THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 338

[2021 No. 846 JR]

IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL TENANCIES ACT 2016

BETWEEN

ENNISKERRY ALLIANCE AND ENNISKERRY DEMESNE MANAGEMENT COMPANY CLG

APPLICANTS

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

CAIRN HOMES PROPERTIES LIMITED

NOTICE PARTY

AND

THE HIGH COURT

JUDICIAL REVIEW

[2021 No. 770 JR]

IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL TENANCIES ACT 2016

BETWEEN

PROTECT EAST MEATH LIMITED

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL AND LOUTH COUNTY COUNCIL

RESPONDENTS

AND

HALLSCOTCH VENTURE LIMITED

NOTICE PARTY

AND

CLIENTEARTH AISBL (BY ORDER)

AMICUS CURIAE

(No. 3)

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

Subject matter of the dispute

1. The dispute relates to liability for costs in challenges to two separate developments:

   (i). in Protect East Meath, the construction of 275 apartments, a crèche and associated site works on lands adjacent to Scotch Hall Shopping Centre, Marsh Road, Drogheda, Co. Louth which is the subject of a permission granted by the board on 29th June, 2021; and

   (ii). in Enniskerry Alliance, the construction of 165 residential units, a child care facility and associated works at Cookstown Road, Enniskerry, Co. Wicklow in respect of which the board granted permission on 13th August, 2021.

Facts - Enniskerry

2. A pre-application consultation occurred on 9th July, 2020 at which representatives of the developer, the local authority and board were present. This resulted in an inspector's report dated 6th October, 2020 that indicated that the proposed application required amendment.

3. The amended application was submitted by the notice party on 28th April, 2021. The application included a material contravention statement that noted contravention of building heights set out in the county development plan, but asserted that this could be justified by reference to Ministerial Guidelines on Urban Development and Building Heights.

4. Environmental Impact Assessment (EIA) was required in the Enniskerry case. Appropriate assessment (AA) was not required.

5. The inspector recommended that planning permission be granted subject to 20 conditions on 30th July, 2021.

6. The board granted permission on 13th August, 2021.

Facts - Protect East Meath

7. In Protect East Meath, a pre-application consultation occurred on 23rd August, 2019 following which the inspector reported that the application required amendment. The amended application was submitted on 11th March, 2021.

8. EIA was screened out in Protect East Meath. AA was also not required.

9. On 23rd June, 2021 the inspector recommended that planning permission be granted subject to 31 conditions.

10. The board granted permission on 29th June, 2021.

Procedural history

11. Both applicants brought proceedings challenging the permissions concerned. Both sought protective costs orders from the court in order to determine, in advance of costs being incurred, that they would not be liable for any such costs if unsuccessful.

12. In *Enniskerry Alliance and Enniskerry Demesne Management Company CLG v. An Bord Pleanála (No. 1)* [2022] IEHC 6, [2022] 1 JIC 1410 (Unreported, High Court, 14th January, 2022), I gave judgment on the protective costs applications, noting a consent order in relation to certain costs, deciding that s. 50B of the Planning and Development Act 2000 did not apply to any other grounds, and that the Environment (Miscellaneous Provisions) Act 2011 applied only to one element of the remaining case, namely core ground 6 in Enniskerry insofar as it relates to prevention of future damage to hedgerows by reason of contravention of s. 9(6)(b) of the 2016 Act which prohibits material contravention of the development plan save on certain conditions.

13. In *Enniskerry Alliance and Enniskerry Demesne Management Company CLG v. An Bord Pleanála (No. 2)* [2022] IEHC 337 (Unreported, High Court, 10th June, 2022), I addressed certain procedural matters.

14. I now make the formal order for reference.

Relevant provisions of EU law

15. The most pertinent provisions of EU law are as follows:

    (i). Directive 92/43/EEC of 21st May, 1992 on the conservation of natural habitats and of wild fauna and flora.

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

    (iii). Council Decision 2005/370/EC of 17 February 2005 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

    (iv). Directive 2011/92/EU of the European Parliament and of the Council of 13th December, 2011 on the assessment of the effects of certain public and private projects on the environment (as amended by council directive 2014/52/EU).

    (v). The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus (Denmark) on 25th June, 1998 ("the Aarhus Convention") which is an integral part of EU law.

Relevant provisions of domestic law

16. The most pertinent provisions of domestic law are as follows:

    (i). Section 50B of the Planning and Development Act 2000, sub-section (2) of which provides a general rule that parties in judicial reviews of decisions under enactments giving effect to EU law public participation rules, or article 6(3) and

(4) of the habitats directive, shall bear their own costs. The section provides for limited exceptions as well as for provision in sub-section (2A) for the applicant to obtain costs to the extent she is successful.

(ii). Section 3 of the Environment (Miscellaneous Provisions) Act 2011 Act, which provides a similar rule for proceedings to which that section applies, and section 4 of the Act, which applies the section to actions for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or to certain other planning requirements, where the failure to ensure such compliance with, or enforcement of, such requirement has caused, is causing, or is likely to cause, damage to the environment.

(iii). Section 9(6)(b) of the Planning and Development (Housing) and Residential Tenancies Act 2016, which provides that the board cannot grant permission to a proposed development which contravenes materially the development plan or local area plan relating to the area concerned, in relation to the zoning of the land.

(iv). Section 9(6)(c) of the Planning and Development (Housing) and Residential Tenancies Act 2016, which provides that where a proposed strategic housing development would materially contravene the development or local area plan, other than in relation to the zoning of the land, then the board may only grant permission 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.

(v). Section 37(2)(b) of the Planning and Development Act 2000 as applied by section 9 of the Planning and Development (Housing) and Residential Tenancies Act 2016, which provides that where a planning authority has refused permission on the grounds that the proposed development would contravene the development plan, the board may grant permission where it considers that:

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

(b). there are conflicting objectives in the development plan or the objectives are not clearly stated,

(c). permission should be granted having regard to regional planning guidelines for the area, policy directives, the statutory obligations of any local authority in the area, and any relevant policy of Government, the Minister or any Minister of Government, or;

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

(vi). Article 27 of the European Communities (Birds and Natural Habitats) Regulation 2011 (S.I. No. 477 of 2011), which provides that any public authority exercising functions which may affect nature conservation shall exercise those functions in compliance with the requirements of the Habitats Directive (Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora) and the Birds Directive (Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds). Public authorities in the exercise of those functions will take appropriate steps to avoid the deterioration and/or disturbance of natural habitats and to take appropriate enforcement action.

(vii). Section 8(1)(a)(iv)(II) of the Planning and Development (Housing) and Residential Tenancies Act 2016 which provides that where an applicant is making a strategic housing development planning application, they must publish a notice in a local newspaper which must indicate, *inter alia,* where the proposed development materially contravenes the said plan, other than in relation to the zoning of the land, and why permission should be granted nonetheless, having regard to section 37(2)(b) of the 2000 Act.

(viii). Regulation 299B(1)(b)(ii)(II)(C) of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001), which provides where the board carries out a preliminary examination of the development and concludes thereupon that there is a significant and realistic doubt in regard to the likelihood of the significant effects on the environment arising from the proposed development, it shall satisfy itself that the applicant has provided to the board a statement indicating how the available results of other relevant assessments of the effects on the environment carried out pursuant to the EU legislation other than the EIA directive have been taken into account.

17. Insofar as the status of Irish costs law is concerned, in my respectful view Irish domestic law does not provide rules that are sufficiently certain so that an applicant can know prior to initiating proceedings firstly whether the not-prohibitively-expensive rule applies; and secondly, if so what the maximum amount of the not-prohibitively-expensive costs can be predicted to be in advance. The legislation is far from comprehensive and the caselaw has not to date answered all of the critical questions in this regard.

18. That conclusion respectfully seems to follow even bearing in mind that the Court of Appeal in *Heather Hill* did, subject to appeal, provide some clarity on the first aspect, albeit not the second. The court did not formally decide on the scope of the 2011 Act. The *obiter* views of that court on the 2011 Act are on different lines to those previously expressed by the same court in *O'Connor v. Offaly County* Council [2020] IECA 72, [2020] 3 JIC 2001 (Unreported, Court of Appeal, Murray J. (Whelan and Noonan JJ. concurring), 20th March, 2020). Without any disrespect to any of the first instance or appellate courts that have laboured on the subject

of environmental costs to date, the thrust of the remarks on "Environment Policy Post Covid-19" by Mr Aurel Ciobanu-Dordea, Director for Implementation, Governance and Semester, Directorate-General for Environment, European Commission, Environment Ireland Conference, 18-19 January, 2022 (Unedited Transcript), which were relied on by the applicants here, have merit:

> "Ireland continues to be the most expensive member state in which to make an environmental claim before the courts. The case law of the national courts has meandered through different interpretations of the courts rules and has left many environmental litigants unable to predict with any certainty the costs exposure."

The relevant grounds of challenge

19. The relevant core grounds in Enniskerry are as follows:

(i). Material contravention of Zoning Objectives R10 and R20 of the Bray Municipal District Local Area Plan 2018-2024 ("LAP") contrary to s. 9(6)(b) of the 2016 Act.

(ii). Material contravention of Zoning Objective OS1 of the LAP contrary to s. 9(6)(b) of the 2016 Act.

(iii). Material contravention of Objective R6 of the LAP or failure to consider such material contravention contrary to s. 9(6)(c) of the 2016 Act.

(iv). Material contravention of Table 7.1 of the Development and Design Standards of the Wicklow County Development Plan 2016-2022 ("CDP") or failure to consider such material contravention, contrary to s. 9(6)(c) of the 2016 Act.

(v). Material contravention of Section 6 of the Development and Design Standards of the CDP in relation to Childcare or failure to consider such material contravention, contrary to s. 9(6)(c) of the 2016 Act.

(vi). Material contravention of Objective N19 of the CDP in relation to hedgerows or failure to consider such material contravention, contrary to s. 9(6)(c) of the 2016 Act.

(vii). Contravention of section 37(2)(b)(i) of the Planning and Development Act 2000 as applied by section 9 of the 2016 Act in that the board did not identify any or any adequate basis for its conclusion that the proposed development was of strategic or national importance and/or the board's Order contains a material error of fact.

(viii). The impugned decision is invalid as the board breached the Applicant's rights to fair procedures and reasoned decision making in its assessment of traffic impacts from the proposed development on the greater Enniskerry area.

20. The relevant core grounds in Protect East Meath can be summarised as follows:

(i). Contravention of density standards in the Drogheda Borough Council Development Plan 2011-2017 ("DBCDP") in breach of section 8(1)(a)(iv)(II) of the 2016 Act.

(ii). Material contravention or failure to identify such contravention of the requirements of Policy HC 19 of the DBCDP in breach of section 8(1)(a)(iv)(II) of the 2016 Act.

(iii). Material contravention or failure to identify such contravention of the zoning objective "TCd" of the DBCDP in breach of section 9(6)(c) of the 2016 Act in.

(iv). Failure to comply with regulation 299B(1)(b)(ii)(II)(C) of the Planning and Development Regulations 2001, by omitting the statement required under national legislation giving effect to article 4(4) of Directive 2011/92/EU.

(v). The board incorrectly found that the requirements of section 37(2)(b)(i) of the 2000 Act as required by section 9(6)(c) of the 2016 Act were satisfied in that the Board did not identify any or any adequate basis for its conclusion that the proposed development was of national and strategic importance as required by that section.

Questions of European law arising

21. As discussed in the No. 1 judgment, it seems to me that a number of questions of European law arise in the proceedings. A further question was identified in the No. 2 judgment. It seems to me that these questions relate to the interpretation rather than application of EU law, that answers are necessary for the decision of this court, that the answers to these questions are not *acte clair* or *acte éclairé,* and that I consider it appropriate in all circumstances to make a reference to the Court of Justice of the European Union under article 267 TFEU.

22. I have received submissions from the applicant, the board, the State, and the *amicus curiae*. The notice party developers and Louth County Council did not make submissions on the questions.

The first question

23. The first question is:

Does the interpretative obligation 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.

24. The applicants' proposed answer is No. The requirement is wider than EU law alone: in applying national environmental law there is an obligation to interpret national procedural law "to the fullest extent possible", to ensure that procedures are not prohibitively expensive, following the decision of the Court in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* (Court of Justice of the European Union, 15th March, 2018, ECLI:EU:C:2018:185).

25. The board's proposed answer is Yes. The whole basis of the asserted competence is that the domestic sphere subjected to European regulation is, in a real sense, in the European sphere – i.e. the fields covered by EU environmental law. What the CJEU held in Case C-470/16, *North East Pylon* reflects precisely how the prior jurisprudence on exactly this issue has been applied especially in Case C-240/09 *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* (Court of Justice of the European Union, 8th March, 2011, ECLI:EU:C:2011:125) and Case C-12/86 *Demirel v. Stadt Schwäbisch Gmünd* (European Court of Justice, 30th September, 1987, ECLI:EU:C:1987:400), *Demirel*; Case C-53/96 *Hermès International v. FHT Marketing Choice BV* (European Court of Justice, 16th June, 1998, ECLI:EU:C:1998:292); Joined Cases C-300/98 and C-392/98 *Dior SA v. TUK Consultancy BV and Assco Gerüste GmbH v. Wilhelm Layher GmbH & Co. KG* (Court of Justice of the European Union, 14th December, 2000, ECLI:EU:C:2000:688), simply by way of example.

26. The State respondents' proposed answer is Yes. The CJEU confirmed in *North East Pylon* that the interpretative obligation was intended to "ensure effective judicial protection in the fields covered by EU environmental law". Article 9 is not directly effective but its obligations attach *via* EU law to the fields of EU environmental law. As a consequence, the interpretative obligation applies widely, to the entire field of EU environmental law, not merely public participation. National environmental law includes all environmental law applicable within the State. As a matter of legal principle, it is not necessarily the case that all national environmental law acts within the field of EU Environmental law.

27. The *amicus curiae's* position is that the interpretative obligation 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 the judicial procedures are not prohibitively expensive, applies not only to national procedural law but to the entirety of any judicial procedure where a member of the public, meeting the criteria if any laid down in national law, which is the position in this case, challenges any act or omission on the basis that it contravenes a provision of law relating to the environment, where that provision is a provision of EU law, a provision of national law giving effect directly or indirectly to EU law, or a provision of purely national law.

28. My proposed answer to the question is "No". Article 9 of the Aarhus Convention is on its own terms not limited to the field of EU law, but applies to all decisions subject to the public participation requirements of article 6 of the Convention. That application is not limited to the public participation aspects of the decision challenged, but includes all aspects of that decision. This must include aspects in the field of purely national law. The need for consistency of interpretation in a context where the Convention is an integral part of EU law, as well as the need for a high level of environmental protection, favours an interpretation whereby member states must comply with Aarhus in full rather than merely in relation to the EU-based aspects of the challenge. In addition the pervasive need to consider at least the question of screening under the SEA, EIA and habitats directives will in effect maintain a link with EU law, albeit not confined to cases where public participation is required. Otherwise the protection for environmental applicants, particularly environmental NGOs such as these applicants, will be fragmented and ineffective.

29. The reason for the reference of this question is that as the Aarhus Convention has not been effectively implemented in Irish law, it primarily applies *via* the EU law interpretative obligation. Therefore, if that obligation has a narrow scope, some of the applicants' points may fall outside enforceable Aarhus protection.

The second question

30. The second question is:

> **If the answer to the first question is in the affirmative, 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.**

31. The applicants' proposed answer is Yes. The interpretative obligation identified in *North East Pylon Pressure Campaign Limited* requires that where the proceedings relate to the sphere of EU environmental law, it is irrelevant whether the applicants grounds for challenge are predicated on domestic environmental law or do not squarely raise EU environmental law grounds.

32. The board's proposed answer is No. If a ground of challenge does not relate to EU environmental law, the fact that a decision is subject to procedures laid down in EU law none of which are called in aid or even relevant to the contours of the legal dispute is irrelevant. If that was not the case, the judgment in Case C-470/16, *North East Pylon* would have been decided differently and the CJEU would have said that the interpretative obligation would arise regardless of the grounds, and only by reference to the wider context.

33. The State respondents' proposed answer is No. If the provisions of national law alleged to have been breached are not sourced in EU environmental law, but it happens that the procedure in question also, separately, contains provisions (of which no breach is alleged) that

are sourced in EU environmental law, the extension of the NPE regime to such "purely" national provisions is arbitrary and likely to give rise to different outcomes in different members states on the basis of mere drafting structure. The Court of Appeal correctly applied EU law and *North East Pylon* in *Heather Hill* in recognising the divisibility of grounds in such a manner.

34. The *amicus curiae's* position is that, where an applicant challenges a decision that is subject to procedures laid down in EU environmental law, the challenge is to be considered as falling within the sphere of EU environmental law in the sense set down in §50 of *Case C-470/16 North East Pylon*, even if the grounds of challenge do not relate to specific provisions of EU environmental law, provided the provision of law contravened relates to the environment in the sense set out above.

35. My proposed answer to the question is that it is not necessary to answer this question if the first question is answered No, but if this question does arise, the answer is "No". Again, the need for consistency of interpretation of Aarhus in a context where the Convention is an integral part of EU law, as well as the need for a high level of environmental protection, favours a wide interpretation of its protections. Where the decision-making process has considered EU law such as at least the question of screening under the SEA, EIA and habitats directives, that exercise provides a sufficient link with EU law, such that the challenge to the decision resulting from such a process should be considered, in full, as within the field of EU environmental law. Otherwise the protection for environmental applicants, particularly environmental NGOs such as these applicants, will be fragmented and ineffective.

36. The reason for the reference of this question is that if the Aarhus interpretative obligation is construed in a narrow sense, much of the applicants' Aarhus rights will not be enforceable in the domestic courts in a member state such as Ireland which has not incorporated the Aarhus convention directly into domestic law.

The third question

37. The third question is:

In particular, is a challenge that is not based on directive 2001/42/EC (the strategic environmental assessment 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.

38. The applicants' proposed answer is Yes. The purposes of the SEA Directive are set at naught if the framework which is assessed for the purposes of that Directive can be departed from at project level without the assessment carried out for the purposes of the SEA Directive being revisited prior to the grant of development consent for the project.

39. The board's proposed answer is No. The fact that the underlying plan was subject to SEA is not determinative. It is not credible in law that any single argument about a plan or

programme subject to SEA is included under costs protection without any scrutiny of the relationship between the argument and SEA or, indeed, European environmental law itself. The point must also be raised, why is SEA special here? Why not EIA or Habitats? If the fact that an underlying European directive is engaged is determinative then there was no purpose to Case C-470/16, *North East Pylon*.

40. The State respondents' proposed answer is No. The posited challenge does not assert a breach of the SEA Directive at all. It is two steps removed from that. Indeed, if the answer were in the affirmative, then – since all development plans will have been subject to SEA – literally any challenge to any development consent on any grounds would fall within the costs protection/NPE regime. That runs starkly contrary to *North East Pylon* as construed in *Heather Hill* (see §174).

41. The *amicus curiae's* position is that where a challenge is not based on directive 2001/42 but nonetheless relates to alleged material contravention of an instrument of general application that was subject to strategic environmental assessment, that challenge is to be considered as a challenge falling within the sphere of EU law relating to the environment. This is because an instrument of general application that was subject to a strategic environmental assessment is to be considered as relating to the environment in the sense set out above.

42. My proposed answer to the question is that it is not necessary to answer this question if the first question is answered No, but if this question does arise, the answer is "Yes". As stated by the applicant, if an instrument of a general nature such as a development plan is subject to SEA, there is a direct engagement with EU law inherently involved in any complaint that a material contravention of that instrument was unlawfully carried out without SEA, even if the unlawfulness alleged is not in itself directly based on EU law grounds. The arguments in favour of a narrow reading are defensive. There is no compelling legal policy reason for EU law to facilitate contravention of democratically adopted development plans by excluding cases about such contravention from the concept of the field of EU law. Contextually, such material contravention has become increasingly common in recent years in Ireland.

43. The reason for the reference of this question is that if the answer is Yes then the applicants' material contravention points would benefit from enforceable Aarhus protection.

The fourth question

44. The fourth question is:

Is a challenge to be considered as falling outside the interpretative obligation 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, 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.

45. The applicants' proposed answer is No. The reference to classic judicial review grounds in Irish domestic caselaw serves only to obscure the fact that all the grounds relate to EU and national environmental law. The grounds themselves are entirely environmental, even if the legal mechanism of how they are pleaded necessarily involves reliance on grounds of judicial review that are utilised in a wide variety of environmental and non-environmental judicial reviews. The relevant issue is whether the subject matter of the challenge is development consent or another legal instrument capable of affecting the environment.

46. The board's proposed answer is Yes. This issue has already been determined by the Irish Court of Appeal in *Heather Hill* based on an extensive analysis of the case-law, including the judgment of the CJEU in Case C-470/16, *North East Pylon*. Where the grounds of challenge are not pleas of law that come from European law, they are not covered. If they are, they are covered. If Irish law imposed obligation *N* on a decision maker where obligation *N* is not required by European law, the costs protection does not arise.

47. The State respondents' proposed answer is Yes. The equivalence of treatment between national environmental law and EU environmental law mandated by the Aarhus Convention (per *North East Pylon* at §50) nevertheless requires that the law at issue be a provision of environmental law. The happenstance inclusion of administrative legal requirements in the same piece of legislation as includes "provisions of… national law relating to the environment" (*per* Article 9(3) Aarhus) does not make those legal requirements a provision of national law relating to the environment. The Court of Appeal in *Heather Hill* (at §§177-178) correctly applied *North East Pylon* in distinguishing allegations of lack of vires and breach of fair procedures from breaches of environmental law.

48. The *amicus curiae's* position is that a challenge cannot be considered as falling outside the interpretative obligation set out in *North East Pylon*, 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: the grounds of judicial review are part of the standard of review and are not to be confused with the concept of provisions of national law related to the environment, which itself is an autonomous concept determined by whether a law has an environmental object or effect.

49. My proposed answer to the question is "No". The meaning of national environmental law is autonomous and, therefore, does not depend on how the grounds of challenge are characterised by the law of a particular member state. It follows that the fact that particular grounds are so characterised as "classic judicial review grounds" or in any other way is irrelevant for the purposes of the application of the obligations under Aarhus, if the grounds

of challenge are aimed, directly or indirectly, at securing an environmental objective such as challenging a particular development consent or other environment-related decision.

50. The reason for the reference of this question is that if the "classic judicial review" grounds are excluded from the protection of enforceable Aarhus convention rights here then much of the applicants' challenge will not benefit from costs protection.

The fifth question

51. The fifth question is:

Does the general EU law principle of legal certainty as applied in the context of the interpretative obligation 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, 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.

52. The applicants' proposed answer is Yes. Prospective litigants in environmental cases are entitled to certainty in advance prior to litigating. As identified by the Court of Justice in Case C-427/07 *Commission of the European Communities v. Ireland* (Court of Justice of the European Union, 16th July, 2009, ECLI:EU:C:2009:457) and Case C-530/11 *European Commission v. United Kingdom* (Court of Justice of the European Union, 13th February, 2014, ECLI:EU:C:2014:67), costs in environmental cases cannot be determined after the fact. Given the substantial costs potentially involved in litigation, national rules must be sufficiently precise and clear as to the cost implications of any environmental litigation contemplated prior to the institution of litigation.

53. The board's position is that, in accordance with the principle of legal certainty, costs rules in the area of planning and environmental law should be sufficiently certain to be reasonably predictable. There is a procedure in domestic law to obtain this certainty before embarking on legal proceedings. However, insofar as NPE would govern and insofar therefore as NPE governs the adjudication of costs (C-167/17 *Klohn v. An Bord Pleanála* (Court of Justice of the European Union, 17th October, 2021, ECLI:EU:C:2018:833), the view of the Advocate General expressed in Case C-260/11 *Edwards v. Environment Agency* (Opinion of Advocate General Kokott, 18th October, 2012, ECLI:EU:C:2012:645) necessarily shows that a determinate prediction on *quantum* is not required and, indeed, as NPE is necessarily variable in context *per Edwards*, there cannot be such a right.

54. The State respondents' proposed answer is that the costs regime in the State is sufficiently clear and coherent, because the grounds that attract the NPE regime are the grounds that

relate to those provisions of its national law relating to the environment. That clarity is not displaced just because arguments are raised in individual cases to the effect that - by mere dint of the location or form of the particular provisions and procedures in the wider legislative scheme - the NPE regime should be expanded to non-environmental grounds that are wholly sourced in national law. Properly understood, the applicability of NPE rules can be determined at the outset of proceedings, and in case of any dispute about its applicability, the resolution of that dispute is itself covered by the NPE regime.

55. The *amicus curiae's* position is that the principle of legal certainty requires, *inter alia*, that rules of law be clear, precise and predictable in their effect, especially where they may have negative consequences on individuals and undertakings, which is not the case where it is necessary as a rule to seek a determination from the Court as to whether Article 9(3) of the Convention applies, and accordingly, in giving an interpretation of national procedural law which, to the fullest extent possible, is consistent with Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive, 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, though this requirement may be supplemented by a procedure for resolving ambiguous cases which cases may only arise in truly exceptional circumstances and shall not be such as to form a normal part of the procedure.

56. My proposed answer to the question is "Yes". The object and purpose of EU environmental law and of the Aarhus Convention would be fundamentally undermined if litigants did not know with reasonable certainty in advance of bringing the proceedings whether the not-prohibitively-expensive rule applies and if so what that means in practice in terms of the maximum level of costs they may be exposed to. Otherwise such litigants will be obliged to decide whether to institute highly complex and technical litigation with the prospect of an unacceptably high level of costs exposure. While total certainty may be elusive in exceptional borderline cases, the rules must be sufficiently clear to provide reasonable certainty.

57. The reason for the reference of this question is that if the answer is Yes, the applicants can go on to make the argument referenced in the sixth question which is essentially that the lack of such certainty in Ireland in itself entitles them to the benefit of enforceable costs protection.

The sixth question

58. The sixth question is:

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 interpretative obligation 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, 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.

59. The applicants' proposed answer is Yes. Domestic courts must disapply national procedural rules in relation to costs in the event that proceedings taken by an applicant, covered by the not-prohibitively-expensive rule, are unsuccessful in the event that to fail to do so would result in an award of costs that are prohibitively expensive. This is without prejudice to the position that, as identified in *Commission v. UK,* the costs rules in environmental cases must be *ex ante* rather than relying on *post-facto* determination of cost issues in such cases.

60. The board's proposed answer is No. The NPE rule does not mandate a 'no costs order' outcome in every scenario. Even if domestic law does not meet the requirements considered in Question 5, the outcome cannot be a blanket "no order" in all cases which would affect not just emanations of the State but private parties in that litigation. It is definitively inherent in the NPE rule that some costs might have to be awarded against an unsuccessful applicant. However, it would depend on the particular factual scenario. *Edwards* presumes a domestic Court will, in fact, grapple with NPE.

61. The State respondents' proposed answer is No. See answer No. 5 above. In addition, the requirement that costs be NPE does not, as a matter of EU law, preclude any costs order being made. The judgment in C-427/07 *Commission v. Ireland* ECLI:EU:C:2009:427 recognises this. In s. 50B of the 2000 Act and ss. 3 & 4 of the 2011 Act Ireland granted greater protections than were required by EU law. This does not have the effect of making these greater protections a part of EU law (as it applies in Ireland). The converse invites the conclusion that European law requires that NPE has a specific meaning under Irish law which it does not have as a matter of European law across the Union.

62. The *amicus curiae's* position is that 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, the general EU law principle of legal certainty as applied in the context of the interpretative obligation 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,

does not 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, *but does* have the effect of requiring that the full extent of his or her rights and liabilities be made clear to the applicant at the earliest possible stage in the proceedings, and in any event before incurring any liability to any other person.

63. My proposed answer to the question is "Yes". In the absence of rules that specify the extent if any and the maximum amount of liability for costs in advance, an applicant's rights under EU law would be significantly impaired if a court could impose after-the-fact costs against them. In principle a member state could adopt clear legislation that allowed some costs to be awarded against an unsuccessful environmental litigant, albeit not prohibitively expensive costs, but such a litigant would be entitled to know with reasonable certainty in advance if such a regime applied and what the maximum costs exposure would be. In the absence of such legal certainty, in order to obviate the consequences of such a breach of EU law, a domestic court should be required to disapply any national rules allowing for the award of any costs against any given applicant, until such time as the law allowing for the award of costs against an applicant is brought into a state of reasonable certainty.

64. The reason for the reference of this question is that, given that the Irish environmental costs regime in my view, for the reasons given, currently fails the test of providing reasonable certainty on all aspects of exposure to costs and as to advance quantification of the maximum amount of costs, if the answer is Yes then these applicants would benefit from the disapplication of general provisions of Irish law allowing for the award of costs against them.

The seventh question

65. The seventh question is:

Whether article 4(3) TEU, article 267 TFEU or the general principles of EU law including the principle of supremacy have the effect that the courts of a member state are obliged to disapply any rule or practice of the domestic law of the member state such as the principle of stare decisis that would have the effect of preventing, discouraging or inhibiting a court from referring a question that it is otherwise minded to refer to the CJEU or rendering that inappropriate on the ground that to do so could in effect question a previous and otherwise binding decision of another court in that member state, in particular a court of higher hierarchical standing than the referring court, or that would have the effect of preventing, discouraging or inhibiting the referring court, insofar as it may be minded to suggest possible answers to the questions being referred, from proposing an answer that it is otherwise minded to propose to the CJEU or rendering that inappropriate on the ground that to do so could in effect question a previous and otherwise binding decision of another court in that member state, in particular a court of higher hierarchical standing than the referring court.

66. The applicants' proposed answer is Yes, a national court is required to disapply such a rule. This is based on a long line of consistent CJEU case law confirming that the discretion to refer questions to the CJEU under Article 267 TFEU is autonomous and cannot be constrained or qualified by national rules such as *stare decisis*.

67. The board's position is as follows:

> "1. The principle in the Court of Appeal in *Minister for Justice v O'Connor* ("O'Connor") is correct.
>
> 2. There is no bright line or absolute domestic rule of law (and indeed the court of Appeal in O'Connor stated at §26 that it is prudent to eschew absolute rules) which would extinguish the discretionary autonomy of the High Court to make a reference, if it deemed it necessary to resolve a question of EU law. However, when exercising its discretion, it is appropriate to consider whether there is a judgment of a higher court that would otherwise be binding, by virtue of the principle of *stare decisis*. Thus, if there is a higher court ruling which is *directly and fully* on point, the national court can decline to exercise its discretion to make a reference if the effect would be to indirectly impeach that ruling, having regard to principles of legal hierarchy, certainty and judicial comity.
>
> 3. Case C-416/10, Krizan means that national courts are not bound by higher court rulings, where they otherwise might be, if there is a conflicting rule of European law or judgment of the European court. In this respect, the underlying legal principles of European law are that national procedural autonomy remains valued as well as principles of legal certainty but are subject to concepts of supremacy and efficacy where European law is clear. Where, however, a superior court has directly considered and applied the very European law in question (as in O'Connor) European law does not preclude a domestic rule as in O'Connor. Whether the superior Court has, in fact, done so is a question for each case."

68. The State's position is that it is legitimate, notwithstanding the undoubted freedom to send a reference contrary to the findings of a higher court, to weigh in the balance, when deciding whether to send such reference, the principles of national procedural law including the doctrine of *stare decisis*. Thus where a lower domestic court has doubts about a previous judgment of a higher domestic court, it might, for example, express its views and grant leave to appeal to the higher court. However, if it plainly takes a different view, there is no inhibition on a reference being made. In the circumstances, it is respectfully submitted that a reference on this question in the abstract serves no useful purpose. The same principles apply to suggesting answers.

69. The *amicus curiae's* position is that it does. This question is '*acte clair*', having been determined in the following cases: C-166/73 *Rheinmuhlen*, C-378/08 *ERG*, C-188/10 *Melki* and *Abdeli*, C-136/12 *Consiglio Nazionale di Geologi*.

70. My proposed answer to the question is "Yes". The freedom of individual national courts and tribunals to have direct access to the CJEU is a fundamental element of the architecture of European law. The CJEU needs no reminder that this right has been challenged in the Europe of today: see Case C-204/21 *Commission v. Poland* (Order of the Vice-President of the Court of Justice of the European Union, 27th October, 2021, ECLI:EU:C:2021:878). It is disappointing to see that right now being questioned in Ireland. That right implies not just the lack of any absolute legal impediment to a refence which might be seen to suggest a different answer than that arrived at by a higher domestic court, but also a systemic acknowledgement of a court or tribunal's freedom to do so without being stigmatised as acting inappropriately. In terms of deterring the exercise of the right to refer, there is little difference in practice between an assertion that a reference is prohibited and an assertion that a party or an appellate court is entitled to label the exercise of that right as "inappropriate". The right to refer and the duty of sincere co-operation also implies an entitlement to suggest the answer that seems most appropriate to the referring court even if that might be different to that arrived at by a higher domestic court. Otherwise the referring court would be failing to offer its best efforts at co-operation to the CJEU and would be presenting the question on an insincere and inadequate premise.

71. The reason for the reference of this question is that the freedom of the referring court to refer the questions set out in the present judgment was not accepted by the board, which, while the reference was under consideration, submitted to another judge that the referring court, in referring the questions, was "in breach of the requirements of stare decisis" (*Jennings v. An Bord Pleanála* [2022] IEHC 249 para. 329). While the board has not made that claim in those exact words in response to the draft question, the equivocal response of the board to the proposed question speaks for itself. Clearly there is a significant prospect of an appellate court being invited to share such criticisms. An answer to the question is therefore required so that the referring court can have definitive confirmation of whether it is enjoys the freedom to refer that is being asserted in the terms referred to in the question.

Order

72. Accordingly, the order will be that the questions set out in this judgment be referred to the CJEU pursuant to article 267 TFEU.