THE HIGH COURT

[2011 No. 125 J.R.]

BETWEEN/

KIMPTON VALE DEVELOPMENTS LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 4th October, 2013

1. This application for security for costs under s. 390 of the Companies Act 1963 ("the 1963 Act") raises once again the general question of how the new costs rules relating to planning and environment matters should be interpreted and applied. A specific dimension of this question concerns both the extent to which and the manner in the manner in which Article 9(4) of the Aarhus Convention (with its requirement that environmental litigation which comes within the scope of that Convention should not be "prohibitively expensive") has been transposed into national law.

2. The problem for consideration arises in this way. The applicant, Kimpton Vale Developments Ltd. ("Kimpton Vale") is a property development company with substantial assets. It also has substantial borrowings and these debts have been

transferred to the National Asset Management Agency. While it is continuing to trade, its viability seems in large measure dependent on the continuing goodwill of NAMA.

3. In these judicial review proceedings Kimpton Vale has challenged a decision of An Bord Pleanála dated 9th December 2010 whereby it was held that the construction of two 1.2m fences on particular lands did not constitute exempted development. The Board reached this conclusion on the ground that this would contravene a particular condition (condition 6) of a planning permission (PL06F.124586) which was previously granted to the applicant. It is accepted that this decision (or, if you will, purported decision) was taken pursuant to s. 5 of the 2000 Act.

4. In truth, this case has substantially turned on whether there is a real prospect that Kimpton Vale would be likely to face an award of costs were it to be unsuccessful in these proceedings. It is not in dispute but that the company has significant bank liabilities (estimated to be just over €8m. in October 2011) and that its ability to pay this debt is dependent on its ability to realise its not inconsiderable property assets in a manner which would enable this to be done. It may be that its ability to do just this in the second part of 2013 might be slightly easier than might have been the case in 2011.

5. Yet its ability to meet any award of the respondent's costs is likely to be dependent on the goodwill of NAMA. The costs themselves have been estimated at some €13,400 and are quite possibly likely to be higher. While one of the applicant's directors, Mr. Laurence Keegan, has stressed that the company is still trading and has not entered any insolvency process such as liquidation, receivership or examinership, this is not quite the same thing as saying that it would be able to meet any order for costs were it to lose the litigation. As Clarke J. so perceptively demonstrated in his

judgment in *Parolen Ltd. v. Doherty* [2010] IEHC 71, there is a "real, and in some cases, a significant, distinction between the solvency of a company on the one hand and its ability to meet a significant costs order in the event that it should mount and lose significant litigation on the other hand."

6. One must, of course, fairly acknowledge that this litigation is likely to be more modest and more straightforward than many other contemporary items of commercial and planning litigation. The costs, accordingly, are likely to be at a level which could not be regarded as crushing. Yet the fact remains that the ability of the company to meet any such award presently remains contingent on the goodwill of NAMA. Certainly, there has been no unequivocal statement from NAMA that it would be prepared to underwrite any such award for costs.

7. In these circumstances, if there was a real risk that an order for costs would be made against Kimpton Vale, then it would follow in turn that there is a real prospect that the company would not be able to meet the respondent's costs. If, then, the ordinary costs rules applied to a case of this kind, then I would be prepared to make an order for security for costs pursuant to s. 390 of the 1963 Act. All of this is, however, simply a prelude to the effective issue which I am required to determine, namely, whether there is a real prospect that an award for costs would be made against the company were it to transpire that it was unsuccessful in these proceedings.

8. The answer to this question really turns on the extent to which the Aarhus Convention has been transposed into domestic law and, just as importantly, the extent to which the Oireachtas elected to modify the costs rules in respect of those categories of planning and environmental cases which would not otherwise come within the scope of the Convention. Before considering that issue it may be acknowledged that there is here no suggestion that the Aarhus Convention requires that the losing party

would enjoy a complete immunity from an award of costs. Thus, for example, a costs order might well be made if were to transpire that one of the parties had behaved unreasonably or had unnecessarily prolonged litigation or had commenced litigation which was hopeless or doomed to fail: *cf.* here the comments of Kearns P. in *Indaver NV v. An Bord Pleanála* [2013] IEHC 11.

9. Since, however, there is no suggestion that the litigation is not being properly advanced by Kimpton Vale or that its challenge is anything other than *bona fide* there is really no prospect that an award of costs will be made on this ground. Everything, turns, accordingly, on whether the default rule relating to costs prescribed by O. 99, r. 1 (*i.e.*, costs following the event) still applies to proceedings of this kind or whether the rules have been changed by statute as a means of giving effect to the Aarhus Convention.

10. It is to this issue to which we may now turn.

The Aarhus Convention and its scope of application

11. It is quite impossible to understand the question of interpretation which arises in the present case without briefly rehearsing the terms of Article 9 of the Aarhus Convention and its reception both by EU law and by the law of the State. The Aarhus Convention is a United Nations sponsored convention, the full title of which is the *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*. Ireland signed the Convention on 25th June, 1998, and ratified it on 20th June, 2012. The European Union also approved the Convention by means of Council Decision 2005/370/EC of 17th February, 2005 (OJ 2005, L 124).

12. The scope of application of the Aarhus Convention is principally governed by Article 6(1)(a) which provides that each Contracting Party shall "apply the provisions

of this article with respect to decisions on whether to permit proposed activities listed in Annex 1." The activities listed in Annex 1 are those which, subject to certain thresholds, most immediately affect the environment: the energy sector, metal production, minerals, chemicals, waste management, waste water treatment plants, pulp and paper production, major road and rail construction, ports, petrol and gas extraction and production, dams, oil and gas pipelines, intensive pig and poultry production, quarries and opencast mining, construction of overhead power lines and the tanning of hides and slaughterhouses. Paragraph 19 of Annex 1 provides that the provisions of the Convention will also apply where "public participation is provided for under an environmental impact assessment procedure in accordance with national legislation."

13. Article 9(2) of the Convention guarantees that interested parties shall have "access to a review procedure before a court of law…to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6." Article 9(4) further requires that these procedures shall not be "prohibitively expensive." It is important here to stress that this obligation only applies to environmental litigation which concerns decisions which otherwise are captured by the operation of Article 6 and, by extension, the enumerated list of activities set out in annex 1.

The transposition of the Aarhus Convention into national law

14. Much of the complications in the rather tangled endeavours to transpose the Convention into national law arise from the fact that the Convention has not been completely transposed by the law of the European Union, save the three distinct – but hugely important - areas of public access to information regarding the environment, environmental impact statements and integrated pollution control by means of three

separate Directives. Insofar as these Directives are directly effective, then *to that extent* the Convention is directly enforceable in national courts by virtue of EU law.

15. But what is the status of the Convention in respect of the balance of our environmental law, insofar as such decisions some within the scope of the Convention? The starting point here, of course, is the fact that Ireland is a dualist State and, by virtue of Article 29.6 of the Constitution, international agreements of this kind do not form part of the domestic law "save as may be determined by the Oireachtas". As it happens, incorporation for the purposes of Article 29.6 may take many different forms. In some cases, of course, the Oireachtas has legislated directly to provide that the international agreement forms part of the law of the State. Thus, for example, s. 4(1) of the International Interests in Mobile Equipment (Cape Town Convention) Act 2005 ("the 2005 Cape Town Convention Act") provides that the Cape Town Convention and Aircraft Protocol have the force of law in the State and s. 8 of that Act requires all courts to take judicial notice of this Convention and the Aircraft Protocol thereto.

16. In other cases, the Oireachtas has refrained from saying that the international agreement in question is generally part of the domestic law of the State, but has nonetheless specified that the agreement is enforceable in domestic law under certain conditions contained in the transposing legislation itself. The European Convention of Human Rights Act 2003 is, perhaps, the known example of this approach. In yet other cases the Oireachtas will endeavour to approximate national law to the international law obligations of the State, without providing directly that the international agreement in question is enforceable *as such* in domestic law.

17. The special case of the EU Directives aside, the latter approach appears to have been that adopted by the State in the case of the Aarhus Convention, albeit with

some modifications. Unlike the approach taken by the 2005 Cape Town Convention Act, the Oireachtas has certainly never specified that the Convention actually forms part of the domestic law of the State. But the Long Title to the Environment (Miscellaneous Provisions) Act 2011 ("the 2011 Act") declares that one of the objects of the Act is "to give effect to certain articles in the Convention" and s. 8 provides that the Court shall take judicial notice of the terms of the Convention. These provisions took effect on 23rd August 2011: see Article 2 of the Environment (Miscellaneous Provisions) Act 2011 (Commencement of Certain Provisions) Order 2013 (S.I. No. 433 of 2011). While the Convention is not, as such part of the domestic law of the State, the nature of the declaration in the Long Title and the fact that the courts are required to take judicial notice of its terms compel the conclusion that the relevant provisions of the 2011 Act should be interpreted in a manner which best gives effect to the corresponding provisions of the Convention. Thus, for example, the new costs rules contained in ss. 3, 4, 5 and 21 of the 2011 Act are obviously designed to give effect to Article 9 of the Convention.

18. Here the requirement contained in Article 9(4) of the Convention that the remedies not be prohibitively expensive is of some importance, since the new costs rules clearly reflect this imperative. To that extent, therefore, the 2011 Act must be taken as having gone somewhat further than the changes previously effected to s. 50B of the 2000 Act by s. 33 of the Planning and Development (Amendment) Act, 2010 Act (the "2010 Act"). Yet one of the difficulties presented by the transposition of the Convention is that it is not always easy to say when the obligations assumed by the State in respect thereof begin and end.

19. The changes effected by s.33 of the 2010 Act have heretofore been interpreted as simply giving effect to specific European Union obligations in the area of

environmental impact assessment, access to public information regarding planning matters and integrated pollution licences following the decision of the Court of Justice in C-427/07 *Commission v. Ireland* [2009] E.C.R. I-6277: see, *e.g.*, the judgment of Charleton J. in *JC Savage Supermarkets Ltd. v. An Bord Pleanála* [2011] IEHC 488 and that of Hedigan J. in *Shillelagh Quarries v. An Bord Pleanála* [2012] IEHC 402. These EU obligations arose from the three specific Directives which were promulgated as a means of giving effect to the Convention at Union and Member State level through the medium of Union law.

20. Both judges stressed that these changes did not change the costs rules *generally* in planning and environmental cases, *other* than in the three specific areas where Article 9 of the Aarhus Convention had been transposed by the three separate Directives. As Hedigan J. put it in *Shillelagh Quarries*:

> "The obligation is that, in certain planning cases, in order to ensure access to Court to challenge decisions, the general public must have a cost effective way of doing so. Such review should be fair, equitable, timely and not prohibitively expensive. Section 50B [of the 2000 Act, as amended] attempts to do this by providing that in such cases, the default order that costs follow the event is set aside and save for certain limited exceptions, no order as to costs should be made."

21. As we shall presently see, the critical question is the extent to which (if at all) the decision in *JC Savage* has been overtaken by the 2011 Act.

<u>The changes effected to the costs rules by the 2011 Act</u>

22. The changes effected by ss. 3, 4 and 7 of the 2011 are significant and it is accordingly necessary to set them out in full. Section 3 of the 2011 Act provides:

> "3- (1) Notwithstanding anything contained in any other enactment or in-

(a) Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986)....., in proceedings to which this section applies, each party (including any notice party) shall bear its own costs.

(2) The costs of the proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant, or as the case may be, the plaintiff, to the extent that he or she succeeds in obtaining relief and any of those costs shall be borne by the respondent, or as the case may be, defendant or any notice party, to the extent that the acts or omissions of the respondent, or as the case may be, defendant or any notice party, contributed to the applicant, or as the case may be, plaintiff obtaining relief.

(3) A court may award costs against a party in proceedings to which this section applies if the court considers it appropriate to do so -

(a) where the court considers that a claim or counter-claim by the party is frivolous or vexatious,

(b) by reason of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of the court.

(4) Subsection (1) does not affect the court's entitlement to award costs in favour of a party in a matter of exceptional public importance and where in the special circumstances of the case it is in the interests of justice to do so.

(5) In this section a reference to 'court' shall be construed as, in relation to particular proceedings to which this section applies, a reference to the

District Court, the Circuit Court, the High Court or the Supreme Court, as may be appropriate."

23. Pausing, therefore, at this point it can be said that in respect of those cases to which it applies, s. 3 introduces a new default rule whereby, absent special circumstances, the normal rule will be that of no order as to costs.

24. Next we may note that s. 7 introduces a new statutory form of protective costs jurisdiction:

"(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 section 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."

25. It may be noted that, absent the consent of all other parties, s. 7(4) endeavours to respect the procedural rights of all parties by providing that any application for such a protective costs order would have to be on notice to all relevant parties who

might be affected thereby. In that respect, therefore, the exclusion of *ex parte* applications for such protective costs orders on grounds of procedural fairness – as explained by Denham C.J. in *Re Coffey's Application* [2013] IESC 31 – remains unaffected by the enactment of the 2011 Act.

26. The scope of application of the s. 3 procedure is itself determined by s. 4 which provides:-

> "(1) Section 3 applies to civil proceedings, other than proceedings referred to in subsection (3), instituted by a person-
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> (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
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> (b) in respect of the contravention of, or the failure to comply with such licence, permit, permission, lease or consent,
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> and where the failure to ensure such compliance with, or enforcement of, such statutory requirement, condition or other requirement referred to in paragraph (a), or such contravention or failure to comply referred to in paragraph (b), has caused, is causing, or is likely to cause, damage to the environment.
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> (2) Without prejudice to the generality of subsection (1), damage to the environment includes damage to all or any of the following:
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> (a) air and the atmosphere;
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> (b) water, including coastal and marine areas;

(c) soil;

(d) land;

(e) landscapes and natural sites;

(f) biological diversity, including any component of such diversity, and genetically modified organisms;

(g) health and safety of persons and conditions of human life;

(h) cultural sites and built environment;

(i) the interaction between all or any of the matters specified in paragraphs (a) to (h).

(3) Section 3 shall not apply-

(a) to proceedings, or any part of proceedings, referred to in subsection (1) for which damages, arising from damage to persons or property, are sought, or

(b) to proceedings instituted by a statutory body or a Minister of the Government.

(4) For the purposes of subsection (1), this section applies to-

(a) a licence, or a revised licence, granted under section 83 of the Environmental Protection Agency Act 1992 ,

(b) a licence granted pursuant to section 32 of the Act of 1987,

(c) a licence granted under section 4 or 16 of the Local Government (Water Pollution) Act 1977 ,

(d) a licence granted under section 63, or a water services licence granted under section 81, of the Water Services Act 2007 ,

(e) a waste collection permit granted pursuant to section 34, or a waste licence granted pursuant to section 40, of the Act of 1996,

(f) a licence granted pursuant to section 23(6), 26 or 29 of the Wildlife Act 1976 ,

(g) a permit granted pursuant to section 5 of the Dumping at Sea Act 1996 ,

(h) a licence granted under section 40, or a general felling licence granted under section 49, of the Forestry Act 1946 ,

(i) a licence granted pursuant to section 30 of the Radiological Protection Act 1991 ,

(j) a lease made under section 2, or a licence granted under section 3 of the Foreshore Act 1933 ,

(k) a prospecting licence granted under section 8, a State acquired minerals licence granted under section 22 or an ancillary rights licence granted under section 40, of the Minerals Development Act 1940 ,

(l) an exploration licence granted under section 8, a petroleum prospecting licence granted under section 9, a reserved area licence granted under section 19, or a working facilities permit granted under section 26, of the Petroleum and Other Minerals Development Act 1960 ,

(m) a consent pursuant to section 40 of the Gas Act 1976 ,

(n) a permission or approval granted pursuant to the Planning and Development Act 2000 .

(5) In this section-

"damage", in relation to the environment, includes any adverse effect on any matter specified in paragraphs (a) to (i) of subsection (2);

"statutory body" means any of the following:

(a) a body established by or under statute;

(b) a county council within the meaning of the Local Government Act 2001 ;

(c) a city council within the meaning of the Local Government Act 2001 .

(6) In this section a reference to a licence, revised licence, permit, permission, approval, lease or consent is a reference to such licence, permit, lease or consent and any conditions or other requirements attached to it and to any renewal or revision of such licence, permit, permission, approval, lease or consent."

27. The first thing to note is that the Oireachtas when enacting s. 4 clearly went further than that which was required by Article 6 (and, by extension, Annex 1) of the Convention in that the new rules apply to all types of enforcement actions in the planning and environmental sphere, and not simply those whose ambit would come within Annex 1.

28. Second, it is clear that from the recent important judgment of Hedigan J. in *Hunter v. Nurendale Ltd.* [2013] IEHC 430 that s. 4 plainly extends to enforcement proceedings designed to ensure compliance with the terms of a planning permission, such as, for example, proceedings under s. 160 of the 2000 Act brought by a private party. (Of course, enforcement proceedings brought by a statutory body or a Minister of the Government do not fall within the scope of this provision: see s. 4(3)(b).)

29. Judicial review proceedings do not, however, fall within the scope of s. 4 because such proceedings do not involve the type of standard enforcement action contemplated by this section. Section 6(a) of the 2011 Act provides, however, that the new s. 3 costs rules apply to:-

> "...proceedings in the High Court by way of judicial review or of seeking leave to apply for judicial review, of proceedings referred to in s. 4 or s. 5..."

30. I propose to return presently to a consideration of the possible implications of this sub-section, but it is first necessary to examine the other changes regarding costs in judicial review proceedings involving environmental matters contained in s. 50B of the 2000 Act (as amended).

The implications of the new s. 50B of the 2000 Act

31. A new sub-section regarding costs in judicial review had previously been introduced by s. 33 of the Planning and Development (Amendment) Act 2010 ("the 2010 Act"). This provided:-

"(1) This section applies to proceedings of the following kinds:-

(a) proceedings in the High Court by way of judicial review, or of seeking leave to apply for judicial review, of—

(i) any decision or purported decision made or purportedly made,

(ii) any action taken or purportedly taken, or

(iii) any failure to take any action, pursuant to a law of the State that gives effect to—

(I) a provision of Council Directive 85/337/EEC of 27 June 1985 to which Article 10a (inserted by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directive 85/337/EEC and 96/61/EC) of that Council Directive applies,

(II) 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, or

(III) a provision of Directive 2008/1/EC of the European Parliament and of the Council of 15

January 2008 concerning integrated pollution prevention and control to which Article 16 of that Directive applies; or

(b) an appeal (including an appeal by way of case stated) to the Supreme Court from a decision of the High Court in a proceeding referred to in paragraph (a);

(c) proceedings in the High Court or the Supreme Court for interim or interlocutory relief in relation to a proceeding referred to in paragraph (a) or (b).

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

(3) The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so—

(a) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,

(b) because of the manner in which the party has conducted the proceedings, or

(c) where the party is in contempt of the Court.

(4) Subsection (2) does not affect the Court's entitlement to award costs in favour of a party in a matter of exceptional public importance and

where in the special circumstances of the case it is in the interests of justice to do so.

(5) In this section a reference to 'the Court' shall be construed as, in relation to particular proceedings to which this section applies, a reference to the High Court or the Supreme Court, as may be appropriate".

32. This was the rule which was in force at the time of the commencement of the *JC Savage* proceedings and it was the rule which governed those proceedings. While, as we have seen, the relevant provisions of the 2011 Act had come into force by the end of August 2011, these new provisions did not apply to proceedings which were already in being such as *JC Savage*. Accordingly, therefore, although Charleton J. gave judgment on 22 November 2011, he was required simply to consider the terms of the amendments effected by the 2010 Act and he did not consider the possible impact of the 2011 Act.

33. It is true that the amendments effected in respect of s. 50B by s. 21 of the 2011 Act did not address the question of the scope of the application of that section. These changes were rather designed to permit a court to award costs to a successful applicant where either the actions of the respondent or any notice party had contributed to "contributed to the applicant obtaining relief." Here we may now address an issue of particular difficulty arising from the inter-operation of the 2010 Act and 2011 Acts. Perhaps the best way of summarising the problem is to endeavour to sum up the rather tangled state of affairs as the law evolved between 2009-2011.

34. First, Article 9(4) of the Aarhus Convention applies to all planning and environmental litigation (including applications for judicial review) concerning

decisions whose subject matter concerns the matters listed in Annex 1. In that respect, therefore, it would seem that the Oireachtas considered that some modification of the standard costs procedure was necessary in respect of those specific decisions in order to meet the requirements of Article 9(4).

35. Second, s. 50B was further amended by s. 21 of the 2011 Act in order to provide:

> "Section 50B of the Act of 2000 is amended by-
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> (a) substituting the following subsection for subsection (2):
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> "(2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986) and subject to subsections (2A), (3) and (4), in proceedings to which this section applies, each party to the proceedings (including any notice party) shall bear its own costs.",
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> and
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> (b) inserting the following subsection after subsection (2):
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> "(2A) The costs of proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant to the extent that the applicant succeeds in obtaining relief and any of those costs shall be borne by the respondent or notice party, or both of them, to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief.".

36. The difficulty which is presented is that in *JC Savage* Charleton J. held that the costs rules introduced by the new version of s. 50B by the 2010 Act do not apply to planning cases generally, but simply apply only when the *underlying project* comes

within the scope of Directive 85/337/EEC (as amended), Directive 2001/42/EC or Directive 2008/1/EC. Yet it is clear from the Long Title of the 2011 Act that the Oireachtas sought to approximate our national law with the requirements of Article 9(4) of the Aarhus Convention and, indeed, made further changes in the scope of application of the costs rules in order to ensure that this was done. It is true that in enacting the 2011 Act the Oireachtas did not materially change the scope of application of s. 50B, but then the decision in *JC Savage* was delivered in November 2011 some months after the enactment of the 2011 Act.

37. Here we come to the nub of the matter. Counsel for Kimpton Vale, Mr. Collins, has argued very forcibly that it is clear from the terms of the 2011 Act that the Oireachtas has at least tacitly recognised that it is impossible to draw a distinction in practice between environmental cases which come within the scope of Annex 1 of the Convention and those which do not. It was, he maintained, for this reason that the Oireachtas extended the new costs rules to all types of enforcement proceedings via s. 4 of the 2011 Act, irrespective of whether they came within the ambit of Annex 1 or otherwise. In other words, these costs rules apply equally to enforcement proceedings concerning the operation of a major waste management plant (which comes within the Convention) on the one hand or the failure on the part of the owner of a domestic dwelling to comply with the terms of a planning permission (which does not) on the other. This approach can also be seen in s. 6(a) of the 2011 Act which protects all judicial review applications arising from enforcement proceedings, howsoever arising.

38. It will be seen that this complex interaction of national law, EU law and the transposition of international agreements has combined to present a question of *stare decisis* in relation to statutory interpretation which is one of acute difficulty. In these

circumstances it perhaps behoves us to reconsider the entire issue as a matter of first principle.

39. First, it seems clear from the terms of the Aarhus Convention that the requirements of Article 9(4) apply to proceedings involving an application for judicial review of planning decisions where the underlying decision came within the scope of Annex 1 of that Convention.

40. Second, the language of s. 50B (as introduced by the 2010 Act) is broad enough to apply to judicial review proceedings seeking to quash any type of planning decision. The amendments to s. 50B were effected by s. 33 of the 2010 Act which is contained in Part II of that Act. But s. 1(2) of the 2010 Act provided that Part II of that Act should be collectively cited and construed with the 2000 Act and the amendments thereto. The effect of the collective citation and interpretation clause is that the 2000 Act and the subsequent amendments thereto are all deemed to be the equivalent of one Act, in this instance, the 2000 Act.

41. Here it is important to note that the judicial review proceedings seek to impugn a decision (or purportedly taken) under the 2000 Act. Nevertheless, as we have just seen, having regard to the collective citation and construction provisions of s. 1(2) of the 2010 Act, it was the 2000 Act which is deemed in law to have been the mechanism whereby the three EU Directives were transposed into national law. It is for this reason, therefore, that the present challenge is to the validity of an administrative decision taken "pursuant to a law of the State that gives effect to" the three Directives to use the language of the *passerelle* provisions of s. 50B(1)(a) of the 2000 Act. In other words, as the challenge is to a decision taken pursuant to the 2000 Act and as it is that Act which is deemed by s. 1(2) of the 2010 Act to be the Act that gives effect to the three Directives in question, the literal language of s. 50B(1)(a)

might suggest that the new "no costs" default rule thereby introduced applied to all judicial review proceedings involving a challenge to the validity of a decision taken under the 2000 Act, irrespective of whether it involved a decision taken under the authority of the three Directives or otherwise.

42. In *JC Savage* Charleton J. emphasised that the legislative changes effected by the 2010 Act were simply intended to ensure that the State complied with the ruling of the Court of Justice in *Commission v. Ireland:*

> "The legislative history of s. 50B includes the prior forms of s. 50 of the Act of 2000 and the amendments thereto before that new section was introduced and the decision of the European Court of Justice of 16th July 2009 in Case C-427/07, *Commission v Ireland.* Nothing in that legislative history shows any intention by the Oireachtas to provide that all planning cases were to become the exception to the ordinary rules as to costs which apply to every kind of judicial review and to every other form of litigation before the courts. The immediate spur to legislative action was the decision of the European Court of Justice in Case C-427/07. Nothing in the judgment would have precipitated the Oireachtas into an intention to change the rules as to the award of costs beyond removing the ordinary discretion as to costs from the trial judge in one particular type of case. Specified, instead, was litigation that was concerned with the subject matter set out in s. 50B (1)(a) in three sub-paragraphs: environmental assessment cases, development plans which included projects that could change the nature of a local environment, and projects which required an integrated pollution prevention and control licence. By expressing these three, the Oireachtas was not inevitably to be construed as excluding litigation concerned with anything else. Rather, the new default rule set out in

section 50B (2) that each party bear its own costs is expressed solely in the context of a challenge under any "law of the State that gives effect to" the three specified categories: these three and no more. There is nothing in the obligations of Ireland under European law which would have demanded a wholesale change on the rules as to judicial discretion in costs in planning cases.

The circumstances whereby the State by legislation grants rights beyond those required in a Directive are rare indeed. Rather, experience indicates that the default approach of the Oireachtas seems to be 'thus far and no further'. There can be exceptions, but where there are those exceptions same will emerge clearly on a comparison of national legislation and the precipitating European obligation. Further, the ordinary words of the section make it clear that only three categories of case are to be covered by the new default costs rule. I cannot do violence to the intention of the legislature. Any such interference would breach the separation of powers between the judicial and legislative branches of government. The intention of the Oireachtas is clear from the plain wording of s. 50B and the context reinforces the meaning in the same way. The new rule is an exception. The default provision by special enactment applicable to defined categories of planning cases is that each party bear its own costs but only in such cases. That special rule may exceptionally be overcome through the abuse by an applicant, or notice party supporting an applicant, of litigation as set out in s. 50B (3). Another exception set out in s. 50B (4) provides for the continuance of the rule that a losing party may be awarded some portion of their costs 'in a matter of exceptional public

> importance and where in the special circumstances of the case it is in the interests of justice to do so.'
>
> 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."

43. In essence, therefore, Charleton J. concluded that it was unlikely that the Oireachtas ever intended to have gone further that comply with the requirements of EU law. In many ways, his reasoning represents a powerful application of the standard mischief rule and the presumption against unclear changes in the law. It may be observed that in sharp contrast to the Long Title of the 2011 Act, the Long Title to the 2010 Act said nothing about giving effect to the Aarhus Convention, since it merely described the latter Act as one which sought "to amend and extend the Planning and Development Act 2000." One might also question why, if the Oireachtas sought to apply such a far-reaching change in the law to all categories of judicial review proceedings challenging decisions of planning authorities, it did so in this rather indirect and complicated fashion.

44. There is, however, another way of looking at this admittedly difficult question of statutory interpretation. I must confess that if the matter were *res integra* – and leaving the question of the possible effects of the 2011 Act aside for one moment – I would have inclined to a different view of the relevant statutory provision than that adopted by Charleton J. in *JC Savage*. In my view, for the reasons I have already endeavoured to set out, the bare language of s. 50B(1)(a) *is* sufficiently broad enough to embrace the application of all judicial review proceedings of planning decisions,

even if the method of doing this – via the *passerelle* clause ("...pursuant to a law of the State that gives effect to.....") in the sub-section – is unusual and indirect. If, however, this view were correct and the language of the sub-section was deemed to be sufficiently clear, then it would be unnecessary to look any further to the underlying purposes of the sub-section. As Denham J. put it in *Board of Management of St. Maloga's School v. Minister for Education* [2010] IESC 57, [2011] 1 I.R. 362:-

> "As the words of s.29 [of the Education Act 1998] are clear, with a plain meaning, they should be so construed. The literal meaning is clear, unambiguous and not absurd. There is no necessity, indeed it would be wrong, to use other canons of construction to interpret sections of a statute which are clear. The Oireachtas has legislated in a clear fashion and that is the statutory law."

Stare decisis and questions of statutory interpretation

45. Thus far we have been considering the matter as if the 2011 Act had not been enacted. If matters had remained as they were after the enactment of the 2010 Act, I would have unhesitatingly followed the judgment of Charleton J. in *JC Savage*, irrespective of any views I might have taken of the issue had the matter been *res integra*. That judgment was a reserved one and it fully considered a difficult question of statutory interpretation on which there is perhaps a good deal to be said on both sides. While the matter is of considerable importance, it does not raise fundamental constitutional questions touching on personal liberty such as in *Li v. Governor of Cloverhill Prison* [2012] IEHC 493, [2012] 2 I.R. 400. In these circumstances I would have considered myself bound to follow *JC Savage* for all the reasons touching

on *stare decisis* in matters of statutory interpretation which I ventured to set out in *AG v. Residential Institutions Redress Board* [2012] IEHC 492.

The effect of the 2011 Act

46. We now come to the most pressing question of all. To what extent has the decision in *JC Savage* been overtaken by the 2011 Act? It is true the 2011 Act has not amended the scope of application of s. 50B(1)(a), even if other related sub-sections were amended at the same time. The enactment, however, of the 2011 Act has now created the potential for anomaly should *JC Savage* remains the law.

47. Suppose, for example, A seeks to challenge the decision of An Bord Pleanála to grant planning permission to his neighbour, B, to enable the latter construct a dwelling which A maintains will obstruct his view. A contends that the decision is manifestly unreasonable and that the reasons given are inadequate. There is no suggestion that a decision of this kind would come within the scope of the Aarhus Convention and in the light of *JC Savage* it is plain that the ordinary costs rules would apply. If, however, A maintained that B had violated the terms of a planning permission by erecting a structure and brought enforcement proceedings against him as a result, then any subsequent judicial review application arising from a decision in the enforcement proceedings would be governed by the new costs rules even though this issue would not come within the scope of the Convention: see s. 6(a) of the 2011 Act.

48. The potential for anomaly cannot admittedly be denied. Where, moreover, the judicial review proceedings involves claims which partially fall within the three nominate categories in s. 50B and which partially fall without, there may well be difficulties in ascertaining when the new costs rules begin and end. While not denying

that the new costs rules operate somewhat haphazardly as a result of this patchwork of legislative changes, in the end, however, I myself obliged to conclude that the 2011 Act cannot be regarded as having made a decisive difference to this issue at least so far as the present case is concerned.

Conclusions

49. In these circumstances, I propose to follow the judgment of Charleton J. in *JC Savage* and conclude that the special s. 50B costs rules do not apply to the present application for judicial review. As Kimpton Vale would therefore open to the ordinary rules as to costs if it were to lose the proceedings and as it is (as I have already found) not otherwise in a position to meet the costs of the Board, I will accordingly accede to the latter request's for an order for security for costs under s. 390 of the 1963 Act.

50. I would accordingly invite the parties to address me regarding the form of any order for security for costs.

Approved

Gerard Hogan

4th October 2013