Judgment

Title:	Sweetman -v- Shell E & P Ireland Ltd
Neutral Citation:	[2016] IESC 58
Supreme Court Record Number:	167/06
High Court Record Number:	2005 No 17 MCA
Date of Delivery:	17/10/2016
Court:	Supreme Court
Composition of Court:	Laffoy J., Dunne J., Charleton J.
Judgment by:	Charleton J.
Status:	Approved
Result:	Other
Details:	Judgment on Costs

Judgments by	Link to Judgment	Concurring
Charleton J.	Link	Laffoy J., Dunne J.

An Chúirt Uachtarach

The Supreme Court

Laffoy J
Dunne J
Charleton J

High Court record number: 2005/17 MCA

Supreme Court appeal number: 167/2006

[2016] IESC

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000

Between

Peter Sweetman

Applicant/Appellant

- and -

Shell E&P Ireland Limited, Lennon Quarries and TJ Lennon

Appellant/Respondent/Defendant

Judgment of Mr Justice Peter Charleton, delivered on Monday 17th October 2016

1. This appeal concerns an award of litigation costs against a losing party; in this case the unsuccessful appellant Peter Sweetman. Order 99 rule 1 of the Rules of the Superior Courts provides that while the "costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those courts", the default position is that the successful party should recover costs from the unsuccessful party. Peter Sweetman commenced this case by originating motion of 9th March 2005. It was an application for an injunction to stop works on the Shell natural gas pipeline at Ballinaboy in County Mayo. Smyth J in the High Court refused the relief sought on 14th March 2006 and awarded costs against the losing party; [2007] 3 IR 13. Peter Sweetman lodged a notice of appeal on 30th April 2006. In consequence of the commencement on 23rd August 2011 of the relevant sections of the Environmental (Miscellaneous Provisions) Act 2011, the ordinary rule pertaining to costs changed, but only in defined cases, those brought for the purpose of protecting the environment. This Court first heard an application in relation to costs on 25th February on this appeal. This followed the judgment of Dunne J on 3rd February 2016 in this Court dismissing the appeal, [2016] IESC 2, There were then three points raised on behalf of Peter Sweetman as to costs. Two points were rejected by ruling dated 18th March and the matter was adjourned to consider the last, which was if the Act of 2011 had changed the usual rule as to costs. The Court then set two points on the statutory question for 21st June, 2016. These two issues were defined thus:

> (1) Whether the Act of 2011 is retrospective, so as to apply to Peter Sweetman's application in the High Court on this appeal, or both?
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> (2) If the Act of 2011 is retrospective, so as to apply to Peter Sweetman's application to the High Court or to this appeal or to both, what is the effect of the provisions of the Act of 2011 in relation to the costs of the application or the appeal or both?

Background

2. The Corrib gas field is situated about 80km off Erris Head in County Mayo. Apparently, it is the most substantial gas find in Irish waters since the discovery of the

Kinsale deposit in the 1970s. That find resulted in the laying of piping which brought natural gas to a large section of the Irish population for use in industrial and domestic settings. The hope nationally is that the Corrib gas find will supplant the Kinsale energy resource. The area of County Mayo that was logistically best for bringing the Corrib gas ashore and processing it is an area of outstanding beauty. With any such enterprise there are potential dangers as well as disruption to local communities as the necessarily huge infrastructure is put in place. This led to both protests and litigation. Most of the court applications centred on the various permissions, including planning, environmental and foreshore, which this complex project required. This particular case commenced on 9th March 2005 and had as its overall objective to stop the development taking place. The means used was an application for an injunction under s. 160 of the Planning and Development Act, which enables the courts to "require any person to do or not to do, or to cease to do … anything that the court considers necessary" to prevent an unauthorised development or to ensure that it is "carried out in conformity with the planning permission pertaining to that development or any condition to which the permission is subject." On this case coming on for hearing before Smyth J in the High Court in March 2006, the diffuse nature of the proceedings brought by Peter Sweetman became apparent. The trial judge was unimpressed by the plethora of allegations made by Peter Sweetman, namely that Shell was not complying with the terms of its planning permission and other permissions and by other allegations which were not backed up by any evidence. Despite the fact that Peter Sweetman had initially sought such a large number of diverse reliefs, by the time of the commencement of the hearing he decided to pursue only two issues: whether Shell had achieved compliance with condition 1 and condition 37 of the planning permission granted by An Bord Pleanála on 22nd October 2004. This change of tactics was only notified to Shell on the eve of the hearing. The challenge to condition 1 concerned the deposit of road excavation materials and was held by the High Court to have not been infringed. This complaint was less substantial than condition 37 which was focused on most closely; An Bord Pleanála had required Shell to lodge, with the planning authority in Mayo, a cash deposit, backed by insurance, for the restoration of the site on the exhaustion of the resource. Smyth J held that there had been substantial compliance with that condition, albeit that certain formalities remained to be fulfilled. Hence, the challenge was rejected in the High Court. Some of the conditions of the planning permission required Shell as developer and Mayo County Council as the local planning authority to agree the various complex steps that the conditions entailed. Condition 37 was one of these. In his notice of appeal to this Court dated 30th April 2006 from the dismissal of his case by the High Court, Peter Sweetman focused on an alleged failure to have in place the bond and the insurance as required by condition 37.

3. As the judgment of Dunne J on behalf of this Court dismissing the appeal makes clear, [2016] IESC 2, after his failure before the High Court Peter Sweetman did nothing to expedite this appeal. In the intervening 10 years, the infrastructure for bringing the gas from the Corrib field ashore and processing it had been put in place. This took enormous expense and effort. Gas was successfully brought ashore for the first time in December 2015. Yet, even still, what was sought on the appeal was injunctive relief under s. 160 of the Act of 2000 which would potentially have nullified that decade of effort. By letter of 10th December 2004, Shell had notified Mayo County Council of the assets of the parent company, how that company intended to fund the reinstatement required by condition 37 and how the necessary formal agreements would be put in place. Of itself, the acceptance of the offer as to the manner of compliance with condition 37 by Mayo County Council in its replying letter of 10th December 2004 may in itself be contractually binding on Shell, but this does not arise for decision on this appeal. What matters is that in accordance with the planning permission, the local planning authority had agreed the substance and form in which compliance with condition 37 would take place. That is what the planning permission required. Smyth J found in the High Court that this constituted substantial compliance. In this Court, the

judgment of Dunne J upheld this finding and further ruled that it was not open to Peter Sweetman to challenge the decision of Mayo County Council to accept the assurance of Shell. In the meanwhile, between the ruling in the High Court and the hearing of this appeal, the solicitors for Shell had contacted the local authority with a view to finalising the security arrangements. As noted by Dunne J, this resulted in a formal agreement of 16th August 2011 and Mayo County Council confirmed, by letter of 22nd August 2011, its satisfaction with the terms thereof and with the arrangements and supports that Shell had put in place. Nonetheless, this appeal proceeded. This Court held that the appeal was moot since no live controversy continued between the parties and that the stated unhappiness of Peter Sweetman as appellant with the form of the agreement could not result in a judicial rewriting of its terms.

4. It was in the aftermath of the loss of that appeal that counsel for Shell applied for the costs of the appeal. The response of counsel for the unsuccessful appellant was that the award of costs by the High Court should be changed to an order that each party bear its own costs and that the same order should be made in this Court. That submission was based on the terms of the Environmental (Miscellaneous Provisions) Act 2011 to which reference should now be made.

The Act of 2011

5. The long title of the Act of 2011 announces it as legislation to "make provision for costs of certain proceedings" and to give effect to "certain articles of the Aarhus [Convention]" of 25th June 1998 and for "judicial notice to be taken" of that convention. The long title of an Act can provide "a legislative statement of the purpose and scope of" the legislation" and may set the "key-note for the interpretation of the powers that are given", for instance, to a subordinate law-making power; see *Minister for Industry and Commerce v Hales* [1967] IR 50 at 57 and see *Bederev v Ireland and the Attorney General* [2016] IESC 34 at para. 29. As always, this is a matter of the interpretation of the intention of the legislature as expressed in the legislation in question. The Aarhus convention provides for "access to information, public participation in decision-making and access to justice in environmental matters." The text thereof requires the signatories to enable public participation in plans that have a serious effect on the environment (Article 3) and to ensure that relevant information is made available to the public (Article 4) in order to render such participation real as opposed to illusory (Articles 5 and 6). The public must have an entitlement to challenge decisions by bodies charged with the grant of licences and permissions relevant to environmental protection. Article 9 of the Convention provides:

> Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.
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> In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

6. These principles are reflected in Directive 2003/35/EC providing for public participation in the drawing up of certain plans and programmes in relation to the environment and amending with regard to public participation and access to justice Council Directive 85/337/EEC and 96/61/EC. Article 10a of Directive 85/337 EEC, as

inserted by Article 3(7) of Directive 2003/35 EC, now part of article 11 of Directive 2011/92 EU, requires Member States to ensure that those members of the public who have a "sufficient interest" in certain environmental plans and projects for which permission is to be granted should have "access to a review procedure before a court of law" in order to "challenge the substantive or procedural legality of decisions". The relevant procedures are to be "fair, equitable, timely and not prohibitively expensive." The implementation by Ireland of the relevant rules is the subject of the ruling of the Court of Justice of the European Union in Case C-427/07 *Commission v Ireland*., judgment of 16th July 2009, wherein it was determined that Ireland had failed to properly transpose certain provisions of those Directives into national law. There followed the insertion of a new section 50B into the Act of 2000 through s. 33 of the Planning and Development (Amendment) Act 2010. According to the submissions by counsel for Shell on this appeal, however, the obligation of the State to provide for such a "not prohibitively expensive" form of court procedure was only fully fulfilled by the passing of sections 3, 4 and 6 of the Act of 2011. To an extent, this is borne out by the long title to that Act. Section 50B of the Act of 2000 was separately further amended by s. 21 of the Act of 2011 in order to provide for the overruling of the ordinary rule that costs follow the event, as in Order 99 of the Rules of the Superior Courts, thus providing for a default position that each party bear its own costs, and also to provide that an applicant in an environmental case might recover costs from a losing party, be it respondent or notice party, "to the extent that the applicant succeeds in obtaining relief". That latter section might have to be considered here, save for the fact that Peter Sweetman has not succeeded to any extent in his appeal to this Court and did not succeed in the High Court.

7. Section 4 of the Act of 2011 applies a new costs regime to civil proceedings concerned with a "licence, permit, permission, lease or consent" where the contravention of which "is causing, or is likely to cause, damage to the environment." While this concept of environmental damage is fully defined, the words used add nothing to the ordinary implication of that term. Specifically, perhaps out of an abundance of caution, breaches of planning permissions and conditions attached thereto are included in the kinds of actions to which the costs rules are to apply. This is set out at s. 3, the first part of which provides:

> (1) Notwithstanding anything contained in any other enactment or in—
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> (a) Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986),
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> (b) Order 66 of the Circuit Court Rules (S.I. No. 510 of 2001), or
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> (c) Order 51 of the District Court Rules (S.I. No. 93 of 1997), and subject to subsections (2), (3) and (4), in proceedings to which this section applies, each party (including any notice party) shall bear its own costs.
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> (2) The costs of the proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant, or as the case may be, the plaintiff, to the extent that he or she succeeds in obtaining relief and any of those costs shall be borne by the respondent, or as the case may be, defendant or any notice party, to the extent that the acts or omissions of the respondent, or as the case may be, defendant or any notice party, contributed to the applicant, or as the case may be, plaintiff obtaining relief.

Retrospective and retroactive legislation

8. Since the appeal was lost, neither s. 3(2) nor s. 21 of the Act of 2011 can assist Peter Sweetman. His counsel argue, instead, that any order of costs made against him is prohibited. It is contended that the Act of 2011 looks backwards since s. 3(1) is merely a procedural rule and that consequently it applies to all proceedings then in train, changing the rule that costs are always awarded against a losing party to litigation, subject only to the court's discretion, into a rule that costs must be borne by each party. It is urged, further, that since the Aarhus Convention was "done on the 25th June 1998", a date "well before these proceedings commenced", there is an obligation to ascertain the purpose of the legislation from that background and to interpret any provision that may be ambiguous in accordance with the international obligations of the State. It is contended to be an obligation of European law "to interpret, to the fullest extent possible, the procedural rules in relation to the conditions to be met" for actions brought in conformity with the Aarhus Convention; see para 52 of case C-240/09 judgment of the Court (Grand Chamber) of 8 March 2011, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*. Of course, no such interpretation can be contrary to law, that would be for the courts wrongfully to distort the meaning of the enactment and so overturn the obligation of the legislature under Article 15.2 of the Constitution to exercise the "sole and exclusive power of making laws for the State"; see *Pfeiffer and Others v. Deutsches Rotes Kreuz* [2004] E.C.R. I-08835 (C-397/01 to C-403/01) paras 111 to 113. This is sometimes called the *contra legem* rule. That obligation of interpretation is central. The text of the Act of 2011 is key. In considering that text, it should be noted that it would have been simple for the Oireachtas to have included words that made the operation of the Act of 2011 retrospective in effect. That was not done.

9. Counsel for Shell counter the contentions on behalf of Peter Sweetman in terms that are best reproduced from their written submissions:

> It is [Shell]'s position that the Act of 2011 cannot be applied retrospectively to either the Appellant's application in the High Court or to this appeal on the basis that the costs provisions contained in the Act of 2011 amount to a substantive change in the law, affecting the vested rights of parties, as opposed to a procedural change and/or that to allow the provisions to be applied retrospectively would be "so unfair" that it cannot have been the intention of the Oireachtas that the provisions would be applied retrospectively. If, however, the Court accepts that the Act of 2011 can be applied retrospectively, it is submitted that the within proceedings do not fall within the scope of section 4 of the Act of 2011 or, in the alternative, that the Court should award costs against the Appellant due to the manner in which he has conducted the proceedings.
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> Part 2 of the Act of 2011 was commenced on the 23rd August 2011, long after the High Court proceedings had been instituted (9th March 2005) and the delivery of judgment (14th March 2006) and the Notice of Appeal filed (30th April 2006). At common law there is a general presumption against the retrospective operation of law. However the courts have held that where the change to the law is procedural or evidential and makes no substantive change to vested rights then it can be applied retrospectively. The Appellants seek to argue that the changes brought about to the costs regime by Part 2 of the 2011 Act are procedural changes which do not affect vested rights and accordingly apply to proceedings instituted prior to the commencement of the provision.

10. The relevant canons of statutory interpretation operate a clear distinction between legislation which affects existing rights and legislation which merely enables the enforcement of such rights through court action. Bennion on *Statutory*

Interpretation (1st edition, London, 1984, and see also to the same effect the current edition) at para 131 states the general rule in the following form:

> It is the principle of legal policy that, except in relation to procedural matters, changes in the law should not take effect retrospectively. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle.

11. While a multitude of cases have helpfully been cited, it is clear that the presumption in interpreting legislation is that, unless there are clear words affecting existing rights, then the provisions of an enactment apply prospectively; that is from the time of enactment and not retroactively. It seems that there are two principles that guide this position. Firstly, there is certainty of law. Where a citizen adopts a particular position, whether it be as to the sale of goods or the formation of a contract or the obtaining of the necessary permission for the building of an extension to a family home, he or she will ascertain the law as it stands on that day and will be expected to obey that law. If today a person does not need planning permission to repair the roof on a family home and repairs the roof, a law passed the next day should not upset the certainty of compliance by imposing civil consequences or criminal penalties. That much is expressed in Article 15.5.1º of the Constitution in stating that the legislature is not to "declare acts to be infringements of the law which were not so at the date of their commission." Consequential laws as to activities that were always a crime, such as profiting from crime and the removal of the proceeds of crime, are not covered by that prohibition; *Murphy v Criminal Assets Bureau* [2001] 4 IR 113. Hence, there is no absolute prohibition on the retrospection of legislation; *McKee v Culligan* [1992] 1 IR 223. But, and this is the second point, legislation passed within a democratic society is intended for the betterment of citizens and not for the imposition of unfair consequence to lawful actions. Thus Maxwell on the *Interpretation of Statutes* (12th edition, Langan editor, London, 1969) states the rule at 214:

> Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.

12. Why rules of procedure, how cases are presented in court, or evidence, how cases are proven in court, are an exception to this rule is explained in Bennion at 314:

> Rules of legal procedure are taken to be intended to facilitate the proper settlement of civil or, as the case may be, criminal disputes. Changes in such rules are assumed to be for the better. They are also assumed to be neutral as between the parties, merely holding the ring. Accordingly the presumption against retrospective penalization does not apply to them, since they are supposed not to possess any penal character. Indeed if they have any substantial penal effect they cannot be merely procedural.

That this rule applies to civil cases is beyond doubt, since the presumption is against legislation altering vested rights or obligations. In *Hamilton v Hamilton* [1982] IR 466 at 480-81, the remarks of Henchy J make that clear:

> From a wide range of judicial decisions I find the relevant canon of interpretation at common law to be this. When an Act changes the substantive, as distinct from procedural law then, regardless of whether the Act is otherwise prospective or retrospective in its operation, it is not to be deemed to affect proceedings brought under the pre-Act law and pending at the date of the coming into operation of the Act,

Of course, legislation cannot just look forward; see the remarks of Lord Denning in *Attorney General v Vernazza* [1960] AC 965. It must also deal with existing situations

and, as O'Higgins CJ explained at 473 in *Hamilton*, legislation can be validly interpreted by necessary implication or in accordance with the terms of its text as applying to existing situations:

> Many statutes are passed to deal with events which are over and which necessarily have a retrospective effect. Examples of such statutes, often described as ex post facto statutes, are to be found in Acts of immunity or pardon. Other statutes having a retroactive effect are statutes dealing with the practice and procedure of the Courts and applying to causes of action arising before the operation of the statute. Such statutes do not and are not intended to impair or affect vested rights and are not within the type of statute with which, it seems to me, this case is concerned. For the purpose of stating what I mean by retrospectivity in a statute, I adopt a definition taken from Craies on Statute Law (7th ed., p. 387) which is, I am satisfied, based on sound authority. It is to the effect that a statute is to be deemed to be retrospective in effect when it "takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."

13. When the substantive, as opposed to the procedural, law is changed during the currency of litigation, meaning after a case has been commenced and is still ongoing, the entitlements of the parties must be determined according to the law when the case was commenced. The exception is where the legislation shows a clear intention to the contrary. Some authorities support the proposition that the more extensive the variation of existing rights is, the more clearly the intention of the legislature must be made manifest in order to make that change. Alterations to forms of procedure or the admission of evidence, however, do not involve vested rights. Such changes are to enable people to better present their case. It is thus presumed that legislation is passed for the improvement of the law. On this appeal, the award of costs at the conclusion of litigation is said by counsel for Peter Sweetman to be merely a procedural matter. This is claimed to be a principle of long standing. Indeed, it is expressed in Maxwell on the *Interpretation of Statutes* at 224 as:

> Statutes affecting costs are of a procedural nature for the purposes of the rules about retrospectivity. Section 34 of the Common Law Procedure Act 1860, which deprived a plaintiff in an action for a wrong of costs if he recovered by the verdict of a jury less than £5, unless the judge certified in his favour, was held to apply to actions begun before the Act had come into operation but tried afterwards, and a similar effect was given to section 10 of the County Courts Act 1867 which dealt with orders for security for costs in county court actions.

14. In Halsbury's Laws of England (4th edition, 1995), it is stated at para 1287 as a general rule that legislation regarding procedures is retrospective:

> The general presumption against retrospection does not apply to legislation concerned merely with matters of procedure; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament. For this purpose 'procedure' includes matters relating to remedies, defences, penalties, evidence and restrictions on vexatious litigants. Procedural enactments thus affect proceedings pending at their commencement unless the contrary intention appears, whilst the applicability to pending proceedings of a provision altering the structure of appeals may depend on whether it increases or reduces rights of appeal.

The origin of the rule that matters of costs are mere procedure and are not substantive rights is to be found in *Wright v Hale* (1860) 6 H & N 227, where Pollock CB stated at 230-31 that putting costs into the category of procedure would not interfere with any "great constitutional principle". He reasoned that "service of proceedings, or what evidence must be produced to prove particular facts" were outside the realm of

substantive law. He instanced something that could easily serve as a modern example: an enactment cutting down on the number of witness that might be called on each side. He held that such a rule could not be regarded as more than "a mere regulation of practice." He added: "Rules as to the costs to be awarded in an action are of that description, and are not matters in which there can be vested rights." That may be doubted. The case was followed in *Kimbray v Draper* (1868) LR, 3 QB 160 and *AG v Theobold* (1890) 24 QBD 557. Cockburn CJ in*Kimbray v. Draper* expressed "great doubts" as to the correctness of the judgment in Wright v Hale. Of note are Blackburn J's comments at 222:

> Whether the Court of Exchequer applied that test properly, in holding it was a matter of procedure where a statute enabled a judge to deprive a plaintiff of costs in a case where but for the statute he would have been absolutely entitled to them, may be questionable; but for the decision in that case I certainly should have been inclined to think this was taking away a right.

15. There had been an earlier decision in *Freeman and Others: Executors of Freeman v. Moyes*(1834) 1 AD&E 339, where the executors as plaintiffs commenced proceedings when costs would have gone in their favour, but an intervening statute had provided for executors to pay costs "unless the Court … shall otherwise order". Littledale J dissented from the decision of Denman CJ and Taunton J, stating at 341 that he would "have thought differently". He thought it "a strange consequence of the Act that a party should commence a suit and find only on the eve of the trial that he is liable to costs; which, if he had known before, he probably would not have brought the action." Slynn J, in a more modern case about legal aid costs entitlements, *R. v. Dunwoodie* [1978] 1 All ER 923, considered himself bound by the prior decisions. His view, however was to doubt as to "whether what is said to be a change in the amount of costs to be awarded was truly a matter of procedure or a remedy. It is certainly not one which in the words of Lord Denning in *Blyth v Blyth*, 'only alter the form of procedure'". In this jurisdiction, the decision of Finlay Geoghegan J in*O'Riordan v O'Connor* [2005] 1 IR 551, while referring to these decisions, does not endorse the proposition that a change to the rules relating to costs is a matter of procedure which can only be applied retrospectively.

16. The overarching principle must be that of fairness. How can it be inferred that the legislature intended an unjust result? This principle, after all, is at the heart of the control of subsidiary legislative bodies in terms of what powers might be considered as a matter of proper construction to have been delegated by the National Parliament and can operate as a tool in the judicial review of subordinate authority to fix prices under delegated law-making powers; see *Island Ferries v Minister for Communication, Island Ferries v Galway County Counci*l [2015] IESC 95. It would be easy, but productive of a potentially facile error, to describe a change in the regime as to the award of costs as 'procedural' when in reality the rights that were there would be taken away. The question of costs is a matter not just as to calling witnesses, or how many of them, or what evidence might be admitted, or how an action was to proceed through the system, but as to funding litigation. Liability as to costs is more than merely procedural. Indeed, in *Yew Bon Tew v Kenderaan Bas Mara* [1983] AC 553 at 558H - 559A Lord Brightman cautioned against the potential dangers lurking in the description of costs as procedural merely. In support of the overarching principle of a presumption that a legislature in a democratic system cannot have intended to produce unfair consequences by means of retrospective legislation is the speech of Lord Mustill in *L'Office Cherifien v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 at 527-8:

> Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that

> value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by parliament cannot have been intended to mean what they might appear to say.

17. One notes also the view taken by Herbert J in *McCallig v An Bord Pleanála* [2014] IEHC 353. He thought the application of s. 50B(2) of the Act of 2000, as amended by s. 21 of the Act of 2011, to pending proceedings, as of the operative date of the commencement of the legislation, would be unfair. This would overturn expectations and litigation planning as to the costs expected rationally by any litigant commencing or facing such an action. To change the rule as to costs in the middle of litigation means that money expended in the reasonable expectation of recovering it through succeeding in an action or in defending it would thereby become irrecoverable.

18. This has to be correct. There is nothing in the Act of 2011 which requires, or even enables, a retrospective application. There is nothing to suggest that the Oireachtas intended to alter the rule as to costs for litigation that had already commenced. It is not within the purview of the legislation that a High Court order from 10 years previously should be altered by statutory intervention, even supposing that the doctrine of separation of powers did not outrule such a step. There is nothing to indicate that the legislature intended any such result or were obliged to provide for it through European obligations. If the latter were the case, parliamentary draftsmen are well aware that there is an obligation to make any such position clear and explicit. In any event, any such change would be unfair. Anyone who commences litigation, as every practitioner will know, is interested in how a case will be funded. In our system, a case which has merit and meets with success will almost invariably be funded through an award of costs from the losing party. Litigants tie their expectations to the certainty that while costs are at the discretion of the court, the default rule of recovering costs from the unsuccessful party will facilitate their access to the court. In many cases, it is a question of necessity. Thus, those considering commencing an action ask not just whether they have a good case but what the expenses are likely to be and also the prospects of recovery of costs. This is only sense. It would be unfair to distort that expectation through intervening legislation which would deprive a litigant of an expectation which they are perfectly entitled to feel is a fundamental building block of the decision to launch an action. Clients perhaps interest themselves in matters of evidence or of procedure, but experience shows such interest to be to a much lesser extent than the recovery of costs. Changes to the mechanics of presenting a case do not impact on recovering the expenses of litigating. Further, the true distinction to be drawn between statutes regulating procedure and those changing an existing entitlement to costs is that drawn in Bennion, quoted above, which is that procedural rules merely hold the ring and "facilitate the proper settlement of civil" procedures while being "neutral as between the parties". Removing an entitlement to costs that was secure on the commencement of an action, or on defending a case, is far from neutral but would in many cases entirely change a potential litigant's attitude.

19. Of course, for future cases, rules as to costs can be changed by legislation. It is so changed by the Act of 2011 as and from the commencement of the relevant sections. As of now, people know where they stand in commencing or defending an action relating to the environment. Their decisions as to initiation of a case or as to defence can be taken in the knowledge that the outcome is defined by law. This is an aspect of the core principle of certainty of law. As a matter of course, rules as to how a case is to

be processed or what evidence may be admitted change over time but substantive rules as to costs are more in the nature of vested rights. At the least, they are ones properly beyond neutral consideration. Were there clear words in this statutory scheme making the award of costs retrospective, the matter might be different. Were there any ambiguity, that would have to be considered. The opposite is the case. Everything in the relevant sections of the Act of 2011 look forward.

Discretion in the Act of 2011

20. Even if this were a case where the Court were required as a matter of European law to directly apply the Aarhus Convention, it seems clear that there is enough flexibility within that text, for example article 3(8) granting national courts the power to "award reasonable costs in judicial proceedings", to ensure that wholly unmeritorious actions do not attract the neutral rules as to costs. Litigants must conduct their actions for a fair purpose of the protection of the environment. They cannot scatter unfounded allegations around without any indication of proof or potential proof. They should discontinue cases where the subject matter has altered so that there no longer remains any prospect of obtaining a court order which meaningfully affects the core interest of the litigation in the protection of the environment. Even if s. 3(3) of the Act of 2011 did operate retrospectively, it nonetheless enables a court to assess how genuine an action as to the environment is. It provides for the award of costs where an action is without merit or where the proceedings are conducted improperly:

> (3) A court may award costs against a party in proceedings to which this section applies if the court considers it appropriate to do so—
>
> (a) where the court considers that a claim or counter-claim by the party is frivolous or vexatious,
>
> (b) by reason of the manner in which the party has conducted the proceedings, or
>
> (c) where the party is in contempt of the court.
>
> (4) Subsection (1) 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 "court" shall be construed as, in relation to -particular proceedings to which this section applies, a reference to the District Court, the Circuit Court, the High Court or the Supreme Court, as may be appropriate.

21. In this regard, it is only necessary to recall the remarks of Smyth J in the High Court as to the demonstrable lack of merit in this case. There were strong criticisms made by the judge which have not been demonstrated on appeal to be incorrect. These emerge from the High Court judgment, [2007] 3 IR 13 at 19:

> The applicant's affidavit and that of his adviser … grounding the application allege, assert or suggest widespread non-compliance by [Shell] with a number of conditions of the planning permission and further that [Shell] has engaged in unauthorised development. The order of Quirke J. of the 16th March, 2005, permitted inspection of the terminal site to ascertain whether unauthorised works were being carried out thereon. Notwithstanding this facility and the applicant's liberty to file any replying affidavit(s) to those filed on behalf of [Shell] so as to put before

> the court any real firm evidence of non-compliance or the carrying out of any alleged unauthorised development, no such affidavit evidence has been put before the court. This is a notable feature of this case as the affidavits filed on behalf of [Shell] identify many inaccuracies in the applicant's assertions.

22. Smyth J recorded, in addition, that many of the reliefs sought, namely those claimed under the Local Government (Water Pollution) Acts 1977 to 1990 and the Waste Management Acts 1996 to 2003 were abandoned at the hearing as not having been properly brought. The proceedings were replete with inaccuracies, he held. While those who genuinely pursue a concern for the environment may not have perfect knowledge of infringements, licences or permissions and the conditions attached thereto when they assert a challenge to a particular development in good faith, proof remains the cornerstone of our system of justice. One can grant a measure of appreciation, but these criticisms go far beyond that. Further, in adversarial proceedings, orders such as that made by Smyth J to enable inspection, and orders for discovery of documents, elucidate the public nature of the planning process together what can be observed on the ground offer sufficient in the way of court procedures for the gathering of appropriate evidence in environmental proceedings. There was no want of information. There is no warrant for disturbing the order of the High Court as to costs made in consequence of that judgment. There is nothing in the Act of 2011 to indicate any intention by the legislature to look backwards to 2006 and to alter existing rights. Thereafter, the appeal to this Court was warehoused by Peter Sweetman. There was no movement over most of a decade despite Shell facing an action which could have resulted in an order to reverse a huge infrastructural project. This is not a fair way to conduct litigation. In terms of the pursuit of an appeal, the trenchant comment in this Court by Dunne J ought to be recalled:

> It goes without saying that a person invoking the jurisdiction of the courts in proceedings of this kind has a responsibility in relation to the assertions being made in the proceedings. Assertions have to be supported by evidence. Equally, such a person has a responsibility to ensure that the proceedings are managed appropriately and speedily. Delay in the conduct of the proceedings may cause hardship to the party entitled to develop a particular project and in cases of excessive delay, the delay may disentitle the applicant to the relief sought in the proceedings.

Result

23. The relevant section as to costs of the Environmental (Miscellaneous Provisions) Act 2011 is not retrospective. It does not apply to litigation already issued prior to the commencement of the Act. It applies to all future litigation started after the commencement date of the Act of 2011. This is because the award of costs is not essentially procedural. An expectation as to the recovery of costs affects both the decision to commence a case and the necessary and legitimate prediction that it would be funded if successfully prosecuted or successfully defended by the party required to answer a legal action.

24. Even if the Act of 2011 applied retrospectively, the legislative provisions providing for an exception to the neutral rule as to costs in environmental protection cases requires this Court leave in place the order of the High Court as to costs. On this appeal, this Court cannot but award costs against the appellant Peter Sweetman in circumstances where an action has languished on appeal for 10 years and was effectively rendered moot by that delay. The costs of this appeal are awarded to Shell as against the appellant Peter Sweetman.