflecting Article 9(2) of Aarhus), EMPA sought to give effect to Article 9(3). However, much as there is an overlap between Article 9(2) and 9(3) it is unsurprising that there should be an overlap between s. 50B and EMPA.

188. In my judgment (with which Whelan and Noonan JJ. agreed) in *O'Connor v. Offaly Co. Co.* [2020] IECA 72, [2021] 1 IR 1, I decided that there was no basis on which it could be concluded that simply because an action took the form of proceedings by way of judicial review, the provisions of EMPA did not apply. What was relevant was the nature of the relief claimed in the proceedings. There, finding that EMPA applied to a challenge brought by way of judicial review of a decision of the respondent to grant to one of the notice parties in the action a renewed national waste collection permit, I concluded that s. 4(1)(a) of EMPA was capable of applying where *inter alia* proceedings could be properly characterised as being for the purpose of ensuring compliance with or the enforcement of, a statutory requirement where the failure to ensure such compliance or enforcement '*has caused, is causing or is likely to cause, damage to the environment.'* That mirrored the literal terms of s. 4(1)(a). I also noted that s. 4(1)(b) refers only to a licence, registration, permit, permission, lease, notice or consent (and not a statutory requirement). I explained the scope of the former provision, as follows (at para. 30):

> *'If this is correct, it means that the scope of proceedings within the meaning of s.4(1)(a) is limited to cases in which, looking to the action as a whole, the applicant seeks to ensure compliance with or enforce into the future, an identified statutory requirement. Noting that proceedings which seek to claim*

> *damages arising from damage to persons or property are excluded from the provision (s.4(3)), proceedings which seek only certiorari or declaratory relief with a view to the correction of historic illegality, are not within the terms of the provision unless they arise from the provisions of a licence, registration, permit, permission or lease. Therefore, to bring its claim within s.4(1) – where that claim is based only on the 'statutory requirement' limb of s.4(1)(a) – the applicant must identify some action into the future which it is seeking to compel, or which it is seeking to compel should be conducted in a particular way and in accordance with a statutory requirement in the sense in which I have explained that term.'*

189. I explained why the language of the provision mandated this conclusion, notwithstanding the fact that the Act was intended to implement Aarhus (at para. 32) :

> *'While none of these propositions is insubstantial, neither do they displace what appears to me to be a clear intention on the part of the Oireachtas to limit the scope of the 2011 Act insofar as it is concerned with proceedings alleging breach of statutory requirements. That distinction is, as I have explained, conspicuous as between ss.4(1)(a) and (b). The only conclusion that can be drawn is that it was intended to differentiate between two types of claim – the claim to ensure compliance with or to enforce a provision, and the claim in respect of the contravention of such a provision – and to exclude those claims alleging a breach of statutory requirements from the latter, but not the former.'*

190. I can fully understand why Holland J. in the course of his judgment in *Jennings* suggested that the effect of this decision was (at para. 211) that s. 4(1)(a) encompasses

proceedings in judicial review intended to quash an invalid permit which, if not quashed, would authorise future activity likely to result in environmental damage. However, even if this is so this still means that there are challenges to development consent decisions that are within Article 9(3) but outside the scope of EMPA. Even on the broad interpretation of EMPA adopted in *Jennings*, proceedings in which it is sought to challenge acts or omissions of public authorities which contravene provisions of national law relating to the environment will *only* engage s. 4 if the applicant can establish that the failure to ensure compliance with those provisions '*has caused, is causing or is likely to cause, damage to the environment'*. While the decision in *NEPPC* means that for at least *some* challenges it will be necessary to disapply this requirement, there is no basis for disapplying the clear language of the Act in proceedings concerned solely with national environmental law. Therefore, looking solely at the text of the provision, this will inevitably knock out at least some actions that are covered by Article 9(3) and in respect of which it is not possible to establish that the grant of the consent in question '*is likely to cause ... damage to the environment'*. I note that the precise implications of this requirement have given rise to some debate across the judgments of Holland J. in *Jennings* and of Humphreys J. in the *East Meath* and *Roscam* cases: Holland J. favours a '*broad view'* and a '*relatively undemanding approach'* to the question of damage, while Humphreys J. concluded that the phrase had to have some meaning, and required '*specific and tangible ecological harm'*. It is not necessary to resolve this issue here – what is relevant is that even on the broadest interpretation there will be cases in which Article 9(4) is engaged without it being possible to establish such damage (and in a number of the grounds identified by Holland J. in *Jennings* this was found to be the case).

191. Second (as I observed at para. 40 of the *O'Connor* judgment) proceedings seeking *certiorari* or declaratory relief in respect of an entirely historic event might not come within EMPA where this would not seek to ensure present compliance or enforce the legal requirement in issue in the terms expressed in s. 4(1)(a). While – as the Board puts it in its submissions – the applicant takes issue with these conclusions, it does not (beyond suggesting that Aarhus requires a different construction) explain why. As I have explained, while Aarhus cannot be used to override the express language of EMPA the principle of interpretation to which I have referred does nudge the proper construction of s. 50B towards its literal meaning. It is far more logical - if both statutes are to be construed to completely implement the NPE obligation in Aarhus - that the provision that construed in accordance with the plain meaning of the language used within it achieves that objective is so construed, than that an agonising debate is had around the metaphysics of when a decision is forward looking, backward looking or concerned with the avoidance of the ethereal concept of '*damage to the environment'*.

In pari materia

192. There are, as Fennelly J. put it in *Sheedy v. The Information Commissioner* [2005] IESC 35, [2005] 2 IR 272 '*strong intuitive reasons favouring a harmonious interpretation'* of two statutes dealing with the same subject matter or, as it has been framed in other cases '*forming part of the same statutory context'* (*The State (Sheehan) v. The Government of Ireland* [1987] IR 550 at 562, per Henchy J.). Where it can thus be said that two Acts '*deal with the same subject matter on similar lines'* the assumption is that '*there is a continuity of legislative approach and uniformity in the use of language'* (Bennion and ors '*Statutory Interpretation'* (8th Ed. 2020) at para. 21.5).

193. As I have observed s. 50B and EMPA are *in pari materia.* There can be no doubt about this – they seek to address the same subject matter, and share the same of purpose giving effect to different aspects of the same principle (NPE) derived from the same legal instrument (Aarhus). The statutes use the same terminology: section 3(2) of EMPA is almost identical to s. 50B(2A) (the differences arise from the fact that the former refers to '*plaintiff'* as well as '*applicant'*), and, critically, both state '*in proceedings to which this section applies, each party (including any notice party) shall bear its own costs'*.

194. It is to be presumed that universality of language and meaning are intended. So, it must follow that if s. 50B – notwithstanding the language used in the provision – is actually a provision that is addressed not to the costs of proceedings, but only to the costs of certain issues or grounds in those proceedings, then at least presumptively EMPA must have the same effect. And, of course, the opposite must also be true.

195. Whatever about the plausibility of the claim that s. 50B, iterating as it does the listed Directives, is concerned only with the costs of specific grounds arising from those provisions, imposing the same division on the language of s. 3 of EMPA is impossible. Section 4 of EMPA defines the proceedings to which it applies not by reference to the legal basis for the actions it is sought to impugn, but by reference to the purpose of the action and the subject matter of the claim. That language simply does not bear a construction whereby it is only the costs associated with certain arguments deployed to obtain that purpose or engage that subject matter that are covered by the section. If EMPA does not bear that construction, then either (a) s. 50B must be construed so as to have the same effect, (b) the legislature must be deemed to have achieved

implementation of overlapping provisions of Aarhus by entirely and fundamentally different means – one by cost protection for the action as a whole, and the other for only parts of it, or (c) an interpretation must be forced on EMPA which is not readily accommodated in its text. The court cannot impose the third and, given that the second interpretation would leave a gap in the State's implementation of the NPE obligations under Aarhus, the case for the first – and literal – construction of s. 50B is coercive.

Conclusion

196. EMPA and s. 50B should be interpreted together as the legislation by which it was intended that the State would implement the NPE requirements of Aarhus. The overlap between Articles 9(2) and 9(3) means that duplication within the domestic law provisions is to be expected. The court should approach s.50B and the relevant provisions of EMPA so as to enable as complete an implementation of the NPE obligation in Article 9(4) as the language of those provisions will permit. This has the following consequences:

(i) Because s. 50B and EMPA are *in pari materia* it must be assumed that, between them universality of language and meaning are intended. It follows that, presumptively at least, there cannot be '*cost splitting'* of the kind urged by the Board and the Attorney General under s. 50B unless there is to be a similar division under EMPA. The basis for cost splitting that has been suggested in this case is not possible under the language of EMPA. The strong presumption must be that it was not envisaged under s. 50B either.

(ii) Noting that the principles attending the construction of legislation implementing international treaty obligations cannot be applied *contra legem,* it is clear that there will be challenges to the validity of development consent decisions that are not covered by EMPA including because the applicant cannot establish *'damage to the environment'* or because they are purely backward looking. Therefore, again subject to *contra legem*, this means that s. 50B should not be interpreted to limit the grounds attracting cost protection to those arising from the listed Directives or as strictly required by EU law, unless other aspects of the text or context suggest that this was not the legislative intent.

(iii) There is nothing in the text of s. 50B that would displace this presumption. On the contrary, the natural and ordinary meaning of the words of the provision point to precisely this conclusion.

197. I should note that the point was made in oral argument in this case that there was a discordance in construing s. 50B so as to apply all decisions captured by Article 9(4) in circumstances in which s. 50B extended a more generous facility to applicants than is captured by NPE. However – aside from the fact that I rely heavily on my conclusion on the language of s. 50B alone – I think this proposition obscures the fact that the State has decided to implement NPE in this way, and that the effect of construing the provision in the light of Aarhus is simply to attribute to Parliament the intention to extend the cost protection it has decided to apply to certain claims that are covered by Article 9(4), to all legal proceedings governed by that provision. Nor, finally, do I believe that it is

appropriate to resort to the soft discretion conferred by Order 99 to resolve these issues in circumstances where the hard language of s. 50B achieves the relevant objective.

VII EU LAW

The problem

198. As with most canons applied in the interpretation of legislation, the principle that legislation implementing an international treaty should be construed to give effect to that agreement *attributes* an intention to the Oireachtas. EU law *imposes* one. Canons of the first kind can be rebutted by proof of an alternative intention. Those of the second kind require more to displace them: generally, the focus where these principles arise is not upon what the Oireachtas might have intended, but upon whether the words of a statute and the overall thrust of the legislation will bear the meaning demanded by the relevant system of law (see *Albatros Feeds Ltd. v. Minister for Agriculture and Food* [2006] IESC 52, [2007] 1 IR 221 at paras. 59-63). That means that insofar as EU law mandates NPE for some types of action, s. 50B and EMPA must be interpreted so as to enable this for those actions insofar as this is possible having regard to the text and '*gist*' of the legislation.

199. I explained earlier that one of the conclusions to be drawn from the decision of the CJEU in *NEPPC* was that there would be certain circumstances in which national courts applying national environmental law will be required to give an interpretation to national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and Article 9(4) of the Aarhus Convention.

200. There are three possible versions of what those circumstances are: (a) that *all* issues of national environmental law trigger this obligation, (b) that it only applies to those issues arising from national legislation giving effect to EU law, and (c) that the obligation will apply more generally to national law in an arena in which the EU had legislated. The applicant argued for the first, the Board and Attorney General for the second and each party for an interpretation of the third that would bring them close to, respectively, the first and second.

201. The debate arises from the language used in different paragraphs in *NEPPC*. Humphreys J. put the matter well at para. 31 of his judgment in *NEPPC 5*: the language in the judgment of the CJEU at paras. 54 to 58, he said, refers variously to rights derived from EU law, to the field of EU environmental law and separately to national environmental law. Humphreys J. suggested that insofar as these concepts are to be reconciled '*the fields covered by EU environmental law*' was the operative one and is wider than a situation where the rights asserted are purely those created by EU law. While he also suggested that a further reference to the CJEU would be necessary on this issue, I do not think that this is so. The judgment as a whole leaves no doubt as to what the governing test is, although as I explain there are undoubtedly issues around what it actually means.

202. The first version is suggested by para. 57 of the judgment:

> *'Consequently, where the application of national environmental law — particularly in the implementation of a project of common interest, within the meaning of Regulation No 347/2013 — is at issue, it is for the national*

> *court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive.'*

203. Para. 58 of the judgment however suggests the third :

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

204. While the language used in parts of the judgment perhaps lacks internal consistency, I do not think that there can be any serious doubt as to the extent of the obligation with which CJEU was concerned. The answer given to the relevant question as framed by Humphreys J. was clear, and mirrored the provisions of para. 58. The interpretative obligation is one that arises only within those parts of national law that are in a '*[fields] covered by EU environmental law'*. This does not merely reflect what the CJEU said,

but it is consistent with the rationale for the proposition in the first place: national courts must in certain circumstances interpret their domestic legislation '*to the fullest extent possible'* to ensure consistency between that law and Articles 9(3) and (4) so as to ensure that there is '*effective judicial protection in the fields covered by EU environmental law'*. The obligation does not arise outside that context. The detailed analysis embarked upon in *Slovak Brown Bear* would have been entirely unnecessary if all national law relating to the environment was deemed to fall within this formulation. That language in the judgment in *NEPPC* which suggests something broader – in particular para. 57 –is explicable by reference to the fact that *NEPPC* was concerned with a Project of Common Interest under Regulation 347/2013. It is reasonable to assume that the CJEU concluded that every aspect of the consent process for that development was itself – and by definition – operating within a '*field covered by EU law'*.

205. The Board accepts that the area covered by '*the fields of European law'* are very broad. Referring to the applicable EU Directives, the Board says that it would include climate change, biodiversity and birds, water protection (including bathing, surface, ground and marine) fisheries protection, air, noise pollution, chemical control, pesticide control, and waste. However – and this is the key difference between the parties – the Board imposes two qualifications on this. First, that it is only pleas of law which relate to allegations of a contravention of the relevant European or domestic legislation in those fields that would attract cost protection according to NPE as rolled into EU environmental law by the decision in *NEPPC.* Second, that it is necessary for the pleas of law to relate to the infringement of national environmental law in a substantive and real sense, rather than being tangentially related to the environment.

Application

206. The test – '*the fields covered by European environmental law*' or '*the sphere*' or '*the scope*' of that law – is easily stated in the abstract, but the application of the concept will not always be straightforward. The decision in *Slovak Brown Bear* provides some assistance: '*a specific issue which has not yet been subject to EU legislation may fall within the scope of EU law if it* ***relates to a field covered in large measure by it'*** (at para. 40, emphasis added).

207. Here, clearly, the agreed grounds come within the field of European law insofar as each of them present challenges arising from the application of either the Habitats Directive, or the Floods Directive. The ground relating to landowner consent is, I think, in all likelihood a component of national environmental law – it defines a legal precondition imposed by national law to the seeking of development consent – but on no version could the granular detail national law has constructed around the administration of the planning system be included under the umbrella of '*European environmental law*'.

208. The real difficulty arises from the issues around the development plan and those grounds that relate to flood risk, but which do not directly engage the Floods Directive. Were it for this court to determine whether these grounds are within the '*[field] of EU law*' as that term is used in *NEPPC,* I would conclude that they are. As the language used by CJEU in *NEPPC* and the holding in *Slovak Brown Bear* show, the question is not whether the specific ground engages a provision of a Directive *per se*, but whether it is functioning within a zone that has been significantly regulated by EU law.

209. For my part, I find the analysis conducted by Simons J. of this question compelling. As he put it in the course of his judgment, a development plan constitutes a '*plan*' or '*programme*' for the purposes of the SEA Directive. The making of a development plan is subject to assessment for the purposes of the SEA Directive. This is achieved principally through amendments made to the Planning and Development Regulations 2001 by the Planning and Development (Strategic Environmental Assessment) Regulations. The entire rationale of the SEA Directive, and, in particular, the purpose of introducing a requirement to carry out a strategic assessment in respect of plans and programmes, is to ensure that an environmental assessment is carried out at the earliest possible stage of decision-making. In circumstances where the content of plans or programmes influence subsequent decision-making in respect of individual development projects, it is essential that an assessment should be carried out at the earlier stage of the making of the plan or programme which sets the framework for development consent.

210. Similarly, the purpose of the Floods Directive is to reduce adverse consequences for human health, the environment, cultural heritage and economic activity associated with flooding. The application of Ministerial guidelines in regard to flooding operates in a zone in which the EU legislator has thus intervened, and which is accordingly in a field regulated by EU law.

211. However, I accept that the law in this regard is not clear, and in this regard, I agree with those judgments of Humphreys J. in which he concluded that the question of whether at least some grounds come within the principle identified in *NEPPC* would, were they

critical to this decision, require an Article 267 TFEU reference. Here, this is not necessary as the matter can be resolved on the basis alone of the interpretation of the Act and the general obligation arising from the status of Aarhus as an international agreement (and see C-561/19 - *Consorzio Italian Management e Catania Multiservizi v. Rete Ferroviaria Italiana SpA* ECLI:EU:C:2021:799).

212. It may be trite to say that even the prospect of such a reference underscores the point I made earlier as to the unwieldy and counterproductive consequence of a rule that relates cost protection to some but not other grounds of challenge to decisions in the planning sphere. The difficulties that have arisen from the interpretation of the decision in *NEPPC* itself demonstrate the strong prospect that even a reference on these issues might leave unresolved other similar (and not uncommon) questions in planning challenges. The grounds based construction of s. 50B urged by the Board and the State (which, for the reasons I have explained, would also have to govern cost protection under EMPA) would produce the real risk of the substantive issues in environmental litigation becoming satellites to endless, expensive and time consuming battles around discrete issues of characterisation and further references to CJEU. It is not evident to me who benefits from this: certainly not those with a stake in the rapid disposition of legal disputes of this kind.

VIII CONCLUSION

213. The conclusion I have reached is that s. 50B means precisely what it says. Any challenge to a decision made pursuant to a statutory provision which gives effect to the listed Directives falls within the costs protection provided for in that provision. This not merely includes s. 9 PD16, but also s. 34 and s. 37 PDA, each of which are statutory provisions that give effect to the appropriate assessment obligation, which includes screening. Logically, as indeed the Board says in its submissions, there is no difference for these purposes between s. 9(6) of PD16 and s. 34 or s. 37 of PDA.

214. The words of the section are the first port of call in its interpretation, and while the court must construe those words having regard to the context of the section, of the Act in which the section appears, the pre-existing relevant legal framework and the object of the legislation insofar as discernible, the onus is on those contending that a statutory provision does not have the effect suggested by the plain meaning of the words chosen by the legislature to establish this.

215. The Board and the Attorney General have failed to do so here. Their case depended on the proposition that the applicant had failed to establish *why* the Oireachtas would have wished to do more than implement the 2003 Public Participation Directive and afford costs protection to all planning challenges, but that was not the pertinent inquiry. The correct questions were (a) why it would *not* have wished to do so and (b) where in the text or context of the statute that asserted, negative purpose could be discerned?

216. While the court can surmise reasons why the Oireachtas might not have wished to allow cost protection for all challenges to decisions granting development consent, it is not hard to point to credible reasons why it might have sought to do so. It is not the function of the court in the teeth of a statutory provision - the language of which is clear in its terms and effect - to interpret that legislation so as to give effect to one of a number of competing policy objectives without some objective basis for deciding as between them. None was identified and thus substantiated by the respondents to this appeal.

217. In fact, in this case there was a compelling reason of context for interpreting s. 50B in the manner contended for by the applicant. The combined effect of Articles 9(2), 9(3) and 9(4) of the Aarhus Convention is that contracting states must ensure that proceedings in which decisions granting development consent are challenged for non-compliance with national law relating to the environment are not prohibitively expensive. This includes challenges to decisions based upon non-compliance with the principles applied to environmental laws that require that administrative decisions be rational, take account of relevant considerations, do not take into account relevant considerations, be reached in accordance with fair procedures and otherwise comply with the standard principles of administrative law.

218. The no cost rule provided for in s. 50B is one of two legal mechanisms by which the State has sought to achieve that objective. EMPA is the other. For the reasons I have explained in this judgment were both of these legal mechanisms to be read together (as they must be) and were s. 50B to be interpreted in the manner contended for by the Board and the Attorney General, effect would not have been given to this aspect of Aarhus. The court should strive to interpret the legislation so as to avoid that outcome.

In the case of s. 50B, this requires no adjustment to the language of the provision: on the contrary it merely requires that it be given its literal interpretation. Aarhus, accordingly provides a powerful confirmation of the text of s. 50B, and a strong counterpoint against arguments of context or purpose.

219. The decision of the CJEU in *NEPPC* overhangs many aspects of this case. Some features of that decision are clear, and to that extent, it emphatically supports the outcome I have determined on the basis of the language in s. 50B. There is, however, an uncertainty around the extent of the obligation which the CJEU in *NEPPC* decided falls to be discharged as a matter of EU law in interpreting Aarhus. Having regard to the conclusion I have reached on the interpretation of the provision as a matter of domestic law, it is unnecessary to refer any question arising from these matters to the CJEU.

220. It follows that this appeal should be allowed, the order of the Court of Appeal set aside, and that made by Simons J. reinstated.