THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 291 J.R.]

IN THE MATTER OF AN APPLICATION PURSUANT TO S. 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED) AND

IN THE MATTER OF AN APPLICATION

BETWEEN

MARGARET McCALLIG

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

DONEGAL COUNTY COUNCIL AND P.J. MOLLOY

NOTICE PARTIES

JUDGMENT of Mr. Justice Herbert delivered the 9th day of April, 2014

1. The applicant in this case was granted leave to apply for judicial review by Order of this Court made on the 6th April, 2011. The application for judicial review was made returnable for the 4th May, 2011. The statement of opposition was delivered by the second notice party on the 22nd September, 2011 and by the respondent on the 5th October, 2011. The matter came on for hearing before this Court on the 6th June, 2012 and was heard over a period of fifteen days. Judgment was delivered on the 24th January, 2013.

2. Section 50B(2) of the Planning and Development Act 2000, as inserted by s. 33 of the Planning and Development (Amendment) Act 2010, became operative on the 28th September, 2010, pursuant to the provisions of SI 451/2010. The Environment (Miscellaneous Provisions) Act 2011 was passed on the 26th July, 2011 and was signed by the President on the 2nd August, 2011. Section 21 of the Act of 2011, became operative on the 23rd August, 2011, pursuant to the provisions of SI 433/2011. It was therefore operative before the second notice party or the respondent joined issue with the applicant on anything advanced in her statement of grounds.

3. The applicant claims an order for the costs of the entire proceedings on foot of s. 50B(2) of the Act of 2000, as amended by s. 21 of the Act of 2011. The second notice party and the respondent rely on the unamended provisions of s. 50B(2) of the Act of 2000 and submit that the court should make no order as to costs or alternatively should order that each party bear its own costs of the proceedings.

4. Section 50B(2) of the Act of 2000, as inserted by s. 33 of the Act of 2010, provides that:-

> "Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts and subject to subss (3) and (4), in proceedings to which this section applies, each party (including any notice party) shall bear its own costs."

5. Section 50(3) confers a discretion on the court to award costs against a party in specified circumstances: none of which arise in this case. Section 50(4) confers a discretion on the Court to award costs in favour of a party where it considers the matter to be of exceptional public importance and in the special circumstances of the case it is in the interests of justice to so do.

6. Section 50B(2) of the Act of 2000 as inserted by s. 33 of the Act of 2010, was amended by s. 21 of the Act of 2011, which confers a further discretion on the court

to award the costs of the proceedings or a portion of those costs to an applicant to the extent that such applicant succeeds in obtaining relief in the proceedings.

7. The second notice party and the respondent (the first notice party took no part in the proceedings), submit that this litigation had been commenced and was pending at the date the amending provisions of s. 21 of the Act of 2011, came into force and, that those provisions do not therefore apply to these proceedings. They submit that the presumption at common law, stated in *Gardiner v Lucas* (1873) 3 A.C. 528 at 601 and, approved by the Supreme Court in *Hamilton v. Hamilton* [1982] I.R. 466 at 474, that:-

> ". . . unless there is some declared intention of the Legislature - clear and unequivocal - or unless there are some circumstances rendering it inevitable that we should take the other view, we are to presume that an Act is prospective and is not retrospective."

applies in this case as there is nothing in the Act of 2011, and, in particular, s. 21 of that Act, to rebut the presumption. They submit that it would be, "so unfair" to apply the provisions of s. 21 of the Act of 2011, retroactively to proceedings already pending when it came into force, that the Legislature could not have intended that it should be so applied. They referred to: *Secretary of State for Social Security v. Tunnicliffe* [1991] 2 A.E.R. 712 at 724 per. Staughton L.; *L 'Office Cherifen v. Ymashita-Shinnihon Steamship Company Limited* [1994] 1 A.C. 486 at 527G – 528C per. Lord Mustill; *Mahbub Alam and Others v. Secretary for State for the Home Department* [2012] E.W.C.A. Civ. 960, para. 33, per. Sullivan L.J.; and, *Wilson v. secretary of State for Trade and Industry* [2003] U.K.H.L. 40, per. Lord Nicholls of Birkenhead, paras. 19 and 20 and Lord Rodger of Earlsferry, paras. 198 to 201.

8. It is submitted by the applicant that the provisions of s. 21 of the Act of 2011, are concerned solely with the power of the court to award legal costs and therefore deal only with the practice and procedure of the courts and not with "vested" or "specific" existing rights. The applicant submits that as there is no clear and unequivocal expression to the contrary in the Act of 2011, it applies to actions commenced before as well as after the coming into force of the Act, (*Wright v. Hale* (1860) 6. H. and N. 237 at 230-233 per. Pollock C.B.; 30 L.J. Ex. 40: *Re. Hefferon Kearns Limited (No. 1)* [1993] 3 I.R. 177 at 184 per. Murphy J. – High Court). The applicant also submits that the provisions of s. 50B(2) of the Act of 2000 as inserted by the Act of 2010 and, the amending provisions of s. 21 of the Act of 2011, apply in any event only to costs in environmental matters and that the provisions of O. 99, of the Rules of the Superior Courts otherwise apply.

9. I am satisfied that these proceedings had been commenced and were "pending" when the provisions of s. 21 of the Act of 2011, came into force. Leave to apply for judicial review was given on the 6th April, 2011, and the section came into force on the 23rd August, 2011. Order 84, r. 20(1) of the Rules of the Superior Courts, 1986, (the Rules of the Superior Courts (Judicial Review) 2011, did not come into operation until the 1st January, 2012, per. SI. 691/2011), provides that, "no application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule". Order 84, r. 22(1) provides that the application for judicial review, (after leave has been first obtained) shall be made by originating notice of motion. In the instant case, the notice of motion is dated the 11th April, 2011, and it was filed in the Central Office of the High Court on the 11th April, 2011. Therefore, the court in my judgment had cognisance of the application and could make an order in the matter before the provisions of s. 21 of the Act of 2011,

became operative. The fact that the second notice party and the respondent did not deliver their statements of opposition until the 22nd September, 2011 and the 5th October, 2011, respectively is not in any way determinative of the issue.

10. It was held by the Supreme Court in *Hamilton v. Hamilton* [1982] I.R. 466, that statutes are to be construed as operating prospectively and not retrospectively unless there is some declared intention of the legislature, - clear and unequivocal, to the contrary or, unless there are circumstances rendering it inevitable that the other view should be taken. It is a rule of interpretation that an enactment should not be given a construction such as would take away or impair any vested or existing right or obligation unless that cannot be avoided without doing violence to the language employed in the enactment. In *Re. Hefferon Kearns Limited (No. 1)* [1993] 3 I.R. 177 at 184 (High Court) Murphy J. held that the basis for this rule is the presumption that the legislature did not intend to create the injustice which would normally flow from retrospective legislation.

11. In *Wilson v. Secretary of State for Trade and Industry* [2003] U.K.H.L. 40, Lord Rodger of Earlsferry at para. 198, gave his opinion that the presumption that legislation does not affect proceedings which are pending at the time when it came into force, unless the language of the enactment compels such a conclusion, is a more limited version of the general presumption that legislation is not intended to affect vested rights. He went on to hold that since the potential injustice of interfering with the rights of parties to actual proceedings is particularly obvious, this narrower presumption will be that much harder to displace.

12. At para. 196 of the same judgment, Lord Roger of Earlsferry held that:-

"The courts have tended to attach the somewhat woolly label 'vested' to those rights which they conclude should be protected from the effect of the new legislation."

13. In *Dublin City Council v. Fennell* [2005] 1 I.R. 604, Kearns J. (as he then was) in delivering the judgment of the Supreme Court, after reviewing a large number of cases decided in this jurisdiction, in the United Kingdom and in the United States of America with regard to the retrospective/retroactive operation of statutes, and a number of authoritative texts on the law of statutory interpretation, - p. 628, para. 75 to p. 636, para. 100, - adopted the following passage at pp. 480 and 481 from the judgment of Henchy J. in *Hamilton v. Hamilton* (above cited):-

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

14. In *Wright v. Hale* (1860) 6 H. and N. 227: 30 L.J. Ex. 40, it was held by the Court of Exchequer, (Pollock C.B., Bramwell and Wilde B.B.), that enactments as to costs deal with procedure only and, unless the contrary is expressed, such an enactment applies to all actions whether commenced before or after the passing of the Act. Wilde B. held as follows:-

"I am prepared to decide this case upon principle. The rule applicable to cases of this sort is that, when a new enactment deals with rights of action unless it is so expressed in the Act an existing right of action is not taken away. But

where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. That this is the true principle sufficiently appears from the cases that have been referred to on both sides. The cases cited by Mr. Chambers are cases relating to rights, which were not affected; those referred to by Mr. Hawkins were cases relating to procedure. Enactments as to costs have been held by the all the Courts to apply to actions commenced before the passing of the Acts in which they are contained. In *Cox v. Thomason* (2 C. and J. 498) it was held that a rule of Court relating to the taxation of costs which was general in its terms, applied to all taxations after the period when it came into operation whether the action was commenced before or not. Mr. Chambers says that the enactment now in question takes away a right from the plaintiff. I do not agree with them. The right of the suitor is to bring an action and have it conducted according to the practice of the Court. Pending the action the procedure may be varied, but his right is to have his action conducted according to the existing course of procedure, whatever that may be."

15. In *O'Riordan v. O'Connor* [2005] 1 I.R. 551 at 557, Finlay Geoghegan J. held that this decision related to legal costs only and, at p. 556, para. 18 went on to hold that:-

"The exclusion of statutes affecting only procedure and practice of the courts from the presumption against retrospective constructions is explained by Maxwell Interpretation of Statutes (12th Ed 1969) p. 222 in the following terms:-

'No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues, and if an Act of Parliament alters that mode of procedure, he can only proceed according to the altered mode.'"

16. Finlay Geoghegan J. also averted to the judgment of Blackburn J. in *Kimbray v. Draper* (1868) L.R. 3 Q.B. p. 160, where the Court of Queens Bench (Cockburn C.J., Blackburn, Mellor and Lush J.J.) held itself bound by the decision in *Wright v Hale* (ante). In the course of his judgment Blackburn J. pp. 162 to 163 held that:-

"The canon of decision in *Wright v. Hale* (1860) 30 L.J. Ex. 40 is, that when the effect of an enactment is to take away a right, *prima facie* it does not apply to existing rights; but where it deals with procedure only, *prima facie* it applies to all actions pending as well as future. Whether the Court of Exchequer applied that test properly, in holding it was matter of procedure where a statute enabled a judge to deprive a plaintiff of costs in a case where but for the statute he would have been absolutely entitled to them, may be questionable; but for the decision in that case I certainly should have been inclined to think this was taking away a right. The present case, however, is far more clearly matter of procedure, as the statute only imposes on the plaintiff the alternative of giving security for costs or proceeding in the county court. This is certainly much more a matter of mere procedure than was the case in *Wright v. Hale*, and we are bound by the principle of that case, and the rule must therefore be absolute."

17. In Republic of *Costa Rica v. Erlanger* (1876) 3 Ch. D. 62 at 69, Mellish L.J. held that:-

"No suitor has any vested interest in the course of procedure, nor any right to complain if during the litigation the procedure is changed, provided of course, that no injustice is done."

18. In an earlier case of *Freeman and Others: Executors of Freeman v. Moyes* (1834) 1 A.D. and E. 339, the executors as plaintiffs commenced proceedings as executors in Easter Term 1832. A verdict was given for the defendant in Michaelmas Term 1833. The statute 3 and 4 W. 4c 42, s. 31 came into operation on the 1st June, 1833 and provided that:-

". . . in every action brought by any executor . . . in the right of the testator . . . such executor . . . shall unless the Court . . . shall otherwise order, be liable to pay costs to the defendant in case of . . . a verdict passing against the plaintiff . . ."

It was held, Lord Denman C.J. and Taunton J. (Littledale J. dissenting), in Kings Bench that on inquiry made Common Pleas and Court of Exchequer had held that actions commenced when the statute came into operation were within the meaning of the section and they held likewise. Littledale J. dissenting, held as follows:-

"I must own, as far as my own opinion goes, I should have thought differently. It seems to me a strange consequence of the Act that a party should commence a suit and find only on the eve of the trial that he is liable to costs; which, if he had known before, he probably would not have brought the action."

19. The above reservation of Blackburn J. in *Kimbray v. Draper*, found an echo in the judgment of Slynn J. in *R. v. Dunwoodie* [1978] 1 A.E.R. 923, but he also deferred to the weight of judicial authority and academic endorsement.

20. In that case solicitors who acted for the defendants in a criminal trial were dissatisfied with the assessment by the taxing authority of the fees payable to them

under the Legal Aid in Criminal Proceedings (Fees and Expenses) Regulations 1968. Following a review by the taxing authority, the solicitors remained dissatisfied. After a further review by a Taxing Master they continued to be dissatisfied and appealed to the High Court. This appeal came on for hearing, but before it was heard, the Legal Aid in Criminal Proceedings (Fees and Expenses) (Amendment) Regulations 1977, came into force. The test for whether the sums payable would provide fair remuneration for the work done was amended from a test of whether, "exceptional circumstances existed" (1968 Regulations), to a test of whether "the nature, importance, complexity or difficulty of the work done or the time involved was such that the sums so payable would not provide fair remuneration", (1977 Regulations). Slynn J. held that the 1977 Regulations applied as the taxation had not been completed before they came into force, even though the work had been done prior to that date. In the course of his judgment at p. 928H and 929 A and B, he held as follows:-

> "During the argument, I doubted it very much whether what is said to be a change in the amount of costs to be awarded was truly a matter for procedure or a remedy. It is certainly not one, which in the words of Lord Denning in *Blyth v. Blyth* [1966] 1 A.E.R. 524 at 535 [1966] A.C. 343 at 666, 'only alter the form of procedure'. I have, however, been referred to the decision in *Wright v. Hale (*1860) 6.H. and N. 227 at 230 to 231, where Pollock C.B. said that changes in practice or procedure do apply to existing proceedings unless not made retroactive, and he added: 'Rules as to costs to be awarded in an action are of that description and are not matters in which there can be vested rights'. There is a passage to the same effect, but in different words in the report in the Law Journal Exchequer (1860) 30 L.J.Ex. 40 at 42. The decision

in that case was doubted in *Kimbray v. Draper* (1868) L.R. 3 Q.B. 160, but the principle was followed, and it has been accepted also in the textbooks. Maxwell *Interpretation of Statutes* (12th Edn. 1969) p. 224 states: 'statutes affecting costs are of a procedural nature for the purpose of the rules about retrospectivity'. Craies *Statute Law* (7th Edn. 1971) p. 140, states the same principle.

Accordingly, despite my own doubts, on the basis of these authorities I accept that the provisions as to costs are to be treated as procedural and in the absence of any express or implied contrary intention, changes would normally take effect on proceedings pending at or commenced after the date of the change. In my judgment, the new regulation 7(6) is to be applied in taxations which have not been completed by or which take place subsequent to the 20th June, 1977, even if the work was done prior to that date."

21. In *McEnery v. Sheahan* [2012] IEHC 331, Feeney J. referred with approval to the opinion of Lord Rodger of Earlsferry, in *Wilson v. Secretary of State for Trade and Industry* [2003] U.K.H.L. 40 [2004] 1 A.C. 816 at 199-202, which was also applied in *Mahbub Alam and Others v. Secretary of State for the Home Department* [2012] E.W.C.A. Civ. 906. Lord Rodger of Earlsferry stated as follows:-

"STATUTES ALTERING MATTERS OF PURE PROCEDURE

'199 So far I have been dealing with changes in substantive law. As can be seen from the statement of Wright J in *In Re. Athlumney* [1898] 2 Q.B. 547, 552 which I quoted above, changes in matters of pure procedure have been treated differently. Wilde B stated the position most starkly in *Wright v Hale* (1860) 6 H & N 227, 232: 'where the enactment deals with procedure only,

unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act'.

The justification for treating matters of pure procedure differently was stated by Mellish L.J. in *Republic of Costa Rica v Erlanger* (1876) 3 Ch. D. 62, 69:

> 'No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done'."

Although, at a general level, the distinction between matters of substance and matters of pure procedure is readily understandable, in practice it has not always proved easy to apply, especially in relation to legislation on limitation or prescription. For that reason, in *Yew Bon Tew v Kenderaan Bas Mara* [1983] A.C. 553, 558H - 559A Lord Brightman cautioned against the potential dangers lurking in the description of a measure as 'procedural'. In *L'Office Cherifien v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 527G - 528C Lord Mustill went further and suggested that a single criterion of fairness should be applied to all provisions. He added, at pp 525F - H:

> 'Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the

> clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by parliament cannot have been intended to mean what they might appear to say.'

This is an application of the 'true principle' identified by Staughton L.J. in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712, 724f - g:

> 'that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.'

201. On Lord Mustill's approach an appropriate test might be formulated along these lines: Would the consequences of applying the statutory provision retrospectively, or so as to affect vested rights or pending proceedings, be 'so unfair' that Parliament could not have intended it to be applied in these ways? In answering that question, a court would rightly have regard to the way the courts have applied the criterion of fairness when embodied in the various presumptions."

22. In my judgment the application of s. 50B(2) of the Act of 2000, as amended by s. 21 of the Act of 2011, to proceedings seeking judicial review, commenced and pending prior to the operative date of the amendment on the 23rd August, 2011, would be "so unfair" that the legislature must be considered not to have intended it to so apply in the absence of a clear and unequivocal direction to the contrary in the Act. In every case, the possibility of exposure to an order for costs in favour of another party is something to which every potential reasonable litigant must rationally have regard in deciding to sue or to defend. With respect to judicial review proceedings commenced between the 28th September, 2010 and the 23rd August, 2011, in the instant case it will be recalled that leave to apply for judicial review was granted on the 6th April, 2011, the only rational and reasonable inference is that parties would be materially influenced by the then statutory provision that subject to the provisions of subs. (3) and (4), the litigation expenses of any party or notice party could not be awarded against them in contesting environmental matters even if they had to bear their own costs in that regard. The fact that in the instant case, the statement of opposition of both the second notice party and the respondent were not delivered until after the 23rd August, 2011, when the provisions of s. 21 of the Act of 2011, were already operational, is not a basis from which to consider whether or not the legislature intended the amendment to operate retrospectively as well as prospectively. There could clearly be other situations where parties could have become exposed to extensive pre-hearing and interlocutory costs prior to the 23rd August, 2011 and perhaps even to the full costs of a hearing.

23. There is nothing in the words employed by the legislature in s. 21 of the Act of 2011, which would require this Court to hold that it was the expressed plain and unequivocal intention of the legislature that its provisions should apply to pending as

well as to future proceedings. I do not accept that it could have been the intention of the legislature to effect an improvement in the position of an applicant in the course of proceedings pending on the 23rd August, 2011, when the amending provisions of s. 21 of the Act of 2011, became operational, at the expense of the other parties to the same pending litigation. The magnitude of such unfairness is not ameliorated by the discretionary nature of the power to award costs vested in the court by the amending section. This is a judicial discretion and the court could not decline to award costs to an applicant, "to the extent that the applicant succeeds in obtaining relief". In the case of proceedings taken after the operative date, the parties in deciding whether to embark on or participate in litigation would do so in full awareness of these provisions as to costs. The fact that very frequently in proceedings concerning environmental matters the respondent or notice party will be a public body, or a very large service provider does not in any way serve to lessen the fundamental unfairness of such a change in the course of pending litigation.

24. Counsel for the applicant submitted that s. 33 of the Act of 2010 and s. 21 of the Act of 2011 were both enacted by the legislature to give effect to the obligations entered into by this State on signing the United Nations Economic Commission for Europe, Convention on Access to Information, Participation in Public Decision Making and Access to Justice in Environmental Matters (the Aarhus Convention): of 25th June, 1998. The long title of the Act of 2011 certainly refers to it and, s. 8 of that Act provides that judicial notice shall be taken of it. Counsel submitted that the later in time provisions of the Act of 2011 must be seen as an acceptance by the legislature that the earlier in time provisions of Act of 2010 did not sufficiently discharge the obligations of the State under the Convention. From this, counsel submitted, the court should infer an intention on the part of the legislature that the provisions of the Act of

2011 should apply both retrospectively as well as prospectively in order to redress this situation.

25. This is an interesting argument but one I am unable to accept. It invites the Court to find that the legislature intended to remedy an alleged insufficiency of the Act of 2010 by making the provisions of s. 21 of the Act of 2011 retroactive, one assumes to the operative date of the Act of 2010, regardless of whether this might result in an injustice to parties to proceedings pending at the operative date of the Act of 2011. Only an express unequivocal statement to that effect or an unavoidable and compelling inference would persuade me to accept that such an extremity had been the intention of the legislature. I find nothing of this nature in s. 21 of the Act of 2011, considered in the context of the Act read as a whole, or elsewhere in that Act. This is scarcely surprising as such a provision is neither necessary or desirable to the implementation of the obligations assumed by the State under the Aarhus Convention.

26. Ireland signed the Aarhus Convention on the 25th June, 1998, but did not ratify the Convention until the 20th June, 2012. The Aarhus Convention is not part of domestic law except where incorporated through the law of the European Union which ratified the Convention in February, 2005, (see *O'Connor v. Environment Protection Agency* [2012] IEHC 370; *NO2GM Ltd v. Environment Protection Agency* [2012] IEHC 369). However, in my judgment by signing the Convention in June 1998, subject to later ratification, this State accepted an obligation to bring domestic law into conformity with all the requirements of the Convention and, by analogy, not to enact legislation which would be in breach of those requirements or the spirit of those requirements. In the interpretation of domestic legislation enacted to give effect to international treaties and conventions it is legitimate to have regard to the nature of the obligations assumed by the State in such treaties and conventions as an aid in

ascertaining the intention of the legislature in the construction of any provisions of such legislation which may be ambiguous or vague. (*ÓDomhnaill v. Merrick* [1984] I.R. 151, per. Henchy J. at p. 159 and per. McCarthy J. at p. 166: *Quazi v. Quazi* [1979] 3 AER 897 at 903 b-c, per. Lord Diplock).

27. I find nothing in the terms of the Aarhus Convention, in particular sub-Articles 9.3, 9.4 and 9.5, Access to Justice, which would require this State to frame domestic legislation implementing the terms of the Convention relating to access to justice in environmental matters in any specific form. Sub-Articles 9.4 and 9.5 require parties to the Convention to undertake to introduce into domestic law procedures providing an adequate and effective remedy to the public, (as defined by Article 2), in environmental matters which is, "not prohibitively expensive" and, to "consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice", in environmental matters. It is left to each party to the Convention to determine, "in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9.3", (L.Z. [2011] E.C.R. I.-0000 para. 50), and (in the case of this State after the 18th September, 2013), subject to the supervisory role of the Aarhus Convention Compliance Committee, how it will implement in domestic legislation the provisions of Articles 9.3, 9.4 and 9.5 of the Convention. This will manifestly require careful consideration, perhaps also public consultation and debate and, it might well require a number of successive legislative attempts before a just, balanced and acceptable implementation is achieved.

28. I do not consider that the decision of the legislature, expressed in s. 21 of the Act of 2011 to improve the costs position of applicants relative to respondents and notice parties in environmental matters can reasonably or rationally be construed as an acknowledgment by the legislature that the provisions of s. 33 of the Act of 2010,

itself enacted, one may assume, following the decision in *Commission v. Ireland* [2009] E.C.R - I-6277 and, to give effect to the Convention and to comply with European Union Directives aligning aspects of European Union Law with the requirements of the Convention, had failed to give effect to the provisions of sub-Articles 9.3, 9.4 and 9.5 of the Convention and, that the Legislature must therefore be presumed to have intended that the provisions of s. 21 of the Act of 2011 should therefore apply retroactively to make good that failure. In my judgment, s. 21 of the Act of 2011 simply reflects a legislative reassessment of the position. The legislature probably based this reassessment upon such considerations as the perceived strength of public finances to cope with a win, no costs, lose, pay costs, regime as applying to public bodies. It may also have had regard to the fact that respondents and notice parties in judicial review proceedings concerning environmental matters are almost invariably public bodies, major service providers or, well funded corporate developers, while applicants are generally private persons or voluntary public-interest associations, organisations or groups for whom an inability to recover costs, even though protected from liability to pay costs, could still be a major disincentive to becoming involved in judicial review proceedings in respect of environmental matters. I therefore find nothing in the obligations assumed by the State under the Aarhus Convention which would lead me to presume that the legislature intended that the provisions of s. 21 of the Act of 2011 should apply retroactively.

29. A similar argument was advanced on behalf of the applicant based on the provisions of article 10(a) of Council Directive 85/337/EEC of 27th June, 1985, (now article 11 Directive 2011/92/E.U.), as inserted by Council Directive 2003/35/E.C. of 26th May, 2003, and is rejected for the same reasons. Even in a matter concerned solely with national parties and issues this Court is obliged, in ascertaining the correct

interpretation of a statutory provision in domestic law, particularly a provision enacted for the purpose of implementing the requirements of a Directive, to interpret domestic law, so far as possible, in the light of the wording and purpose of the Directive concerned in order to achieve the result sought by the Directive, (*Pfeiffer & Ors v. Deutsches Rotes Kreuz* [2004] E.C.R. I-68835, (Case – 397/01 to C. – 403/01). I find nothing in Article 10a which would lead me to consider that the legislature intended that s. 21 of the Act of 2011, in order to comply with article 10a should have retroactive effect. Article 10a simply requires Member States to ensure that domestic law contains a review procedure before a court of law which is fair, equitable, timely and not prohibitively expensive in order to enable qualifying members of the public to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of the Directive. The general objective of the Directive, to ensure and facilitate effective participation by the "public", (as defined), in decision-making procedures affecting the environment, including by way of recourse to judicial review proceedings, is not in my judgment a sufficient basis from which to infer an intention on the part of the legislature that the costs provisions of s. 21 of the Act of 2011 should apply retroactively.

30. The obligation to provide in domestic law a judicial review procedure in environmental matters which is not "prohibitively expensive" cannot reasonably be construed as requiring that any legislation amending earlier legislation with a view to making procedure by way of judicial review less expensive for the "public", - defined in Article 1 of the Directive as, "one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups", - should apply retroactively unless perhaps where national legislation put or remaining in place after the 26th May, 2003, manifestly failed to implement the terms

of Article 10a of the Directive. This was not the situation here. The provisions of s. 33 of the Act of 2010 may, on further examination and evaluation have been considered by the legislature not to have gone far enough to reduce the cost of access to the courts by the "public" in judicial review proceedings relating to environmental matters, but it could not reasonably be held that after the enactment of s. 33 that such costs remained, "prohibitively expensive".

31. I find nothing of assistance regarding the intention of the legislature as to whether or not s. 21 of the Act of 2011 should apply retrospectively in s. 47 of the same Act dealing with "Savings and Transitionals". Sections 22, 23 and 24 of the Act of 2011 expressly provide that the amendments effected by the immediately preceding subsection of each of these sections shall not apply to development begun prior to the commencement of the section. The legislature is therefore expressly providing that these sections are not to have retroactive effect as regards any such development. These sections relate to the carrying out of works affecting the character of a protected structure or proposed protected structure, the carrying out of works to the exterior of a structure located in an architectural conservation area and, development within an area of special planning control. Section 48 of the Act of 2011 substituted s. 194 of the Local Government Act which provides that while place-name changes made under s. 189 or s. 190 of that Act become effective from the dates specified in the declaration or order, references to the place-name in any enactment, instrument or document applicable, or in any civil or criminal proceedings pending immediately before that date, shall be construed as references to the new place-name.

32. Section 3 and s. 6 of the Act of 2011 introduce cost provisions in civil proceedings, including applications for interim interlocutory relief regarding compliance with or enforcement of certain licenses, permits, permissions, leases or

contracts where non-compliance had caused, was causing or was likely to cause damage to the environment, similar to the costs provisions of s. 50B of the Planning Development Act 2000, (as inserted by s. 33 of the Act of 2010, and as amended by s. 21 of the Act of 2011). Section 7 of the Act of 2011 provides as follows:-

> "7. – (1) A party to proceedings to which section 3 applies may at any time before, or during the course of, the proceedings apply to the court for a determination that section 3 applies to those proceedings.
>
> (2) Where an application is made under subsection (1), the court may make a determination that section 3 applies to those proceedings.
>
> (3) Without prejudice to subsection (1), the parties to proceedings referred to in subsection (1), may, at any time, agree that section 3 applies to those proceedings.
>
> (4) Before proceedings referred to in subsection (3) are instituted, the persons who would be the parties to those proceedings if those proceedings were instituted, may, before the institution of those proceedings and without prejudice to subsection (1), agree that section 3 applies to those proceedings.
>
> (5) An application under subsection (1) shall be by motion on notice to the parties concerned."

In my judgment the correct inference to be drawn from these other sections of the Act of 2011, is that the legislature has indicated a concern and a clear intention that the provisions of that Act should not operate retrospectively if the effect of that would be

to adversely affect any existing specific right or privilege, or cause an injustice to any party in proceedings pending on the operative date of that Act of 2011.

33. Section 21 of the Act of 2011, is expressed to "amend" s. 50B of the Planning and Development Act 2000, as inserted by s. 33 of the Planning and Development (Amendment) Act 2010, by "substituting" a new subs. (2) for the existing subs. (2) and by "inserting" an additional subsection, designated (2A). The effect of this is to repeal the original subs. (2) which provided that notwithstanding anything contained in O. 99, of the Rules of the Superior Courts and subject to subs. (3) and (4) in proceedings to which this section applies, each party (including any notice party) shall bear its own costs.

34. Section 26(1) of the Interpretation Act 2005, provides that where an enactment repeals another enactment and substitutes other provisions for the enactment so repealed, the enactment so repealed continues in force until the substituted provisions come into operation. Subsection (2)(c) of the same section provides that proceedings taken under the former enactment may, subject to s. 27(1) be continued under and in conformity with the new enactment insofar as that may be done consistently with the new enactment. Section 27(1) of the Interpretation Act 2005, provides, *inter alia,* that where an enactment is repealed the repeal does not:-

> "(b) affect the previous operation of the enactment or anything duly done or suffered under the enactment,
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment, . . . or
>
> (e) prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability, offence or contravention."

35. Section 27(1)(b) of the Interpretation Act 2005, provides that anything already done or permitted to be done by virtue of a repealed statute or a section of a statute or, any other use or employment of a statute or a section of a statute prior to its repeal remains lawful despite that repeal. In the instant case, no issue as to costs arose prior to the repeal of s. 50B(2) of the Act of 2000, as inserted by s. 33 of the Planning and Development (Amendment) Act 2010, by s. 21 of the Act of 2011, as no legal right had been, or had failed to be, established in the proceedings prior to the 23rd August, 2011, Judgment in the case was delivered on the 24th January, 2013. Section 27(1)(b) of the Interpretation Act 2005, has therefore no application in the present case.

36. Section 50B(2) of the Act of 2000, as inserted by s. 33 of the Planning and Development (Amendment) Act 2010, was in my judgment concerned solely with an aspect of procedural law. It was concerned solely with an aspect of the rules and provisions by reference to which rights and duties are judicially defined or enforced. It did not give rise to any vested, acquired or accrued right or privilege enforceable by legal proceedings. The granting of leave to seek judicial review on the 6th April, 2011, did not, in my judgment, vest in any party to these proceedings a specific right or privilege in the terms of s. 50B(2), which, by virtue of s. 27(1)(e) of the Interpretation Act 2005, remained unaffected despite the repeal of that subsection and the substitution therefore after the 23rd August, 2011, of a new section 50B(2).

37. However, it appears to me that it would be so unjust to parties to litigation, whether as applicants, respondents or notice parties, commenced after the Act of 2010, with the assurance of this statutory declaration as to how costs would fall to be assessed as and when the occasion arose, to significantly alter those provisions during the course of that litigation that I am compelled to conclude that the legislature did not intend the repealing provisions of the Act of 2011, to apply retrospectively to

proceedings commenced prior to the operational date of that Act and after the operative date of the Act of 2010.

38. Section 50B(2) of the Planning and Development Act 2000, (as inserted by s. 33 of the Planning and Development (Amendment) Act 2010), provides that in proceedings to which s. 50B(1) applies each party, including any notice party, shall bear its own costs notwithstanding anything contained in Order 99 of the Rules of the Superior Courts, unless the provisions of subsections (3) and (4) apply. Section 50B(3) vests a discretion in the court to award costs against a party in proceedings to which s. 50B applies, if it considers that a claim or counterclaim of a party is frivolous or vexatious or, that the party is in contempt of the court or, because of the manner in which the party has conducted the proceedings. I am quite satisfied that none of these arose in the instant case. Section 50B(4) entitles 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.

39. Section 50(B)(1) applies only to proceedings in the High Court by way of judicial review or seeking leave to apply for judicial review of any decision or purported decision made or purported to be made, or any action taken or purported to be taken, or any failure to take any action pursuant to the law of the State which gives effect to the provisions of Council Directive 85/337/EEC of 27th June, 1985, to which Article 10a, as inserted by Directive 2003/35/EC of the European Parliament and of the Council of 26th May, 2003 applies.

40. In, *J.C. Savage Supermarket Limited & Anor v. An Bord Pleanála* [2011] IEHC 488, Charleton J. (p. 11 of 11 para. 4.0) held that:-

> "The new default rule set out in s. 50B(2) that each party bear its own costs is expressed solely in the context of a challenge under any law of the State which

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."

I adopt this statement of law by Charleton J.

41. At paras. 4.1 and 4.2 of the same judgment Charleton J. continued as follows:-

"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 the government. The intention of the Oireachtas is clear from the plain wording of s. 50B and the context enforces the meaning in the same way. The new rule is an exception. A 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 of 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".

4.2 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."

42. It was submitted on behalf of the second notice party and adopted by the respondents that the "proceedings" in the instant case were by way of judicial review of a decision or purported decision made pursuant to one of these three specific categories and, therefore, each party should bear that party's own costs of the entire proceedings. It was submitted on behalf of the applicant that the provisions of s. 50B(2) applied only to that specific part of her challenge to the decision of the respondents as was based on environmental impact assessment grounds and, that the provisions of Order 99 of the Rules of the Superior Courts applied to the other distinct and severable part of her challenge which was based solely on a breach of the planning permission requirements of s. 34(i)(a) as applied by s. 37(i)(b) of the Planning and Development Act 2000, and of Article 22(2)(g) of the Planning and Development Regulations 2001 (as amended). I find that this submission of the applicant is correct.

43. In the written replying submission of the applicant she expressly identified two bases for her challenge to the decision of the respondents to grant planning permission to the second notice party. At para. 1.4 of this replying submission the applicant stated that, "the primary basis for the challenge…is that the decision was made in

breach of the requirements of s. 34(i) as applied by s. 37(i)(b) of the 2000 Act". At para. 5.1 of that submission the applicant referred to:-

> "Another group of grounds upon which [the applicant] bases her challenge to the validity of the decision, relates to the failure of the respondent to ensure that the likely significant effects of the proposed development on environmental matters were assessed prior to the development consent being given contrary to the provisions of Council Directive 85/337/EC as amended by Council Directive 97/11/EC and, Council Directive 2003/35/EC and contrary to Irish planning legalisation."

The particular environmental matters identified by the applicant were, the likely significant impact of the proposed development on flora and fauna and in particular avifauna and also on the cultural heritage of the area which is an important Gaeltacht.

44. In my judgment "proceedings" as used in s. 50B(1) only refers to that part of judicial review proceedings which challenge a decision made or action taken or a failure to take action pursuant to one or more of the three categories therein specified. "Proceedings" is not defined in the Act of 2010, in the Planning and Development Act 2000, or in the Interpretation Act 2005. It is not a term of legal art and where undefined its meaning falls to be established by reference to the context in which it is used, (see *Minister for Justice v. Information Commissioner* [2001] 3 I.R. 43 at 45: *Littaur v. Steggles Palmer* [1986] 1 W.L.R. 287 at 293 A-E). In my judgment it cannot be considered that the legislature intended so radical an alteration to the law and practice as to costs as to provide that costs in every judicial review application in any planning and development matter, regardless of how many or how significant the other issues raised in the proceedings may be, must be determined by reference only to the fact that an environmental issue falling within any of the three defined legal

categories is raised in the proceedings. Such a fundamental change in the law and practice as to awarding costs is not necessary in order to comply with the provisions of the Directive. It would encourage a proliferation of judicial review applications. Litigants would undoubtedly resort to joining or non-joining purely planning issues and environmental issues in the same proceedings so as to avoid or to take advantage of the provisions of s. 50B(2). This is scarcely something which the legislature would have intended to encourage.

45. The applicant submitted that notwithstanding the provisions of s. 50B(2) she should be awarded the costs of the entire proceedings as it was a matter of exceptional public importance and in the special circumstances of the case it was in the interests of justice that she should be awarded those costs. I find that a number of the issues raised in the instant case are arguably concerned with matters of general public importance. A number of the issues raised *inter partes* which the court was called upon to determine have a general and significant public importance which transcends the private and particular concerns of the litigants themselves. The decision of the court on these issues may well provide a precedent in future cases. The fact that in the course of *inter partes* litigation, such as the instant case, the court formulates new legal principles or, makes some novel application of established law to facts which are not so unique that identical or similar facts are unlikely to occur in the future may render the matter one of public importance. However, in my judgment it is not sufficient to make it a matter of "exceptional public importance". In my judgment it was the intention of the legislature in employing the phrase "exceptional public importance" to signify that the matter at issue had to be of special importance to the general public and not just to the parties to the proceedings.

46. As to the construction of "exceptional" I adopt what was held by Lord Bingham of Cornhill C.J. in *R. v. Kelly* [2000] Q.B. 198 at 208, [1999] 2 AER 13 at 20 (c), (in the context of s. 2 of the Crime (Sentences) Act, 1997 - exceptional circumstances which justify not imposing a sentence of life imprisonment), where he held that:-

> "We must construe "exceptional" as an ordinary familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique or unprecedented, or very rare; but it cannot be one that is regularly or routinely or normally encountered."

47. In my judgment 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". I find that this first part of the test is not satisfied in the instant case. The plaintiff is therefore entitled, pursuant to the provisions of Order 99 of the Rules of the Superior Courts only to costs relating to that part of her claim in respect of which she was successful and which did not concern any environmental impact assessment issue.

48. The applicant was granted leave to apply for *certiorari* by way of judicial review quashing the decision of the respondent, made on 11th February, 2011, to grant planning permission to the second notice party and, for other reliefs which did not include a claim for a permanent injunction or for damages. Essentially, her

application was based on just two grounds: first, that a portion of her lands was wrongfully included in the application for and in the grant of permission by the respondent to the second notice party and second, that there had been multiple infringements by the respondent and the second notice party of the law of the State which gives effect to the Directives specified in s. 50B(1) of the Act of 2000, - environmental impact assessment matters. The court in its judgment did not quash the decision to grant planning permission to the second notice party or declare that it was *ultra vires* the powers of the respondent to grant that permission. It was submitted by the second notice party and, adopted by the respondent, that the applicant had therefore failed with respect to both aspects of her claim. I do not accept this submission. The court certainly declined to make an order of *certiorari* quashing the decision of the respondent to grant permission to the second notice party but held that in so far as, and to the extent that it purported to decide to grant planning permission in respect of or in any manner affecting the land of the applicant or any part of it the decision was void. I find that in the state of the law prior to the judgment of the court in the instant case it was reasonable for the applicant to have made her claim in the form of an application for *certiorari* by way of judicial review quashing the decision of the respondent in its entirety. I find that the applicant succeeded on the first but not on the second ground of her claim. The latter in any event falls within the provisions of s. 50B(2) of the Act of 2000, as inserted by s. 33 of the Act of 2010.

49. I am satisfied that it is reasonable and proportionate in such circumstances that the applicant should be awarded the costs of the planning issue, (non-environmental impact assessment issue), regarding what the court found was the wrongful inclusion without her consent of portion of her lands in the application for and in the subsequent grant of planning permission. I find that she is also entitled to the costs of the issue

raised by the respondent and the second notice party, (in which they were unsuccessful), that as a consequence of the second condition attached by the respondent to the decision to grant permission for the proposed development, that the decision no longer affected any part of the applicant's lands. I further find that the applicant is entitled to the costs of the issue raised by the respondent alone, (in which it was unsuccessful), that if its decision to grant permission for proposed development was declared invalid the decision of the first named notice party of 15th September, 2010, to grant permission for that development remained and became the effective decision. All of these issues are to be found addressed and decided at paras. 1 to 86 inclusive in the judgment of the court.

50. An order for costs in favour of the applicant will be made against the respondent solely as regards the latter issue, (revival of the decision of the first notice party), and, jointly and separately against the respondent and the second notice party as regards the first and second issues (first, the wrongful inclusion of part of her lands in the application for and in the planning permission and second, that this was irrelevant as the decision to grant permission did not affect any part of her lands). Whether or not the raising by the applicant of the environmental impact assessment issues, (considered and decided at paras. 80 – 120 inclusive of the judgment of the court), could reasonably be said to have increased the costs of the parties, (*Re Skytours Travel Limited: Doyle v. Bergin* [2011] 4 I.R. 676 at 679 *per.* Laffoy J.), is not a relevant consideration in the instant case by reason of the statutory provisions of s. 50B(2) of the Act of 2000 that as regards such issues each party and the notice party shall bear their own costs. There will be no order for costs made against or in favour of the first notice party. No relief was sought against the first notice party in the

course of the hearing of the application and, the first notice party did not appear, was not represented and took no part whatsoever in the proceedings.

Approved.

Daniel Herbert