THE HIGH COURT

JUDICIAL REVIEW

2019 No. 20 J.R.

BETWEEN

HEATHER HILL MANAGEMENT COMPANY CLG

GABRIEL MCGOLDRICK

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

BURKEWAY HOMES LTD

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 29 March 2019.

INTRODUCTION

1. This judgment is given in respect of an application for a pre-emptive or protective costs order. The within judicial review proceedings seek to challenge a decision of An Bord Pleanála to grant development consent for a large-scale residential development project. The Applicants for judicial review contend that the proceedings attract the special costs rules governing environmental litigation under section 50B of the Planning and Development Act 2000 (as most recently amended in 2018) and/or under Part 2 of the Environment (Miscellaneous Provisions) Act 2011.

2. An Bord Pleanála and the Developer submit that the special costs rules only apply to certain of the grounds advanced by the Applicants. More specifically, it is submitted that the special costs rules only apply to the grounds alleging a breach of (i) the Habitats Directive; and (ii) the EU Floods Directive. An Bord Pleanála and the Developer cite the judgment of the CJEU in Case C 470/16 *North East Pylon* as authority for the proposition that legal costs can be apportioned as between the various grounds of challenge, with different costs rules applying to different aspects of the case.

3. For the reasons set out herein, I am satisfied that the special costs rules under section 50B of the PDA 2000 apply to the entirety of the proceedings, i.e. to all grounds of challenge. Whereas An Bord Pleanála and the Developer are correct in saying that EU law does, in principle, allow a distinction to be drawn between the costs of various grounds in legal proceedings, this distinction is not, in fact, provided for under Irish domestic legislation. Rather, the criteria triggering the special costs rules under Irish domestic legislation are directed to the nature of the *decision* being challenged in the judicial review proceedings. Where, as in this case, the impugned decision is made pursuant to a statutory provision that gives effect to any one of the following four EU Directives, namely (i) the public participation provisions of the EIA Directive; (ii) the Strategic Environmental Assessment Directive; (iii) the Industrial Emissions Directive; or (iv) article 6 (3) or (4) of the Habitats Directive, then the special costs rules apply.

FACTUAL BACKGROUND

4. The within proceedings seek to challenge a decision of An Bord Pleanála to grant development consent for a strategic housing development at Trusky East, Bearna, Co. Galway. The proposed development will consist of the demolition of existing outbuildings and the construction of 197 new dwellings (houses and apartments).

5. The decision to grant planning permission is dated 16 November 2018, and bears the An Bord Pleanála reference "ABP-302216-18". The decision to grant planning permission was made pursuant to section 9 of the Planning and Development (Housing) and Residential Tenancies Act 2016 ("*the PD(H)A 2016*"). In brief, the PD(H)A 2016 introduces, *on a temporary basis*, a special streamlined procedure for development consent applications in respect of "strategic housing development" as defined. This procedure is distinct from the streamlined procedure introduced for other types of strategic infrastructure development under the Planning and Development (Strategic Infrastructure) Act 2006. The procedure under the PD(H)A 2016 is less obviously integrated into the Planning and Development Act 2000. A strategic housing development planning permission is distinct from either (i) a conventional planning permission under section 34 of the PDA 2000, or (ii) a strategic infrastructure development permission under section 37G of the PDA 2000. Presumably, this is because the procedure under the 2016 Act is intended as a temporary measure only, and by keeping it in parallel to the PDA 2000, it can be more readily phased out.

6. As we shall see presently, the fact that the decision to grant planning permission was made pursuant to section 9 of PD(H)A 2016 distinguishes this case from other High Court judgments decided subsequent to the judgment of the CJEU in Case C 470/16 *North East Pylon.*

7. As appears from An Bord Pleanála's decision, the board records that it completed an environmental impact assessment in relation to the proposed development, taking into account the nature, scale and extent of the proposed development, and concluded that the effects on the environment of the proposed development by itself and in combination with other development in the vicinity would be acceptable.

8. An Bord Pleanála also records that it completed a screening for appropriate assessment for the purposes of the Habitats Directive. In this regard, the board states that it accepted and adopted the screening determination carried out in the inspector's report. The board records that it was satisfied that the proposed development, either individually or in combination with other planned projects, would not be likely to have a significant effect on the relevant European sites in view of the sites' conservation objectives, and that a stage 2 appropriate assessment was not therefore required.

9. The within proceedings were instituted on 14 January 2019. In accordance with Practice Direction HC74, the proceedings were listed before the presiding judge in the Strategic Infrastructure Developments List, Mr Justice Barniville. Leave to apply for judicial review was granted on 17 January 2019.

GROUNDS OF CHALLENGE
10. In order to better understand the arguments advanced by An Bord Pleanála and the Developer in opposition to the application for a protective costs order, it is necessary to rehearse briefly the principal grounds of challenge advanced by the Applicants.

11. For the purpose of this exercise, it is proposed to group the grounds of challenge under broad headings. Whereas it will be necessary at the substantive hearing of the judicial review application for the trial judge to analyse the *individual* grounds of challenge in detail, it is sufficient for present purposes to adopt this thematic approach.

12. The first group of grounds raise issues under the Habitats Directive and the domestic law provisions transposing that Directive. It is alleged that the screening exercise conducted by An Bord Pleanála was fundamentally flawed. In particular, it is alleged that the documentation furnished by the Developer was itself fundamentally deficient, in consequence whereof it is said that same was not capable of providing An Bord Pleanála with sufficient information to enable it to conduct a lawful screening exercise and/or to justify the conclusions drawn from the screening exercise.

13. It is further alleged that An Bord Pleanála and its inspector erred in law in misinterpreting and/or misapplying the provisions of domestic legislation and/or article 6(3) of the Habitats Directive.

14. There is a related tranche of grounds which allege that mitigation measures were unlawfully taken into account for the purposes of the screening exercise. The recent judgment of the CJEU in C 323/17 *People Over Wind* is cited in this regard.

15. The second group of grounds allege a material contravention of the development plan. Relevantly, it is pleaded that the decision is contrary to section 9(6) of the PD(H)A 2016. At a later point in the Statement of Grounds it is alleged that there was a material contravention of the land use zoning objectives contrary to section 9(6) of the PD(H)A 2016.

16. The third group of grounds relate to an alleged circumvention of Ministerial Guidelines issued in 2009, namely the "Planning System and Flood Risk Management Guidelines for Planning Authorities". It is also alleged, at paragraph E.50 of the Statement of Grounds, that the board's decision is contrary to the provisions of the EU Floods Directive, and, in particular, article 7 thereof.

17. The final group of grounds relate to an allegation that the consent of the landowner to the making of the application for planning permission has not been properly obtained.

18. The Statement of Grounds also includes a prayer for an order applying section 50B of the Planning and Development Act 2000 to the proceedings and/or an order applying section 3 of the Environment (Miscellaneous Provisions) Act 2011 (as amended) to the proceedings. These prayers were subsequently followed up by the issuing of a Notice of Motion.

APPLICATION FOR PROTECTIVE COSTS ORDER
19. By Notice of Motion dated 13 February 2019, the Applicants seek the following relief.

> 1. An Order that section 50B of the Planning and Development Act 2000, as amended, applies to the within proceedings;
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> 2. An Order pursuant to section 7 of the Environment (Miscellaneous Provisions) Act 2011, as amended, that section 3 and 4 of the said Act apply to the within proceedings;
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> 3. An Order, pursuant to Order 99 of the Rules of the Superior Court 1986, as amended, and/or pursuant to the inherent jurisdiction of the Court, limiting the sum to which the Applicants and/or each of them, shall be liable in the event that the Applicants and/or each of them, or unsuccessful in obtaining relief in the within proceedings.

20. The application is grounded on an affidavit sworn by Mr Gabriel McGoldrick, the second named applicant. This affidavit exhibits an exchange of correspondence between the Applicants' solicitor and the solicitors acting on behalf of An Bord Pleanála and the Developer, respectively.

21. Following an exchange of written legal submissions, the matter came on for hearing before me on 21 February 2019 and 8 March 2019.

JURISDICTION TO MAKE PRE-EMPTIVE OR PROTECTIVE COSTS ORDER
22. Order 99, rule 5 of the Rules of the Superior Courts provides that costs may be dealt with by the court at any stage of the proceedings. (This is subject to special provision in the case of interlocutory costs). The High Court (Laffoy J.) in *Village Residents Association Ltd. v. An Bord Pleanála* [2000] 4 I.R. 321 accepted that this rule would, in principle, allow for the making of a pre-emptive costs order. On the facts of that case, however, an order was refused.

23. Section 7 of the Environment (Miscellaneous Provisions) Act 2011 provides that a determination as to whether the costs rules *under that Act* apply to proceedings can be made at any time. See also *McCoy v. Shilleagh Quarries Ltd*. [2015] IECA 28, [2015] 1 I.R. 627.

POSITION OF APPLICANTS
24. Counsel on behalf of the Applicants, Mr Neil Steen, SC, submits that the entire proceedings come within section 50B of the PDA 2000. The impugned decision was made pursuant to section 9 of the PD(H)A 2016, and that section gives effect to the EIA Directive and the Habitats Directive. It is submitted that it is incorrect for An Bord Pleanála to suggest that the requirement for EIA and AA have merely been *grafted* onto the existing legislation. The amendments have changed the procedures and the mechanisms by which consent applications are now decided. Counsel further submits that EU law cannot be disentangled from national law, and relies, in particular, on the provisions of section 1A of the PDA 2000 which identifies the EU Directives to which the PDA 2000 gives effect.

25. Counsel also relies on the interpretative obligation in respect of article 9(3) of the Aarhus Convention. It is submitted that article 9(3) is capable of applying to both national law and EU law, and it follows that it must be given a uniform interpretation for both. Counsel cites paragraph [50] of the judgment in Case C 470/16 *North East Pylon*, and paragraph [32] in *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála (No. 5)* [2018] IEHC 662.

POSITION OF AN BORD PLEANÁLA AND DEVELOPER
26. In order to avoid unnecessary duplication, it is proposed, at this stage, simply to provide a summary of the position adopted by An Bord Pleanála and of the submissions in support of that position. I will return to consider the detail of the board's very helpful written and oral submission as part of the discussion under the next heading below.

27. In brief outline, the position adopted by An Bord Pleanála is that the Applicants are only entitled to costs protection in respect of (i) those grounds of challenge which allege a breach of the Habitats Directive, and (ii) the single ground in respect of the EU Floods Directive (an objection is made that this ground is not properly pleaded). Put otherwise, it is submitted that the only grounds which attract costs protection are those set out at paragraphs E.24 to E.35, and paragraph E.50, of the Statement of Grounds.

28. An Bord Pleanála submits that, following on from the judgment of the CJEU in Case C 470/16 *North East Pylon*, the entitlement of an applicant to maintain proceedings at a cost that is not prohibitively expensive is confined to (i) grounds which allege an infringement of any one of the four EU Directives identified under section 50B, or (ii) grounds which allege a contravention of the provisions of national law relating to the environment within the field of EU environmental law. An Bord Pleanála places particular emphasis on three judgments of the High Court which postdate the judgment of the CJEU in *North East Pylon*, *namely SC SYM Fotovoltaic Energy SRL v. Mayo County Council (No. 3)* [2018] IEHC 245 ("*Fotovoltaic*"); *Merriman v. Fingal County Council*, unreported, High Court, 17 May 2018 ("*Merriman*"); and *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála (No. 5)* [2018] IEHC 662 ("*North East Pylon No. 5*"). It is said that, in each of these judgments, costs were apportioned by reference to the grounds of challenge. More generally, An Bord Pleanála cites the earlier judgment of the Supreme Court in *Conway v. Ireland* [2017] 1 I.R. 53.

29. The Developer has adopted a similar position to that of An Bord Pleanála. The Developer has also filed written legal submissions, and these were supplemented by a helpful oral submission by Jarlath Fitzsimons, SC.

DISCUSSION

30. There is no doubt but that the genesis of the requirement that certain environmental litigation attracts special costs rules is to be found in EU law and, ultimately, can be traced back to the Aarhus Convention. For this reason, much of the content of the written and oral submissions of the parties was, understandably, directed to the judgment of the CJEU in Case C 470/16 *North East Pylon*. It is important, however, to emphasise that the costs rules under neither the Aarhus Convention nor the EU Directives which implement same have "direct effect" in the domestic legal order. Rather, same give rise to an interpretive obligation on the part of the national court. This interpretive obligation is subject to the *contra legem* principle. See, generally, the judgment of the Supreme Court in *Conway v. Ireland* [2017] IESC 13; [2017] 1 I.R. 53.

31. Accordingly, the starting point for the analysis of whether the Applicants are entitled to a protective costs order must be the relevant provisions of domestic law in relation to costs. Whereas domestic law must, of course, be interpreted insofar as is possible in the light of EU law and the Aarhus Convention, it is still necessary to undertake the task of statutory interpretation. It is not permissible simply to ignore the language which the Oireachtas has enacted, and to proceed immediately to a consideration of the case law instead. This is especially so where the legislation has been amended since the delivery of the judgment of the CJEU in Case C 470/16 *North East Pylon*, and since the delivery of two of the three High Court judgments relied upon by An Bord Pleanála.

32. The provisions of Section 50B (as most recently amended in October 2018) are set out in full as an Appendix to this judgment. Insofar as relevant to these proceedings, the key provisions are 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,
>
> […]
>
> pursuant to a statutory provision that gives effect to—
>
> […]
>
> (IV) paragraph 3 or 4 of Article 6 of the Habitats Directive;
>
> (2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986) and subject to subsections (2A), (3) and (4), in proceedings to which this section applies, each party to the proceedings (including any notice party) shall bear its own costs.
>
> (2A) The costs of 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."

33. It is clear from the structure of section 50B (as amended) that the qualifying criteria for costs protection under the section are directed to the type of decision or action which is the subject of the judicial review proceedings. The costs protection then applies to the "proceedings". There is no reference whatsoever in section 50B to the "grounds" of challenge.

34. In the present case, the decision under review is a decision to grant development consent pursuant to the provisions of section 9 of the PD(H)A 2016. Section 9 imposes obligations upon An Bord Pleanála in respect of both the EIA Directive and the Habitats Directive. More specifically, section 9(1)(b) obliges An Bord Pleanála to consider, where required, an environmental impact assessment report ("*EIAR*") or Natura impact statement ("*NIS*") or both that report and that statement, as the case may be, submitted to the board pursuant to section 8(2). Section 9(2) requires An Bord Pleanála, in considering the likely consequences for proper planning and sustainable development, to have regard to *inter alia* whether the area or part of the area is a European site, or whether the proposed development would have an effect on a European site.

35. It follows that, on its natural and ordinary meaning, section 9 of the PD(H)A 2016 is a "statutory provision" that gives effect to *inter alia* paragraph 3 of article 6 of the Habitats Directive. Section 50B is triggered where the statutory provision pursuant to which the impugned decision is made gives effect to any *one* of the four EU Directives specified. It is thus sufficient to attract the special costs rules that section 9 gives effect to article 6(3) of the Habitats Directive.

36. Leading counsel on behalf of An Bord Pleanála, Nuala Butler, SC, submits that this is the incorrect approach to take to section 50B. An Bord Pleanála's principal submission is that the judgment in Case C-470/16 *North East Pylon* expressly allows a Member State to apportion costs as between different aspects of legal proceedings. The board relies, in particular, on the following passages from the judgment of the CJEU at [42] to [44].

> "Thus, since the EU legislature intended simply to transpose into EU law the requirement that certain challenges not be prohibitively expensive, as defined in Article 9(2) and (4) of the Aarhus Convention, any interpretation of that requirement, within the meaning of Directive 2011/92, which extended its application beyond challenges brought against decisions, acts or omissions relating to the public participation process defined by that directive would exceed the legislature's intent.
>
> Where, as is the case of the leave application which led to the main proceedings concerning the determination of costs, a challenge brought against a process covered by Directive 2011/92 combines legal submissions concerning the rules on public participation with arguments of a different nature, it is for the national court to distinguish — on a fair and equitable basis and in accordance with the applicable national procedural rules — between the costs relating to each of the two types of arguments, so as to ensure that the requirement that costs not be prohibitive is applied to the part of the challenge based on the rules on public participation.
>
> It follows from the foregoing that the answer to the second question is that, where an applicant raises both pleas alleging infringement of the rules on public participation in decision-making in environmental matters and pleas alleging infringement of other rules, the requirement that certain judicial procedures not be prohibitively expensive laid down in Article 11(4) of Directive 2011/92 applies only to the costs relating to the part of the challenge alleging infringement of the rules on public participation."

37. An Bord Pleanála's submission is correct insofar as it goes. Certainly, it would have been open in principle to Ireland to transpose article 11 of the EIA Directive by confining costs protection to the costs associated with individual *grounds* which allege an infringement of the public participation provisions of the EIA Directive. (The position under the Aarhus Convention is addressed separately below, at paragraph 84 *et seq*.). Of course, it does not necessarily follow from the fact that a Member State has *discretion* to transpose the EIA Directive by a particular method that the Irish State has actually chosen that method. This can only be determined by reference to the statutory language employed under section 50B.

38. As appears from the passages from the judgment in Case C 470/16 *North East Pylon* cited above, the CJEU refer to "arguments" or "pleas" alleging infringement of the rules on public participation. These terms equate to what are described under domestic law as the "grounds" for judicial review. Crucially, there is nothing in the statutory language employed under section 50B which restricts the benefit of the special costs rules to prescribed categories of grounds. Indeed, there is no reference whatsoever to "grounds" in section 50B. Rather, section 50B refers to "proceedings" *simpliciter*.

39. The omission of any reference to the grounds of challenge under section 50B cannot be ignored in interpreting the provisions. This is especially so given that the immediately preceding section, section 50A, expressly refers to "grounds". More specifically, section 50A(3)(a) provides that the High Court shall not grant section 50 leave unless it is satisfied *inter alia* that there are "substantial grounds" for contending that the decision or act concerned is invalid or ought to be quashed. Section 50A(5) provides that no "grounds" shall be relied upon in the application for judicial review other than those determined by the court to be substantial under subsection (3)(a). Had the Oireachtas intended to impose different costs rules in respect of different categories of grounds with the same "proceedings", then the term "grounds" would have been carried forward into section 50B.

40. I am satisfied, therefore, that the special costs rules apply to all of the costs of proceedings which seek to question the validity of a decision made pursuant to a statutory provision—such as section 9 of the PD(H)A 2016—which gives effect to article 6(3) of the Habitats Directive.

PREVIOUS CASE LAW

41. An Bord Pleanála contends that the above approach to the interpretation of section 50B would be inconsistent with the previous case law, especially the three High Court judgments referenced at paragraph 28 above, namely, *Fotovoltaic; Merriman*; and *North East Pylon No 5.* As explained presently, I am satisfied that there is no such inconsistency.

42. Before turning to consider the three most recent judgments, it may be helpful to refer to some of the early case law in respect of section 50B. That section was inserted into the PDA 2000 by the Planning and Development (Amendment) Act 2010. The first judgment to address the section is that in *JC Savage Supermarket Ltd v. An Bord Pleanála* [2011] IEHC 488 ("*JC Savage*"). This judgment was delivered in November 2011, that is, prior to the Irish State's ratification of the Aarhus Convention in June 2012. The Aarhus Convention was not relied upon by the parties in *JC Savage*, and there is no reference to same in the judgment.

43. The proposed development consisted of what was described as a "discount food store" to be operated by the retailer Lidl. Crucially, it was accepted by all parties that the proposed development did not constitute a prescribed project for the purposes of the EIA Directive. (The planning application indicated that the store would have a gross floor area of 1,666 square metres, a fraction of the mandatory threshold for EIA, 10,000 square metres). Instead, the grounds of challenge related primarily to the retail impact of the proposed development.

44. The decision to grant planning permission had been made pursuant to the provisions of section 34 of the PDA 2000. This section regulates what might be described as conventional planning permissions, as opposed to strategic infrastructure development which is regulated by way of permission under section 37G, or strategic housing development which is governed by the PD(H)A 2016.

45. The principal issue before the High Court in *JC Savage* was whether the version of section 50B then applicable should be interpreted as applying to *all* judicial review proceedings under the planning legislation. In contrast to the 2018 version of section 50B, the original version referred to a decision made pursuant to a "law of the State" which gives effect to what were then three EU Directives. The applicant in *JC Savage* had sought to argue that the entirety of the PDA 2000 was a "law of the State" which gave effect to the EIA Directive, and that, accordingly, all decisions made pursuant to the planning legislation were subject to section 50B. Unsurprisingly, the High Court (Charleton J.) rejected this argument.

46. The *ratio decidendi* of the judgment is to be found at paragraphs 4.0 and 4.1 as follows.

> "The legislative history of s. 50B includes the prior forms of s. 50 of the Act of 2000 and the amendments thereto before that new section was introduced and the decision of the European Court of Justice of 16th July 2009 in case C-427/07, *Commission v Ireland*. Nothing in that legislative history shows any intention by the Oireachtas to provide that all planning cases were to become the exception to the ordinary rules as to costs which apply to every kind of judicial review and to every other form of litigation before the courts. The immediate spur to legislative action was the decision of the European Court of Justice in case C-427/07. Nothing in the judgment would have precipitated the Oireachtas into an intention to change the rules as to the award of costs beyond removing the ordinary discretion as to costs from the trial

> judge in one particular type of case. Specified, instead, was litigation that was concerned with the subject matter set out in s. 50B (1) (a) in three sub-paragraphs: environmental assessment cases, development plans which included projects that could change the nature of a local environment, and projects which required an integrated pollution prevention and control licence. By expressing these three, the Oireachtas was not inevitably to be construed as excluding litigation concerned with anything else. Rather, the new default rule set out in section 50B (2) that each party bear its own costs is expressed solely in the context of a challenge under any 'law of the State that gives effect to' the three specified categories: these three and no more. There is nothing in the obligations of Ireland under European law which would have demanded a wholesale change on the rules as to judicial discretion in costs in planning cases.
>
> The circumstances whereby the State by legislation grants rights beyond those required in a Directive are rare indeed. Rather, experience indicates that the default approach of the Oireachtas seems to be 'thus far and no further'. There can be exceptions, but where there are those exceptions same will emerge clearly on a comparison of national legislation and the precipitating European Obligation. Further, the ordinary words of the section make it clear that only three categories of case are to be covered by the new default costs rule. I cannot do violence to the intention of the legislature. Any such interference would breach the separation of powers between the judicial and legislative branches of government. The intention of the Oireachtas is clear from the plain wording of s. 50B and the context reinforces the meaning in the same way. The new rule is an exception. The default provision by special enactment applicable to defined categories of planning cases is that each party bear its own costs but only in such cases. That special rule may exceptionally be overcome through the abuse by an applicant, or notice party supporting an applicant, of litigation as set out in s. 50B (3). Another exception set out in s. 50B (4) provides for the continuance of the rule that a losing party may be awarded some portion of their costs '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'."

47. As appears, the finding of the court is that the then version of section 50B did not apply to projects which were not subject to the EIA Directive. The High Court was not asked to decide—and did not decide—the *separate* question as to whether the costs of proceedings might have to be apportioned between the EIA and non-EIA grounds.

48. It should also be noted that *JC Savage* was decided by reference to the original version of section 50B. The section was subsequently amended by the Environment (Miscellaneous Provisions) Act 2011. The amendments resulted in a costs regime which, in some respects at least, is *more generous* than that required by EU law. In particular, an applicant not only has costs protection if unsuccessful, an applicant may actually be awarded costs to the extent that the applicant succeeds in obtaining relief. Any rule of thumb to the effect that the Irish State should be assumed to have adopted a minimalist approach to the transposition of the costs rules no longer holds good.

49. The arguments of the parties in *JC Savage* were directed to the interpretation of the phrase "law of the State" which gives effect to the then three EU Directives specified. This aspect of the judgment was considered in some detail by the High Court (Hogan J.) in *Kimpton Vale Ltd. v. An Bord Pleanála* [2013] IEHC 442; [2013] 2 I.R. 767. Hogan J. summarised the alternative interpretation of the phrase "law of the State" as follows.

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

50. Ultimately, however, Hogan J. chose to respect the principle of precedent by following the judgment in *JC Savage*.

51. The legal position has since been clarified by a further amendment introduced to section 50B by section 29 of the Planning and Development (Amendment) Act 2018. The qualifying words under section 50B(1) have changed from a "law of the State" to a "statutory provision" that gives effect to the specified EU Directives. The term "statutory provision" is defined under section 50B(6) as meaning a provision of an enactment or instrument under an enactment. The effect of this amendment is to remove any argument that it is sufficient to attract the special costs rules that the *parent Act* is one which gives effect to the specified EU Directives. Instead, the focus is on the individual statutory provisions.

52. The question of the apportionment of costs as between different grounds of challenge did not arise for consideration until 2014. The High Court (Herbert J.) addressed the issue in *McCallig v. An Bord Pleanála (No. 2)* [2014] IEHC 353. The issue is dealt with as follows at paragraph [44].

> "In my judgment 'proceedings' as used in s. 50B(1) only refers to that part of judicial review proceedings which challenge a decision made or action taken or a failure to take action pursuant to one or more of the three categories therein specified. 'Proceedings' is not defined in the Act of 2010, in the Planning and Development Act 2000, or in the Interpretation Act 2005. It is not a term of legal art and where undefined its meaning falls to be established by reference to the context in which it is used, (see *Minister for Justice v. Information Commissioner* [2001] 3 I.R. 43 at 45: *Littaur v. Steggles Palmer* [1986] 1 W.L.R. 287 at 293 A-E). In my judgment it cannot be considered that the legislature intended so radical an alteration to the law and practice as to costs as to provide that costs in every judicial review application in any planning and development matter, regardless of how many or how significant the other issues raised in the proceedings may be, must be determined by reference only to the fact that an environmental issue falling within any of the three defined legal categories is raised in the proceedings. Such a fundamental change in the law and practice as to awarding costs is not necessary in order to comply with the provisions of the Directive. It would encourage a proliferation of judicial review applications. Litigants would undoubtedly resort to joining or non-joining purely planning issues and environmental issues in the same proceedings so as to avoid or to take advantage of the provisions of s. 50B(2). This is scarcely something which the legislature would have intended to encourage."

53. The judgment in *McCallig* is unsatisfactory in a number of respects. First, Herbert J. adopted an artificial interpretation of the term "proceedings". In effect, the term is treated as if it meant "grounds for judicial review". For the reasons set out in more detail at

paragraphs 38 and 39 above, this interpretation is not supported by a textual analysis of sections 50A and 50B.

54. Secondly, the judgment takes as its starting point an *assumption* as to what the legislative intent would be. There is little, if any, analysis of the statutory language. Moreover, as explained at paragraph 48 above, the amendments since introduced under the Environment (Miscellaneous Provisions) Act 2011 have resulted in a costs regime which, in some respects at least, is more *generous* than that required by EU law.

55. Thirdly, the value of *McCallig* as a precedent is undermined by the fact that on the central issue in the judgment, namely whether the amendments introduced by the Environment (Miscellaneous Provisions) Act 2011 applied to proceedings which had been instituted prior to the commencement date, the judgment appears to be inconsistent with the subsequent judgment of the CJEU in Case C-167/17 *Klohn*.

56. Finally, the judgment in *McCallig* appears to have been decided without proper weight being given to the interpretative obligation imposed on a national court. There is only the briefest reference to the landmark judgment in Case C 240/09 *Brown Bear I*. It seems, therefore, as if *McCallig* may have been decided *per incuriam*.

57. For all of these reasons, then, I do not think that the judgment in *McCallig* continues to represent good law. Accordingly, I respectfully decline to follow same.

58. I turn now to consider the three very recent High Court judgments relied upon by An Bord Pleanála, all of which were decided by reference to the judgment in Case C 470/16 *North East Pylon.*

59. Each of these cases is distinguishable by reference to the fact that the decision under review was made under a different "statutory provision" than is in issue in the present proceedings. As explained earlier, the qualifying criteria for determining whether the special costs rules under section 50B apply relate to the type of decision under review. On the facts of the present case, the impugned decision is a decision to grant development consent for a strategic housing development pursuant to section 9 of the PD(H)A 2016. Accordingly, the proceedings benefit from costs protection.

60. There is no inconsistency between this approach and that adopted by Barniville J. in *Fotovoltaic*. The decision under challenge in that case did not constitute a "development consent" but rather was a decision made pursuant to section 5 of the PDA 2000. Section 5 is a procedure peculiar to domestic law which allows parties to obtain a declaration as to whether particular acts are "development" requiring planning permission, or are "exempted development". There is no equivalent provision under the EIA Directive or any of the other three EU Directives specified under section 50B.

61. Similarly, there is no inconsistency between a finding that the present proceedings are subject to section 50B and the approach adopted by Barrett J. in *Merriman*. On the facts of that case, the decision under challenge was one made pursuant to section 42 of the PDA 2000. Section 42 allows for the extension of the duration of a planning permission. The High Court had found in *Merriman* that such a decision did not constitute a "development consent" for the purposes of either the EIA Directive or the Habitats Directive. In determining costs, the High Court proceeded, properly, on the basis that unless and until those findings were set aside on appeal, the costs should be determined on the assumption that those finding were correct. (As it happens, since the principal judgment was delivered in *Merriman* in November 2017, there has been an advance in the jurisprudence of the CJEU as to the understanding of the concept of a "development consent". See the Opinion of the Advocate General in Case C 411/17 *Inter-Environnement Wallonie*).

62. The distinction between the present case and *North East Pylon No. 5* is less immediately obvious. On the facts of that case, the proceedings concerned an application for development consent pursuant to section 182B of the PDA 2000. However, at the time the proceedings were instituted, the consent application had not yet been decided. Indeed, one of the principal reliefs sought in the proceedings concerned the conduct of an oral hearing before An Bord Pleanála, which is a procedural step at some remove from a final decision to grant or refuse development consent. Much of the argument in the judicial review proceedings was directed to the question as to whether same properly fell within section 50 and section 50A at all. Insofar as section 50B is concerned, therefore, there had been no final decision pursuant to a law of the State which gives effect to the EIA Directive. It is true to say that Humphreys J. appeared to accept that section 50B does contemplate the apportionment of costs. The outcome of the case was, however, that the applicant was entitled to costs protection under Order 99.

63. Whereas there may be some argument that there is a difference of approach between the present case and that in *North East Pylon Pressure Campaign Ltd*, the significance of any such difference is very much minimised by the fact that the costs outcome in both cases will be the same, i.e. both judgments decide that the applicant is entitled to costs protection.

64. In summary, I am satisfied—for the reasons outlined above—that there is no discrepancy between the approach which I propose to adopt in respect of the costs in the present case, and the approach taken in the three recent High Court judgments cited by An Bord Pleanála.

PRINCIPLE OF PRECEDENT / COSTS OF ENVIRONMENTAL LITIGATION

65. More generally, and without prejudice to my finding under the previous heading that there is no inconsistency between the approach adopted to costs in the present case and the three High Court judgments discussed, I have some doubts as to whether the full rigour of the principle of precedent can be applied to the costs of environmental litigation. The usual position is, of course, that one High Court judge will follow the decision of another High Court judge. This was the approach adopted, for example, by Hogan J. in *Kimpton Vale Ltd. v. An Bord Pleanála* [2013] IEHC 442; [2013] 2 I.R. 767 (discussed at paragraph 49 above). However, as explained by Clarke J. (as he then was) in *In re Worldport Ireland Ltd. (In Liquidation)* [2005] IEHC 189, there are exceptions to this principle.

> "It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. *Huddersfield Police Authority v- Watson* [1947] K.B. 842 at 848, *Re Howard's Will Trusts, Leven & Bradley* [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be

> introduced would be disproportionate to any perceived advantage in the matter being reconsidered. In the absence of a definitive ruling from the Supreme Court on this matter I do not, therefore, consider that it is appropriate for me to consider again the issue so recently decided by Kearns J. and I intend, therefore, that I should follow the *ratio* in *Industrial Services* and decline to take the view, as urged by counsel for the Bank, that that case was wrongly decided."

66. There are a number of features of the law in relation to the costs of environmental litigation which suggest that the precedent value of earlier judgments will be weaker than in other areas of law. First, the underlying legislation has been amended on a number of occasions. For example, section 50B has been amended by the Planning and Development (Amendment) Act 2018. These amendments include the introduction of a fourth directive, namely the Habitats Directive. This is significant in that it extends the range of proceedings which will now benefit from the special costs rules.

67. Secondly, the case law of the CJEU in this area of the law continues to evolve. As recently as October 2018, the CJEU delivered a significant judgment on costs on a reference from the Irish Supreme Court (Case C 167/17 *Klohn*). This judgment postdates two of the three High Court judgments relied upon by An Bord Pleanála.

68. Thirdly, the restrictions imposed by the planning legislation on the making of an appeal to the Court of Appeal have the practical effect that guidance from the appellate courts is not as readily available as in other areas of the law. A putative appellant must obtain the leave of the trial judge to bring an appeal to the Court of Appeal. Alternatively, a putative appellant may apply to the Supreme Court for leave to appeal to that court in accordance with Article 34.5 of the Irish Constitution. Whereas the Supreme Court did grant leave to appeal in *Sweetman v. An Bord Pleanála* [2017] IESCDET 19 on points of law which would have allowed for an authoritative interpretation of section 50B, the parties to the appeal subsequently compromised the appeal and the matter did not proceed to judgment. Some guidance will be provided by the anticipated judgment in *Klohn v. An Bord Pleanála*; however, the focus of that appeal is narrower and directed principally to the issue of retrospective effect.

69. Finally, the High Court must be mindful of its obligation as a national court to seek to give effect to EU law. As explained by the Supreme Court in its determination in *Sweetman v. An Bord Pleanála* [2017] IESCDET 19, the costs regime in Ireland has experienced difficulty in adapting to the requirements of the Aarhus Convention and the Public Participation Directive (which amended *inter alia* the EIA Directive), and an overly narrow interpretation of section 50B of the PDA 2000 might leave the Irish costs regime incompatible with the Directive and European law generally.

> "There can be little doubt but that the costs regime in Ireland has experienced difficulty in adapting to the requirements of the Aarhus Convention and the Public Participation Directives. Section 50B is part of the regime introduced to seek to bring the position in this jurisdiction into line with EU obligations. Its precise scope does, therefore, raise an issue of general public importance. On the one hand an overbroad interpretation has the potential, as Eirgrid point out, of affording costs protection in cases which may be wholly unmeritorious. On the other hand, an over narrow interpretation might leave the Irish costs regime incompatible with the Directive and European law generally. While there is consistent authority in the High Court, there is no decision of this Court and at least one High Court judge, while following the established position for consistency reasons, did posit an alternative view.
>
> Furthermore, there is at least the potentiality that it may be necessary to interpret s.50B in a manner compatible with EU law or, indeed, that there may be issues as to whether certain aspects of EU law (including the Aarhus Convention to which the EU is a party) may be capable of being directly effective so as to require Irish courts to operate the costs regime in a manner compatible with EU law. Alternatively, it may be the case that the discretion which Irish courts have in respect of costs orders may be required to be exercised in a particular way in the light of such EU law. Thus the question of the appropriate exercise of the Court's discretion in relation to costs orders, even if the case is not governed by s.50B, may potentially arise."

70. Moreover, the Supreme Court in *Callaghan v. An Bord Pleanála* [2017] IESC 60 emphasised that the proper interpretation of legislation is objective and is not dependent, necessarily, on the arguments put forward by the parties. Clarke J. (as he then was) went on to say that—by analogy with the approach taken to the statutory interpretation by reference to the Constitution—it is at least arguable that an Irish court, in order to comply with the principle of conforming interpretation, would be required to have regard, even on its own motion, to provisions of EU law where those provisions might have an impact on the proper interpretation of the national measures under consideration.

71. It seems reasonable to extrapolate from this obligation upon a court to have regard to EU law, even on its own motion, that a judge may also, on occasion, have to decline to follow an earlier High Court judgment in order to comply with the principle of conforming interpretation.

72. In conclusion, and against this background of constantly evolving case law and a recognised uncertainty in respect of the legal principles, each High Court judge must endeavour to do his or her best to apply the law governing the costs of environmental litigation in its current state. Too rigid an application of the principle of precedent might produce an incorrect result. Each case has to be considered by reference to its own factual background and, in particular, by reference to the specific "statutory provision" pursuant to which the impugned decision was made.

THE "DECISION" SUBJECT TO JUDICIAL REVIEW

73. There was some discussion at the hearing before me as to whether the term "decision" under section 50B(1) should be understood as referring to the decision to grant or refuse development consent, or should, instead, be understood as encapsulating specific sub-decisions or strands of decision made as part of the overall determination of the consent application.

74. To elaborate: as part of its overall determination of the consent application, a competent authority may first have to make a determination for the purposes of the Habitats Directive. Under Part XAB of the PDA 2000, a competent authority is required to carry out a screening exercise in order to determine whether the proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site (section 177U). If the result of the screening exercise is "positive", then it will be necessary for the competent authority to carry out an appropriate assessment (section 177V).

75. The statutory framework was described as follows in *Kelly v. An Bord Pleanála* [2014] IEHC 400, [15].

> "The ultimate decisions taken by the Board on the appeals were whether or not to grant planning permission for the developments that were the subject of each of the appeals pursuant to s. 37 of the PDA. In taking those decisions, by reason of the nature and location of the proposed developments, there were three separately identifiable requirements deriving from Statute (in part enacted to give effect to EU obligations) with which the Board had to comply:

(i) Consideration of what might be termed normal or general planning requirements under the PDA and compliance with its procedural requirements; and

(ii) The carrying out of an environmental impact assessment required by the EIA Directive as implemented by Part X of the PDA; and

(iii) The carrying out of an appropriate assessment as required by Article 6(3) of the Habitats Directive implemented by Part XAB of the PDA including making a determination."

76. (The judgment in *Kelly* has subsequently been approved of by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31; [2018] 2 I.L.R.M. 453).

77. The question which arises for consideration in the present case is whether these "separately identifiable requirements" constitute individual "decisions" for the purposes of section 50B(1). If they do, then it could be argued that the Applicants in the present case are, in fact, challenging two discrete "decisions", namely (i) a decision to grant development consent pursuant to section 9 of the PD(H)A 2016, and (ii) a screening determination pursuant to section 177U of the PDA 2000. On this analysis, costs protection might only apply to the latter.

78. It should be acknowledged that this argument was not strongly pressed at the hearing before me. I think that this was a wise approach for counsel to adopt. Such an interpretation of the term "decision" cannot be reconciled with the scheme for judicial review prescribed under sections 50, 50A and 50B of the PDA 2000. The term "decision" must be given a consistent interpretation throughout the three sections. The scheme envisages that any proceedings which question the validity of a planning decision must be brought by way of judicial review. The eight-week time-limit generally begins to run from the date of the making of the decision. In circumstances where—as in the present case—a screening determination has been reached and recorded as part of an indivisible decision to grant planning permission, it does not constitute a separate and distinct "decision" for the purposes of section 50.

79. The approach adopted by the High Court (MacMenamin J.) in *Urrinbridge v. An Bord Pleanála* [2011] IEHC 400 is instructive. The issue in *Urrinbridge* concerned the point in time at which a decision on a planning application could be said to have been made. More specifically, the issue was whether a final decision should be regarded as having been made on the date of the board meeting at which the appeal was decided, or the later date when the decision was formally drawn up and issued to the parties. In finding that it was the latter date, MacMenamin J. had regard to what the implications of the alternative finding would be for the timing of judicial review proceedings.

> "The consequence of accepting the Board's case can also be seen in another way; it is a principle of interpretation to apply a construction which removes undesirable ambiguity or uncertainty. Were the Board for some reason not to notify the parties of the fact that it had in fact reached a 'determination', from when would time run for the purposes of judicial review? That point in time would be uncertain, in an area where certainty is a requirement. It begs the question as to how a party could be expected to challenge a decision of which it had not been informed and had not been notified. The problem is not confined to planning law, and might arise in other circumstances where a range of rights is in question. The interpretation therefore sought by the Board suffers from the further defect of lack of clarity, also relevant in the context of statutory interpretation. If it were to be the case that this enactment was to attenuate a constitutional right, it would be expected that such attenuation be expressed with absolute clarity. The interpretation which is urged by the Board would be to run counter to the clear provisions of s. 50, cited earlier. Certainly, there is no express statutory wording supporting the interpretation now urged by the respondent (see Dodd, Statutory Interpretation in Ireland, (Tottel Publishing, 2008), para. 11.51). It has not been shown it was the intention of the legislature to create a situation where the rights of such persons were to be further restricted by the enactment of the Act of 2000."

80. The Supreme Court—while not disagreeing with the High Court's analysis—resolved the appeal on narrower grounds. See *Ecological Data Centres Ltd. v. An Bord Pleanála* [2013] IESC 61, [58].

> "I do not find it necessary to consider the matter before the Court in the present appeals from the point of view of rights. The rights of access to the courts for the purposes of applications for judicial review are, of course, highly relevant when considering the date of a decision of a planning authority or the Board and fixing the date when time begins to run. The interpretation of s.140(1)(a) does not raise any issue of rights. In my view it is a straightforward matter of statutory interpretation. I am satisfied that an appeal can be validly withdrawn for the purposes of that provision at any time prior to the formulation of the written decision of the Board. I would answer the question in each appeal accordingly."

81. Were the term "decision" under section 50B to be interpreted as encapsulating sub-decisions then this would have a knock-on effect on the interpretation of the eight-week time-limit, and would create precisely the type of legal uncertainty eschewed by MacMenamin J. in *Urrinbridge v. An Bord Pleanála*.

82. I am satisfied, therefore, that the section 50B "decision" impugned in the within proceedings is the decision to grant planning permission pursuant to section 9 of the PD(H)A 2016.

INTERIM CONCLUSION

83. For the reasons set out above, I have concluded that, on its natural and ordinary meaning, section 50B applies to the facts of the present case. Specifically, the proceedings seek judicial review of a decision made pursuant to a statutory provision which gives effect to, at the very least, one of four of the Directives specified in section 50B. Accordingly, the special costs rules under section 50B of the PDA 2000 apply to the entirety of the proceedings, i.e. to all grounds of challenge.

NATIONAL ENVIRONMENTAL LAW

84. Up until this point in the judgment, the discussion has been directed to the natural and ordinary meaning of section 50B. For the reasons outlined above, I am satisfied that the within proceedings do come within section 50B, and are, accordingly, subject to the special costs rules. Lest I am incorrect in this, I propose to consider, briefly, whether the interpretation of section 50B should be informed by the provisions of the Aarhus Convention, i.e. whether a purposive interpretation should be applied to same.

85. The structure of Article 9 of the Aarhus Convention is as follows. Article 9(4) prescribes the procedural requirements which are to apply to proceedings coming with article 9(2) and 9(3). These procedural requirements include the "not prohibitively expensive" requirement.

86. Article 9(2) obliges the Contracting Parties to make provision for a "review procedure" whereby qualified applicants may 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, of other relevant provisions of the Aarhus Convention. As interpreted by the CJEU, Article 9(2) is confined to decision-making in respect of certain categories of development consent. The consent must relate to a project which is likely to have a significant effect on the environment. This coincides, largely, with projects which are subject to assessment under the EIA Directive, but also includes projects which require assessment under the Habitats Directive (See *Brown Bear II*). In order to come within article 9(2), the proceedings must allege an infringement of the public participation provisions.

87. Article 9(3) has a wider scope.

> "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."

88. The interaction between the two sub-articles has been addressed in detail in Case C 470/16 *North East Pylon* and in Case C-664/15 *Protect Natur*. In brief, the approach of the CJEU has been, first, to give a narrow interpretation to article 9(2) by confining it to proceedings which allege an infringement of the public participation provisions; and, secondly, to give a broad interpretation to article 9(3). The practical consequence of this is that proceedings which allege a contravention of national environmental law will benefit from the interpretative obligation notwithstanding that those proceedings do not allege an infringement of the public participation provisions of the Aarhus Convention.

89. The parties were in disagreement as to whether it is sufficient to trigger the interpretative obligation that a contravention of national environmental law *simpliciter* is alleged, or whether, alternatively, the interpretative obligation is confined to a *subset* of national environmental law, namely that which comes within a field of EU environmental law.

90. On behalf of the Applicants, Mr Neil Steen, SC, drew particular attention to paragraphs [49] to [51] of the judgment in Case C 470/16 *North East Pylon* which appears to encourage a consistent approach as between domestic and non-domestic proceedings.

> "Consequently, the requirement that certain judicial procedures not be prohibitively expensive laid down in the Aarhus Convention must be regarded as applying to a procedure such as that at issue in the main proceedings, in that it is intended to contest, on the basis of national environmental law, a development consent process.
>
> Moreover, as the Court has repeatedly held, where a provision of EU law 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 European Union's interest that, in order to forestall future differences of interpretation, that provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied (judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C 240/09, EU:C:2011:125, paragraph 42 and the case-law cited).
>
> It follows that the interpretation given in the answer to the first question — concerning the applicability of the requirement that judicial procedures not be prohibitively expensive to a procedure before a national court in which it is determined whether leave may be granted to bring a challenge — can be transposed to Article 9(3) and (4) of the Aarhus Convention."

91. Mr Steen also suggested that the approach taken by the High Court (Humphreys J.) in *North East Pylon (No. 5)* came closest to reflecting the true legal position.

> "32. 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. Thus there is no need to get unduly caught up in classifying challenges as relating to public participation only as opposed to national environmental law within the EU law field more generally because ultimately both come to the same thing. As regards the rider that national law should be read to this effect 'to the fullest extent possible', this is not a problem for Ireland as the discretion arising from O. 99 is sufficiently flexible that it can always be read in an EU law-compatible manner."

92. In the event, I do not think that it is strictly necessary, for the purposes of this case, to resolve this particular dispute. This is because I am satisfied that the issues raised—save with the single exception of the landowner consent issue—are all ones which come within the *subset* of the subset of national environmental law which comes within a field of EU environmental law. (Insofar as the costs of the landowner's consent issue is concerned, the costs associated with this net issue are likely to represent such a small proportion of the overall costs as not to justify separate treatment).

93. The starting point for this analysis must be the judgment of the Supreme Court in *Conway v. Ireland* [2017] IESC 13; [2017] 1 I.R. 53. Clarke C.J., having cited the definition of "national law relating to the environment" suggested by the Aarhus Compliance Committee with approval, held that the question of whether a national law may be a "law relating to the environment" for the purposes of article 9(3) of the Aarhus Convention must be determined as a matter of *substance* rather than as a matter of form.

> "[61] While not providing a definitive legal interpretation of the scope of the Aarhus Convention, it is, in my view, appropriate to have regard to decisions and commentaries of the compliance committee established under the Aarhus Convention for the purposes of facilitating the compliance by subscribing states with the terms of the Convention itself. That committee has taken the view that 'national law' relating to the environment includes European Union law applicable within European Union member states.
>
> [62] In the context of what is said to be encompassed within environmental law for the purposes of article 9.3, the compliance committee in its Implementation Guide (2nd ed., 2014) said the following at p. 197:-
>
> > 'First, as regards 'contravening national law relating to the environment', it does not have to be established prima facie, i.e., before the review, that there has been a violation. Rather, there must have been an allegation by the member of the public that there has been an act or omission violating national law relating to the environment (see ACCC/C/2006/18 (Denmark) discussed above). Second, 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, environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships are covered by paragraph 3, regardless of whether the provisions in question are found in planning laws, taxation laws or maritime laws. This was illustrated in the Compliance Committee's findings on communication ACCC/C/2005/11 (Belgium), where the Committee assessed Belgian planning laws under article 9, paragraph 3, and in its findings on Bulgarian planning law in communication ACCC/C/2011/58.'

[63] It follows that the question of whether a national law may be a "law relating to the environment" for the purposes of article 9.3 of the Aarhus Convention must be determined as a matter of substance rather than as a matter of form. It does not matter if the legislation in question deals with other questions or has a title implying that its principal focus may be matters other than environmental provided, importantly, that the measure sought to be enforced can properly be said, in any material and realistic way, to relate to the environment."

94. I turn now to apply these principles to the facts of the present case. The grounds of challenge have already been summarised at paragraph 10 *et seq*. above. It is common case that the grounds in respect of (i) the EIA Directive, and (ii) the Floods Directive, raise issues which fall within a field covered by EU law.

95. An Bord Pleanála argues that the grounds in respect of the development plan pleaded at paragraphs E.35 to E.44 of the Statement of Grounds are premised entirely on national law. A similar argument is made in respect of the grounds at E.56 to E.61 of the Statement of Grounds which allege that the board's decision involved a material contravention of the zoning objectives of the development plan.

96. An Bord Pleanála's argument is summarised as follows in its written legal submissions.

"24. In respect of the grounds pleaded at paragraphs 35 – 44 of the Statement of Grounds, the legal basis of the claim is clear from paragraph 44 in which the decision of the Board is impugned on grounds of error of law, misdirection of law, taking account of irrelevant consideration and/or overlooking relevant material and/or acting irrationally. Pleas of this nature are not matters of national and/or European environmental law but, rather, are classically administrative law challenges premised entirely on national law.

25. Similarly, in respect of the grounds pleaded at paragraphs 56 – 61 of the Statement of Grounds, the challenge is premised on a claim of acting *ultra vires* and contrary to natural and constitutional justice. It is further pleaded that the Board erred in the interpretation of certain matters and failed to give adequate reasons for its assessment."

97. With respect, this is 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. See, in particular, paragraphs E.35, E.44 and E.58 of the Statement of Grounds as follows.

"35. The decision of the Board is unlawful and/or irrational in circumstances where the decision authorises an allocation of population within the subject development which is in excess of that permitted by the County Development Plan zoning, with the result that the decision runs contrary to section 9(6) of the SHD Act and is, therefore, unlawful.

[…]

44. Thus, erroneously and without adequate reasoning, the impugned decision effects a material contravention of the Galway County Development Plan, contrary to section 9(6)(b) and (c) of the SHD Act. In consequence whereof, the Board has 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.

[…]

58. Furthermore, the permitted development would materially contravene Policy Objective CCF6 – 'Inappropriate Development on Flood Zones' given its partial location on land designated for the purpose of Policy Objective CCF6 and the absence of sufficient compliance with that objective including the submission with the planning application of a 'Development Management Justification Test'. Accordingly, the decision was made in contravention of the provisions of section 9(6) of the SHD Act and is unlawful, invalid and of no legal effect."

98. Section 9 of the PD(H)A 2016 is 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*. See paragraph 93 above. 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 9is the proper planning and sustainable development of the area in which it is proposed to situate the development.

99. 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.

100. Secondly, 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). A development plan constitutes a "plan" or "programme" for the purposes of the Strategic Environmental Assessment Directive (Directive 2001/42/EC) ("*the SEA Directive*"). The making of a development plan is subject to assessment for the purposes of the SEA Directive. This is achieved principally through amendments made to the Planning and Development Regulations 2001 by the Planning and Development (Strategic Environmental Assessment) Regulations. The entire rationale of the SEA Directive, and, in particular, the purpose of introducing a requirement to carry out a strategic assessment in respect of plans and programmes, is to ensure that an environmental assessment is carried out at the earliest possible stage of decision-making. In circumstances where the content of plans or programmes influence subsequent decision-making in respect of *individual* development projects, it is essential that an assessment should be carried out at the earlier stage of the making of the plan or programme which sets the framework for development consent. See, for example, Case C–160/17 *Thybaut*, [61] to [63]

"[61] The Court notes that the fundamental objective of the SEA Directive is to ensure that 'plans and programmes' which

are likely to have significant effects on the environment are subject to an environmental assessment when they are prepared and prior to their adoption (see, to that effect, judgment of 28 February 2012, *Inter-Environnement Wallonie* and *Terre wallonne*, C 41/11, EU:C:2012:103, paragraph 40 and the case-law cited).

[62] In that regard, as the Advocate General stated in point 39 of her Opinion, it is clear from Article 6(2) of the SEA Directive that the environmental assessment should be carried out at the earliest possible stage so that the results of that assessment are still capable of influencing any decisions. It is indeed at that stage that the various elements of an alternative may be analysed and strategic choices made.

[63] In addition, although Article 5(3) of the SEA Directive provides for the possibility of using relevant information obtained at other levels of decision-making or through other EU legislation, Article 11(1) of that directive specifies that an environmental assessment carried out under that directive is to be without prejudice to any requirements under the EIA Directive."

101. It would negate the purpose of the SEA Directive if—following the completion of an environmental assessment of the development plan—a competent authority was, thereafter, free to disregard such plans and programs. Section 9 ensures that the objectives of the SEA Directive are achieved by requiring An Bord Pleanála, as the competent authority for the purposes of granting an application for development consent for strategic housing development, to have regard to the development plan.

102. Separately, I am satisfied that the grounds of challenge advanced in respect of the "Flood Risk Management Guidelines" also relate to national environmental law in a field covered by EU environmental law. Again, I think that An Bord Pleanála's characterisation of the Applicants' grounds is overly narrow. The board's position is stated as follows in its written legal submissions.

> "29. Thus, while the grounds pleaded under this heading may relate to the topic of floods, the challenge to the decision of the Board is largely premised on an alleged error in the interpretation and application of guidelines, a breach of fair procedures and natural and constitutional justice and an argument that the decision is irrational, unreasonable, ultra vires, invalid and of no legal effect (see paragraph 49 of the Statement of Grounds). Quintessentially, these are matters of national law that fall outside the not prohibitively expensive rules."

103. This characterisation of the grounds of challenge appears to overlook the status which Ministerial Guidelines have for the purposes of the consent application. Section 9(2)(b) of the PD(H)A 2016 imposes an obligation upon An Bord Pleanála to "have regard to" any guidelines issued by the Minister under section 28 of the PDA 2000. The gravamen of the complaint made by the Applicants at E.49 is that An Bord Pleanála and its inspector erred in their interpretation and application of the statutory guidelines. This is an allegation of a contravention of a provision of national environmental law, namely section 9(2)(b). On the facts of the present case, the statutory guidelines in question relate to a field covered by EU environmental law, namely the assessment and management of flood risk. See Directive 2007/60/EC.

104. Given my conclusion that section 9 of the PD(H)A 2016 represents a provision of national environmental law in a field covered by EU environmental law, it follows that the interpretative obligation identified in Case C–470/16 *North East Pylon* applies to proceedings which allege a contravention of section 9. The practical consequence of this is that this court must—subject always to the *contra legem* principle—seek to interpret section 50B so as to ensure that the special costs rules apply to such proceedings. The interpretation posited earlier in this judgment, i.e. to the effect that section 50B will apply to all of the costs of proceedings which question the validity of a decision made pursuant to section 9 would achieve this result. By contrast, the narrower interpretation advocated for by An Bord Pleanála and the Developer, which would require this court to give an artificial interpretation to the term "proceedings" and "decision" must be rejected. Such arguments run counter to the interpretative obligation, by seeking to invite the court to depart from the natural and ordinary meaning of the statutory language precisely for the purpose of *restricting* the category of cases which would benefit from the special costs rules.

ENVIRONMENT (MISCELLANEOUS PROVISIONS) ACT 2011

105. In circumstances where I have concluded that the proceedings benefit from the special costs rules provided for under section 50B of the PDA 2000, it is not necessary for me to consider the alternative basis on which the Applicants have sought costs protection, namely pursuant to Part 2 of the Environment (Miscellaneous Provisions) Act 2011. However, lest this judgment is to be subject to an appeal, I propose to set out briefly my findings in respect of the 2011 Act.

106. Costs protection under Part 2 of the Environment (Miscellaneous Provisions) Act 2011 ("*EMPA 2011*") applies to civil proceedings (a) for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition or other requirement specified in or attached to a licence, registration, permit, permission, lease, notice or consent specified, or (b) in respect of the contravention of, or the failure to comply with such licence, registration, permit, permission, lease, notice or consent.

107. Whereas the conventional wisdom had been that the EMPA 2011 was intended to regulate the costs of *enforcement proceedings*, with the costs of judicial review proceedings dealt with separately under section 50B of the PDA 2000, the recent judgment of the High Court in *O'Connor v. Offaly County Council* [2017] IEHC 606 confirms that the 2011 Act can, in principle, apply to judicial review proceedings also.

108. Costs protection under the EMPA 2011 is, however, subject to a significant restriction. Specifically, it is a prerequisite that the failure to ensure compliance with, or enforcement of, a statutory requirement has caused, is causing, or is likely to cause, damage to the environment.

109. The CJEU in Case C 470/16 *North East Pylon* has held that a Member State is not entitled to impose such a restriction. See paragraph [66] as follows.

> "4. A Member State cannot derogate from the requirement that certain judicial procedures not be prohibitively expensive, laid down by Article 9(4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 11(4) of Directive 2011/92, where a challenge is deemed frivolous or vexatious, or where there is no link between the alleged breach of national environmental law and damage to the environment."

110. Notwithstanding that Part 2 of the EMPA 2011 has been amended subsequent to delivery of the judgment in Case C 470/16 so as to ensure that the costs of proceedings in respect of the Habitats Directive are now included, the requirement for "damage to the environment" remains in force. This means that the provisions of Part 2 of the EMPA 2011—if considered in isolation—would represent an incomplete implementation of the Aarhus Convention. Of course, Part 2 of the EMPA 2011 cannot be read in isolation, but must

instead be read in conjunction with section 50B of the PDA 2000. The fact that section 50B is not subject to an "environmental damage" requirement may mean that proceedings which might otherwise have been thought to achieve costs protection under Part 2 of the EMPA 2011 might instead achieve costs protection under section 50B.

111. The High Court (Humphreys J.) in *North East Pylon No. 5* suggested that rather than disapply the "environmental "damage requirement under the EMPA 2011, the courts should instead rely on the legislative intent underlying the provisions when interpreting other costs rules. In particular, Humphreys J. seems to suggest that when interpreting the discretion under Order 99, the High Court should have regard to this. See [2018] IEHC 622, [19].

> "In the present case, the language of ss. 3 and 4 of the 2011 Act is such that the link to environmental damage is so embedded in the phrasing of the section that it cannot be excised by normal severance or overcome by interpretative reading-down. It is not, on this specific wording, simply a discrete condition that can be disregarded or crossed out. That leaves a limited number of other options. One is striking down the sections, which would be disproportionate if there are other alternative approaches. A second is reading-up the sections to interpret them in a manner beyond their terms; an approach which gives one some cause for hesitation, given the direct interference with the work of the legislature that is necessarily involved. The final and best option to deal with an under-inclusive statute where there is a parallel source of discretion to achieve the same result is to leave the statute in place, 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. That jurisdiction as to costs would have to be exercised in a manner consistent with the spirit of the statutory provision, given that it is not permissible to discriminate on the basis of a link to environmental damage. Doing so here would require a no-order-as-to-costs outcome for all or virtually all of the applicant's case."

112. There was some discussion at the hearing before me as to the implications, if any, of the judgment of the CJEU in Case C 664/15 *Protect Natur*. There, the CJEU suggests that a national court was obliged to disapply any rule of national procedural law which conflicts with the requirements of the Aarhus Convention.

> "54 In that regard, it must be noted that 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 proceedings, in accordance with both the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental organisation, such as Protect, to challenge before a court a decision taken following an administrative procedure that may be contrary to EU environmental law (see, by analogy, judgment of 8 March 2011, *Lesoochranárske zoskupenie*, C-240/09, EU:C:2011:125, paragraph 52).
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> 55 However, if such a compliant interpretation were to be found to be impossible, it would then be for the referring court to disapply, in the proceedings before it, the rule of national procedural law requiring the environmental organisation at issue to have the status of a party in order to be able to bring an action against a decision granting a permit for a project that may be contrary to the obligation to prevent the deterioration of the status of bodies of water as set out in Article 4 of Directive 2000/60.
>
> 56 In that regard, it follows from the established case-law of the Court that a national court which is called upon, within the exercise of its jurisdiction, to apply rules of EU law is under a duty to give full effect to those rules, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means (see, *inter alia*, judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraphs 21 and 24, and of 5 April 2016, PFE, C-689/13, EU:C:2016:199, paragraph 40 and the case-law cited).
>
> 57 Any provision of a national legal system and any legislative, administrative or judicial practice that might impair the effectiveness of EU law by withholding from the national court with jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions that might prevent EU rules from having full force and effect are incompatible with those requirements, which are the very essence of EU law (see, *inter alia*, judgments of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraph 22, and of 5 April 2016, PFE, C-689/13, EU:C:2016:199, paragraph 41 and the case-law cited)."

113. On the particular facts of that case, the rule was one in relation to *locus standi* of environmental non-governmental organisations. Similar sentiments, presumably, apply in respect of legal costs rules. However, the suggestion that the national court can disapply conflicting provisions of national procedural law is difficult to reconcile with earlier case law from the CJEU which indicates that the interpretative obligation is subject to the *contra legem* principle. It is also difficult to reconcile with the clear statement of the Supreme Court in *Sweetman v. Shell E & P Ltd*. [2016] IESC 58; [2016] 1 I.R. 742.

114. In all the circumstances, I think that the approach adopted by Humphreys J. in *North East Pylon No. 5* at [19] has much to recommend it. Rather than seek to strike down the "environmental damage" requirement under Part 2 of the EMPA 2011, Humphreys J. suggested that a court should instead use the general jurisdiction as to costs under Order 99 to apply a similar approach to any cases that are not within the wording of the section. I propose to adopt the same approach here.

ORDER 99

115. In the event that I am incorrect in my earlier conclusion that the entire costs of the within proceedings are subject to the special costs rules under section 50B of the PDA 2000, I think that I would be obliged to produce a similar outcome through the exercise of my discretion pursuant to Order 99. In this regard, I respectfully adopt the approach of High Court (Humphreys J.) in *North East Plyon No. 5.*

PROPOSED ORDERS

116. For the reasons set out above, I propose to make the following orders.

117. An order declaring that the costs of the within proceedings in their entirety are subject to section 50B of the PDA 2000. This declaration applies to all of the grounds of challenge.

118. (It should be noted that the scheme of section 50B is such that costs are largely contingent on the outcome of the proceedings, and, in particular, on the extent, if any, to which an applicant succeeds in obtaining relief. It will therefore be a matter for the trial judge to make the final decision, in accordance with section 50B, as to the incidence of costs.)

119. I will hear the parties as to whether it would be appropriate to make an order, in the alternative, pursuant to Order 99, rule 5 of

the Rules of the Superior Courts on a pre-emptive basis to the effect that—irrespective of the eventual outcome of the proceedings—no order for costs is to be made against the Applicants.

APPENDIX: SECTION 50B

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 provision that gives effect to—

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

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

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

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

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

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

(2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986) and subject to subsections (2A), (3) and (4), in proceedings to which this section applies, each party to the proceedings (including any notice party) shall bear its own costs.

(2A) The costs of 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) The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so —

(a) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,

(b) because of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of the Court.

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

(5) In this section a reference to 'the Court' shall be construed as, in relation to particular proceedings to which this section applies, a reference to the High Court or the Supreme Court, as may be appropriate.]

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