In the matter of intended proceedings between **Stella Coffey**, **No2GM Limited**, **Derek Banim**, **Thomas O'Connor**, **Richard Auler**, **Theresa Carter**, **David Notley**, **Michael Hickey**, **Malcolm Noonan**, **Gavin Lynch**, **Danny Forde**, **Enda Kieran** and **Dymphna Maher**, Applicants v. **The Environmental Protection Agency**, Respondent and **Teagasc**, Notice Party [2013] IESC 11 and 31, [S.C. Nos. 451, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 464 & 498 of 2012]

Supreme Court 26th February, 2013

Supreme Court 25th June, 2014

Courts – Representation – Right of audience – Representation by unqualified person not party to proceedings – Limitation of right of audience to parties to proceedings and qualified lawyers – Administration of justice – Public interest – Limited company – Exceptions – Whether circumstances to justify exception being made – Whether obligation on courts to permit representation of litigant by unqualified person.

Costs – Protective costs order – Fair procedures – Whether permissible to make protective costs order ex parte – Courts Act 1971 (No. 36), s. 17 – Aarhus Convention 1998 – Protocol (No 3) on the Statute of the Court of Justice of the European Union, article 19 – Rules of Court of the European Court of Human Rights 2015, r. 36.

The thirteen applicants ("the applicants") intended to issue proceedings seeking judicial review of a certain decision made by the Environmental Protection Agency. Prior to issuing those proceedings, the applicants made applications *ex parte* to the High Court seeking what were described as "not prohibitively expensive costs orders" by which the applicants meant protective costs orders providing that all parties to the intended proceedings of the applicants would bear their own costs, save for the applicants, who would pay either a nominal or no sum.

The applications were refused by the High Court (Birmingham, Hogan and Hedigan JJ.) (see [2012] IEHC 370 and 445) on the basis of the fundamental breach of fair procedures that would be involved in making an order of that kind necessarily affecting an opposing party without affording that party any opportunity to be heard (although the applicants were all given leave to make a similar application on notice to the intended respondent and notice party). The applicants had also sought permission to be represented by a Mr. Percy Podger, who was not formally connected with the proceedings in any way.

The applicants appealed the determinations of the High Court to the Supreme Court, which appeals were brought *ex parte*. The court permitted Mr. Podger to argue that he should be entitled to represent the applicants, including the second applicant, a limited company of which Mr. Podger had become a member during the course of the appeal.

Held by the Supreme Court (Denham C.J., Fennelly and McKechnie JJ.), in refusing to allow Mr. Podger to appear on behalf of the applicants, 1, that the limitation of the right of audience to professionally qualified persons was designed to serve the interests of the administration of justice and thus the public interest, and that to open to unqualified persons the same rights of audience and representation as were conferred by the law on duly qualified barristers and solicitors would be inimical to the integrity of the justice system.

2. That to afford completely unqualified persons complete parallel rights of audience in the courts would in particular tend to undermine the elaborate system of professional regulation to which the professions were subject.

Abse v. Smith [1986] Q.B. 536 approved. *In re the Solicitors Act and Sir James O'Connor* [1930] I.R. 623 and *R.B. v. A.S. (Nullity: domicile)* [2002] 2 I.R. 428 considered.

3. That only a qualified and duly instructed barrister or solicitor had the right to represent a litigant before the courts. Although on rare occasions, exceptions to the strict application of that rule had been permitted where it would have worked particular injustice, there was nothing in the case before the court to justify the making of an exception.

4. That, in the absence of statutory exception, a limited company could not be represented in court proceedings by its managing director or other officer or servant as, as a strict matter of law, the incorporated company was a legal person separate from its members and from its directors or management. Accordingly, unless it had legal representation, it could not be represented in court proceedings.

Tritonia Ltd. v. Equity and Law Life Assurance Society [1943] A.C. 584, *Battle v. Irish Art Promotion Centre Ltd.* [1968] I.R. 252, *Re G.J. Mannix Ltd* [1984] 1 N.Z.L.R. 309, *P.M.L.B. v. P.H.J.* (Unreported, High Court, Budd J., 5th May, 1992) and *Coffey v. Tara Mines Ltd.* [2007] IEHC 249, [2008] 1 I.R. 436 considered.

5. That there was no basis under either the law of the European Union or the European Convention of Human Rights 1950 for the claim that there was any obligation on the courts to permit a litigant to be represented by a person other than a duly qualified lawyer.

The applicants subsequently applied to the Supreme Court to have the appeal determined on the papers lodged, which application was granted in the special circumstances of the case.

Held by the Supreme Court (Denham C.J., Fennelly and McKechnie JJ.), in dismissing the appeal, that as notice of proceedings or of orders against a party was basic to fair procedures and implicit in the administration of justice, the High Court was correct in law in refusing to grant a costs order against parties without notice to those parties and in their absence from the court.

Cases mentioned in this report:-

Abse v. Smith [1986] Q.B. 536; [1986] 2 W.L.R. 322; [1986] 1 All E.R. 350.

R.B. v. A.S. (Nullity: domicile) [2002] 2 I.R. 428.

Battle v. Irish Art Promotion Centre Ltd. [1968] I.R. 252.

Coffey v. Tara Mines Ltd. [2007] IEHC 249, [2008] 1 I.R. 436.

Commission v. Ireland (Case C-427/07) [2009] E.C.R. I-6277; [2011] 2 C.M.L.R. 46.

Collier v. Hicks (1831) 2 B. & Ad. 663; (1831) 109 E.R. 1290.

R.D. v. McGuinness [1999] 2 I.R. 411; [1999] 1 I.L.R.M. 549.

Re G.J. Mannix Ltd [1984] 1 N.Z.L.R. 309.

D.K. v. Crowley [2002] 2 I.R. 744; [2003] 1 I.L.R.M. 88.

McKenzie v. McKenzie [1970] 3 W.L.R. 472; [1970] 3 All E.R. 1034.

In re Dymphna Maher [2012] IEHC 445, (Unreported, High Court, Hedigan J., 22nd October, 2012).

No2GM Ltd v. Environmental Protection Agency [2012] IEHC 369, (Unreported, High Court, Hogan J., 28th August, 2012).

O'Connor v. Environmental Protection Agency [2012] IEHC 370, (Unreported, High Court, Hogan J., 28th August, 2012).

P.M.L.B. v. P.H.J. (Unreported, High Court, Budd J., 5th May, 1992).

R. (Edwards) v. Environmental Agency [2010] UKSC 57, [2011] 1 W.L.R. 79; [2011] 1 All E.R. 785.

R. (Edwards) v. Environmental Agency (Case C-260/11) [2013] 1 W.L.R. 2914; [2014] All E.R. (E.C.) 207; [2013] 3 C.M.L.R. 459.

In re the Solicitors Act and Sir James O'Connor [1930] I.R. 623; (1929) 64 I.L.T.R. 25.

Tritonia Ltd. v. Equity and Law Life Assurance Society [1943] A.C. 584; [1943] 2 All E.R. 401.

Appeal from the High Court

The facts have been summarised in the headnote and are more fully set out in the judgments of Fennelly J. and Denham C.J., *infra*.

The applicants applied *ex parte* to the High Court on the 13th and 28th August, and the 22nd October, 2012, for leave to be represented by a non-party, and for orders relating to the costs of intended proceedings. The High Court refused the applications.

By notices of appeal dated the 9th October and the 7th November, 2012, the applicants appealed to the Supreme Court against the determination of the High Court. The preliminary issue of representation was heard

by the Supreme Court (Denham C.J., Fennelly and McKechnie JJ.) on the 11th December, 2012. The court made a ruling on that date refusing the application and reserved its reasons to a later date.

The applicants appeared in person.

Cur. adv. vult.

Denham C.J. 26th February, 2013

[1] I have read the judgment about to be delivered by Fennelly J. and I agree with it.

Fennelly J.

[2] This judgment provides the reasons for the decision of the court made at the hearing of these 13 appeals on the 11th December, 2012, declining the application of the 13 appellants to be permitted to be represented at the hearing of the appeal by Mr. Percy Podger or, put otherwise, the application of Mr. Podger to be permitted to appear for and to argue the appeals as the representative or advocate of the appellants.

[3] For the purpose of considering that issue, the court heard Mr. Podger and permitted him to argue that point and that point only. Having heard him, the court ruled that it would not hear Mr. Podger as representative of the appellants. It informed the appellants that it would hear them or any of them who wished to present the appeal on his or her own behalf. The court adjourned briefly to enable them to consider the position. At the resumed hearing, none of the appellants wished to do so. However, Mr. Podger announced that he had, during the period of the adjournment of the hearing, been made a member of the appellant company, No2GM Ltd., and that he proposed to represent it. The court declined to hear him as representative of the company.

[4] In this judgment, I give the reasons for ruling that the court should not hear Mr. Podger as advocate or representative of the appellants.

[5] The situation is procedurally singular, if not unique. The appeals, like the applications in the High Court, are presented *ex parte*, even though the appellants applied to the High Court and are now applying to this court for orders potentially adversely affecting the interests of the respondents to

their intended applications for judicial review but without hearing the latter. Thus, the appellants, and Mr. Podger on their behalf, do not even name the affected bodies (the Environmental Protection Agency (the "EPA") and Teagasc) in the titles of their applications in the High Court or in their notices of appeal to this court.

[6] The appellants are: Stella Coffey, No2GM Ltd., Derek Banim, Thomas O'Connor, Richard Auler, Theresa Carter, David Notley, Michael Hickey, Malcolm Noonan, Gavin Lynch, Danny Forde, Enda Kiernan and Dymphna Maher. It will be noted that one of the appellants is a company, in fact a company limited by guarantee. The papers submitted to the High Court and supporting submissions for each of the 13 appellants are, in effect, identical and clearly prepared by the same person. It is clearly Mr. Podger who is coordinating the applications for judicial review which the appellants apparently wish to commence in the High Court.

[7] The appeals are taken against judgments of the High Court delivered respectively by Birmingham J. (one case, the application of Stella Coffey), Hogan J. (*O'Connor v. Environmental Protection Agency* [2012] IEHC 370, (Unreported, High Court, Hogan J., 28th August, 2012) (11 cases)) and Hedigan J. on the 22nd October, 2012 (*In re Dymphna Maher* [2012] IEHC 445, (Unreported, High Court, Hedigan J., 22nd October, 2012) (one case)).

[8] It appears that each of the appellants wishes to seek judicial review of a decision made on the 25th July, 2012, by the EPA in the exercise of the powers conferred on it by the Genetically Modified Organisms (Deliberate Release) Regulations 2003 (S.I. No. 500 of 2003) granting a consent to Teagasc, Oak Park, County Carlow to carry out the deliberate release of certain genetically modified potato lines subject to certain conditions. None of the applicants has, to date, in fact made any application to the High Court for leave to apply for judicial review. In fact, they did not even place before the High Court any material by way of evidence or legal argument providing grounds for judicial review of the EPA decision. As Birmingham J. said, in the case of Stella Coffey, "the papers address only the request for a not prohibitively expensive order".

[9] The appellants each applied to the High Court for what they describe as a "not prohibitively expensive costs order". Each applicant is described on the face of the application as a "European citizen … lacking sufficient resources".

[10] The appellants base their application for a "not prohibitively expensive costs order" essentially on the Convention on access to information, public participation in decision-making and access to justice in

environmental matters done at Aarhus, Denmark, on the 25th June, 1998 ("the Aarhus Convention"). That is a United Nations Convention, which was not ratified by Ireland until the 20th June, 2012, though it had been ratified by the European Union in February, 2005 and effect has been given to certain of its provisions in European Union law.

[11] The appellants allege that to proceed without the benefit of the claimed "not prohibitively expensive costs order" would render them financially incapable of continuing with the challenge against the EPA, and would leave them financially exposed should they be ultimately unsuccessful and have costs awarded against them.

[12] The Aarhus Convention is the basis of the appellants' argument that costs incurred in challenging an environmental decision should not be "prohibitive." The appeals brought by the 13 appellants against the substance of the High Court orders remain pending before this court. This judgment does not deal with the correctness or otherwise of the High Court judgments or the merits of the appeals. For that reason, it is sufficient to state very briefly the effect of the High Court judgments.

[13] None of the High Court judgments decided, on the merits, whether the court had jurisdiction to make what the appellants term a "not prohibitively expensive costs order". Hogan J. raised issues concerning the status of the Aarhus Convention in Irish law and referred to case law of the Court of Justice of the European Union. He was of the view that further clarification would have to be sought from the Court of Justice. However, his decision was based, like those of Birmingham and Hedigan JJ., on the fundamental departure from fair procedures which would be involved in making a final order of that kind necessarily affecting an opposing party but without affording that party any opportunity to be heard. As Hogan J. expressed the matter in *O'Connor v. Environmental Protection Agency* [2012] IEHC 370, (Unreported, High Court, Hogan J., 28th August, 2012), at p. 7:-

> "21. Since the making of a final order of the kind sought without notice to other parties actually or potentially affected by such order would infringe [the] fundamental principle of fair procedures as understood by the Constitution, the European Convention of Human Rights and the [European Union] Charter of the Fundamental Rights, I consider that I have no jurisdiction to make such an order. For those reasons, I must decline to grant the relief sought."

[14] As I have emphasised, however, that is a matter for the substantive hearing of the appeals, which remain pending. I turn, therefore, to the question of Mr. Podger's representation of the appellants.

[15] Each of the three judges heard Mr. Podger in the High Court. In *No2GM Ltd v. Environmental Protection Agency* [2012] IEHC 369, (Unreported, High Court, Hogan J., 28th August, 2012), at p. 2, Hogan J. said that Mr. Podger had represented the applicants, though he had freely admitted that he was neither a solicitor nor counsel. The judge said that he had heard him "[a]s a concession and a courtesy to the applicant". He added: "I express no view as to whether he was lawfully entitled to represent the company in this manner, whether by virtue of being a McKenzie friend or otherwise."

[16] Each of the appellants included the following statement in his or her grounding affidavit and repeated in an affidavit for this court:-

> "My person of choice to speak and interact for me with you for the instant matters, pursuant not only to your duties and obligations towards wide access to justice but also in the interests of the full and proper application of the EU law and international law and you giving full effect to and moreover best effect to and proper application to the European law and international law, and proceed to permit me to make this application here with Mr. Percy Podger, who has – as Murphy J. of the Irish Superior Courts, High Court acknowledged – has a particularly good knowledge of this European law concerned, and consequently I know he can handle it better than I, with a better flow of communication – thus best effect possible – as anything other than so, if forced upon me by you, shall be a violation of the EU law concerned *inter alia* the rubric of the application, as *I declare I have lesser abilities to make this application particularly in verbal communication and interaction with you, though of course I comprehend the nature of the application etc.*
>
> Any so called 'McKenzie friend' type of communication with you, and where such friend cannot address the court and speak on my behalf is too restrictive an approach and not allowing wide access to justice, and obstructs the flow of thought and obstructs the flow of communication and is an impediment to justice itself, apart from being in practice dysfunctional and resulting in poor communication and consequently is wholly unacceptable and unnecessary and contrary to the letter, spirit and intent of the European law and international law concerned, and makes it in practice impossible or excessively difficult for me to exercise my rights conferred by EU law, in the instant matter. If I be somehow wrong in this, then I put it to you whether you can state answers to the following two questions precisely and with detailed reference as to:-

A. – Where does it state in 'European Law' that I must only represent myself *via* your (or our former colonial rulers) so called 'McKenzie friend' process or suchlike process? And

B. – if it does, then where is it said in 'European Law' that such discrimination is proper and in order and why?" (emphasis in original).

[17] These paragraphs encapsulate the nature of the application being made by Mr. Podger on behalf of the appellants. The court is not confronted in this case with a litigant in person. Such litigants have become an increasingly common feature of litigation in our courts. The reasons are many and various. There can be no doubt that a major contributory factor has been that the difficult economic circumstances prevailing in recent years have made it difficult or impossible for many people to pay for their own legal representation. In these circumstances, the courts of necessity are obliged to allow parties to present their own cases and, though it may be difficult for them, legal arguments. The courts have recognised the capacity of a McKenzie friend to assist a lay litigant, usually by giving advice or organising papers. That procedure, however, must, of necessity, be carefully supervised. Only in the most limited circumstances will a court permit a McKenzie friend to address it. In the family courts, in particular, it is necessary to ensure that the admission of a McKenzie friend does not undermine the confidentiality of proceedings being heard *in camera*. Furthermore, any application in this regard must be made *bona fide* and must relate solely to the activities which, if admitted, such a friend may perform.

[18] The notion of a McKenzie friend originates in the decision of the Court of Appeal in England in *McKenzie v. McKenzie* [1970] 3 W.L.R. 472. Davies L.J. recalled the following statement of Lord Tenterden C.J. in *Collier v. Hicks* (1831) 2 B. & Ad. 663, at p. 669:-

"Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the Court as settled by the discretion of the justices."

[19] That brief statement continues to represent an accurate description of the role of a McKenzie friend and is generally accepted by our courts. It was considered in the High Court by Macken J. in *R.D. v. McGuinness* [1999] 2 I.R. 411, which were family law proceedings. She concluded, at p. 421, that "a party who prosecutes proceedings in person is entitled to be accompanied in court by a friend who may take notes on his behalf and quietly make suggestions and assist him generally during the hearing, but

… may not act as advocate". This conclusion was based, in part, on an order made by this court in an earlier case, where there was no note of a written judgment. Nonetheless, I am satisfied that the statement is correct. It will be noted, of course, that this is a description of the role of the McKenzie friend. This is not to say that a judge may not, on occasion, as a matter of pure practicality and convenience, invite the McKenzie friend to explain some point of fact or law, where the party is unable to do so or do so clearly. That must always be a matter solely for the discretion of the judge. The McKenzie friend has no right to address the court unless invited to do so by the presiding judge.

[20] Here the court is asked to permit something utterly different.

[21] In effect, Mr. Podger wishes to be permitted to exercise the role of advocate, without restriction. If he were himself an appellant, he would have the right to appear for himself. In that situation, each of the other appellants would be able briefly to adopt his arguments. But then, he would be a party, with an interest with all the attendant duties and responsibilities associated with that status and would, *inter alia*, be liable for any costs awarded against him.

[22] Mr. Podger is neither counsel nor a solicitor, nor does he wish to act in the capacity of a McKenzie friend. He seeks an unrestricted right of audience before the courts. As I understand it, he wishes to be permitted to present the appeal on behalf of all of the appellants to the same extent as if he were a professionally qualified counsel or solicitor. He rejects the suggestion that he could act as a McKenzie friend. He is unwilling to accept the limited nature of that role. He considers it unduly restrictive that he should be limited to assisting the appellants without enjoying a right of audience. He seeks an unlimited right to appear and to argue the appeals but without any of the limitations which would apply either to a McKenzie friend or to a properly qualified legal practitioner. He submits that, in the absence of any provision of European Union law prohibiting such a lay advocate as himself, that he is entitled to an unrestricted right of audience before the courts and that to deny him such a right of audience is to infringe the rights of the appellants to access justice in general, and specifically to access justice under the Aarhus Convention.

[23] I am satisfied that the application of the appellants to be allowed to be represented by Mr. Podger and by him that he should be allowed to represent them must be rejected.

[24] The fundamental rule is that the only persons who enjoy a right of audience before our courts are the parties themselves, when not legally represented, a solicitor duly and properly instructed by a party and counsel

duly instructed by a solicitor to appear for a party. That rule does not exist for the purpose of protecting a monopoly of the legal professions. Kennedy C.J. considered an application, *In re the Solicitors Act and Sir James O'Connor* [1930] I.R. 623, at p. 629, for the readmission to the roll of solicitors of a person who had formerly practised as both a solicitor and a barrister before being appointed to the bench from which he had retired. That issue is not before the court and I express no view on the issue of readmission of former members of a profession. It is of interest, however, that the former Chief Justice explained that one of the points of view of relevance was that "of the public—of the people from whom ultimately are derived and held … as a privilege the monopoly of the right to practise as solicitors and advocates". The limitation of the right of audience to professionally qualified persons is designed to serve the interests of the administration of justice and thus the public interest.

[25] The exclusive right of counsel to audience in the courts is derived from the common law. In order to extend that right, in the case of the superior courts, to solicitors, it was necessary to enact s. 17 of the Courts Act 1971, which provides:-

> "A solicitor who is acting for a party in an action, suit, matter or criminal proceedings in any court and a solicitor qualified to practise (within the meaning of the Solicitors Act, 1954) who is acting as his assistant shall have a right of audience in that court."

[26] Thus, the right of audience is regulated by law. It is true that a party to proceedings (other than a corporation) has the right to appear for him or herself and to plead his or her own case. This is a matter of necessity as well as right. Regrettably it is a fact of life especially during the current economic difficulties in our country that many people are unable to afford the often high cost of professional representation and that the availability of legal aid is limited. There are other cases where litigants disagree with their lawyers or are unwilling to accept representation. Whatever the reason, there is an inevitable number of cases before the courts where litigants are unrepresented. In those cases, they have the right to represent themselves. It has to be accepted that this is sometimes unavoidable, which is not to say that it is desirable. There is no doubt that courts are better able to administer justice fairly and efficiently when parties are represented.

[27] In *R.B. v. A.S. (Nullity: domicile)* [2002] 2 I.R. 428 at p. 447, Keane C.J. remarked on the difficulties presented by the necessity to deal with litigants in person:-

"The conduct of a case by a lay litigant naturally presents difficulties for a trial court. Professional advocates are familiar with the rules of procedure and practice which must be observed if the business of the courts is to be disposed of in as expeditious and economic a manner as is reconcilable with the requirements of justice. That is not necessarily the case with lay litigants. Advocates, moreover, are expected to approach cases with a degree of professional detachment which assists in their expeditious and economic disposition: one cannot expect the same of lay litigants, least of all in family law cases.

The trial of cases involving lay litigants thus requires patience and understanding on the part of trial judges. They have to ensure, as best they can, that justice is not put at risk by the absence of expert legal representation on one side of the case. At the same time, they have to bear constantly in mind that the party with legal representation is not to be unfairly penalised because he or she is so represented. It can be difficult to achieve the balance which justice requires and the problem is generally at its most acute in family law cases, such as the present."

[28] Sir John Donaldson M.R. in *Abse v. Smith* [1986] Q.B. 536 remarked on the benefits for the administration of justice from the competent representation of parties. At p. 545 of his judgment he referred to the limitation of rights of audience to qualified persons:-

"These limitations are not introduced in the interests of the lawyers concerned, but in the public interest. The conduct of litigation in terms of presenting the contentions of the parties in a concise and logical form, deploying and testing the evidence and examining the relevant law demands professional skills of a high order. Failure to display these skills will inevitably extend the time needed to reach a decision, thereby adversely affecting other members of the public who need to have their disputes resolved by the court and adding to the cost of the litigation concerned. It may also, in an extreme case, lead to the court reaching a wrong decision."

[29] The Master of the Rolls also made some remarks, with which I agree, concerning the essential qualities of probity and integrity expected of qualified members of the legal profession and how important it is to the fairness and efficiency of the administration of justice. He said at pp. 545 to 546:-

"The public interest requires that the courts shall be able to have absolute trust in the advocates who appear before them. The only interest and duty of the judge is to seek to do justice in accordance with the law. The interest of the parties is to seek a favourable decision and their

> duty is limited to complying with the rules of the court, giving truthful testimony and refraining from taking positive steps to deceive the court. The interest and duty of the advocate is much more complex, because it involves divided loyalties. He wishes to promote his client's interests and it is his duty to do so by all legitimate means. But he also has an interest in the proper administration of justice, to which his profession is dedicated, and he owes a duty to the court to assist in ensuring that this is achieved. The potential for conflict between these interests and duties is very considerable, yet the public interest in the administration of justice requires that they be resolved in accordance with established professional rules and conventions and that the judges shall be in a position to assume that they are being so resolved. There is thus an overriding public interest in the maintenance amongst advocates not only of a general standard of probity, but of a high professional standard, involving a skilled appreciation of how conflicts of duty are to be resolved.
>
> These high standards of skill and probity are not capable of being maintained without peer leadership and pressures and appropriate disciplinary systems and the difficulty of maintaining them increases with any increase in the size of the group who are permitted to practise advocacy before the courts."

[30] It would be inimical to the integrity of the justice system to open to unqualified persons the same rights of audience and representation as are conferred by the law on duly qualified barristers and solicitors. Every member of each of those professions undergoes an extended and rigorous period of legal and professional training and sits demanding examinations in the law and legal practice and procedure, including ethical standards. Barristers and solicitors are respectively subject in their practice to and bound by extensive and detailed codes of professional conduct. Each profession has established a complete and active system of profession discipline. Members of the professions are liable to potentially severe penalties if they transgress.

[31] There would be little point in subjecting the professions to such rules and requirements if, at the same time, completely unqualified persons had complete, parallel rights of audience in the courts. That would defeat the purpose of such controls and would tend to undermine the administration of justice and the elaborate system of controls.

[32] I wish to make it clear that there is no reason at all to suspect the integrity of Mr. Podger, his commitment to the cases he wishes to bring on behalf of the appellants or his knowledge of this particular area of envi-

ronmental law. However, the fact remains that he is not qualified in law and does not have any right of audience.

[33] It may be that the representation of companies presents a particular aspect of the problem. In *Battle v. Irish Art Promotion Centre Ltd.* [1968] I.R. 252 at p. 254, Ó Dálaigh C.J., with the agreement of his colleagues, ruled that:-

> "… in the absence of statutory exception, a limited company cannot be represented in court proceedings by its managing director or other officer or servant. This is an infirmity of the company which derives from its own very nature. The creation of the company is the act of its subscribers; the subscribers, in discarding their own personae for the persona of the company, doubtless did so for the advantages which incorporation offers to traders. In seeking incorporation they thereby lose the right of audience which they would have as individuals; but the choice has been their own."

[34] In the course of his judgment, Ó Dálaigh C.J. cited with approval the statement of Viscount Simon L.C. in his speech in *Tritonia Ltd. v. Equity and Law Life Assurance Society* [1943] A.C. 584 where he said at p. 586:-

> "In the case of a corporation, inasmuch as the artificial entity cannot attend and argue personally, the right of audience is necessarily limited to counsel instructed on the corporation's behalf."

[35] This ruling proceeds from the fact that the incorporated company is, as a strict matter of law, a legal person separate from its members and from its directors and management. Nonetheless, in practice, the courts have to deal on a daily basis with difficult cases involving unrepresented companies, frequently because there are simply no funds to provide for legal representation. The company, being a purely legal or notional person, cannot speak except through a representative of some kind. If it has no legal representation, it will not be represented at all. Although that is far from ideal, it represents the present law.

[36] A slight modification of the strict rule regarding companies was adopted in the New Zealand case of *Re G.J. Mannix Ltd* [1984] 1 N.Z.L.R. 309, considered by Budd J. in *P.M.L.B. v. P.H.J.* (Unreported, High Court, Budd J., 5th May, 1992). Cooke J. in the New Zealand Court of Appeal had thought that the court should retain a residual discretion to hear unqualified advocates but considered that it would be a reserve or rare expedient.

[37] In *Coffey v. Tara Mines Ltd.* [2007] IEHC 249, [2008] 1 I.R. 436 at p. 444, Ó Néill J. thought that *Battle v. Irish Art Promotion Centre Ltd.* [1968] I.R. 252 did not preclude him from exercising an inherent jurisdic-

tion where, in his view, there was in existence "a combination of circumstances that are so exceptional or rare as to probably, be unique". He permitted the plaintiff to be represented by his wife because he had formed the view that the action would "proceed no further and that is an outcome or consequence that would be destructive of the interests of justice".

[38] In conclusion, the general rule is clear. Only a qualified barrister or solicitor has the right, if duly instructed, to represent a litigant before the courts. The courts have, on rare occasions, permitted exceptions to the strict application of that rule, where it would work particular injustice. The present case comes nowhere near justifying considering the making of an exception. Mr. Podger seeks nothing less than the general right to appear on behalf of a group of 13 litigants and to plead their cases to precisely the same extent as if he were a solicitor or counsel, which he accepts that he is not, but without being subject to any of the limitations which would apply to professional persons.

[39] Nor do I think that the attempt to represent the company No2GM Ltd. gives rise to any exception. Mr. Podger has not demonstrated any exceptional circumstance which would justify permitting him to speak as the representative of the company. It was patent that Mr. Podger availed of the opportunity provided by the court's brief adjournment of the hearing to defeat the effect of its ruling by devising the stratagem of making himself a member of the company. It was a device and was without merit.

[40] Finally, Mr. Podger purports to demand that the court provide some reference to a provision of European Union law excluding him from representing the appellants. That would be to reverse the proper nature of the inquiry, which is whether there is any provision of European Union law precluding the court from applying the fundamental tenets of its legal system adopted in the interests of the protection of the integrity of the administration of justice. In fact, article 19 of the Statute of the Court of Justice of the European Union regulates the representation of parties in proceedings before the court. Member states and the institutions of the union must "be represented before the Court of Justice by an agent appointed for each case". The agent "may be assisted by an adviser or by a lawyer." Most materially, the article then provides:-

> "Other parties must be represented by a lawyer.
>
> Only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court."

Furthermore:-

> "University teachers being nationals of a Member State whose law accords them a right of audience shall have the same rights before the Court as are accorded by this Article to lawyers."

To similar effect, r. 36 of the Rules of Court of the European Court of Human Rights provides that an applicant "must be so represented at any hearing decided on by the Chamber, unless the President of the Chamber exceptionally grants leave to the applicant to present his or her own case, subject, if necessary, to being assisted by an advocate or other approved representative". Furthermore, any such representative shall "be an advocate authorised to practise in any of the Contracting Parties and resident in the territory of one of them, or any other person approved by the President of the Chamber".

It is clear, therefore, that there is no warrant for the claim that, in the application of European Union law or the European Convention on Human Rights 1950, specifically either by the Court of Justice or the European Court of Human Rights, there is any obligation on the court of a member state to permit a litigant to be represented by a person other than a duly qualified lawyer.

[41] Thus Mr Podger's application to be allowed to represent the appellants at the hearing of their appeals must be rejected.

McKechnie J.

[42] I agree with Fennelly J.

Following delivery of the judgment on the 26th February, 2013, the court adjourned the hearing of the appeals to the 14th May, 2013. On the 2nd May, 2013, the appellants requested that the court determine the appeals on the papers only without the need for oral submissions. The court granted that request on the 8th May, 2013.

Cur. adv. vult.

Denham C.J. 25th June, 2013

[1] The 13 appellants in these appeals brought identical applications *ex parte* to the High Court seeking an order. In the proceedings brought on behalf of Stella Coffey the order sought was described as including:-

"A NOT PROHIBITIVELY EXPENSIVE ORDER FOR A HEARING ON NOTICE for a Not Prohibitively Expensive Order (NPE Order) (whereby all parties that partake in that hearing will bear their own costs, save for the applicant where a limit of less than the expected own cost is sought)."

In other appeals the order is described shortly as:-

"A NOT PROHIBITIVELY EXPENSIVE ORDER (NPE Order)."

[2] The appeals to this court were presented *ex parte*.

[3] There has already been a judgment of this court in relation to these cases. On the 11th December, 2012, this court declined the applications of the 13 appellants that they be represented on their appeals by Mr. Percy Podger. On the 26th February, 2013, in a judgment delivered by Fennelly J., this court gave its reasons for that decision ([2013] IESC 11).

[4] On the 11th December, 2012, when stating that it would not hear Mr. Percy Podger representing the appellants, the court indicated that it would hear any individual appeal that day, or, if any appellant wished, the court could consider their appeal on the papers. The appeals were adjourned.

[5] After delivery of the judgment in February, a date was given for the hearing of the appeals, being the 14th May, 2013. On the 2nd May, 2013, the appellants and Mr. Percy Podger appeared in the management list and all requested that the court hear the appeals on the papers. In the special circumstances of the case, the court decided to consider these appeals on the papers, and the appellants were so informed by letter of the 8th May, 2013.

[6] Each of the 13 applications to the High Court were identical, and based on identical information, and resulted in judgments of the High Court. Birmingham J. delivered judgment in Stella Coffey's application on the 14th August, 2012; Hedigan J. delivered judgment in the application of Dymphna Maher on the 22nd October, 2012 (*In re Dymphna Maher* [2012] IEHC 445, (Unreported, High Court, Hedigan J., 22nd October, 2012)); and Hogan J. delivered judgment in the remaining 11 applications on the 28th August, 2012 (*O'Connor v. Environmental Protection Agency* [2012] IEHC 370, (Unreported, High Court, Hogan J., 28th August, 2012)).

[7] In his judgments of the 28th August, 2012, Hogan J. gave a similar analysis in each case. Thus, for example, in the application of Richard Auler, the High Court Judge described the situation thus:-

"(i) On the 25th July, 2012, the Environment Protection Agency (EPA) made a decision in the exercise of the powers conferred on it by the Genetically Modified Organisms (Deliberate Re-

lease) Regulations 2003 (S.I. No. 500 of 2003) granting a consent to Teagasc, Oak Park, County Carlow to carry out the deliberate release of certain genetically modified potato lines subject to certain conditions. Mr. Auler objects to this decision of the EPA and he has indicated to me that he is desirous of challenging the validity of this order, albeit that no proceedings have yet been commenced by him.

(ii) In this application Mr. Auler was represented by Mr. Percy Podger, who as he freely admitted to me, is neither a solicitor or counsel. As a concession and a courtesy to the applicant, I permitted Mr. Podger to be heard, but I express no view as to whether he was lawfully entitled to represent Mr. Auler in this manner, whether by virtue of being a McKenzie friend or otherwise. This judgment is but one of a number of similar applications moved by Mr. Podger on the same day and in respect of which he requested separate judgments

(iii) One immediate complication for Mr. Auler is that s. 87(10) of the Environmental Protection Agency Act 1992 (as inserted by s. 15 of the Protection of the Environment Act 2003) provides that:-

> 'A person shall not by any application for judicial review or in any other legal proceedings whatsoever question the validity of a decision of the Agency to grant or refuse a licence or revised licence (including a decision of it to grant or not to grant such a licence on foot of a review conducted by it of its own volition) unless the proceedings are instituted within the period of 8 weeks beginning on the date on which the licence or revised licence is granted or the date on which the decision to refuse or not to grant the licence or revised licence is made'.

(iv) It would appear therefore that any such legal proceedings would have to be commenced by the 18th September, 2012, if the eight week period as defined is to be complied with. I might add that this court has no jurisdiction to stay the operation of that eight week period contrary to what was urged on behalf of Mr. Auler. In other words, any person wishing to challenge the decision of the Agency must do so within the eight weeks and this court has no jurisdiction or power to suspend or extend that time period.

(v) This is the general background to the present application which, to say the least, is somewhat unusual. The gist of the application is that this court should declare on an *ex ante* and *ex parte* basis that Mr. Auler is entitled to have what is described as a not prohibitively expensive cost order. The background to this application lies in article 9(4) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998 ('the Aarhus Convention'). This is a United Nations Convention which Ireland ratified on the 20th June, 2012.

(vi) Article 9(4) of the Aarhus Convention requires that the procedures for challenging the validity of certain administrative decisions affecting the environment:-

> 'shall provide adequate and effective remedies, including injunctive relief as appropriate and be fair, equitable, timely and not prohibitively expensive'.

(vii) Article 9(2) stipulates that members of the public shall have the right to challenge 'the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6'. Article 6 provides that each party to the Aarhus Convention:-

> '(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex 1;
>
> (b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions …'

(viii) I should just observe at this point that it would not appear that the grant of a licence for the release of genetically modified plants is directly within the scope of annex 1, a point to which I shall return.

(ix) Mr. Podger appeared to think that an act of ratification was sufficient *in itself* to make the Aarhus Convention part of Irish domestic law. This, however, is not the case for two reasons. First, article 20(3) of the Convention provides that so far as each State which subsequently ratifies the Convention:-

> '… shall enter into force on the ninetieth day after the date of deposit by such State or organization of its instrument of ratification, acceptance, approval or accession.'

(x) This means, therefore, that the Aarhus Convention will only enter into force so far as Ireland's international law obligations are concerned on the 17th October, 2012.

(xi) Second, the Oireachtas has not (yet) elected to make the Convention part of the domestic law of the State in the manner required by Article 29.6 of the Constitution.

(xii) It follows, therefore, that insofar as the Aarhus Convention has binding force as part of the domestic law of this State it is only by virtue of the force of and within the proper scope of application of European Union law. While the Union ratified the Convention in February, 2005, the preparatory work for the ultimate transposition of the principles of the Convention is found in Directive 2003/35/EC: see recitals 5 to 10 of that Directive. This is further reflected in the recitals 18 to 22 of Directive 2011/92/EU ('the 2011 Directive'), which is the consolidated version of the Environmental Impact Assessment Directive. Article 11(1) provides that member states shall provide for access:-

> 'to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.'

(xiii) Article 11(4) requires that any such procedure 'shall be fair, equitable, timely and not prohibitively expensive'.

(xiv) Similar requirements obtain in the case of the consolidated version of the Integrated Pollution Prevention Control Directive, Directive 2008/1/EC ('the 2008 Directive'). Recital 26 refers to the ratification of the Aarhus Convention by the Union and article 16 is in exactly the same terms as article 11(1) of the 2011 Directive.

(xv) Some consideration of the meaning of the phrase 'not prohibitively expensive' was given by the Court of Justice in *Commission v. Ireland (Case C-427/07)* [2009] E.C.R. I-6277, in a judgment which concerned the earlier (pre-consolidation) versions of both the 2008 Directive and the 2011 Directive. Here the Court of Justice observed (at para. 92) that:-

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

(xvi) This judgment confirms that the making of a costs order in environmental cases is not in itself precluded by these provisions, provided that the costs are not prohibitive. This, of course, rather begs the question of what is meant by the phrase 'not prohibitively expensive' and how the application of that phrase is to be judicially evaluated. Some guidance may well be given on this question by the European Court of Justice following the reference pursuant to article 267 TFEU on this very question by the United Kingdom Supreme Court in *R. (Edwards) v. Environmental Agency* [2010] UKSC 57, [2011] 1 W.L.R. 79. In his judgment for [the Supreme Court] making the order for reference, Lord Hope examined the various possible meanings of that phrase, although he suggested that the question of prohibitive cost should be measured by reference to the standards and monetary values of the average members of the public.

(xvii) Pending a final decision by the European Court of Justice, I would rather incline to that view. It would not take much persuasion to convince me that the traditional taxed costs associated with a complex challenge of this kind would be likely to be measured at a level which would deter most members of the public from commencing litigation of this kind. It might accordingly be thought that such a level of costs might be said to be prohibitively expensive in that sense.

(xviii) Nevertheless, enough has been said to demonstrate that the meaning of the phrase 'not prohibitively expensive' is at present uncertain and requires further clarification from the European Court of Justice. Moreover, it is not even clear that the requirements of article 9(4) of the Aarhus Convention (or, more precisely, the corresponding obligations contained in

both the 2008 Directive and the 2011 Directive) apply to a challenge to the validity of an administrative decision licensing the release of genetically modified organisms for the purposes of field tests. A further issue is whether the Directives require that the level of costs must be determined *ex ante* and capped at some upper limit. All of these matters are at present uncertain.

(xix) I appreciate that the applicant maintains that he must secure this assurance regarding costs on an *ex ante* basis before even commencing proceedings against the EPA, as otherwise he could not take the financial risks associated with the commencement of litigation. Enough has been said, however, to show that the applicant's entitlement to the relief sought and the scope of any such order is uncertain. Even assuming that I had a jurisdiction to make such an order on an *ex ante* and *ex parte* basis, it would be grossly unfair to make a final order of this kind without having given the EPA and any other notice parties the opportunity to have been heard on the matter.

(xx) Fair procedures and the obligation to hear both sides before any final order affecting the parties can properly be made is fundamental to the judicial mandate of administering justice in the manner envisaged by Article 34.1 of the Constitution: see, *e.g.*, *D.K. v. Crowley* [2002] 2 I.R. 744. This principle is equally central to the legal order established by both article 6 of the European Convention of Human Rights and that of the European Union. After all, article 41(2) of the European Union Charter of Fundamental Rights provides that the right to good administration means that every person has the right 'to be heard, before any individual measure which would affect him or her adversely is taken'.

(xxi) Since the making of a final order of the kind sought without notice to other parties actually or potentially affected by such order would infringe the fundamental principle of fair procedures as understood by the Constitution, the European Convention of Human Rights and the European Union Charter of Fundamental Rights, I consider that I have no jurisdiction to make such an order. For those reasons, I must decline to grant the relief sought."

[8] In the application of Stella Coffey, Birmingham J. delivered judgment on the 14th August, 2013, refusing the application on the basis of the

lack of notice to proposed respondents. He explained his decision of the previous day thus:-

> "I stated that I was not prepared to deal with it on an *ex parte* basis, but that I would give leave to Ms. Coffey to bring a motion before the High Court on the 22nd August, 2012, being the next scheduled formal vacation sitting.
>
> I explained that I felt and I repeat now, that it would be the antithesis of justice and fair procedures to make an order that would have possible implications for a potential respondent and notice party on an *ex parte* basis, behind their back and without giving them an opportunity to be heard. Mr. Podger indicated that in that event that there was a second application that he wished to make, which was that there should be a not 'prohibitively expensive order (NPE Order)' to cover the application for such an order, *i.e.* a protective costs order to cover the costs of making an application for such an order.
>
> I indicated that for the same reason, I was not prepared to make an order which could adversely affect parties that were not before the court and were not on notice. Orders that offer comfort or advantage to one party in litigation have the potential to disadvantage opponents, and those who may be affected must have a right to be heard. All and any applications that Ms. Coffey wished to make or which it was wished should be made on her behalf could be made at the vacation sitting on the 22nd August, 2012. On that occasion too, the entitlement of Mr. Podger to act as an advocate could be addressed. In my view, that is also an issue on which the intended respondent and intended notice party are entitled to be heard. Permitting Mr. Podger so to act would represent a departure from the traditional approach of the Irish courts and would have implications for the notice party and respondent.
>
> Accordingly, I confirm that Ms. Coffey is being given leave to bring a motion on notice to the proposed respondent, the Environmental Protection Agency and the proposed notice party Teagasc on the 22nd August, 2012, seeking a so called not prohibitively expensive order and also seeking an order providing for a protective costs order or a so called not prohibitively expensive order in relation to the substantive application in relation to costs that she seeks.
>
> Because Ms. Coffey is not legally represented I would simply add this postscript, that it is likely that a court hearing such an application would want to be told something about the details of the challenge and told something at least of the grounds which in due course it is intend-

ed to advance – that is something to which she and those who advise her should have regard."

[9] On the 22nd October, 2012, Hedigan J. delivered judgment in *In re Dymphna Maher* [2012] IEHC 445, (Unreported, High Court, Hedigan J., 22nd October, 2012), stating in conclusion at p. 2:-

"(i) No provision is made for this court to make *ex parte* an order such as is sought herein. It is not for this court to legislate in this way and I will not do so. The correct approach is for the plaintiff to seek to obtain the consent of those intended defendants or failing that to bring a motion on notice to those parties for a declaration that s. 3 [of the Environmental Protection Act 2011] applies.

(ii) The second application today is that, in the event I would refuse the order sought and direct the application be dealt with by way of notice of motion on the intended defendants, I would make an order that no order for costs would be awarded against the applicant were the motion to fail. I do not believe I have any jurisdiction to make such an order. The issue of costs will be for the judge who hears the motion. I consider that this may well be unsatisfactory to the applicant as it leaves her in peril of an order for costs of that motion. I cannot accept those costs would be as high as has been represented today but I am conscious that such as they are they may mount an insuperable obstacle to the applicant bringing a motion.

(iii) Whilst I am sympathetic to the applicant's situation in this regard, I am unaware of any legal authority that will permit me to make such an order. It is very arguable that the absence of some legal provision permitting an applicant to bring such a motion without exposure to an order for costs acts in such a way as to nullify the State's efforts to comply with its obligation to ensure that costs in certain planning matters are not prohibitive. As things stand, I have no power to change this.

(iv) Both the orders sought must be refused."

[10] Thus, all three judges of the High Court refused the *ex parte* applications and stressed the necessity for notice to be given of any such application to potential respondents or notice parties. These decisions were made on the basis of fair procedures.

[11] The orders of the High Court were as follows. From Hogan J. on the 28th August, 2012:-

"The court doth refuse to grant a 'not prohibitively expensive order' on an *ex parte* basis and the court doth grant short service if necessary to bring the application by way of motion on notice to the respondent [Environmental Protection Agency] and notice party [Teagasc] before the High Court during vacation period".

[12] From Birmingham J. on the 13th August, 2012:-

"And the court stating that it was not prepared to deal with the application on an *ex parte* basis.

It is ordered that the applicant be at liberty to bring the application by way of motion on notice to the respondent and notice party before the High Court in the Vacation List on the 22nd day of August, 2012."

[13] From Hedigan J. on the 22nd October, 2012:-

"And it appearing that the applicant wishes to challenge the decision of the Environmental Protection Authority decision made on the 25th July, 2012, re: B/IE/12/01 by way of judicial review.

The Court doth refuse the relief sought on an *ex parte* basis and doth direct that the within application be made on notice to all intended respondents to any judicial review application.

And on the further application of the applicant for

a. An order that the applicant shall not be liable to pay for the said hearing on notice so directed nor for any legal costs fees and expenses of her own side nor legal costs of any other party(s) concerning the said application for a not prohibitively expensive order (NPE order) and the reliefs sought thereto for the legal challenges she makes in relation to EPA decision of the 25th July, 2012 re: B/IE/12/01 that is over and above the threshold set by article 9 of the Aarhus Convention *i.e.* prohibitively expensive and given that said hearing on notice is but proportionately a small matter that has arisen out of the first application which concerns a prohibitively expensive case for the applicant and the applicant lacking sufficient resources to take it the applicant seeks that the costs of the hearing on notice in their entirety be limited to no more than €100.00 or €0.00
b. An order fixing the maximum euro amount to a figure of no more than no more than €100.00 or €0.00 limit for the said hearing on notice – to be made for the NPE order – that the applicant may be subjected to pay in total for any and all costs to the applicant re the hearing on notice and inclusive of any and all damages and/or security in the applicants intended legal challenges of the EPA decision of the 25th July, 2012, re: B/IE/12/01 howsoever they may

arise and wherever they may arise and if they arise including but not limited to the said hearing on notice

c. Such further or other order and relief as this court sees fit so as to do everything necessary to secure ensure and judicially protect the above and the full and proper application of the international and European law in the matters concerned and inter alia our European and international law rights invoked here and as otherwise exist and in anyway applicable the environment concerned in the instant matter in *e.g.* inclusive but not limited to stop the clock as of right now suspend time limits for legal challenge and or otherwise extend time limits for legal challenges thus ensure and secure and judicially protect parties who are interested to challenge the decision and provide them with effective remedies in the prevailing climate and circumstances and judicially protect the environment concerned by interim injunction the entire latter being particularly sought where the court has in any way declined and/or not granted the NPE Orders sought and that such time limits be upheld until the decision of the instant High Court is not only appealed to the Supreme Court but heard with decisions and orders perfected by the Supreme Court.

The court doth refuse said application."

[14] The time limits established by statute were expressly pointed out by the High Court. In relation to the 12 applications brought in August, 2012, express provision was made for further applications within the vacation sittings. Further, it was expressly pointed out that applications for judicial review had to be commenced before the 18th September, 2012.

[15] However, the appellants took no further steps in the High Court. Instead in each of the 13 cases they appealed to this court.

[16] The books of appeal in 12 cases were similar. The appeal filed by Dymphna Maher filed extensive grounds of appeal on the issue of representation by Mr. Percy Podger, which matter has been decided in the judgment of this court delivered by Fennelly J. delivered on the 26th February, 2013.

[17] In essence, on appeal to this court are the decisions of the High Court that it would not make a costs order *ex parte*, without notice to and in the absence of the proposed respondent and notice party.

Decision

[18] I am satisfied that the trial judges of the High Court were acting within their jurisdiction, and were correct in law and under the Constitution in refusing to grant a costs order against parties without notice to those parties and in their absence from the court.

[19] Fair procedures are at the core of the law and the Constitution. Notice of proceedings, or of orders against a party, are basic to fair procedures and implicit in the administration of justice. Thus, it was entirely appropriate and correct for the High Court judges to order as they did.

[20] There were further orders sought before Hedigan J., but for similar reasons he fell into no error on the orders.

[21] I would affirm the judgments and orders of the High Court.

[22] Thus, for the reasons given in this judgment, I would dismiss the appeals by the 13 appellants.

[23] Consequently, the substantive issues raised by the appellants were not reached in either the High Court or this court. However, I note that *R. (Edwards) v. Environmental Agency (Case C-260/11)* [2013] 1 W.L.R. 2914, referred to by Hogan J., has been decided by the European Court of Justice on the 11th April, 2013, when that court ruled that:-

> "49 … The requirement, under the fifth paragraph of Article 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment and the fifth paragraph of Article 15a of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, that judicial proceedings should not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result. Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required – as courts in the United Kingdom may be – to state its views, at an earlier stage of the proceedings, on a possible capping of the costs for which the unsuccessful party may be liable, it must satisfy itself that that requirement has been complied with, taking into account both the inter-

est of the person wishing to defend his rights and the public interest in the protection of the environment.

In the context of that assessment, the national court cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.

By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him.

Lastly, that assessment cannot be conducted according to different criteria depending on whether it is carried out at the conclusion of first-instance proceedings, an appeal or a second appeal."

Fennelly J.
[24] I agree with Denham C.J.

McKechnie J.
[25] I also agree with Denham C.J.

[*Reporter's note*: The judgment of Birmingham J. of the 14th August, 2012, wherein the application of the first intended applicant, Stella Coffey, was refused has not been circulated. The judgment of Hogan J. of the 28th August, 2012, wherein the application of the fifth intended applicant, Richard Auler, was refused has also not been circulated, but is in essentially the same terms as the judgment of Hogan J. in *O'Connor v. Environmental Protection Agency* [2012] IEHC 370, (Unreported, High Court, Hogan J., 28th August, 2012).]

Úna Ní Chatháin, Barrister
