

## REPLY ON BEHALF OF IRELAND

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*Re: Communication to the Aarhus Convention's Compliance Committee Concerning Compliance by Ireland Regarding the costs of Access to Justice: (ACCC/C/2014/113)*

**1. Please explain how the forthcoming Legal Services Regulation legislation will address the specific issues raised in the communication, especially as regards costs.**

1. The Legal Services Regulation Act 2015 (“the 2015 Act”) was enacted on 30<sup>th</sup> December 2015.<sup>1</sup> The Act introduces both an independent Regulatory Authority for legal professionals (“the Authority”) and an independent Costs Adjudication System as part of recommendations made by the European Commission under the EU/IMF-supported programme.<sup>2</sup>
2. The 2015 Act will affect both the legal profession and the legal market by (i) creating more transparency in legal fees, (ii) diversifying the legal market and (iii) creating an independent review committee and complaints committee which deal with complaints. Together, the 2015 Act will transform and make more transparent the market for legal services in Ireland.
3. It is, however, important to note that the Communication at no stage raised any specific issues affecting the Communicant. Rather, a wide range of generalised and imprecise complaints were made. In broad terms, the three main issues raised by the communicant were the following:

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<sup>1</sup> The preamble to the Act reads as follows: “An Act to provide for the regulation of the provision of legal services, to provide for the establishment of the legal services regulatory authority, to provide for the establishment of the legal practitioners disciplinary tribunal to make determinations as to misconduct by legal practitioners, to provide for new structures in which legal practitioners may provide services together or with others, to provide for the establishment of a roll of practising barristers, to provide for reform of the law relating to the charging of costs by legal practitioners and the system of the assessment of costs relating to the provision of legal services, to provide for the manner of appointment of persons to be Senior Counsel, to provide for matters relating to clinical negligence actions, and to provide for related matters”. At the time of writing, preparations are taking place by the incoming Regulatory Authority, and secondary legislation is being drafted: accordingly, the Act has not yet been commenced.

<sup>2</sup> In respect of the provisions, various consultations are taking place and the Regulatory Authority has been tasked with enabling the secondary legislation to be correctly developed.

- The special cost provisions provided for in section 50B of the Planning and Development Act 2000 (as amended) (the “PDA”) and section 3 of the Environment (Miscellaneous Provisions) Act 2011 (the “EMPA”)(together “the Special Costs Provisions”) do not provide sufficient certainty that an applicant for a remedy will not be exposed to a liability for costs which are not prohibitively expensive;
  - The mechanisms for regulating one’s own legal costs which are available in Ireland are inadequate, in circumstances where he alleges that it will frequently be necessary for an applicant to hire his/her own lawyer to represent them in legal proceedings;
  - The Irish legal system has a lack of transparency, as it does not publish (i) the majority of outcomes of legal costs adjudication, (ii) the outcomes of professional complaints procedures and (iii) information in respect of special costs procedures in applicable environmental cases.
4. Before addressing the potential impact of the 2015 Act on each of these matters, it might be helpful to set out the scope of the Act (a copy of which is annexed hereto).

*Legal Services Regulation Act 2015*

5. The 2015 Act is divided into 15 parts. Part 2 provides for the creation of the Legal Services Regulatory Authority which will have powers to regulate all members of the legal profession practising in the State and Part 3 sets out the powers of that Authority and its inspectors in carrying out investigations.
6. Parts 4 and 5 of the 2015 Act provide certain protections for clients of legal practitioners including in relation to monies held on clients’ behalf.

7. Part 6 sets out detailed procedures for dealing with complaints made against legal practitioners, including complaints about one's own legal representative. For present purposes, it is important to highlight that section 50(1)(l) of the Act defines misconduct to include seeking a fee in respect of legal services which is "grossly excessive" and in considering an allegation of misconduct on this ground, the complaints body can have regard to the fact that a legal costs adjudicator has found that the costs charged were grossly excessive<sup>3</sup>.
8. Complaints are, in the first instance, heard by a Complaints Committee, a majority of which must be lay persons (non legal practitioners) which shall operate in divisions of 3 or 5. A majority of each division must also be lay persons.<sup>4</sup> It is anticipated that more serious complaints may be referred by the Complaints Committee to the Legal Practitioners Disciplinary Tribunal which shall also have a lay majority. Proceedings before the Tribunal shall be heard in public unless directed otherwise "in the interests of justice".<sup>5</sup>
9. Where a practitioner is found guilty of misconduct following an inquiry by the disciplinary tribunal, a number of serious sanctions are set out in section 82.<sup>6</sup> This decision can then be appealed to the High Court within 21 days of the determination.
10. The Authority will have the power to publish a report with information relating to the number and types of complaints received, and the general nature and outcome

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<sup>3</sup> Section 50(2)(c)

<sup>4</sup> Section 69

<sup>5</sup> Section 81

<sup>6</sup> An example of sanctions include an advice, an admonishment, a censure, a direction that the legal practitioner participate in one or more modules of a professional competence scheme and furnish, within a specified period, evidence to the Disciplinary Tribunal of such participation. More serious sanctions include, where for example the legal practitioner is a practising barrister, a direction to the chief executive of the Authority directing him or her to impose a specified restriction or condition on the legal practitioner in respect of his or her practice as a barrister. The most serious sanctions include suspension and prohibition from practice.

of those complaints and the sanction imposed.<sup>7</sup> These reports are to be published at intervals no greater than six months

11. Part 7 of the 2015 Act provides for the imposition of a levy on legal practitioners in order to fund the work of the complaints bodies established under Part 6.
12. Part 8 of the 2015 Act provides for the establishment of a number of alternative business models for the legal profession, including legal partnerships and multi-disciplinary partnerships (although the introduction of the latter is subject to further consultation). The purpose of these models will be to encourage greater competition in the market for legal services, thereby reducing consumer costs.
13. Professional codes will no longer be permitted to prevent direct (public) access to a barrister for non-litigious matters.<sup>8</sup> Moreover, barristers in employment may represent their employers in court<sup>9</sup>.
14. In respect of fundamental changes to existing business models, a legal practitioner will be able to provide legal services as a partner in, or an employee of, a legal partnership with a barrister.<sup>10</sup> Furthermore, and subject to a review to be conducted, the 2015 Act prohibits professional codes prohibiting a legal practitioner to provide legal services as a partner in, or an employee of, a multi-disciplinary practice.<sup>11</sup>
15. Part 9 of the 2015 Act imposes a number of obligations on practising barristers. Part 10 of the Act deals with legal costs and is addressed separately below.

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<sup>7</sup> Section 73 of the 2015 Act. Where the authority considers it appropriate, they will publish the name of the legal practitioner.

<sup>8</sup> Section 101 of the 2015 Act.

<sup>9</sup> Section 212 of the 2015 Act. See further below.

<sup>10</sup> Section 2, subsection (1) of the 2015 Act.

<sup>11</sup> The creation of multi-disciplinary practices is subject to a review process which has not yet commenced.

16. Part 11 of the 2015 Act codifies the general rules in relation to costs and in particular, at section 169 sets out the rule that a successful party will be entitled to costs of proceedings unless a court otherwise orders. It is expressly provided that this general rule does not affect the special costs provisions contained in section 50B of the Planning and Development Act or Part 2 of the Environment (Miscellaneous Provisions) Act 2011.
17. Part 12 of the 2015 Act deals with the awards of Patents of Precedence by the Government, expanding the range of persons who may apply for and obtain such patents. Part 13 sets out consequential amendments to acts regulating solicitors, Part 14 a number of miscellaneous amendments and Part 15, specific rules in relation to clinical negligence cases.

*Part 10 of the Legal Services Regulation Act 2015*

18. Part 10 of the 2015 Act is itself divided into 5 chapters and contains a number of provisions in relation to legal costs including, most significantly, the creation of a new office, that of the Office of the Legal Costs Adjudicator and the abolition of the existing system for taxation (measuring) of legal costs. Some of the more relevant amendments are described below.

- *Pre-engagement notification*

19. Under the existing regime, a solicitor must disclose to his client the legal costs that will be incurred in relation to the matter on which s/he has accepted instructions, or if it is not practicable to do so, the basis on which the fees will be calculated<sup>12</sup>. A barrister must also do so upon request by the solicitor or client. Under section 150 of the 2015 Act, all legal practitioners must provide such an estimate of fees upon receiving instructions. Should any emergent factor later arise which would

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<sup>12</sup> Section 68 of the Solicitors (Amendment) Act 1994.

significantly add to estimated costs, a new notice will be required.<sup>13</sup> A ten-day cooling off period is provided for during which legal practitioners are not to engage services providers.<sup>14</sup> Both the client and the legal practitioner can arrive at an agreement which sets out the amount and manner of payment of all or part of the legal costs and no other amount shall be chargeable in respect of legal services provided save as otherwise provided in the agreement. This agreement shall, however, be amenable to adjudication by the Legal Costs Adjudicator.

- *Bills of costs*

20. The legal practitioner is required to provide an itemised bill of costs as well as a summary of the legal services provided and where time is a factor in the calculation of legal costs, the time spent in dealing with the matter. The legal practitioner shall provide to the client (together with the bill of costs) an explanation in writing of the procedure available to the client should the client wish to dispute any aspect of the bill of costs, which shall contain information such as the fact that the client may have a dispute referred to mediation and/or adjudication.<sup>15</sup>

- *Costs adjudications*

21. The 2015 Act will create the Office of the Legal Costs Adjudicator.<sup>16</sup> The Chief Legal Costs Adjudicator shall ensure that a register of determinations is established and maintained in relation to applications for adjudication of legal costs under this Part.<sup>17</sup>

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<sup>13</sup> Section 150, subsection 5 of the 2015 Act.

<sup>14</sup> Section 150, subsection 4 (f) of the 2015 Act read in conjunction with section 150, subsection 7.

<sup>15</sup> Section 152 of the 2015 Act.

<sup>16</sup> Section 139 of the 2015 Act.

<sup>17</sup> Sections 139 and 140 of the 2015 Act, respectively.

22. Section 152 imposes an obligation on legal practitioners to attempt to resolve disputes with their clients before resorting to an application to the Legal Costs Adjudicator. A disputed charge will only stand if it is found to be "*fair and reasonable in the circumstances*".<sup>18</sup>
23. Section 154 of the Act provides that a person can refer a dispute in relation to their own costs to the Office of the Legal Costs Adjudicator (as can the legal practitioner). In addition, where a person is ordered to pay the costs of another party to litigation, that party must provide the person so ordered with a bill of costs prepared in accordance with the requirements of the 2015 Act (and any rules of Court) and any dispute in relation to that bill of costs can also be referred for adjudication.
24. The determination arrived at in any dispute shall contain the outcome and reasons for the determination, unless such publication would be contrary to the public interest or where it does not involve a matter of public legal importance.<sup>19</sup> A register of taxation will also be created by the County Registrar<sup>20</sup> which will keep information relating to the determinations made by the Legal Costs Adjudicator. The register will keep a note in monetary terms of the outcome of the determination and shall be available for inspection during office hours without payment by any person who applies to inspect it.<sup>21</sup> It is considered that publication of determinations will directly affect the fee estimates made by legal practitioners, and will empower consumers of legal services in negotiating contracts.
25. The Act sets out a series of 'Principles Relating to Legal Costs'<sup>22</sup> which require the Legal Costs Adjudicator to adjudicate legal costs on the basis that they are (i) reasonably incurred and (ii) reasonable in the amount.<sup>23</sup>

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<sup>18</sup> Section 157, subsection 3 of the 2015 Act.

<sup>19</sup> Sections 140 (e) and (h) and section 140, subsection 3 (d) of the 2015 Act.

<sup>20</sup> A Court official having charge of each Circuit Court office in the State.

<sup>21</sup> Section 141, subsection 4 of the 2015 Act.

<sup>22</sup> Schedule One of the 2015 Act.

<sup>23</sup> Under Section 155, sub-section 4 of the 2015 Act, the Legal Costs Adjudicator shall, where adjudicating on the issue of costs:



26. Section 156 of the Act provides the legal costs adjudicator with the necessary powers to conduct the adjudication, including the power to hold an oral hearing which will be conducted in public unless otherwise ordered by the legal costs adjudicator “in the interests of justice.” This reflects the overarching constitutional principle in Irish law that “save in special and limited cases prescribed by law”, justice be administered in public.<sup>24</sup>

- *Stamp duty on adjudications*

27. Where an adjudication concerns only legal costs as between a legal practitioner and his or her client, and the Legal Costs Adjudicator has determined that the aggregate of the amounts to be paid is less than 15 per cent lower than the aggregate of those amounts set out in the bill of costs, the party chargeable to those costs shall pay the costs of the adjudication (but is likely to benefit from the outcome of the adjudication otherwise).<sup>25</sup>

28. Where a Legal Costs Adjudicator has determined that the aggregate of the amounts to be paid in respect of the legal costs referred to in that section is 15 per cent or more than 15 per cent lower than the aggregate of those amounts set out in the bill of costs, the legal practitioner who issued the bill of costs shall be responsible for the costs of the adjudication.<sup>26</sup>

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- a. *verify that the matter or item represents work that was actually done,*
  - b. *determine whether or not in the circumstances it was appropriate that a charge be made for the work concerned or the disbursement concerned,*
  - c. *determine what a fair and reasonable charge for that work or disbursement would be in the circumstances, and*
  - d. *determine whether or not the costs relating to the matter or item concerned were reasonably incurred.*

<sup>24</sup> Article 34.1 of the Constitution of Ireland

<sup>25</sup> Section 158, subsection 2 of the 2015 Act.

<sup>26</sup> Section 158, subsection 3 of the 2015 Act.

29. In the latter scenario, the costs of the adjudication may be set off against the aggregate amount owed as determined by the adjudicator, thus negating the need for an applicant to access funds directly for this service.

- *Special Costs Provisions*

30. As noted above, section 169 of the 2015 Act, which provides that costs in civil proceedings normally follow the event, expressly provides that nothing in that part shall affect section 50B of the Planning and Development Act 2000 (PDA) or Part 2 of the Environment (Miscellaneous Provisions) Act 2011 (EMPA).

31. It is noted that section 142 of the 2015 Act requires that the Chief Legal Costs Adjudicator shall consult with the Minister for Environment, Community and Local Government<sup>27</sup> in relation to the guidelines to be prepared by the Chief Legal Costs Adjudicator setting out how the adjudication process works, what is required for an application to the Office, the applicable fees etc. As the applicable Minister is responsible for Aarhus Convention matters, the policy intention is that the guidelines will have regard to Ireland's obligation under the Convention..

32. Turning then to the three main issues raised by the communicant and the potential impact of the 2015 Act.

i. *Special Costs Provisions are not sufficiently certain*

33. Ireland does not contend that the 2015 Act will materially affect the extent to which section 50B of the PDA and Part 2 of the EMPA protect an applicant from costs which are not prohibitively expensive. Section 50B and Part 2 are directed towards protecting an applicant from exposure to the legal costs of those parties whose actions (or inactions) that applicant wishes to challenge with a view to ensuring that

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<sup>27</sup> It is intended that this function will transfer to the Minister for Communications, Climate Action and Environment and following the completion of a Transfer of Functions order and the Alteration of Name of Department and Title of Minister Order in the coming weeks.

the risk of being liable for such third party costs does not impede access to justice. The protection afforded by the special costs provisions set out in those acts is expressly retained without amendment in the 2015 Act. The Party Concerned's position that these provisions satisfy its obligations pursuant to the Convention is thus maintained.

*ii. Inadequate mechanisms available to enable an applicant to regulate own costs*

34. Firstly, as previously advised and as set out in greater detail in response to Question 9 below, it is the Party Concerned's position that the regulation of "own lawyer" costs is not encompassed by Article 9(4) of the Convention and that any complaint by the communicant in this respect is misconceived.
35. Secondly, the communicant's suggestion that an applicant will be required in certain instances to obtain representation for which s/he will necessarily incur costs is not borne out by any evidence adduced by him or on his behalf. Rules of Court permit all natural persons to represent themselves in any legal proceeding to which they are a party. Furthermore, conditional fee arrangements – described in detail in earlier correspondence with the Committee – enable applicants in environmental cases to obtain legal representation without exposure to the costs of so doing. Even in the absence of such conditional fee arrangements, there are mechanisms available to an applicant to ensure that s/he can control costs as they accrue – by requiring information on costs to be incurred – and s/he can seek an independent review of costs which have been accrued – through the taxation process before the taxing master.
36. Notwithstanding the Party Concerned's position as set out above, it is its view that the procedures for regulating and adjudicating on costs have been amplified and improved by the measures contained in the 2015 Act. In particular, it is considered that the procedures will ensure that clients are better able to control costs before they arise and that any complaint about a bill of costs or items in a bill of costs can be dealt with in a more efficient and streamlined process. Clients can enter legal

agreements with their legal practitioners and practitioners will not be entitled to charge for work other than in accordance with that agreement. Notwithstanding having entered such an agreement, a client will be entitled to have the costs incurred in accordance with such an agreement sent to adjudication.

37. In addition, the provision in the Act which expressly defines misconduct to include charging fees which are grossly excessive will act as a further disincentive to legal practitioners to charge anything other than a reasonable fee for work actually performed.

*iii. Lack of Transparency*

38. It is considered that the provisions of the 2015 Act will allow for greater transparency in the adjudication process. Though there are restrictions on certain matters being made public in the costs adjudication process, it is considered that the provisions represent a reasonable balance between the interests of justice and the privacy of those involved. Although the communicant complains in his initial complaint that the restrictions on publication of names of those involved in a costs adjudication will undermine the utility of publication of costs in determining what constitutes reasonable costs, the Party Concerned considers that such a complaint is entirely premature.
39. In addition, proceedings before the Disciplinary Tribunal are to be heard in public unless directed otherwise in the interests of justice.

**2. If the courts may reject Special Costs Protection (SCP) for the reason that there is not an environmental issue or for the reason that the claim is frivolous and vexatious, does the Court announce that before considering the claim on its merits?**

40. For a Court to determine that the Special Costs Protection (SCP) applies to a particular set of proceedings, a party to the proceedings must (generally speaking) make an application for such a determination. The time at which the Court decides whether the SCP applies will, therefore, depend on the time at which the application is made.

41. It is open to any party to proceedings to apply for the Special Costs Protection under Section 7 of the Environmental (Miscellaneous Provisions) Act 2011 *at any point before or during* those proceedings.<sup>28</sup> Where such an application is made before or during the proceedings, the Court will make its determination before going on to consider the claim on its merits.

42. In *Hunter v. Nurendale Ltd*<sup>29</sup> the applicant sought and was granted a protective costs order pursuant to s. 7 of the Environmental (Miscellaneous Provisions) Act 2011 at the outset of the substantive proceedings.<sup>30</sup>

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<sup>28</sup> It has long been recognized that the Irish Courts have an inherent jurisdiction to make a protective costs order at any stage of proceedings: *Village Residents Association Ltd v. An Bord Pleanala* (No 2) [2000] 4 IR 321.

<sup>29</sup> *Hunter v. Nurendale Ltd t/a Panda Waste* [2013] IEHC 430. Likewise, in *Conway v. Ireland and the NRA* [2009] IEHC 472 (which predates the Environmental (Miscellaneous Provisions) Act 2011) the Plaintiff sought that the Defendants pay for costs of civil engineering studies in progressing his case, which he said were otherwise “prohibitively expensive”. This application was dealt with at the outset of the proceedings. The Court addressed whether such a requirement of providing the provisions of access to justice, as implemented by Directive 2003/35/EC (the Public Participation Directive which gives European sanction to the Aarhus Convention) encompassed this type of financial assistance and held that nothing in the Directive requires a Member State to make available to members of the public expert professional assistance and representation equivalent to that available to and used by bodies such as the NRA involving infrastructural development.

<sup>30</sup> The proceedings related to various orders sought by the Plaintiff under the Planning and Development Act 2000 relating to the Respondent’s use of a waste facility adjacent to the Plaintiff’s property.

43. The Court of Appeal recognised that the very language of s. 7(1) of the 2011 Act envisages that such an application can be brought even before the proceedings are actually commenced:<sup>31</sup> the Court (Hogan J) held that any other conclusion would defeat one of the principal objects of the 2011 Act and would be at odds with the actual language.

44. Although applications in advance of a hearing on the merits are not expressly provided for in section 50B, in practice, such applications have been made and considered by the Courts. In *Callaghan v An Bord Pleanala*<sup>32</sup> the applicant sought an order that section 50B of the PDA applied to the proceedings. Although the order was refused, the Court and the parties (including the State which was a respondent to the proceedings) accepted that it was an application which the applicant was entitled to make.

**3. Besides SCP, are there any other mechanisms established under Irish law to assist members of the public regarding the financial implications of seeking access to justice in environmental matters? Please describe any such mechanisms and explain the extent which they are in practice used by the public.**

45. Other than the Special Costs Provisions under Section 50B PDA 2000 and Part 2 of EMPA, protective costs orders can be sought in any proceedings where it is claimed that the proceedings are of particular public importance.

46. In *Friends of the Curragh Environment Limited v An Bord Pleanala & Ors*<sup>33</sup>, Kelly J set out the relevant principles as follows: (1) a protective costs order might be made at any stage of the proceedings, on such conditions as the court thought fit, provided that the court was satisfied that (i) the issues raised were of general public

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<sup>31</sup>*McCoy v Shillelagh Quarries* [2015] IECA 1, at paragraph 47, per Hogan J. The Court of Appeal held it is clear from the terms of s. 7 of the 2011 Act that the Court has a jurisdiction to make a final determination regarding a protective costs order at an early stage of the proceedings.

<sup>32</sup> [2015] IEHC 235

<sup>33</sup> [2009] 4 IR 451

importance; (ii) the public interest required that those issues should be resolved; (iii) the applicant had no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent and to the amount of costs that were likely to be involved, it was fair and just to make the order; and (v) if the order was not made the applicant would probably discontinue the proceedings and would be acting reasonably in so doing; (2) if those acting for the applicant were doing so pro bono this would be likely to enhance the merits of the application for a protective costs order; (3) it was for the court, in its discretion, to decide whether it was fair and just to make the order in the light of the considerations set out above<sup>34</sup>.

47. In addition, as discussed below in response to Question 5, a Court may award an unsuccessful applicant costs where the case was considered to be of “exceptional public importance.”

**4. Please provide case law demonstrating how the Irish Courts interpret and apply the concept of “frivolous and vexatious” proceedings. Please also provide any relevant academic commentary on this issue, if such exists.**

48. The Courts have a power pursuant to both Order 19 rule 28 of the Rules of the Superior Courts, 1986 (“RSC”) and their inherent jurisdiction, to strike out proceedings where they can be shown to be unsustainable.<sup>35</sup> The phrase “*frivolous and vexatious*” has been held to refer to proceedings which are without basis in law<sup>36</sup> or have no reasonable chance of succeeding.<sup>37</sup> The High Court recently affirmed<sup>38</sup> the following *indicia* of frivolous or vexatious proceedings:<sup>39</sup>

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<sup>34</sup> It is noted that in *Rosborough v Cork City Council* [2008] 4 IR 572, the High Court, though confirming the jurisdiction to make protective costs orders insulating a party to litigation from the prospect of having to meet an award of costs, held that it had no jurisdiction to make a pre-emptive order that an applicant should be entitled to his/her costs irrespective of the result.

<sup>35</sup> See Delaney & McGrath *Civil Procedure in the Superior Courts* (3<sup>rd</sup> ed.) (2012) page 575, paragraph 16-01.

<sup>36</sup> *Adams v. Minister for Justice* [2001] 2 ILRM 452.

<sup>37</sup> *Farley v. Ireland* [2000] IESC 59. Similarly, in *Jodifern v. Fitzgerald* [1999] IESC 38 the Supreme Court said that if a claim could never have succeeded, then the proceedings should be struck out.

- (a) *the bringing up on one or more actions to determine an issue which is already being determined by a court of competent jurisdiction;*
- (b) *where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;*
- (c) *where the action is brought for improper purposes including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate right;*
- (d) *where issues are rolled forward into subsequent actions and repeated and supplemented often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;*
- (e) *where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;*
- (f) *where the respondent persistently takes unsuccessful appeals from judicial decision.*

49. As noted in both *O’Riordan* and the subsequent case of *Bullen*, an action can be regarded as frivolous or vexatious if any of the above criteria are met.

50. The Supreme Court has recently described this power as a very useful jurisdiction which allows the court to terminate proceedings at the very outset if it is apparent that they should not be permitted to proceed.<sup>40</sup>

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<sup>38</sup> *Bullen v O’Sullivan & Ors* [2015] IEHC 72 (Donnelly J) at paras 51-53, 68-73 & 90-92; *O’Driscoll & Dunne v McDonald & Ors* [2015] IEHC 100 (Barton J).

<sup>39</sup> *Riordan v. Ireland (No. 5)* [2001] 4 IR 463 (Ó Caoimh J) citing a judgment of the Ontario High Court in Canada in *Re Lang Michener and Fabian* (1987) 37 D.L.R. (4<sup>th</sup>) 685 at p.691.

<sup>40</sup> *Nowak v Data Protection Commissioner* [2016] IESC 18, at paragraph 14.



51. The leading academic text on Irish civil procedure states that the test that legal proceedings are wholly unsustainable and should be struck out is a *“difficult test to satisfy as it will be necessary for the defendant to establish that the plaintiff’s claim is entirely devoid of merit”*.<sup>41</sup>
52. Academic commentary suggests that Irish courts have struck an appropriate balance between securing the right of access to the courts and the need to ensure that the court system, with its limited resources, is not abused by *“litigants seeking to air vexatious claims or seeking to harass or embarrass parties at the expense of the system and other litigants seeking to enforce their rights”*.<sup>42</sup> Ireland’s leading academic on civil procedure in the Superior Courts has argued that *“the very existence of the jurisdiction acts as a deterrent to litigants who seek to pursue vexatious or unsustainable claims and it represents an important weapon in the armoury of the courts to prevent abuse of process.”*<sup>43</sup>
53. Accordingly, this jurisdiction is rarely exercised. Moreover, in judicial review proceedings, once leave for judicial review has been granted by the High Court on the basis that the claims constitute an *“arguable case”* or *“substantial grounds”* depending on the proceeding, any motion to strike out on the basis of frivolity or vexatiousness would be very unlikely to succeed.<sup>44</sup> The Party Concerned is not aware of any proceedings in which it has been successfully contended that section 50B does not apply because the proceedings were frivolous or vexatious.

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<sup>41</sup> Delaney and McGrath, *Civil Procedure in the Superior Courts*, (3<sup>rd</sup> Edition, Roundhall), at Page 583. *“Abuse of Process”*, *Annual Review of Irish Law* 2014 1(1), 544 - 574, Sam Collins

<sup>42</sup> Trevor Murphy, *“To Strike or not to Strike? A Review of the Jurisdiction to Dismiss Proceedings in the Superior Courts”*, *Commercial Law Practitioner*, 2014, at 37

<sup>43</sup> Hilary Delany, *“Striking out where No Reasonable Cause of Action, where Claim Frivolous or Vexatious or where Clearly Unsustainable, Irish Law Times”*, 2000, 18, 127-130.

<sup>44</sup> See: *Costs in Environmental Cases*, Stephen Dodd, *Irish Planning and Environmental Law* 2014, 21(1), 23 -31 at p. 28

**5. What are the cases of “exceptional public importance” under Irish law for which unsuccessful applicants may be awarded costs?**

54. There has always been a jurisdiction in the Irish courts to depart from the general rule that costs follow the event and to award costs to an unsuccessful applicant. This jurisdiction is expressly preserved by section 50B(4) of the PDA and also in S3(4) of the Environment (Miscellaneous Provisions) Act 2011.
55. The key test is whether the issues of law litigated within the proceedings are of special and general importance to the public, rather than merely to the applicant concerned.<sup>45</sup>
56. In *Dunne v Minister for Environment*<sup>46</sup> the Supreme Court held that an important factor for the court when considering costs is whether the legal issues raised, rather than the subject matter itself, were of special and general public importance to justify a departure from standard costs rules<sup>47</sup>. In *Lancefort Ltd v An Bord Pleanála* [1998] 2 IR 511 at 516 it was held that to meet the criterion of being of exceptional public importance required the raising of a point of law of such gravity and importance that it transcends the interests and consideration of the parties actually before the court.
57. In *Pringle v Government of Ireland* [2014] IEHC 174 the Supreme Court found that the case involved exceptional public importance such that costs should be awarded by reason of: (a) the unquestionable importance of the legal issues raised (which were adjudicated upon by a rare plenary sitting of the Court of Justice in an accelerated procedure) in relation to the application of EU law; (b) the complexity of the legal issues raised in the constitutional challenge because of the context in which they

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<sup>45</sup> *Curtin v Clerk of Dáil Éireann & Ors* [2006] 2 IR 556.

<sup>46</sup> [2008] 2 IR 775

<sup>47</sup> It was made clear in *Callaghan v An Bord Pleanála* [2015] IEHC 618, that the fact that an applicant also has a private interest in proceedings does not debar him from relying on the exceptional jurisdiction.

require to be resolved; (c) the significance of the ultimate resolution of the legal issues both in European Union law and in national law; and (d) the fact that the plaintiff had no private interest in the outcome of the case.

58. In *Millstream Recycling Ltd v Tierney* [2010] IEHC 55, a case which related to the apportionment of blame for a scandal involving contamination of animal feed and pork products which had caused significant damage to the agri-food industry, the High Court found that the determination of the facts behind the scandal transcended the individual claims and counterclaims of the parties, and thus the case raised issues of exceptional public importance.
59. In *McCallig v An Bord Pleanála*<sup>48</sup>, the High Court has found that: *"a reasonable approach in applying the first part of the two-part test mandated by s. 50B(4) would be for the court to ask itself whether it could reasonably be considered that the ruling sought by a party to the litigation was on a matter not only of importance to that party but also of particular value and interest to the public in general. If the answer is in the affirmative then the first part of the test is satisfied and the matter could be regarded as one of "exceptional public importance"."*

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<sup>48</sup> [2014] IEHC 353

6. Please clarify whether it is possible under Irish Law to be represented before the courts by an environmental NGO or by a person who is not a solicitor or a barrister?

*Present situation*

60. It is, in general, not possible for a litigant to be represented by a person who is not a solicitor or a barrister<sup>49</sup>.
61. A lay litigant may make use of a *McKenzie* friend, including an environmental NGO, to assist them. A *McKenzie* friend is a non-lawyer who attends for the purpose of assisting the litigant (such as taking notes, advising the litigant, handling papers) but does not generally act as an advocate.<sup>50</sup> Where a lay litigant has particular difficulties in properly articulating their arguments, the Irish Courts will permit a *McKenzie* friend to make submissions.<sup>51</sup>
62. A litigant can be represented in Court by a solicitor or a barrister. Any solicitor in possession of a practising certificate has a right of audience in an Irish Court, including a solicitor in the employment of a corporation or non-governmental organisation.<sup>52</sup> Thus, an environmental NGO can be represented in Court by a solicitor within its employment.

*Upon commencement of the 2015 Act*

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<sup>49</sup> *In the Matter of Applications for Orders in Relation to Costs in Intended Proceedings by Coffey and others 2013 IESC 11, paras. 23 to 40*

<sup>50</sup> *RD v. McGuinness* [1999] 2 IR 41.

<sup>51</sup> *Delaney v. AIB Bank PLC* [2016] IECA 1. *In the Matter of Applications for Orders in Relation to Costs in Intended Proceedings by Coffey and others 2013 IESC 11, paras. 16 to 18*

<sup>52</sup> Section 56(2) of the Solicitors Amendment Act 1994 defines a solicitor in practice to include a solicitor providing legal services as an employee of any other person or body.

63. Section 212 of the Legal Services Regulation Act 2015 will (when commenced) permit employed barristers to represent their employers in court. This will enable barristers employed by NGOs to represent those environmental NGOs in proceedings to which they are a party.
  
64. It is noted that An Taisce, the National Trust for Ireland, the leading environmental NGO in the State, frequently acts as an applicant in environmental proceedings in the Irish courts.

**7. Please explain how the burden of proof is distributed between the parties within the costs adjudication procedure both before the Taxing Master and the Law Society.**

65. The standard of proof in the taxation of costs is the balance of probabilities.<sup>53</sup> The onus is on the party claiming costs to demonstrate to the satisfaction of the Taxing Master that such costs as were incurred were proper and reasonable in all the circumstances.
66. As regards an application for the adjudication of legal costs under the Legal Services Regulation Act 2015, guidelines will be published setting out the procedure to be adopted by the Legal Costs Adjudicator.<sup>54</sup>
67. The Law Society has no role in costs adjudication. Rather, its role is disciplinary.

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<sup>53</sup> Flynn, James & Halpin, Tony *Taxation of Costs* (1999) p. 286. “[H]owever the Taxing Master is guided by his experience as to when this onus has been discharged and he is not controlled by the strict limits imposed, for example by the onus of proof in criminal courts but, rather, is guided by the evidence presented and after hearing both sides is satisfied on the balance of probabilities that the cost are proper and reasonable they are allowable cost having regard to the nature of the matter”.

<sup>54</sup> Section 142 of the 2015 Act.

**8. Is it your view that the issue of costs between a client and their own solicitor/barrister is within the scope of article 9, paragraph 4 of the Convention?**

68. Article 9(4) of the Convention, which relates to the requirements for access to the review procedures specified under Articles 9(1), (2) and (3), does not extend to the regulation of own costs incurred in private contractual relations between an individual and a legal practitioner. Nothing in the Convention requires Ireland to interfere with the private costs arrangements of litigants and their lawyers in those review procedures or otherwise.
69. Ireland is obliged to ensure that access to justice in environmental matters is not prohibitively expensive. It has done so through providing that, in the relevant review procedures, litigants in Aarhus matters are not subject to legal costs if unsuccessful, will recover costs if successful, and may even recover legal costs if unsuccessful where the proceedings are of exceptional public importance. These provisions go far beyond the requirements of Article 9(4) of the Convention.
70. It is noted that this is also the view taken by the Irish courts. In *Browne v Fingal County Council*<sup>55</sup> the Court rejected an application made in advance of an application for leave to apply for judicial review for a “pre-emptive” costs order, *i.e.* an Order that irrespective of the outcome of the proceedings, the applicant would be entitled to his costs. The application was said to be made in reliance on the State’s obligation under the Convention. The application was rejected by the High Court:

*In this country, it appears that what is provided for in relation to costs in cases of this kind gives even greater protection to an unsuccessful applicant than is required under the Aarhus Convention 1998. That protection is what appears in s. 50B of the Planning and Development Act 2000 as amended. Under these provisions no order as to costs may be awarded against an unsuccessful applicant. The court is required*

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<sup>55</sup> [2013] 2 IR 194

*to make no order as to costs in such a case. The court may of course under s. 50B(2A) of the Act of 2000, as inserted, make an order for costs in favour of a successful applicant*

*Neither the Aarhus Convention 1998, nor R. (Edwards) v Environment Agency (No. 2) (Case 260/11) [2013] 1 WLR 2914, mandate that legal aid be available to impecunious applicants as part of the requirement that access to justice should not be prohibitively expensive. Paragraph 38 of R. (Edwards) v Environment Agency (No. 2) (Case 260/11) [2013] 1 WLR 2914 makes a brief reference to legal aid schemes in member states as being something, inter alia, as a matter to be taken into account. Clearly if legal aid had to be available, or some sort of pre-emptive order for costs in advance of an application, this would have been clearly stated, and it is not.”<sup>56</sup>*

71. In circumstances where there is an undisputed market for the provision of legal services, in which contingent fee arrangements exist<sup>57</sup> and are an important feature, it cannot be said that as a matter of fact lawyer-client own costs are prohibitively expensive. Nor has the Communicant evidenced same, either empirically or as it has affected him.
  
72. In any event, as previously set out, Ireland already provides protective mechanisms such that parties to all proceedings can have their own costs taxed. Moreover, under the Legal Services Regulation Act 2015, further protections are afforded including a provision that a pre-litigation agreement between a litigant and a legal professional shall itself be amenable to adjudication by the Legal Costs Adjudicator.<sup>58</sup>

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<sup>56</sup> The State was not a party to the proceedings and therefore, as noted by the Court, there was no express argument advanced before the Court that the State had failed in its obligations under the Aarhus Convention.

<sup>57</sup> See, for example, *McCoy v Shillelagh Quarries* [2015] IECA 28.

<sup>58</sup> Section 151 subsection 4 of the 2015 Act.



9. This question is addressed to the Communicant.
10. Please provide the Committee with relevant case law showing the application in practice of Section 50B of the Planning and Development Act 2000 (as amended) and Part 2 of the Environment (Miscellaneous Provisions) Act 2011.

*Section 50B*

73. The application of section 50B has become a commonplace in Irish jurisprudence. It is usually evident that proceedings are proceedings to which section 50B applies, e.g. because a challenge includes a claim that the EIA conducted by the competent authority was deficient in some respect. In such cases, the applicant for judicial review is typically afforded the benefits of the special costs provision without debate. There are, however, a number of written decisions of the Superior Courts in which the precise scope of section 50B has been analysed.
74. Prior to the amendments to section 50B introduced by the Environment (Miscellaneous Provisions) Act 2011<sup>59</sup>, the High Court in *JC Savage Supermarket Limited & Becton v An Bord Pleanála*<sup>60</sup> examined the scope of section 50B. The Court rejected an argument that section 50B applied to any proceedings in which a decision made pursuant to the Planning and Development Acts was being challenged. The argument was based on the specific wording of section 50B which states that it relates to proceedings challenging decisions made “pursuant to a law which gives effect to” three specified EU Directives. The argument made was to the effect that since the PDA gave effect to, in particular, the EIA Directive, any decision made pursuant to the PDA was made pursuant to a law which gave effect to the

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<sup>59</sup> Which introduced a new section 2A which facilitated costs orders being made in favour of successful applicants.

<sup>60</sup> [2011] IEHC 488. See also *Kimpton Vale Ltd v An Bord Pleanála* [2013] IEHC 442 in which Hogan J rejected the same argument but stated that were it not for this earlier decision, he would have accepted the argument. The same argument was also rejected by O’Neill J in *Harrington v An Bord Pleanála* [2011] IEHC 488 but the question of the proper interpretation of section 50B was made the subject of a certificate of leave to appeal to the Supreme Court. The proceedings have been remitted to the Court of Appeal.

EIA Directive and was therefore covered by section 50B whether or not there was any EIA-related argument in the proceedings.

2 4.0 *The legislative history of s. 50B includes the prior forms of s. 50 of the Act of 2000 and the amendments thereto before that new section was introduced and the decision of the European Court of Justice of 16<sup>th</sup> July 2009 in case C-427/07, Commission v Ireland. Nothing in that legislative history shows any intention by the Oireachtas to provide that all planning cases were to become the exception to the ordinary rules as to costs which apply to every kind of judicial review and to every other form of litigation before the courts. The immediate spur to legislative action was the decision of the European Court of Justice in case C-427/07. Nothing in the judgment would have precipitated the Oireachtas into an intention to change the rules as to the award of costs beyond removing the ordinary discretion as to costs from the trial judge in one particular type of case. Specified, instead, was litigation that was concerned with the subject matter set out in s. 50B (1) (a) in three subparagraphs: environmental assessment cases, development plans which included projects that could change the nature of a local environment, and projects which required an integrated pollution prevention and control licence. By expressing these three, the Oireachtas was not inevitably to be construed as excluding litigation concerned with anything else. Rather, the new default rule set out in section 50B (2) that each party bear its own costs is expressed solely in the context of a challenge under any "law of the State that gives effect to" the three specified categories: these three and no more. There is nothing in the obligations of Ireland under European law which would have demanded a wholesale change on the rules as to judicial discretion in costs in planning cases.*

3 4.1 *The circumstances whereby the State by legislation grants rights beyond those required in a Directive are rare indeed. Rather, experience indicates that the default approach of the Oireachtas seems to be 'thus far and no further'. There can be*

*exceptions, but where there are those exceptions same will emerge clearly on a comparison of national legislation and the precipitating European Obligation. Further, the ordinary words of the section make it clear that only three categories of case are to be covered by the new default costs rule. I cannot do violence to the intention of the legislature. Any such interference would breach the separation of powers between the judicial and legislative branches of government. The intention of the Oireachtas is clear from the plain wording of s. 50B and the context reinforces the meaning in the same way. The new rule is an exception. The default provision by special enactment applicable to defined categories of planning cases is that each party bear its own costs but only in such cases. That special rule may exceptionally be overcome through the abuse by an applicant, or notice party supporting an applicant, of litigation as set out in s. 50B (3). Another exception set out in s. 50B (4) provides for the continuance of the rule that a losing party may be awarded some portion of their costs "in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so."*

*4 4.2 The Court must therefore conclude that as this litigation did not concern a project which required an environmental assessment, costs must be adjudged according to the ordinary default rule that costs should follow the event unless there are exceptional circumstances.*

75. In *Shillelagh Quarries Ltd v. An Bord Pleanála*<sup>61</sup> the applicant sought to review a decision of An Bord Pleanála in which it had refused permission for quarry development on the basis that the quarry was subject to the requirements of the EIA Directive and it was therefore precluded by the decision in C-215/06 from considering any application for permission. The claim was dismissed by the High

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<sup>61</sup> [2012] IEHC 257

Court. Subsequently, the Board and the notice parties applied for costs<sup>62</sup> on the basis that the particular challenge was not based on any of the provisions of the EU Directives specified in section 50B. The Court found that as the project the subject of the proceedings was a project subject to environmental impact assessment (which *was* a relevant factor in making the decision which was challenged), the case fell within the class of cases envisaged by s. 50B of the Act.

76. It is noted that the notice party in that case also sought to rely on sub-section 3(b) and 3(c) and sub-section 4 of section 50(B) of the Act in seeking their costs. In relying on sub-sections 3(b) and 3(c) the notice party pointed to the fact that the applicant had continued quarrying notwithstanding a High Court Order from more than 30 years previously requiring operations to cease. The High Court determined that there was insufficient evidence as to what had occurred in the interim to warrant departing from the (then) usual rule: *"I do not think it would be just to impose what really amounts to a penalty in the absence of convincing evidence."*

The argument based on sub-section 4 was similarly rejected on the grounds that there was insufficient evidence that the matter was of exceptional public importance.

77. Sub-section 3(b) of section 50B was again considered by the High Court in *Indaver NV Ltd t/a Indaver Ireland v An Bord Pleanála & Ors*<sup>63</sup>. The applicant had withdrawn proceedings immediately prior to hearing and the Board and notice party sought their costs on the basis of the manner in which the applicant had conducted the proceedings. The Court awarded costs against the applicant on the basis that it had unnecessarily prolonged proceedings when it no longer had a *bona fide* belief in its case. The Court stated that its continuation of the proceedings beyond that time

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<sup>62</sup> [2012] IEHC 402. It is noted that the costs decision was made on the basis of the law prior to the amendment of section 50B and therefore the Board and the Notice Party, despite having succeeded in the case would not have been entitled to their costs if section 50B applied.

<sup>63</sup> [2013] IEHC 11

could only be seen as “an abuse of the Court process” and section 50B could not therefore be relied on.<sup>64</sup>

78. *McCallig v An Bord Pleanála*<sup>65</sup> involved a challenge to a windfarm development on a variety of grounds which included a challenge based on an allegedly deficient EIA, but also a challenge based on the infringement of the applicant’s property rights. Although the challenge based on EIA was rejected, the challenge based on an infringement of the applicant’s property rights was, in part, successful. The case was decided pursuant to the unamended section 50B and the applicant would not have been entitled to recover costs despite succeeding if section 50B were determined to apply. In the circumstances, the Court applied the section 50B rules only to the element of the proceedings involving the challenge to the environmental impact assessment, and the ordinary costs rules were applied in respect of the balance of the case.

79. In *Tesco Ireland v. Cork County Council*<sup>66</sup> the Applicant was awarded its costs even in respect of grounds on which it was unsuccessful.

80. Finally, in *Callaghan v An Bord Pleanála*<sup>67</sup> the Court was asked to consider as a preliminary issue whether a decision to designate a development as “strategic infrastructure” was a decision to which section 50B applied. The designation

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<sup>64</sup> It is noted that the applicant who was ordered to pay costs was the company which had applied for development consent and the notice party which successfully obtained its costs (or at least its costs for the period during which the applicant had improperly continued its case) was a local environmental group, Cork Harbour Alliance for a Safe Environment, which had opposed the development.

<sup>65</sup> (No 1) [2013] IEHC 60; (No 2) [2014] IEHC 353; (No 3) [2014] IEHC 354.

<sup>66</sup> *Tesco Ireland v. Cork County Council* [2013] IEHC 580. The applicant set out four grounds of argument in his judicial review, but because he succeeded on the first ground – being the *ultra vires* ground – the Court did not proceed to hear the rest of the matter, having found for the applicant on that point. Peart J. found that section 50B(2A) was enacted in the interests of a successful applicant so that the Court retained discretion to award the costs (in full) to the successful applicant if it so desired. However, while those costs should only be awarded to the extent that the applicant has succeeded, Peart J found that it would be unfair if the Applicant was not awarded his full costs simply because the other issues in the judicial review were not determined, where the applicant had succeeded on the first ground of its judicial review. As the Court had reached no conclusion on the other grounds of the application, the applicant could not be considered to have failed. He was therefore awarded the full cost of the proceedings.

<sup>67</sup> *Callaghan v An Bord Pleanála* [2015] IEHC 235.

affected the manner in which the application for development consent would be processed, but did not affect the requirement for the project to be subject to environmental impact assessment.<sup>68</sup> The applicant nonetheless argued that the designation formed part of the EIA process and, in particular, was therefore subject to the public participation requirements in the Directive.

81. The Court expressly accepted the analysis of section 50B from *JC Savage v An Bord Pleanála* but concluded that “nothing that the Board had determined had anything to do with EIA” and therefore section 50B did not apply.

#### *Part 2 of EMPA*

In *Hunter v. Nurendale Ltd*<sup>69</sup> the applicant sought a protective costs order pursuant to section 7 of the Environmental (Miscellaneous Provisions) Act 2011 at the outset of the substantive proceedings, which related to the Respondent’s use of a waste facility adjacent to the applicant’s property. The Court granted the relief and set down criteria for the future applications.<sup>70</sup>

Applying these criteria to the circumstances of the case, the Court concluded that the applicant was entitled to a protective costs order pursuant to section 3 of the 2011 Act.

82. In *McCoy v Shillelagh Quarries*<sup>71</sup> the Court of Appeal, as noted above, rejected an argument that an application brought pursuant to section 7 of the EMPA at the outset of proceedings was premature. The case also involved an analysis of the status of the Aarhus Convention in domestic law. Hogan J quoted from his own judgment given in an earlier High Court case<sup>72</sup>:

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<sup>68</sup> Applications for development consent for projects which are designated as strategic infrastructure are made directly to An Bord Pleanála whereas ‘ordinary’ applications are made to the relevant local authority with an appeal available to An Bord Pleanála.

<sup>69</sup> *Hunter v. Nurendale Ltd t/a Panda Waste* [2013] IEHC 430

<sup>70</sup> [2013] IEHC 430, at p. 16

<sup>71</sup> [2015] IECA 28

*“[The Aarhus Convention] is quite possibly the most influential international agreement of its kind in the sphere of international environmental law. Perhaps one of the reasons that the Convention has proved to be so influential is that it has been ratified by the European Union and that it has been transposed into certain key areas of EU environmental law, on which the latest version of the Environmental Impact Assessment Directive (2011/92/EU) is only the most prominent example.”*

83. Whilst noting that the EMPA had not made the Aarhus Convention part of domestic law, he noted that the long title to the Act had as one of its objects “to give effect to certain articles” of the Aarhus Convention. He further noted that:

*“To the extent, therefore, that the Aarhus Convention has been subsumed into EU law (either by virtue of the fact that it is an international agreement adopted by the Union or its provisions have been incorporated into primary EU legislation such as new consolidated version of the Environmental Impact Assessment Directive 2011/92/EU), this Court would be obliged, in an appropriate case, to give effect to the terms of the Convention as part of these wider EU law obligations.”*

84. In that case, the Respondent had argued for a narrow interpretation of section 4 of EMPA by reference to the Convention. It was argued that since the Convention only applied to “environmental decision-making”, where there was, in fact, no decision at issue<sup>73</sup> a law with a stated object of giving effect to the Convention could have no application. The Court rejected this argument on the basis of its interpretation of domestic law.

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<sup>72</sup> *Waterville Fisheries v Aquaculture Licensing Appeals Board (No. 3)* [2014] IEHC 522

<sup>73</sup> The case turned on whether the development in issue, a quarry, pre-dated the introduction of planning controls in the State and was therefore not subject to the requirement to obtain planning permission.

85. An application for the protection afforded by EMPA was also made in *Callaghan v An Bord Pleanala*.<sup>74</sup> The Court rejected the application concluding that there must be a causative link between the failure to ensure compliance with, or enforcement of, a statutory requirement and damage to the environment. In circumstances where the application for development consent had not been determined, the Court stated that it could not proceed on the presumption that it would be determined other than in accordance with law, *i.e.* other than in a manner which would avoid damage to the environment, and therefore refused the application.

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<sup>74</sup> [2015] IEHC 357. It will be recalled that a pre-emptive application pursuant to section 50B was refused at an earlier point in the proceedings.



**11. Please clarify the precise scope of Section 50B of the Planning and Development Act 2000 (as amended), i.e. to what category of cases does it apply specifically?**

86. The Communicant has raised no decision or environmental issue he seeks to address or in respect of which he would seek a remedy, to which section 50B or the provisions of the 2011 Act do not apply.
87. Section 50B of the Planning and Development Act 2000 (as amended) is expressly and purposefully broad in its scope (the consolidated text of same was set out in Annex 1 of Ireland's original response dated 29<sup>th</sup> September 2015.)
88. Section 50B applies only to judicial review proceedings taken challenging decisions taken pursuant to the PDA. It is noted that *all* challenges to decisions taken pursuant to the PDA must be by way of judicial review.
89. As appears from the decision in *JC Savage Supermarket v An Bord Pleanala* which is discussed above in response to question 10,<sup>75</sup> whilst not all judicial review proceedings challenging decisions made pursuant to the PDA are encompassed by section 50B, but only those which relate to the EU Directives specified at section 50B(a)(I),(II) and (III), an applicant otherwise seeking relief under the Planning and Development Acts in proceedings concerning damage to the environment (as set out in section 4 of the Environment (Miscellaneous Provisions) Act 2011) will under section 7 of the 2011 Act be entitled to make an application for SCP pursuant to section 3 of the 2011 Act.

**12. Please clarify whether it is the case that the issue of SCP under section 50B of the Planning and Development Act 2000 (as amended) is determined only after the case has been heard by the court. Is there any provision under section 50B for the**

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<sup>75</sup> See also *Kimpton Vale Ltd v An Bord Pleanala* [2013] 2 IR 767 in which the Court determined that section 50B did not apply to proceedings challenging a decision that construction of a 1.2 metre fence did not constitute exempted development (development which did not require planning permission).

**applicant seeking judicial review to obtain confirmation from the court, in advance, before the case proceeds, that SCP applies to their particular case?**

90. As set out above in response to question 10, an application for an Order that section 50B applies to proceedings can be sought prior to the conclusion of proceedings.<sup>76</sup> In addition, as set out in response to question 3, a protective costs order can also be sought prior to the conclusion of proceedings.
91. Finally, as set out in Ireland's response to the question posed by the Committee, Irish law provides that it is open to any party to proceedings to apply for the Special Costs Protection under Section 7 of the Environmental (Miscellaneous Provisions) Act 2011 *at any point before or during* the proceedings (including at the point of the issuance of proceedings, before the substantive proceedings between the parties commences).<sup>77</sup>

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<sup>76</sup> *Callaghan v An Bord Pleanala* [2015] IEHC 235

<sup>77</sup> *McCoy v Shillelagh Quarries* [2015] IECA 28.

## TABLES OF ANNEXES AND HYPERLINKS

### ANNEXES

#### Case Law

*Village Residents Association Ltd v. An Bord Pleanala (No 2)* [2000] 4 IR 321.

*Hunter v. Nurendale Ltd t/a Panda Waste* [2013] IEHC 430.

*Conway v. Ireland and the NRA* [2009] IEHC 472.

*McCoy v Shillelagh Quarries* [2015] IECA 28.

*Friends of the Curragh Environment Limited v An Bord Pleanala & Ors* [2009] 4 IR 451.

*Browne v Fingal County Council* [2013] IEHC 630.

*Adams v. Minister for Justice* [2001] 3 IR 53.

*Farley v. Ireland* [2000] IESC 59.

*Jodifern v. Fitzgerald* [1999] IESC 88.

*Bullen v O'Sullivan & Ors* [2015] IEHC 72.

*O'Driscoll & Dunne v McDonald & Ors* [2015] IEHC 100.

*Riordan v. Ireland (No. 5)* [2001] 4 IR 463.

*Nowak v Data Protection Commissioner* [2016] IESC 18.

*Dunne v Minister for Environment* [2008] 2 IR 775.

*Lancefort Ltd v An Bord Pleanála* [1998] 2 IR 511.

*Pringle v Government of Ireland* [2014] IEHC 174.

*Millstream Recycling Ltd v Tierney* [2010] IEHC 55.

*McEvoy and Smith v Meath County Council* [2003] 1 IR 208.

*Curtin v Clerk of Dáil Éireann & Ors* [2006] 2 IR 556.

*Coffey and others v Environment Protection Agency* [2013] IESC 31.

*McCallig v An Bord Pleanála* [2014] IEHC 353.

*RD v. McGuinness* [1999] 2 IR 411.

*Delaney v. AIB Bank PLC* [2016] IECA 5.

*Shillelagh Quarries Ltd v. An Bord Pleanála* [2012] IEHC 257.

*Callaghan v An Bord Pleanála* [2015] IEHC 235.

*Callaghan v An Bord Pleanála* [2015] IEHC 357.

*Indaver NV Ltd t/a Indaver Ireland v An Bord Pleanála & Ors* [2013] IEHC 11.

*JC Savage Supermarket Limited & Becton v An Bord Pleanála* [2011] IEHC 488.

*Tesco Ireland v. Cork County Council* [2013] IEHC 580.

*Kimpton Vale Ltd v An Bord Pleanála* [2013] IEHC 442.

### **Academic Commentary**

Hilary Delaney and Declan McGrath, *Civil Procedure in the Superior Courts*, (3<sup>rd</sup> Edition, Roundhall), at Pages 575-584, and 724-732.

Flynn, James & Halpin, Tony *Taxation of Costs* (1999) p. 286.

Hilary Delany, "Striking out where No Reasonable Cause of Action, where Claim Frivolous or Vexatious or where Clearly Unsustainable", *Irish Law Times*, 2000.

Trevor Murphy, "To Strike or not to Strike? A Review of the Jurisdiction to Dismiss Proceedings in the Superior Courts", *Commercial Law Practitioner*, 2014.

### **HYPERLINKS**

The Legal Services Regulation Act 2015:

<http://www.irishstatutebook.ie/eli/2015/act/65/enacted/en/pdf>

Administrative consolidation of the Planning and Development Act 2000 prepared by the Irish Law Reform Commission. Updated as of 8<sup>th</sup> February 2016:

[http://www.lawreform.ie/\\_fileupload/RevisedActs/WithAnnotations/EN\\_ACT\\_2000\\_0030.PDF](http://www.lawreform.ie/_fileupload/RevisedActs/WithAnnotations/EN_ACT_2000_0030.PDF)