

JUDICIAL REVIEW

[2022] IEHC 249

2021/750JR

**IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT, 2000
(AS AMENDED)**

BETWEEN:-

**WENDY JENNINGS
AND
ADRIAN O’CONNOR**

APPLICANTS

AND

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

RESPONDENTS

AND

COLBEAM LIMITED

NOTICE PARTY

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Judgment of Mr Justice Holland delivered the 3rd of May 2022

Introduction

1. The Applicants seek to have quashed the decision of the Respondent (“the Board”) dated 3 June 2021 to grant planning permission (“The Impugned Permission”) to the Notice Party, (“Colbeam”), for, essentially, construction of 698 student bedspaces on a site at Our Lady’s Grove, Goatstown Road, Dublin 14 (“the Site”). That permission was granted pursuant to the Planning and Development (Housing) and Residential Tenancies Act 2016 (“the 2016 Act”) as applicable to Strategic Housing Developments (“SHD”). The Applicants live nearby and consider that the permission permits significant over-development of the Site.

2. This is my fourth judgment in this case. In my first, delivered 14 January 2022¹, I declined to stay operation of the Impugned Planning Permission in respect of a limited part of the permitted works. In my second judgment, delivered 19 January 2022², I refused the application by the Notice Party (“Colbeam”) that the further prosecution of these proceedings be made conditional on the Applicants’ provision of undertakings in damages. I also refused Colbeam’s application that the Applicants be directed to disclose their means to satisfy any liability which could arise on such an undertaking. In my third judgment, delivered 7 February 2022³, I stayed operation of the Impugned Permission in respect of the permitted works pending appeal of my refusal of such a stay pending trial.

3. This judgment addresses the question whether the Applicants should have a Protective Costs Order (“PCO”). By Notice of Motion dated 19 November 2021 the Applicants seek a PCO under any of the following three bases:

- S.50B PDA 2000⁴
- Part 2 - Ss 3, 4 & 7 - of the 2011 Act⁵
- The inherent jurisdiction of the Court, Order 99 of the Rules of the Superior Courts and/or S.168 of the Legal Services Regulation Act 2015

The Notice of Motion also seeks a PCO under the duty to interpret national law in accordance with the **Aarhus Convention**⁶ (“Aarhus”) and the EU Charter of Fundamental Rights. However, as will be seen, these are not free-standing bases on which PCOs may be made but result, rather, in techniques of statutory interpretation.

¹ [2022] IEHC 11

² [2022] IEHC 16

³ [2022] IEHC 61

⁴ Planning & Development Act 2000

⁵ Environmental Miscellaneous Provisions Act 2011. In fact the Notice of Motion invokes S.3 only.

⁶ 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

4. It is important to state also that these bases are intertwined and each is entwined with Aarhus such that their truly separate consideration is impossible⁷. Each of the foregoing bases may fall to be interpreted in light of Aarhus on foot of either or both of two distinct interpretive aids:
- at EU Law, what has been called the “Interpretive Obligation”.
 - at Irish Law, the Presumption of statutory interpretation in conformity with the State’s international law obligations.

Both, it is argued, bring to bear on the interpretation of domestic legislation the so-called “NPE Rule” (Not Prohibitively Expensive) of Aarhus Art 9(4).

Also, and as will be seen, each of these bases falls to be considered by reference to each individually of the grounds on which judicial review is sought. The result is a complexity which does no credit to the law.

5. The law in this area remains in a state of considerable flux and dispute over a decade after the 2011 Act took effect. It is even longer since S.50B took effect. It is difficult to see that the aim, expressed in the UK⁸, of ensuring that costs protection rules should not “*undermine legal certainty and promote satellite litigation thereby increasing the potential for delay in the challenge process*” has been achieved. One could be forgiven for the impression that, in practice, PCO satellite litigation is fast becoming an inevitable, expensive and time-consuming waystation en route to trial in planning and environmental judicial reviews.

6. In **North East Pylon #5**⁹ Humphreys J expressed the “... *very respectful view, that a default rule, such as that the court should lean towards no order in challenges based on national environmental law or otherwise within the scope of the not-prohibitively expensive principle, would itself save an enormous amount of inconvenience and expense for parties and the court. In the absence of a default rule, costs will have to be litigated every time, with a considerable wasted expenditure of scarce judicial resources.*”

7. I, equally respectfully, join in that observation and suggest that the regrettable length and complexity of this judgment may support it. I will attempt to contribute to what Humphreys J restrainedly called “*something of a struggle*”¹⁰ to untangle the costs rules. Any greater ambition seems excessive. This seems to me a situation in which, subject to the necessity of compliance with EU law and as O’Donnell J said in **Quinn v PwC**¹¹, “.. *it is more important that the law be clear rather than clever*”. At present, it is at least not the former.

⁷ I am relieved to see a similar observation by Humphreys J in *North East Pylon Pressure Campaign Ltd. & anor v An Bord Pleanála & ors* No.5 [2018] IEHC 622 §13

⁸ *R(HS2 Action Alliance Ltd) v Secretary of State for Transport and another* [2015] All ER (D) 132 (Mar) [2015] EWCA Civ 203

⁹ *North East Pylon Pressure Campaign Ltd v An Bord Pleanála* No.5 [2018] IEHC 622

¹⁰ *Enniskerry Alliance and Enniskerry Demesne Management Company CLG v An Bord Pleanála* [2022] IEHC 6 (High Court (General), Humphreys J, 14 January 2022)

¹¹ *Quinn Insurance Ltd v Price Waterhouse Coopers* [2021] IESC 15 (Supreme Court, 22 March 2021)

8. At risk of exacerbating rather than simplifying, and though the usage may by now be too well-established to displace and though there is no precisely correct usage¹², properly, and specific to its origin in Aarhus Article 9(4), it might be better to refer to an “NPE Principle” than to an “NPE Rule”. There is no precisely correct usage as what is in practice a principle when viewed from the perspective of domestic law could arguably be called a rule at EU Law¹³ even though not directly effective and is undoubtedly a rule of International Law. But in terms of practical litigation in our courts what Aarhus Article 9 states is not, per se, enforceable law – a rule - unless and until it is made so by either EU law or domestic law¹⁴. On balance, the term “NPE Principle” seems to better convey the position when describing the practical legal quality of the effect of Aarhus Article 9(4). The term “NPE Principle” seems to me also better to fit the mechanism whereby Aarhus Article 9(4), in the absence of transposition by legislation, operates as an EU Law Interpretive Obligation or an Irish Law Presumption of statutory interpretation¹⁵ - though I do not intend thereby to diminish the importance of either. Of course, when Article 9(4) is transposed by EU law or Domestic Law and thereby rendered enforceable, it makes undeniable sense to refer to an “NPE Rule”. However, I repeat my appreciation that there is no usage precisely correct in all contexts: as stated, whether a Rule or a Principle can be a matter of perspective and context.

9. To further exacerbate the tangle and strictly speaking, these various bases of costs protection could afford, in detail, somewhat different levels of protection to the Applicants. Those differences were not the subject of detailed submissions at hearing and the Board has indicated¹⁶ that it will, for simplicity’s sake, ignore such differences as to the grounds in respect of which it concedes a PCO. Colbeam takes a different view. That difference may require further consideration in light of this judgment.

10. The decision of the Court of Appeal in **Heather Hill #1**¹⁷ as to the scope of costs protection under S.50B PDA 2000 and the EU law Interpretive Obligation is under appeal to the Supreme Court. Since the hearing of this matter, Humphreys J gave judgment in the PCO motion in **Enniskerry/PEM**¹⁸. He decided certain matters as to the costs protection afforded by S.50B PDA 2000 and the 2011 Act. However, he also decided in principle to refer questions to the CJEU¹⁹ as to the effect of the EU Law Interpretive Obligation. So the full ratio of the decision in **Enniskerry/PEM** remains to be determined as to costs protection regarding judicial review grounds other than those in respect of which he has granted PCOs. I have supplemental written submissions from all parties on the significance for this case of **Enniskerry/PEM**. All parties eschewed the opportunity of further oral argument. I am informed by the Board that an appeal is envisaged of the decision in **Enniskerry/PEM** as to the costs protection afforded by the 2011 Act. The Board hopes by this means to allow issues in relation to the scope of all three bases to be considered together by the Supreme

¹² Or at least none that isn’t cumbersome.

¹³ given the EU’s monist approach to international law makes Aarhus an integral part of the EU legal Order

¹⁴ As to which, see further below

¹⁵ As to which, see further below.

¹⁶ By letter dated 15 November 2021

¹⁷ Heather Hill Management Company CLG v An Bord Pleanála [2021] IECA 259

¹⁸ Enniskerry Alliance & Anor v An Bord Pleanála & Ors and Protect East Meath Limited v An Bord Pleanála & Ors [2022] IEHC 6. This was a single judgment in 2 separate proceedings relating to different planning permissions.

¹⁹ Court of Justice of the European Communities.

Court in **Heather Hill #1** and **Enniskerry/PEM**. It remains to be seen, however, what precisely will be the issues in any such appeals and whether and in what respects, if any, the Supreme Court will grant leave to appeal. While that some such leave will be granted can readily be imagined, it cannot be assumed: still less can its scope be assumed. Costello J in the Court of Appeal has recently²⁰ observed that the reference to in **Enniskerry/PEM** is likely to be answered by the CJEU at the earliest 18 months from now - September 2024. Indeed, Costello J may not have been aware that the reference has not yet been finalised as to its terms or sent to the CJEU. And I understand indeed that the Board may yet seek deferral of that reference to await the outcome of appeals to the Supreme Court. Even more recently, further questions on costs protection have been identified for reference to the CJEU in **Save Roscam**²¹.

11. The Board suggests that I have two options in light of that state of considerable flux. The first is to further reserve judgment in this PCO motion pending developments in **Enniskerry/PEM** and in **Heather Hill #1**. The Board suggests that this would be at the cost of significant delay in the proceedings, contrary to the legislative intent for expedition in planning judicial review²² and potentially at the cost of prejudice to Colbeam.

12. The Board prefers its second option - to now determine the PCO issues on the law as it stands. The Board suggests that the present is an application for a preliminary Costs Order and observes that the question of costs will be revisited after the proceedings have been decided. It submits that it will be open to the Applicants to re-ventilate all costs protection matters at that stage in the light of the law as it stands *at that time*. It submits that it will also be open to the Applicants to seek to stay the making of final orders as to costs pending the outcome of references or appeals still pending at that stage. Colbeam agrees with the Board in this respect.

13. The Applicants, in contrast, urge that I should:

- a) In light of **Enniskerry/PEM** make an interim PCO under ss.3 and 4 of the 2011 Act as to the issues raised by the Applicants in respect of the protection of trees and bat roosts, which the Applicants propose to appeal to the Court of Appeal.
- b) Otherwise reserve judgment in the PCO motion pending the CJEU answer to the reference in **Enniskerry/PEM**.
- c) Consider certifying to the CJEU questions in relation to undertakings as to damages not addressed in **Enniskerry/PEM** and arising from my judgment of 19th January 2022.

²⁰ Jennings v An Bord Pleanála et al & Colbeam Ltd [2022] IECA 100 – a judgment as to the issue of a stay on development pending trial.

²¹ Save Roscam Peninsula Clg, V An Bord Pleanála, & Ors Including Alber Developments Limited [2022] IEHC 202

²² S.50A(10) PDA 2000 - The Court shall, in determining an application for *section 50* leave or an application for judicial review on foot of such leave, act as expeditiously as possible consistent with the administration of justice.

The Evidence

14. The Notice of Motion dated 19 November 2021 for a PCO is grounded on the affidavit of Fred Logue, Solicitor to the Applicants, sworn 19 November 2021. It asserts uncertainty in the law as to PCOs as a result of the Court of Appeal decision in **Heather Hill #1** and asserts resultant dispute between the parties in correspondence as to the availability of a PCO to the Applicants. It asserts an entitlement in the Applicants to know in advance of further prosecution of the proceedings their position with reference to what they assert to be their entitlement that these proceedings not be prohibitively expensive for them. Otherwise, Mr Logue's affidavit does not address the financial and other circumstances of the Applicants, the likely costs of the proceedings or the strength of the Applicants' case.

15. Mr Logue's affidavit does exhibit²³ inter partes correspondence from 27 October 2021 to 18 November 2021 on the issue of PCOs. John O'Connor, solicitor to Colbeam, swore an affidavit on 30 November 2021 in the PCO motion solely to exhibit inter partes correspondence from 29 July 2021 to 25 November 2021. It considerably overlaps the correspondence exhibited by Mr Logue. I will address this correspondence below.

16. John O'Connor swore another affidavit on 8 December 2021 exhibiting a costs drawer's report estimating on a preliminary basis Colbeam's probable party and party costs of the proceedings at about €370,000²⁴. The report suggests that, assuming a PCO on 4 of 15 grounds €271,000²⁵ (11/15) of that figure "could be allocated" to the grounds not attracting a PCO. Of course, for many and good reasons – perhaps not least the allocation of the costs equally across each of the 15 grounds - these can only be ballpark estimates. However, it is easy to see that even broadly similar costs incurred by the Applicants and the Board would total a very significant sum. And if the grounds pleaded against the State require separate hearing, the total costs could be significantly higher still.

17. In his grounding affidavit sworn 26 July 2021, the First Applicant, Adrian O'Connor, described himself as a "Chief Executive" but gives no other information as to his financial or other circumstances. His exhibited submission to the Board establishes him as resident near the Site and complains, inter alia of tree removal, open space issues, housing density, building height, lack of parking and ecology issues. In her grounding affidavit sworn 26 July 2021, the Second Applicant, Wendy Jennings, described herself as a "Marketing Manager" but gives no other information as to her financial or other circumstances. She considered the proposed development would be "significant overdevelopment of the site with serious environmental and planning implications". She envisages provision of a planning report²⁶ on the issue of open space and exhibits a large number of

²³ Exhibit FPL1

²⁴ I have rounded up slightly.

²⁵ I have rounded up slightly.

²⁶ Not since to hand

documents, including her submission to the Board²⁷. Her submission establishes her as resident near the Site. She expresses concern as to the community impact of the proposed development and makes submissions in similar vein to Mr O'Connor.

Agreed Orders on Grounds 10 & 12 & Order on Ground 8

18. It is common case that whether a PCO should be made requires decision as to the costs of the proceedings as they relate separately to each individual ground on which leave to seek judicial review was granted.

19. It is agreed that the Applicants should have a PCO as to Grounds 10 and 12, which read as follows:

“10. The impugned decision is invalid because the Board failed to comply with Article 299B(1)(b)(i) of the Planning and Development Act Regulations 2001 (‘the 2001 Regulations’) and/or Article 4(5) of the EIA Directive as it was not open to the Board to conclude that the possibility of significant effects on the environment could be excluded at preliminary assessment stage.”

This ground relies on the fact that Colbeam’s Ecological Impact Assessment Report identified that the site was a suitable habitat for foraging and commuting bats and that 4 trees for removal were potentially suitable as bat roosts. Similar assertions are made as to birds.

“12. The impugned decision is invalid in that it contravenes Article 12 of the Habitats Directive, Article 299(C)(1) of the Planning and Development Regulations 2001 and/or Article 27 of the European Communities (Birds and Natural Habitats) Regulations 2011 (‘the Habitats Regulations’) as it failed to apply the correct legal test in respect of bat fauna that are entitled to strict protection and/or the preliminary examination EIA determination was based on inadequate information submitted by the developer contrary to Article 4(4) of the EIA Directive.”

20. The Applicants also urge a PCO as to Ground 8 pursuant to the 2011 Act. Ground 8 reads as follows:

8. The Decision is invalid as the proposed development granted permission by the Board is in material contravention of the CDP in relation to trees. The grant of planning permission constituted a grant of permission contrary to Zoning contrary to section 9(6)(b) of the 2016 Act of the land and/or a grant in material contravention of the CDP that was not made pursuant to section 37(2)(b) of the Planning and Development Act 2000.

²⁷ Exhibit WJ1 tab 18

21. By way of particulars of Ground 8, the Applicants assert, inter alia, that:

- The Site is subject to a Development Plan objective to *‘protect and preserve trees and woodland’*.
- That is a zoning objective.
- The proposed development will result in the removal of 35 of the 57 trees on site - including 9 oaks identified by the Developer as Category B trees of high biodiversity value.
- The Parks Department of the Planning Authority (Dun Laoghaire Rathdown County Council – “DLRC”) described the 9 oaks as early mature and *“highly prized”*, described the development proposal as for *“wholesale loss of trees”* across the site and recommended that permission be refused.

22. I will address the 2011 Act in more detail later. For now it suffices to observe that, S.3 of the 2011 Act disapplies in certain categories of legal action the normal principle that costs follow the event. S.4 of the 2011 Act describes those categories of legal action. It imposes a requirement that any asserted breach of a statutory requirement *“has caused, is causing, or is likely to cause, damage to the environment.”* (the “damage criterion”). S.7 of the 2011 Act enables a party to proceedings at any time before or during those proceedings to seek a determination from the Court that s.3 applies to that action.

23. The Board concede the Applicants should have a PCO as to Ground 8 pursuant to the 2011 Act. They do so on the basis that, as pleaded, Ground 8 satisfies the criteria for a 2011 Act PCO identified by Humphreys J in **Enniskerry/PEM**. He held that, to attract a 2011 Act PCO, a ground must allege that:

- a) Breach of an identified statutory requirement;
- b) The breach occurred in the grant of planning permission;
- c) The breach will in the future cause specific and tangible ecological harm²⁸; harm not such as would arise in the case of any development, but more tangible harm like cutting trees, removing hedgerows, causing an adverse effect on species or habitats, or causing pollution.

24. The Board accepts, for the purposes of these proceedings only (and without prejudice to its intended appeal on this point against the decision of Humphreys J), that, by those criteria, 2011 Act costs protection applies to Core Ground 8.

25. Colbeam does not concede a 2011 Act PCO as to Ground 8. Its position is based on the single assertion that Ground 8 fails the criterion of tangible ecological harm.

²⁸ Emphasis added

26. Colbeam notes that Humphreys J in **Enniskerry/PEM** made a 2011 Act PCO as to Ground 6 in that case, which contended that the Board’s decision was invalid because the Board failed to consider that the development constituted a material contravention of the development plan in relation to hedgerows and/or that the decision constituted a grant in material contravention of the plan, contrary to s.9(6)(c) of the 2016 Act. They cite Humphreys J as summarising this case as an allegation of non-compliance with s.9(6)(c) which would result in *“future ecological harms of a specific nature” “because the development so facilitated will cause damage to or removal of hedgerows that would not have occurred had the development plan not been contravened.”* Colbeam states that at first blush, Ground 6 in **Enniskerry/PEM** as to damage to hedgerows looks similar to Ground 8 as to tree loss in the present case. But Colbeam states that its development will not cause *“specific and tangible ecological harm”* necessary to attract the protection of the 2011 Act because the impugned decision authorises the removal of trees on condition that they be replaced with a greater number of trees of better quality. Colbeam states that all the evidence suggests that the removal of trees will not have any other ancillary environmental or ecological effects.

27. The Applicants assert that Colbeam’s posited distinction on the facts as between Ground 6 in **Enniskerry/PEM** as to damage to hedgerows and Ground 8 as to tree loss in the present case is baseless as, in **Enniskerry**, the Developer also proposed (and the Board conditioned) in like-for-like replanting of removed hedgerows and trees and proposed a planting scheme that would result in significantly more native deciduous trees on the site than those removed.

28. I have no evidence of that condition in **Enniskerry/PEM** – it is not mentioned in the decision of Humphreys J. But I do not think it is necessary to resolve that issue for present purposes. As Humphreys J said in **Enniskerry/PEM** *“All an applicant has to do at the protective costs stage is to make out a stateable argument as opposed to one that is likely to succeed.”* As Murray J said for a unanimous Court of Appeal in **O’Connor v Offaly County Council**²⁹, *“the Court is concerned only to characterise the proceedings, to determine that they disclose a stateable claim, and to determine whether the characterisation of the claim brings it within or without s.3.* Notably, Murray J said: *“the answer to both of these questions should be in the affirmative in many cases.”* The implications of this position are strikingly illustrated in the observation of Murray J that *“... unless contending that it is too early to decide if s.3 applies to the case, a respondent or defendant to proceedings faced with an application for a protective costs order should either accept that the proceeding meet the required threshold, or contemporaneously apply to set aside leave or strike out the proceedings.”* No application to strike out Ground 8 is made in these proceedings.

29. The environmental damage criterion was not at issue in the Court of Appeal in **O’Connor** so the decision of the High Court (Baker J³⁰) remains unaffected. Murray J recorded that Baker J had considered that criterion of causative and direct link between the impugned decision and likely damage to the environment by reference to the question whether the claim *‘had a certain degree of*

²⁹ [2020] IECA 72

³⁰ [2017] IEHC 606

*substance and that it had a reasonable prospect of success*³¹. Baker J had also considered that leave to seek judicial review on the ground in question implied an arguable case and the Court could not at that stage of the proceedings resolve any conflict of evidence. Baker J formulated³² an onus on a party seeking an order under s.7 of the 2011 Act “... *to establish that he or she has a reasonable case with a reasonable prospect of success, and to make out a stateable argument that damage to the environment is occurring or is likely to occur.*”

30. In my first judgment in this case³³ - on the question of a stay on operation of the planning permission pending trial - I considered the prospect of environmental harm by reason of tree removal in the context of the application of “**Okunade**”³⁴ balance of justice analysis. However, that is a very different context to the present – not least in the emphasis **Okunade**, and later decisions such as **Krikke**³⁵, place on the importance of enabling presumptively valid statutory schemes, and permissions issued thereunder, to be carried into effect. That issue does not arise as to costs protection. Accordingly, though Krikke speaks of enquiring as to “*the strength of the case, and the reality of irreparable harm*” and **Dowling**³⁶ of “*serious and irreparable harm*”, it by no means follows that, as to the criterion of environmental damage, the same standard of inquiry applies, the same severity of damage must be foreseen or that refusal of a stay implies refusal of costs protection. As stated, the law on stays pending trial is in part informed by the importance of enabling presumptively valid statutory schemes and permissions issued thereunder to be carried into effect. The law on costs protection addresses a different public interest, identified in Aarhus Article 9, which tends in the opposite direction: that of enabling access to justice by way of judicial review of such permissions. Accordingly, as Baker J says, all an Applicant must show is a “*a stateable argument that damage to the environment is occurring or is likely to occur.*”

31. I do not propose here to repeat my analysis in my first judgment of the prospect of environmental harm resulting from tree-removal. I concluded that damage was likely to be caused if a stay was refused but I was not persuaded that the reality of such damage is that it was likely, at least after replanting, to be irreparable and serious. However, that is not the same as a conclusion, by reference to a very different public interest, that the Applicants’ argument “*that damage to the environment is occurring or is likely to occur*” is unstateable. The Applicants say removal would materially contravene a Development Plan objective specific to the site to “*Protect and Preserve Trees and Woodlands*”. Whatever about the application of the phrase to “woodlands”, it is at very least arguable that to “*protect and preserve*” trees is not the same thing as to replace them. Indeed, it is at very least arguable that if they were to be preserved they wouldn’t need replacing. And though the Board took a different view, I note in particular the view of the Dun Laoghaire/Rathdown County Council (“DLRCC”) Parks Department cited above as to the significance of tree removal in this case.

³¹ McCoy v Shillelagh Quarries Ltd [2015] IECA 28, [2015] 1 IR 627

³² At §65

³³ [2022] IEHC 11

³⁴ Okunade v Minister for Justice and Equality [2012] IESC 49, [2012] 3 IR 152

³⁵ Krikke v Barranafaddock Sustainability Electricity Ltd [2020] IESC 42 (Supreme Court, O’Donnell J, 17 July 2020)

³⁶ Dowling v Minister for Finance [2013] 4 IR 576

32. Accordingly, I conclude that the Applicants do allege in Ground 8 that the breach they allege will cause specific and tangible ecological harm in the form of loss of trees – and trees protected by a specific provision of the Development Plan. So, they are entitled to a 2011 Act PCO as to Ground 8.

33. I should add that, since the hearing of this motion, Colbeam on 24 January 2022, prior to all supplemental submissions on the PCO issue, carried out tree-felling on Site. Whether it was entitled to do so is disputed. It suffices here to note that no party submitted that those works should affect my decision on the issue of a PCO as to Ground 8.

The Remaining Grounds – 1 to 7, 9 & 11

34. The grounds on which leave to seek judicial review was granted are set out below, as is a summary of the position of the parties. Grounds 12 to 15 assert invalidity of legislative instruments and stand adjourned. I ignore them for present purposes. Accordingly, the Grounds remaining for consideration (“the Remaining Grounds”) are as follows:

Grounds		
1. ³⁷	Material Contravention of the Development Plan as to provision of open space	These grounds allege breach of s.9(6)(c) of the 2016 Act in granting permission without considering whether such material contravention could be justified by reference to S.37(2)(b) PDA 2000 ³⁸
2.	Material Contravention of the Development Plan as to Institutional Lands and as that designation of the Site imposes requirements as to (a) open space (b) maintaining the open character of the lands, (c) residential densities and/or (d) Future Institutional Use /Additional facilities.	
3.	The Board acted <i>ultra vires</i> in <ul style="list-style-type: none"> granting permission without provision for Part V³⁹ social housing in breach of s.96 PDA 2000 and s.15 of the 2016 Act. not rejecting and/or considering rejecting the planning application on the basis of non-compliance with Article 297(2)(h) PDR 2001 and S.4(1)(a)(iv) of the 2016 Act requiring the application to address Part V. 	

³⁷ Note – numerical order of grounds altered for layout purposes

³⁸ Planning & Development Act 2000

³⁹ Part V PDA 2000

Grounds	
	<ul style="list-style-type: none"> considering that such breaches could be justified by invoking S.9(6) of the 2016 Act and S.37(2)(b) PDA 2000.
4.	Error in justifying, under s.37(2)(b) PDA 2000 and by reference to SPPR3 ⁴⁰ of the 2018 Building Height Guidelines ⁴¹ , material contravention of the Development Plan as to building height - SPPR3 does not apply to the lands.
5.	Alternatively, non-compliance with SPPR3 resulting in <ul style="list-style-type: none"> Contravention of the sunlight/daylight requirements/criteria of §3.2 of the Height Guidelines and the Apartment Guidelines 2020⁴² and so of S.9(3) of the 2016 Act. Contravention of BER Guidelines as to <i>Site Layout Planning for Daylight and Sunlight</i>⁴³ and/or BS 8206-2 <i>Code of Practice for Daylighting</i>, 2008⁴⁴ and/or material errors of fact.
6.	Alternatively, contravention of SPPR3 in material contravention of the Development Plan in failing to assess the adequacy of public transport capacity .
7.	Contravention of S.37(2)(b)(i) PDA 2000 and S.9 of the 2016 Act in failing identify any or adequate basis for concluding the proposed development was of national and strategic importance .
9.	Contravention of S.8(1)(a)(iv)(II) of the 2016 Act - obligation on Colbeam to publish a notice identifying how the proposed development would materially contravene the Development Plan.
11.	Contravention of Article 297(1) PDR 2001 in that the planning application form failed to accurately identify the land ownership of Roebuck House .

⁴⁰ Specific Planning Policy Requirement as contemplated in S.28(1C) PDA 2000. In part, SPPR3 of the 2018 Height Guidelines reads as follows:

"It is a specific planning policy requirement that where;

(A) 1. an applicant for planning permission sets out how a development proposal complies with the criteria above; and

2. the assessment of the planning authority concurs, taking account of the wider strategic and national policy parameters set out in the National Planning Framework and these guidelines;

then the planning authority may approve such development, even where specific objectives of the relevant development plan or local area plan may indicate otherwise."

Development Management Criteria set out "above" at §3.2 of the Guidelines require the Applicant to demonstrate satisfaction of a range of listed criteria relevant to Building Height, for example, as to response to the overall natural and built environment, availability of public transport, access to daylight, overshadowing, and effect on birds and bats.

⁴¹ Urban Development and Building Heights: Guidelines for Planning Authorities (2018)

⁴² Sustainable Urban Housing: Design Guidelines for New Apartments (2020)

⁴³ *Site Layout Planning for Daylight and Sunlight: A Guide to Good Practice* (BR 209)

⁴⁴ as revoked and replaced by BS EN 17037:2018

Aarhus – Introduction & Relevant Provisions

35. **Aarhus** is the ultimate source of all three types of special costs rule at issue and has been the subject of much and complex caselaw addressing, inter alia, the interactions of no less than three systems of law – International, EU and National and within National Law the various provisions listed above. Accordingly, and with no little diffidence, I will first attempt a consideration of Aarhus and its place in the legal order, before moving to the specific types of special costs rule at issue.

36. Aarhus is authoritatively described⁴⁵ as having three Pillars of public entitlement⁴⁶. The First Pillar is Access to Environmental Information. The Second Pillar is Participation in Environmental Decision-making. The Third Pillar is Access to Justice - legal remedy to enforce entitlements provided by the First and Second Pillars and, importantly, to also enforce domestic environmental law⁴⁷. These are entitlements recognised at International Law as binding States - as opposed to domestic law entitlements capable of being relied on by citizens in litigation.

37. **Aarhus Article 1** states the objective of Aarhus and the general obligation at international law of those, such as the EU and Ireland, who ratify it:

“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”⁴⁸

38. **Aarhus Article 2(3)** defines “Environmental Information” in a manner considered⁴⁹ to necessarily, and hence impliedly, define the concept of “environment”:

“3. “Environmental information” means any information on:

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

⁴⁵ United Nations Economic Commission For Europe The Aarhus Convention An Implementation Guide, Second edition, 2014

⁴⁶ Ignoring pro tem the distinction between the “public” and the “public concerned”

⁴⁷ Aarhus Implementation Guide p187

⁴⁸ Emphases added

⁴⁹ Aarhus Implementation Guide

(c) *The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;*"

Later instruments have tended to elide the distinction between the elements identified at Article 2(3)(a) and (c) but, as a comparison will readily reveal, this list clearly informed the definition of environmental damage in S.4(2) of the 2011 Act.

39. Aarhus Article 3, entitled "General Provisions", includes the following:

"1. Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and 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.

2. Each Party shall endeavour to ensure that officials and authorities assist and provide guidance to the public in seeking access to information, in facilitating participation in decision-making and in seeking access to justice in environmental matters.

3. Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters.

8. Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings."⁵⁰

Article 3 clearly identifies Access to Justice in environmental matters as a positive good to be promoted. It is far from a necessary inconvenience. This view of matters is also apparent from the recitals of Aarhus.

40. Aarhus Article 6, as to public participation, includes the following:

"1. Each Party:

(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

⁵⁰ Emphases added

(b) *Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions;*"

Aarhus Annex I lists various activities not here relevant save at §20 which lists:

"20. Any 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."

41. Aarhus Article 9, entitled "Access to Justice", includes the following:

- Article 9(1) provides for access to legal remedy for breach of the right of access to environmental information. Article 9 continues as follows:

"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 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.

3. 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.

4. 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.
.....

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."⁵¹

⁵¹ Emphases added

Notably, Article 9(4) is the direct source of the NPE Principle.

42. The Applicants submit that, for the purposes of this motion, Aarhus Article 9(3) is a key provision and a key issue concerns the concept of “*national law relating to the environment*”, which arose in **Heather Hill #1**.

43. So, in addition to its overall objective, more specifically, Aarhus seeks to:

- encourage the public to participate in decision-making on proposals for development affecting the environment (Articles 3, 6, 7 and 8);
- ensure that the public is adequately informed about matters relating to the environment (Articles 3, 4 and 5);
- ensure that independent judicial processes enable the public to participate in and challenge decisions and acts and omissions affecting the environment – i.e. access to justice (Article 9);
- actively facilitate and promote access to access to justice by educational and other methods of raising public awareness and by ensuring that remedies are fair and effective, the process equitable and timely, and the cost of taking action is not prohibitively expensive (Articles 3 & 9(4)).

44. One general comment is required. In our system in which costs follow the event in legal proceedings, those environmental litigants who win their cases typically do not need costs protection. It is obvious, but can be overlooked, that it is intrinsic in costs protection that those whom it benefits are, and are intended to be, predominantly those whose complaints are found unjustified or who fear that they may be. That this is so despite the understandable frustration and ire of their successful opponents in litigation and the resultant cost to them and delay in often-desirable, often-urgent, and as matters transpire, legal development, is testament to the high value the society by its laws has chosen to place on access to environmental justice. It is testament also to part of the price society has decided to pay for environmental protection. Indeed, access to justice rights are not, at least primarily, an end in themselves: the law views citizens exercising such rights as a means to environmental protection. **Edwards**⁵² cites the EU objective to give the public concerned ‘*wide access to justice*’ and, to the broad end of preserving, protecting and improving the quality of the environment, “*to ensure that the public plays an active role*”. This is a strong vindication of the role of the public in environmental matters and of the importance of access to justice in that regard, the facilitation of which access is the purpose of costs protection.

⁵² Case C-260/11 *Edwards v Environmental Agency* [2013] ECR I-000 §30 & 31 – cited in *ClientEarth* (see *infra*)

Aarhus - Legal Status in EU & Irish Law & Shared Competence

45. Aarhus is not in origin an EU legislative instrument or a creature of EU law more generally or a convention directed exclusively to the EU or EU law. Aarhus is an international law treaty made under the auspices of the UN Economic Commission for Europe. It is open for ratification by states members of, or having consultative status with, that Commission - which states include states not members of the EU. It is also open for ratification by certain regional economic integration organisations. Thus, for example, Aarhus has been ratified by the EU itself and by non-EU States such as Georgia, Armenia and Ukraine.

46. Ireland, and the EU, each in its own right, have ratified Aarhus. But the legal status of Aarhus in EU law in virtue of its ratification by the EU⁵³ differs from its legal status in Irish law by virtue of its ratification by Ireland and, as to Aarhus, the relationship between EU law and Irish law and the division of legal competencies as between states and the EU are complex.

47. As Hogan J observed in **McCoy v Shillelagh Quarries**⁵⁴, the EU “*adopts a largely monist attitude to international agreements*”. By the EU’s ratification of Aarhus and by Article 216 TFEU⁵⁵ Aarhus binds both EU institutions and EU Member States. So, Aarhus has been described in CJEU caselaw⁵⁶ as an “*integral part of the EU legal order*” – to the extent, indeed, that failing conforming interpretation of the EU legislation with such international agreements, such that EU legislation conflicts with such international agreements, the latter prevail in EU law⁵⁷. However, the precise effect of an international agreement such as Aarhus by virtue of its status as an integral part of the EU legal order is not inevitable and requires consideration in the case of each such agreement – see **Stichting Natuur en Milieu**⁵⁸. For example, and like provisions of an EU Directive, an international agreement may or may not have direct effect in EU law such that individuals can rely on it. And if it does not have direct effect, it may still engender an obligation in EU law to interpret EU and national laws in accordance with its objectives. That is the case with Aarhus.

48. At Irish domestic law, the position is different. **Article 29.6 of the Constitution**⁵⁹ adopts a dualist approach to international law. So, leaving aside Aarhus obligations in Irish Law imposed by EU law, and in virtue of Ireland’s ratification of Aarhus, Aarhus binds the State in International Law but is binding in Irish law only to the extent determined by the Oireachtas – see **Waterville**

⁵³ Decision 2005/370

⁵⁴ [2015] IECA 28

⁵⁵ The Treaty on the Functioning of The European Union

⁵⁶ E.g. “IATA” Case C-344/04 R. (International Air Transport Association) v Department for Transport (Case C-344/04) [2006] E.C.R. I-403; [2006] 2 C.M.L.R. 557 §§35 & 36; “LZ1/Brown Bears” Case C-240/09 Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky; “North East Pylon” Case C-470/16, North East Pylon Pressure Campaign Ltd. & Sheehy v An Bord Pleanála & Ors

⁵⁷ “IATA” Case C-344/04 R. (International Air Transport Association) v Department for Transport (Case C-344/04) [2006] E.C.R. I-403; [2006] 2 C.M.L.R. 557 §§35 - Joined Cases C-404/12 P and C-405/12 P, Council & Commission, v Stichting Natuur en Milieu, 13 January 2015

⁵⁸ Joined Cases C-404/12 P and C-405/12 P, Council & Commission, v Stichting Natuur en Milieu, 13 January 2015

⁵⁹ Article 29.6 reads, “No international agreement shall be part of the domestic law of the state save as may be determined by the Oireachtas.”

Fisheries⁶⁰, **McCoy v Shillelagh Quarries**⁶¹ and **Conway v Ireland**⁶². That extent is limited, in summary, to the extent to which Aarhus is given effect by S.50B PDA 2000 and the 2011 Act. The ability of individual litigants, such as the present Applicants, to rely on Aarhus is limited by those extents as, otherwise, Aarhus is not part of Irish domestic law. However even absent such reliance there remains the question to what extent Aarhus may inform the interpretation of national law.

49. It is also relevant, in considering the interaction of Aarhus, EU law and Irish law, that by **Article 4(2)(e) TFEU** the EU and Member States share competence as to the environment – which area is the subject-matter of Aarhus. As Aarhus is an international law treaty concluded by the EU, and Member States, non-EU countries and international organisations and is concluded in an area in which the EU and the Member States share competence, it is termed in EU Law a “*mixed agreement*”. By **Article 2(2) TFEU** “*When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence.*”⁶³ Accordingly, in ratifying Aarhus by **Decision 2005/370**⁶⁴, the EU stated that its legislation did

“... not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its 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”.

50. In other words, to any extent that the EU has not by its legislation effected Aarhus Article 9(3) rights and obligations or obliged Member States to do so, to that extent it is a matter for Member States to decide whether, to what extent and how to do so. The CJEU said in **LZ1 – Slovak Brown Bears**⁶⁵ (“LZ1”) that if in the field covered by Aarhus Article 9(3) the EU has not exercised its powers and adopted provisions to implement the obligations which derive from it, the obligations deriving from Aarhus Article 9(3) remain covered by the national law of the Member States and it is for the courts of those States to determine, on the basis of national law, whether individuals can rely directly on Aarhus rules. EU law does not require or forbid Member States to accord to individuals the right to rely directly on a rule laid down in Aarhus. But if the EU has exercised its powers and adopted provisions in the field covered by Aarhus Article 9(3), EU law applies and it is for the CJEU to

⁶⁰ Waterville Fisheries Development Limited v Aquaculture Licenses Appeals Board & Ors #3 [2014] IEHC 522

⁶¹ [2015] IECA 28 citing Sweeney v Governor of Loughlan House Open Prison [2014] IESC 42, [2014] 2 I.L.R.M. 401

⁶² [2017] IESC 13, [2017] 1 I.R. 53; See also NO2GM Ltd v Environmental Protection Agency [2012] IEHC 369 and O'Connor v Environmental Protection Agency [2012] IEHC 370

⁶³ It also provides that The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising this competence.

⁶⁴ On the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters

⁶⁵Case C-240/09 Lesochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, Judgment 8 March 2011

determine whether the Aarhus provision in question has direct effect. The CJEU in **Stichting Natuur en Milieu**⁶⁶ cited **LZ1** to the effect that, as EU law now stands and as to the obligations deriving from Aarhus Article 9(3) with respect to national administrative or judicial procedures, implementation falls primarily within the scope of Member State law. Accordingly, I reject the Applicants' submission that Aarhus, in virtue of its incorporation in the EU legal order, enjoys in any general sense supremacy over member states' law. Such questions must be considered specifically by reference to the question, whether in the field of law, in question the EU has exercised its powers and adopted provisions.

51. The respective competences of the EU and member states and their bearing on citizens' rights must also be understood in the context of two other factors:

- Tending against the conferral by Aarhus of rights on individuals are CJEU findings that certain Aarhus provisions do not have direct effect – as the CJEU held of Article 9(3) Aarhus in **LZ1**; Colbeam also, and correctly, cites **Barreaux francophones, Tessens et al**⁶⁷ to the effect that the wording of Aarhus Article 9(4) is clear that it applies only to proceedings referred to in Aarhus Article 9(1), (2) and (3) and *“Those provisions do not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals.”*
- Tending, in practical terms, somewhat to the contrary is the CJEU finding in **North East Pylon**⁶⁸ that *as a matter of EU law* and in certain circumstances Member States' domestic law must be interpreted consistently with certain Aarhus provisions. This is known as the “EU Law Interpretive Obligation”, to which I will now turn.

Aarhus Article 9(3), “Environment”, “National Law Relating to the Environment”

52. Aarhus Article 9(3) relates to challenges based on *“national law relating to the environment”*. Understanding this phrase requires consideration of the meaning of three concepts – “National”, “Environment” and “Law” and the phrase “relating to”. As they typically arise for consideration together, it is impractical to consider “Environment” and “Law” separately.

Aarhus - “National Law relating to the Environment” includes EU Law

Arguably counterintuitively, but explicable given Aarhus is open for ratification by states and certain organisations including the EU, and has been ratified by the EU itself, when Aarhus Article 9 contemplates *“national law”* and *“national law relating to the environment”* these international law

⁶⁶ Joined Cases C-404/12 P and C-405/12 P, Council & Commission, v Stichting Natuur en Milieu, 13 January 2015

⁶⁷ Ordre des barreaux francophones et germanophone, Tessens et al v Council of Ministers et al; Case C-543/14, Judgment 28 July 2016

⁶⁸ Case C-470/16, North East Pylon Pressure Campaign Ltd. & Sheehy v An Bord Pleanála & Ors; judgment 15 March 2018

concepts include EU law - see **Conway v Ireland**⁶⁹ citing the Aarhus Compliance Committee view⁷⁰ that “national law’ relating to the environment includes EU law applicable within EU member states”. In turn, this was recently cited by Humphreys J in **Enniskerry/PEM**⁷¹.

Aarhus Implementation Guide⁷² & O’Connor

53. The Aarhus Implementation Guide, though not binding, is influential⁷³. It says that: “The clear intention of the drafters, ... was to craft a definition [of environmental information] that would be as broad in scope as possible⁷⁴, a fact that should be taken into account in its interpretation.” In turn it cites⁷⁵ the “implied definition of “environment” under the Convention” found in the Aarhus Article 2(3) definition of Environmental Information.

54. Noting the words “relating to” in Aarhus Article 9, this view in the Guide seems to me at least consistent with the obiter observation of McDonald J in **Highlands**⁷⁶ that the words “in relation to”, (which in my view have the same meaning as “relating to”) in the absence of some indication to the contrary in the relevant statutory provision, are generally regarded as wide words. In a different area of law, McDonald J took the same view in **Re Parkin**⁷⁷.

55. Aarhus Article 2 differentiates between “elements of the environment such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity ...” and “the state of human health and safety, conditions of human life, cultural sites and built structures”. Information as to the latter is “environmental” only “inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements,” by various cited “factors, activities or measures”⁷⁸. Nonetheless, the Guide suggests, as to “human health and safety and the conditions of human life”, that “By implication, these factors are also included in the implied definition of “environment” under the Convention”.

In a specifically planning law context one cannot but be struck by the width of the phrase “the conditions of human life”. The inclusion of “built structures” is also notable.

⁶⁹ [2017] IESC 13, [2017] 1 I.R. 53, citing the Aarhus Compliance Committee - Whilst this is not a court, its decisions “deserve respect on issues relating to standards of public participation”: per Lord Carnwath JSC in *Walton v Scottish Ministers* [2013] PTSR 51, §100.

⁷⁰ Aarhus Implementation Guide p198 – citing Compliance Committee communication ACCC/C/2006/18 (Denmark),

⁷¹ *Enniskerry Alliance and Enniskerry Demesne Management Company CLG v An Bord Pleanála* [2022] IEHC 6 (High Court (General), Humphreys J, 14 January 2022) §56

⁷² United Nations Economic Commission For Europe The Aarhus Convention An Implementation Guide Second edition, 2014

⁷³ See e.g. Conway, Venn and ClientEarth *infra*

⁷⁴ Emphasis added

⁷⁵ Pp 25, 58, 176

⁷⁶ *Highlands Residents Association v. An Bord Pleanála* [2020] IEHC 622 (High Court (Judicial Review), McDonald J, 2 December 2020)

⁷⁷ *In re Lisa Parkin (a debtor)* [2019] IEHC 56 (High Court, McDonald J, 4 February 2019)

⁷⁸ Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

56. The Guide states that Article 9(3) is “*applicable to a far broader range of acts and omissions than*” Articles 9(1) and 9(2)⁷⁹ and “... *national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment. Thus, also acts and omissions that may contravene provisions on, among other things, city planning, are covered by paragraph 3, regardless of whether the provisions in question are found in planning laws, taxation laws or maritime laws.*”⁸⁰

57. In my view, a comparison of the Aarhus Article 2(3) definition of Environmental Information with the types of environmental damage listed in S.4(2) of the 2011 Act readily reveals acceptance by the Oireachtas that Aarhus Article 2(3) did indeed impliedly define “environment” in the manner described in the Guide. It may be that the Oireachtas approached the matter via the Aarhus Regulation⁸¹ and/or the Access to Environmental Information Directive⁸² which contain a similar, though not identical, list. In **O’Connor v Offaly**⁸³ Baker J referred to “*the environment as broadly defined in section 4(2)*”. The Court of Appeal did not demur.

Conway v Ireland⁸⁴

58. While considering a different issue⁸⁵, the Supreme Court in **Conway** cite the Aarhus Implementation Guide as assisting interpretation of Aarhus in a respect generally supportive of a broad view of the meaning of “*environment*” and “*national laws relating to the environment*”. The court cites the Guide content as to the breadth of Article 9(3) set out above. So, whether a national law may be a “*law relating to the environment*” for the purposes of Aarhus Article 9.3 is a matter of substance rather than form – whether it, in any “*material and realistic way*”, relates to the environment. For example, as to road construction projects, “*laws concerning the grant of permission for such projects clearly form part of environmental law*” – even if, as the court found, many other laws as to roads do not fall within the ambit of environmental law. By that logic, it is difficult to see that laws concerning the grant of planning permissions more generally would not form part of environmental law.

59. The Board disputes the applicability of the Guide’s phrase “*somehow relates to the environment*” as opening the door too wide. But the Supreme Court, having cited the passage of the Guide containing those words, explicitly commence the next paragraph of the judgment with the words “*It follows that ...*” - clearly adopting that passage of the Guide without apparent reservation.

⁷⁹ While allowing greater flexibility of implementation.

⁸⁰ P197

⁸¹ Regulation (EC) No 1367/2006 of 6 September 2006 on the application of the Aarhus Convention to EU institutions and bodies (OJ 2006 L 264, p. 13)

⁸² Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information

⁸³ [2017] IEHC 606

⁸⁴ [2017] IESC 13, [2017] 1 I.R. 53

⁸⁵ Not at all considering the 2011 Act or S.50B

The Court's words "*material and realistic way*" are also, of course, important. But the very clear overall impression of a wide meaning of "*law relating to the environment*" remains.

Venn

60. In **Venn**⁸⁶, cited by Humphreys J in **Enniskerry/PEM**⁸⁷, the Court of Appeal of England & Wales, took a broad view of the meaning of the word "*environmental*" for Aarhus purposes. **Venn**, as does the present case, arose from an application to quash a planning permission – in that case alleging failure to have regard to emerging local plan policy. The Court notably records that:

- **LZ1** supports the conclusion that environmental matters are given a broad meaning in Aarhus.
- the appeal in Venn had not challenged the trial judge's conclusion that the description of "*environmental information*" in Aarhus Article 2(3) was an indication of the intended ambit of the word "*environmental*" in the Convention, and that the Aarhus Implementation Guide (which the court cites as of "*persuasive authority*") assisted in reaching that conclusion.
- the Guide took the view that the drafters of Aarhus intended a definition of environmental information as broad in scope as possible.⁸⁸
- The respondent Secretary of State accepted that, since administrative matters likely to affect "*the state of the land*" are classed as "*environmental*" under Aarhus, the definition of "*environmental*" in the Convention is arguably broad enough to catch most, if not all, planning matters.

61. For Irish law purposes, this seems to me to have been a significant concession by the Secretary of State, as the Aarhus concept of the environment is echoed in S.4(2) of the 2011 Act. Though, of course, the concession not binding here, it seems correct. At very least, it strongly suggests that wide availability of costs protection in planning matters is not as unthinkable or surprising as some argue. The inclusion of such as "*land, landscape and natural sites*" and "*the state of human health and safety, conditions of human life, cultural sites and built structures*" as environmental categories bolsters that suggestion.

62. Further, as to the meaning of "Environmental Law" and in terms broadly descriptive also of the Irish milieu, the English Court of Appeal said:

⁸⁶ Venn v Secretary of State for Communities and Local Government and others - [2015] 1 WLR 2328

⁸⁷ §59

⁸⁸ See above

“... it is a characteristic of the UK’s approach to environmental protection that much (if not most) of the detail is contained, not in statutory regulations, but in policies, both national policies adopted by the government (the NPPF), and local policies adopted by local planning authorities in their development plan documents. When preparing their local development plan documents local planning authorities must have regard to national policies; including the NPPF: Decision-makers are then required to have regard to such policies; and if the policies are contained in the development plan they must be followed unless material considerations indicate otherwise:”

“Given that this is the way in which the UK has chosen to implement a great deal of environmental protection “within the framework of its national legislation”, it would deprive article 9(3) of much of its effect if a distinction was drawn between the policies, both national and local, which do relate to the environment, and the law which does not directly relate to the environment, but which requires those policies which do relate to the environment to be prepared, and then to be taken into account, and in certain cases to be followed unless material considerations indicate otherwise. It would not be consistent with the underlying purpose of Aarhus to adopt an interpretation of article 9(3) which would, at least in the UK, deprive it of much of its effect⁸⁹: In 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”.”

63. The “*broad view*” adopted in **LZ1** and **Venn** was applied in **Dowley**⁹⁰ (a law authorising intrusive land surveys was deemed environmental) and very recently in **Lewis**⁹¹. I take the Board’s point that the English cases must be treated with care as their transposition of Aarhus costs protection rules was arguably simpler and clearer than ours by the 2011 Act, at least as concerns the identification of proceedings to which the rules apply. Their CPR Pt 45⁹² provides for judicial review costs capping orders in “Aarhus Convention” claims, which it identifies as follows at §45.41(2):

“(a) ‘Aarhus Convention Claim’ means a claim brought by one or more members of the public by judicial review or review under statute which challenges the legality of any decision, act or

⁸⁹ Citing LZ1 §§46, 49 & 50

⁹⁰ R(Dowley) v Secretary of State for Communities and Local Government [2016] EWHC 2618, §99: a challenge to an authorisation to conduct site investigations on the claimant's land with a view to the construction of a new nuclear power station, under s 53 of the Planning Act 2008 (s 53) attracted Aarhus costs protection as involving national law relating to the environment.

Surveys, including Environmental surveys, of Dowley’s estate had been identified as necessary to deciding the appropriateness of the land for development and the form of the proposal for the next stage of consultation. Part of the estate had been identified for potential use for spoil storage, roads, borrow pit, campus accommodation and construction activities associated with the proposed construction of Sizewell C. The surveys were both non-intrusive, such as walking over the land, and intrusive, such as the undertaking of various boreholes and trenching required for archaeological surveys. Other surveys were required to facilitate compliance with the EIA Directive and the Habitats Directive.

⁹¹ R (Lewis) v Welsh Ministers [2022] EWHC 450 (Admin). This case also illustrates the different approach taken in England & Wales: “... where a ground which brings the Aarhus Convention costs limit into operation is included in a claim in good faith it is not appropriate to distinguish between the costs attributable to that ground and those attributable to other grounds.” And “... argument as to which parts of a claim were and which were not within the scope of Pt 45 section VII and as to which part of the costs were attributable to which ground.” Interestingly that view was grounded in the precise terms of the applicable rule but was also based on the view that such an approach “.. would be an undesirable consequence and one which would be inconsistent with the Overriding Objective” of enabling the court to deal with cases justly and at proportionate cost. However, the CJEU in North East Pylon clearly permit differentiating costs protection by reference to individual grounds of challenge – rejecting the Advocate General’s opinion to the contrary.

⁹² Civil Procedure Rules of England and Wales

omission of a body exercising public functions, and which is within the scope of article 9(1) or 9(2) or 9(3) of [the Aarhus Convention] "(b) references to a member or members of the public are to be construed in accordance with the Aarhus Convention."

But whatever about the UK's different transposition to domestic law, there is no reason on that account to particularly disregard the interpretation of Aarhus itself in those cases, not least given the transposition's direct reliance on the terms of Aarhus. Nor do they seem to me to take a view inconsistent with Irish and European caselaw.

ClientEarth

64. The broad view of the scope of the Aarhus concepts of the "environment" and also of "environmental law" is strikingly apparent in **ClientEarth**⁹³. The European Investment Bank (EIB), an EU institution, refused ClientEarth, an environmental NGO, an internal review under Art 10 of the Aarhus Regulation⁹⁴ of its resolution to finance a proposed biomass power plant project in Spain, which had succeeded in a tender procedure for renewable energy projects. ClientEarth essentially asserted that the project would not meet environmental protection criteria.

65. Article 2(1)(f) of the Aarhus Regulation defined 'environmental law' as EU legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of EU policy on the environment as set out in the TFEU: namely preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems.

66. The EIB argued, inter alia, that:

- the resolution had not been adopted 'under environmental law' as it was adopted pursuant to Article 19(3) of the EIB Statute - which does not refer to the environment.
- its decisions are investment decisions that do not directly implement environmental law.
- compliance with environmental law is the responsibility of the promoters when they implement the projects, subject to the control of the national competent authorities.
- the fact that the project would have an impact on the environment does not imply, in law, that the resolution was adopted under environmental law.

⁹³ ClientEarth v European Investment Bank, Case T-9/19 [2021] All ER (D) 99 (Jan)

⁹⁴ Article 10 entitled certain NGOs by reasoned request to trigger an internal review of an administrative act by the EU institution or body that adopted it under environmental law.

67. The GCEU⁹⁵ held that *“It follows from the wording of Article 2(1)(f) of the Aarhus Regulation that, by referring to the objectives listed in Article 191(1) TFEU, the EU legislature intended to give the concept of 'environmental law' referred to in that regulation a broad meaning, not limited to matters relating to the protection of the natural environment in the strict sense”* Indeed, a restricted interpretation of the concept of 'environmental law' would to a great extent exclude provisions and measures listed in Article 192 TFEU⁹⁶.

68. Article 191 TFEU requires that EU policy aim at a high level of protection of the environment. To that end, Article 192 TFEU requires the EU to adopt measures affecting, inter alia *“town and country planning”*, and *“land use”* - clearly placing laws on these subjects as subsets of environmental law.⁹⁷

69. True, the GCEU interpreted meaning of 'environmental law' in the specific context of the Aarhus Regulation and by reference to other provisions of that regulation. But it seems highly unlikely that 'environmental law' should mean something different as between the Aarhus Regulation and other Aarhus contexts. In any event, the GCEU explicitly placed its view in the context of *“the interests of a general interpretation of Article 9(3) of the Aarhus Convention”* and of Article 191 TFEU and, by necessarily implied extension, Article 192 which encompasses *“town and country planning”*, and *“land use”*. As will be seen, the CJEU has, in the interest of harmonious interpretation, asserted as a matter of EU Law the right to interpret the Aarhus Convention for purposes even outside EU law.

70. So, the GCEU held that the phrase 'environmental law' is to be interpreted *“very broadly”* and *“covers any measure of individual scope subject to requirements under secondary EU law which, regardless of their legal basis, are directly aimed at achieving the objectives of EU policy on the environment.”*

71. Notably echoing Venn in this regard, the GCEU held⁹⁸ that the phrase 'environmental law' encompassed not merely what one might call hard law but also *“policies, strategies, appraisals, principles or standards, internal policies of general scope”* adopted *“for the purposes of achieving the objectives of the TFEU”* and *“duly published and implemented, which, irrespective of their binding nature or not in the strict sense, limit the exercise of the EIB's discretion in the exercise of its activities”*. Accordingly, *“when the Courts of the European Union examine the legality of an act adopted by the EIB, they take into account the internal rules adopted by the EIB”*. So *“the rules of general application governing its activity in relation to the granting of loans for the purpose of attaining the objectives of the TFEU as regards environmental matters, in particular the environmental criteria for the eligibility of projects for EIB funding, must therefore be regarded in the*

⁹⁵ General Court of the European Union

⁹⁶ Treaty On The Functioning Of The European Union

⁹⁷ Articles 191 and 192 TFEU are grouped in Title XX TFEU entitled “Environment”

⁹⁸ §123 & 124

same way as EU legislation in the field of environmental law, within the meaning of Article 2(1)(f) of the Aarhus Regulation.”

72. In applying that view of the scope of environmental law to the facts⁹⁹, the GCEU set out the many environmental justifications of the project on which the financing proposal to the EIB had been based and noted that the EIB resolution had been decided on environmental eligibility criteria, adopted by the EIB and aimed at achieving EU policy objectives as to the environment – as to which the GCEU recited content of the EIB climate strategy and its Statement of Environmental and Social Principles and Standards, including that environmental and social sustainability considerations be respected for all funding granted by the EIB. The GCEU held that the EIB resolution had been adopted 'under environmental law'.

S.4(2) of the 2011 Act - Environmental/Planning – a distinction?

73. S.4(2) of the 2011 Act lists types of environmental damage, as including damage to:

- “(a) air and the atmosphere;*
- (b) water, including coastal and marine areas;*
- (c) soil;*
- (d) land;*
- (e) landscapes and natural sites;*
- (f) biological diversity, including any component of such diversity, and genetically modified organisms;*
- (g) health and safety of persons and conditions of human life;*
- (h) cultural sites and built environment;*
- (i) the interaction between all or any of the matters specified in paragraphs (a) to (h).”*

I will return to this provision later as to the damage criterion. Here I consider it for the light it sheds on the meaning of “environmental”. I have observed that the list is clearly informed by the implied definition of “environmental” in Aarhus Article 2(3).

74. As I have presaged above, the breadth of environmental categories in S.4(2) of the 2011 Act listed is striking. Just as striking is that the list is explicitly without prejudice to the generality of the reference in S.4(1) to damage to the environment. In other words, the list is inexhaustive. This seems to me entirely in accordance with the “*broad view*” of the concept of “*environment*”.

⁹⁹ ClientEarth §129 - 140

75. Striking also is the overlap between this list and considerations historically termed “planning” rather than “environmental” – for example, “*landscapes and natural sites*”; “*conditions of human life*”; and “*cultural sites and built environment*”.

Enniskerry/PEM & another case

76. Humphreys J considers much of the foregoing in **Enniskerry/PEM**¹⁰⁰. Inter alia, he notes that neither **Venn** nor **Dowley** appear to have been opened to the Court of Appeal in **Heather Hill #1** and, of those cases he observes that “*A wide interpretation of the environment implies a wide interpretation of national environmental law*”.

77. Though considering specifically the meaning of “environmental Information”, the decision in **Department for Business, Energy and Industrial Strategy v Information Commissioner**¹⁰¹ generally supports the “broad¹⁰² meaning” view of the definition of what is “environmental” – citing, inter alia, LZ1, Venn and **Austin v Miller Argent**¹⁰³.

Collection of the foregoing

78. Clearly, a broad and functional view is to be taken, for all purposes of effecting Aarhus, including whether to make a 2011 Act PCO, of the meaning of the words “*environment*”, “*environmental*” and “*law relating to the environment*”. There is no preconception that what have been traditionally considered “planning” matters do not relate to the environment. If anything, the presumption is to the opposite effect. It seems to follow that merely because a particular interpretation of these concepts might be seen as likely to require PCOs in a greater rather than lesser number of planning judicial reviews is not, as a general proposition, a weighty argument against such an interpretation - as it merely conforms to what Aarhus Article 9(3) requires. Also, **Venn** and **ClientEarth** (not apparently cited to the Court of Appeal in **Heather Hill #1**) seem persuasive that, in considering whether a national law relates to the environment, the required broad view is likely to encompass laws which do not directly relate to the environment but which require environmental policies (such as, for example, development plans) to be prepared and taken into account or generally followed.

¹⁰⁰ §61 & 62

¹⁰¹ [2017] EWCA Civ 844

¹⁰² Though not unlimited

¹⁰³ See below

Aarhus as an Aid to Interpreting National Law – 2 Routes

79. It is important to note that, as each separately of the State and the EU has ratified Aarhus, there are two distinct, but not entirely separate, routes whereby Aarhus may influence the interpretation of domestic legislation. It is important to keep each distinctly in mind.

- First, and to date most influentially, there is, the “Interpretive Obligation” imposed as a matter of EU law on Member States to interpret national environmental law in accordance with the objectives of Aarhus. This obligation arises in virtue of the EU’s ratification of Aarhus and the consequent status of Aarhus as an “*integral part of the EU legal order*”.¹⁰⁴ This obligation certainly applies as to national environmental law within the sphere of EU environmental law¹⁰⁵. For example, and most obviously, the EU Law Interpretive Obligation certainly applies to national regulations transposing EU environmental law directives. But the “sphere” is defined both broadly and pragmatically and at least in part by reference whether the EU has legislated in the particular sphere covered by the Aarhus Article (or perhaps sub-article) under consideration.¹⁰⁶

A question arises whether, as a matter of EU law, the Interpretive Obligation also applies to the interpretation of “purely” national environmental law – i.e. outside any sphere of EU environmental law. I will come to that in due course.

- The second route whereby Aarhus may influence the interpretation of national law is in virtue of Ireland’s ratification of Aarhus and the consequent status of Aarhus in Irish law. By its ratification of Aarhus Ireland, as a matter of international law as opposed to EU Law, committed to implementation of Aarhus. Given Ireland’s duallist approach to international law, this interpretive route takes the form, not of an interpretive obligation imposed by EU law, but of an interpretive presumption in Irish Law that the Oireachtas intentionally legislates consistently with the State’s international treaty obligations and that that the courts should, where possible, interpret legislation consistently with those obligations.

80. The two distinct interpretive routes described above are not entirely separate. EU law links them. As has been seen, at EU law Aarhus is a “mixed agreement” ratified separately by the EU and by Member States on the basis of shared competence such that Member States’ legal competence persists in spheres of environmental law in which the EU has not legislated. At first blush this system would seem to preserve the distinction between the two interpretive routes. However, that is not so as to the interpretation of Aarhus. The CJEU, in **LZ1** and **North East Pylon** held that:

¹⁰⁴ “LZ1” - Lesoochránárske zoskupenie, C-240/09, EU:C:2011:125, §30 and “North East Pylon” Case C-470/16, North East Pylon Pressure Campaign Ltd. & Sheehy v An Bord Pleanála & Ors; Judgment 15 March 2018

¹⁰⁵ Case C-470/16, North East Pylon Pressure Campaign Ltd. & Sheehy v An Bord Pleanála & Ors; Judgment 15 March 2018

¹⁰⁶ “LZ1” - Lesoochránárske zoskupenie, C-240/09, EU:C:2011:125, Opinion of AG Sharpston §73 & 74

- The CJEU has jurisdiction to give preliminary rulings concerning the interpretation of mixed agreements, including the interpretation of Aarhus¹⁰⁷.
- To interpret Aarhus, the CJEU has jurisdiction to define the obligations which the EU has assumed and those which remain the sole responsibility of the member states.¹⁰⁸
- Where a provision of Aarhus can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law, it is clearly in the interest of EU law that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply.¹⁰⁹

81. So, while the role of the CJEU is generally confined to EU law and it has no direct role in elucidating the international law obligations imposed on Ireland by reason of its accession to Aarhus, the CJEU does assert the jurisdiction to rule on the interpretation of Aarhus to ensure it is interpreted uniformly in all circumstances. It will be seen therefore, that as a matter of EU law, in areas of law addressed by Aarhus in which they remain competent, member states remain free to implement Aarhus in their domestic law as they see fit and, it seems, to interpret their domestic laws as they see fit. But to any extent that in doing either they are informed by an interpretation of Aarhus, it seems they are bound by the CJEU's interpretation of Aarhus. To put it more simply, as a matter of EU Law (which has primacy over domestic law), a provision of Aarhus cannot mean one thing in EU law and another in the domestic law of each member state. So, a provision of Aarhus cannot mean one thing in the domestic law of a member state when implementing EU law and another thing the domestic law of that member state when implementing Aarhus directly in respects in which it retains competence.

82. So, it is important to bear in mind:

- That, whether as an interpretive aid via the EU law Interpretive Obligation or via the Irish Law Presumption of legislation in compliance with international law, the substantive content of the interpretive aid – Aarhus – remains the same. It has an autonomous content which the CJEU can authoritatively determine.
- Which of the two interpretive routes one is traversing at any given point.

¹⁰⁷ LZ1 §30; North East Pylon §46

¹⁰⁸ LZ1 §31;

¹⁰⁹ LZ1 §42; citing in particular, Giloy v Hauptzollamt Frankfurt am Main-Ost (Case C-130/95) [1997] ECR I-4291, §28 and Hermès International v FHT Marketing Choice BV (Case C-53/96) [1998] ECR I-3603, §32.; Case C-470/16, North East Pylon Pressure Campaign Ltd. & Sheehy v An Bord Pleanála & Ors; Judgment 15 March 2018 §50

Aarhus & Interpretive Routes not Free-Standing in Irish Law

83. Counsel for the Board understood the Applicants to argue that Aarhus itself has free-standing status in Irish law such as might be relied upon by the Applicant as directly generating enforceable costs protection rights – beyond relying on it as an aid to interpreting Irish law. Such an impression has perhaps been engendered by an understandable, but it seems to me confusing, tendency in cases such as this to refer to such as “NPE rules” as if they can be applied independently of specific national legislative instruments or of the common law inherent jurisdiction in the court, identified independently of Aarhus, to make PCOs¹¹⁰. It may be that referring to what Aarhus Article 9(4) creates as the “NPE Principle” assists in this regard.

84. I confess I was not myself clear to what extent that assertion of free-standing status had in fact been pursued by the Applicants. But it is clearly not a viable assertion. As to the “direct” route from Aarhus to Irish law, and as outlined above, the assertion would offend against the dualist approach to international law taken in **Article 29.6 of the Constitution**. A litigant cannot invoke the Aarhus Convention directly in proceedings.¹¹¹ As to the “indirect” route from Aarhus to Irish law, via EU Law, it is clear, as will be seen, that likely Aarhus generally, but in any event all of Aarhus Article 9, does not have direct effect in EU Law – as to Aarhus Article 9(3) see **LZ1, Barreaux francophones, Tessens et al**¹¹², **North East Pylon**¹¹³ and **Klohn**¹¹⁴.

85. It is important also to bear in mind that neither interpretive route is free-standing. Neither has effect of itself. Each takes effect only when applied to a domestic law. So, though having autonomous content which must be discerned, when considering Aarhus as an interpretive aid it is important to do so in the context of a specific national law the interpretation of which it may assist. Whether that be S.50B, the 2011 Act, Order 99 RSC or the inherent jurisdiction, it is generally useful to clearly specify which is being interpreted at any given point. This is so not least as, given the “contra legem” principle and depending on the precise terms of the particular national law being interpreted, the interpretive aid which Aarhus can render may differ as between particular national laws.

Aarhus Interpretive Route 1 - the EU Law Interpretive Obligation - LZ1 Slovak Brown Bears #1 & some related cases.

86. The Interpretive Obligation imposed by EU Law in furtherance of the objectives of Aarhus Article 9 requires interpretation of national procedural law, where possible, so as to provide, within the meaning of Aarhus Article 9(4), fair, equitable, timely, not prohibitively expensive, adequate and effective remedies in the judicial procedures contemplated in Aarhus Articles 9(1), (2) and (3).

¹¹⁰ As to which, see further below.

¹¹¹ Simons on Planning Law, 2nd Ed’n, Browne 2012 §12–609

¹¹² §49 - 55

¹¹³ CJEU §§52, 53, and 58.

¹¹⁴ Klohn v An Bord Pleanála, Case C-167/17, judgment 17 October 2018

87. In **LZ1** the EU Law Interpretive Obligation was established as to Aarhus – though as to a question of locus standi rather than of the NPE Principle. LZ, an environmental NGO, challenged decisions refusing it standing in administrative decisions on applications for derogations under Article 16 of the Habitats Directive as to, inter alia, hunting Brown Bears. LZ argued that Article 9(3) Aarhus had direct effect in Slovene law even in the absence of EU legislation transposing it to EU Law – such as to give LZ the standing it asserted. The Slovak court referred that question to the CJEU.

88. Citing prior caselaw¹¹⁵ and the then-equivalent of Article 216 TFEU¹¹⁶, the CJEU described Aarhus as “*an integral part of the legal order of the European Union*”.¹¹⁷ As noted above, it held that as Aarhus was concluded by the EU and all the Member States on the basis of joint competence, it followed that the CJEU had jurisdiction to interpret Aarhus and to define the obligations which the EU has assumed and those which remained the sole responsibility of the Member States¹¹⁸. The CJEU considered that where an Aarhus provision can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply.¹¹⁹ So the CJEU had jurisdiction to interpret such an Aarhus provision.¹²⁰

89. The CJEU considered¹²¹ whether the EU had adopted provisions to implement the obligations derived from Article 9(3). If not, those obligations would remain covered by the national law of the Member States and it would be for Member States’ courts to determine, on the basis of national law, whether individuals could rely directly on Article 9(3). The CJEU continued:

“33. *However, if it were to be held that the European Union has exercised its powers and adopted provisions in the field covered by Article 9(3) of the Aarhus Convention, EU law would apply and it would be for the Court of Justice to determine whether the provision of the international agreement in question has direct effect.*

34. *Therefore, it is appropriate to examine whether, in the particular field into which Article 9(3) of the Aarhus Convention falls, the European Union has exercised its powers and adopted provisions to implement obligations deriving from it.*¹²²

.....

37. *..... the dispute in the main proceedings concerns whether an environmental protection association may be a ‘party’ to administrative proceedings concerning, in*

¹¹⁵ Citing by analogy, Case C-344/04 IATA and ELFAA [2006] ECR I-403, §36, and Case C-459/03 Commission v Ireland [2006] ECR I-4635, §82).

¹¹⁶ Article 300(7) EC

¹¹⁷ §30 & 31

¹¹⁸ Citing Haegeman v Belgian State (Case 181/73) [1974] ECR 449, paras 4-6 and Demirel v Stadt Schwäbisch Gmünd (Case 12/86) [1987] ECR 3719, para 7 and by analogy, Joined Cases C-300/98 and C-392/98 Dior and Others [2000] ECR I-11307, §33, and Case C-431/05 Merck Genéricos - Produtos Farmacêuticos [2007] ECR I-7001, §33.

¹¹⁹ §42 - Citing Case C-130/95 Giloy [1997] ECR I-4291, §28, and Case C-53/96 Hermès [1998] ECR I-3603, §32

¹²⁰ §43

¹²¹ §32 - Citing by analogy, Dior §48 and Merck Genéricos §34.

¹²² Citing by analogy, Merck Genéricos §39

particular, the grant of derogations to the system of protection for species such as the brown bear. That species is mentioned in Annex IV(a) to the Habitats Directive, so that, under Article 12 thereof, it is subject to a system of strict protection from which derogations may be granted only under the conditions laid down in Article 16 of that directive.

38. *It follows that the dispute in the main proceedings falls within the scope of EU law.”*

90. I pause to observe that the application in this case of the Aarhus Article 9(4) NPE Principle for which the Applicants argue is in respect of a judicial procedure (these proceedings) to challenge a decision which (allegedly) *“contravene(s) provisions of its national law relating to the environment”* within the meaning of Aarhus Article 9(3). The CJEU in **LZ1** referred¹²³ to the EU’s declaration of competence¹²⁴ to enter into Aarhus cited above, to the effect that Member States remain responsible for the performance of obligations imposed by Aarhus Article 9(3) save to the limited extent the EU had legislated for such performance. That supports the Board’s argument that at EU and Irish law the Interpretive Obligation deriving from EU law and Aarhus Article 9(4) applies to contraventions of *“provisions of [Irish] national law relating to the environment”* only if that Irish environmental law is in a field covered by EU environmental law.

91. **LZ1** also states, crucially according to the Applicant, that:

“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.”¹²⁵

.....

40 it cannot be inferred that the dispute in the main proceedings does not fall within the scope of EU law because, 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.”

92. The CJEU held¹²⁶ that Aarhus Article 9(3) did not have direct effect – did *“not contain any clear and precise obligation capable of directly regulating the legal position of individuals. Since only members of the public who meet the criteria, if any, laid down by national law are entitled to exercise the rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure.”* See also **McCoy v Shillelagh Quarries**¹²⁷. This supports the

¹²³ §39

¹²⁴ Annexed to Decision 2005/370 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters. The European Community declared that, in accordance with the TEU - in particular Article 175(1) - it is competent for entering into international agreements, and for implementing the obligations resulting therefrom, which contribute to the pursuit of the following objectives:

— preserving, protecting and improving the quality of the environment,

Art 19(5) Aarhus provides that in their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 shall declare the extent of their competence with respect to the matters governed by this Convention.

¹²⁵ Citing by analogy, Case C-239/03 Commission v France [2004] ECR I-9325, §29 to 31

¹²⁶ §45

¹²⁷ [2015] IECA 28 §18 citing Stichting Natuur en Milieu EU:C:2015:5

Board’s argument in that the EU Law Interpretive Obligation deriving from Article 9(4) applies to proceedings alleging contraventions of “*provisions of [Irish] national law relating to the environment*” within the meaning of Article 9(3) only in favour of members of the public who meet the criteria, if any, laid down by national law and so are “*entitled to exercise the rights provided for in Article 9(3)*”.

93. The CJEU went on to note that Article 9(3) is intended to ensure “*effective environmental protection*” and so that:

“47 In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law¹²⁸, in this case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case.¹²⁹

.....

49 if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

50 It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.

51 Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.¹³⁰

And so, the answer to the referred questions was that:

“52 ... Article 9(3) of the Aarhus Convention does not have direct effect in EU law.

It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and

¹²⁸ Emphasis added

¹²⁹ Citing Case C-268/06 Impact [2008] ECR I-2483, §44 and 45

¹³⁰ Citing Case C-432/05 Unibet [2007] ECR I-2271, §44, and Impact, §54 – emphases added

*the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.*¹³¹

94. The Board argues, and I agree, that the foregoing passages clearly identify the purpose of the EU Law Interpretive Obligation as being to that of “safeguarding rights which individuals derive from EU law”. Its “objective [is] of effective judicial protection of the rights conferred by EU law” – “to ensure effective judicial protection in the fields covered by EU environmental law” in respect of “administrative proceedings liable to be contrary to EU environmental law.”

95. As argued by the Board and contrary to the Applicants’ submission, it was the CJEU decision in **LZ1** which introduced the concept of applying the EU Law Interpretive Obligation where the national environmental law in question was in a field covered by EU environmental law. That concept was not introduced by the form of question posed to the CJEU in **North East Pylon** such as to limit the scope of that decision – to which I will turn in due course.

96. As Aarhus Articles 9(3) and 9(4) lack direct effect, the Applicants can call Aarhus Article 9(4) in aid as a matter of EU law only via the EU Law Interpretive Obligation identified in **LZ1**. And **LZ1** is authority only that the EU Law Interpretive Obligation arises where the underlying dispute engages judicial protection of rights conferred by EU law to challenge an administrative decision as “*contrary to EU environmental law*.”

97. True, **LZ1** did not in terms address the question whether Aarhus Article 9(4) applies as a matter of EU law to proceedings relating to alleged contravention of national environmental law within the meaning of Aarhus Article 9(3) even where that national environmental law is not in a field covered by EU environmental law. The Applicants argue that this effect arises as Aarhus is “*an integral part*” of EU law, as the subject-matter of Aarhus is itself a field covered by EU environmental law. This ingenious argument founders on two rocks:

- **LZ1** imposed the Interpretive Obligation in spite of the fact that Article 9(3) did not have direct effect, and only because of the specific need to avoid undermining the effectiveness of EU environmental law.
- Aarhus is “*an integral part*” of EU law – but subject to the express limits on its integration into EU law laid down by **Decision 2005/370**¹³², to the effect that that Member States remain responsible for the performance of Article 9(3) obligations not covered by EU legislation.

¹³¹ Emphases added

¹³² On the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters

In any event, in **LZ1** the CJEU eschewed this ingenious and potentially all-embracing argument – it found the field covered by EU environmental law not in Aarhus itself but in the fact that the dispute as to the Brown Bears raised issues under the Habitats Directive. It was that fact that brought the matter within EU environmental law.

98. Turning to cases cited in LZ1, in **Merck Genéricos**¹³³ the preliminary ruling concerned an alleged patent violation and Article 33 of the “TRIPS Agreement”¹³⁴. The CJEU described the TRIPS Agreement as “*an integral part of the Community legal order*” and as having been concluded by the Community and all Member States on the basis of joint competence. The CJEU held that:

“34 ... when the field is one in which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights and measures taken for that purpose by the judicial authorities do not fall within the scope of Community law, so that the latter neither requires nor forbids the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the TRIPS Agreement or to oblige the courts to apply that rule of their own motion

35 On the other hand, if it should be found that there are Community rules in the sphere in question, Community law will apply, which will mean that it is necessary, as far as may be possible, to supply an interpretation in keeping with the TRIPS Agreement ... although no direct effect may be given to the provision of that agreement at issue ...”

This appears supportive by analogy of a view that the integration of Aarhus Article 9(3)&(4) into EU law does not impose the EU Law Interpretive Obligation save where that national environmental law operates in a field covered by EU legislation.

99. In **Commission v France**¹³⁵ the CJEU took a broad view of the meaning of a field covered by EU Environmental law in considering whether a national environmental law fell within that field. But that does not seem to advance the Applicants’ argument in this case that the criterion of falling within such a field does not even exist. In **Commission v Ireland**¹³⁶ the Commission complained of Ireland’s failure to amend its copyright law to adhere to the Berne Convention¹³⁷ in breach of the EEA Agreement¹³⁸. Ireland argued that the mixed character of the EEA Agreement meant that the CJEU had no jurisdiction – asserting that intellectual property had not been the subject of EU legislation. The CJEU held that the protection of literary and artistic works, was to a very great extent governed by EU legislation. Again, that does not seem to advance the Applicant’s argument in this case that the criterion of falling within a field covered by EU environmental law does not even exist.

¹³³ Case C-431/05 Merck Genéricos - Produtos Farmacêuticos [2007] ECR I-7001

¹³⁴ on Trade-Related Aspects of Intellectual Property Rights - annexed to the Agreement establishing the World Trade Organisation

¹³⁵ Case C-239/03 Commission v France [2004] ECR I-9325 - the Étang de Berre case

¹³⁶ C-13/00

¹³⁷ Berne Convention for the Protection of Literary and Artistic Works

¹³⁸ The Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3)

100. The English Court of Appeal in **Austin v Miller Argent**¹³⁹ considered LZ1. The Plaintiff sought a PCO, in a private nuisance action complaining of dust and noise from a coal mine near her home. She relied on Aarhus Articles 9(3) and 9(4). The Court held that a private nuisance action could fall within Article 9(3) provided it would, if successful, confer significant public environmental benefits.

101. On the facts Ms Austin's action failed that criterion. For present purposes the case is relevant in that Ms Austin argued, relying on LZ1, that though Aarhus had not been directly incorporated into English Law the Aarhus Article 9(4) NPE Principle bound English courts by virtue of the fact that the EU itself, as a distinct entity, is party to Aarhus such that Aarhus, specifically Article 9(3), is part of EU law. As recorded above, the present applicant makes a similar argument.

102. That argument failed in **Austin v Miller Argent** – the Court of Appeal observing¹⁴⁰ that in **LZ1** the “critical premise” to the application of the EU Law Interpretive Obligation had been that there was “an EU right in play” - in LZ1 a right derived from the Habitats Directive. Insofar as Ms Austin relied on planning permission conditions “that is not a matter of EU law. The claimant has no EU right to the benefit of the conditions, and their enforcement is not the enforcement of an EU right.”

103. The foregoing analyses seem to me to strongly suggest that the EU Law Interpretive Obligation applies only to the interpretation of national environmental law where that national environmental law is in a field covered by EU environmental law.

104. However that conclusion does not per se imply that the Irish Law Presumption of legislation in conformity with international law does not apply to the interpretation of Irish environmental law in a field not covered by EU environmental law. I will come to that in due course.

Aarhus Interpretive Route 1 - the EU Law Interpretive Obligation - North East Pylon

North East Pylon, CJEU – The Interpretive Obligation

105. In **North East Pylon**¹⁴¹ the Applicants had failed in judicial review to prevent the Board from holding an oral hearing as to an intended “North/South” electricity interconnector and relied on S.50B PDA 2000 and the 2011 Act in opposing costs orders against them.

106. Article 11 of the EIA Directive had transposed to EU law public participation principles of Aarhus Articles 6 and 9 – including the NPE Principle. S.50B PDA 2000 in turn transposed those obligations to Irish Law costs protection rules.

¹³⁹ Austin v Miller Argent (South Wales) Ltd [2014] EWCA Civ 1012; [2015] 1 WLR 62

¹⁴⁰ §33

¹⁴¹ Case C-470/16, North East Pylon Pressure Campaign Ltd. & Sheehy v An Bord Pleanála & Ors - judgment 15 March 2018

107. On a reference from the High Court (necessarily as to questions of EU law), the CJEU held that the NPE Rule of Article 11 of the EIA Directive applies only to the costs relating to the part of proceedings alleging infringement of the EIA Directive rules on public participation and does not apply to challenges alleging infringement of other rules laid down by the EIA Directive or of rules laid down other than by the EIA Directive. Where proceedings combine challenges within and without the NPE Rule of Article 11, *“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.”* As S.50B PDA 2000, insofar as relevant, was the transposition of Article 11, this meant that S.50B fell to be applied separately to each ground of challenge in a judicial review.

108. But that was not the end of the matter. The question of effect of Aarhus Article 9(3) and (4) remained to be considered. The CJEU answered a question posed as follows by the High Court:

(iv) whether a national court, in order to ensure effective judicial protection in the fields covered by EU environmental law,¹⁴² should interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in art. 9(3) of [the Aarhus Convention]

(a) in a procedure challenging the validity of a development consent process involving a project of common interest that has been designated under [Regulation (EU) No 347/2013], and/or

(b) in a procedure challenging the validity of a development consent process where the development affects a European site designated under [the “Habitats Directive”¹⁴³];

109. The Applicants emphasise the underlined words as first introduced by the High Court and delimiting the scope of its fourth question, and so, the CJEU’s answer, such that the answer does not imply that a different answer would be given if, the underlined words were replaced by those of art. 9(3) Aarhus – i.e. *“national law relating to the environment.”* As **LZ1** shows¹⁴⁴ and as recorded above, the Applicants’ submission is misconceived that the words *“in the fields covered by EU environmental law”* were first introduced by the referring court in North East Pylon.

110. The CJEU analysed the matter as follows¹⁴⁵:

- By the EU’s signing and approval¹⁴⁶ of Aarhus it forms an *“integral part of the EU legal order”*.

¹⁴² Emphasis added

¹⁴³ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [(OJ 1992, L 206, p. 7)

¹⁴⁴ See above

¹⁴⁵ §§46 – 57 citing LZ1 §§30, 42, 45, 47, 49 and C-543/14 Ordre des barreaux francophones et germanophone and Others, §50 and case C-268/06 Impact, §46 Emphases added in what follows.

¹⁴⁶ Decision 2005/370

- The Aarhus Article 9(3) and (4) NPE Principle¹⁴⁷ applies to legal proceedings intended to contest, on the basis of national environmental law, a development consent process and so an application for leave to seek judicial review in the course of a development consent process.
- Aarhus Articles 9(3) and (4) contain no unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals and so do not have direct effect.
- Although they do not have direct effect, Articles 9(3) and (4) Aarhus are intended to ensure effective environmental protection.
- Therefore, if the effective protection of EU environmental law, in this case the EIA Directive¹⁴⁸ and Regulation No 347/2013¹⁴⁹, is not to be undermined, it is inconceivable that Article 9(3) and (4) Aarhus be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law (citing LZ1 by analogy).
- Absent EU legislation on the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, it is for the domestic legal system of each Member State to lay down those rules and to ensure that those rights are effectively protected in each case.
- Those procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness).
- “*Consequently*”, where the application of national environmental law ...¹⁵⁰ 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) Aarhus, so that judicial procedures are not prohibitively expensive.

The word “consequently” refers back to the proposition that it must not be made impossible or excessively difficult to exercise rights conferred by EU law - such that it seems clear that, in referring to the obligation to interpret national procedural law as consistently as possible with the objectives of Aarhus Article 9(3) and (4) in applying national environmental law, the CJEU is speaking of national environmental law securing rights conferred by EU law.

111. A paraphrased, but I hope accurate, version of the CJEU's answer¹⁵¹ in **North East Pylon** to the 4th and 5th questions put to it is as follows¹⁵²:

As to parts of a challenge not covered by the NPE Rule of Article 11 of the EIA Directive¹⁵³ and “to ensure effective judicial protection in the fields covered by EU environmental law”¹⁵⁴

¹⁴⁷ The CJEU called it a “requirement”.

¹⁴⁸ Directive 2011/92

¹⁴⁹ Guidelines for trans-European energy infrastructure

¹⁵⁰ “Particularly in the implementation of a project of common interest, within the meaning of Regulation No 347/2013” omitted for exposition purposes

¹⁵¹ §§58

¹⁵² Words in quotation marks taken verbatim from answer

¹⁵³ Which applies only to the costs relating to the part of the challenge alleging infringement of the rules on public participation

¹⁵⁴ Emphasis added

Article 9(3) and (4) Aarhus mean that the NPE Principle applies to proceedings brought “to ensure that national environmental law is complied with”. Article 9(3) and (4) “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.”

North East Pylon, CJEU – Environmental Damage Criteria

112. In answer to the 6th and 7th questions to the CJEU, it held it impermissible to derogate from the Aarhus/EIA Directive Article 11 NPE Principle¹⁵⁵/Rule where a challenge is frivolous or vexatious or where there is no link between the alleged breach of national environmental law and damage to the environment. It held that the wording of Aarhus Articles 9(2), 9(3) and 9(4) clearly seeks to apply NPE costs protection to challenges aimed at enforcing environmental law in the abstract, without making it subject to any link with existing future potential damage to the environment.

The Applicants’ Argument from the CJEU decision in North East Pylon

113. The Applicants say that, given the conditioning of the CJEU’s answer to the fourth question by the reference in the question to “*the fields covered by EU environmental law*”, the answer does not address the question whether the interpretive obligation applies to the wider concept of “*national law relating to the environment*” to which art. 9(3) Aarhus Convention applies. They say the concept is wider in two respects.

114. First, they say “*national law relating to the environment*” is broader than “*national environmental law*”. Little seems to me to turn on that observation. I think the two phrases interchangeable, the concept is broad on any view and, in any event, the Supreme Court in **Conway** has explained it¹⁵⁶.

115. Second, the Applicants say that for purposes of the EU Law Interpretive Obligation in applying the Aarhus Article 9(4) NPE Principle to proceedings within Aarhus Article 9(3) brought “to ensure that national environmental law is complied with”, the caselaw does not hold that the concept of national environmental law is limited to national environmental law in the fields covered by EU environmental law. If correct, that argument does not get the Applicants to the point of a positive finding that that for purposes of the EU Law Interpretive Obligation the concept of national environmental law is not limited to national environmental law in the fields covered by EU environmental law. I have already indicated some reasons to reject a submission to that effect.

¹⁵⁵ The CJEU called it a “requirement”.

¹⁵⁶ See below

116. To further consider that issue, it is necessary to note that the Applicants properly observe that Aarhus Article 9(3) is addressed to the State parties, including Ireland, and to “*judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*” As Aarhus is not an EU Law instrument, Aarhus Article 9(3) itself, unsurprisingly, contains no limitation of such *national law* by reference to EU environmental law and, as a matter of International Law, is addressed to such *national law* whether or not in a field covered by EU environmental law. For purposes of the EU Law Interpretive Obligation any such limitation would have to derive from EU Law. On that basis it is plausible that, the EU having “bought in”, as it were, to the Aarhus Convention by its ratification, and given Article 216 TFEU, the EU would seek to advance the aims of Article 9(3) in their own right and “*to the fullest extent possible*” and not just for the limited purpose of advancing specifically EU environmental law. But that it is plausible does not necessarily imply it is the case. And that environmental law is a shared competence of the EU and the Member States need not imply that the EU would extend its imposition of the NPE Principle on Member States beyond the extent required to advance specifically EU environmental law. Indeed, in the context of shared competence, **Decision 2005/370**¹⁵⁷ suggests the opposite. It explicitly recognises, in a declaration of competence, Member States’ competence in areas in which the EU has not adopted laws implementing Aarhus obligations. Nor, it seems to me, does the high level of protection of the environment enjoined by Article 191 TFEU require such a conclusion: the primary means of attaining that end is via specifically EU environmental law.

North East Pylon #5 – High Court

117. In light of the decision of the CJEU, the High Court in **North East Pylon #5**¹⁵⁸ considered the question of costs of the failed judicial review leave application. Humphreys J observed that

“The upshot is that the not-prohibitively-expensive rule applies (to the fullest extent that it is possible to read national law to that effect) to challenges based on national environmental law within the field of EU environmental law even if the challenges do not relate to the public participation rules.”

In other words, the EU Law Interpretive Obligation arises on foot of Aarhus Article 9(3) even if not on foot of Aarhus Articles 9(2) and 6 and the Public Participation Directives including, notably, Article 11 of the EIA Directive.

¹⁵⁷ On the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters

The EU stated that its legislation did “not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its 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”.

¹⁵⁸ North East Pylon Pressure Campaign Ltd. & anor v An Bord Pleanála & ors No.5 [2018] IEHC 622

118. However, Humphreys J had just observed:

“It is clear that art. 9(3) of Aarhus includes a purely domestic law¹⁵⁹ challenge, providing as it does for procedures ‘to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment’ ”.

In this Humphreys J was making essentially the same observation as I have made above - that Aarhus is not an instrument of EU law but of international law and that its concept of national law relating to the environment includes, but is not limited to, State law in the field of EU environmental law.

119. Humphreys J continued:

“It is fair to say that the language in the judgment of the CJEU at paras. 54 to 58 is not necessarily totally consistent, referring variously to rights derived from EU law, to the field of EU environmental law and separately to national environmental law.

.....

Insofar as these concepts are to be reconciled I would read the concept of “the fields covered by EU environmental law” as being the operative one (indeed it is the one referred to in para. 3 of the curial part of the judgment) and as being wider than a situation where the rights asserted are purely those created by EU law. If a point arises where this comes into dispute and would make a difference to the outcome, it might be that a further reference to the CJEU will be necessary on this and perhaps other issues.”¹⁶⁰

Here, Humphreys J was not doubting the limitation of the applicability of the EU Law Interpretive Obligation to national law in “the fields covered by EU environmental law”. On the contrary, he saw that as the “operative” concept. His purpose was merely to state that the concept was wider than a posited limitation, which he rejected, of the applicability of the EU Law Interpretive Obligation to national law as to rights “created by EU law”. It was only in that respect that he contemplated the possibility of a reference to the CJEU in a suitable case. He did not suggest such a reference as to what he identified as the “operative” concept of national law in “the fields covered by EU environmental law”.

120. The Applicants argue that the CJEU has never decided whether the EU Law Interpretive Obligation applies the NPE Principle to the costs of disputes relating to national environmental law not in the field of EU environmental law. But it seems to me that that point is answered by the recognition that as to Aarhus, a mixed agreement in the environmental field, competence is shared between the EU and Member States in the manner set out in the EU Council Decision¹⁶¹ approving Aarhus and declaring the extent of its competence. That Decision explicitly recognises that it had not legislated to cover fully the obligations resulting from Aarhus Article 9(3) such that member states remain responsible for performance of those obligations unless and until the EU legislates for their

¹⁵⁹ Emphasis added

¹⁶⁰ I have changed layout for ease of exposition

¹⁶¹ 2005/370/EC

implementation. The issue seems to me to be one not of direct effect or of interpretive obligation but of competence. That recognition of the remaining competence of Member States expressly as to the obligations resulting specifically from Aarhus Article 9(3) seems to me to undermine the Applicant's suggestion that Aarhus Article 9(3) has become EU law applicable to national environmental law even where that national environmental law is not in a field covered by EU environmental law.

Conclusion

121. On consideration of the CJEU and High Court decisions in North East Pylon, I remain of the view that EU law does not impose the Interpretive Obligation in respect of proceedings relating to national environmental law in fields not covered by EU environmental legislation.

122. That said, I note that in **Enniskerry/PEM** Humphreys J has provisionally posed a question whether the EU Law Interpretive obligation¹⁶² applies "*only within the sphere of EU environmental law.*" I will return to this below.

Aarhus Interpretive Route 2 - the Irish Law Presumption of Legislation Conforming to International Law

CLM Properties, McCoy, Kimpton Vale, ClientEarth & Austin Miller

123. Notably, North East Pylon addresses the EU Interpretive Obligation. It does not address the Irish Law Presumption of legislation in conformity with International Law.

124. As to that Irish Law Presumption, it is necessary to say that **Part 2 (Ss.3 to 8) of the 2011 Act** was enacted to fulfil the States' Aarhus obligations at International Law – as opposed to its Aarhus obligations mediated by EU Law. In the fulfilment of the latter, the EU Law Interpretive Obligation applies.

125. In **McCoy v Shillelagh Quarries**¹⁶³, Hogan J noted that Finlay-Geoghegan J in **CLM Properties**¹⁶⁴ had observed that the fact that S.8 of the 2011 Act provides that judicial notice shall be taken of Aarhus does not appear to require any special meaning to be given to s.4 of the 2011 Act which provides for costs protection.

¹⁶² Set out in Case C-470/16 North East Pylon Pressure Campaign Limited v An Bord Pleanála

¹⁶³ [2015] IECA 28

¹⁶⁴ CLM Properties Ltd v Greenstar Holdings Ltd & Ors [2014] IEHC 288

126. Greenstar¹⁶⁵ owed CLM about €3 million for landfill restoration, remediation and aftercare works. Bank of Ireland, in exercise of rights of security and in defrayal of debt on which Greenstar had defaulted, had taken for itself funds in Greenstar accounts in Bank of Ireland. Greenstar had collected those funds as statutory landfill “Gate Fees”¹⁶⁶. Greenstar’s waste licenses obliged it to financially provide for landfill restoration, remediation and aftercare. CLM lost a preliminary issue whether the Gate Fees were required by law to be used solely to pay for such works such that they were unavailable to Greenstar to use as security for its debts to Bank of Ireland. CLM defended the resultant costs application on the basis that its claim had been an action within S.4(1)(a) of the 2011 Act. Finlay-Geoghegan J¹⁶⁷ asked whether objectively, *“as a matter of reality and substance, the proceedings are for the purpose of ensuring compliance with or enforcement of either a statutory provision or condition”*. She held that *“in reality and substance, the purpose of the proceedings is to obtain payment to the plaintiff of the monies ... for work done ..”* On the facts, this was an entirely unsurprising conclusion.

127. That the mere fact that judicial notice shall be taken of Aarhus does not require any special meaning to be given to s.4 of the 2011 Act is an equally unsurprising conclusion. However, her conclusion should be understood in the context of the issue Finlay-Geoghegan J had to consider. It is not clear from her understandably brief observation to that effect what, if any, special meaning of s.4 had been urged upon her, what argument there was on the issue, what place Aarhus had occupied in any such argument, what element of Aarhus had been asserted to mandate a particular special meaning of s.4 or, indeed, what part her observation as to the effect of judicial notice played in her ultimate and entirely unsurprising decision. I do not read Finlay-Geoghegan J’s judgment as a general assertion that Aarhus is unavailable as an aid to interpreting the 2011 Act. Indeed, it is difficult to see that the purpose of such judicial notice could have been other than to make Aarhus available as such an aid, in accordance with the principle of interpretation of statutes consistently with the objectives of treaties they purport to effect.

128. Mr McCoy sought a planning injunction under S.160 PDA 2000 to restrain operation of an unauthorised quarry near his home. The quarry, resisting Mr McCoy’s application for a 2011 Act PCO, argued that Aarhus supported its view of the interpretation of Part 2 of the 2011. Hogan J noted that the Oireachtas had sought by ss.3 to 7 of the 2011 Act to approximate our domestic law to the requirements of Aarhus Article 9(3) and Article 9(4). He characterised the quarry’s argument as implying that Aarhus *“and Article 9(3) and Article 9(4) in particular – has a fixed and unyielding meaning which could decisively govern our interpretation of the 2011 Act, at least in cases of doubt.”* Hogan J observed that the critical provisions of Aarhus are expressly contingent on the application of national law. So, for example, these obligations imposed by Aarhus are not regarded as so clear, unconditional, precise and unambiguous as to create direct effects in EU law capable of directly regulating the legal position of individuals¹⁶⁸. Hogan J continued:

¹⁶⁵ See earlier report sub nom Environmental Protection Agency v Greenstar Holdings Ltd & ors; CLM Properties Limited v Greenstar Holdings Ltd & ors [2014] IEHC 178

¹⁶⁶ Waste disposal charges imposed, determined and collected pursuant to s. 53A(4)(c) of the Waste Management Act 1996

¹⁶⁷ Citing Rowan v Kerry County Council [2012] IEHC 544

¹⁶⁸ Citing Council of the European Union v Stichting Natuur en Milieu EU:C:2015: 5 Joined Cases C-404/12 P and C-405/12 P, Judgment 13 January 2015

“All of this means that neither Article 9(3) or, for that matter, Article 9(4) can be regarded as prescribing firm criteria which would facilitate any judicial assessment of whether their objectives had actually been met by legislation (whether at EU or, as here, national level) designed to give effect to these provisions.

For all these reasons, therefore, it cannot be said that either the existence of the Aarhus Convention in general or Article 9(3) or Article 9(4) in particular could or should decisively influence the interpretation of the 2011 Act. The situation might have been different had, for example, these provisions of the Convention contained firm criteria against which the new costs rules contained in the 2011 Act might have been measured, such that the presumption that the Oireachtas did not intend to depart from the terms of our international obligations would have more strongly come into play.”

129. On one reading, Hogan J in McCoy is of the view that Aarhus, as to matters in respect of which its terms are insufficiently clear, unconditional, precise and unambiguous or in respect of matters contingent on the application of national law, not merely does not have direct effect - it does not even inform interpretation of the 2011 Act. But his view seems to me, on close examination, to be more nuanced than might at first appear. Hogan J “*equally*” acknowledges that the presumption that the Oireachtas legislates consistently with the State’s treaty obligations and that that the courts should, where possible, interpret such legislation consistently with those obligations¹⁶⁹ “*must be especially so in the present case given that the long title of the 2011 Act declares that one of its objects is to give effect to Aarhus*”. This seems distinctly to allow that Aarhus may inform interpretation of the 2011 Act in at least some respects. In my view it is entirely likely that one of those respects is the meaning of “*environment*”. That is an overarching concept of Aarhus as opposed to an issue of detail, such as procedures or remedies, as to which national competence is preserved and/or the application of national law is required. Nor does Aarhus require that States adopt particular national laws relating to the environment: it merely provides that where they do so, Article 9 may apply. It seems to me that this observation as to the meaning of “*environment*” may be especially apt where the 2011 Act, at S.4(2) adopts an inexhaustive description of damage to the environment which has appreciable echoes in the definition of environmental information at Aarhus Article 2(3).

130. Hogan J briefly referred in McCoy to his judgment in **Kimpton Vale**¹⁷⁰, but not as to its content regarding the interpretive question. Notably, in Kimpton Vale Hogan J had earlier “*sought to disentangle the increasingly complex web of legislation in the area of special costs rules*”¹⁷¹ which he described as presenting an acutely difficult question of *stare decisis* in relation to statutory interpretation such as required consideration of the entire issue as a matter of first principle. He also

¹⁶⁹ Citing O’Domhnaill v Merrick [1984] I.R. 151, 159 per Henchy J and Sweeney v Governor of Loughlan House Open Prison [2014] IESC 42, [2014] 2 I.L.R.M. 401, 417, per Clarke J

¹⁷⁰ Kimpton Vale Developments Ltd. v An Bord Pleanála [2013] IEHC 442, [2013] 2 I.R. 767.

¹⁷¹ As his purpose was later described by Costello J in Heather Hill #1 §74

observed that “one of the difficulties presented by the transposition of the Convention is that it is not always easy to say when the obligations assumed by the State in respect thereof begin and end.”¹⁷²

131. Hogan J in **Kimpton Vale** found that while Aarhus was not part of the domestic law of the State, nonetheless the Long Title to, and S.8 of, the 2011 Act:

*“compel the conclusion that the relevant provisions of the Act of 2011 should be interpreted in a manner which best gives effect to the corresponding provisions of the Convention. Thus, for example, the new costs rules contained in ss. 3, 4, 5 and 21 of the Act of 2011 were obviously designed to give effect to Article 9 of the Convention.”*¹⁷³

*“it is clear from the long title of the Act of 2011 that the Oireachtas sought to approximate our national law with the requirements of article 9(4) of the Aarhus Convention”*¹⁷⁴

132. Importantly, since **McCoy** was decided, the CJEU has in **North East Pylon**¹⁷⁵ on the one hand echoed Hogan J’s view that Article 9(3) and (4) Aarhus do not have direct effect. But, on the other hand, the CJEU noted that Article 9(3) and (4) are intended to ensure effective environmental protection. So, while the detailed procedural rules governing actions for safeguarding rights under EU law are for Member States to lay down, nonetheless “if the effective protection of EU environmental law, is not to be undermined, it is inconceivable that Article 9(3) and (4) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law”¹⁷⁶. Accordingly, while Article 9(3) and (4) do not have direct effect, the CJEU nonetheless expressed the EU Law Interpretive Obligation that:

*“..... where the application of national environmental law 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.”*¹⁷⁷

133. The point of my repeating here the terms of the EU Law Interpretive Obligation identified in LZ1 is that the CJEU has clearly taken the view that the terms of Aarhus Articles 9(3) and (4) suffice to enable their deployment as an aid to the interpretation of national legislation. If Aarhus Articles 9(3) and (4) suffice for that purpose as to the EU Law Interpretive Obligation, it seems difficult to see why they should not similarly suffice as to the Irish Law Presumption of legislation in conformity with international law obligations. And, in the cause of harmony in the law generally, it seems at least desirable that both interpretive approaches should adopt the same attitude to the interpretive aid which Aarhus Articles 9(3) and (4) can offer.

¹⁷² §18

¹⁷³ §17

¹⁷⁴ §36

¹⁷⁵ Case C-470/16 North East Pylon Pressure Campaign Ltd & Sheehy v An Bord Pleanála & others Judgment 15 March 2018

¹⁷⁶ §56

¹⁷⁷ §57 & 58

134. I have considered **ClientEarth** above as to the scope of the concepts of the environment and environmental law. **ClientEarth** also post-dates **McCoy**. As an instance of the EU's exercising legislative powers in effecting Aarhus objectives via the Aarhus Regulation¹⁷⁸ it raised questions relating to the EU Law Interpretive Obligation. The case is also a further example of courts' reliance on the Aarhus Implementation Guide as an aid to interpreting Aarhus. The judgment contains the following as to the EU Law Interpretive Obligation – as itself deriving directly from the International Law obligations of Aarhus:

“..... EU legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the European Union¹⁷⁹.

When called upon to interpret the provisions of directives implementing, as regards the Member States, the requirements of Article 9(4) of the Aarhus Convention, the Courts of the European Union noted that the objective pursued by the European legislature was to give the public concerned 'wide access to justice' and that that objective pertained, more broadly, to the desire of the EU legislature to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public plays an active role.¹⁸⁰

Accordingly, it considered that, although the parties to the Aarhus Convention had a certain margin of appreciation in the application of Article 9(3) of that convention, a highly protective approach to the effectiveness and objectives of that convention¹⁸¹ in the context of the implementation obligations incumbent on the Member States should nevertheless be adopted.¹⁸²

For similar reasons, it is necessary, so far as possible, to interpret the two conditions referred to in paragraph 106 above¹⁸³ in the light of Articles 9(3) and (4) of the Aarhus Convention¹⁸⁴ ... and, therefore, in the light of the requirement to ensure effective access to justice.”¹⁸⁵

“... it is clear from the wording and scheme of Articles 9(3) and (4) of the Aarhus Convention, in the light of which the Aarhus Regulation must, so far as possible, be interpreted¹⁸⁶

¹⁷⁸ Regulation (EC) No 1367/2006 of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to [European Union] institutions and bodies (OJ 2006 L 264, p. 13)

¹⁷⁹ Citing judgment of 14 July 1998, *Safety Hi-Tech*, C-284/95, EU:C:1998:352, §22; see also judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C-263/18, EU:C:2019:1111, §38 and the case-law cited

¹⁸⁰ Citing judgment of 11 April 2013, *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, §§31 and 32

¹⁸¹ Emphasis added

¹⁸² Citing Opinion of Advocate General Jääskinen in *Council and Others v Vereniging Milieudéfensie and Stichting Stop Luchtverontreiniging Utrecht*, C-401/12 P to C-403/12 P, EU:C:2014:310, §132 and the case-law cited

¹⁸³ These were Aarhus Regulation conditions first that the act in question must have 'legally binding and external effects' and, second, that it must have been adopted 'under environmental law'.

¹⁸⁴ citing, by analogy, judgment of 18 July 2013, *Deutsche Umwelthilfe*, C-515/11, EU:C:2013:523, §32 and the case-law cited

¹⁸⁵ §107 – layout changed for exposition

¹⁸⁶ Emphasis added

that all acts of public authorities which run counter to the provisions of environmental law should be open to challenge".¹⁸⁷

"... it is necessary, so far as possible, to interpret" implementing legislation "in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the EU" (for which here we can read "Ireland" as it recognises a similar presumption) and that specifically Aarhus Articles 9(3) and (4) supply such an interpretive aid¹⁸⁸ – not least "in the light of the requirement to ensure effective access to justice."

135. In other words, not merely do the objectives of Aarhus Articles 9(3) and (4) supply legitimate aid in interpreting EU legislation - the interpretive approach required is one "*highly protective*" of those objectives and their effectiveness – especially as to access to justice and, by necessary implication given the terms of Article 9(4), as to the role of costs protection in facilitating that access. I therefore and respectfully agree with Humphreys J when he, citing the same caselaw¹⁸⁹, observed that:

"Aarhus obligations appear to be particularly empathic insofar as they are applied to the EU institutions themselves ... But even as applied to domestic actors, such obligations must be given considerable weight."

136. ClientEarth addressed the EU's obligations at International Law. Leaving aside monist/duallist distinctions, the EU's obligations at International Law are similar to Ireland's obligations at International Law as concerns interpretive presumptions. It does not seem to me to do violence to Ireland's Constitutional relationship to its obligations at International Law or to the Irish Law Presumption of interpretation of statutes in accordance with International Law to paraphrase the excerpt cited above as follows:

"..... ~~EU~~ Irish legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by ~~the European Union~~ Ireland."

137. I should say that this imperative may perhaps be diluted in that, in Irish Law, presumptions of statutory interpretation are tools to aid divination of legislative intent, rather than highly prescriptive rules. They may be rebutted or yield to countervailing considerations or presumptions. And the duallist approach may also be a diluting factor. Nonetheless, the paraphrase above seems to me generally illustrative of the position at least as to Irish legislation, such as to 2011 Act, intended specifically to give effect to Aarhus.

¹⁸⁷ §125

¹⁸⁸ Emphasis added

¹⁸⁹ Case T-396/09 *Vereniging Milieudefensie* and Case T-9/19 *ClientEarth*

138. Still, it is theoretically not impossible that, for purposes of the Irish Law Presumption of legislation in conformity with International Law, the terms of Aarhus Articles 9(3) and (4) could be considered inadequate to aid the interpretation of national legislation and yet be considered adequate for purposes of the EU law Interpretive Obligation as applied to the interpretation of national legislation to achieve the objectives of Aarhus Articles 9(3) and (4) to the fullest extent possible. But such a dissonance - two different interpretive approaches to national legislation depending on whether it implements a given Aarhus provision directly or does so via EU law - would be highly undesirable in an area of law already beset by great complexity.

139. Some further, if perhaps anaemic, support for that proposition is derived from **Austin Millar**. In applying English domestic – as opposed to EU law-inspired – costs protection law, the Court of Appeal considered the UK law presumption that UK law should be interpreted and applied in harmony with international obligations. The Court held that Aarhus could be a factor – though no more - in a discretion to grant a PCO or in resolving a statutory ambiguity. It *“reinforces the need for the courts to be alive to the wider public interest in safeguarding environmental standards when considering whether or not to grant a PCO.”* One can’t help suspecting that this anaemia may have derived in part from Mr Troman’s overegging his pudding¹⁹⁰ in arguing that the UK law presumption operated in the context in question as an obligation to grant a PCO where this would be required by Aarhus.

140. It seems to me that the CJEU decision in **North East Pylon**¹⁹¹ and the GCEU decision in **ClientEarth**¹⁹² (especially the underlined phrases above) compel a reconsideration of the view, expressed in **McCoy**, that Aarhus Article 9(3) and (4) may not inform the interpretation of domestic legislation – specifically the 2011 Act. True, North East Pylon relates to the value of Aarhus as an aid to interpretation of national law relating to effective judicial protection of EU law rights derived from Aarhus and ClientEarth relates to the value of Aarhus as an aid to interpretation of EU Law rather than to national law relating to effective judicial protection of access to justice deriving directly from Aarhus. But if the objectives of Article 9 are sufficiently discernible to inform the interpretation of those laws via the EU Interpretive Obligation, it is difficult to see that they should be insufficiently discernible to inform, via an Irish Law Presumption of legislation in conformity with International Law, the interpretation of national law relating to effective judicial protection of access to justice deriving directly from Aarhus, such as Part 2 of the 2011 Act.

141. The view of this issue taken in **Kimpton Vale** and set out above seems preferable, and I gratefully adopt it, as more consistent with the view later taken in **North East Pylon** and **ClientEarth**.

¹⁹⁰ I may be accused of mixing my metaphors but I understand eggs may inhibit iron absorption.

¹⁹¹ Case C-470/16 North East Pylon Pressure Campaign Ltd & Sheehy v An Bord Pleanála & others Judgment 15 March 2018

¹⁹² ClientEarth v European Investment Bank [2021] All ER (D) 99 (Jan) case T-9/19 – see further below

Aarhus Interpretive Routes 1 & 2 – Comparison

Fields covered by EU environmental law

142. Without here seeking to fully compare them, there is an important point of difference between Route 1 - the application of the EU Law Interpretive Obligation and Route 2 - the Irish Law Presumption of legislation in conformity with International Law obligations. I have expressed the view that the former applies only to national environmental law “*in the fields covered by EU environmental law*”. No such limitation of the concept of national environmental law by reference to such EU Law fields arises in the application of the Irish Law Presumption. Route 2 does not involve EU Law – it is based on the direct relationship between Aarhus and National law, as opposed to Route 1 which is based on that relationship as mediated by EU Law.

Environmental damage criterion

143. As has been seen, the CJEU in **North East Pylon**, as to the EU Law Interpretive Obligation, has held it impermissible to impose an environmental damage criterion on the application of the NPE Principle. But as the CJEU did so by way of an interpretation of Aarhus, and as the CJEU asserts the right to interpret Aarhus such that it will be interpreted uniformly whatever the circumstances in which it is to apply¹⁹³, it would seem that, as a matter of EU law, that interpretation of Aarhus binds the State even where our courts are applying, not the Route 1 EU Law Interpretive Obligation, but the Route 2 Irish Law Presumption of legislation in conformity with International Law obligations.

144. However, while Irish law must accept that interpretation of Aarhus, the Irish law Presumption sits firmly in the context of the duallist approach mandated by the Constitution. So, and as to its legislation to directly effect Aarhus in Irish Law in fulfilment of its International Law, as opposed to its EU Law, obligations, the State is entirely free to effect Aarhus in whole or in part or subject to any conditions it may see fit to impose – including as to environmental damage.

145. Accordingly, it seems to me that, as to the imposition of an environmental damage criterion in legislation providing for PCOs in litigation challenging alleged contravention of national law relating to the environment not in a field covered by EU environmental law, there can be no objection to the imposition of such a criterion as long as it is done sufficiently clearly to rebut the presumption, which would otherwise apply, of legislation in conformity with International Law. That, as Humphreys J in **North East Pylon #5** and **Enniskerry/PEM** and Simons J in **Heather Hill #1** observe¹⁹⁴, has been very clearly done in Part 2 of the 2011 Act.

¹⁹³ See above

¹⁹⁴ See commentary also in O'Connor v Offaly County Council [2020] IECA 72 §27

146. The net result, introducing a perhaps unfortunate dichotomy, seems to be that even if the damage criterion imposed by the 2011 Act renders that Act inadequate for purposes of the EU law Interpretive Obligation as bearing on national environmental law in a field covered by EU environmental law, that same damage criterion is unobjectionable in application of the Irish Law Presumption of legislation in conformity with International Law as bearing on national environmental law in a field not covered by EU environmental law.

National Law Relating to The Environment & Development Plans

Introduction

147. Most of the Remaining Grounds relate to material contravention of the relevant Development Plan made pursuant to the PDA 2000 - Ireland's main land-use planning legislation. Importantly, in the present case, the breach of the statutory requirements of S.9(6) of the 2016 Act and S.37(2)(b) PDA 2000 is alleged as to the Remaining Grounds as they relate to material contravention of the Development Plan. The Applicants say these are "*statutory requirements*" within S.4 (1) of the 2011 Act and are "*national law relating to the environment*" within Aarhus Article 9(3).

148. As recited in S.1A, the PDA 2000 gives effect, inter alia, to listed EU environmental legislation¹⁹⁵ and the PDA 2000 must be interpreted in light of its intention to give effect to those EU Law instruments¹⁹⁶. But the statutory antecedents of the PDA 2000 long-precede those EU laws. Its purpose and effect is wider than merely giving effect to those EU laws and includes purely domestic purposes and also effects of a planning nature. As a result, there may be some tendency to differentiate "environmental" from "planning" law when, in reality and increasingly, they largely overlap - not least given the wide definition of "environment" canvassed above. In general terms, many of these domestic purposes and effects of planning law, and planning policy made thereunder, are in substance the same as or, to coin the phrase, are found in the same "field" as the "*objectives of EU policy on the environment as set out in the TFEU: namely preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources*"¹⁹⁷.

149. For "*town and country planning*" and "*land use*" planning purposes (TFEU concepts explicitly environmental¹⁹⁸) and under Ss.9 & 10 PDA 2000, development plans are made by planning authorities to set overall strategy and development objectives for the proper planning and

¹⁹⁵ Including, by way of example, the Birds Directive, the Habitats Directive, the EIA Directive, the SEA Directive and the Public Participation Directive 2003

¹⁹⁶ See *An Taisce/The National Trust for Ireland v McTigue Quarries Limited & Ors.* [2018] IESC 54 §29 & *Heather Hill Management Company CLG v An Bord Pleanála* [2021] IECA 259 §136

¹⁹⁷ C.f. *ClientEarth - Case T-9/19*, GCEU 27 January 2021, [2021] All ER (D) 99 (Jan)

¹⁹⁸ See Article 192 TFEU

sustainable development of their functional areas. Development plans are an important yardstick by which planning applications are decided. By S.10 PDA 2000, development plans provide for land use zoning, the provision or facilitation of the provision of infrastructure (including waste water services) and the conservation and protection of the environment. They set objectives relating to the Habitats Directive, the promotion of compliance with EU environmental standards and integration of planning and sustainable development with the social, community and cultural requirements of the area and its population, preservation of landscape character, including the preservation of views and prospects and the amenities of places and features of natural beauty or interest, the protection of structures and areas of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest, prevention of urban blight, the preservation improvement and extension of amenities, control of establishments for purposes of the Major Accidents Directive¹⁹⁹, landscape, and other objectives. Also included is the promotion of sustainable settlement and transport strategies “*having regard to location, layout and design of new development*” including the promotion of measures to reduce energy demand and anthropogenic greenhouse gas emissions, and to address the necessity of adaptation to climate change. This is not a complete list.

150. Most, if not all, of these planning objectives I have listed can inevitably be described also as “environmental”. Many derive from EU environmental law. Others are domestic in origin. Many are a combination of the two. And in general terms they come within the “*objectives of EU policy on the environment as set out in the TFEU: namely preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources*”²⁰⁰ which objectives are characteristic of “Environmental Law”.

151. Notably, **S.10(1D) PDA 2000** requires that a development plan

“.....include a separate statement which shows that the development objectives in the development plan are consistent, as far as practicable, with the conservation and protection of the environment.”

152. In **AG (McGarry) v Sligo County Council**²⁰¹ McCarthy J, for a unanimous Supreme Court in 1989, described development plans as follows in terms confirmatory of their environmental purpose:

“The plan is a statement of objectives; it informs the community, in its draft form, of the intended objectives and affords the community the opportunity of inspection, criticism, and, if thought proper, objection. When adopted it forms an environmental²⁰² contract between the planning authority, the council, and the community, embodying a promise by the council

¹⁹⁹ A.k.a. the Seveso Directive

²⁰⁰ C.f. ClientEarth - Case T-9/19, GCEU 27 January 2021, [2021] All ER (D) 99 (Jan) §14

²⁰¹ [1991] 1 IR 99 at p 113

²⁰² Emphasis added

that it will regulate private development in a manner consistent with the objectives stated in the plan ...”.

If anything, given not least the increasing influence of EU environmental law over time, the word “environmental” is even more apt now than it was in 1989.

In **Byrne v Fingal County Council**²⁰³ McKechnie J considered that:

“... a development plan, founded upon and justified by the common good and answerable to public confidence”, is a representation in solemn form, binding on all affected or touched by it, that the planning authority will discharge its statutory functions strictly in accordance with the published plan. This implementation will be carried out openly and transparently, without preference or favour, discrimination or prejudice. By so doing and by working the plan as the law dictates, the underlying justification for its existence is satisfied and those affected, many aversely, must abide the result. They must suffer the pain, undergo the loss and concede to the public good.”²⁰⁴

S.9 of the 2016 Act

153. S.9 of the 2016 Act governs decisions by the Board on SHD planning permission applications. S.9(1) obliges the Board to consider, inter alia, likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the development, likely effects on the environment and/or on a European site, as the case may be, of the proposed development, if carried out, any EIAR²⁰⁵ and NIS²⁰⁶ submitted to the Board. S.9(3) obliges the Board to apply, where relevant, specific planning policy requirements of guidelines issued by the Minister under s.28 PDA 2000.

154. S.9(2) includes the following as particularly relevant:

“(2) In considering the likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the strategic housing development, the Board shall have regard to —

- (a) the provisions of the development plan, including any local area plan if relevant, for the area,*
- (b) any guidelines issued by the Minister under section 28 of the Act of 2000,*
- (c) the provisions of any special amenity area order relating to the area,*
- (d) if the area or part of the area is a European site or an area prescribed for the purposes of section 10(2)(c) of the Act of 2000, that fact,*

²⁰³ [2001] 4 IR 565

²⁰⁴ Emphases added

²⁰⁵ Environmental Impact Assessment Report

²⁰⁶ Natura Impact Statement

(e) if the proposed development would have an effect on a European site or an area prescribed for the purposes of section 10(2)(c) of the Act of 2000, that fact, ..”

155. As to development plans in the particular context of planning permissions for strategic housing developments such as that at issue in this case, **S.9(6) of the 2016 Act** provides:

(6) (a) Subject to paragraph (b), the Board may decide to grant a permission for a proposed strategic housing development in respect of an application under section 4 even where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned.

(b) The Board shall not grant permission under paragraph (a) where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned, in relation to the zoning of the land²⁰⁷.

(c) Where the proposed strategic housing development would materially contravene the development plan or local area plan, as the case may be, other than in relation to the zoning of the land, then the Board may only grant permission in accordance with paragraph (a) where it considers that, if section 37(2)(b) of the Act of 2000 were to apply, it would grant permission for the proposed development.”

S.37(2) PDA 2000

156. **S.37 PDA 2000** deals with appeals to the Board from decisions of planning authorities. As has been seen, S.9(6) of the 2016 Act applies it to consideration of material contravention issues in the Board’s consideration of SHD planning applications S.37(2) reads as follows:

(2) (a) Subject to paragraph (b), the Board may in determining an appeal under this section decide to grant a permission even if the proposed development contravenes materially the development plan relating to the area of the planning authority to whose decision the appeal relates.

(b) Where a planning authority has decided to refuse permission²⁰⁸ on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that —

(i) the proposed development is of strategic or national importance,

²⁰⁷ PDA 2000 - S.10(2) development plan shall include objectives for— (a) the zoning of land for the use solely or primarily of particular areas for particular purposes (whether residential, commercial, industrial, agricultural, recreational, as open space or otherwise, or a mixture of those uses),

²⁰⁸ S.37(2)(b) relates to planning permission decisions generally as opposed to planning permissions for strategic housing developments and so to the normal procedure whereby the Board considers planning applications only on appeal from the planning authority

(ii) *there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned,*
or

(iii) *permission for the proposed development should be granted having regard regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government,*
Or

(iv) *permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan.*

(c) *Where the Board grants a permission in accordance with paragraph (b), the Board shall, in addition to the requirements of section 34(10), indicate in its decision the main reasons and considerations for contravening materially the development plan.*

Analysis

157. Notably, in **Heather Hill #1**, in a finding with which I gratefully and respectfully agree, Costello J, agreed with the trial judge, Simons J, that s.9 of the 2016 Act is a measure of national environmental law. Given its terms as set out above, it is easy to see why that view was taken. However, it may assist to elaborate a little. Simons J considered S.9:

“... undoubtedly a provision of national law relating to the environment, and in particular to town planning. The section fulfils the criteria identified by the Aarhus Committee, and endorsed by the Supreme Court in Conway v. Ireland. More specifically, section 9 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 section 9 is the proper planning and sustainable development of the area in which it is proposed to situate the development.

Section 9 also relates to fields covered by EU environmental law. First, as flagged earlier, section 9 imposes obligations on An Bord Pleanála, as competent authority, in respect of both the EIA Directive and the Habitats Directive.

..... section 9 regulates the role of the development plan in the development consent process. The board is required to have regard to the provisions of the development plan for the area (section 9(2)(a)). The circumstances in which An Bord Pleanála can grant planning permission in material contravention of the development plan are specified under section 9(6).”

158. Given he was considering S.50B PDA 2000 and the confinement of its application by reference to the four directives listed in it²⁰⁹, Simons J went on to consider that, in referring to the Development Plan, S.9 was referring to a plan the making of which was subject to SEA²¹⁰. But by reference to the more general terms of Aarhus Article 9, it needs merely be noted that the Development Plan is a specifically “environmental contract”. Given the centrality of the Development Plan to S.9(6) of the 2016 Act it is clear, both in principle and on authority, that S.9(6) is “national law relating to the environment” within the meaning of Aarhus Article 9.

159. In my view and for reasons similar to those given as to S.9(6) of the 2016 Act, not least its close relationship to the Development Plan and also, in the specific context of SHD, in its specific role of providing criteria for the operation of S.9(6) of the 2016 Act in enabling the grant of permissions in material contravention of the Development Plan, S.37(2) PDA 2000 is “national law relating to the environment” within the meaning of Aarhus Article 9.

160. Development plans are largely policy documents – they are not “laws” in the ordinary sense and are not construed as such. But a development plan has important legal effects and is described by McCarthy J as an environmental contract and by McKechnie J as a representation in solemn form, binding on all affected or touched by it. As we have seen, by S.9 of the 2016 Act, the Board in granting SHD planning permissions:

- must have regard to the content of the development plan
- may not materially contravene a zoning objective of the Development Plan
- may otherwise materially contravene a development plan the development plan only within bounds set by S.9(6) of the 2016 Act and S.37(2)(b) PDA 2000.

161. Further, while development plans are not themselves statutory requirements, **Venn** and **ClientEarth**, not apparently cited to the Court of Appeal in **Heather Hill #1**, strongly suggest that development plans are to be regarded for Aarhus purposes as at least analogous to statutory requirements given the particular form taken by English, and by Irish, planning law and practice by way of promulgation of policy documents such as development plans and guidelines having statutory status such that, as was put in **Venn**, this “combination of statute and policy, ... is properly characterised as “national law relating to the environment”²¹¹. This even though such policies are not, per se, provisions of national law and the statutory provisions governing them did not directly relate to the environment. To put it another way, these cases imply that the court should disregard as formalistic the argument that the interposition of the policy between the statute and the development consent decision it authorises and between the statute and its relationship to the environment renders the statute unrelated to the environment. Whatever about the law/non-law status of the development plan itself, as to such statutory provisions this analysis at least conforms

²⁰⁹ See below

²¹⁰ Strategic Environmental Assessment for the purposes of the SEA Directive 2001/42/EC

²¹¹ Venn §17

to the broad view of what is “*law relating to the environment*”. It suggests that the law in question may relate mediately to the environment via such a policy as well as immediately.

162. While this last observation supplements my view, it is not necessary to my view that, in the present case, the breaches of S.9(6) of the 2016 Act and S.37(2)(b) PDA 2000 alleged in the Remaining Grounds, as they relate to material contravention, are alleged breaches of statutory requirements within the meaning of S.4(1) of the 2011 Act.

163. However, and as will be seen, I am bound by authority to a contrary view.

S.50B PDA 2000 & the Remaining Grounds

164. S.50B PDA 2000, providing special rules as to costs in certain proceedings was enacted in response to the CJEU decision in **Commission v Ireland Case C-427/07**, that Ireland had failed to properly transpose Article 10a of the EIA Directive, to give effect to the NPE Principle stated therein²¹².

165. The EU had partly implemented Aarhus by adopting the **Public Participation Directive 2003**²¹³. Inter alia, it amended, with regard to public participation and access to justice, the 1985 EIA Directive²¹⁴ by inserting Article 10a²¹⁵ - later codified in the 2011 EIA Directive²¹⁶ as Article 11, and so cited hereafter - and the 1996 IPPC Directive²¹⁷. In **Conway v Ireland**²¹⁸ these three directives were, as to their public participation and access to justice provisions, collectively termed the “Public Participation Directives”. These Directives imposed obligations on Member States to confer on individuals domestic law rights having their origins in Aarhus. Most notably, Article 11²¹⁹ effects, in EIA, Aarhus Article 9 in support of the public participation rights identified in Aarhus Article 6.

²¹² now Article 11(4)

²¹³ 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

²¹⁴ Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment

²¹⁵ 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

²¹⁶ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

²¹⁷ Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control

²¹⁸ [2017] IESC 13, [2017] 1 I.R. 53

²¹⁹ Article 11 of the EIA Directive is also cited in caselaw as Article 11 of the Public Participation Directives.

Article 11 of the EIA Directive

166. **Article 11 of the EIA Directive** now reads as follows:

“1 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.

2 Member States shall determine at what stage the decisions, acts or omissions may be challenged.

3 What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

4 The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

5 In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.”

167. The application of Article 11 of the EIA Directive is limited, as concerns legal proceedings, to proceedings *“to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive”*. The public participation provisions of the EIA Directive are:

- Article 6(2&3) – which requires that the public be informed early in the environmental decision-making procedures of various matters relevant to the development consent application and the prospect of EIA and arrangements for making relevant information materials available to the public.

- Article 6(4) - which entitles the public to early and effective opportunities to participate in the environmental decision-making procedures and to express comments and opinions before the decision on the request for development consent is taken and when all decision options remain open.
- Article 8 – which obliges the decision-maker to “duly” take “results of consultations and the information gathered” in the public participation “into account” in the development consent procedure.
- Article 9 – which obliges the decision-maker to inform the public of the decision and its content and the main reasons and considerations on which the decision is based, including information about the public participation process – including a summary of the results of the consultations and the information gathered and how those results have been incorporated or otherwise addressed.

S.50B PDA 2000

168. In its present form as amended, as relevant and somewhat edited for ease of reading, S.50B PDA 2000 as provides in part as follows:

“50B.— (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 provision²²⁰ that gives effect to —
- (I) a provision of [the EIA] Directive²²¹ .. to which Article 10a²²² of that ... Directive applies,
 - (II) [the SEA] Directive²²³ .., or
 - (III) a provision of [the IPPC] Directive²²⁴ .. to which Article 16 of that Directive applies, or
 - (IV) paragraph 3 or 4 of Article 6 of the Habitats Directive;
- or
- (b)

²²⁰ s.29 of the Planning and Development (Amendment) Act 2018 substituted the words “statutory provision” for “law of the State” – in response to the decisions of the High Court interpreting section 50B (as amended). See Heather Hill Management Company CLG v An Bord Pleanála [2021] IECA 259 §62 & 63.

²²¹ Directive 85/337/EEC of 27 June 1985

²²² Now Article 11 of directive 2011/92/EU as amended by directive 2014/52/EU

²²³ 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

²²⁴ Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control

(c)

(2) *Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts 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 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 actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief.*

(3)

(4) *Subsection (2) does not affect the Court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.*

(5)

(6) *In this section 'statutory provision' means a provision of an enactment or instrument under an enactment.²²⁵*

169. Judicial review applicants may seek, as the present Applicants have done, a "Protective Costs Order" declaring that S.50B PDA 2000 applies to their judicial review proceedings. Such an order, in practice, appreciably reduces the risk of such proceedings, in costs, to such applicants.

S.50B - Heather Hill #1

170. The interpretation and effect of S.50B PDA 2000 has recently been elucidated by the Court of Appeal (Costello J²²⁶) in **Heather Hill #1**²²⁷. Heather Hill sought a PCO under S.50B PDA 2000 and also under Ss 3, 4 and 7 of the 2011 Act. In reliance on **North East Pylon**²²⁸ Heather Hill contended that all of the grounds advanced in its proceedings concerned matters of national or EU environmental law. They said: "*one looks at the substance of the case and asks: is it, in substance, an environmental case. If it is, all grounds are necessarily covered.*"

²²⁵ Ss(6) inserted by s.29 of the Planning and Development (Amendment) Act 2018 – in response to the decisions of the High Court interpreting section 50B (as amended). See Heather Hill Management Company CLG v An Bord Pleanála [2021] IECA 259 §62 & 63.

²²⁶ For a unanimous court

²²⁷ Heather Hill Management Company CLG v An Bord Pleanála [2021] IECA 259

²²⁸ Case C-470/16 North East Pylon Pressure Campaign Ltd. & Sheehy v An Bord Pleanála & Ors.

171. Simons J in the High Court held that, whether under S.50B PDA 2000 or the 2011 Act, the “*criteria triggering the special costs rules under Irish domestic legislation are directed to the nature of the decision²²⁹ being challenged in the judicial review proceedings*”. Simons J held that if the impugned decision was made pursuant to a statutory provision that gives effect to any of the four EU directives listed in s.50B, including the public participation provisions of the EIA Directive, or of the Habitats Directive, then the special costs rules apply. He held that the fact that the impugned permission issued under S.9 of the 2016 Act sufficed to attract the special costs rules as S.9 imposes obligations on the Board in respect of both the EIA Directive and the Habitats Directive.

172. Costello J in the Court of Appeal recognised that the fact that costs normally follow the event²³⁰ may act, in prospect, “*as a powerful disincentive to members of the public bringing otherwise meritorious²³¹ challenges to decisions affecting the environment.*” In other words, the Court of Appeal accepted that, for want of a PCO, substantively meritorious challenges could be stymied by potential applicants’ fear of losing the action and so bearing costs. Yet the Court of Appeal held that PCOs are available only in limited circumstances. But that is explicable as that costs follow the event is the norm of litigation in Ireland²³² – costs protection is very much the exception.

173. Simply put, for purposes of this part of this judgment and as to S.50B costs protection in judicial review, the Court of Appeal in **Heather Hill #1** overturned the High Court and decided, in part, that:

- a. S.50B costs protection applies, or not, by reference to the grounds of challenge to the impugned decision and not by reference to whether the impugned decision was made pursuant to any of the directives specified in s.50B(1).
- b. Whether S.50B costs protection is available in judicial review falls to be considered by reference separately to each ground pleaded by the applicant for judicial review. It may apply to all, none or some only of those grounds.
- c. Where some grounds only are subject to S.50B costs protection, the court must distinguish – on a fair and equitable basis and in accordance with the applicable national procedural rules – between the costs relating to those grounds which are, and those which are not, subject to S.50B costs protection.
- d. S.50B costs protection applies only to those grounds of challenge which allege a breach of the specific provisions of the four directives specified in s.50B(1), and not to any other grounds of challenge.

²²⁹ Emphasis in the original

²³⁰ In essence, the event of victory or defeat in the action

²³¹ Emphasis added

²³² Though subject to exceptions and the Court’s discretion

- e. S.50B cannot be properly interpreted literally. It requires interpretation reflecting the intention of the Oireachtas only to give effect to Ireland's obligations to transpose the Public Participation Directives - and no more.
- f. So, as to EIA issues, S.50B gives effect to Article 11 of the EIA Directive. Hence S.50B costs protection applies only to judicial review grounds which allege infringement of the rules on public participation set out in the EIA Directive.²³³ It does not apply to grounds which allege infringement of any other provisions of the EIA Directive.
- g. In accordance with the EU Law Interpretive Obligation, S.50B also falls to be interpreted, to the fullest extent possible, consistently with the objectives of Aarhus Article 9(3) and (4) but pleas that the impugned permission was granted in material contravention of a development plan ultra vires S.9(6) of the 2016 Act are not pleas of breach of national law relating to the environment within the meaning of Aarhus Article 9(3) and do not attract S.50B PCOs.
- h. S.50B costs protection was not available as to the material contravention grounds pleaded.

174. In the present proceedings the Applicants' submissions accept that the decision of the Court of Appeal in **Heather Hill #1** was such that material contravention grounds would not generally come within the ambit of the S.50B protective costs regime.

²³³ Likewise Costello J held that as regards the Habitats Directive, s.50B applies only to judicial review grounds which allege infringement of a provision which gives effect to Article 6(3) and (4) of the Habitats Directive

S.50B - Enniskerry/PEM

175. The Applicants also accept that more recently Humphreys J in **Enniskerry/PEM**²³⁴ interpreted s.50B in accordance with **Heather Hill #1** to the effect that material contravention grounds would not generally come within the ambit of that protective costs regime.²³⁵

176. Humphreys J also observed that S.50B only applies to decisions made or action or failure to take action under a statutory provision that gives effect to one of the identified provisions of the four directives listed in S.50B. As to the EIA Directive, S.50B applies only to provisions to which art. 11 of the EIA Directive applies - that is, to the public participation provisions of the EIA Directive, which I have listed above. As the EIA Directive does not require formal public participation in screening, Humphreys J cites recital 29 to the 2011 EIA Directive²³⁶ and the Advocate General's Opinion in **Gruber**²³⁷ to the effect that S.50B does not apply to EIA screening such that s.50B can't apply to any potential EIA points where EIA was never directed.

177. In the present case, EIA was deemed unnecessary at the "pre-screening" preliminary examination²³⁸ stage. Accordingly, S.50B can't apply to any potential EIA points in the present case. That was the view Humphreys J took in **Enniskerry/PEM** of the Protect East Meath case.

S.50B PCOs in this case – Conclusion

178. None of the "Remaining Grounds" are pleaded by reference to or invoke issues arising under the EIA Directive or the other three directives listed in S.50B. It follows that no PCO under S.50B is available to the Applicants in the present case as to the "Remaining Grounds". And Costello J in **Heather Hill #1**²³⁹ took that view even having considered the EU Law Interpretive Obligation.

179. Nor has the Applicant advanced any basis for departing from the general position that material contravention grounds do not fall within the S.50B protective costs regime.

²³⁴ Enniskerry Alliance & Anor v An Bord Pleanála & Ors and Protect East Meath Limited v An Bord Pleanála & Ors [2022] IEHC 6. This was a single judgment in 2 separate proceedings relating to different planning permissions.

²³⁵ Enniskerry/PEM At §31

²³⁶ Inserted by the 2014 Directive. It reads in part "... no formal consultation is required at the screening stage, ..."

²³⁷ Case C-570/13 Gruber v Unabhängiger Verwaltungssenat für Kärnten (Opinion of Advocate General Kokott, 13th November, 2014, ECLI:EU:C:2014:2374). §46 reads in part: "... the decision on carrying out an environmental impact assessment does not require any public participation, Article 11 of the EIA Directive does not apply. This is because Article 11 concerns only measures which are subject to the directive's public-participation provisions."

²³⁸ As provided for by Art 103 PDR 2001 inserted by SI 296/2018

²³⁹ Heather Hill Management Company CLG v An Bord Pleanála [2021] IECA 259

180. I am bound accordingly and so refuse the application for S.50B PCOs as to Remaining Grounds 1, 2, 3, 4, 6, 7, 9 & 11. It would seem to follow by analogy that a plea of breach of S.9(3) of the 2016 Act does not fall within S.50B either, so Remaining Ground 5 does not attract a S.50B PCO.

2011 Act PCOs – the Law

181. Humphreys J in **North East Pylon #2**²⁴⁰ noted that Ireland implemented Aarhus by ss. 3 and 4 of the 2011 Act – though they are narrower than Aarhus in requiring that, to attract costs protection, any illegality be causatively linked to environmental damage, actual or likely.²⁴¹ Humphreys J said that ss. 3 and 4 appear designed to reflect Aarhus Article 9 rather than the narrower EIA Directive Article 11, “*although, as with any legislation, they would need to be construed in a manner compatible with EU law where possible.*”

Part 2 of the 2011 Act - “Costs of certain proceedings to be borne by each party in certain circumstances”

182. S.3 of the 2011 Act provides that generally²⁴² “*in proceedings to which this section applies, each party (including any notice party) shall bear its own costs.*”. So, there shall be no order as to costs against an unsuccessful applicant/plaintiff. S.4 of the 2011 Act identifies the proceedings to which S.3 applies. S.7 of the 2011 Act permits applications, such as the present, for a determination that S.3 “applies” to the proceedings in question²⁴³. S.8 of the 2011 Act requires that judicial notice be taken of Aarhus.

183. For present purposes and subject to exclusions not here relevant²⁴⁴, S.4(1) provides that S.3 - i.e. costs protection - applies to civil proceedings instituted for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement where the failure to ensure such compliance with, or enforcement of, such statutory requirement, has caused, is causing, or is likely to cause, damage to the environment. Thus stated, the scope of the protection is both widely drawn and simply stated. In essence it comprises only two elements:

- an allegation of breach or apprehended breach of a statutory requirement
- in consequence of such breach, actual or likely damage to the environment.

²⁴⁰ North East Pylon Pressure Campaign Limited v An Bord Pleanála (No. 2) [2016] IEHC 490 (High Court, Humphreys J, 29 July 2016)

²⁴¹ Humphreys J cited *Callaghan v An Bord Pleanála* [2015] IEHC 357 (Unreported, High Court, Costello J, 11th June, 2015) This in turn had the narrowing effect in practice that only a challenge to a final decision to grant development consent, could attract 2011 Act costs protection.

²⁴² Subject to certain exceptions

²⁴³ 7.— (1) A party to proceedings to which *section 3* applies may at any time before, or during the course of, the proceedings apply to the court for a determination that *section 3* applies to those proceedings.

(2) Where an application is made under *subsection (1)*, the court may make a determination that *section 3* applies to those proceedings.

²⁴⁴ See S.4(3)

184. But it is important to state that, for reasons explained below, the formulation of S.4(1) set out above excludes certain elements. S.4(1) reads in full as follows:

“Section 3 applies to civil proceedings, other than proceedings referred to in subsection (3), instituted by a person —

(a) for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition or other requirement, permission, lease or consent specified in subsection (4), or

(b) in respect of the contravention of, or the failure to comply with, permission, lease 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.”

Again, it can be seen that S.4(1) sets only two criteria: as to the purpose of the proceedings and as to damage to the environment. It is significantly different from S.50B in that its scope of application is not confined to the application of the four EU Directives – or indeed any EU directives or specific types of projects such as those listed in Aarhus Annex 1. Nor is it confined by reference to any concepts of EU law.

2011 Act PCO – Heather Hill #1 & 2011 Act PCO - in Judicial Review? & Private Interest

185. The manner in which, in **Heather Hill #1**²⁴⁵, Simons J dealt with the motion for a 2011 Act PCO was not appealed and so the 2011 Act PCO regime was not directly considered in any great detail and was not in any event applied by Costello J in the Court of Appeal²⁴⁶. But Costello J did consider the 2011 Act incidentally when considering caselaw in the area of PCOs. Simons J noted the CJEU disapproval in **North East Pylon** of the damage criterion in S.4(1) of the 2011 Act and adopted the approach of Humphreys J in **North East Pylon #5**²⁴⁷ to apply the 2011 Act and its damage criterion, *“unlawful as it is, covering the cases that it does cover, and to use the general jurisdiction of the court as to costs to apply a similar approach to any cases that are not within the wording of the statute.”* So, Simons J held that if his decision to grant a PCO under s.50B PDA 2000 was wrong (as transpired) he would be obliged to produce a similar outcome via his discretion under Order 99 RSC. It is not clear from the judgments of Simons J or Costello J whether Simons J made any PCO-like order under Order 99 RSC.

186. In **Heather Hill #1**²⁴⁸ Costello J observed that the proceedings listed in S.4(1)²⁴⁹ as subject to the S.3 special costs provisions are enforcement rather than judicial review proceedings. Though not

²⁴⁵ Heather Hill Management Company Clg v An Bord Pleanála [2019] IEHC 186 (High Court, Simons J, 29 March 2019)

²⁴⁶ [2021] IECA 259 §31

²⁴⁷ [2018] IEHC 622

²⁴⁸ [2021] IECA 259 §60

²⁴⁹ The judgment says “subs. (4)” but the reference seems clearly to be to S.4

cited by Costello J to that effect, the High Court decision in **Kimpton Vale**²⁵⁰ was authority that “Judicial review proceedings do not, however, fall within the scope of s.4 because such proceedings do not involve the type of standard enforcement action contemplated by this section.” But it is not apparent that the Court of Appeal decision in **O’Connor v Offaly County Council & Tag-A-Bin Ltd**²⁵¹ was cited to the Court of Appeal in **Heather Hill #1**.

187. Mr O’Connor challenged in judicial review a decision to renew and/or not revoke a waste collection permit²⁵² despite alleged past breaches of the permit and resultant pollution. The High Court (Baker J) had declared that the s.3 special costs provisions applied. The Court of Appeal (Murray J) dismissed the appeal, inter alia deciding that there was no basis for the suggestion that s.3 of the 2011 Act does not apply to judicial review proceedings - “It does. The issue in any given case is not the form the proceedings assume, but the nature of the relief claimed in those proceedings ...”. Humphreys J in **Enniskerry/PEM**²⁵³, in my respectful view correctly, described the observation by Costello J in **Heather Hill** as obiter and the contrary views of Baker J and Murray J in **O’Connor** as part of the *ratio* of their decisions. Humphreys J considers that the proposition that the 2011 Act doesn’t apply to judicial review at all is “ruled out by O’Connor”. I respectfully adopt that view.

188. Though as O’Connor deals with the point it is unnecessary to rely on it, it is of some interest to note the view, cited by the Applicants, of Moore-Bick J in **Land Securities v Fladgate Fielder**²⁵⁴ as to the nature of judicial review. He referred to:

“... the public law nature of the proceedings themselves, the essential nature of which is to ensure that a public body complies with the law²⁵⁵. That does not mean that the claimant will not be seeking to serve a private interest of its own; in very many cases, it will, and will be expecting to further that interest as a direct or indirect result of obtaining the relief that it seeks. Whatever may be the claimant’s private purpose in commencing and continuing the proceedings, however, the public has an interest in ensuring that breaches of the law by public bodies are identified and, where appropriate, corrected.”

189. The Appellants correctly cite **Land Securities**, by reference to the terms of S.4(1)(a) of the 2011 Act, for the proposition that judicial review is brought to “ensure that a public body complies with the law” and so is well-suited “for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement”. But more generally the passage also illustrates the suitability of judicial review as a means whereby, doubtless often propelled at least in part by private interest, the citizen can perform the public role of speaking for the environment and why it should not be a surprise that costs protection may be available in such proceedings.

²⁵⁰ [2013] IEHC 442

²⁵¹ [2020] IECA 72

²⁵² The decision was made pursuant to the Waste Management (Permit Collection) Regulations 2007-2016

²⁵³ At §31

²⁵⁴ Land Securities plc and others v Fladgate Fielder (a firm) - [2010] 1 EGLR 111 §94

²⁵⁵ Emphasis added

190. This seems to me to echo the observation in **Atlantic Diamond**²⁵⁶, consistent with the more general view deriving from Aarhus and the question “Who speaks for the Earth?”, that environmental protection – and, indeed, protection of public interests in good administration - are, in some degree and as Humphreys J put it, “crowdsourced”. Humphreys J noted that the question was answered at least in part by AG Kokott in **Edwards**: “*the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations*” and such citizens “*cannot be expected to bear the full risk in terms of costs of judicial proceedings up to the limit of their own capacity to pay...*”. So, private interests are harnessed to the public good. This is well-illustrated in **Austin v Miller Argent**²⁵⁷ - and in the decline of the “*no private interest*” criterion for PCOs in England and Northern Ireland²⁵⁸. In **Austin**, though declining one on the facts, the Court accepted that a PCO could be made in a private nuisance action. It noted the focus on Aarhus on participation, and considered there was “*merit in recognising the valuable function which individual litigants can play in helping to ensure that high environmental standards are kept, even if in the process they are also vindicating a private interest.*” The Court accepted that “*the mere fact that the claimant has a personal interest in the litigation does not of itself bar her from obtaining a PCO.*” That was acknowledged in **Venn** - but private interest remains a relevant factor in the UK - at least where EU law is not in issue²⁵⁹. In similar vein and referring to Aarhus, Ouseley J observed in **McMorn**²⁶⁰

“..... there is a significant public benefit in decisions on national environmental law being lawful, and therefore in their lawfulness being tested readily by individuals. The fact that the individual’s livelihood or property value may also be at stake could not disapply the Convention or the CPR, and there is nothing in the text of either to suggest that it does. The Convention is not just for the disinterested environmentalist or national body, but must have recognised that many individuals or ad hoc groups of individuals would be concerned with decisions which affected them personally, as it affected their enjoyment of their property, leisure, area or interests.”

The “private interest” criterion was applied, at least to some degree, in **Tearfund**²⁶¹ - a case of application for a common law/inherent jurisdiction PCO.

²⁵⁶ Atlantic Diamond Limited v An Bord Pleanála & EWR Innovation Park Limited [2021] IEHC 322

²⁵⁷ Austin v Miller Argent (South Wales) Ltd - [2015] 1 WLR 62; [2014] EWCA Civ 1012

²⁵⁸ see Obasi v The General Medical Council [2021] NIQB 58

²⁵⁹ §27

²⁶⁰ R(McMorn) v Natural England - [2016] PTSR 750, [2015] EWHC 3297 (Admin)

²⁶¹ Tearfund Ireland Ltd v Commissioner of Valuation [2020] IEHC 621

2011 Act S.4(1)(a) - "Statutory requirement" – Free-Standing

191. Murray J in **O'Connor**²⁶² observes that the question whether proceedings – by way of judicial review or otherwise – fall within s.4(1)(a) or (b), is not conclusively resolved by reference to the fact that the relief claimed is directed to quashing the permit. Section 4(1)(a) is engaged where proceedings can be properly characterised as being for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement.

192. It will have been seen that, before setting out S.4(1) in full above, I recorded that S.4(1) provides that S.3 costs protection applies to civil proceedings instituted for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement where the failure to ensure such compliance with, or enforcement of, such statutory requirement, has caused, is causing, or is likely to cause, damage to the environment. I did so to isolate the elements of S.4(1) relevant to the present case in light of the view of Baker and Murray JJ in **O'Connor**, following the Court of Appeal in **McCoy v Shillelagh Quarries**²⁶³, that, as Hogan J said in McCoy, *"the reference to "statutory requirement" in s.4(1)(a) is a free standing one which is distinct and separate from proceedings designed to ensure the compliance with or enforcement of a condition or other requirement of a licence, permit or other form of development consent."* By that is meant that S.4(1)(a) applies S.3 to proceedings designed either to ensure compliance with or enforcement of a statutory requirement or, alternatively, to ensure compliance with or enforcement of a condition or other requirement attached to a licence or other form of development consent.

193. Murray J observes²⁶⁴ that, as to identifying a 'statutory requirement', in his costs judgment in **North East Pylon**²⁶⁵ *"Humphreys J operated on the basis that the section was engaged by a claim in which 'all of the points raised can go back directly or indirectly to a statutory requirement'"*. Murray J is agnostic whether the reference to a statutory requirement should be defined so broadly but does observe that it is *"unsurprising that in characterising a claim as within or without the reference to 'statutory requirement' a broad view has been adopted by some Courts"*.

194. An interesting question may arise on the basis that the *"statutory requirement"* criterion is free-standing. S.4 contains no express limitation of that criterion by reference to the subject-matter of the statutory requirement in question. For example, the criterion could have been, but is not, expressly limited by the Aarhus Article 9 concept of national law relating to the environment. Arguably, the *"statutory requirement"* could derive from any statute, whether or not addressing environmental issues.

²⁶² §26

²⁶³ McCoy and anor. v Shillelagh Quarries Ltd. and ors [2015] IECA 28, [2015] 1 IR 627 §28

²⁶⁴ §26

²⁶⁵ [2018] IEHC 622 §15

195. It would not be unexpected that the 2011 Act, a purpose of which is to effect Aarhus Article 9(3) and 9(4), would limit the “*statutory requirements*” to which it applied via S.4(1)(a) to those statutory requirements which constitute, in the phrase used in Aarhus Article 9(3), “*national law relating to the environment*”. But, to adopt the reasoning of Costello J in **Heather Hill #1** and MacMenamin J in **An Taisce v McTigue Quarries**²⁶⁶, if that was the legislative intention it would have been simple to expressly say so. Of course, it might be that Oireachtas intended an expansive view of the Aarhus Article 9 concept of “*national law relating to the environment*” by limiting the identification of “*statutory requirements*” and the consequent availability of costs protection by reference only to the question whether breach of the statutory requirement in question “*has caused, is causing, or is likely to cause, damage to the environment.*” In other words, a functional test of whether a statutory requirement relates to the environment by reference to the effects of non-compliance with it. This is now complicated in that, after the decision of the CJEU in **North East Pylon**²⁶⁷, the damage requirement has a precarious legal status. However, that precariousness is in EU law and the 2011 Act addresses the State’s obligations in International Law, albeit the CJEU, in the interests of uniform interpretation of Aarhus as a mixed agreement, asserts in **LZ1**²⁶⁸ the right to interpret Aarhus for all purposes.

196. I need not decide that complex issue. Insofar as matters in this case, the statutory requirement in question is S.9(6) of the 2016 Act. It was held in **Heather Hill #1** to be a provision of national law relating to the environment. On that basis and whatever view one takes of any possible implicit circumscription of the phrase “*statutory requirement*” in S.4(1)(a), requirements imposed by S.9(6) of the 2016 Act are statutory requirements within S.4(1)(a) of the 2011 Act. I take the same view of S.37(2) PDA 2000.

2011 Act Costs Protection – Purpose of Proceedings - “Damage to the Environment” - Forward Looking & Ongoing – Action to Quash a Permit

197. **O’Connor** is authority that a court, in hearing an application under s.7 of the 2011 Act, is concerned with the objective reality and substance, rather than the form, of the proceedings. The question is whether in reality and substance they are for the purpose – the object²⁶⁹ - of ensuring compliance with or enforcement of the statutory provision.²⁷⁰ As Murray J said, “*they must be directed to ensuring compliance with those statutory requirements or must seek to enforce them*”.²⁷¹ Thus, proceedings advanced for a collateral purpose do not come within the section – for example, proceedings brought not to secure compliance with a planning condition, but to prevent a

²⁶⁶ An Taisce/The National Trust for Ireland v McTigue Quarries Limited & Ors. [2018] IESC 54

²⁶⁷ See below

²⁶⁸ Lesoochranárske zoskupenie, C-240/09, EU:C:2011:125, Judgment 8 March 2011 (Grand Chamber) §42

²⁶⁹ Murray J §25

²⁷⁰ Murray J §9 citing Baker J §23 in turn citing Finlay Geoghegan J in CLM Properties Limited v Greenstar Holdings Limited and ors [2014] IEHC 288; Murray J §26

²⁷¹ Murray J §29

neighbouring landowner from building a house²⁷² or proceedings brought with a view to recovering a debt²⁷³.

198. Murray J in **O'Connor** found, as to “ensuring compliance with, or the enforcement of, a statutory requirement”, that there was “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”.²⁷⁴ S.4(1)(a) is “forward looking” – it “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”.²⁷⁵ Murray J said as to a claim “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 ...”.²⁷⁶ Given the facts and substantive decision in **O'Connor**²⁷⁷ it seems to me that one can read this passage as encompassing, not merely actions which the applicant seeks to compel, but also those which (s)he seeks to prevent. In considering whether proceedings meet this criterion, the Court will look “at a general level to the true objective of the proceedings”.²⁷⁸

199. In his summary Murray J summarised the foregoing as follows:

“the scope of proceedings referred to 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. 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 explain that term in this judgement.”²⁷⁹

200. In that light and as to proceedings asserting breach of statutory requirements and the phrase “into the future”, it may assist to identify (perhaps non-exhaustively), the possibility of four temporal situations. The first three are:

- An impugned event entirely in the past - Murray J said that proceedings seeking declaratory relief in respect of an entirely historic event do not come within s.4(1)(a). We need consider this no further.
- An impugned event anticipated to occur entirely in the future. That does not arise here as the Impugned Permission was granted in the past.

²⁷² Rowan v Kerry County Council [2012] IEHC 544

²⁷³ CLM Properties Limited v Greenstar Holdings Limited and ors

²⁷⁴ Murray J §32

²⁷⁵ Murray J §30

²⁷⁶ Murray J §30

²⁷⁷ See below

²⁷⁸ Murray J §33

²⁷⁹ §81

- An impugned event which commenced in the past, continues in the present and is anticipated to continue in the future. This was the factual situation in **O'Connor**. Mr O'Connor complained that the impugned waste collection permit permitted continuation of pollution already emanating from Tag-A-Bin's premises, which pollution had forced Mr O'Connor to close his adjacent equestrian centre²⁸⁰. Murray J observed that the proceedings concerned an ongoing state of affairs in which, Mr O'Connor alleged, an unlawful activity was being conducted on foot of a permit which was, in law, invalid and Mr O'Connor's objective was, when he issued the proceedings, to preclude the continuation of that activity.

201. The question arises whether the history of pollution and the fact that it was ongoing were essential to the decision in **O'Connor** or should be regarded as a contextual and evidential observation such that the essential issue was the prospect of pollution - whether or not in continuance of historic pollution. It is difficult to see why, in principle, the history of pollution should be essential to the decision O'Connor save as evidence of the prospect of pollution. Unless compelled to do so I would not so read the judgment of Murray J. That prompts consideration of the fourth temporal scenario as follows.

202. The fourth temporal situation consists in an impugned event in the past – such as, in **O'Connor**, a decision to grant a waste collection permit allegedly in breach of statutory requirements – which, once acted on, may result in environmental damage in the future. That is another way of looking at the facts in O'Connor. It is important to note that in O'Connor this situation was characterised by the court not merely as the past breach of statutory requirements in the decision to grant a permit, but as the prospect of future breach of the statutory requirement that the permitted activity occur only on foot of a valid permit. This is apparent from the following remark of Baker J in concluding that the proceedings fell within s.4(1)(a):

“... if the applicant succeeds in quashing the permit, the proceedings will have had the effect of ensuring compliance with the statutory requirements that a waste facility be operated only with the benefit of a permit and²⁸¹ that the permit be granted in accordance with the requirements of Articles 28 and 29 of the Regulations of 2007.”²⁸²

Note Baker J's identification of two statutory requirements: the latter past; but the former future.

203. Murray J held²⁸³ that Baker J was correct that the proceedings in judicial review to quash the waste permit came within S.4(1)(a). He approved, as correctly describing the substance of the claim, the observation of Baker J that *“The applicant seeks to impugn the granting of a permit and by that*

²⁸⁰ This is a somewhat simplified account. Mr O'Connor had opposed the renewal of the collection permit on the basis that the waste collected on foot of it was being brought to premises which were not a licensed waste facility

²⁸¹ Emphasis added

²⁸² §43 – cited by Murray J at §11

²⁸³ §37 & 38

means seeks to ensure compliance with a statutory requirement that there be a valid licence.” Putting the same proposition another way, Baker J said, *‘in substance these proceedings are ones by which the applicant seeks to ensure compliance with the statutory requirement that a waste facility be licensed by law’.*

204. Murray J described as “*fundamental*”, “*the proposition that by seeking to quash a permit granted in the past by reference to breaches of Articles 28 and 29 which have already taken place, the applicant is seeking to enforce on an ongoing basis²⁸⁴ the provision pursuant to which the permit was granted in the first place.*”²⁸⁵ The Board stresses this passage as, it says, establishing that it was fundamental that the proceedings concerned a state of affairs already in being – the breaches which had already taken place. I disagree.

205. First, no rationale has been offered for why such an interpretation would advance the purposes of the 2011 Act. Clearly, the real environmental mischief in view in O’Connor was future pollution. It is difficult to see why a question whether pollution had already occurred or was ongoing at the date of the impugned decision should affect costs protection if, in any event, future pollution was in view. This is consistent with the phrase in S.4(1)(a) “*likely to cause, damage to the environment*” and the view that it is, as Murray J puts it, “*forward-looking*”.

206. Second, in my view, a textual and contextual analysis of the judgment of Murray J does not support such an interpretation. Murray J’s sentence cited above, to the words “*taken place,*” describes the evidential means whereby Mr O’Connor sought to achieve the end which was fundamental – that end was to demonstrate the prospect of and need to avoid future pollution. The evidential means of demonstrating that need was to show that pollution was ongoing - from which the risk of future pollution could be inferred. The essential aspect of the judgments of Baker and Murray JJ is that “*the applicant is seeking to enforce on an ongoing basis the provision pursuant to which the permit was granted*”. The “*provision*” sought to be enforced was that waste be collected in future only under a valid permit. For “*on an ongoing basis*” one may alternatively read “*into the future*”.

207. That the breaches were an “*ongoing state of affairs*” past and present speaks merely to their evidential value in anticipating environmental damage in the future. This is shown where Murray J described²⁸⁶ the manner in which Baker J had addressed whether a link had been established between the grant of or failure to revoke the permit, and damage to the environment. Having said that the assertion of such a link had to show a certain degree of substance, Baker J found on the evidence a *prima facie* case that damage to the environment was occurring such that the applicant

²⁸⁴ Emphasis added

²⁸⁵ §37

²⁸⁶ Murray J §13

satisfied the onus “to make out a stateable argument that damage to the environment is occurring or is likely to occur.”²⁸⁷

208. It is useful in this context to return to the judgment of Baker J. She pointed out that:

“No leave is sought for the purpose of enforcing the permit already granted. The action rather is one to require that Offaly comply with the statutory requirements regulating the grant of a permit

The grounds on which relief is sought are broadly speaking that the Council failed to properly consider or investigate the alleged breaches of the conditions attached to its existing permit, or the fact that Tag-A-Bin was alleged to be causing environmental pollution. ...

.....

Put simply, the claim of the applicant is that in renewing the permit, Offaly failed to have regard to the submissions of the applicant relating to the breach of the conditions of the permit, and the operation of the existing waste collection facility, and the fact that waste was being transferred to, and stored at, an unauthorised facility and involves the risk of environmental pollution therefrom.”²⁸⁸

209. To my mind it is in the foregoing sense that that, in his summary, Murray J states that

“..... the respondent's concern was, at the time the proceedings were instituted, with an ongoing state of affairs. The question of whether there was compliance with s.34(1) required that the underlying invalidity be determined by the Court. The applicant's object was, when he issued the proceedings, to preclude the continuation of an activity which – he said – was unlawful. Accordingly, Baker J was correct in concluding that the proceedings thus understood fell within the terms of s.4(1)(a).”²⁸⁹

210. There seems to me no reason in principle why the risk of future environmental damage may not be shown by means other than by evidence of past or ongoing damage. The relevance of the “breaches ... which have already taken place” is to the validity of the permit which purported to authorise the collection of waste in the future. Such a reading is consistent with ordinary meaning and with the finding by Murray J that S.4(1)(a) is forward-looking.

211. In my view, the fundamental finding of Baker and Murray JJ is 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.

²⁸⁷ Baker J §65

²⁸⁸ Baker J §36 & 37 & 42

²⁸⁹ Murray J §82

212. And if a waste collection permit, so too a planning permission. The “*true objective*” of this present case – to use the phrase used by Murray J - is to prevent future development which, the Applicants allege, will be environmentally damaging.

213. The Board’s citation of the presumption against unclear changes in the law is, it seems to me, something of a counsel of perfection if applied too closely to Part 2 of the 2011 Act and could eviscerate it if applied rigorously. As over a decade of litigation has amply shown, the whole area of costs protection legislation is not overburdened with clarity. Costello J in **O’Connor**²⁹⁰ referred to the “*increasingly complex web of legislation in the area of special costs rules*” which Hogan J had sought to “*disentangle*” in **Kimpton Vale**. There, Hogan J described a “*complex interaction of national law, EU law and the transposition of international agreements has combined to present a question of stare decisis in relation to statutory interpretation which is one of acute difficulty*” and in which “*the new costs rules operate somewhat haphazardly as a result of this patchwork of legislative changes*”. Humphreys J in **North East Pylon #5**²⁹¹ made a plea, in which I enthusiastically join, for statutory reform to encompass all relevant costs protection principles in “*a single statutory provision, in order to avoid confusion*”. That the Board is not aware of a single authority applying the 2011 Act to an application for judicial review in respect of a decision to grant or refuse planning permission does not seem to me a very convincing argument in this complex area of law. That is especially so when, 9 years after the Act became law, it was still necessary for the Court of Appeal to make clear as late as in 2020, rejecting argument to the contrary in **O’Connor**²⁹², that Part 2 of the 2011 Act even applied to judicial reviews, which are the most common form of environmental litigation, at least in the superior courts. In that light, it is perhaps not so surprising that it has taken until 2022 for the issue of the application of 2011 Act costs protection to judicial reviews of decisions on planning applications to come up for decision.

214. And, as I say, if a decision to grant a waste collection permit is considered “forward-looking” for the purposes of S.4(1) of the 2011 Act, so too a planning permission.

S.4(1) of the 2011 Act – “Damage to the Environment” – Breadth of the Concept

215. The Applicants’ first written submissions dispute the legal validity of the damage criterion in S.4(1) of the 2011 Act but otherwise say merely that “*it would in any case be met in the present proceedings.*” Those submissions pre-dated **Enniskerry/PEM**. Their second written submissions²⁹³ dispute the test of “*specific and tangible*” harm set by Humphrey J in **Enniskerry/PEM**. They say it is not a test posited by the Court of Appeal in O’Connor or set by the 2011 Act.

²⁹⁰ §74

²⁹¹ North East Pylon Pressure Campaign Ltd. & anor v An Bord Pleanála & ors No.5 [2018] IEHC 622

²⁹² §79

²⁹³ Their second written submissions assert that Ground 8 in the present case as to tree removal is indistinguishable from Ground 6 in Enniskerry/PEM. I have addressed Ground 8 in the present case earlier in this judgment.

216. I have already in this judgment found the concepts of “*environment*” and “*law relating to the environment*” for Aarhus purposes to be broad. For 2011 Act costs protection to apply, S.4(1) requires that the “*statutory requirement*” in question be such that failure to ensure compliance with it, or enforcement of it, “*has caused, is causing, or is likely to cause, damage to the environment*”.

217. This damage requirement has been held by the CJEU in **North East Pylon**²⁹⁴ to, in effect, disqualify the 2011 Act costs protection regime from constituting compliance with the NPE Principle of Aarhus Article 9(4) and the NPE Rule of Article 11(4) of the EIA Directive. Incidentally, that does not seem to me to render the damage criterion unlawful. It just disqualifies the 2011 Act costs regime from fulfilling the function I have described. The CJEU held that Aarhus:

“... clearly sought to apply the protection against prohibitive expense to challenges aimed at enforcing environmental law in the abstract, without making such protection subject to the demonstration of any link with existing or, a fortiori, potential damage to the environment.”

218. But Humphreys J in **North East Pylon #5**²⁹⁵ considered the environmental damage requirement so embedded in the language of ss. 3 and 4 of the 2011 Act that it cannot be excised, disregarded or overcome by interpretive reading-down. Simons J in **Heather Hill #1**²⁹⁶ followed that view – noting that, while in **Protect Natuur**²⁹⁷ the CJEU held that a national court must disapply any rule of national procedural law which conflicts with Aarhus Convention requirements, the EU Law Interpretive Obligation is subject to the *contra legem* principle. He agreed with Humphreys J that the better course is to apply the 2011 Act, according to its terms, including the damage requirement, as “*covering the cases that it does cover*” and to avail of the general jurisdiction of the court as to costs under Order 99 RSC (now s.169 of the Legal Services Regulation Act 2015), so that, in cases where the imposition of a damage hurdle would breach EU law, nonetheless no order as to costs is made. Murray J noted this controversy in **O’Connor** but did not need to resolve it. As I have held above, this difficulty arises in the application of the EU Law Interpretive Obligation as to national law relating to the environment in a field covered by EU law relating to the environment. The difficulty does not arise in the application of the Irish Law Presumption of legislation in conformity with international law obligations as to national law relating to the environment in a field not covered by EU law relating to the environment.

219. In **O’Connor**, what was found to be in prospect was clearly environmental damage²⁹⁸. Humphreys J in **North East Pylon #5**, observing that “*the scope of the 2011 Act has to boil down to*

²⁹⁴ Case C-470/16 North East Pylon Pressure Campaign Ltd. & Sheehy v An Bord Pleanála & Ors. JUDGMENT OF 15. 3. 2018 §§64 & 65

²⁹⁵ North East Pylon Pressure Campaign Ltd v An Bord Pleanála No.5 [2018] IEHC 622 (High Court, Humphreys J, 30 October 2018)

²⁹⁶ Heather Hill Management Company Clg v An Bord Pleanála [2019] IEHC 186 (High Court, Simons J, 29 March 2019) §112

²⁹⁷ Case C 664/15

²⁹⁸ Mr O’Connor alleged that Tag-A-Bin was bringing waste onto its property, storing it there, and washing down trucks and skips used in the collection activity – resulting in noise, odours and health and safety concerns such that he had to close his adjacent equestrian centre.

some rule that is capable of ready practical application” held, as inter alia involving “an approach to harm that is not totally open-ended” that:

“..... insofar as certiorari of development consent is concerned, the 2011 Act applies to breach of an identified statutory requirement, non-compliance with which will result in a development causing identified specific and tangible ecological harm such as impact on specific species, habitats or natural resources, above and beyond impact of a type that can be alleged in respect of any development.”

And later

“Thus, certiorari of a planning permission could attract the protection of the 2011 Act insofar as the grounds are based on an argument that breach of a specific statutory provision was committed in the course of the grant of the permission thereby facilitating a development which will, in the future, if carried out, cause specific and tangible ecological harm. Not the sort of harm that arises in every case, such as alleged sub-optimal land use by erecting a commercial building on land that would have been better developed for public uses, or the common or garden harm of replacing grass with concrete, but more tangible harms like cutting trees, removing hedgerows, causing an adverse effect on species or habitats, or causing pollution.”

Incidentally, this passage conforms to my understanding of **O’Connor** that past or present environmental damage is not considered a fundamental proof in an application for a PCO by reference to the “statutory requirement” option of S.4(1)(a) of the 2011 Act.

220. While Humphreys J in **Enniskerry/PEM** articulated for purposes of Part 2 of the 2011 Act a test of “specific and tangible ecological harm”, it’s not clear to me that he refused any PCO for failing that test. Only in PEM did Humphreys J refuse 2011 Act PCOs and it’s not stated these refusals were for want of a prospect of “specific and tangible ecological harm”. Accordingly, it’s not clear that this criterion formed part of the ratio of that decision.

221. I am sure Humphreys J, responding to the facts before him, as related to matters ecological, did not intend to suggest that only ecological harm would suffice to meet the environmental damage criterion. As I have already observed, S.4(2) of the 2011 Act lists types of environmental damage, as including damage to:

- “(a) air and the atmosphere;*
- (b) water, including coastal and marine areas;*
- (c) soil;*
- (d) land;*
- (e) landscapes and natural sites;*
- (f) biological diversity, including any component of such diversity, and genetically modified organisms;*

- (g) *health and safety of persons and conditions of human life;*
- (h) *cultural sites and built environment;*
- (i) *the interaction between all or any of the matters specified in paragraphs (a) to (h)."*

As noted above, this definition of environmental damage was clearly informed by the definition of environmental information in Article 2(3) and so validates the Implementation Guide's description of Article 2(3) as impliedly defining the concept of environment. As will be apparent, by no means all of the foregoing forms of environmental damage are ecological.

222. Indeed, the breadth of types of environmental damage listed is striking. Some of the listed types overlap notably with considerations historically in this jurisdiction termed "planning" rather than "environmental" – for example, "*landscapes and natural sites*"; "*conditions of human life*"; and "*cultural sites and built environment*". So, Humphrey J's formulation might be revised to "*identified, specific and tangible environmental²⁹⁹ harm*",

223. In the very understandable cause of practical applicability of the criterion, Humphreys J excluded the sort of "*common or garden*" harm that "*arises in every case*". By way of illustration, Humphreys J contemplated "*Not the sort of harm that arises in every case, such as alleged sub-optimal land use by erecting a commercial building on land that would have been better developed for public uses, or the common or garden harm of replacing grass with concrete, but more tangible harms like cutting trees, removing hedgerows, causing an adverse effect on species or habitats, or causing pollution.*"

224. In light of the consistent authority for

- a wide access to justice required by Aarhus Article 9,
- a broad meaning of "environment" and "environmental law" - which I have addressed above and
- the fact that the damage criterion disqualifies Part 2 of the 2011 Act from effecting the Aarhus Article 9 NPE Principle via EU Law, as found by the CJEU in **North East Pylon**, and that thereby the CJEU gave an interpretation of the Aarhus Article 9 NPE Principle as not permissive of a damage criterion,

I confess that I am unclear why one would seek to adopt a restrictive interpretation of environmental damage in the cause of "*an approach to harm that is not totally open-ended*".

225. The implication of **North East Pylon** in this respect would seem to be that the "*approach to harm*" should ideally be not merely open-ended but entirely absent. Humphreys J in **North East Pylon #5**³⁰⁰ and Simons J in **Heather Hill #1**³⁰¹ agree (as I presume to do), that that end is unachievable as contra legem in the case of the 2011 Act given its clear statutory requirement of environmental damage. But it seems to me that a broad interpretation of environmental damage

²⁹⁹ Not merely ecological

³⁰⁰ North East Pylon Pressure Campaign Ltd v An Bord Pleanála No.5 [2018] IEHC 622 (High Court, Humphreys J, 30 October 2018)

³⁰¹ Heather Hill Management Company Clg v An Bord Pleanála [2019] IEHC 186 (High Court, Simons J, 29 March 2019) §112

would have the virtue of tending to minimise the detrimental effect of the damage requirement deprecated by the CJEU in **North East Pylon**. It would also promote wide access to justice in environmental matters. It seems to me that, insofar as proper statutory interpretation may allow, a less rather than more demanding approach to the damage criterion, with a view to diluting its effect, is desirable and justifiable on a purposive interpretation of Part 2 of the 2011 Act. And it seems to me unlikely that the Oireachtas intended the word “damage” in a single statutory provision to have two different meanings depending on whether the national law at issue was or was not in a field covered by EU law relating to the environment.

226. It also seems to me that while the criterion of “*identified, specific and tangible environmental harm*”³⁰², not the sort of “*common or garden*” harm that “*arises in every case*”, may be less difficult to apply to the ecological matters under consideration in **Enniskerry/PEM**, and the concept of environmental damage is well-understood in many specific contexts (for example, damage to European sites and various forms of pollution), that criterion may be far more difficult to apply as to other very general environmental categories listed in S.4(2) of the 2011 Act.

227. And, as “cases” are highly variable, the type of harm which could be said to “*arise in every case*” or be “*common or garden*” may be extremely limited such that it may not prove an effective filter. Even the meaning of “*damage*” can be highly contested in a sense in which it would be inappropriate for a court to resolve. For example, as to “*cultural sites and built environment*”, the Eiffel Tower, now thought beautiful and iconic, was commonly considered an eyesore when first erected: likewise, the glass pyramid at the Louvre (some may still consider it so). What some, perhaps perfectly reasonably, praise as development sensitive to and reflective of a protected Victorian residential setting is, perhaps equally reasonably, decried by others as damaging pastiche. Perhaps more topically in these courts, and as to “*landscape*”, some think wind turbines a blight: others think them generally acceptable and some even think them elegant. As to damage to such a broad category as the “*conditions of human life*”, I confess to wondering whether a distinction between the “*identified, specific and tangible*” and the “*common or garden*” harm that “*arises in every case*” is likely to produce predictability or certainty in the law.

228. Development implies environmental change and whether a particular change is beneficial or damaging can often be a matter of fairly evenly divided and respectable opinion and perspective. The choice between, and resolution of, such opinions is for planning authorities and the Board - not the courts - and I confess that I would be reluctant to have the courts become their arbiter for purposes of costs protection.

229. The fact that many of these issues call for at least some degree of subjective judgment amplifies the necessity that the choice must be made by the Board in accordance with law, not least so the “loser” can, one hopes, accept that choice. It is therefore unsurprising that in **O’Connor, Baker**

³⁰² Humphreys J perfectly accurately used the words “harm” and “damage” synonymously.

J in the High Court held that the burden on an applicant for a 2011 Act PCO was only to make out a stateable argument, on some reasonable foundation beyond mere assertion, that damage to the environment is occurring or is likely to occur. Perhaps typically, but in any event in many cases, once that hurdle is surmounted, the question of environmental damage may play little or no further part in judicial review proceedings focussed on the legality of the impugned decision as opposed to its merits.

230. It also seems difficult to reconcile a restrictive view of “damage” with its definition in S.4(5) of the 2011 Act, as including “*any adverse effect on any matter*”. Baker J in **O’Connor**³⁰³ referred to the definition as being in broad terms and Murray J in **O’Connor**³⁰⁴ records Hogan J in **McCoy**³⁰⁵ to the effect that damage to the environment is “*generously*” defined in S.4.

231. In truth, the foregoing analysis is likely less a respectful disagreement with the posited criterion for discerning environmental damage than a recognition of the wisdom of the CJEU in **North East Pylon** in rejecting the damage criterion, albeit for the different reason of absence of a damage criterion in Aarhus Article 9. So perhaps it is at base a recognition of the wisdom of the drafters of Aarhus once their wide implied definition of the “*environment*” is accepted.

232. It seems to me that a broad interpretation of environmental damage, as required by S.4(1) and S.4(5) of the 2011 Act, is not merely desirable as minimising the effects of its imposition as a criterion for costs protection as criticised by the CJEU in **North East Pylon** – such an interpretation is also available on ordinary principles of statutory interpretation and already established by the Court of Appeal in light of the:

- Fact that in **O’Connor** neither the Court of Appeal or the High Court required a narrower, or indeed any particular, definition of environmental damage.
- Breadth of the definition of damage in S.4(5) of the 2011 Act – recognised by both courts as broad and generous. This breadth is apparent in the list of types of damage, in the nature of at least some of the types of damage listed and in the statutory phrase “*any adverse effect on any matter*”.
- Breadth of the list in S.4(2) of the 2011 Act. In **O’Connor v Offaly**³⁰⁶ Baker J referred to “*the environment as broadly defined in section 4(2)*”. The Court of Appeal did not demur.
- Antecedence in Aarhus of that list.
- Purpose, explicit in its long title, of the 2011 Act in giving effect to Aarhus.

³⁰³ §14

³⁰⁴ §26

³⁰⁵ §31

³⁰⁶ [2017] IEHC 606

- Presumption that statutes (such as the 2011 Act) giving effect to international treaties (such as Aarhus) should, if possible, be interpreted in the light of the treaty effected and in accordance with the purposes of that treaty.³⁰⁷
- Explicit requirement in S.8 of the 2011 Act that judicial notice be taken of Aarhus.
- Well-established width of the meaning of “environmental” in Aarhus.
- Purpose of the NPE Principle identified in **Edwards** as including “wide access to justice”.

233. As recorded above, in **O’Connor v Offaly**³⁰⁸ Baker J required of an applicant for a 2011 Act PCO more than “*mere assertions*” of prospective damage to the environment. The assertion must have “*some reasonable foundation*” amounting to a stateable argument. But while that remains the law, it preceded the deprecation of the damage criterion by the CJEU in **North East Pylon**. That suggests that the court should refrain from being any more demanding than it must be as to an Applicant’s proofs of environmental damage, actual or likely.

234. That said, the environmental damage criterion cannot be simply “read out” of S.4. That would do impermissible violence to its express terms and would also, arguably, remove any workable limitation its identification of “free-standing” statutory requirements in the absence in S.4 of a limitation to such statutory requirements to those constituting national law relating to the environment.

235. It seems to me that a broad view should be taken, in considering whether to make a 2011 Act PCO, of the concept of “*damage to the environment*”. However at a late stage in the preparation of this judgment, the judgments in **Abbey Park**³⁰⁹ and **Save Roscam**³¹⁰ have come to hand. They apply as ratio the **Enniskerry/PEM** view of the damage requirement – that is, requiring specific and tangible environmental harm - and I am bound accordingly.

2011 Act PCO – Damage Requirement, Causative Link & Some Grounds Only?

236. In **O’Connor**³¹¹, the issue not having been argued and as in the particular circumstances no risk of injustice turned on the issue, the Court of Appeal did not decide if the question whether 2011 Act PCOs should be made must be considered separately as to each ground on which judicial review is sought.

³⁰⁷ See generally, Dodd on Statutory Interpretation §9.40 and cases cited therein.

³⁰⁸ [2017] IEHC 606

³⁰⁹ **Abbey Park and District Residents Association Baldoyle V An Bord Pleanála, & Ors** including The Shoreline Partnership [2022] IEHC 201

³¹⁰ **Save Roscam Peninsula Clg, V An Bord Pleanála, & Ors** including Alber Developments Limited [2022] IEHC 202

³¹¹ See §§72 - 76

237. Since **O'Connor** and albeit the law was laid down prior to O'Connor by the CJEU in **North East Pylon** in the context of Article 11 of the EIA Directive and of the distinction between public participation rights and other content of the EIA Directive, the Court of Appeal in **Heather Hill #1** has decided that whether a S.50B PDA 2000 PCO should be made must be considered separately as to each ground on which judicial review is sought. The view taken by the CJEU in **North East Pylon** accepts that, in proper circumstances, cost protection may be limited to only some grounds of challenge and that each ground be scrutinised having regard to the underlying mischief costs protection is intended to address.

238. The question which arises here is of applying that logic to a criterion of environmental damage which the CJEU has deprecated. As I have suggested, a less rather than more demanding approach to the damage criterion, with a view to diluting its unlawful effect, is desirable. This suggests that while the S.4(1)(a) criterion of failure to comply with the statutory requirement should be applied to each ground individually, if that criterion is met as to any ground capable of resulting in certiorari quashing the permission, the criterion of likelihood of causation of environmental damage may be applied to the permission generally as opposed to the grounds individually as, if any ground results in certiorari, the likelihood of environmental damage will be averted.

239. However, I do not think proper statutory interpretation does allow such an interpretation as, by S.4(1) of the 2011 Act, the damage criterion is explicitly and unambiguously linked, in causation terms, to “... *the failure to ensure such compliance with, or enforcement of, such statutory requirement*”. Humphreys J has already taken the same view in **Enniskerry/PEM**³¹² - referring to the requirement

“to identify a statutory provision that is being contravened or requires to be enforced”, and then be able to say that non-compliance with that provision³¹³ will result in a negative environmental impact.”

240. Accordingly, in my view, for the purposes of 2011 Act costs protection the issues of the prospect of environmental damage and the causative link between such damage and the grounds on which judicial review is sought, must be considered separately as to each ground. It will not suffice for the Applicant merely to identify environmental damage causatively linked to development on foot of the impugned permission. The causative link must be between particular environmental damage alleged or foreseen and the particular failure to ensure compliance with, or enforcement of, a statutory requirement alleged in each ground.

³¹² §42

³¹³ Emphasis added

2011 Act PCO – Strength of Claim, Discretion & Proofs

241. I have suggested above that, as to proof of environmental damage, it is desirable not to apply in an excessively demanding fashion the criterion set by **Baker J** of a stateable argument, on some reasonable foundation beyond mere assertion, that damage to the environment will occur by reason of the alleged breach in prospect.

242. More generally, Baker J also held that the Court must be satisfied that the claim had a certain degree of substance and a reasonable prospect of success. But as leave to seek judicial review had been granted Baker J said, *'it must therefore be said that the proceedings meet the threshold that there exists an arguable case in respect of the grounds pleaded'*. That must be all the more so where, as in this case, in planning judicial review and by S.50A PDA 2000 an applicant for leave to seek judicial review must show *"substantial grounds"*. However, Murray J in the Court of Appeal in **O'Connor** pointed out that such a hurdle seems too high as costs protection is denied by S.3 of the 2011 Act only to those whose claim is *"frivolous or vexatious"*³¹⁴ – albeit that phrase is given a broader meaning than usual as including cases which obviously can't succeed, which are unsustainable in law, or which are without merit³¹⁵. Murray J ultimately concluded that the applicant need only show an arguable case – a basic threshold. Where leave is granted ex parte the Respondent remains entitled to dispute that the case is stateable³¹⁶ but the logic of that entitlement is that the Respondent should either accept that the proceedings meet the required threshold, or contemporaneously apply to set aside leave or strike out the proceedings. I need not further consider the issue as leave was granted in this case to the *"substantial grounds"* standard and the Respondent has not disputed that the case is stateable.

243. As to other proofs, in **McCoy**³¹⁷ Hogan J cited the CJEU in **Edwards**³¹⁸ to the effect that a national court, called upon to make a PCO, could take into account:

"..... the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure and the potentially frivolous nature of the claim at its various stages ..."

244. Hogan J cited the *"very helpful guidance"* of Hedigan J in **Hunter v Nurendale**³¹⁹, formulated by reference to **Edwards**, that an applicant for a 2011 Act PCO should set out:

- *what broadly the expenses involved in such an application would be,*
- *a broad statement of the claimant's financial situation,*

³¹⁴ Leaving aside exceptions as to the manner of conduct of the proceedings and contempt of court as they do not relate to the underlying strength of the claim.

³¹⁵ Murray J at §53 citing Order 19 Rule 28 RSC, *Farley v Ireland*, Unreported, Supreme Court, 1st May 1997, *Riordan v Ireland* (No.5) [2001] 4 IR 463), *McCoy v Shillelagh Quarries Ltd. And Sweetman v Shell E&P Ireland Limited* [2016] IESC 58, [2016] 1 IR 742 at para. 20).

³¹⁶ Murray J cited *Adam v Minister for Justice* [2001] 3 IR 53, at p. 77

³¹⁷ [2015] IECA 28

³¹⁸ Case C-260/11 *Edwards v Environmental Agency* [2013] ECR I-000 §42

³¹⁹ *Hunter v Nurendale Ltd.* [2013] IEHC 430 Hedigan J

- *the reasons why he believes that there is a reasonable prospect of success,*
- *clearly what is at stake for the claimant and for the protection of the environment,*
- *the position as to any possible claim of frivolous proceedings, should that arise; and*
- *the position as to any possible legal aid scheme or any contingency arrangement in relation to costs that may have been made with their solicitors.*

245. Nonetheless, **McCoy** suggests that the evidential requirements as to the likely costs of the proceedings and the applicant's financial capacity to pay them may not be very demanding in practice, depending on the circumstances of the case. In that case the Court of Appeal held Baker J entitled to conclude that it would not require "*any great analysis or debate*" to accept that a full-time student would not be able to meet the costs of a complex and difficult High Court witness action scheduled to last for two weeks in order to meet, as Murray J put it in **O'Connor**, "*the test as to means suggested in some of the authorities.*" The same may perhaps be said of the issue of a legal aid scheme or any costs contingency arrangement with solicitors.

246. In **McCoy**, Hogan J said:

"It is, admittedly, striking that the applicant in his affidavit did not address the final factor mentioned by Hedigan J in Hunter, namely, "any contingency arrangement in relation to costs that may have been made with [his] solicitors." While we consider that it would have been preferable if he had done so, we are not persuaded given the particular circumstances of this case that this would have been a decisive consideration. The biggest obstacle to environmental litigation of this kind is the risk of exposure to the costs of the other parties to the litigation. It is against this risk that a potential applicant needs practical assurance in advance. Accordingly, even if the applicant had secured a fee arrangement with his own lawyers of a satisfactory kind, this still would not have obviated the difficulties faced by an applicant of limited means. An adverse costs order in litigation of this complexity and likely duration would financially cripple all but the most affluent.

It follows, therefore, that while it would have preferable and more satisfactory had the applicant furnished additional details in advance in his grounding affidavit as to both his means and any fee arrangements with his own solicitor in the manner suggested by Hedigan J in Hunter, in the circumstances of the present case these omissions cannot be regarded as critical for the reasons which we have just stated."

And later:

"..... while it would have been preferable if the applicant had provided fuller details of his financial means and any arrangements which he made with his lawyers regarding contingent fee arrangements, given that the applicant's financial status was not in dispute and the object of any protective costs order is to safeguard the litigant against exposure to the costs of the other side, these omissions were not fatal. We think that Baker J was fully entitled to conclude that, having regard to the likely costs entailed in a lengthy and complex witness

action of the kind envisaged in the present case, the risk of an adverse costs order was likely to prove daunting for all potential litigants save for the most affluent.”

The acceptance that *“the risk of an adverse costs order was likely to prove daunting for all potential litigants save for the most affluent”* and the somewhat diffident word *“preferable”* may imply a presumption in favour of applicants, as to means, that the risk of costs will be daunting, or if not, a light burden in that regard on an applicant for a PCO.

247. It is also important to observe that, in referring to the reality that such costs would *“financially cripple all but the most affluent”*, Hogan J was not setting a test: costs far short of the *“financially crippling”* may *“prove daunting”* to those who contemplate exercising their right of access to justice. Or, as Clarke J put it in **Conway** – the end sought is that of *“cost not becoming a significant barrier to pursuing relevant claims.”*³²⁰ And as the CJEU has held in **Commission v UK**³²¹, the fact that an applicant has not been deterred in practice from bringing his action does not in itself establish that the proceedings are not prohibitively expensive for him.

248. **Browne**³²² considers **Hunter** and **McCoy** and doubts the correctness of the **Hunter** guidelines on the basis that they can apply only to the exercise of a discretion whereas, in the author’s view, the 2011 Act sets a bright line, non-discretionary rule, in excess of the Aarhus requirements identified in **Edwards**, as to whether S.3 of the 2011 Act (i.e. costs protection) *“applies”*. If the bright line rule is satisfied, in his view *“the new costs rules automatically apply.”* And by S.4(1) that rule has only two criteria: as to the purpose of the proceedings and as to damage to the environment. Browne suggests that, as the statutory criteria are clearly identified, it is difficult to understand on what basis the High Court could impose additional criteria, such as, for example, the individual financial circumstances of the parties.

249. On that understanding of Browne’s view – that the 2011 Act provided costs protection in excess of that required by Aarhus - it bears observing by analogy that a similar argument as to S.50B PDA 2000 foundered in **Heather Hill #1** on the view that the Oireachtas had not intended to *“provide for a “gold plate” special costs rule so far in excess of that required by either the Aarhus Convention or EU law”*³²³ – such, indeed, that a literal interpretation of S.50B PDA 2000 yielded to a narrower purposive one. One might argue that a similar interpretive approach should be taken to the interpretation of the 2011 Act and is implicitly taken in **Hunter** and **McCoy**. But they may be weak authority for the point as, in both those cases, 2011 Act PCOs were made despite notably weak compliance with the Hunter guidelines. Also, the 2011 Act and S.50B PDA 2000 rules are both clearly *“gold plated”* at least in the sense of generally imposing a no-costs rule where the Aarhus NPE rule requires only that the costs not be prohibitively expensive and *“does not prevent the national courts from making an order for costs”* – see **Edwards**³²⁴. It seems likely that this was in the hope (forlorn,

³²⁰ [2017] IESC 13, [2017] 1 I.R. 53, §35 – emphasis added

³²¹ Case C-530/11, *Commission v UK* §50 – citing Case C-260/11 *Edwards and Pallikaropoulos* [2013] ECR §43

³²² *Simons on Planning Law*, 3rd edition, Browne, 2021, §11-728 et seq

³²³ *Heather Hill #1* §153

³²⁴ §25 – citing Case C-427/07 *Commission v Ireland* [2009] ECR I-6277, §92

as this and many other judgments demonstrate) of simplicity of costs protection law and practice. But if simplicity – and one may add procedural expedition – was the aim, the types of inquiry suggested in *Hunter* may sit ill with it.

250. Though *Browne* does not cite it in this respect, in **O'Connor** (a case not apparently cited to the Court of Appeal in **Heather Hill #1**) Murray J refers, somewhat diffidently, to *“the test as to means suggested in some of the authorities.”* But given Baker J was not appealed on this issue Murray J says, *“it is not necessary for the Court to consider whether the trial Judge was correct in concluding that there was an implied limitation on the obligation of a party seeking a protective costs order to make public disclosure of his financial affairs.”*

251. Murray J does however describe S.7(2) as discretionary³²⁵ such that the Court should approach decisions whether to make S.7 PCOs *“on a case by case basis albeit by reference to identified principle. To that extent, the factors identified by Hedigan J in Hunter v. Nurendale Limited and applied by this Court in McCoy v. Shillelagh Quarries Ltd. may be of assistance in some cases. However, they should not be applied indiscriminately.”* I hope I may be forgiven for again suggesting that diffidence is notable here and in neither *Hunter* nor *McCoy* were those factors applied to the exclusion of a PCO despite a paucity of relevant evidence.

252. Murray J’s following treatment suggests that the real substance of the respondent’s interest in the discretion allowed by S.7(2) may be to defer what would be a final determination under S.7 that S.3 applies against the possibility that it may later emerge that s.3 does not apply. For example, it might emerge that the claim is brought for a purpose not envisaged by S.3. Murray J says:

“Once that is understood, the first and critical question in determining whether to grant a protective costs order under s.7 is whether the Court is confident based on the information before it at the time the application is made, that it can (a) determine whether the proceedings fall within s.3 and (b) be sure that nothing is likely to happen after the making of such an order that will affect the answer to that question.

Given (as I explain shortly) that the Court is concerned only to characterise the proceedings, to determine that they disclose a stateable claim, and to determine whether the characterisation of the claim brings it within or without s.3, the answer to both of these questions should be in the affirmative in many cases.”³²⁶

“..... considerations such as requiring that a case be strong, or reasonable, or that the applicant show that he is a person of means, or that the issue of whether s.3 applies be postponed to the trial of the case could intrude into the discretion of the Court in deciding whether it is appropriate to make such an order at an early stage. The decision in McCoy

³²⁵ §54 et seq

³²⁶ §57

establishes that it is permissible to take account of these factors when exercising that discretion.

However, in most cases in which the Court determines that the action falls within s.3, that it is stateable, and that there is no basis for believing that the application of s.3 will change as the proceedings develop, it is hard to see how these considerations are relevant, and harder to see where the Court obtains the power to condition the exercise of its discretion by reference to whether the claim enjoys a reasonable prospect of success.”³²⁷

253. Murray J does not elaborate on the basis on which the Applicant’s means could be relevant to the question posed by S.7 – which is whether S.3 applies to the proceedings. But he does seem to be of the view that such instances will be rare. That such instances will be rare may also be consistent with the EU Law requirement, expressed in **Commission v UK**³²⁸, that a claimant is entitled to “*reasonable predictability as regards both whether the costs of the judicial proceedings in which he becomes involved are payable by him and their amount, although such predictability appears particularly necessary because, as the United Kingdom acknowledges, judicial proceedings in the United Kingdom entail high lawyers’ fees.*”

254. Murray J does observe that, timing or deferral of a S.7 PCO aside, in a very important sense the 2011 Act PCO jurisdiction is not discretionary and not conditioned by the means of the Applicant. He says:³²⁹

“It would have been open to the Oireachtas in framing the special costs provisions to confer a discretion upon the Court and to condition that discretion by reference to inter alia the strength of the underlying claim, the financial position of the applicant for relief or the complexity of the case. Instead of doing this, the draftsman has applied a sharp rule applicable to a specific type of proceedings. Section 3(1) imposes a mandate that where the section applies to proceedings, each party shall bear its own costs. Section 4 defines the proceedings to which s.3 applies. A case either falls within these provisions, or it does not.”

255. This passage seems supportive of Browne’s “bright line rule” analysis³³⁰ and suggests that the only criteria for exercise of the 2011 Act PCO jurisdiction are those set out in S.4(1) and relate to the nature of the proceedings and the question of environmental damage. Reading this passage with the observations of Murray J cited above as to the relevance of issues such as the Applicant’s means, suggests that such issues are likely to be irrelevant, or at least not decisive, in all but rare cases.

³²⁷ §59

³²⁸ Case C-530/11, judgment 13 February 2014

³²⁹ §48

³³⁰ See above

256. Regrettably, it is all too easy to accept that an adverse costs order in litigation of this complexity and likely duration would financially cripple all but the most affluent. *Á fortiori* the prospect of an adverse costs order would be daunting to all but the most affluent. And as with the damage criterion and for reasons I have set out above, including the aim of wide access to justice, it appears to me that a broad view should be taken rather than one restrictive of the exercise of the jurisdiction.

2011 Act - Radical Change in the Law?

257. In **Heather Hill #1** the Court of Appeal limited what would otherwise have been the literal and wider meaning of **s.50B PDA 2000** by applying the presumption against radical change in the law³³¹. This is understandable, S.50B being limited in its application to circumstances relating to four specified Directives. S.50B costs protection was amended by S.21 of the 2011 Act but it need not follow that the same approach applies to the distinct costs protection regime set out in Part 2 of the 2011 Act - which is expressed in more general terms, including as to as to “*statutory requirements*”. Certainly, costs protection seems radical to the common law litigation lawyer. And in our duallist system, as a matter of and Irish domestic and constitutional law, the State is not obliged to legislate Article 9 Aarhus into domestic law. But would it really be radical if it met its obligations at international law by doing so? The question seems rhetorical.

258. After all, and leaving EU law entirely aside, the State has long since itself ratified Aarhus which, as a matter of international law, commits the State to applying in its domestic law the NPE rule of Article 9(4) to “*.. judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*”. Should it be considered radical or surprising that it has chosen to meet that commitment? Or should it rather be surprising to find that it has not? The Aarhus Compliance Committee³³² expect that challenges to planning permission decisions will ordinarily attract costs protection. Their view imposes no obligation in Irish domestic law and in any event recognises, even as a matter of International Law, that States may provide for exceptions. Nonetheless, their view can be considered influential at least as to the interpretation of Aarhus and what international law thereby requires of the State and so may bear on the question whether wider availability of costs protection in planning judicial review should be considered radical or surprising.

259. Other than listing the specific acts which it amends, the only purpose of the 2011 Act identified in its Long Title is “*... to give effect to certain articles of the [Aarhus] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters and for judicial notice to be taken of [Aarhus]*”.

³³¹ §§84, 131, 132 & 153 - citing *McCallig v An Bord Pleanála* (No. 2) [2014] IEHC 353 and *Dodd*, *Statutory Interpretation in Ireland* (2008), §§4.110-4.112).

³³² Communication ACCC/C/2005/11 - compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice.

260. Given both the wide implied definition of “*environment*” in Aarhus and the non-exhaustive list of environmental elements in S.4(2) of the 2011 Act as including such traditionally “planning” concerns as land (which must include use of land), landscapes, conditions of human life, cultural sites and the built environment and given also the recital in Aarhus recognising the right to live in an environment adequate to health and well-being, it appears to me that one need not have recourse to the Secretary of State’s concession in **Venn** to conclude that it should come as no surprise that “*national law relating to the environment*” encompasses many issues traditionally categorised as “planning” issues and that Aarhus costs protection would encompass judicial reviews as to such issues.

261. Humphreys J in **Enniskerry/PEM**³³³ notes the Aarhus Compliance Committee decision as to a judicial review of a decision whether planning permission was required for **Belfast City Airport**³³⁴. Humphreys J described such a decision³³⁵ as similar to a decision under S.5 PDA 2000 as to whether a proposed course of action is development or exempted development. The Compliance Committee found that the judicial review fell within Aarhus Article 9(3) as challenging acts and omissions by a public authority alleged to contravene national law relating to the environment. Humphreys J suggests that “*The tenor of the decision of the compliance committee is that general planning judicial review questions can come within the Aarhus Convention.*”

262. As to grounds of judicial review alleging breach of statutory requirements relating to material contravention of development plans, as recited above and as long ago as **McGarry**,³³⁶ McCarthy J defined development plans as not merely a contract between the planning authority, the council, and the community, embodying a promise by the council that it will regulate private development in a manner consistent with the objectives stated in the plan but, specifically, an “*environmental contract*” embodying that promise. Again, this suggests that it should be no surprise to find allegations of breach of statutory requirements regarding regard to and departure from the content of Development Plans falling within Aarhus Article 9 – not least as it relates to “*national law relating to the environment*”.

263. Arguably however, “*radical*”, in the context of the presumption means less a surprising or unexpected change in the law than a major or substantial change. As **Dodd**³³⁷ says: “*It is considered improbable that the legislature would overthrow fundamental principles, infringe rights or depart*

³³³ Enniskerry Alliance and Enniskerry Demesne Management Company CLG v An Bord Pleanála [2022] IEHC 6 (High Court (General), Humphreys J, 14 January 2022)

³³⁴ United Nations ECE/MP.PP/C.1/2010/6/Add.2 Economic and Social Council Distr.: General 24 August 2011 Original: English: Economic Commission for Europe: Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters: Compliance Committee: Twenty-ninth meeting Geneva, 21–24 September 2010: Report of the Compliance Committee on its Twenty-Ninth meeting: Addendum Findings and recommendations with regard to communication ACCC/C/2008/27 concerning compliance by the United Kingdom of Great Britain and Northern Ireland: Adopted by the Compliance Committee on 24 September 2010

³³⁵ Under art. 41 of the Planning (Northern Ireland) Order 1991

³³⁶ Attorney General (McGarry) v Sligo County Council [1991] 1 IR 99

³³⁷ Dodd, Statutory Interpretation in Ireland (2008), §§4.110

from the general system of law without expressing its intentions with irresistible clarity. It is presumed that the legislature does not intend to change the law beyond the immediate scope and object of an enactment.” But Dodd also says that “for the presumption to have any application, a provision must be ambiguous or unclear”³³⁸ and “The presumption may not be used to defeat the intention of the legislature where the intention is to effect radical changes. Where the Act makes it clear that a radical change in the law is intended, the courts must give effect to that intention.”³³⁹ In this latter respect he cites **Farrell v The Attorney General**³⁴⁰ in which Keane J in the Supreme Court held that a major change in the law was contemplated by the Oireachtas:

“The submission on behalf of the applicant that one should not impute to the Oireachtas an intention to effect a radical change in the law in the absence of clear language begs the question, because it assumes that, on the face of the section, no such radical alteration was contemplated. The contrary is the case: on any view of the section, it envisaged a major change in the Irish law on this topic.”

264. There can be no doubt but that Part 2 of the 2011 Act effected - and was intended by the Oireachtas to effect - a radical change in the law as to costs in environmental litigation. It is not, I think, excessive to suggest that it set out to “*overthrow fundamental principles*” that, ordinarily at least, costs follow the event. In **McCallig**³⁴¹ Herbert J framed that rule as fundamental. And there can be no doubt but that that effecting in domestic law (as the State clearly intended) the State’s international law obligations imposed by Aarhus Article 9 would inevitably effect a “radical” change in the law as to such costs. Barrett J observed in **Merriman**³⁴² that the 2011 Act “*establishes a radically different default costs regime to that which generally prevails ...*”. Accordingly, I think it very doubtful that the presumption against radical change in the law applies to Part 2 of the 2011 Act.

265. It seems to me that it would be perilous for a court, faced with undeniably radical legislation, to attempt, save perhaps on highly prescriptive runes, to finely divine the intention of the Oireachtas as to the shades and degrees of intended radicalness (my apologies), and thereby pare and shave the scope of the legislation. That might arise where the Court is driven to it by legislation clearly ambiguous or by a legislative intention clearly limited - as was found in **Heather Hill #1** by reference to particular obligations imposed by four particular EU directives. But that does not seem to be the case as to the 2011 Act.

266. In **Heather Hill #1** the particular literal and expansive interpretation of S.50B rejected by the Court of Appeal would have implied an unlikely, complex and convoluted legislative means of achieving a relatively simple end: for that reason amongst others that interpretation was rejected. That factor does not seem present in the 2011 Act. On the words of the 2011 Act, on the authority,

³³⁸ Dodd, *Statutory Interpretation in Ireland* (2008), §§4.116, citing *Macks Bakeries Ltd (In Liquidation) & Luby v O’Connor T/A P O’Connor & Sons Solicitors* [2003] 2 ILRM 75

³³⁹ Dodd, *Statutory Interpretation in Ireland* (2008), §§4.115

³⁴⁰ *Farrell v The Attorney General* [1998] 1 IR 212.

³⁴¹ *McCallig v An Bord Pleanála (No. 2)* [2014] IEHC 353

³⁴² *St Margaret’s Concerned Residents, Merriman et al v Dublin Airport Authority* [2018] IEHC 66

inter alia of **O'Connor** and for reasons explained above, it is clear that the concepts of “*environment*” and “*environmental damage*” are to be given a broad meaning and that “*statutory requirement*” has a stand-alone meaning. While the Secretary of State’s concession in **Venn** is not binding here it is notable, as is the definition of “*damage to the environment*” in S.4(2) of the 2011 Act which seems apt to encompass what have been traditionally considered “*planning*” issues.

267. The Board’s submission, based on the presumption against unclear changes in the law, that “*such a radical change as that for which the Applicants contend cannot be regarded as ‘a clear change’*” appears to me to confuse the concepts of radical change and clear/unclear change. A radical change can be perfectly clear – better, indeed, if it is.

268. The Board contends that to accept the Applicant’s interpretation of the 2011 Act costs protection regime would be to accept that it applies to virtually all judicial reviews of planning decisions, which, the Board contends, was manifestly not the intention of the Oireachtas. The Board appears to base its understanding of the intention of the Oireachtas on the proposition that Part 2 of the 2011 Act was enacted to give effect to the requirements of EU law and that to apply them where the EU Law Interpretive Obligation does not apply would go beyond what EU Law requires. For this proposition they cite Charleton J in **JC Savage**³⁴³ and Costello J in **Heather Hill #1**³⁴⁴. But the Board’s proposition is incorrect. There is no objective reason to impute such a limited intention to the Oireachtas.

269. S.50B of the 2000 Act was indeed enacted to give effect only to specific and identified requirements of EU law and **JC Savage** and **Heather Hill #1** were decided accordingly. S.50B applies solely to a decision, action or omission pursuant to a statutory provision that gives effect to four specified EU Directives³⁴⁵. To paraphrase Charleton J: “*these four and no more*”. So much for S.50B. But **JC Savage** did not speak to the reason why Part 2 of the 2011 Act was enacted.

270. Part 2 of the 2011 Act is not limited in its terms in any way analogous to the limitation in S.50B identified by Charleton J as indicating an intention that S.50B was intended only to carry EU law into effect. And S.4(4) of the 2011 Act, in listing licenses and the like for purposes of S.4(1)(a), lists many which, while perhaps affected by EU law, have their origins in national law: for example, Foreshore Leases and Licenses under the Foreshore Act 1933.

271. The S.4(4) list includes planning permissions at S.4(4)(n). The Board correctly states that, as the “*statutory requirement*” criterion of S.4(1)(a) is free standing, the list in S.4(4) is not applicable to it and that in **O'Connor**³⁴⁶ the argument was rejected that that “*of itself makes the present proceedings*

³⁴³ JC Savage Supermarket Ltd v An Bord Pleanála [2011] IEHC 488

³⁴⁴ §68 & 131

³⁴⁵ EIA, SEA, IPPC and Habitats Directives

³⁴⁶ High Court §33; Court of Appeal §10

ones in which the enforcement of a requirement or condition in such permit is in issue". As is express, that is the rejection, not of an argument as to the interpretation of the phrase "statutory requirement", but of an argument that the facts in O'Conner fell within criteria of S.4(1)(a) other than the "statutory requirement" criterion. **O'Connor** does not require rejection of an argument that, while being mindful of its internal distinctions, S.4 should be interpreted as a whole and in light of its purpose of effecting Aarhus Article 9(3) and (4). That lends appreciable support to the (in any event unsurprising) view that planning permissions are in the realm of "national law relating to the environment" such that "statutory requirements" relating to decisions on planning permission applications would similarly be in that realm.

272. There is, in my view no reason to believe that the intention of the Oireachtas was other than as explicitly stated in the Long Title to the 2011 Act. That is to say, to give effect to obligations on the State at international law by giving 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*". That includes but is not limited to giving effect to EU law obligations derived from Aarhus. Whatever view one may take as to the practical scope of the intention of the Oireachtas, the rationale offered by the Board for limiting it to the effecting of obligations of EU Law is in my view incorrect. And for that reason, as decisions on the limited intention of the Oireachtas in enacting S.50B, neither **JC Savage, Shillelagh Quarries**³⁴⁷, **McCallig**³⁴⁸ nor **Heather Hill #1**, in the respects in which cited by the Board for this argument, support the argument that the 2011 Act is similarly limited.

273. In fairness to the Board, I should record that elsewhere in its submission it did identify giving effect to Aarhus (by which I mean directly as opposed to via EU law), and in particular Articles 9(3) and 9(4), as a purpose of the 2016 Act. I do not accept the Board's assertion that the absence of reference in the 2011 Act to public participation in environmental matters implies that the 2011 Act does not give effect to Aarhus Article 9(2) but I need not decide that issue here.

274. The Board submits that "*The intention of the Oireachtas was to provide a limited measure that did not go beyond the requirements of Articles 9(3) and (4)*". It also submits that "*the intention of the Oireachtas in enacting Sections 3 and 4, which was to give effect in a limited way to the requirements of Articles 9(3) and (4) of the Aarhus Convention and no more than that.*" These submissions clearly suggest, and I accept, the requirements of Aarhus Articles 9(3) and (4) as the limits of the legislative intention. But these submissions could be read as suggesting an intention falling short of the full extent of the requirements of Aarhus Articles 9(3) and (4) – a partial implementation of the requirements of Aarhus Articles 9(3) and (4). I am not clear that the Board was advancing that case and so it is no criticism of the Board to observe that it advanced no rationale for discerning a legislative intention falling short of the full requirements of Aarhus Articles 9(3) and (4) given the presumption of legislation in conformity with international law and given the clear intention to effect by the 2011 Act the international law obligations imposed on the State by

³⁴⁷ Shillelagh Quarries Limited v An Bord Pleanála [2012] IEHC 402

³⁴⁸ McCallig v An Bord Pleanála (No. 2) [2014] IEHC 353

Aarhus. An intention to effect those obligations only partially would be entirely within the Constitutional powers of the State. But given the presumption, and *ceteris paribus*, such an intention should not be readily inferred from a statute absent its clear expression. It also seems to me that inferring such an intention would be inconsistent with S.4(1) of the 2011 Act – in particular the free-standing “statutory requirement” criterion.

275. The Board asserts that to apply Sections 3 and 4 of the 2011 Act to judicial reviews of planning decisions would exceed the requirements of Aarhus Articles 9(3) and (4). I confess that I have difficulty discerning why this should be so, given the simplicity and breadth of the reference in Article 9(3) to “... *acts and omissions by .. which contravene provisions of its national law relating to the environment*” and as it seems to me indisputable that planning law is, at least generally, law relating to the environment and that, at least as a general proposition, a challenge based on planning law is a challenge based on law relating to the environment. I am a little fortified in my view in noting that, in **Venn**, the Secretary of State took that view. I also have difficulty discerning, given **O’Connor**³⁴⁹, why on the Board’s logic and specifically by reference to Aarhus requirements, Sections 3 and 4 of the 2011 Act should apply to judicial reviews of grants of waste permits but not to grants of planning permissions. Even accepting for argument’s sake, which I don’t, that O’Connor is distinguishable by reference an “ongoing” element of breach, that criterion derives, if at all, from the terms of the 2011 Act – not from the scope of the requirements of Aarhus.

276. As to Part 2 of the 2011 Act, it seems to me that a more accurate imputation of intention to the Oireachtas would be to simply effect Aarhus Article 9(3) and 9(4) to afford costs protection to any proceedings, whether or not in judicial review (remembering it is an international agreement which may not have had our remedies of judicial review exclusively in mind) “*to challenge acts .. which contravene provisions of its national law relating to the environment.*” That relatively simple and undeniably wide formula seems well-fitted to encompass many planning judicial reviews. And in carrying it into effect I suggest that, once the courts had clarified that the reference in S.4(1) to “*a statutory requirement*” was free standing, it became apparent that the Oireachtas adopted an equally clear and simple formula in which, for S.3 to apply to them, civil proceedings need only relate to the breach or apprehended breach of a statutory requirement which breach has caused, is causing, or is likely to cause, damage to the environment. That formula also seems well-fitted to encompass any civil proceedings to that end – including many planning judicial reviews. It is unnecessary hear to explore any limits of such a view. By reference to the phrase used by Hogan J in **Kimpton Vale**, in referring to S.50B not Part 2 of the 2011 Act and as cited by Costello J in **Heather Hill #1**³⁵⁰, such a mechanism of making costs protection widely available in environmental litigation seems neither “*indirect*” nor “*complicated*”. As it is merely a matter of the greater including the lesser, the Board’s observing that S.4 does not specify planning judicial reviews is to view the section myopically through the lens of this dispute.

³⁴⁹ O’Connor v Offaly County Council [2020] IECA 72

³⁵⁰ §150

277. Accordingly, I respectfully do not agree with the Board that one can readily apply to the 2011 Act the very understandable rhetorical question posed by Costello J in **Heather Hill #1**³⁵¹ to the effect that if the Oireachtas meant a wider meaning they could have simply said so “*why did the section not simply say so? Why adopt the cumbersome formulation of linking proceedings and particular Directives?*” Very arguably later, in the 2011 Act, the Oireachtas did simply say so. Also, S.50B was clearly limited to addressing specific EU law obligations under the Public Participation Directives whereas Part 2 of the 2011 Act is not similarly limited and addresses demonstrably wider international law obligations imposed directly by Aarhus. But I need decide only what S.4 means for these particular proceedings.

278. In **McCallig**³⁵² Herbert J, in considering S.50B, observed that:

*“..... 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.”*³⁵³

279. Accepting this passage as relating to S.50B rather than the 2011 Act costs protection regime, but attempting to discern its application to the 2011 Act costs protection regime, I respectfully observe as follows:

- Importantly, Herbert J was rejecting a proposition that any judicial review ground attracting costs protection would thereby protect the entire proceedings in which it was advanced. I agree that the 2011 Act costs protection regime will apply only to the specific grounds it covers, not to the entire proceedings. So, the mischief foreseen by Herbert J does not arise.
- The 2011 Act costs protection regime is not limited by the “three³⁵⁴ defined legal categories or the scope of obligations to comply with them, so the prospect of outstripping the purpose of those directives does not arise. The 2011 Act costs protection regime is limited, rather, by the objectives of Article 9 of the Aarhus Convention which is in far broader terms.

³⁵¹ §143

³⁵² *McCallig v An Bord Pleanála* (No. 2) [2014] IEHC 353

³⁵³ Emphasis added by Costello J in *Heather Hill #1*

³⁵⁴ Now four, the Habitats Directive having later been added to the list.

- While the legislature will not have intended to encourage tactical pleading of issues by reference to their potential for costs protection that is, I suggest, inevitable no matter where the “line” is drawn dividing grounds which attract costs protection from those which do not. Pleadings will gravitate to the protected grounds and the courts will have to deal with any issues which may arise in consequence. But as it is now clear that the 2011 Act costs protection regime will apply only to the specific grounds it covers, not to the entire proceedings, this mischief seems likely to be less of a concern than in the scenario which Herbert J was considering.

280. In **Kimpton Vale**, Hogan J, in seeking to disentangle the “*complex web*”, noted that the Oireachtas, by enacting s.4, “*clearly went further than that which was required by article 6 (and, by extension, annex 1) of the Convention in that the new rules apply to all types of enforcement actions in the planning and environmental sphere*³⁵⁵, and not simply those whose ambit would come within annex 1”. Here again we see that the presumption against change beyond the requirements of EU or International law does not apply to Part 2 of the 2011 Act. The latter is, at least in this respect, “*gold-plated*”.

281. At that time, it was thought that S.4 applied S.3 only to enforcement actions and not to judicial review³⁵⁶. It has since become clear that S.4 applies S.3 to judicial review as well – see **O’Connor**³⁵⁷. One obvious possible implication is that one might rephrase Hogan J’s phrase to read “.. *the new rules apply to all types of judicial review and enforcement actions in the planning and environmental sphere*”³⁵⁸.

282. I agree with Costello J in **Heather Hill #1** that if costs protection applies – albeit here via Part 2 of the 2011 Act as opposed to S.50B PDA which she was considering - to many planning judicial reviews it may have consequences which some may consider undesirable: perhaps most obviously as to small or even minor developments. And as a matter of effecting International Law directly in domestic law (as opposed to in compliance with EU Law obligations) the State is at large to do so fully, partially and/or subject to such exclusions or limitations as it thinks right. But that is for the State, not the Courts, to do and I can’t see that the State has in fact subjected the 2011 Act costs protection regime to such exclusions or limitations.

Fotovoltaic #3 & Merriman

283. As they were considered in **Heather Hill #2**, it may assist to briefly consider these two cases. In **Fotovoltaic #3**³⁵⁹, Barniville J, as to the application of S.50B PDA 2000, applied the CJEU judgment

³⁵⁵ §27 - Emphasis added

³⁵⁶Kimpton Vale §29 - save for judicial review of such enforcement proceedings in lower courts as provided for in S.6

³⁵⁷ O’Connor v Offaly County Council [2020] IECA 72

³⁵⁸ Emphasis added

³⁵⁹SC SYM Fotovoltaic Energy SRL v Mayo County Council #3 [2018] IEHC 245

in **North East Pylon** as permitting him to afford costs protection on one only of 3 judicial review grounds. He also rejected an argument, also based on the CJEU judgment in **North East Pylon**, that the Interpretive Obligation required an interpretation of S.50B which conformed to Aarhus Articles 9(3) and 9(4) insofar as the applicant is sought to ensure compliance with national environmental law other than law relating to Article 11 of the EIA Directive as to public participation. He did so as he considered that the grounds of challenge he was considering – as to fair procedures and adequacy of reasons – “*raise purely national law questions which are not concerned with national environmental law, or its application*” - citing **Conway** and the Implementation Guide to the effect that whether a national law is a “*law relating to the environment*” for the purposes of Aarhus Article 9.3 is determined as a matter of substance rather than form.

284. It is important to note that the only “*national procedural law*” Barnville J was considering for purposes of possible application of the EU law Interpretive Obligation in **Fotovoltaic #3** was s.50B PDA 2000 – he did not need to, and did not, consider the possibility of interpreting the 2011 Act in conformity with Aarhus Article 9.³⁶⁰

285. **Merriman**³⁶¹ is a decision similar in scope and outcome to that in **Fotovoltaic #3** and is the source of the memorable and illuminating observation that, in enacting S.50B to effect the four directives it lists, and particularly Article 11 of the EIA Directive, the Oireachtas did not intend to “*gold plate*” costs protection by exceeding the requirements of Article 11 which was confined to requiring costs protection on public participation issues arising from the EIA Directive. It does not add to analysis of the possibility of interpreting the 2011 Act in conformity with Aarhus Article 9.

Heather Hill #1 on Material Contravention - Res Integra?

286. In **Heather Hill #1** Costello J considered³⁶² the EU Law Interpretive Obligation as it bore on the interpretation of S.50B PDA 2000. I confess myself unclear if Costello J considered the EU Law Interpretive Obligation as it bore on national procedural law other than S.50B. It appears not. But nothing turns on that as the substantive content of the EU Law Interpretive Obligation remains constant regardless of the national procedural law on which it bears.

287. Costello J cited the CJEU in **North East Pylon**³⁶³ to the effect that the EU Law Interpretive Obligation, as to the Aarhus Article 9(4) NPE rule as applicable to the access to justice rights

³⁶⁰ In an earlier judgment in the same case on the costs issue, Barnville J had deferred a final decision pending the then-awaited CJEU judgment in **North East Pylon**. He recorded “*There is no suggestion that the provisions of the 2011 Act apply.*” - SC SYM **Fotovoltaic Energy SRL v Mayo County Council #2** [2018] IEHC 81. **Fotovoltaic #3** also did not address the question whether, to require the application of the Aarhus Article 9(4) NPE rule, it would suffice that the issue be one of national environmental law or its application - or whether, in addition, the issue of national environmental law had to be in a field covered by EU environmental law.

³⁶¹ **Merriman v Fingal County Council** (Unreported, High Court, 17 May 2018), [considered in **Heather Hill #1**] and Unreported, High Court 21st December, 2018) [2018] IEHC 763

³⁶² §168 et seq

³⁶³ §49

described in Aarhus Article 9(3), applies to a procedure in which it is intended to contest a development consent process “on the basis of national environmental law”³⁶⁴.

288. Costello J observed that “*the grounds upon which the challenge is brought are key*”³⁶⁵ to the question whether Aarhus Article 9(4) requires costs protection in a given case. By this she meant that for Aarhus Article 9(4) to apply on foot of Aarhus Article 9(3) it is the grounds of challenge, as opposed to the impugned decision, which must be based on national environmental law.

289. The grounds of challenge in **Heather Hill #1** included:

- material contravention of land use zoning objectives contrary to s.9(6) of the 2016 Act. The applicant pleaded that by not following the correct procedures when approving the development, the Board acted *ultra vires* and contrary to natural and constitutional justice.
- material contravention of the development plan by misinterpreting and misapplying its core strategy³⁶⁶ allocations of population³⁶⁷. As a result, the Board allegedly “*erred in law, misdirected itself in law, acted (sic) took into account irrelevant considerations and/or misunderstood or overlooked relevant material and/or acted irrationally, such as to vitiate the decision of the Board.*”

290. Costello J agreed with the trial judge, Simons J, that s.9 of the 2016 Act is a measure of national environmental law and that the impugned decision was taken “*pursuant to*” s.9(6) of that Act. But she held that that did not determine the question whether the Aarhus Article 9(4) NPE Principle applied to the proceedings.

291. Costello J held that the challenges I have identified above were not “*on the basis of national environmental law*” nor did they “*put in issue the application of national environmental law*”³⁶⁸. These are Aarhus Article 9(3) concepts. She said that “*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.*” So, Costello J held that while S.9 of the 2016 Act was national environmental law, the grounds of challenge in Heather Hill #1 were classic judicial review grounds of national law not related to the environment.

³⁶⁴ Emphasis added by Costello J

³⁶⁵ §174

³⁶⁶ By S.10(1A) PDA 2000, a development plan must include a core strategy which shows that the development objectives in the development plan are consistent, as far as practicable, with national and regional development objectives set out in the National Planning Framework and the regional spatial and economic strategy and with specific planning policy requirements specified in guidelines under *subsection (1) of section 28*.

³⁶⁷ This refers to the Development Plan’s allocation of expected/permissible population growth to specific parts of the Council’s functional area.

³⁶⁸ §177

292. It seems to me that the view taken by Costello J may turn on the phrases “*on the basis of*” and “*put in issue the application of*”. Though the Supreme Court in **Conway**, in looking to substance rather than form, was considering whether a law related to the environment, it would seem inconsistent with that approach to take a different approach to the question whether the challenge was “*on the basis*” of or “*put in issue the application of*” such a law. So we should look here also to substance rather than form. And it is striking that the touchstone identified in Conway was whether the statutory provision in issue “*somehow relates to the environment*” – not an apparently demanding formulation - one cited by the Supreme Court from the Aarhus Implementation Guide and not a formulation from which it demurred. Though it must be read with the requirement “*that the measure sought to be enforced can properly be said, in any material and realistic way, to relate to the environment.*” Any different approach would also seem inconsistent with the EU law prescription of “*wide access to justice*” being not merely permitted but encouraged as part of the project of providing spokespersons for the environment. Looking to the substance rather than the form of the basis of the challenge also seems to me to be required by the Supreme Court’s view that “*it would not be appropriate for a court to take an overly technical view of the proceedings as formulated for the purposes of deciding whether the Aarhus Convention and/or the Public Participation Directives were engaged*”.

293. In considering **Heather Hill #1** and by reference to the Supreme Court’s prescription in **Conway**, and as to identifying the “basis” of challenge in circumstances such as those relating to material contravention in **Heather Hill #1**, I confess to being unclear as to where, as to the “basis” of the challenge, is the form and where the substance.

294. Very arguably, it appears to me, the substance of grounds alleging material contravention in SHD cases, stripping out the common lawyer’s adherence to classic forms of pleading, is the simple allegation of unlawfulness - of breach of s.9 of the 2016 Act which, all agree, is a measure of national environmental law. Indeed, these complaints in **Heather Hill #1** were, and in the present case are, not merely that the impugned decision was taken, as Costello J puts it, pursuant to s.9(6) but that it was taken in breach of s.9(6) which, in the cause of upholding the “*environmental contract*” that is the development plan, prohibits the grant of permission materially contravening that plan unless certain conditions are met. It seems to me that it was in substance that breach of national environmental law which allegedly rendered the impugned decision ultra vires in **Heather Hill #1**. That does suggest to me that allegations of the grant of permission in material contravention of a development plan in breach of s.9 of the 2016 Act do amount to allegations on the basis of breach of environmental law and put in issue the application of national environmental law. As the Applicant submits, the classic grounds of judicial review do not exist in a vacuum but always relate to a specific law.

295. Also, I confess to being unclear that there is a principled division between the EU environmental law concepts of public participation on the one hand and, on the other hand, national law concepts – “classic” judicial review concepts - of fair procedures. Fair procedures are essential to

effective public participation. For example, as to the principle audi alteram partem and the obligation to consider relevant material, if a member of the public, entitled³⁶⁹ by Aarhus to participate, has not been heard in the development consent process and the relevant material (s)he has submitted has not been considered, I have difficulty seeing that it should matter whether the resultant challenge takes the form, on the one hand, of alleged breach of his/her right to participation or, on the other hand, of a classic judicial review allegation such as audi alteram partem or failure to consider relevant material or to give adequate reasons. Indeed, these latter seem to me to be directed squarely, if from a common lawyer's perspective, at vindicating the rights of public participation protected by Aarhus but, in the planning context, going back at least to the 1963 Planning Act. Nor do I see why a substantive allegation of breach of S.9(6) is taken outside Aarhus costs protection because the complaint of unlawfulness in that regard is made in the form of a classic judicial review allegation of ultra vires. On asking on what "basis" is the decision allegedly ultra vires, one necessarily returns to the alleged breach of S.9(6) which is, clearly, a national environmental law.

296. I confess that I have difficulty seeing why in principle, if an Applicant pleads the "braces" of breach of a statutory requirement capable of attracting costs protection – for example breach of S.9(6) - it should lose that protection by reason of pleading also the "belt" of "classic" judicial review grounds, such as ultra vires, if the latter is merely another form of framing in legal terms the same breach in question. No doubt fortunately, belts do not cancel braces.

297. Nor do I agree with Colbeam that the Applicants' pleading breach of S.9(6) is "strategic" within the use of that word by Murray J in **O'Connor**³⁷⁰ as representing, as it were, a distraction from the substance of the case in hope of attracting an undeserved PCO. For my part, and as to the material contravention Grounds, I see the pleading of breach of S.9(6) as squarely expressing the core illegality alleged and the legal substance of the case.

298. Nonetheless I reiterate that while Costello J in **Heather Hill #1** was not considering the application of the EU Interpretive Obligation to the 2011 Act, as to judicial review grounds alleging material contravention it seems to me that **Heather Hill #1** is directly on point as to the substance of the implications of the Aarhus Article 9(3) concept of contravention of national law relating to the environment and of the EU law Interpretive Obligation. That obligation remains the same regardless which is the statutory costs protection regime to which it is applied as to material contravention grounds. Also, and while he did not refer to them as "classic", Barniville J's refusal of costs protection to grounds based on "*fair procedures and an alleged failure to provide adequate reasons*" in **Fotovoltaic** is of a piece with the reasoning of Costello J in **Heather Hill #1**. I consider myself bound by both.

³⁶⁹ Using that word loosely

³⁷⁰ Murray J §31

299. Simons J in **Heather Hill #1** had considered S.50B PDA in light of the EU law Interpretive Obligation.³⁷¹ The Board had argued that the grounds alleged by Heather Hill were “... *classically administrative law challenges premised entirely on national law*” - error and misdirection of law, taking account of irrelevant considerations, overlooking relevant material, acting irrationally, acting *ultra vires* and contrary to natural and constitutional justice, failure to give adequate reasons. It submitted that such pleas “*are not matters of national and/or European environmental law but, rather, are classically administrative law challenges premised entirely on national law.*” Simons J³⁷² considered that submission:

“an overly narrow characterisation of the grounds of challenge. It overlooks the fact that the Applicants’ case is predicated on an allegation that An Bord Pleanála’s decision was reached contrary to section 9(6) of the PD(H)A 2016”

But in applying the EU Law Interpretive Obligation, Costello J clearly overruled Simons J in this respect. She clearly identified³⁷³ the grounds in question as had he: “*The second group of grounds alleged a material contravention of the Development Plan and, in particular, it was alleged that the decision was contrary to s. 9(6) of the PD(H)A 2016*”.

300. Whereas Costello J, in **Heather Hill #1**, explicitly cited the Board in appealing Simons J on his application of the EU Law Interpretive Obligation, as positing the criterion of “*national environmental law within the field of EU environmental law*”³⁷⁴ Costello J, in deciding that issue, did not mention the “*field of EU environmental law*” element of that posited criterion. She decided the issue against the Applicants on a simpler footing. She agreed that S.6 of the 2016 Act was a provision of “*national environmental law*”. Nonetheless she held that the allegations of material contravention and other breaches alleged were not allegations “*on the basis of national environmental law*” nor do they “*put in issue the application of national environmental law*” but were, rather, allegations based on classic grounds of judicial review. She essentially decided the matter on an interpretation of Aarhus Article 9(3). Accordingly, it does not appear open to me to distinguish **Heather Hill #1** on the basis that Costello J was applying the EU Law Interpretive Obligation (which includes the “*field of EU environmental law*” element of that criterion) as opposed to the Irish Law Presumption of legislation in conformity with International obligations (which has no “*field of EU environmental law*” criterion).

301. Accordingly, it seems to me that I am obliged as a matter of stare decisis to reject the Applicant’s submission in this case that the challenge relating to material contravention issues is based not on classic judicial review grounds of inadequate reasons or lack of fair procedures but attracts costs protection as based clearly and squarely on a breach of s.9(6).

³⁷¹ §84 et seq

³⁷² §97

³⁷³ §23

³⁷⁴ §§166 - 167

302. Were the matter *res integra* I confess - with very considerable diffidence given the carefully-decided authorities which bind me - that I would decide differently as to the identification of the “basis” of challenge and whether it put in issue the application of national environmental law. I would hold that the material contravention grounds are allegations on the basis of breach of “*statutory requirement*” within S.4 of the 2011 Act and/or of “*breach of national law relating to the environment*” within Aarhus Article 9(3) – those statutory requirements being S.9(6) of the 2016 Act and S.37(2) PDA 2000. I would grant 2011 Act PCOs accordingly, assuming any necessary proofs - as to which see below. But, for the reasons identified above, I consider that **Heather Hill #1** prevents my doing so. I confess to hesitation as I confess to thinking that **Conway** might provide a route to making such orders. But **Heather Hill #1** seems directly on point.

303. If I make an order under the 2011 Act, I must follow **Heather Hill #1** and refuse to make a 2011 Act PCO as to those grounds.

304. That said, the degree of uncertainty of the law in this area pending resolution of, it seems, at least two appeals in the Irish courts and two references from the High Court to the CJEU, when combined with my own respectful view of the 2011 Act as set out in this judgment are such as to persuade me that unusually, I should exercise the jurisdiction, identified by Murray J in O’Connor, to defer a decision on 2011 Act PCOs to the trial of the action. I will return to this issue below.

305. There is another reason why I am bound by the judgment of the Court of Appeal in **Heather Hill #1**³⁷⁵. In this case the Board decided that the proposed development did not require EIA. Costello J records³⁷⁶ that Aarhus Article 6 is headed “*Public participation in decisions on specific activities*”. Those activities are listed in Annex I. Generally, they are major developments³⁷⁷ not here relevant. But there are two extensions of the list. First, Annex 1 §20 is a residual category of any activity not covered by §§1-19 where “*public participation is provided for under an environmental impact assessment procedure in accordance with national legislation*”. Second, Article 6(1)(b) requires each Party to “*in accordance with its national law, also apply [Article 6] to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions;*” Costello J clearly views this list as governing the scope of application, not merely of Article 6, but of the entire Aarhus Convention, including Article 9. Costello J, states, and I am bound accordingly, that

“Thus, the obligations assumed by the parties to the Convention extend to those major projects outlined in Annex I, but no further. If the provisions of national law require an EIA in respect of projects which do not come within the scope of Annex I, then the obligations under

³⁷⁵ [2021] IECA 259

³⁷⁶ §38

³⁷⁷ Costello J lists, by way of example, mineral, oil and gas refineries, nuclear power stations and, developments for the production and processing of metals; they cover developments in the mineral industry and the chemical industry, such as installations for the production of cement, asbestos, glass, chemical installations for the production of basic organic and inorganic chemicals, pharmaceutical products, explosives, waste management and waste water treatment plants of a particular capacity, railways, motorways, airports, pipelines, quarries, opencast mining, overhead electricity power lines and installations for the storage of petroleum, petrol chemical or chemical products of a certain capacity.

the Convention apply to such projects also. Importantly, the obligations in the Aarhus Convention do not apply to all projects having a potential impact upon the environment. This is clear from the provisions of Article 6 (1) (b) which requires that the parties to the Convention '[s]hall in accordance with its national law, also apply the provisions of this Article to decisions on proposed activities not listed in Annex I which may have a significant effect on the environment. To that end Parties shall determine whether such a proposed activity is subject to these provisions'."

306. Hogan J in **Kimpton Vale**³⁷⁸ had earlier, and similarly, observed that *"The scope of application of the Aarhus Convention is principally governed by article 6(1)(a)"* It may perhaps be that this latter observation is to be understood in the context that Hogan J was considering Article 9(2) (which specifically addresses Article 6) as opposed to Article 9(3).

307. The Annex I list in Aarhus and its extensions are found in Article 6 only. The Article 9 access to justice provisions of Aarhus are not in terms limited by reference to the Aarhus rights to environmental information and public participation (the so-called First and Second Pillars). Articles 9(1) and 9(2) deal with those two issues – Article 9(2) deals specifically with challenges to the legality of any decision, act or omission subject to Article 6. But, as the Aarhus Implementation Guide states³⁷⁹, Article 9(3) is in broader terms – *"applicable to a far broader range of acts and omissions than"* Articles 9(1) and 9(2).³⁸⁰ The Guide states:

*"The rationale behind the access to justice pillar of the Convention is to provide procedures and remedies to members of the public so they can have the rights enshrined in the Convention on access to environmental information and environmental decision-making, as well as national laws relating to the environment, enforced by law. Access to justice helps to create a level playing field for the public seeking to enforce these rights. It also helps to strengthen the Parties' implementation of, and compliance with, the Convention as well as the effective application of national laws relating to the environment. The public's ability to help enforce environmental law adds important resources to government efforts."*³⁸¹

*"While article 9 explicitly refers to the Convention's provisions on access to information in article 4, and public participation in decisions on specific activities in article 6, it also requires that access to justice be ensured for other decisions, acts and omissions related to the environment. The provisions on access to justice essentially apply to all matters of environmental law ..."*³⁸²

(referring to Article 9(3)) "... national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive

³⁷⁸ *Kimpton Vale Limited v An Bord Pleanála* [2013] 2 IR 767

³⁷⁹ p197

³⁸⁰ While allowing greater flexibility of implementation

³⁸¹ p187 – emphases added

³⁸² p187 – emphases added

issue is if the provision in question somehow relates to the environment. Thus, also acts and omissions that may contravene provisions on, among other things, city planning, are covered by paragraph 3, ...”³⁸³

308. If one accepts the premise that, as the Board submits, the Oireachtas intended, in enacting Part 2 of the 2011 Act, no more than implementation of Aarhus Article 9, it seems to follow that the Oireachtas accepted that the Article 6/Annex I criteria and list did not limit the scope of Article 9 – or at least Article 9(3) – as the list in S.4(4) is not so limited. Specifically, S.4(4)(n) listing planning permissions, is not limited by reference to the types of project listed in Annex I or by a criterion that the permitted development require EIA. Indeed, as explained elsewhere in this judgment, even the premise may be doubted. The Oireachtas clearly went beyond Aarhus requirements in Part 2 of the 2011 Act in imposing a general “no-costs” rule not required by Aarhus – which required only a “Not Prohibitively Expensive Rule”. And in **Kimpton Vale**, Hogan J found³⁸⁴ that s.4 of the Act of 2011 went further than required by Aarhus Article 6 in that the costs rules applied to all types of planning and environmental enforcement actions - not simply those whose ambit came within Aarhus Annex 1 and extended to enforcement proceedings designed to ensure compliance with a planning permission. If that can be so as to enforcement why not as to judicial review?

309. Finally, and in deference to the Applicants’ argument that, the material contravention grounds in the present case can be distinguished from those in **Heather Hill #1** on the basis that such grounds are in the present case, but were not in Heather Hill, pleaded by reference to breach of s.9(6) of the 2016 Act – i.e. a “statutory requirement” within the meaning of S.4(1) of the 2011 Act, I will address that issue further. This, the Applicants’ say, takes the case out of the “*classic grounds of judicial review*” exclusion from costs protection. I believe the argument misconceived. Costello J in **Heather Hill #1** explicitly noted that:

“The second group of grounds alleged a material contravention of the Development Plan and, in particular, it was alleged that the decision was contrary to s.9(6) of the PD(H)A 2016.”³⁸⁵

“The disputed grounds related to the development plan and an allegation that the decision involved a material contravention of the zoning objectives of the development bill. He³⁸⁶ held that Heather Hill’s case was that the decision of the Board was reached contrary to s.9(6) of the PD(H)A 2016. This section was “undoubtedly” a provision of national law relating to the environment.”³⁸⁷

“He³⁸⁸ therefore concluded that s.9 of PD(H)A 2016 represents a provision of national environmental law in a field covered by EU environmental law which attracts the

³⁸³ p197

³⁸⁴ §27

³⁸⁵ §23

³⁸⁶ i.e. Simons J, the trial judge

³⁸⁷ §162 - also §29

³⁸⁸ i.e. Simons J, the trial judge

interpretative obligation, identified by the CJEU in North East Pylon, to “proceedings which allege a contravention of section 9”. This means that the disputed grounds (save that relating to landowner consent) are entitled to the benefit of the not prohibitively expensive requirement in Article 9 of the Aarhus Convention. This requires the court, in turn, to interpret s.50B in a manner which gives effect to this interpretative obligation. In addition, it precludes a restrictive interpretation of s.50B as contended for by the Board. The Board appealed in respect of this conclusion also. It submitted that the disputed grounds related to compliance with s.9(6) of the PD(H)A 2016³⁸⁹, i.e. whether the development materially contravened the Galway County Development Plan ...”³⁹⁰

“I agree with the trial judge that s.9 of the PD(H)A 2016 is a measure of national environmental law and that the impugned decision was taken pursuant to s.9(6) of that Act. However, that does not determine the question whether the not prohibitively expensive rules arising under Article 9(3) and (4) of the Aarhus Convention apply to these proceedings. ... The critical distinction is between the basis for the challenge to the decision and the decision under challenge.”³⁹¹

“They also alleged material contravention of land use zoning objectives contrary to s.9(6) of the PD(H)A 2016, in that parts of the development footprint encroach upon lands zoned for open space/recreation and amenity, and constrained land use, and breach “Objective CCF6” (inappropriate development on flood zones). They pleaded that by not following the correct procedures when approving the development, the Board acted ultra vires and contrary to natural and constitutional justice.”³⁹²

“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.”³⁹³

310. I have set out my views as to 2011 Act PCOs at, no doubt excessive, length and, I hope, with a diffidence appropriate to the complexity of the context and of the authorities to date. I have done so against the possibility that my view that I am bound by **Heather Hill #1** as to 2011 Act PCOs might not be upheld. On a similar basis I will address certain evidential aspects of this matter.

2011 Act PCO – Financial Information as to the Applicants

311. One may distinguish for present purposes the questions:

³⁸⁹ Emphasis added

³⁹⁰ §§165 & 166

³⁹¹ §173 & 174

³⁹² §176

³⁹³ §176

- Whether the Applicants can be forced to provide, against their will, information as to their financial circumstances and the funding of the proceedings. In my second judgment delivered the 19th of January 2022 I refused Colbeam such an order.
- Whether the Applicants in seeking 2011 Act PCOs would be wise to choose to provide such information.

312. As recorded above, the affidavits in the PCO motion of Fred Logue, sworn 19 November 2021 and of John O’Connor, sworn 30 November 2021, exhibit correspondence agitating dispute as to the parties’ respective obligations as to costs protection. As to the financial and other circumstances of the Applicants, the likely costs of the proceedings, costs funding arrangements or the strength of the Applicant’s case, generally Mr Logue’s correspondence does not in substance address those matters either – rather, he asserts their irrelevance. More specifically:

- By letter of 5 November 2021 Colbeam asked how the Applicants had funded the proceedings to date and intended to do so into the future and how they proposed to meet any costs order made against them in the proceedings. The letter also enquired as to third party sources of such funding.
- By letter of 12 November 2021 Mr Logue declined to answer those questions.
- By letter of 18 November 2021 Colbeam again sought details of third party funding as relevant, inter alia, to any PCO application. They cite the CJEU³⁹⁴ and **Klohn**³⁹⁵ to the effect that PCOs may be made and the question whether proceedings may be “prohibitively expensive” only on consideration of the
 - “concrete particulars of the case, including the applicants’ means” including the availability of third party funding.
 - financial arrangements between the Applicants and their legal advisors.
- Mr Logue, by letter dated 21 November 2021, agreed that whether proceedings may be “prohibitively expensive” fell to be considered in the context of all costs borne by the Applicant but asserted that assessment of the costs as a whole is not generally required in Ireland as the NPE rule had been implemented by S.50B PDA 2000 and S.3 of the 2011 Act to the effect that the losing applicant need only pay its own costs and not those of the other parties. Accordingly, Mr Logue asserted, the application of the NPE rule in Ireland does not require an assessment /quantification of a party’s costs or the disclosure of the Applicant’s own costs to a notice party. Mr Logue asserted that Klohn did not apply to the present case. He declined to provide the information sought.
- By letter of 25 November 2021 Colbeam asserted various facts which, it said, suggested third party funding of the proceedings and again sought the information as to funding which it had previously sought threatening a motion in that regard.

³⁹⁴ Without identifying specific judgments

³⁹⁵ Klohn v An Bord Pleanála [2021] IESC 51 (Supreme Court, Clarke CJ, 3 August 2021)

313. The only evidence tendered as to the second of the subjects identified in Hunter – that the Applicant should set out “*a broad statement of the claimant's financial situation*” - is that the first Applicant is a “*Chief Executive*” and the second a “*Marketing Manager*”. Greater information would have been preferable. These descriptions do not provide the same assurance of relative impecuniosity as did that of the “*full-time student*” in **McCoy**. Some chief executives would be well able to afford proceedings such as these: but most not. That may be the more so as to marketing executives. In McCoy, the applicant’s financial status was not in dispute, whereas in the present case the correspondence establishes that it is. But there was no application to cross-examine the deponents on this issue for the purpose of this motion. Neither has any evidence addressed the question of contingency arrangements with the Applicants’ legal advisors. Were the Hunter guidelines applicable, a question would arise whether the Applicants had laid the necessary evidential basis for a 2011 Act PCO. However, while I have recorded the correspondence and evidence in this regard in deference to the parties’ engagement on this issue, I have determined, having regard to the view of Murray J in **O’Connor**, that Mr Logue was correct in correspondence in, in effect, asserting the Hunter guidelines irrelevant – save perhaps in rare cases and I do not see that this is one of those rare cases. Accordingly, I do not see that considerations of the financial position of the Applicants or their financial arrangements with their legal advisors rule out a 2011 Act PCO in this case to the extent the 2011 Act may allow a discretion to rule out a PCO on that account rather than imposing a bright-line rule as to applicability or non-applicability of S.3 of the 2011 Act to these proceedings³⁹⁶.

314. I would not refuse 2011 Act PCOs by reference to the means of the Applicants.

2011 PCO - Damage

315. For reasons stated above, I consider it would have been appropriate, but for the judgments in **Abbey Park**³⁹⁷ and **Save Roscam**³⁹⁸, to apply a relatively undemanding approach to the question whether the Applicants’ assertion of satisfaction of the damage criterion of S.4 of the 2011 Act is justified to the criterion of stateability beyond mere assertion identified by Baker J in **O’Connor**.

316. As to the exhibited correspondence:

- Mr Logue by letter of 15 November 2021 does assert that the proceedings are for the purpose of ensuring compliance with statutory requirements in the interest of preventing likely damage to the environment. But he does not elaborate on the likelihood of damage by reference either to the specific grounds on which leave to seek judicial review was granted or to the facts underlying

³⁹⁶ As to which issue, see above.

³⁹⁷ Abbey Park and District Residents Association Baldoyle V An Bord Pleanála, & Ors including The Shoreline Partnership [2022] IEHC 201

³⁹⁸ Save Roscam Peninsula Clg, V An Bord Pleanála, & Ors including Alber Developments Limited [2022] IEHC 202

the proceedings. His primary position was that the damage requirement had been invalidated by the decision of the CJEU in **North East Pylon**³⁹⁹.

- The Board in reply describes Mr Logue’s assertion of the proceedings as being for the purpose of ensuring compliance with statutory requirements in the interest of preventing likely damage to the environment as “mere assertion” and complains more generally that the Applicants have failed to set out their asserted basis for the application of the 2011 Act. Colbeam likewise disputed the alleged likelihood of damage to the environment.
- Mr Logue by letter dated 18 November 2021 again asserts the invalidation of the damage requirement but states that if it does apply it *“would be met by the grounds, for example, the provisions of the development plan seek to protect the environment, the objective for the protection of trees and grounds also relate to the Habitats Directive.”*

317. The Applicants’ first written submissions dispute validity of the damage criterion in S.4(1) of the 2011 Act but otherwise say merely that *“It would in any case be met in the present proceedings.”* Their second submissions dispute the test of damage canvassed by Humphreys J in Enniskerry/PEM but do not address the substance of the damage issue. The Board and Notice Party say there is no evidence of such damage. In oral submissions the Applicants addressed the question of damage to trees and woodland for purposes of ground 8, on which I have held in their favour above. And Counsel for the Applicants disavowed any assertion of particular damage to the enjoyment of the Applicants' households, or property damage or property values and the like as to Grounds 8, 10 and 12 but those grounds are not my present concern.

318. What follows are my views on satisfaction of the environmental damage criterion in this case. I cannot and do not conclude that the Board and DLRCC are “wrong” as to adverse effect or its acceptability if present. It is important to state that for present purpose the Board’s conclusions as to the prospect of damage are not determinative – not least as the premise of the Grounds is that they were not reached in accordance with law. The question of environmental damage must, it seems to me, be considered on the premise that the Ground in question is in law stateable.

Grounds (Summarised)		Environmental Damage? ⁴⁰⁰
1. ⁴⁰¹	Material Contravention of the Development Plan as to provision of open space	It suffices to record, as does the Board’s Inspector ⁴⁰² , the expert view of DLRCC that <ul style="list-style-type: none"> • the scheme <i>“is in contravention of the 25% open space requirement as required under the INST objective”</i> • as to maintaining the open character of the site <i>“given the schemes layout and</i>
2.	Material Contravention of the Development Plan as to Institutional	

³⁹⁹ Case C-470/16 North East Pylon Pressure Campaign Ltd. & Sheehy v An Bord Pleanála & Ors. JUDGMENT OF 15. 3. 2018

⁴⁰⁰ Not applying the Enniskerry/PEM, Abbey Park and Save Roscam criterion of specific and tangible environmental harm.

⁴⁰¹ Note – numerical order of grounds altered for layout purposes

⁴⁰² Inspector’s report p39

Grounds (Summarised)	Environmental Damage? ⁴⁰⁰
<p>Lands and as that designation of the site imposes requirements as to</p> <p>(a) open space</p> <p>(b) maintaining the open character of the lands,</p> <p>(c) residential densities and/or</p> <p>(d) Future Institutional Use/Additional facilities.</p>	<p><i>lack of regard to existing features it fails to accord with RES5 and Section 8.2.3.4(xi) in qualitative terms.”</i></p> <ul style="list-style-type: none"> • <i>“the failure to achieve the required open areas is indicative that the scheme seeks to accommodate a number of residents for which it is not able to provide an adequate level of amenity.”</i> • <i>“The provision of high quality open space is critical in the context of the institutional lands. The planning authority are not satisfied that the current proposal achieves the required standard.”</i> • <i>“the density appears to be in excess of what can be absorbed while delivering adequate levels of amenity for residents.”</i> • <i>“the proposal is not in accordance with the density parameters applicable to lands with the institutional objective.”</i> <p>These grounds appear to me to allege a prospect of environmental damage in the form of “any adverse effect on”⁴⁰³ categories of environment listed in S.4(2) of the 2011 Act being landscape, land, conditions of human life and the built environment and their interaction.</p>
<p>3. The Board acted <i>ultra vires</i> in</p> <ul style="list-style-type: none"> • granting permission without provision for Part V⁴⁰⁴ social housing in breach of s.96 PDA 2000 and s.15 of the 2016 Act. • not rejecting and/or considering rejecting the planning application on the basis of non-compliance with Article 297(2)(h) PDR 2001 and s. 4(1)(a)(iv) of the 2016 Act requiring the application to address Part V. 	<p>I do not consider that this ground satisfies the environmental damage criterion of S.4(1) of the 2011 Act</p>

⁴⁰³ Damage” as defined in s. 4(5) of the 2011 Act

⁴⁰⁴ Part V PDA 2000

Grounds (Summarised)		Environmental Damage? ⁴⁰⁰
	<ul style="list-style-type: none"> considering that such breaches could be justified by invoking S.9(6) of the 2016 Act and S.37(2)(b) PDA 2000 	
4.	<p>Error in justifying, under s.37(2)(b) PDA 2000 and by reference to SPPR3⁴⁰⁵ of the 2018 Building Height Guidelines⁴⁰⁶, material contravention of the Development Plan as to building height - SPPR3 does not apply to the lands.</p>	<ul style="list-style-type: none"> The proposed development provides for apartment blocks up to 7 storeys high. DLRCC considered the height proposal acceptable inter alia on the basis that <i>“On balance it is considered that while the proposal would have a moderate negative impact from certain locations, the proposed heights are not anticipated to have a negative visual impact over the larger area. It is also noted that the separation distances are in excess of 30m to adjacent dwellings, the proposal is not deemed to detrimentally impact the amenity of those dwellings of have an overbearing impact.”</i> Ms Jennings’ submission to the Board §4 addresses “Building Heights”, asserting that the applicable Development Plan Policy recommended heights of 2 storeys and that the proposed heights bear no relationship to surrounding dwellings such that Colbeam had failed to demonstrate absence of detrimental effect on existing character and residential amenity. I am conscious that there are very conflicting and valid views in many quarters on the acceptability or otherwise of building heights significantly greater than surrounding buildings. These differences are, at least in appreciable part, a matter of opinion and taste. The Board and DLRCC clearly consider acceptable the heights of the development as permitted by the Impugned Permission. However it appear to me that the Applicants are entitled to their view that

⁴⁰⁵ Specific Planning Policy Requirement as contemplated in S.28(1C) PDA 2000

⁴⁰⁶ Urban Development and Building Heights: Guidelines for Planning Authorities (2018)

Grounds (Summarised)		Environmental Damage? ⁴⁰⁰
		building height in this case would represent “any adverse effect on” categories of environment listed in S.4(2) of the 2011 Act being conditions of human life, the built environment and landscape.
5.	<p>Alternatively, non-compliance with SPPR3 resulting in</p> <ul style="list-style-type: none"> • Contravention of the sunlight/daylight requirements/criteria of §3.2 of the Height Guidelines and the Apartment Guidelines 2020⁴⁰⁷ and so of S.9(3) of the 2016 Act. • Contravention of the BER <i>Daylight and Sunlight</i> Guidelines⁴⁰⁸ and/or BS 8206-2 <i>Code of Practice for Daylighting</i>, 2008⁴⁰⁹ and/or material errors of fact. 	<ul style="list-style-type: none"> • Essentially, the Applicants assert that an incorrectly low daylight standard of 1.5% was applied where 2% was required. • If the Applicants are correct, it seems likely to follow that the occupants of the intended development will reside in a less daylit environment than standards consider adequate, such that this ground appears to me to imply a prospect of environmental damage in the form of “any adverse effect on” conditions of human life and on the built environment.
6.	<p>Alternatively, contravention of SPPR3 in failing to assess the adequacy of public transport capacity before granting planning permission in material contravention of the Development Plan.</p>	<ul style="list-style-type: none"> • DL RCC raised no objection on this account (it seems given proximity to UCD and available cycle lanes) but also noted that the site was over 1km from high quality public transport. • The Board’s Inspector⁴¹⁰ records observers’ concerns that the site is not well connected to public transport. • The inspector, in contrast, considered the site “highly accessible”. • It does not seem to me that it would be consistent with the aim of environmental protection to consider that such a ground did not imply a prospect of environmental damage when the very premise of the ground is that the issue had not been considered. • Accordingly, this ground seems to me to imply a prospect of environmental damage in the form of “any adverse effect on” conditions of human life. It seems to me that the adequacy of public transport

⁴⁰⁷ Sustainable Urban Housing: Design Guidelines for New Apartments (2020)

⁴⁰⁸ BER Guidelines *Site Layout Planning for Daylight and Sunlight: A Guide to Good Practice* (BR 209)

⁴⁰⁹ As revoked and replaced by BS EN 17037:2018

⁴¹⁰ Inspector’s report p76

Grounds (Summarised)		Environmental Damage? ⁴⁰⁰
		availability in the vicinity of a strategic, hence large, housing development, inevitably affects those conditions for good or ill.
7.	Contravention of S.37(2)(b)(i) PDA 2000 and S.9 of the 2016 Act in failing to identify any or adequate basis for concluding the proposed development was of national and strategic importance.	I do not consider that these grounds 7, 9 & 11 satisfy the environmental damage criterion.
9.	Contravention of S.8(1)(a)(iv)(II) of the 2016 Act - obligation on Colbeam to publish a notice identifying how the proposed development would materially contravene the Development Plan.	
11.	Contravention of Article 297(1) PDR 2001 in that the planning application form failed to accurately identify the land ownership of Roebuck House.	

319. Against the possibility that I have erred in considering myself bound by **Heather Hill #1** to refuse 2011 Act PCOs in respect of the grounds set out above, I have set out my views as to the application to those grounds of the environmental damage requirement set by S.4(1) of the 2011 Act. I have done so in accordance with my views of the scope, extent and interpretation of that damage requirement set out above and on the footing that the view of that requirement stated in **Enniskerry/PEM** was obiter.

320. However, as indicated above, at a late stage in the preparation of this judgment, the judgments in **Abbey Park**⁴¹¹ and **Save Roscam**⁴¹² have come to hand. They apply as ratio the **Enniskerry/PEM** view of the damage requirement – that such that, had I not in any event refused the 2011 Act PCOs in question I would have been obliged by precedent to do so at least insofar as the density aspect of Ground 2 is concerned.

321. However in my view this points up another aspect of the unworkability of the present system. Individual grounds of challenge, such as Ground 2 in this case, often contain “sub-ground”

⁴¹¹ Abbey Park and District Residents Association Baldoyle V An Bord Pleanála, & Ors Including The Shoreline Partnership [2022] IEHC 201

⁴¹² Save Roscam Peninsula Clg, V An Bord Pleanála, & Ors Including Alber Developments Limited [2022] IEHC 202

likely to require further atomisation of the analysis of each ground. That implies the application of at least 3 costs protection regimes and 2 distinct interpretive techniques to each sub-ground, the damage alleged to derive from each sub-ground and in due course after trial an equally atomised analysis of how costs were incurred and/or are to be allocated as between such grounds and sub-grounds. Indeed one suspects that, in reality, the allocation process at that stage will be a far rougher and readier process than the analysis at the PCO stage such that the minute dissection of grounds and sub-grounds will have been illusory to a greater or lesser degree. I note that in **Save Roscam** also costs protection was disputed as to parts of some grounds.

322. I confess to the view that all this involves complexity, effort, resources and time grossly disproportionate to any really useful end it may achieve and productive primarily of delay – and indeed significant additional costs. I agree with the deployment by Humphreys J in **Save Roscam** of MacDuff’s line “*confusion now hath made his masterpiece*” such that he dealt with the motion in that case, and as he put it, “*as best I can*”. I have done likewise. Indeed at present, as between Enniskerry/PEM and Save Roscam no less than 9 questions are pending for reference to the CJEU. I am equally as diffident as Humphreys J, though unable to match his enviable brevity, as to the outcome of this present motion. I also, and respectfully to all concerned, agree with his hope that the Supreme Court can assist by considering such appeals as it considers may enable it to bring clarity to the question of costs protection generally. For what it’s worth, I respectfully suggest that, failing the true solution by way of legislative intervention to provide a single and simple costs protection regime, a view of the full breadth of the costs protection afforded by the 2011 Act as effecting the breadth of Aarhus Article 9 and an interpretation of the damage criterion of S.4 of the 2011 Act in broad terms may facilitate a passably workable approach to providing the predictability to which EU law seeks to afford all litigants as to costs protection.

Inherent Jurisdiction, Order 99 RSC, Part 11 of the Legal Services Regulation Act 2015

323. On the authority of **Village Residents #2**⁴¹³ and **Friends of the Curragh**⁴¹⁴ I have inherent jurisdiction or jurisdiction under Order 99 RSC and/or Part 11 of the Legal Services Regulation Act 2015 to make a PCO in an appropriate case⁴¹⁵. Humphreys J in **North East Pylon #5** has identified this jurisdiction as the means of avoiding, for reasons set out above and where the need arises on the facts, the damage criterion of the 2011 Act. Given the mixed motives of most local resident applicants for judicial review, that means may or may not suffice depending on the view one takes of the “No Private interest” requirement noted in **Friends of the Curragh**⁴¹⁶ and recently, if perhaps

⁴¹³ Village Residents Association Limited v An Bord Pleanála and McDonald's Restaurants of Ireland Limited and Kilkenny Corporation, (No 2) - [2000] 4 IR 321

⁴¹⁴ Friends of the Curragh Environment Limited, v An Bord Pleanála, and The Trustees of the Turf Club, Kildare County Council, Percy Podger and Associates and Geraldine McCann, [2009] 4 IR 451

⁴¹⁵ English law on this issue can be seen in Austin v Miller Argent supra.

⁴¹⁶ Friends of the Curragh Environment Limited, v An Bord Pleanála, and The Trustees of the Turf Club, Kildare County Council, Percy Podger and Associates and Geraldine McCann, [2009] 4 IR 451

diffidently, applied in **Tearfund**⁴¹⁷ in light of English caselaw diluting the requirement.⁴¹⁸ More recently the Northern Irish case of **Obasi**⁴¹⁹ concluded that it was clear from the authorities that having a private interest in the outcome of the case is a factor to be considered, but it is not an absolute bar to the making of a PCO. Nor does a “No Private interest” requirement seem consistent with what Humphreys J described as the “crowdfunding” of environmental protection and decisions such as **Land Securities v Fladgate Fielder**⁴²⁰. The criterion expressed in **Village Residents #2** and **Friends of the Curragh** that “*if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing*” seems no longer applicable in light of **Commission v UK**⁴²¹. And clearly the observation that “*the discretion to make protective costs orders, even in cases involving public interest challenges, should be exercised only in the most exceptional circumstances*” is inapplicable if statutory criteria for a costs protection are satisfied other than a damage criterion where the purposes is to evade that criterion. But as the jurisdiction in question is inherent and derived from common law, presumably it is malleable to the end required.

324. However my refusal of 2011 Act PCOs is not only by reference to its damage criterion but is based primarily on the view that I am bound by the interpretation of Aarhus Article 9 taken by Costello J in **Heather Hill #1**. As that interpretation would also govern exercise of an inherent jurisdiction I consider myself similarly bound in that regard.

Deferral of Decision?

325. It is characteristic – indeed a purpose - of costs protection that an Applicant for judicial review is enabled to know its position as to costs protection at an early stage of the proceedings. Indeed, and radically, a putative applicant may seek a 2011 Act PCO before even commencing proceedings⁴²². As the Applicants observe, in **Commission v Ireland**⁴²³ and **Commission v UK**⁴²⁴ the CJEU emphasised the importance of certainty, clarity and predictability of national law as to costs protection, especially in states where legal costs are high. Ireland is such a state. Deferral of a decision as to costs protection creates uncertainty in the Applicant which tends to degrade the Applicant’s wide access to justice. In **McCoy**⁴²⁵ Hogan J, said:

“Part II of the 2011 Act sought to facilitate access to justice by persons who contended that certain acts or omissions of other parties were illegal and had caused or was likely to cause damage to the environment, a term which was itself generously defined. The way in which this was to be done was to modify the traditional costs rules, as these were thought to inhibit

⁴¹⁷ Tearfund Ltd v Commissioner of Valuation [2020] IEHC 621.

⁴¹⁸ *R (Roszkowski) v Secretary of State for the Home Department* [2017] EWCA Civ 412; *Drummond v Commissioners for Her Majesty’s Revenue and Customs* [2016] UK UT 369 (TCC)

⁴¹⁹ *Obasi v The General Medical Council* [2021] NIQB 58

⁴²⁰ *Land Securities plc and others v Fladgate Fielder (a firm)* - [2010] 1 EGLR 111 §94

⁴²¹ Case C-530/11, *Commission v UK* §50 – citing Case C-260/11 *Edwards and Pallikaropoulos* [2013] ECR §43

⁴²² Though that is a fairly theoretical right in planning judicial review given the short time limits for seeking leave

⁴²³ Case C-424/07

⁴²⁴ Case C-530/11

⁴²⁵ [2015] IECA 28

environmental litigation of this kind. Thus, the protective costs regime is designed to facilitate an early application to court so that the environmental litigant can know in advance whether the litigation can be safely continued from a costs perspective in advance of the resolution of issues, many of which will doubtless be complex and time-consuming.”

And later:

“..... the Court has a jurisdiction to make a final determination regarding a protective costs order at this early stage of the proceedings. Any other conclusion would defeat one of the principal objects of the 2011 Act and would be at odds with the actual language (“...at any time before, or during the course of the proceedings...” of s. 7(1).”

326. While I am not aware that they have yet been settled, the questions to the CJEU provisionally identified in **Enniskerry/PEM** are as follows, albeit edited slightly for exposition:

(i). Does the Interpretive obligation⁴²⁶ whereby, in proceedings where the application of national environmental law 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, apply only within the sphere of EU environmental law.

(ii). Where an applicant challenges a decision that is subject to procedures laid down in EU environmental law, is the challenge to be considered as falling within the sphere of EU environmental law even if the grounds of challenge do not relate to EU environmental law.

(iii). In particular, is a challenge not based on Directive 2001/42 (the SEA⁴²⁷ directive), but that relates to alleged material contravention of an instrument of general application that was subject to strategic environmental assessment, to be considered as a challenge falling within the sphere of EU environmental law.

(iv). Is a challenge to be considered as falling outside the said Interpretive obligation⁴²⁸, either as not being one where the application of national environmental law is in issue or as not within the sphere of EU environmental law, merely because it involves classic judicial review grounds that are not environment-specific but that are raised in the context of a challenge to a development consent or other environmental issue.

⁴²⁶ Set out in Case C-470/16 North East Pylon Pressure Campaign Limited v An Bord Pleanála

⁴²⁷ Strategic environmental assessment

⁴²⁸ Set out in Case C-470/16 North East Pylon Pressure Campaign Limited v An Bord Pleanála set out in Case C-470/16 North East Pylon Pressure Campaign Limited v An Bord Pleanála whereby in proceedings where the application of national environmental law 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

(v⁴²⁹). Does the general EU law principle of legal certainty, as applied in the context of the said Interpretive obligation⁴³⁰, have the effect that the domestic law of a member state should provide rules that are sufficiently certain so that an applicant can know prior to initiating proceedings whether the not-prohibitively-expensive rule applies and, if so, what the maximum amount of the not-prohibitively-expensive costs can be predicted to be in advance.

(vi⁴³¹). In the absence of provision in the domestic law of a member state providing rules that are sufficiently certain so that an applicant can know prior to initiating proceedings whether the not-prohibitively-expensive rule applies and if so what the maximum amount of the not-prohibitively-expensive costs can be predicted to be in advance, does the general EU law principle of legal certainty as applied in the context of the said Interpretive obligation⁴³² have the effect that a domestic court should disapply national procedural rules allowing for any costs to be awarded against applicants in proceedings covered by the not-prohibitively-expensive rule thus providing for no order as to costs if the applicants are unsuccessful.

327. Notably, in **Save Roscam**, Humphreys J has noted that the Board seeks to defer the references to the CJEU in **Enniskerry/PEM** pending domestic appeals in **Heather Hill #1** and **Enniskerry/PEM**. Though whether they will be deferred remains to be seen, that prospect adds to present procedural uncertainty.

328. The questions to the CJEU provisionally identified in **Save Roscam**, additional to those to be referred in **Enniskerry/PEM**, are as follows, albeit edited slightly for exposition and order changed:

- whether the concept of “national law relating to the environment” in art. 9(3) of the Aarhus Convention includes national law relating to sustainable development⁴³³.
- whether art. 9(3) of the Aarhus Convention has the effect that if domestic legislation in a member state implements that provision in relation to specified matters by means of an express legislative rule that there be no order as to costs, leaving all other matters to be dealt with by judicial discretion which is subject to the EU law interpretative obligation that it is to be exercised in accordance with the Aarhus Convention, such discretion should be exercised in that member state along the same lines as the express legislative rule of no order as to costs.

⁴²⁹ Renumbered here

⁴³⁰ Set out in Case C-470/16 North East Pylon Pressure Campaign Limited v An Bord Pleanála whereby, in proceedings where the application of national environmental law 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

⁴³¹ Renumbered here

⁴³² Set out in Case C-470/16 North East Pylon Pressure Campaign Limited v An Bord Pleanála whereby in proceedings where the application of national environmental law 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

⁴³³ Having regard inter alia to the preamble to the Aarhus Convention and to the Rio Declaration on Environment and Development approved by the United Nations Conference on Environment and Development, held at Rio de Janeiro in June 1992, referred to in the preamble to the Aarhus Convention

- if the answer to the next preceding question is in general no, whether art. 9(3) of the Aarhus Convention has the effect that if domestic legislation in a particular member state implements that provision in relation to the prevention of future contraventions of national law relating to the environment by means of an express legislative rule that there be no order as to costs, leaving the remedying of past contraventions of national law relating to the environment to be dealt with by judicial discretion which is subject to the EU law interpretative obligation that it is to be exercised in accordance with the Aarhus Convention, such discretion should be exercised in that member state in relation to the remedying of such past contraventions along the same lines as the express legislative rule of no order as to costs.

329. Colbeam and the Board submit that Humphreys J, by referring questions to the CJEU in **Enniskerry/PEM**, failed to follow the Court of Appeal in **Heather Hill #1** and instead referred questions to the CJEU in effect questioning the Court of Appeal’s decision and so acted in breach of the requirements of stare decisis, and specifically the principle identified in **Minister for Justice v O’Connor**⁴³⁴. Mr O’Connor had submitted that if the Court of Appeal considered itself bound by a Supreme Court decision⁴³⁵ it should refer a question to the CJEU. Ryan P held that would be inappropriate:

*“..... even if this court were minded to take a different view of the issue than that of the Supreme Court. While it is always prudent in these matters to eschew absolute rules, it would not be proper for this court to seek to overturn a Supreme Court decision that was binding otherwise by referring the matter to the Court of Justice in hope of securing a different result. That would be inconsistent with the constitutional structural relationship and the comity of the courts and is not something that this court would be prepared to consider otherwise than in wholly exceptional circumstances.”*⁴³⁶

Hogan J was of the same view. He considered the Court of Appeal bound by the Supreme Court’s decision and said:

*“It is also true that, strictly speaking, this court also enjoys the freedom as a matter of EU law to make an Article 267 TFEU reference, irrespective of any views which the Supreme Court may have expressed on the point however, having regard to the hierarchical system of our legal system and the importance of precedent in that legal system, it would be inappropriate for this court to take a step which might be thought indirectly to impeach the authority of Minister for Justice v Olsson [2011] IESC 1 by making an Article 267 TFEU reference to the Court of Justice.”*⁴³⁷

330. I respectfully decline the invitation to express a view, explicitly or implicitly, on the decision of Humphreys J to refer questions to the CJEU. I need not set my reasons out in detail but principles

⁴³⁴ [2018] 3 IR 1 §26

⁴³⁵ Minister for Justice v Olsson [2011] IESC 1, [2011] 1 IR 384

⁴³⁶ §26

⁴³⁷ §105, 106 & 146

of judicial comity and stare decisis come to mind. Also and, whatever view might be taken by a higher court, respect for the established independence of judges in the exercise of their jurisdiction to refer to the CJEU⁴³⁸ is especially due from a member of the same court.

331. The Board has submitted that a decision on the PCO issue in the present case should be made now *“on the basis of the law as it stands”* and on the basis that the issue of costs will be revisited after the proceedings have been determined. It will then, the Board says, be open to the Applicant to re-ventilate costs protection issues in the light of the law as it stands at that time and once the CJEU’s answers to the questions posed to it and/or Supreme Court decisions in any appeals in **Heather Hill #1** and **Enniskerry/PEM** are to hand⁴³⁹. In citing the legislative imperative to expedition in planning judicial review (S.50A(10) PDA 2000⁴⁴⁰) the Board clearly envisages that the proceedings will continue meanwhile. The prospect of prejudice to Colbeam by reason of delay in effecting a presumptively valid permission can be added to the scales in that regard. Costello J has recently analysed that prospect specifically in this case when dealing with a question of a stay on development pending trial⁴⁴¹.

332. Costs will be visited after these proceedings have been determined. But Hogan J in **McCoy**⁴⁴² says *“Nor can a protective costs order made under s.7 be properly regarded as an interlocutory matter: it is rather a final determination of the issue, subject only to an appeal.”* The “issue” is whether S.3 of the 2011 Act applies to the case. Murray J in **O’Connor** said the same⁴⁴³: *“... an Order that s.3 applies (or indeed an affirmative order that it does not apply) made on foot of an application under s.7 is a final determination of the issue subject only to appeal ...”*.⁴⁴⁴ So the possibility of an interim or provisional PCO does not arise. Even if it did and a PCO were granted it is difficult to see that it could serve the function of providing an applicant for judicial review with the necessary reassurance. If an interim or provisional PCO were refused the Applicant might take another bite at the cherry after trial but, as I say, the caselaw holds that possibility of an interim or provisional PCO does not arise.

333. However, and importantly, Murray J did in one sense allow what the Board proposes: *“the Court may decline to make an order under the provision but may leave it open to the applicant to agitate his contention that s.3 does apply to the case at a later point in time. This follows from the extent of the discretion vested by s.7(2).”*⁴⁴⁵ He said, *“the first and critical question in determining whether to grant a protective costs order under s.7 is whether the Court is confident based on the information before it at the time the application is made, that it can (a) determine whether the*

⁴³⁸ Data Protection Commissioner v Facebook Ireland Ltd [2019] IESC 46 (Supreme Court, Clarke CJ, 31 May 2019) §8.1 – “..... it is not appropriate for this Court to interfere with the dialogue between the High Court and the CJEU.”

⁴³⁹ We now add Save Roscam to that list.

⁴⁴⁰ “The Court shall, in determining an application for *section 50* leave or an application for judicial review on foot of such leave, act as expeditiously as possible consistent with the administration of justice.”

⁴⁴¹ Jennings v An Bord Pleanála et al & Colbeam Ltd [2022] IECA 100

⁴⁴² [2015] IECA 28

⁴⁴³ Citing McCoy v Shillelagh Quarries Ltd. §§39 and 54

⁴⁴⁴ §52

⁴⁴⁵ §52

proceedings fall within s.3 and (b) be sure that nothing is likely to happen after the making of such an order that will affect the answer to that question”.

334. Given the profusion of questions to the CJEU and prospective domestic appeals which I have noted, and the general uncertainty of the law in this area I do not consider that I can be “*sure that nothing is likely to happen after the making of such an order that will affect the answer to that question*”. Indeed it looks very likely that some such thing, or things, will happen.

335. As I have stated, if I were to decide the issue now, and for reasons set out above, I would consider myself bound by **Heather Hill #1** to refuse 2011 Act PCOs. However, it seems clear that, whether by way of answers from the CJEU or decisions by the Supreme Court, further elucidation of the relevant principles is likely before a final costs order is made in these proceedings. I consider that the Applicants should be enabled to benefit from such developments in the law if they assist the Applicants.

336. I have considered **Cilfit**⁴⁴⁶ at the Applicants’ request. It requires reference to the CJEU where determination of a question of EU law is necessary to determination of a matter before a court from whose decision there is no appeal. This court, as to this motion, is not such a court. In any event I do not think that adding to the list of questions referred to the CJEU is likely to be useful.

337. Yet I must bear in mind the statutory requirement of expedition in planning judicial reviews and the possibility of significant prejudice to Colbeam if the proceedings are delayed significantly. I must also bear in mind that, as I have found, precedent binding on me would deprive the Applicants of costs protection – though I am respectfully unclear that it should do so.

338. On balance, and conscious that there is no really satisfactory solution (as is often the case at interlocutory stage in various types of motion), I consider it best in all the circumstances to exercise the jurisdiction, identified by Murray J in **O’Connor**, to defer to the trial of the action making any orders as to 2011 Act costs protection, with liberty to any party to apply to resurrect the issue before trial in the event that decisions of the Supreme Court or the CJEU clarify matters. On a similar basis, I will defer decision on costs protection pursuant to the inherent jurisdiction of the court, Order 99 RSC and/or Part 11 of the Legal Services Regulation Act 2015.

339. I confess to no little sense of disappointment that such a lengthy judgment as this has resulted in such an inconclusive result. However I hope I will be forgiven in the circumstances of legal uncertainty at present attending these matters and hope, with considerable diffidence, that the analysis set out above may contribute to dispelling it or, if not, to at least describing it.

⁴⁴⁶CILFIT Srl and Lanificio di Gavardo SpA v Ministry of Health - Case 283/81. Judgment 6 October 1982

340. For completeness I should note that the Applicants also in their most recent submissions asked me to make a reference to the CJEU on a basis unclear to me and as arising from my earlier judgments, in particular as to undertakings in damages. It seems to be a request to refer questions arising in the context of the prospect that the Developer may yet apply to vary the position as to the stay on works and as to the significance of an undertaking in damages in this regard. I do not see that those issues arise at present and any such reference would be premature.

Orders

341. In accordance with the foregoing, I will in due course make orders as follows:

- Making costs protection orders as to Grounds 8, 10 and 12.
- Other than as to Grounds 8, 10 and 12, refusing costs protection orders under S.50B PDA 2000.
- Other than as to Grounds 8, 10 and 12, deferring to the trial of the action the question whether the Applicants are entitled to costs protection under the 2011 Act, the inherent jurisdiction of the court, Order 99 RSC and/or Part 11 of the Legal Services Regulation Act 2015.
- Directing that the action proceed to trial in the ordinary way.

342. I will defer making final orders for the present and list the matter for mention only on the 16th of May 2022 lest the parties wish to make submissions in that regard and submissions to the costs of the motions to date. In that event I will list the matter thereafter unless it can be briefly completed on the 16th of May 2022.

David Holland
3 May 2022