Environmental Pillar
An advocacy coalition of 28 ENGOs from Ireland

Briefing note on certain Access to Justice Issues in Ireland,

for the

Compliance Committee of the Aarhus Convention

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This submission was prepared on behalf of the Environmental Pillar following a plenary mandate but does not necessarily reflect the policy position of each member group in the pillar.

Environmental Pillar members:

An Taisce. Bat Conservation Ireland, BirdWatch Ireland. CELT - Centre for Ecological Living and Training. Coast Watch. Coomhola Salmon Trust. Crann. ECO UNESCO. Feasta. Forest Friends. Friends of the Earth. Good Energies Alliance Ireland. Global Action Plan Ireland, Gluaiseacht. Hedge Laying Association of Ireland. Irish Doctors Environment Association. Irish Natural Forestry Foundation. Irish Peatland Conservation Council. Irish Seed Savers Association. Irish Whale and Dolphin Group. Irish Wildlife Trust. The Native Woodland Trust. The Organic Centre. Sonairte. Sustainable Ireland Cooperative. VOICE. Zero Waste Alliance Ireland.

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1. Objective

The purpose of this paper is to set out some context for the Compliance Committee on the practical experience and issues with Access to Justice in certain environmental decisions in Ireland. It is hoped this may be of assistance to it in understanding some of the gerneal context and considerations around domestic recourse, and in particular issues around "costs" in general in Ireland. This is intended to assist the consideration of the committee on these matters while recognising that the issues and evolving case law is both extensive and complex and not all Communicants may be in a position to rebut certain assertions made. It is hoped that the context provided here may assist the Committee in its deliberations and further information requirements as appropriate, and that it will set a general context for the practical experience of pursuing Access to Justice in Ireland since the ratification of the convention.

It is therefore not targeted at any specific Irish communication – but is potentially relevant to all Irish communications where domestic recourse and/or access to justice is tabled, but in particular the following:

- ACCC/C/2013/107 Kieran Cummins
- ACCC/C/2014/113 Kieran Fitzpatrick
- PRE/ACCC/C/2016/139 – Irish Underwater generally

The primary focus of this paper is to follow the experience of new cost rules introduced by Ireland as part of its welcome efforts to address the requirement that such reviews should not be "prohibitively expensive"[1] . We should highlight that other issues regarding the scope of review and *locus standi* have not been addressed here as substantially for reasons of resource and time constraints, but some brief comments are also offered in relation to issues around standing.

The changes introduced in relation to the costs rules in Irish courts for certain environmental decisions were essential in the context of Irish Court costs which can run to hundreds of thousands of Euros, and resulted in a view held by some that environmental justice was only available to the very rich who could afford it, or the very poor "man of straw" who has no assets to seize.

[1] As provided for in Art 9(4) of the CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS done at Aarhus, Denmark, on 25 June 1998 , "the Aarhus Convention"

While these new cost rules have made improvements, the following is intended to demonstrate that unfortunately their impact has been compromised consequent on a number of interpretation and practical issues arising. It will also endeavour to highlight how the State and/or emanations of the State, such as An Bord Pleanála or the Office of the Commissioner for Environmental Information position and argue matters such as the limited nature of the scope of actions or stages of decisions covered by these rules, and how the courts have ruled on such issues. Most importantly it will endeavour to highlight the uncertainty and confusion this creates for potential applicants to the courts and their legal teams, and the associated barrier this is to accessing justice. It will also highlight the timelines following on from the introduction of the rules and the subsequent judgements in relation to them. In so doing hopefully will also highlight to the Compliance Committee the environment of uncertainty which prevailed which may have in certain cases been a concern in pursuing domestic recourse, and in certain areas this uncertainty still exists and remains a barrier to accessing justice.

The paper sets out the following:

- Section 2, An overview of the umbrella organisation submitting this paper
- Section 3 The principles of the new cost rules
- Section 4 and Annex I and II - set out the legislation in section 4 and includes the relevant provisions in annexes I & II.
- Section 5 Overviews the legislation more formally
- Section 6 sets out issues encountered in practice
- Section 7 makes some brief remarks on *locus standi* issues.
- Section 8 Concludes the paper.

2. Overview of the Irish Environmental Pillar

The paper has been prepared and is being submitted on behalf of the Environmental Pillar which is comprised of some 28 national independent environmental non-governmental organisations who work together to act as an advocacy voice for the environment and to represent the views within the Irish environmental sector. [2]

[2] The Environmental Pillar was established as an independent national social partner by decision of the Irish Government in 2009. The work of its members covers a broad range of areas including habitat conservation, wildlife protection, environmental education, sustainability, waste and energy issues, as well as environmental campaigning and lobbying. The members work

3. The principle behind the new Irish Cost rules for certain environmental cases.

While these matters are set out more formally below with reference to the specific legislation and also various court judgements interpreting them – it may be helpful to first establish the basic principle behind the new cost rules introduced for certain environmental cases.

Costs in the High Court for a standard judicial review application could be in the region of €300,000-500,000[3] (depending on whether it is admitted to the Commercial Court and the number of parties involved). In the context of the significant level of costs associated with Irish court proceedings, Ireland introduced "an own costs rule" principle for a limited set of environmental challenges. In other words, instead of "costs following the event", each side was to bear its own costs. This "own costs rule" was intended to protect unsuccessful applicants but the effect was that it was harder to secure legal representation as there was no prospect of full costs recovery.[4] There was significant opposition to the model given that the public in general and eNGOs in particular were not in a position to fund even their own costs – so the model effectively required legal practitioners to engage on a *pro bono* basis without any hope of remuneration save for a discretionary award in the public interest – which is a very *very* high bar in an Irish court context, or for the applicant to fund entirely their representation, which at market rates could in itself be "prohibitively expensive". Clearly this was an unsustainable model, particularly given the small number of practitioners prepared to engage with such applicants.

The rules were modified in 2011, firstly to create an additional set of provisions which extended the scope of decisions to which the own cost rules applied and also to allow discretion for the courts to make awards in respect of reliefs won and lost, in what is inscrutable algebraic equation in the legislation - the effect or outcome of which is nigh on impossible to predict, given the level of judicial discretion afforded.

In the context of "Conditional Fee Arrangements" whereby Counsel might engage for lower or no fee in the expectation of winning and being awarded some element of costs – this ability to recover/win costs was an improvement, and the other parties were liable based on

towards achieving Sustainable Development, according to the Rio Declaration of 1992. These principles require the balancing of the three pillars of Sustainable Development – social, environmental, and economic.

[3] Putting this cost in context most would consider this is more than the cost of an average family home in Dublin Ireland's Capital city over the period of these provisions.

[4] *Stack Shanahan and Sheehan v Ireland & Ors.* [2012] IEHC 571.

the extent to which their acts/omissions had resulted in the impugned decision. However not all Counsel and solicitors are prepared to engage on such a basis, nor are all potential applicants even aware of such possibilities when seeking and selecting their representation, and the lack of clarity on what the costs might award even if you are successful is not helpful.

The burden therefore of carrying one's own costs and the lack of communication there has been historically on how this might be overcome through conditional fee arrangements has undoubtedly been an issue for many prospective applicants. There has been some improvement on communicating the potential to engage on a conditional fee basis – following urging from our sector – however more focus is needed on this.

Admittedly there is also a provision for judicial discretion to award costs where there is 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" however in this double bar is a particularly high one to meet.

The effective cost protection of this own cost rule is not absolute as it can be compromised if the case is found to be frivolous and vexatious – terms the courts have interpreted as discussed later below, or given issues with the conduct of parties in the proceedings.

4. The Legislation:

The specific procedural rules overviewed above which were introduced for certain challenges are set out in:

a. Section 50B of the Planning and Development Act 2000 ('the PDA 2000'), as inserted by s.33 of the Planning and Development (Amendment) Act 2010 and amended by s.21 of the Environment (Miscellaneous Provisions) Act 2011 (see Annex I) and
b. Part 2 of the Environment (Miscellaneous Provisions) Act 2011 ('the EMPA 2011') (see Annex II)

In addition, there are general costs provisions which **may** apply if the proceedings do not fall under the specific categories of s.50B of the PDA 2000 or Part 2 of the EMPA 2011. These are set out in Order 99 of the Rules of the Superior Courts (RSC); Order 66 of the Circuit Court Rules (CCR) and Order 53 of the District Court Rules (DCR) (as inserted by S.I. No.17 of 2014) *.

Finally, there are specific costs provisions in s.156 of the PDA 2000 (penalties for offences under the PDA 2000 following enforcement by a planning authority) and/or s.161 of the PDA 2000 (costs of prosecutions and applications for injunctions) *. It is not proposed to discuss this further save that to note that s.161 of the PDA 2000 allows the court to measure the costs and expenses of enforcement and injunction proceedings or, alternatively to exercise its discretion not to impose costs where there are 'special and substantial' reasons for not imposing costs (see also Order 56 CCR as amended by S.I. No.312 of 2007).

5. Overview of Statutory Provisions

Section 50B of the Planning and Development Act 2000 as amended, the PDA:

Section 50B(1) of the PDA 2000 applies where an applicant for judicial review seeks to challenge a decision, action or failure to take action which is 'pursuant to a law of the State that gives effect' to either the Environmental Impact Assessment (EIA) Directive[5]; Directive 2001/42/EC (the "Strategic Environmental Assessment (SEA) Directive")[6]; or Directive 2008/1/EC (the "Integrated Pollution Prevention and Control (IPPC) Directive").[7] This applies to the leave stage, the substantive application, an appeal to the Court of Appeal/Supreme Court (where leave is certified) and interim or interlocutory reliefs in either the High Court or the Supreme Court. However, this is subject to the provisions in s.50B(2)-(4). It also applies to the Court of Appeal following the Court of Appeal Act 2014.

The interpretation of what falls to be considered under these provisions has been the subject of much court time as set out below.

Part 2 of the Environment (Miscellaneous Provisions) Act 2011 , EMPA 2011

Section 3 establishes that this applies to civil proceedings which are instituted for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition or

[5] Council Directive 85/337 of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment has been amended by Directive 97/11/EC; Directive 2003/35/EC and Directive 2009/31/EC. These amendments were codified in Directive 2011/92/EU. The EIA Directive has been subsequently amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.

[6] Council Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.

[7] Council Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control.

other requirement attached to a licence, permit, permission, lease or consent or the failure to comply with a licence, permit, permission, lease or consent, (however the interpretation of this has been the subject of much court time) The plaintiff/applicant must ALSO show that the failure to ensure compliance with or enforcement of a statutory requirement, condition or other requirement or the contravention or failure to comply has caused, is causing, or is likely to cause, damage to the environment, an additional bar for any applicant to pass, evidence and indeed pay for such expert evidence, and which has no grounding in the convention.

Both sets of provisions, (s50B PDA and Part 2 EMPA) provide that the costs of proceedings or a portion of such costs, as are appropriate, "***may***" be awarded to the applicant, or as the case may be, the plaintiff, to the extent that he or she succeeds in obtaining relief, and afford judicial discretion on this.[8] There is no *prima facie* entitlement to costs and accordingly the court may exercise its discretion and award costs to the applicant or decline to make an order for costs depending on the circumstances of the case.[9] Furthermore, the successful applicant(s) may only recover a portion of costs and there is no guarantee of full costs recovery.

The own cost rule/cost protection can also be compromised for frivolous and vexatious suits or in light of issues in the conduct of proceedings, and there is as stated earlier judicial discretion to award costs where the very high double bar is reached and the case concerns 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"

It should be noted that s.169 of the Legal Services Regulation Act 2015 here setting out the principle of costs following the event specifically states that "*Nothing in this Part [Part 11 relating to legal costs in civil proceedings] shall be construed as affecting section 50B of the Planning and Development Act 2000 or Part 2 of the Environment (Miscellaneous Provisions) Act 2011*".

As is set out later below, the interpretation of the scope of both of these provisions, and at what point in a decision process they have or have not effect has generated significant

[8] Section 50B(2A) now provides that the costs of the proceedings or a portion of the costs may be awarded to the applicant(s) where the applicant succeeds in obtaining the reliefs sought. Those costs will be borne by the respondent and/or notice parties to the extent that their acts and/or omissions were responsible for the impugned decision or act.[8]

[9] *Tesco Ireland Limited v Cork County Council & Ors.* [2013] IEHC 580.

satellite litigation – a sufficient indication to any cautious applicant that protection from prohibitively expensive cost exposure is far from certain, with the associated barrier to justice that fear creates. Additionally, how the circumstances of frivolous and vexatious are being argued to apply and what is being interpreted as conduct issues are also addressed further below.

6. Issues Arising in Practice

The matters set out below may be of particular interest in the context of the following communications:

- ACCC/C/2013/107 Kieran Cummins
- ACCC/C/2014/113 Kieran Fitzpatrick
- ACCC/C/2015/132 RTS

i. To what does s.50B of the PDA 2000 apply?

What decisions exactly are encompassed by the wording of s.50B has emerged as a significant issue as the following cases evidence, exercising court time. It is arguable, and indeed has been argued, that the wording of s.50B extends to all planning judicial review proceedings and not just those covered by the EIA, SEA and IPPC Directives because of the phrasing 'pursuant to a law of the State that gives effect to'. This has proven to be a particularly contentions issue which is yet to be resolved. This lack of clarity on what falls within the scope of the costs protection of the own cost rules is clearly of critical importance and concern to litigants, and the uncertainty a barrier. The following sets out briefly key judgements in respect of this issue, and highlights a pending appeal.

- In *JC Savage Ltd. and Becton v An Bord Pleanála*[10], Charleton J. held that the costs rules in the original s.50B only applied to the EIA Directive, the SEA Directive and the IPPC Directive and did not apply to all ordinary planning cases as that would do "*violence to the intention of the legislature"* (para.4.1). This position was subsequently approved in *Shillelagh Quarries Ltd. v An Bord Pleanála (No.2).*[11] In that case, there was no order as to costs and each party was obliged to bear its own costs.

[10] [2011] IEHC 488.
[11] [2012] IEHC 402.

- In *Nee v An Bord Pleanála*[12], the applicant sought to rely on an expanded interpretation of the costs provisions in s.50B in circumstances where an EIA point had not been advanced but the case partially involved a habitats point. O'Malley J. held (in an *ex tempore* judgment) that costs protection only applied to the particular circumstances in s.50B and the wider provisions of art.9 of the Aarhus Convention did not have direct effect. This reflects the Slovakian Brown Bear case (Case C-240/09)[13], wherein it was held that art.9(3) of the Convention does not have direct effect because its provisions are not sufficiently precise.[14]

- However, in *Kimpton Vale Developments Limited v An Bord Pleanála*[15], Hogan J. noted that if the matter was *res integra* he would be inclined to have decided the matter differently and was of the view that s.50B applied more generally to planning cases by virtue of the *passerelle* provisions of s.50B and the specific wording *"pursuant to a law of the State that gives effect to"* which could be construed as applying to the PDA 2000 more generally. Ultimately, Hogan J. felt bound by the doctrine of *stare decisis* and applied the reasoning of Charleton J. in *J.C. Savage*.

- The issue of whether s.50B only applies specifically to decisions or projects involving EIA and IPPC and plans involving SEA or whether it involves a more general application has been certified to the Court of Appeal as a 'matter of exceptional public importance' by Ó'Néill J. in *Harrington v An Bord Pleanála*[16]. However, this point is yet to be determined and there remains considerable uncertainty as to the extent to which s.50B applies. It should be noted that pursuant to s.50A(7) of the PDA 2000 the test is that the question that is proposed to be certified must be of exceptional public importance and in the general public importance. In practice, this is a difficult test to overcome and certificates are rarely granted.

- Furthermore, in a number of cases such as *Nee* and *Harrington*, the Applicant has sought to contend that s.50B covers cases whereby an appropriate assessment was

[12] [2012] IEHC 532.
[13] Case C-240/09, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] I-01255.
[14] See also the Opinion of Advocate General Kokott in Case C-243/15, *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín* which was delivered on the 30th June 2016.
[15] [2013] 2 I.R. 767.
[16] [2014] IEHC 232.

required under the Habitats Directive but not an EIA either on the basis that this was the policy intention or else that art.9 of the Aarhus Convention has direct effect. It should be noted that the Aarhus Bill[17] which had been mooted by the Oireachtas does not appear to have any prospect of being published in the near future.

ii. When does s.50B of the PDA 2000 apply?

Even in the context of EIA decisions which would seem to indisputably fall within the scope of s50B – limitations to the application of the own cost rules have been argued and emerged, and/or concerns exist on the extent to which the rules can be relied upon.

- For example in a few recent cases, the issue has arisen whether s.50B applies where an Applicant seeks to challenge a decision on the basis that an EIA ought to have been carried out and that the screening for EIA was conducted unlawfully See *South-West Regional Shopping Centre Promotion Association Ltd. & Anor. v An Bord Pleanála & Ors*.[2016] IEHC 84.
- This was also an issue which particularly exercised the Applicant in *An Taisce v Minister for Environment, Community and Local Government & Ors.* [2012/1048JR] which concerned an application by Providence Resources for a foreshore licence, where a clear transposition error had led to a flawed screening decision, and where ultimately following the application to the court for judicial review, the licence was surrendered and the flawed legislation subsequently corrected.
- In *Sweetman v An Bord Pleanála*[18], the Notice Party has suggested that it will seek its costs whereby the (unsuccessful) Applicant contended that there had been unlawful project splitting such as to avoid the need for EIA. There is a real concern that the

[17] The Irish Government's legislative programme in 2015 here is an acknowledgement that there is need for further work to be done on Ireland's implementation of the Convention, and indicates the intention to bring forward an Aarhus Bill which is to:

> " ..consolidate and clarify the existing costs provisions in one piece of legislation, to provide a statutory basis for a number of other provisions of the Aarhus Convention and related EU Directives"

The extent of what this proposed Aarhus bill will address and how is unclear to us at present, and the bill is no longer listed on the current 2016 programme for Government, pending prioritisation of legislation by the new Ministers and the formal assignment of their portfolios. However in short, we do not have any idea of when it will be included in the legislative Programme for Government, and we do not have any or sufficient basis for comfort that this proposed Aarhus bill will address the issues laid out in this paper.

[18] Unreported, High Court, Hedigan J., July 30, 2016.

costs protection in s.50B does not extend to cases whereby an Applicant challenges a screening decision and structures the argument on the basis of the EIA Directive and yet is not entitled to costs protection.

- It is also arguable as to whether s.50B applies where a party seeks to be added as an *amicus curiae* to the proceedings, and the costs of any such application.
- A particular concern is whether s.50B applies in the event of an application which is deemed to be premature or prior to the final administrative decision. In *North East Pylon Pressure Campaign Limited v An Bord Pleanála & Ors. (No.2)*[19], Humphreys J. has recently referred seven questions to the CJEU. Of note is the question of whether art.11(4) of the EIA Directive (which requires that costs should not be prohibitively expensive) applies where the legislature has not expressly and definitively stated at what stage of the process a decision is to be challenged and whether this falls for judicial determination on a case-by-case basis in accordance with common law rules. The court also queried whether the requirement that costs should not be prohibitively expensive applies to all elements of a judicial procedure by which the legality of a decision, act or omission is challenged and whether the phrase 'decisions, acts or omissions' in art.11(1) of the EIA Directive includes administrative decisions in the course of determining an application for development consent or the decision which 'finally and irreversibly' determines the rights of parties.
- This was also an issue in *An Taisce v An Bord Pleanála*[20] which concerned a challenge to a road project for the renowned Dingle peninsula in County Kerry. In that case, the applicant contended that the first notice party (Kerry County Council) split an original application to upgrade and develop a 32km road scheme which it acknowledged an EIA was required for, into a 4.2 km scheme for which it contended no EIA was required or was carried out prior to its completion and a remaining 28 km scheme for which an EIA was then done. It was contended by An Taisce that this was project splitting for the purposes of the EIA Directive. However it was held by Haughton J. that the challenge to the Development Consent and EIA for the 28 km alleging project splitting was a collateral attack on an earlier administrative decision which required an Environmental Impact Statement be produced for the 28km route, and that that decision was out of time, albeit the administrative decision was one which was made without notification to the public or any public participation.

[19] [2016] IEHC 490.
[20] [2015] IEHC 604.

- In Callaghan -v- An Bord Pleanála & ors[21] a somewhat analogous decision to declare a development to be strategic infrastructure and to consequently require the production of an EIS was also subject to a challenge. However McGovern J. ruled that the decision here was so far outside the EIA process itself that it wasn't covered by the cost protection of s.50B for EIA projects. (see paragraph 21) here
- One commentator in considering both the experience of Dingle Road decision in *An Taisce v An Bord Pleanála*[22] and Callaghan -v- An Bord Pleanála & ors[23] described the terrain for Judicial Review following on from this decision of Haughton J as:

  > " - *an unnavigable terrain of chilling bear traps for potential applicants – where it is unclear what and when you should challenge – as you are either "premature" or "too late", and given it is unclear when your cost protection is triggered, or if a timing issue will fatally compromise that protection"*

  This is given a particularly problematic and chilling effect of this uncertainty on when to challenge and in particular of being too late – which raises the prospect of being deemed to be pursuing a case with "no prospect of success" and thereby being deemed to be frivolous and vexatious compromising your cost protection. We return to this later below.

iii. Mix of 'Pure' Planning and EIA Points

A further issue arises on whether s.50B applies in cases where the project required EIA but no specific EIA points were pleaded and argued or where the specific EIA points are pleaded and it is argued this is just to benefit from the cloak of costs protection.

Additionally, in certain cases, An Bord Pleanála[24] and/or the Notice Party developer(s) have also threatened to pursue costs from the unsuccessful applicant for court time spent on points which concern Appropriate Assessment considerations arising from the EU Habitats Directive or 'pure planning' issues and not EIA and thus attempting to avail of the decision of

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[2015] IEHC 235

[22] [2015] IEHC 604.
[23] [2015] IEHC 235

[24] An Bord Pleanala was established in 1977 under the Local Government (Planning and Development) Act, 1976 and is responsible for the determination of appeals and certain other matters under the Planning and Development Acts, 2000 to 2014 and determination of applications for strategic infrastructure development including major road and railway cases. It is also responsible for dealing with proposals for the compulsory acquisition of land by local authorities and others under various enactments. The Board also has functions to determine appeals under a number of other Acts.

Herbert J. in *McCallig v An Bord Pleanála.*[25] How cases are argued by the other side compounds such issues and how much court time is expended on what elements of the case. In a subsequent costs judgment, Herbert J. noted that, given the separate and discrete issues that were raised by the applicant, costs should be awarded on an 'issue basis' rather than on 'overall effective success basis'. The court identified five separate issues and awarded costs in respect of the three 'planning issues' and directed that each party bear its own costs in respect of the two 'EIA issues', having regard to the default position that applied pursuant to the Planning and Development (Amendment) Act 2010.[26]

In *Buckley & Grace v An Bord Pleanála*[27], the notice party developer sought to rely on the decision in *McCallig* and applied for its costs. In the circumstances, Cregan J. adjourned the matter generally until the *Harrington* certificate application is determined. This uncertainty causes difficulties for legal practitioners in advising their clients and results in the final bill of costs only being determined following taxation and based on the time spent in court or the extent to which a point is advanced in pleadings and legal submissions and then not pursued at the hearing.

1.1. Requirement for a Certificate for Leave to Appeal

If an applicant is refused costs at the substantive stage, the Supreme Court has determined that a certificate must be granted on the substantive matter to enable an appeal to be brought on the costs determination. In *Browne v Kerry County Council*[28], the applicant was unsuccessful and costs were awarded against him. The applicant sought to appeal but solely on the issue of costs rather than any substantive appeal. It was contended that the court had no jurisdiction to entertain the appeal as it could only have been entertained following the grant of a certificate for leave to appeal on the basis that it concerned a matter of exceptional public importance.

It was held by the Supreme Court that the question of costs in judicial review proceedings was an 'intrinsic and inherent' part of the proceedings and that the determination of the court encompassed the decision of the court on costs. Accordingly, it was determined that the question of costs was not one which the legislature intended should be capable of being

[25] [2014] IEHC 353.
[26] [2014] IEHC 354.
[27] [2015] IEHC 572.
[28] Unreported, Supreme Court, *ex tempore*, March 24, 2014.

treated as separate from the High Court decision and therefore the appellant had no right of appeal in circumstances where no certificate for leave to appeal had been granted and the Court had no jurisdiction to entertain the appeal on costs only. This is particularly concerning where the applicant must seek a certificate from the High Court judge who has refused the application. It is difficult to conceive of a situation where an appeal solely in relation to the issue of costs is deemed to be a matter of exceptional public importance within the meaning of s.50A(7) of the PDA 2000.[29]

1.2. Disapplication for Frivolous or Vexatious Claims or Abuse of Process

Section 50B(3) of the PDA 2000 allows the court to award costs against any party to the proceedings where it is considered appropriate to do so because the court considers the claim or counterclaim to be frivolous or vexatious or because of that party's conduct in the proceedings or where the party is in contempt of court. This is a particularly concerning aspect of the costs provisions as it is sometimes invoked or threatened to be invoked by the Board and/or Notice Parties where the Applicant is unsuccessful, and/or where an appeal is under consideration and the threat of aggressive pursuit of costs is used to deter applicants from pursuing appeals. The following examples are of interest, and in the first instance consider examples around cost rulings and what can be determined to be conduct issues, and then later examples consider the frivolous and vexatious issue.

- In *JC Savage Ltd. and Becton v An Bord Pleanála*[30], Charleton J. noted at para.4.1: *"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).*" This effectively allows the court to impose costs against a party as a punitive measure due to the manner in which that party has conducted itself during the proceedings.[31]

- In *Indaver NV t/a Indaver Ireland v An Bord Pleanála*[32], Kearns P. made an order of costs in favour of the Respondent and Notice Party in circumstances where the

[29] s.50A(7) provides: "The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the Supreme Court in either case save with leave of the Court which leave shall only be granted where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court."

[30] [2011] IEHC 488.

[31] Planning and Development Act 2000 s.50B(3) as inserted by s.33 of the Planning and Development (Amendment) Act 2010.

[32] See *Indaver NV t/a Indaver Ireland v An Bord Pleanála* [2013] IEHC 11.

Applicant withdrew the case on the eve of trial on the basis of the manner in which the Applicant conducted itself.

- In *Hunter v Environmental Protection Agency (No.2)*[33], it was held by Hedigan J. at para.7 that "*Whilst an order for costs made thereunder is in the nature of a penalty, the manner in which a party conducted the proceedings does not require any moral turpitude on the part of the party criticised in order for it to be fixed with costs. The court should simply look at how the proceedings were conducted. If, as here, they have delayed one year before conceding, in the course of which there occurred numerous appearances before the court, including the contested application for leave, then there is, in my view, a case to answer.*"

- In the recent case of *Sweetman v An Bord Pleanála*[34], which concerned an overhead powerline in Bellacorick in Mayo, the Notice Party has mooted that it will seek its costs for time spent in preparation for a judicial review where a point concerning wayleave notices and land ownership was pleaded and pursued in the case up to the point of legal submissions but was not advanced at the hearing. The Notice Party has indicated that it will rely on s.50B(3) and the decision in *Indaver*. The matter is listed in October 2016 before Hedigan J.

The question of whether an application is deemed to be frivolous or vexatious because proceedings are instituted in the first instance is used as a tactical approach by the Board and/or Notice Parties to dissuade Applicants who may be concerned about an Order for costs: see, for example, *An Taisce v An Bord Pleanála* [2015/14JR] ('the Dingle case'), where an entirely novel argument was introduced on the last day of the hearing by the Notice Party to allege the applicant should have challenged an earlier administrative decision, and the challenge was a collateral attack and was out of time, leaving the applicant open to be determined to have been frivolous and vexatious.

Furthermore, in *Ratheniska and Timahoe Substation v An Bord Pleanála*[35], the Respondent (An Bord Pleanála) indicated that it was seeking its costs just prior to the application for a certificate for an appeal being heard which had a dissuasive effect on the Applicants who withdrew the application.

[33] [2013] IEHC 591.
[34] Unreported, High Court, Hedigan J., July 30, 2016.
[35] [2015] IEHC 18.

iv. Issues with the burden of own costs

The following example in *Browne v Fingal County Council*[36], highlights the issue for an applicant whose "own costs" were an issue, and a further example of *An Taisce v An Bord Pleanála*[37], in the Edenderry powerplant case – where the uncertainty in costs awards even when successful can result in uncertainty for legal practitioners who might be prepared to engage on a contingency basis – where their clients don't have to pay their fees or all of them and their remuneration is based on the cost award won.

On one reading, the current statutory regime on costs in this jurisdiction goes further than is required by art.11 of the Environmental Impact Assessment (EIA) Directive and art.9 of the Aarhus Convention, as noted by Peart J. in *Browne v Fingal County Council* (para.11).[38] The international obligations require that costs should not be 'prohibitively expensive'. In Case C-427/07, *Commission v Ireland*[39], it was held at para.90 that the requirement of 'not prohibitively expensive' did not prohibit the award of reasonable costs against an unsuccessful applicant.

In *Browne v Fingal County Council*[40], the applicant (who was not legally represented) sought an order in advance of moving his leave application that his legal costs would be paid regardless of the outcome. Peart J. noted that art.9 of the Aarhus Convention merely requires that proceedings should not be 'prohibitively expensive' and neither the Convention nor the 2013 decision in Case C-260/11, *Edwards*[41] precluded a costs order or indeed mandate that legal aid be offered to impecunious applicants. Peart J. also noted that s.50B did not impose any costs cap unlike the situation in the UK under the Civil Procedure Rules.

Although this may incentivise lawyers to act on a contingency basis, the difficulty is that parties' own costs can be prohibitively expensive and because parties are potentially not exposed to an adverse costs order there is the potential that this might be exploited by lawyers seeking full costs for taking instructions. Furthermore, it should be stressed that there is no reality to an eNGO in Ireland being able to employ or retain on a full-time basis a barrister

[36] [2013] 2 I.R. 194.
[37] [2015] IEHC 633.
[38] [2013] IEHC 630.
[39] [2009] I-06277.
[40] [2013] 2 I.R. 194.
[41] Case C-260/11, *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others*, unreported Judgment of the Court (Fourth Chamber) of 11 April 2013.

and/or solicitor for legal representation in court given the difficulties in fundraising and the limited State grants and other funding available to eNGOs. [42]

Prior to the Legal Services Regulation Act 2015, barristers were sole traders at the independent referral Bar who could only be retained by solicitors on contentions matters (although NGOs were able to access legal advice by way of direct professional access on non-contentious matters). While the 2015 Act allows for the possibility for in-house counsel and multi-disciplinary partnerships this has yet to be realised in practice, and the feasibility of it must be in serious question for eNGOs as resourcing and financial matters currently stand. Thus, while s.50B theoretically allows an applicant costs protection from the other parties in the event of an unsuccessful application there is no guarantee that costs will be limited for 'own party' costs. In that sense, unless Applicants have the resources they are still dependent on *pro bono* or contingency arrangements where fees will be paid in the event of a successful application.

However, even where an Applicant is successful or partly successful, the court still maintains discretion to award a discounted or portion of costs or to withhold costs: see, for example, the decision of White J. in *An Taisce v An Bord Pleanála*[43], which concerned the Edenderry Power plant and wherein the Applicant was only awarded 66% of its costs. The extent of cost award and the extent of judicial discretion afforded, does potentially serve to undermine the potential for contingency fee arrangements.

The above is to give some sense of the level of controversy and issue that exists in relation to the scope, application and interpretation of s.50B, and evidences in a number of instances the aggressive and restricting approach pursued by emanations of the State, and is intended to highlight that potential applicants can in certain circumstances have just cause for concern in relation to their exposure to prohibitive costs in pursuing reviews before the courts in Ireland of certain environmental decisions/acts or omissions.

[42] It should be noted that it was a very unusual circumstance whereby the individual employed by An Taisce one of Ireland's oldest and larger eNGO's engaged a Natural Environment Officer who was also had qualifications as a solicitor and who for a period of time then operated also as an inhouse solicitor. Having now moved to a different employer, the likelihood of a reoccurrence of this dual resourcing situation is very low, and should in no way be considered to be indicative of the capacity of Irish eNGOs to employ inhouse legal practitioners.

[43] [2015] IEHC 633.

v. The extent to which the Environment and Miscellaneous Provisions Act, EMPA 2011 Applies

Turning now to the EMPA 2011 provisions, Section 4(4) of the EMPA 2011 sets out a list of licences, permits and consents to which s.3 applies. From the outset it should be noted the key judgement interpreting the scope of these provisions was made in the Court of Appeal only as recently in 2015 in the McCoy case as detailed below.

The matters set out below may be of particular interest in the context of the following communications:

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- ACCC/C/2014/113 Kieran Fitzpatrick
- PRE/ACCC/C/2016/139 – Irish Underwater Council

As drafted there are specific issues with these provisions from the outset including the following:

- An additional bar of "environmental damage": As already indicated Section 4 only applies where it can be shown that there has been or there is potentially environmental damage. Section 4(2) outlines what is meant by 'environmental damages' despite the fact that this is not required by the Aarhus Convention. This is an additional requirement imposed by the EMPA which is not to be found in the Convention.
- Limitation to the range of licences and/or permits covered. s.4 of the Act does not cover the full range of licences and/or permits, and related legislation in certain instances effect "carve-outs" from the provisions, and Part 2 includes a list of "carve-outs."
- The wording of the provisions in particular s.4 has been quite problematic and a number of cases concerned themselves extensively with considerations on whether they fell within the scope of the provisions, most notably Hunter v Nurendale and McCoy & anor -v- Shillelagh Quarries Ltd & ors which are dealt with more extensively below.
- The procedural requirements for pursuing the s.7 application to seek a declaration that your application fall within the cost rules are not specified. Additionally, it is unclear if the cost rules apply even to the s. 7 application you may feel you need to pursue to determine if the EMPA Part 2 s.3 own cost rules apply to your substantive application. We address this in more detail below.

The following examples endeavor to highlight how these provisions have been interpreted in the courts, and certain associated issues.

- *Motive as a consideration in cost protection:*
  Notwithstanding the convention does not permit or provide for consideration of motive in making a challenge or consider that as a requirement to entitle one to a review which is not prohibitively expensive – these are considerations which have not only exercised the Irish Courts, but led to some very specific determinations with significant implications for the scope of what is covered by these provisions and the extent to which an applicant can or can't rely with certainty on the "own costs" principle set out in the legislation. For example:

  - In *Rowan v Kerry County Council*,[44] Birmingham J. held that the proceedings were not designed to secure environmental compliance but were issued to advance the applicant's private agenda to prevent a neighbouring landowner from constructing a house in circumstances where the applicant's case concerned a condition relating to traffic safety and requiring the realignment of a public road. In the circumstances, it was held that ss.3 to 4 of the Environment (Miscellaneous Provisions) Act 2011 did not apply and the court made an order for costs in favour of the respondent and notice party in accordance with the normal rule of costs follow the event.[45] The Supreme Court dismissed the appeal and held that the determination on the issue of costs forms part of the decision in the case and thus cannot be appealed unless a certificate is granted by the High Court.[46] This decision is of concern because the court imputed a motivation to the applicant which is an additional requirement not to be found in the EIA Directive and/or Convention.

  - The approach in *Rowan* was followed in *CLM Properties Ltd. v Greenstar Holdings Ltd. & Ors. (No.2)*[47]. The Plaintiff argued that s.3 of the EMPA 2011 applied and accordingly that each party should bear its own costs. Finlay Geoghegan J. agreed with the approach of Birmingham J. in *Rowan* but held that,

[44] [2012] IEHC 65.
[45] [2012] IEHC 544.
[46] Unreported, Supreme Court, December 18, 2015.
[47] [2014] IEHC 288.

whilst the pleadings are the starting point for any consideration, the Court is required to look at the question as to whether, as a matter of reality and substance and by objectively looking at the facts, the proceedings are for the purpose of ensuring compliance with or enforcement of either a statutory provision or condition. Finlay Geoghegan J. concluded that the purpose of the proceedings was the recovery of money allegedly due to the Plaintiff and, accordingly, s.3 of the EMPA did not apply to the proceedings. Thus, the courts will look at the motives of the plaintiff in bringing the proceedings before applying the protection of s.3 of the EMPA.

vi. Other issues with the provisions include:

- Section 5 applies to proceedings relating to Access to Information on the Environment Regulations 20072-11 and provides that the costs protection in s.3 applies where the proceedings are instituted by a person relating to a request referred to in reg.6 of the Regulations. However, it does not apply to proceedings instituted by the Office of the Commissioner for Environmental Information (OCEI) which given their resource restrictions arguably has impeded their ability to secure clarity before the courts. Furthermore, there is a perennial issue with even the OCEI disputing whether the request falls under the AIE category and in particular contending that the request does not conform to the definition of environmental information and, as a result, contending that the cost protection afforded by the EMPA does not apply. While Ireland has argued before the Committee already that no court has found in this regard, the issue for potential applicants wishing to challenge the OCEI's decision is clearly the chilling effect of the threat to the cost protection of the own cost rules.

- Section 6 sets out the types of proceedings to which s.3 of the EMPA 2011 applies. However, it is not clear whether it applies to an application for leave to appeal of a decision on a judicial review (in circumstances where an appeal is not automatic.

vii. Scope of the EMPA Part 2 cost rules, and court declarations on the application of EMPA cost rules and the compromise to the own costs principle

This is a particularly odd issue, where as indicated s.7 of the EMPA allows a party to proceedings to apply to the court for a determination that the own cost rules set out in s.3 applies to the proceedings. The cases outlined below in considering a s.7 declaration on whether the cost rules apply also involve invariably involve consideration of what falls within the scope of the EMPA cost rules – so both issues are dealt with below – to avoid duplication, but they focusing primarily on the declaration point. However it should be noted that considerable court time has been expended on determining how s.4(1) of the EMPA should be read, and whether "statutory consent" should be read disjunctively and be a stand alone specification given s.4(1) provides:

> "4(1) Section 3 applies to civil proceedings, other than proceedings referred to in subsection (3), instituted by a person—
>
> (a) for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition or other requirement attached to a licence, permit, permission, lease or consent specified in subsection (4), or
>
> (b) in respect of the contravention of, or the failure to comply with such licence, permit, permission, lease or consent,"

Turning first to the declaration issue on whether the cost rules in s.3 apply - one might expect that given the principle of the provisions is for own costs – the s.7 provisions would just enable an applicant ascertain if their application fell within the scope of the own costs rules or not. However what has emerged in the jurisprudence is an entirely new level of consideration around Protective Cost Orders, PCOs with associated considerations, which have no basis in the Act as passed by the Oireachtas, (the Irish legislature), at least to this commentator. and would appear to be inconsistent with the default 'own cost' provisions.

Additionally, it is not clear whether costs protection applies to the making of the application in the first place and therefore a plaintiff/applicant may be dissuaded from bringing the application in the first place if the motion to seek clarity on the costs situation is contested. The cases below in considering a s.7 certification on whether the cost rules apply also involve invariably involve consideration of what falls within

the scope of the EMPA cost rules – so both issues are dealt with below – to avoid duplication.

It should be noted that while the EMPA 2011 has provided for a statutory application for a pre-emptive determination on whether costs protection applies, the courts prior to the enactment of theses new provisions exercised their jurisdiction to grant PCOs in planning and environment law cases previously: see, for example, *Village Residents Association Ltd. v An Bord Pleanála (No.2)*[48], wherein Laffoy J., in refusing the application for a pre-emptive costs order, held that the court had jurisdiction to make a pre-emptive costs order if the issues raised in the proceedings were a matter of general public importance and if the making of the order would be both in the public interest and in the interest of justice. Furthermore, it was held that the decision to award costs was in the discretion of the court and could be dealt with at any stage in the proceedings even though the proceedings had not been concluded. In *Friends of the Curragh Environment Ltd. v An Bord Pleanála & Ors.*[49], Kelly J. considered that a PCO might be granted if the issues raised were of general public importance and should be resolved in the public interest and, 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. Certain of this thinking seems to have influenced the subsequent processing under the EMPA provisions, notwithstanding the quite different starting premise of the "own costs rules" these EMPA introduced in s.3.

So following on the introduction of the EMPA provisions, in *Hunter v Nurendale Limited t/a Panda Waste*[50], it was held by Hedigan J. that the new costs protection regime in Part 3 of the 2011 Act applied in circumstances where the applicant instituted s.160 (enforcement) proceedings in relation to unauthorised development because there had been a failure to comply with the relevant statutory requirement. It was held by Hedigan J. the key factors to be taken into account by a court when deciding whether to exercise its jurisdiction was the extent to which it might have been reasonable to think that the party who was primarily liable for the costs could meet any costs if it failed in the proceedings and whether the proceedings were pursued in a reasonable fashion. In this regard Hedigan J. arguably moved from the

[48] [2000] 4 I.R. 321.
[49] [2009] 4 I.R. 451.
[50] [2013] 2 I.R. 373.

"own costs" principle of the Irish legislature, admittedly possibly because of the complex nature of the application.

The *Edwards*[51] decision of the Court of Justice of the European Union was followed and the court held that in considering whether to make a PCO the court should consider whether judicial proceedings on environmental matters were prohibitively expensive for a claimant. It could not 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 was also considered that the court should take into account the situation of the parties concerned, whether the claimant had a reasonable prospect of success, the importance of what was 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. Hedigan J. also prescribed a number of factors which should be considered in such applications. These are arguably in excess of what is required by the *Edwards* decision or Part 2 of the EMPA.

Hedigan J. also suggested that the respondent in any replying affidavit should set out its broad view of the potential costs involved in the case and should express a view in relation to the situation of the parties and whether the claimant had a reasonable prospect of success. This mirrors the recommendations set out in the *Edwards* decision, particularly in relation to the claimant's financial situation and whether there was a reasonable prospect of success. Such a prescriptive approach is not provided for in Part 3 of the 2011 Act nor indeed the Aarhus Convention and it is questionable whether it should be followed in similar circumstances. However, it is arguable that these comments were *obiter dicta* and therefore they should not be strictly construed.

The application of the *Hunter* decision was since considered in *McCoy and South Dublin County Council v Shillelagh Quarries Limited & Ors.*[52] . Here again, the first named applicant commenced proceedings pursuant to s.160 of the PDA 2000 and

[51] C-260/11 REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court of the United Kingdom (United Kingdom), made by decision of 17 May 2011, received at the Court on 25 May 2011, in the proceedings The Queen, on the application of: David Edwards, Lilian Pallikaropoulos

[52] [2014] IEHC 511.

applied for a declaration pursuant to ss.3 and 7 of the EMPA 2011. The respondent argued that the applicant was not entitled to such a declaration as the development itself was not unauthorised given that it had commenced prior to October 1, 1964 and, therefore, the substantive proceedings under s.160 were not brought to enforce compliance with a grant of planning permission but rather for a declaration that the quarrying activity did not have the benefit of planning permission. Baker J. accepted the reasoning of Hedigan J. in *Holly Hunter* in relation to the disjunctive nature of s.4(1) and held that the applicant was entitled to bring the application on the basis that he was seeking to enforce a statutory requirement to obtain planning permission. Baker J. also found that the application was not premature as s.3 of the EMPA 2011 allows an application for a declaration to be brought at any stage of the proceedings including before the hearing commences.

Again arguably moving outside of the basic "own costs" principles however - it was further held that when considering an application for a PCO the test is higher than ordinary interlocutory applications and the applicant must show that he or she has a reasonable prospect of success and that the case has a certain measure of substance. It was held that the applicant had satisfied the test that there must be a reasonable prospect of success. In the third limb of the test, Baker J. held that the applicant had satisfied the court that the proceedings relate to the general public interest and the protection of the environment and were not brought for any private gain or benefit and, therefore, that the court should grant the order sought by the first named applicant and make a declaration that s.3 of the Environment (Miscellaneous Provisions) Act 2011 applied to the proceedings.

In a subsequent judgment in *McCoy and South Dublin County Council v Shillelagh Quarries Limited & Ors.*[53], Baker J. noted that the statutory costs order provided by the 2011 Act is more in the form of a costs limitation order compared to the traditional pre-emptive costs orders and that no rules of court had been made which would govern the means by which an application for a declaration could be made. It was held that the applicant was entitled to the costs of the motion to be taxed in default of agreement given that the respondent had filed lengthy affidavits containing detailed technical evidence which were more appropriate for the substantive issues

[53] [2014] IEHC 512.

and the applicant's solicitors had written to the respondent seeking agreement that s.3 of the 2011 Act did apply before such an application was brought.

In the Court of Appeal then on the same case - *McCoy and South Dublin County Council v Shillelagh Quarries Limited & Ors.*[54] it was held by Hogan J., in dismissing the appeal on behalf of the Court of Appeal, that the proceedings involved an application for the enforcement of a statutory condition which came within the scope of s.4(1) of the EMPA 2011 and, therefore, the court had jurisdiction to make a PCO pursuant to s.7. Furthermore, it was held that the application was not premature as s.7(1) of the 2011 Act envisages that an application can be brought even before the proceedings are commenced. In addition, an application for a protective costs order pursuant to s.7 is not an interlocutory matter but rather the final determination of an issue, subject only to a right of appeal. Finally, it was held that while it would have been preferable if the applicant had provided further details of his financial means and contingent fee arrangements such omissions were not fatal given that the objective of a PCO is to protect a litigant from full costs exposure.

In agreeing with Baker J., the Court of Appeal determined that the wording in s.4(1) was disjunctive and, as a result, s.4(1)(a) applies to proceedings which are either designed to ensure compliance or enforcement with a statutory requirement or, alternatively, with a condition or other requirement attached to a licence or other form of development consent. Thus, the reference to 'statutory requirement' in s.4(1)(a) is a free-standing requirement which is distinct and separate from proceedings which are designed to ensure the compliance with or enforcement of a condition or other requirement of a licence, permit or other form of a development consent. However it should be noted that this interpretation on the disjunctive reading of the s.4(1) confirming that "statutory requirement" was not confirmed until February 2015. Therefore prospective applicants in considering challenges not covered by s.50B, might understandably have had cause for concern that the provisions extended only to "ensuring compliance with, or the enforcement of, … or condition or other requirement attached to a licence, permit, permission, lease or consent" and not been confident on relying on the standalone nature of statutory requirement in respect of the list of provisions detailed in s.4(4), such as Dumping at Sea consents.

[54] [2015] IECCA 28.

- In *Waterville Fisheries Development Ltd. v Aquaculture Licenses Appeals Board & Anor. (No.3)*[55], Hogan J. noted that the application for a PCO pursuant to s.7 of the 2011 Act was made at a somewhat belated stage, particularly since s.7 anticipates that an application for a 'modified costs order' or PCO be made at "*any time before or during the course of the proceedings*" and, therefore, although it was considered that there much force' in the respondent's argument that the court was *functus officio*, the court proceeded to determine the motion on the basis that it had jurisdiction to do so (para.5).

- Ultimately, it was held that the licensing regime under the Fisheries (Amendment) Act 1997 did not come under the scope of the special costs rules in the 2011 Act and the applicant could not rely on art.9 of the Aarhus Convention as did that not enjoy "*autonomous free standing status in Irish law*" (para.14). Furthermore, although intensive fish farming is referred to in the context of Annex II to the EIA Directive, it was held that art.11(4) of the EIA Directive does not state that all judicial review proceedings involving the licensing of intensive fish farming should benefit from the modified costs rules and the relevant proceedings did not invoke a complaint of non-compliance with the EIA Directive. Accordingly, it was held that the modified costs rules in art.9 had no application to the proceedings.

viii. Judicial Discretion and Principle of Certainty

It is arguable that the degree of judicial discretion which is afforded by s.50B of the PDA 2000 and/or s.3 of the EMPA falls foul of the decision in Case C-427/07, *Commission v Ireland*[56] (at paras.93-94)[57]. Apart from the general discretion afforded to the courts pursuant to s.50B(3)-(4), the provision in s.50B(2A) also allows a degree of judicial discretion which

[55] [2014] IEHC 522.

[56] Case C-427/07, *Commission of the European Communities v Ireland* [2009] I-06277.

[57] "c-427/07: 93 Although it is common ground that the Irish courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party, that is merely a discretionary practice on the part of the courts.

94 That mere practice which cannot, by definition, be certain, in the light of the requirements laid down by the settled case-law of the Court, cited in paragraphs 54 and 55 of this judgment, cannot be regarded as valid implementation of the obligations arising 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."

tempers the strict application of the default rule, particularly so where the court may award a 'portion' of the costs to the applicant(s). This arguably allows too wide a discretion on the court which may reduce costs on any basis that it determines apart from the more defined category in s.50B(3).

Finally, it should be noted that s.50B(4) of the PDA 2000 allows the Court to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so. This potentially means that an applicant might recover costs even where the proceedings do not fall under the categories in s.50B(2). However, again this is entirely discretionary and will depend on whether the questions that are raised fall within the category of 'exceptional public importance' and that it is in the interests of justice to award costs in the circumstances.

In *Dunne v Minister for the Environment*[58], it was held by the Supreme Court, in allowing the appeal against the order for costs made in favour of the plaintiff in the High Court and in awarding the defendants the costs of the trial and the appeals, that the normal rule was that the costs of every proceeding followed the event but that the courts always retained discretion in relation thereto. There was no fixed rule or principle determining the ambit of that discretion and, in particular, no overriding principle which determined that it had to be exercised in favour of an unsuccessful plaintiff in specified circumstances or in a particular class of case. It was also held that the fact that a plaintiff was not seeking a private personal advantage and that the issues raised were of special and general public importance were factors which could be taken into account along with all other circumstances of the case in deciding whether there was sufficient reason to exercise a discretion to depart from the general rule that costs followed the event. However, the two principles were not the determining factors in any category of cases which could be described as public interest litigation and the courts always retain a large degree of discretion.

7. Standing:

The Planning and Development Act introduced standing for eNGOs in s.50A(3). However it was not until 2014 that standing was extended to a whole range of other consents permits and

[58] [2008] 2 I.R. 775.

licenses for eNGOs via statutory instrument SI 352/2014[59] here. This is arguably only in respect of a limited type of consents and circumstances and does not even include all the Irish legislative provisions where Environmental Impact Assessment is required. That latter point is a matter which we have raised specifically with the EU Commission in the context of a Reasoned Opinion being prepared against Ireland for failures under the Public Participation Directive 2003/35/EC.

However in general terms a non-eNGO applicant needs to evidence standing in order to pursue a challenge successfully, and critical to this in general is either a specific interest and having participated in earlier stages of the decision making process. While there may be reasons for why there hasn't been participation, even in some cases where there is no provision for participation in the decision at issue as in an extension of duration of a permission under the Planning and Development Act and marry this possible issue with uncertainty under the cost rules - and pursuit of domestic remedy can be a chilling prospect.

8. Conclusion:

It is hoped that the above has served to highlight that issues and uncertainties pertain to the cost rules in Ireland and the jurisprudence landscape has been and is evolving. As a consequence, consideration of what is and is not reasonable in terms of exhaustion of domestic remedies given the extent of cost risk potential applicants are exposed we would hope fall to be considered by the Committee in its deliberations on such issues, together with other cost issues arising in an Irish context. We would be happy to provide clarification on the above as necessary, and apologize that time and resources constraints impeded our ability to set this out as clearly as we would otherwise have hoped to. We thank the committee for its consideration of our remarks.

59 S.I. No. 352/2014 - European Union (Access to Review of Decisions for Certain Bodies or Organisations promoting Environmental Protection) Regulations 2014.