THE SUPREME COURT

S:LE:IE:2009:000376
High Court Record No: 2008 1319 P

S:LE:IE:2009:000387
High Court Record No: 2009 6638 P

MacMenamin J.
O'Malley J.
Baker J.

JAMES KENNY

Appellant

- AND –

THE PROVOST, FELLOWS AND SCHOLARS OF THE UNIVERSITY OF DUBLIN TRINITY COLLEGE

Respondent

Judgment of Ms. Justice Baker delivered the 26 day of August 2021

1. This judgment is given in respect of two separate appeals raising broadly similar but not identical questions of law and almost identical factual backgrounds. The appeals are of some antiquity and are part of litigation conducted over 20 years by Mr. Kenny against the respondents ("Trinity") and An Bord Pleanála ("The Board") concerning the development of student accommodation by the respondents near his principal private residence at Dartry,

County Dublin. These two appeals are the last appeals in the litigation against Trinity, details of which will be recited in the course of the judgment.

2. The appeals are from an order of Clarke J. (as he then was) made on 28 January 2009 for the reasons set out in his reserved judgment delivered on that day ([2009] IEHC 35) and from an order of Laffoy J. given on 23 July 2009, following an *ex tempore* ruling.

3. The core legal question which Mr. Kenny says arises in the two appeals concerns the award of costs against him in the litigation against Trinity and the basis on which those costs were assessed at taxation. As will become apparent, the High Court judgments had a broader scope and the question of the apportionment and measure of the costs was but one of a number of issues raised in the High Court proceedings, some of which sought to reverse or re-open finally determined decisions of the High Court and this Court made in earlier proceedings.

4. The primary legal basis of Mr. Kenny's argument derives from the principles first articulated in Article 9(4) of the Aarhus Convention, adopted into EU law by Article 10a of Directive 85/337/EEC inserted by Directive 2003/35/EC (now Article 11 of the codified Directive 2011/92/EU). Directive 85/337 as amended, was transposed into domestic law by s. 50B of the Planning and Development (Amendment) Act 2010 ("the Act of 2010"). One of the objectives underlying Aarhus and Directive 85/337 as amended is to encourage public participation in the protection of the environment, and that finds reflection in the principle that costs incurred by litigants in such litigation should not be so prohibitively expensive as to discourage participation by members of the public.

5. Ireland failed to transpose Directive 85/337 as amended by the transposition date of 25 June 2005, and Mr. Kenny claims that notwithstanding a failure of transposition he was still at some of the relevant times entitled to the benefit of an approach to certain costs orders made in his litigation against Trinity that would have reflected the principle that they not be prohibitively expensive. In the course of the hearing of the appeals the parties adopted, and I

now adopt for convenience, the shorthand "NPE". I will use the phrase "NPE principles" but without taking any view as to whether they are rules of law or procedure, or guiding principles.

6. This Court has delivered two judgments in the very recent past in the litigation commenced by Mr. Kenny which have some relevance to the matters in these appeals. The appeal of Mr. Kenny against the dismissal by the High Court of proceedings against Trinity pursuant to s. 160 of the Planning and Development Act 2000 (as amended) ("the Act of 2000") was dismissed: see the judgment of O'Malley J. dated 14 August 2020 [2020] IESC 54; and the dismissal of the appeal against an order for sale of the principal private residence of Mr. Kenny and his wife by Trinity which had registered its taxed costs as a judgment mortgage. That resulted in the making of a conditional order for sale of the on 21 December 2020: [2020] IESC 77.

7. In order to understand the context in which this judgment is given it is necessary to set out an overview of the history of the development at Dartry, of the litigation between Mr. Kenny and Trinity, and other litigation also concerning the development where the Board was the respondent. For convenience I set out in the appendix a list of the litigation.

The planning permission

8. In November 1999 Dublin City Council granted permission to Trinity for the construction of three student halls of residence at a site in Dartry. The decision was appealed and the Board in August 2000 granted planning permission subject to 19 conditions. Performance of some of those conditions was then the subject of a second decision by Dublin City Council which in January 2002 issued an order that the documents and plans submitted demonstrated satisfactory compliance with the conditions. Construction then commenced, and the development was finally completed in January 2004.

9. For the purpose of the planning application, Trinity submitted an EIS stated to be made in compliance with its obligations under Directives 85/337 and 97/11. Mr. Kenny has at all

material times maintained that the EIS was inadequate in particular in its treatment of the location and design for the centralised boiler house within the development and in its description of the emissions stack for that boiler.

10. Mr. Kenny commenced numerous proceedings against Trinity relating to the development. These fall into three broad categories: proceedings to reverse the planning permission by judicial review of the decision of the Board; proceedings for enforcement under s. 160 of the Act of 2000; and, proceedings challenging the decision of Dublin City Council that Trinity had complied with the conditions in the planning permission. Trinity was a party in some of these proceedings, and in some was the only named defendant/respondent; in others it was named either as notice party or co-respondent to proceedings where the Board was the primary respondent/defendant. The litigation by then was fairly described by Fennelly J. as a "marathon".

11. The costs of four proceedings are relevant to these appeals which I now describe.

The first costs order: the permission judicial review: Record No. 2000/532 JR

12. The first proceedings were commenced in October 2000 when leave was sought in proceedings bearing High Court Record No. 2000/532 JR to apply for judicial review of the permission, in which the Board was named as respondent and Trinity as notice party. McKechnie J. in his written judgment dated 15 December 2000 (*Kenny v. An Bord Pleanála (No. 1)* [2001] 1 IR 565) refused leave to apply for judicial review and later refused leave to appeal that decision on 2 March 2001 (*Kenny v. An Bord Pleanála (No. 2)* [2001] 1 IR 704).

13. The relevant argument was that concerning the boiler system, and Mr Kenny now says he argued in the leave application that the emissions from the boilers had not been adequately assessed by the Board or dealt with in the EIS, and relies on this proposition to now say that NPE principles should have been engaged. A reading of the judgment of McKechnie J. shows that the primary argument regarding the boilers concerned their location as the developer had

at the oral hearing proposed a decentralised system, and the EIS was prepared on the basis that the system would be centralised. The principles presenting were national judicial review principles of adequacy of information or unreasonableness, and no environmental reason from EU law concerning emission levels was raised. As McKechnie J. in his second judgment said no issue of regarding the transposition provision was raised and no point of European law arose in the judicial review.

14. The leave proceedings had then been conclusively determined and the challenge to the planning permission on the grounds of an inadequate EIS can therefore be said to have concluded and the planning permission was unassailable on that ground.

15. Costs were awarded to Trinity and to the Board by McKechnie J. in respect of the application for leave and the application for leave to appeal.

16. Trinity's costs were subsequently taxed on 7 June 2002 at €123,238.18. Mr. Kenny did not attend the taxation or challenge the decision of the Taxing Master in regard to Trinity's costs.

17. He did seek to argue NPE in respect of the Board's costs in an *ex parte* application to commence proceedings on 23 July 2010, but this was refused by Cooke J. ([2010] IEHC 321), who said:

> "the complaint made to the European Commission is incapable of producing a result which has any bearing upon the validity of a costs order obtained in 2001."

The complaint to the Commission formed the basis on which Mr. Kenny had in 2009 sought an injunction before Laffoy J. in the proceedings discussed below.

The second costs order: compliance judicial review: Record No. 2002/383 JR

18. Mr. Kenny then instituted proceedings concerning the compliance decision of Dublin City Council in which Trinity was a notice party. Murphy J. refused to grant judicial review

and awarded costs against Mr. Kenny in a judgment given on 8 September 2004 ([2004] IEHC 381). Mr. Kenny appealed the decision to this Court.

19. Trinity's costs in the High Court were taxed at €289,666 on 12 January 2007.

20. The appeal to this Court was dismissed by Fennelly J. on 5 March 2009 ([2009] IESC 19) on the basis that the application was without substance and, even if there was some merit to it, it would fail for delay.

21. Mr. Kenny sought NPE protection in the hearing before this Court in relation to the costs of that appeal and the costs of the High Court on 18 March 2009 but this argument was rejected by Fennelly J. on the grounds that neither the Aarhus Convention nor Directive 85/337 as amended were applicable in domestic law at that time and the costs of the appeal were awarded against Mr. Kenny.

22. Mr. Kenny did attend the hearing of the taxation on 20 July 2010 and unsuccessfully sought NPE protection from the Taxing Master. He did not seek to review the decision of the Taxing Master.

23. Trinity's costs in the Supreme Court were taxed at €79,363. On 24 February 2012 the High Court rejected Mr. Kenny's challenge to this decision of the Taxing Master ([2012] IEHC 77). Those costs are not relevant to these appeals.

The third costs order: second set aside proceedings: Record No. 2003/7926P

24. Mr. Kenny then commenced what became known as the "second set aside proceedings" on 3 July 2003 again seeking to set aside the judgment of McKechnie J. and seeking injunctive relief, on this occasion because he questioned whether the evidence given to McKechnie J. was "truthful", and again on the basis that the EIS was invalid. Those proceedings were listed along with the s. 160 proceedings and the compliance judicial review over a number of days in March 2004. Murphy J. by order of 26 March 2004 struck out the proceedings and that order was appealed to this Court by Mr. Kenny (Appeal No. 193/04).

25. Costs of the High Court hearing were awarded to Trinity on 27 June 2005, and taxed at €69,009.20 on 12 January 2007.

26. Mr. Kenny withdrew his appeal to this Court on 10 April 2019.

The fourth costs order: first set aside proceedings: Record No. 2002/14269P

27. Mr. Kenny instituted fresh proceedings on 7 November 2002 but this time against Trinity in the light of certain changes he alleges were made to the locations of the boilers and other factual differences he alleges were apparent between the construction work from the ground and the plans and drawings submitted with the planning permission and the compliance application, and in which he made an allegation that the evidence put forward by Trinity was fraudulent, and also repeated the claim that the EIS was inadequate. Those proceedings were struck out as disclosing no cause of action by this Court in an *ex tempore* judgment by Murray J. (as he then was) on 20 June 2003, reversing the decision of Finnegan P. in the High Court.

28. On 27 July 2004 costs were awarded against Mr. Kenny for the High Court and Supreme Court hearings: €40,533 and €42,480 respectively. The decision of the Taxing Master was reviewed by the High Court and upheld by Quirke J. on 17 June 2005 ([2005] IEHC 203) only days before the transposition date. As is apparent from the written judgment, Mr. Kenny sought to challenge the measurement of costs not on the basis of any broad principle of NPE but rather that the proceedings were in substance, and ought to be taxed, as "a little motion". Quirke J. rejected this, determining that Trinity's application to dismiss Mr. Kenny's proceedings was of considerable gravity and could not have been determined without consideration of all the issues which had come before the court in earlier judicial review proceedings and which arose in the subsequent plenary proceedings. The costs of this High Court challenge were awarded against Mr. Kenny and on 12 January 2007 these were taxed at €10,382.

29. It is that order which is the subject of the first appeal here under consideration.

30. On 15 October 2007 this Court reversed the order of Murray J. on the grounds of objective bias, with the consequence that the costs orders of 27 July 2004 were also reversed, and the proceedings were reinstated ([2007] IESC 42).

31. During the rehearing of the Supreme Court appeal in 2008, Mr. Kenny sought NPE protection under the Aarhus Convention and Directive 85/337 as amended.

32. Judgment was delivered in the appeal on 10 April 2008 by Fennelly J. who dismissed the proceedings as failing to disclose a reasonable cause of action: *Kenny v. Trinity College Dublin* [2008] IESC 18. The Court found that the case sought to be made by Mr. Kenny did not meet the standard for setting aside a judgment on the grounds of fraud and that the proceedings disclosed no reasonable cause of action, and were frivolous and vexatious. The proceedings were dismissed on these grounds. Costs were awarded against Mr. Kenny for the High Court and Supreme Court hearings and the judgment made no reference to Mr. Kenny's request for NPE protection.

33. On the same day judgment was given in another appeal concerning the Board's costs in *Kenny v. An Bord Pleanála* [2008] IESC 17, not relevant to these appeals.

34. Trinity was awarded its High Court costs as previously taxed at €40,533. On 20 July 2010, Trinity's costs for the second Supreme Court hearing were taxed at €40,945, following the Taxing Master's rejection of Mr. Kenny's request for NPE protection.

35. Where appropriate in the course of this judgment I will refer to these orders as "the four costs orders". All four costs orders were in issue in the decision of Clarke J., the first appeal here dealt with. Three of them, numbers 1, 2 and 3 are the subject of the appeal from the order of Laffoy J., the second appeal here dealt with.

<u>Other proceedings not directly the subject of these appeals</u>

36. Although not directly part of these appeals other proceedings are part of the context in which the appeals were heard.

37. Proceedings under s. 160 of the Act of 2000 were commenced in July 2002 by Mr. Kenny against Trinity and these proceedings had as their focus an argument that Trinity had either then breached, or had evidenced an intention to breach, the conditions in the planning permission. Those proceedings were struck out by Feeney J. in April 2011 ([2011] IEHC 202) and this Court in a judgment delivered by O'Malley J. on 14 August 2020 dismissed Mr. Kenny's appeal ([2020] IESC 54**)**.

38. A third set aside proceedings were commenced by Mr. Kenny on 5 October 2005 who sought to set aside the High Court's decision in the Permission Judicial Review on the grounds of alleged fraud by Trinity in the altering of the photomontage evidence.

39. The proceedings were dismissed by Clarke J. on 30 March 2006 on the grounds that they were bound to fail and he also made a limited Isaac Wunder order against Mr. Kenny ([2006] IEHC 131), on the grounds that the proceedings were the third unsuccessful attempt to set aside the order of McKechnie J. He expressly said the order did not preclude the concluding of appeals then properly before the courts, and explained that its effect was to prevent the commencement of further proceedings against the parties without leave of the court. Clarke J also noted that the order did not preclude Mr Kenny from seeking leave to bring judicial review on new grounds provided he could persuade the court that an extension of time should be granted: see paras. 41 to 49 of the judgment.

40. Mr. Kenny appealed and this Court (*per* Fennelly J.) dismissed both aspects of the appeal in judgments delivered on 13 December 2011 and 16 December 2011 respectively**.**

41. A costs order was made in favour of Trinity to be taxed in default of agreement. The costs were never agreed or referred to taxation.

Complaints to the EU Commission

42. On 23 April 2009 Mr. Kenny filed a complaint with the EU Commission concerning *inter alia* the failure of Ireland to recognise or enforce the principles of NPE from the Aarhaus

Convention and/or under the Directive. The Commission requested comments from Ireland in a letter of 27 April 2010 and in correspondence directly with Mr. Kenny on 15 December 2010 said it was "not satisfied that the measures taken by [Ireland] to address the judgment in Case C-427/07 also addresses the issue you have raised because, *inter alia*, the new measures only relate to future litigation and not the litigation which was the subject of the complaint". The Commission indicated that it was then closing the engagement with Mr. Kenny "with a view to taking the next available step, which would be the launching of an infringement case under Article 258 of the Treaty on the Functioning of the EU". It seems those infringement proceedings did commence and it is not clear what happened thereafter. What is clear however for the purposes of this judgment is that the enforcement proceedings were brought against the State of Ireland and not against Trinity.

The present appeals

43. It is two proceedings instituted by Mr. Kenny against Trinity in February 2008 and July 2009 that are the focus here.

44. The respondents brought a motion dated 5 February 2021 to dismiss the appeals on the grounds that they were moot, or in the alternative that they had been withdrawn or abandoned by the appellant, or that the appellant had inexcusably and inordinately delayed in prosecuting the appeal.

45. The two appeals and the motion were heard together.

46. Mr. Kenny was not legally represented at these appeals but was ably supported in his written and oral submissions by one of his adult children. He was however represented by solicitor, senior and junior counsel in many of the proceedings relating to the development over the years and in the very recent past.

The first appeal: the application to Clarke J. for leave to commence plenary proceedings

47. In the course of argument on this appeal these proceedings were referred to as "the costs set aside proceedings".

48. Mr. Kenny purported to commence proceedings on 18 February 2008 by plenary summons bearing High Court Record No. 2008/1319P, which was called in the course of the hearing and will be called in this judgment the "costs set aside proceedings". The relief pleaded is the setting aside of the four costs orders, and ancillary interlocutory relief to restrain enforcement of those orders until there was "a rehearing" of the judicial review which had been heard and rejected by McKechnie J. in 2000 (*supra* para. 12).

49. Because of the Isaac Wunder order Mr. Kenny needed leave of the court to commence proceedings and it is the refusal of Clarke J. to authorise the commencement of proceedings that is here appealed.

50. The plenary summons sought an order setting aside the four orders for costs made in favour of Trinity.

51. The application for leave to institute and maintain the proceedings was heard by Clarke J. That application itself had a somewhat long history and resulted in two written judgments of Clarke J., one delivered on 17 October 2008 ([2008] IEHC 320) and the later judgment delivered on 28 January 2009 ([2009] IEHC 35). The second judgment arose from the fact that, while the trial judge had not been persuaded by Mr. Kenny that he had a case which was not bound to fail, he gave liberty to file a draft revised plenary summons and a draft statement of claim in the light of the submissions made by Mr. Kenny at the hearing of the application where the case he wished to argue had evolved.

52. The statement of claim proposed by Mr. Kenny had as its focus the prevention of the enforcement of the four costs orders and the basis on which it was proposed to plead such relief was that the underlying planning permission was invalid by reason of the stated grounds, these

grounds were derived mostly from the Directive and the EIS . All of the primary pleas relate to the validity of the planning permission. Inevitably the question arose whether the proposed proceedings were bound to fail or were, in truth and in substance, an impermissible attempt to challenge the planning permission in respect of which a final judgment had been given by McKechnie J. on 2 March 2001.

53. Clarke J. took the view that the intended challenge of Mr. Kenny was directed to the planning permission, and in essence was a challenge to the decision of the Board, not a party to those intended proceedings. He considered that, as the validity of the planning permission had been conclusively determined, Mr. Kenny ought not to be granted permission to commence fresh proceedings which had as its primary purpose a challenge to that valid permission.

54. Another element of the decision of Clarke J. concerned the consequences of the decision of the CJEU in *Commission v. Ireland,* Case C-215/06, ECLI:EU:C:2008:380 ("*Derrybrien*"). Irish legislative provisions require that an application to challenge a planning permission be brought under s. 50(8) of the Act of 2000, and subject to the time limits in that section. Clarke J. considered that plenary proceedings intended to be commenced by Mr. Kenny did not comply with that procedural obligation, and that a challenge by plenary action was not permissible. The judgment of the CJEU recognised the procedural autonomy of the Member States at para. 59 and the wide measure of discretion in defining the procedures to be adopted before the courts of each Member State, subject only to the requirement that there be an effective remedy at national level.

55. For the purposes of this appeal Mr. Kenny does not argue that Clarke J. was incorrect in those two substantive conclusions, and his appeal of the decision of Clarke J. relies on the argument that he erred in refusing to permit Mr. Kenny to challenge the failure to adopt an NPE approach to the four costs orders.

56. The statement of claim runs to 26 numbered paragraphs of some complexity. Most of it makes no reference to the apportionment or measurement of costs, but some paragraphs do. Paragraph 18 pleads that the procedures adopted by Trinity restricted his access to effective enforcement of environmental law and *inter alia* that Member States are required by reason of Article 10(a) of Directive 85/337 to provide access to procedures in environmental law which were not prohibitively expensive.

57. Paragraph 19 sets out the intended plea that had McKechnie J. applied EU law in the light of the decision of the CJEU in *Derrybrien* that a consequence would have been that no costs would have been awarded against Mr. Kenny, "a blameless third party […] who acted in the public interest".

58. The prayers in the intended statement of claim run to nine in number, the first being a prayer for an order setting aside, and an order restraining execution on foot of, the costs orders. The detailed plea at paragraph 3 of the prayer seeks an injunction restraining the execution of the costs orders pending the carrying out of an EIA of the Trinity development by Dublin City Council and the Board, or in the alternative pending a further rehearing of the judicial review proceedings against the planning permission.

59. There is no prayer for relief that the award of costs or their amount be reconsidered in the light of NPE principles. Paragraphs 18 and 19 are the only places in the amended draft statement of claim in which NPE rights are mentioned either directly or tangentially and none of the nine prayers in the draft statement of claim sought any relief arising from those rights.

60. The relief sought is a reversal of the costs order because the planning permission was invalid in the light of an alleged infirmity in the EIS, not on NPE grounds.

61. The pleadings identified the parameters, and the legal and factual basis of the claim, but I would not be prepared to determine this appeal solely in reliance on the limitation on the pleadings, as the absence of a prayer in reliance on NPE principles could be dispositive of the

appeal, as I am mindful of the obligation of national courts to be vigilant in the protection of EU legal principles within the context of national procedural autonomy. I therefore propose to consider whether Mr. Kenny did in fact argue the case before Clarke J., at least in part on NPE principles.

62. For the purposes of the appeal this Court has been furnished with the submissions of Mr. Kenny to Clarke J. following the delivery of his first judgment on 17 October 2008 which gave him an opportunity to present a basis for the proposed litigation. As noted Mr. Kenny's focus was a failure of the State, recognised in the CJEU judgment in *Derrybrien*, that the failure to transpose Directive 85/337 as amended by Council Directive 97/11 meant that there were inadequacies in the Trinity EIS. He relies on the primacy of EU law and the obligation of the domestic courts to protect and defend his rights under EU law in the case of a conflict with domestic law. His argument is twofold: Trinity knowingly submitted a deficient EIS or the Board deliberately chose to overlook Trinity's omissions from its EIS and did not meet its obligations under the EU environmental directives.

63. I have concluded that Mr. Kenny's detailed and lengthy submissions were concerned entirely with the lawfulness of the development and the adequacy of the matters addressed in the EIS furnished by Trinity.

64. Further, from my review of the draft amended statement of claim and the submissions made by Mr. Kenny, I conclude that his argument was that the planning permission was invalid as a result of the deficiencies in the EIS. At no point in the submissions does he rely on any NPE argument, and although the proceedings did seek to set aside the four costs orders it was not on the basis that they did not meet NPE/Aarhaus Convention principles, but because the orders should never have been made as the permission judicial review was wrongly decided.

The Notice of Appeal: 376/09

65. In his oral arguments and written submissions made on this appeal Mr. Kenny's focus is on NPE and he seeks to reverse the decision of Clarke J. on the grounds that Irish law was inadequate to protect his NPE rights, that he has as a result suffered great injustice, that his right to make a challenge to a development on environmental grounds was thereby restricted and that he was denied an effective remedy at national law.

66. The notice of appeal pleads 32 grounds of substance, the vast bulk of which concern the allegation that the EIS which Trinity had submitted for the project was insufficient as a matter of European law. Paragraph 11 of the notice of appeal pleads that "new evidence" showed that Trinity had "materially misrepresented part of its planning proposals", and that McKechnie J. had erred in the view he took that the Board had adequately considered the environmental impact of the proposed development. Paragraph 12 pleads that Clarke J. was wrong to conclude that his proceedings were misconceived and improperly constituted because Mr. Kenny was seeking to challenge the validity of the original grant of planning permission. Paragraph 15 again refers to "new evidence" which it is pleaded would have been material to the decision of McKechnie J. and which it is pleaded ought to have been permitted to be ventilated in fresh proceedings. Paragraph 18 and 19 are general pleas that the court had failed to have regard to the appellant's rights including under Article 6(1) of the ECHR and of the Community treaties. Paragraph 22 and 23 mention fresh and previously unavailable evidence. Paragraph 25 pleads the primacy of EU law.

67. Costs are mentioned in eight paragraphs of the notice of appeal. Paragraph 14 pleads that Clarke J. erred in holding that Mr. Kenny would have no basis to seek to overturn various costs orders, even if the planning permission was valid. Paragraphs 26 and 27 make further reference to the costs orders: a plea at paragraph 26 that Clarke J. erred in concluding that Mr. Kenny had not established any basis for challenging the costs orders; and at paragraph 27 a

plea that the costs orders should be set aside on the grounds of fraud and that Clarke J. erred in failing to consider that context in the conclusion that he drew from the draft pleadings. Paragraph 28 pleaded that Clarke J. erred in not permitting the appellant to "go behind costs orders" and that that was a failure to adopt a purposive approach to the legal principles as required by Community law. Paragraph 29 pleads that Clarke J. was wrong that the challenge to the costs orders was bound to fail. Paragraph 30 pleads that Clarke J. was wrong to ignore the complaint which Mr. Kenny had made to the Commission concerning the planning process and that this was a basis on which injunctive relief was available to prevent the enforcement of the costs orders. Paragraph 31 referred to the "postponement of the enforcement of costs orders". Paragraph 32 pleads that Clarke J. was incorrect to hold that, as the proper procedural approach was judicial review and not plenary action, the claim was procedurally misconceived.

68. None of the pleas relate specifically to the allocation of or the quantum or measure of the costs, and the challenge to the costs orders were made expressly on the grounds that the judgment of McKechnie J. was wrongly decided, and as a consequence the planning permission and the decision of Dublin City Council that Trinity had complied with the conditions set out in the Board's planning permission were flawed as a matter of EU law and on account of the failure of Trinity to accurately set out the relevant facts before those bodies.

69. The notice of appeal therefore, insofar as questions of costs were concerned, had as its focus a claim that Clarke J. had erred in refusing to permit the institution of the intended proceedings because the decisions in the permission judicial review and the compliance judicial review were wrong in law. There is no express claim of NPE rights, nor am I able to extrapolate or infer from the pleaded grounds of appeal that Mr. Kenny's real focus was a challenge not to the planning permission but to the fact that, because costs were awarded against him, or that the costs were or had been assessed at a level which made it prohibitively expensive for him to

engage in the litigation, there existed a barrier to him as a private citizen bringing environmental litigation.

The argument made at the hearing of the appeal

70. Written and oral submissions were made by Mr. Kenny at the hearing of the appeal and he now relies entirely on NPE rights, the obligations of the courts to give effective judicial protection to that principle under Directive 85/337 as amended and/or under Article 47 of the Charter of Fundamental Rights of the European Union. He argues that the failure of the Irish State to transpose Directive 85/337 as amended by the deadline of 25 June 2005 has resulted in an injury and an injustice to him because costs in those cases remained before the courts between 2005 and the enactment of s. 50B of the Act of 2000 introduced by the Planning and Development (Amendment) Act 2010, commenced on 28 September 2010. His focus here is events and costs between 2005 and 2010, and he makes a general argument that s. 50B of the Act of 2000 (as amended) is inadequate to make proper provision for the protection of NPE rights for litigation which happened, or presumably costs which were assessed, before that legislation came into force.

71. He makes the argument that the costs orders the subject of the appeal from the order of Clarke J. were not assessed from the perspective of NPE protection, and that they are therefore wrong in law.

72. In his written and oral submissions to this Court on appeal, Mr. Kenny was careful to say that he does not now wish to challenge the planning permission.

73. It is fair to say that one of the primary bases on which Mr. Kenny now makes his argument regarding NPE rights derives from the decision of the CJEU in *Klohn v. An Bord Pleanála*, Case C-167/17, ECLI:EU:C:2018:833 ("*Klohn*"). That judgment has established a number of principles on which he relies, primarily that from para. 47 of the judgment that considerations regarding costs in proceedings which were ongoing as of 25 June 2005 are

entitled to NPE protection, even costs incurred in that litigation before that date. Mr. Kenny recognises that the CJEU was careful to exclude from that principle any costs orders which have the force of *res judicata* and which had become final before that date.

74. It is useful to digress here to consider the evolution of NPE principles and the judgment of the CJEU in *Klohn*.

NPE Principles generally

75. It is necessary to first say something about the evolution about NPE principles in the case law of the CJEU.

76. The primary source of the NPE principle is Article 10a of Directive 85/337 inserted by Article 3(7) of Directive 2003/35. Article 10a of Directive 85/337 was reproduced in Article 11 of the codified Directive 2011/92. Mr. Kenny also relies on Article 9(4) of the Aarhaus Convention which was given effect by Directive 85/337 as amended. The broad scope of Directive 85/337 was to enable public participation in environmental protection and it is only the part of the Directive which relates to costs that falls for consideration here. The relevant principle may be summarised as meaning that Member States shall ensure that members of the public have access to a means to challenge the substantive or procedural legality of decisions, acts or omissions to which the Directive applies, broadly and for present purposes, those are likely to have a significant effect on the environment, emissions, pollutants, the creation of nuisances, and the elimination of waste.

77. Article 10a provides in its material part:

> "Any such procedure shall be fair, equitable, timely and not prohibitively expensive."

78. In *Commission v. Ireland*, Case C-427/07, ECLI:EU:C:2009:457 ("*Commission v. Ireland*") delivered on 16 July 2009 where the CJEU held that while the NPE principle in Article 10a does not have direct effect, once the transposition date had passed national courts

were obliged to have regard to the principle *inter alia* when considering liability for or the measurement of costs in the environmental litigation to which the Directive applied.

79. The fact that the principle is not capable of direct effect is apparent from a number of judgments, including *Commission v. Ireland*, *North East Pylon Pressure Campaign v. An Bord Pleanála,* Case C-470/16, ECLI:EU:C:2018:185 ("*North East Pylon*") and more recently in *Klohn,* and in domestic Irish decisions in *Appleridge Developments Ltd. v. Ní Ghruagáin* [2019] IESC 34. As a result of the judgment in *Klohn* with regard to litigation which had not concluded, or costs orders which had not been finally and conclusively determined whether as to quantum or entitlement, must have regard to the obligation of national courts to interpret national law in conformity with EU law.

80. It is clear that the NPE principle does not prevent a costs order being made, and in *Edwards v. Environment Agency,* Case C-260/11, ECLI:EU:C:2013:221 ("*Edwards*") the CJEU confirmed a number of factors that must be taken into account in the allocation of costs. In very clear terms at para. 60 of *North East Pylon* the CJEU said that the requirement "in no way prevents national courts from ordering an applicant to pay costs" (albeit there what was under consideration was Article 11(4) of Directive 2011/92, and factors such as the nature of the challenge, whether it is frivolous or vexatious, what is at stake for the individual and for the protection of the environment are factors to which regard may be had in allocating costs.

81. Only those costs relevant to the obligations under Directive 85/337 as amended require that the NPE principle be applied and this was further clarified in *North East Pylon* at para. 58 so that the principle is applicable to national and European environmental legal provisions:

> "Article 9(3) and (4) of the Aarhus Convention must be interpreted as meaning that, in order to ensure effective judicial protection in the fields covered by EU environmental law, the requirement that certain judicial procedures not be prohibitively expensive applies to the part of a challenge that would not be covered by that requirement, as it

> results, under Directive 2011/92, from the answer given to the second question, in so far as the applicant seeks, by that challenge, to ensure that national environmental law is complied with. Those provisions do not have direct effect, but it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with them."

82. This is apparent too from *Conway v Ireland* [2017] IESC 13, [2017] 1 IR 53 and *SYM Fotovoltaic Energy v. Mayo County Council* [2018] IEHC 245 where some of the challenges related to domestic judicial review principles such as the failure to give reasons and those parts of the challenge were excluded from considerations of the NPE principle. It is not necessary to decide the present appeals on this basis.

83. The central question in the present case however, is the extent to which decisions that have become final may be called into question in the light of the decision in *Klohn* that the NPE principle applied to litigation or decisions made after 25 June 2005.

Klohn v. An Bord Pleanála

84. It is necessary then to consider in more detail the CJEU's decision in *Klohn* which provides the interpretative lens through which the time question may be properly understood.

85. Following unsuccessful judicial review proceedings against An Bord Pleanála costs were awarded against Mr. Klohn in favour of the Board. At the hearing before the Taxing Master, Mr. Klohn had argued that pursuant to Article 3(8) and Article 9(4) of the Aarhaus Convention, as well as Article 10a of Directive 85/337 as amended, the costs should be assessed on the basis that they should not offend NPE principles. The Taxing Master disagreed and Mr. Klohn then commenced proceedings for review of his decision.

86. Hedigan J. delivered judgment in the High Court on 11 May 2011 ([2011] IEHC 196) on the review of the Taxing Master's decision. He accepted the argument made by the Board that Article 10a of Directive 85/337, as amended, was not applicable to the proceedings if the

planning application was made before the transposition date. Hedigan J. also considered that the proceedings brought by Mr. Klohn were misconceived as his proper remedy was not a review of the decision of the Taxing Master under s. 27(3) of the Courts and Court Officers Act 1995 but rather an appeal of the decision of McMahon J. awarding costs against him. He concluded that Article 10a of Directive 85/337 did not apply retrospectively to those proceedings instituted on 24 June 2005, a day before the transposition date. He also rejected the argument that the Directive was directly effective and dismissed the appeal.

87. That decision was appealed to this Court which made a reference to the CJEU under Article 267 TFEU asking whether the NPE provisions of Article 10a of Directive 85/337, as amended, can have any application when the development consent challenged in the proceedings was granted prior to the latest date for transposition and where the proceedings challenging the development were commenced prior to that date. It also asked whether the national courts had an obligation, when considering an order for costs in proceedings to which the Directive applied, to ensure that any costs order does not render the proceedings "prohibitively expensive" either because the relevant provisions of the Directive are directly effective, or because the national court is required to interpret its procedural law in a manner, to the fullest extent possible, which fulfils the objectives of Article 10a. The reference also asked whether, where an order for costs is unqualified and would, in the absence of any appeal, be regarded as final and conclusive as a matter of national law, does EU law require that either a Taxing Master charged in accordance with national law with the task of quantifying the amount of costs reasonably incurred by the successful party or a court asked to review a decision of such a Taxing Master, nonetheless has an obligation to depart from otherwise applicable measures of national law and determine the amount of costs to be awarded in such a way as ensures that the costs so awarded do not render the proceedings prohibitively expensive?

88. The CJEU gave judgment in *Klohn* on 17 October 2018 and held that Article 10a of Directive 85/337 does not have direct effect as it did not have the sufficient precision to be directly effective. However, the CJEU considered that because the national courts of a Member State are required to interpret national law to the fullest extent possible in a manner consistent with the objective of the Directive, once the time limit for transposition had expired, costs questions in proceedings which were ongoing before the transposition date law must be assessed in so far as possible in a manner compatible with the Directive.

89. At para. 47 of the judgment of the CJEU in *Klohn* the court said:

> "[…] [T]here is no need to distinguish between costs depending on whether they have in practice been incurred before or after the end of the transposition period, provided that the decision on the allocation of costs has not been taken as at that date and that therefore the obligation to interpret national law in conformity with the not prohibitively expensive rule is applicable to that decision […]."

90. At paras. 63-64, the CJEU also explored the limits of the interpretation of national law in conformity with the Directive and held that EU law does not preclude *res judicata* operating such that judicial decisions which have become final after all rights have been exhausted or after expiry of time limits can no longer be called into question, and referred in particular to *Klausner Holz Midersachsen*, Case C-505/14, ECLI:EU:C:2015:742 (at para. 38), and *Di Puma v. Consob*, Case C-596/16, ECLI:EU:C:2018:192 (at para. 31).

91. The conclusion of the CJEU was that the provisions of Article 10a of Directive 85/337 as amended are to be interpreted in such a way that national courts ought to apply the NPE principle to any procedures ongoing at the date at which transposition should have occurred in national law and that there is an obligation to interpret national law in conformity with a directive that a Member State had failed to transpose once the transposition date had passed.

Conclusion from EU jurisprudence

92. The principle that emerges from *Klohn* is that even where proceedings have been commenced before 25 June 2005, or the costs incurred before that date, any decision regarding those costs, whether it be as to the allocation of costs or the measure of costs, must be made in a way that is consistent with the NPE principle.

93. In practical terms that means that costs proceedings brought before 25 June 2005, the deadline for transposition into national law of Directive 85/337 as amended, could still be subject to NPE principles once they had not concluded before that date. However, the principle of non-retroactivity and legal certainty are not displaced. Of particular relevance in the present case is that the CJEU confirmed that the principle of *res judicata* must mean that judicial decisions which have become final after all rights of appeal or review have been exhausted, or because of the expiry of time limits for appeal or review can no longer be called into question, even in the light of NPE principles. EU law could not require national law to be interpreted *contra legem*. The Taxing Master or a court on review could in a suitable case consider the quantum or measure of costs applying NPE principles when that had not already been conclusively determined judicially.

94. Advocate General Bobek's Opinion in *Klohn v. An Bord Pleanála*, Case C-167/17, ECLI:EU:C:2018:387 expressed the matter in clear terms: that a Taxing Master or a court reviewing a decision of a Taxing Master has an obligation to apply Article 10a of Directive 85/337 as amended according to which costs must not render proceedings prohibitively expensive.

Res Judicata

95. Whether decisions of domestic courts which have become final either because all avenues of appeal have been exhausted or because an appeal or review is no longer possible on account of domestic time limits has been the subject of a number of decisions of the CJEU

which I propose to briefly outline. In *Kapferer v. Schlank*, Case C-234/04, ECLI:EU:C:2006:178 the CJEU held that the principle of cooperation does not require a national court to set aside a final judicial decision if that decision would be contrary to Community law and that that approach was necessary "to ensure both the stability of the law and legal relations and the sound administration of justice". The CJEU stated that judicial decisions that had become "definitive after all rights of appeal have been exhausted or after the expiry of time-limits provided for […] can no longer be called into question" (para. 20).

96. The matter was considered again in *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, Case C-119/05, ECLI:EU:C:2007:434 which restated the obligation on national courts to apply Community law even when this conflicted with national legislation. The Court stated that the primacy of Community law may in certain cases in which the Commission had exclusive competence require that aid granted in breach of Community law could be recovered even if in so doing the national court would be setting aside or not applying a final order of a domestic court.

97. In *Pizzarotti v. Comune di Bari*, Case C-213/13, ECLI:EU:C:2014:2067 a case concerning public procurement the CJEU said that EU law does not require a judicial body "automatically to go back on a judgment having the authority of *res judicata* in order to take into account the interpretation of a relevant provision of EU law adopted by the Court after delivery of that judgment". *Lucchini* was described by the CJEU as a "highly specific situation, in which the matters at issue were principles governing the division of powers between the Member States and the European Union in the area of State aid".

98. For present purposes, it seems to me it would be appropriate to treat *Lucchini* as thus limited.

99. The CJEU went on to say that if applicable domestic rules of procedure provide the possibility for a national court to go back on a decision that possibility must prevail in

accordance with the principles of equivalence and effectiveness in order to bring the situation "back into line with the EU legislation on public works contracts" (para. 62).

Application to appeal against order of Clarke J.

100. I do not propose to come to a conclusion based on the proposition advanced by Mr. Kenny that Trinity is to be considered to be an emanation of the State for the purposes of the application of the principles found in *Klohn,* but rather on a more broad principle from *Klohn* that costs in litigation ongoing but not finally determined at the transposition date might still have to be assessed in conformity with NPE principles.

101. It is true, as Mr. Kenny notes, that Clarke J. in his first written judgment probably anticipated the decision of the CJEU in *Klohn* when he noted that proceedings might come to be instituted because of the failure of Ireland to transpose Directive 85/337 as amended and whether the fact that costs are dealt with in a sufficiently discretionary way in the Irish courts might be sufficient to meet its mandate. However he cannot, and does not, argue that as a result of the decision of the CJEU in *Klohn* NPE rights could be relied on to reopen litigation and costs orders which had been determined finally. His argument is made on a much narrower basis, that NPE protection is relevant to costs incurred before and after 25 June 2005 in proceedings that had not yet been determined finally and conclusively on that date.

102. I accept that Mr. Kenny did mention NPE principles in broad terms in his draft statement of claim, but he did so not because he sought to challenge the award of costs against him on NPE grounds, nor because the measure of those costs made them prohibitively expensive. His pleas were entirely focused on reversing the costs orders because of an asserted frailty in the planning permission, and the claim that the costs should be set aside was made because he ought not to have lost the litigation. His argument was made in reliance on Article 10a of Directive 85/337, but with regard to the requirement for an EIS/EIA and not on the grounds of costs. It cannot be said that the proposed litigation was in substance a claim that

the award of costs against him or the measure of those costs made the litigation so prohibitively expensive as to impede his public participation rights derived from the Aarhaus Convention and/or the Directive. Usefully Mr. Kenny's written submission identifies 400 explicit references in his earlier proceedings to set aside the planning permission to EIS, EIA, and EU environmental directives and related matters. This bears out an interpretation that the real purpose and substance of the litigation is the reversal of the planning permission, and in my view Clarke J. took the correct approach to the intended cause of action on that basis, and in holding, as he did, that the proposed litigation was bound to fail as the validity of the planning permission and, insofar as it arose, the compliance by Trinity with the conditions in the permission, had been conclusively determined, and the planning permission was by then unassailable.

103. Mr. Kenny now argues that the reliefs he sought in the proceedings in respect of which this appeal is brought did not in truth amount to a challenge to the planning permission. I cannot agree. Mr. Kenny nowhere pleaded that the costs orders, enforcement of which was sought to be restrained, and which were sought to be set aside in their entirety, were wrong because the orders for costs, or the measurements of those costs, failed to have regard to NPE principles, either because the level of costs was unreasonably high and amounted to an effective prevention of or disincentive to litigation, or because his right to participate as a citizen in environmental challenges ought to have been respected by either the making of no order as to costs, or a modulated order which limited the amount that could be recovered.

104. I agree therefore the basis on which Mr. Kenny sought relief regarding the costs was the invalidity of the planning permission in the light of European law, and while he does not expressly seek a declaration that the planning permission is invalid, all of his pleas are directed towards that ultimate proposition. Quite apart from the fact, as was noted by Clarke J. at para. 2.7 of his second judgment, that any challenge to the planning permission ought to have been

directed to the Board, and was procedurally flawed and hopelessly out of time, it is only if the decision of McKechnie J. was incorrect as a matter of law could he have hoped to sustain an argument that the costs orders were wrongly made.

105. Two of the costs orders were sought to be impugned on the grounds of fraud. Clarke J. concluded that those proceedings were based on domestic legal principles, and that therefore no question involving European law arose in the substantive decisions and *ipso facto* in the determination regarding costs. I consider that Clarke J. was correct, and even though as noted above, Mr. Kenny has identified 400 references to EIS, EIA and EU environmental directives, he did so as part of his pleadings and evidence to support an allegation that the EIS lodged by Trinity had in one case relied on fraudulently altered photomontage and in the other on an allegation that the EIS was fraudulently composed.

Does *Klohn* provide a full answer?

106. As a result of the decision of the CJEU in *Klohn* a properly formulated claim for NPE protection was not bound to fail. However, an important difference between the present appeals and the challenge brought by Mr. Klohn is that Mr. Klohn directly involved NPE rights in the taxation of costs, and appealed the refusal of the Taxing Master to measure the costs against that yardstick. Mr. Kenny's case on the other hand seeks leave to commence proceedings to challenge orders for costs made against him because he claims those orders for costs resulted from decisions, the substance of which failed to fully respect environmental principles and especially the EIA Directive as amended. He argues that had the outcome of the challenge in *Commission v. Ireland* delivered only a short time after the second judgment of Clarke J., or even the judgment 10 years later in *Klohn* being known to Clarke J. he would not have refused permission to commence the proceedings. That is not correct. As explained in some detail above, the proceedings Mr. Kenny sought to commence had as their objective the setting aside of various costs orders, and the legal basis relied was an error in the EIS or a failure on the part

of Trinity to properly adopt an conduct and the EIS. In substance the application was for leave to commence proceedings to set aside costs orders on the basis that the planning permission had been wrongly granted, and that McKechnie J was wrong to refuse leave to bring judicial review to challenge that permission. Therefore, it seems to me that Mr. Kenny did not raise the same kinds of complaints made by Mr. Klohn with regard to the award of or the measurement of costs, because the proposition advanced was that the costs orders were wrong because the EIS was flawed.

107. It is true that at the hearing of the appeal and in his written submissions the arguments advanced were primarily focused on NPE protection, but as noted above, this argument did not form part of the case at trial or to any material extent of the pleadings considered by the trial judge. Nonetheless, I propose to give some consideration to his arguments for a number of reasons: first, this litigation has run now for 20 years and it is in the interests of the parties and the proper administration of the courts that the matter be finally determined; Trinity was aware for some time before the appeal was heard that Mr. Kenny intended to raise a general NPE protection argument for the purposes of the appeal, and was in a position through counsel to argue the matter fully; the test applied by Clarke J. in deciding whether to permit the proceedings to be commenced obliges the court to consider whether any basis has been made out that might sustain the proceedings, and indeed Clarke J. gave Mr. Kenny ample opportunity to amend his statement of claim before he finally concluded that leave to institute the proceedings was not warranted. Mr. Kenny did not seek to amend his notice of appeal and this may have been in the context of the long-established reluctance on the part of the courts to permit an argument to be made for the first time on appeal. The recent judgment of this Court in *Lough Swilly Shellfish Growers Ltd v. Bradley* [2013] IESC 13 recognised that exceptionally a new point may be considered on appeal as both parties were anxious to have the central point

decided (para. 12). In my view the approach taken by Trinity on appeal together with the other factors justifies some consideration of the possible application of NPE principles in this appeal.

NPE principles applied to the costs orders: possible consequences

108. With that in mind it seems that, applying the judgment of the CJEU in *Klohn*, and noting also its judgments in *Edwards* and *North East Pylon*, and also noting that EU law is clear that a final decision at national level may not be reopened and that the element of retrospectively identified in *Klohn* is thereby limited, timing is to a large extent dispositive of the argument sought to be made by Mr. Kenny as I now explain by reference to each order.

109. As to the first costs order, the operative date from which at its height Irish law should have afforded Mr. Kenny NPE protection is 25 June 2005. The order of McKechnie J. was made and those permission judicial review proceedings had concluded by 2001. The certificate of the Taxing Master issued on 7 June 2002: see *supra* para. 16. In regard to that order and the costs flowing therefrom no argument can be made by Mr. Kenny in reliance on the recent jurisprudence of the CJEU as that decision and the taxation of costs had been conclusively disposed of before the operative date. The principles of *res judicata* mean that as a matter of domestic law, a matter may not be reopened if it has been conclusively determined in accordance with national law and procedures. No principle of European law has displaced this fundamental proposition.

110. The second costs order relates to proceedings in which the High Court delivered judgment on 19 October 2005 and it is not apparent that he did, as he asserts, raise NPE arguments on appeal to this Court which on 5 March 2009 dismissed the appeal: [2009] IESC 19. The litigation concerning the validity of the planning permission has been conclusively determined and the matters are *res judicata*. At the taxation of the High Court costs awarded against Mr. Kenny he did not raise NPE principles and he did not challenge the certificate of

taxation which issued on 7 November 2007. Insofar as he raised NPE he did so in regard to the Supreme Court costs, not part of the application to Clarke J. to which this appeal relates.

111. The third costs order was made on 27 June 2005. The certificate of taxation issued after the transposition date on 12 January 2007. Mr. Kenny did not appear at taxation or challenge the certificate. He did seek NPE protection at the hearing of the Supreme Court appeal on 18 March 2009. The costs of the High Court had been conclusively determined and measured before that date. The costs of the Supreme Court hearing are not relevant to this appeal as they were not part of the application before Clarke J.

112. In summary therefore two sets of costs came to be measured by the Taxing Master after 25 June 2005, but at neither adjudication did Mr. Kenny seek to argue that NPE principles were applicable, nor did he avail of the domestic remedy of reviewing those certificates of taxation, the route taken by Mr. Klohn.

113. Timing is again a factor in the fourth order for costs. The costs were measured on 17 January 2007 and again no challenge on NPE grounds was made by Mr. Kenny although in the light of *Klohn* such a challenge may have been open to him, and he was broadly aware of the basis on which it might be argued.

Conclusion on the appeal from the order of Clarke J.

114. The arguments now raised orally and in written submissions of this appeal are difficult to reconcile with Mr. Kenny's pleaded case, with the statement of claim reviewed by Clarke J. and with the arguments Mr. Kenny made in the light of the opportunity afforded by Clarke J. to clarify and formulate the basis of his intended claim. The narrow NPE focus is not reflected in what occurred in the High Court. The costs orders he seeks to challenge are final, and the measurements of costs have been finally made. The plenary proceedings Mr. Kenny sought to commence were procedurally flawed, but perhaps more importantly this Court cannot grant authorisation to commence those proceedings in the light of the conclusion drawn by Clarke

J., with which I , that the proceedings are a collateral attack on the planning permission, and because the costs orders have been finally and conclusively made, and the costs measured. This is not a "merely" procedural conclusion: the measurement by the Taxing Master of the costs could have been but were not challenged in the High Court on NPE grounds. Mr. Kenny did not make a challenge in respect of three of the taxation awards and did challenge the fourth costs order, but not in reliance on any NPE principles.

115. It seems to me that the basis for the challenge could have been identified by Mr. Kenny and since the adoption at EU level of the Aarhus Convention the NPE principle was known. He sought to challenge not so much the measure of costs but the making of a costs order in the first place. His arguments throughout were to the merits of the planning decision and he never made the arguments that the costs were measured at too high a level, but rather his argument was that there should not have been costs at all.

The decision of Laffoy J.: Record No. 2009/6638P

116. In the course of argument on this appeal these proceedings were referred to as "the costs stay proceedings".

117. This decision concerns an application to stay the enforcement of three of the four costs orders considered in the judgment of Clarke J. and dealt with above, namely costs orders 1, 2 and 3, all of which after the costs were taxed and finally ascertained were registered as judgment mortgages on Mr. Kenny's principal private residence and on a premises in County Donegal jointly owned by Mr. Kenny and his wife.

118. The plenary summons issued on 20 July 2009 and sought interlocutory relief staying the hearing of the application for well charging relief and an order for sale pending the completion by the EU Commission of an investigation into complaints made by Mr. Kenny on 23 April 2009 and 10 July 2009. The well charging and sale proceedings have now concluded

and an order of this Court was made following delivery of judgment on 21 December 2020 ([2020] IESC 77).

119. Nonetheless, I do not propose to deal with this appeal by treating it as moot, an argument advanced by Trinity, primarily because the litigation has had such a long history, and the listing of the appeal of the order of sale first happened more by reason of convenience, as that case was ready to be heard before these appeals. Importantly, the order made by this Court in the sale proceedings granted a stay on the sale of the principal private residence of Mr. Kenny and his wife, and the likely proceeds of sale of the premises in Donegal are not expected to meet more than a relatively small percentage of the overall costs already taxed. Thus were Mr. Kenny to succeed in the appeal and if that were to result in the continuation of these proceedings, and were they to be successful, the amount of the costs well charged and to be paid from the sale could, at least at the level of principle, be modified.

120. Mr. Kenny brought a motion dated 22 July 2009 seeking interlocutory relief, and the primary basis of relief mirrors to a large extent the factual and legal pleas made in the proposed proceedings not authorised by Clarke J. The motion refers to "fraudulent conduct" on the part of Trinity in submitting the planning application, which it is alleged did not comply with Directive 85/337 as amended and the "inadequacy of and the irregular procedures practised by organs of the State". There is an express reference to restrictions to access to justice by members of the public at "non-prohibitively expensive costs".

121. In his grounding affidavit at paragraph 4 Mr. Kenny avers that the complaint to the Commission is "primarily concerned" with the judgments of McKechnie J. of 15 December 2000 and 2 March 2001, and to "subsequent related High Court and Supreme Court proceedings", presumably the other proceedings referred to in this judgment and others not here relevant. He also says that the complaint made by him to the Commission "covers a range of issues relating to" the development.

122. At paragraph 9 Mr. Kenny avers that the complaint also concerns the manner in which Trinity "purported to give assurances to Dublin City Council […] and the Board that it had conformed with all legislative requirements in respect of an Environmental Impact Statement". He goes on to say that these assurances were "false". At paragraph 12 he avers that he expects that the Commission's approach

> "… will be wide, so as to include a detailed investigation of the planning procedures, specifically as to how the Defendant obtained planning permission for the Trinity Hall project when its planning application and accompanying EIS for the project were not, as I have complained to the Commission, in compliance with relevant provisions of the Community's environmental directives or national planning regulations which applied to the Defendant's project."

123. At paragraph 13 he avers that the Commission was likely to "enquire into the level of costs permitted by the courts to be awarded" in that these were "at prohibitively expensive costs levels" and represent "the failure of the courts to comply with their obligations to give effect to the provisions of the Aarhaus Convention in relation to legal proceedings concerning environmental law matters".

124. At paragraph 18, he explains the interlocutory relief was sought to prevent any further steps being taken by Trinity on foot of its judgment mortgages as Mr. Kenny said that he expected that the result of the Commission's process would ultimately be "such as to the negative any liability of mine to the Defendant arising out of undischarged costs orders".

125. The motion was heard on 23 July 2009, after the transposition date. It is clear from the transcript of the hearing that Laffoy J. had read the judgment of the CJEU in *Commission v. Ireland* and the two written judgments of Clarke J. dealt with in detail above.

126. Mr. Kenny was self-represented at the hearing. The transcript of the hearing shows that Mr. Kenny indicated that the primary focus of the stay was to permit time for the Commission

to make its findings on the "illegality of proceedings", however, he also said regarding his complaint "the scope is extremely wide". While Mr. Kenny did not make detailed submissions on costs he stated that "the quantum of costs I think is under – is open to questioning".

127. Because the proceedings and the injunction concerned the costs Laffoy J., correctly in my view, confined him to arguments regarding the costs in the light of the decision in *Commission v. Ireland.* In the knowledge that Clarke J. had already decided the issue to a large extent, Laffoy J. said that she could be concerned only with what has occurred since 28 January 2009 the date of his second decision.

128. It became clear in the course of argument that all the costs orders arose from proceedings which had been commenced before the transposition date. The argument made by counsel for Trinity in the course of the hearing was that only the judgment and order of McKechnie J. could be properly said to relate to the requirement for an EIA, and therefore Directive 85/337 as amended could not be said to be relevant to the other costs orders. In his oral submissions Mr. Kenny accepted that some of the costs to which the proceedings related were incurred before the transposition date, but he pointed out that the complaint to the Commission dealt not just with costs but with other matters.

129. Laffoy J. in her *ex tempore* ruling held that NPE costs protection could not apply to the costs awarded in the proceedings as the decision of the CJEU in *Commission v. Ireland* did not have retrospective effect and, therefore, because all of the proceedings had commenced before the transposition deadline the Directive 85/337 as amended had no application to the award of or measurement of those costs.

130. Laffoy J. was of the view that Mr. Kenny's complaint to the Commission could not result in an outcome which would affect the entitlement of Trinity to enforce the costs orders awarded before the State was obliged to implement the Directive. She also held that Trinity is a private individual and not a public body and that any decision in a case taken by the

Commission against Ireland on foot of Mr. Kenny's complaint could not affect Trinity and its entitlement to enforce the costs.

131. Because the plenary summons sought interlocutory relief, and not permanent relief or other relief not encompassed in the interlocutory relief sought in the motion, she dismissed not just the motion but also the proceedings and awarded costs against Mr. Kenny.

132. In his notice of appeal Mr. Kenny relied primarily on *Commission v. Ireland*, and pleads that Laffoy J. was in error in concluding that it was not open to him to seek NPE relief in regard to the costs registered as judgment mortgages. Again he pleaded "fraud, misrepresentation or concealment" by Trinity in its planning application.

Decision

133. As a result of the decision of the CJEU in *Klohn*, Mr. Kenny is correct that Laffoy J. was in error in concluding that NPE protection could be afforded only to the costs of proceedings commenced after 25 June 2005, and any order which related to proceedings ongoing on 25 June 2005, or taxed after that date could at least at the level of principle be informed by NPE protection.

134. As discussed above, and at the risk of repetition, it is clear that the costs order in the permission judicial review had been finally and conclusively determined both as to measure and entitlement by 7 June 2002: see *supra* para. 16. Those costs orders are now not capable of challenge under domestic law.

135. The situation is somewhat different regarding the other two sets of costs, second and third costs orders, considered by Laffoy J.

136. Under then applicable national law, the measurement of costs by a Taxing Master was open to review by the High Court and under s. 27(3) of the Courts and Court Officers Act 1995 and O. 9, r. 38(3) of the Rules of the Superior Courts.

137. The second costs order of Murphy J. was made on 19 October 2004, no stay was placed on the taxation or recovery of the costs and they were taxed on 7 November 2007. Mr. Kenny did not appear at the taxation of these costs nor did he seek to review the measure of costs under the statutory review provisions.

138. Fennelly J. in this Court dismissed Mr. Kenny's appeal against the order ([2009] IESC 19**)**. Although only the High Court costs are relevant for the stay application, it is worth noting that at the hearing for the Supreme Court costs Mr. Kenny did seek NPE protection in respect of both the Supreme Court and High Court. Fennelly J. on 18 March 2009 held against him on the basis that the Directive was not applicable.

139. The Supreme Court costs were taxed on 20 July 2010 and Mr. Kenny did attend and sought NPE protection which was refused by the Taxing Master. The Taxing Master concluded, that as the Aarhaus Convention had not been incorporated into Irish law, the Directive and the Convention could not affect measurement of costs. That decision is not relevant to these appeals and the costs of the Supreme Court were not registered as judgment mortgages.

140. The third costs order relevant to the decision of Laffoy J. were the costs of the second set aside proceedings where Mr. Kenny sought to have an earlier decision of the High Court set aside. Murphy J. made an order on 26 March 2004 striking out these proceedings and awarded costs to Trinity. The costs were taxed on 12 January 2007 and Mr. Kenny did not appear. Mr. Kenny did not utilise the statutory provisions to review the decision of the Taxing Master. He withdrew his appeal to this Court on 10 April 2019.

141. In *Klohn* the CJEU said that it was a matter for national law to determine whether a liability to pay costs or on quantum had become final.

142. In the present appeal the decisions awarding Trinity costs against Mr. Kenny had been finally determined as a matter of national law. Some of these decisions were made after the

transposition date of 25 June 2005. As regards the taxation of costs these too have been finally determined.

143. Mr. Kenny either did not seek to review the costs orders or did not appear at taxation to challenge the level of costs. Therefore all of the orders allocating costs and the measurements of costs relevant to the decision of Laffoy J. had been finally determined and enjoyed the benefit of *res judicata* by the time the motion and proceedings seeking interlocutory relief were heard by her. Mr. Kenny could not have challenged them on NPE grounds.

144. Furthermore, as is apparent from the recitals of the pleas and averments of Mr. Kenny his primary focus was the broad argument regarding the sufficiency of the EIS and the challenge to the planning permission.

145. Finally, the course of the complaint to the Commission is not clear. No evidence was available to this Court as to what had happened after the correspondence with Mr. Kenny in December 2010. There exists now no possible basis on which this Court could grant the interlocutory relief sought either in the motion or the proceedings on account of the passage of time. No basis has been argued on which the proceedings could or should be permitted to continue.

146. I am of the view that this appeal is without merit and should be dismissed.

Summary

147. The most relevant decision is that in *Klohn* where what was in issue was the correct approach of a Taxing Master to the taxation of costs after the transposition date.

148. In *Klohn* the CJEU distinguished between allocation of costs, the order for which was final and *res judicata* applied, and the decision of the Taxing Master, the review of which gave rise to the reference under Article 267 TFEU. At para. 71 the CJEU said that it was a matter for national law to determine whether a liability to pay costs or a quantum had become final.

149. In the present appeals at the date of the two orders under appeal, the decisions awarding Trinity costs against Mr. Kenny and the measurement of those costs, had been finally determined as a matter of national law. Some of these decisions were made after the transposition date of 25 June 2005. Nonetheless Mr. Kenny did not avail of national procedural measures to challenge the measurement of costs, or where he did he did not do so on NPE grounds.

150. Each of the appeals resulted in the refusal to permit Mr. Kenny to proceed with his action or intended action. Clarke J. was correct in my view that the proposed action was bound to fail, and was therefore justified to refuse authorisation to commence the action. Laffoy J. was correct that the challenge had no basis in law and, as the action sought only interlocutory relief, she too was correct that the action ought properly to be dismissed.

151. I would dismiss both appeals.

The motion to dismiss

152. The motion to dismiss the appeals on the ground of mootness should be refused for the reasons set out at para. 119 above. I do not understand Trinity to be pursuing with much enthusiasm the argument that the appeals had been withdrawn, and I am satisfied on the evidence and from exchanges at hearing and at case management that this did not occur. The delays in bringing the appeals to hearing were dealt with at early case management and arose to a large extent from the ill health of Mr. Kenny.

153. I would refuse the relief sought in the motion.

Interest on the taxed costs

154. Counsel for Trinity has calculated the amount now said to be due on account of taxed costs and interest as over 1 million euro.

155. Interest is payable on the costs by reason of the provisions of the Debtors (Ireland) Act 1840 and under the Courts Act 1981 (as amended). The rate has varied from 8% to 2% over the relevant period.

156. Some of the interest on the taxed costs has accrued during the time when Mr. Kenny was by reason of illness unable to prosecute his appeal, and during a time when resources were such that there was a significant delay in the hearing of appeals to this Court.

It is not apparent from the submissions made by the parties whether any argument was had regarding the payment of interest on the costs, or the rate of interest applicable. The parties are invited to make further submissions to this Court regarding the proper treatment of interest on the measured costs in the light of the principles explained in this judgment, the delay in the hearing of the appeal, and the fact that some, if not indeed most of, that interest accrued after the transposition date. The precise focus of those submissions can be further refined at case management.