THE COURT OF APPEAL
CIVIL

High Court Record No. 2019/169JR
Court of Appeal Record No. 2021/01
Neutral Citation No. [2023] IECA 19

UNAPPROVED
NO REDACTION NEEDED

Barniville P.
Murray J.
Noonan J.

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT/APPELLANT

– AND –

THE LEGAL AID BOARD

RESPONDENT

– AND –

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Mr. Justice Murray delivered on the 3rd of February 2023

Background

1. The fundamental issue in this appeal is whether a body corporate may apply for and obtain legal aid pursuant to the provisions of the Civil Legal Aid Act 1995 as amended (‘*the Act*’). The applicant – relying upon the provisions of the Interpretation Act 2005 (‘*the 2005 Act*’), Article 47 of the EU Charter of Fundamental Rights (‘*the Charter*’), and Article 9(4) of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (‘*the Aarhus Convention*’) – contends that it can, and that reference in relevant provisions of the Act to ‘*persons*’ should be construed accordingly. The respondent – the body charged with responsibility for administering civil legal aid in accordance with the Act – contends that it cannot, arguing that, interpreting the Act as a whole in the light of certain Regulations made thereunder, it is clear that it was not the intention of the Oireachtas to extend eligibility for legal services to artificial legal persons. The respondent further disputes that the provisions of Article 47 of the Charter or of the Aarhus Convention affect this construction, a position shared by the notice parties.[1] Following a detailed and careful survey of the Act and relevant authorities ([2020] IEHC 454), Hyland J. agreed with the position adopted by the respondent on each of these questions.

2. The relevant facts are few and undisputed. The applicant is a company limited by guarantee. It has been active in the protection and promotion of the Irish environment for approximately twenty years. That activity has included the bringing of legal proceedings challenging the legality of various decisions of state agencies potentially

[1] For reasons explained at [2020] IEHC 347, the notice parties were joined by the High Court judge for the purposes of addressing the relevance of the Aarhus Convention to the applicant’s claims.

affecting the environment. In April 2018 it applied to the respondent for legal aid in connection with proposed proceedings in which it then intended to apply for leave to seek relief by way of judicial review of the Government's National Planning Framework and National Development Plan. That leave was granted on 14 May 2018 (*Friends of the Irish Environment v. Government of Ireland* 2018/391 JR) ('*the NDP case'*). By decision of 12 November 2018, the respondent refused the applicant's application for legal aid. That decision was appealed internally and upheld by decisions dated 28 January and 11 February 2019. The principal basis for all of these decisions was that the Act did not enable the grant of legal aid to a body corporate.

3. Meanwhile, the applicant proceeded with the NDP case, being represented throughout those proceedings by solicitor and counsel. Barr J. refused the relief claimed in that action on 24 April 2020 ([2020] IEHC 225). That decision was unsuccessfully appealed to this Court ([2021] IECA 317), the Supreme Court granting to leave to appeal that decision on 21 February 2022 ([2022] IESCDET 22). In a judgment delivered by the Supreme Court on 9 November 2022 ([2022] IESC 42), that Court referred certain questions arising in the case to the CJEU.

The decisions

4. In their letter applying for legal aid of 18 April 2018, the applicant's solicitors asserted that the proceedings their client intended to institute were prohibitively expensive by reason of their complexity and bearing in mind the limited resources available to the applicant. In consequence – it was said – the State had an obligation under the Constitution, the Charter of Fundamental Rights of the European Union and the Aarhus

Convention to grant legal aid so that the applicant could engage solicitors and specialist barristers to represent it in the NDP case.

5. The letter prompted the respondent to revert with an application form. That form was clearly designed to process applications from natural persons (it referred, for example, to employment, pensions, social welfare income and spousal income). When the applicant's solicitors pointed this out by e-mail of 19 April 2018, the respondent replied thus:

> '*The Legal Aid Board provides legal advice and legal aid in civil cases to persons who satisfy the requirements of the Civil Legal Aid Act 1995. The principal requirements are that a person's financial means must be below a certain limit and there must be some merit in their case. Therefore Legal Aid is not available to a Company.'*

6. Following further correspondence, the applicant's solicitors (on 15 April 2018) completed the form insofar as possible to do so having regard to the applicant's corporate status, provided the respondent with the court papers (on 2 July 2018) and (on 12 November 2018) agreed to meet at the respondent's offices on 15 November as part of that application process. Then, on 12 November 2018, the respondent wrote cancelling that meeting, stating as follows:

> '*It has come to our attention that the Application for Legal Services received from you is being made by an organisation rather than by a 'person' as is required by the Civil Legal Aid Act 1995. It is accordingly not possible for the*

> *Legal Aid Board to provide legal services to you in those circumstances. Furthermore Section 27(9)(a) of the 1995 Act*[2] *provides that legal aid shall not be granted in respect of an application by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned.*'

7. In their letter of 23 November 2018 appealing this decision, the applicant's solicitors stressed that there was nothing in the Act that prohibited the granting of legal aid to an organisation and noted the provisions of s. 18(c) of the 2005 Act:

> '*"Person" shall be read as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons, as well as an individual, and the subsequent use of any pronoun in place of a further use of "person" shall be read accordingly'*

8. Insofar as the respondent had referred to s. 27(9)(a)[3] of the Act, the applicant's solicitors said that their client was not applying for legal aid '*on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned*'. The applicant was, they said, bringing the proceedings as a non-governmental organisation with a special role to play in environmental decision making and neither it, its directors nor its members, had any private interest in the litigation. Emphasising the provisions of Article 9(4) of the Aarhus Convention, the applicant's solicitors said that the State was under an obligation to provide legal aid to

[2] This reference was in error, and should have been to s. 28(9)(a). The provision is addressed later in this judgment.
[3] The same correction stands to be made here.

applicants for proceedings seeking judicial review of decisions that fall within the scope of that provision, and that the respondent was required to interpret the relevant legislation so that it conformed with the State's obligations as a Member State of the European Union and in a way that gives effect to Article 9(4). It was contended that s. 27(9)(a)[4] of the Act was unconstitutional and incompatible with the Charter.

9. In its letter of 28 January 2019, the respondent identified its principal function as defined in s. 5 of the Act ('*to provide, within the Board's resources and subject to the other provisions of this Act, legal aid and advice in civil cases to persons who satisfy the requirements of this Act ... and a family mediation service'*). It noted that the respondent's own guidelines addressing the interpretation of its governing legislation expressly stated that only natural persons could receive civil legal services *except* in certain child abduction cases where the applicant was a state body in another jurisdiction to whom the respondent was required, under the international convention governing those proceedings, to provide such assistance. This led to the following conclusion:

> '*You will note from the guidelines that the Board is not in a position at the moment to process an application from a company limited by guarantee .... I do however acknowledge that you may take a different view in relation to the word person. The Board will reflect on this further and revert to you within two weeks.'*

[4] The reference here should also have been to s. 28(9)(a).

10. In a further letter dated 11 February 2019, the respondent confirmed that it was satisfied that the approach outlined in its letter dated 28 January 2019 was correct, and that it could not accept an application from a company limited by guarantee. A request from the applicant's solicitors that the respondent reconsider this decision was, by letter dated 11 March 2019, refused.

The challenge, and the decision of the High Court

11. In its Statement of Grounds the applicant made five points in support of its application for an order of certiorari quashing the refusal of the respondent to grant and/or consider granting legal aid in respect of the NDP case, and for ancillary declaratory relief.

12. First, it said that the respondent had erred in construing the word '*persons'* as it appeared in the Act as being limited to natural persons: there was nothing in the legislation to warrant that conclusion, and the provisions of s. 18(c) of the 2005 Act required that the word be construed so as to include bodies corporate.

13. Second, it said that insofar as the respondent had relied upon the provisions of s. 28(9)(a) in support of its decision, it was in error. The applicant was not a member of, or acting on behalf of, a group of persons having the same interest in the substantive proceedings: while elements of the substantive proceedings were taken as an *actio popularis* in the sense that they were of general importance, the applicant was acting only on behalf of itself.

14. Third, a point was made around the initial failure of the respondent to refer the applicant's application to an appeal committee which, it was said, was a breach of the statutory scheme and of the applicant's right to fair procedures.

15. Fourth, it was contended that the effect of the decision was to breach the applicant's rights of access to the courts and of fair procedures under the Constitution, its right to an effective remedy under Article 47 of the Charter and its rights under Article 6(3) of the European Convention on Human Rights (having regard to the provisions of the European Convention on Human Rights Act 2003).

16. Fifth, it was pleaded that the respondent's refusal to consider the substance of the applicant's application for legal aid constituted a breach of the Aarhus Convention which, it was said, is an integral part of the EU legal order. The obligation imposed by Articles 9(4) and (5) of that Convention, it was contended, required the State to ensure that proceedings relating to public participation rights and other challenges under national environmental law were not prohibitively expensive and to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

17. In addressing the first of these propositions, Hyland J. in the High Court concluded that the effect of s. 18(c) of the 2005 Act was that in construing the reference to '*person*' in the Civil Legal Aid Act, the court should proceed on the basis that that word would ordinarily import legal persons and natural persons, considering from there whether a contrary intention appears in the Act. Six features of the legislation and its context led her to conclude that such a '*contrary intention*' did indeed appear:

(i) The fact that the Act exclusively used the pronouns 'he' or 'she' carried '*a certain implication*' that the Act was intended only to apply to natural persons.

(ii) The Act (s. 29) uses the term '*disposable income*' as relevant to the determination of financial eligibility. The judge felt that this term in its ordinary and natural meaning referred to the income of an individual. It was, she found far more difficult to apply this term to a legal person since its '*disposable*' income will depend entirely on the nature of the legal entity and its activities.

(iii) The judge also felt that the use of the term '*hardship*' as it appeared throughout the Act was significant. She observed that it surfaces eight times in the statute, most notably in s. 24(a), where it is used in the eligibility test for determining whether a reasonably prudent person would be likely to seek the services in question at their own expense ('*would not impose undue hardship*'). The judge concluded that the term applied to human persons: she felt that the reference to '*undue*' carries with it an implication of core human needs that must be met and a reluctance to impose financial hardship on persons that would impact on their ability to meet those basic needs.

(iv) Sections 28(9)(a)(viii) and (ix) exclude from the scope of legal aid, proceedings brought by an applicant as a member of a group of persons for the purposes of establishing a precedent in which the other members of the group have an interest. Also excluded is any other matter as respects which the application is made by or on behalf of a person who is a member and acting on behalf of a group of persons having the same interest in the proceedings concerned. Hyland J. was struck by the fact that if a company was entitled to legal aid, these

provisions might not exclude it from issuing proceedings designed to benefit its members. She felt that if the legislature had assumed such legal persons were included in the definition of a '*person*', it would have included a proviso excluding from legal aid litigation brought by a person aimed at securing a benefit for its members or shareholders.

(v) The Act makes extensive provision for circumstances particular to natural persons (litigation, for example, concerning the family home). The judge noted that there were no equivalent provisions applicable only to legal persons. Hyland J. described that omission as '*significant, though by no means determinative'*.

(vi) Finally, the judge noted the Pringle Report on the provision of legal aid (Prl. 6862 December 1977), the decision of the European Court of Human Rights in the case of *Airey v. Ireland* (1979) 2 EHRR 305 and the Non-Statutory Scheme for Legal Aid (Prl. 8543 1979). The first of these recommended a scheme of legal aid for natural persons only, the third so provided and the second was concerned solely with a human rights breach involving the failure to afford natural persons civil legal aid. These were, Hyland J. said. '*suggestive of an intention to provide civil legal aid to natural persons only.'*

18. The second main finding of the judge arose from the applicant's claim that if there was a doubt about the meaning of the word '*person'* in the Act, it should be interpreted in such a way as to advance the requirements of the Charter which, the applicant had contended, required that legal aid must in principle be available to legal persons. Hyland J. decided that the authority relied upon by the applicant in support of this latter proposition – Case C-279/09 *DEB Deutsche Energiehandels-und*

Beratungsgesellschaft mbH v. Bundesrepublik Deutschland ECLI:EU:C:2010:811 ('*DEB'*) – did not establish it. Instead, she decided, that case determined not that there was an entitlement to obtain legal aid, which may be conditioned, but that there is '*an entitlement to an effective remedy, and if the conditions of legal aid limit the right of access to the court such that the core of that entitlement is restricted, then those conditions might be incompatible with the right to legal aid.'* This was a fact dependent enquiry and, insofar as the litigation giving rise to the application for legal aid was concerned, the case had not been made that in the absence of civil legal aid it had been impossible for the applicant to exercise its right of access to the court or that it was denied an effective remedy. It followed, the court found, that the conditions required for an entitlement to civil legal aid had not been met and that there was no principle of EU law identified by the applicant that affected the interpretation of the Act.

19. From there, Hyland J. addressed the interpretative obligation said to arise from the provisions of the Aarhus Convention. Her finding that the judicial review procedure was not prohibitively expensive for the applicant notwithstanding its exclusion from the legal aid scheme, was reasoned as follows:

(i) Article 9(4) (this being the only provision of the Aarhus Convention truly in play) was not directly effective because it did not contain unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals.

(ii) There was clearly no obligation under Article 9(4) to establish a system of legal aid.

(iii) The obligation that is imposed by that provision is to ensure that the various procedures identified in the Aarhus Convention provide adequate and effective remedies and are not prohibitively expensive. Parties to the Convention have a wide discretion as to how they achieve that result.

(iv) The requirement that judicial review proceedings not be prohibitively expensive arises where a party is *prevented* from litigating. Applying that requirement in this case involved a consideration of whether access to judicial review proceedings for this applicant would be prohibitively expensive were it to be excluded from the legal aid scheme.

(v) Hyland J. stressed that in the present case there was no averment presented on the applicant's behalf that it could not access solicitors and counsel or had any great difficulty in doing so. She found that where the applicant could avail of judicial review procedures without fear of costs orders against it and where the applicant was in a position to obtain a legal team willing to act for it, it did not seem that the judicial review procedure in place in Ireland was so prohibitively expensive that the applicant was prevented from accessing it.

The issues in this appeal

20. As will be obvious from the foregoing, those provisions of the Act addressing the making of application for, and grant of, legal aid and advice (ss. 24, 25, 26, 28, and 29) refer to that aid and advice being sought and made available, to '*persons'*, but do not expressly state whether this includes bodies corporate. However, as I have earlier

noted, s. 18(c) of the 2005 Act identifies as one of the provisions applying to the construction of *inter alia* an Act of the Oireachtas the following :

> '*"Person" shall be read as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons, as well as an individual, and the subsequent use of any pronoun in place of a further use of "person" shall be read accordingly'.*

21. That being so, five questions arise from the arguments of the parties as they have developed in the course of this appeal. These are:

(a) What test should be applied in determining whether the presumption posited by s. 18(c) has been displaced?

(b) Whether, having regard to that test, the provisions of the Act are properly interpreted as limiting those references to '*persons'* in ss. 24, 25, 26, 28, and 29 to natural persons?

(c) Whether in so construing the Act the court may have regard to the provisions of Regulations made thereunder and, if so, how these Regulations affect the interpretation of the Act?

(d) Whether the provisions of Article 47 of the Charter confer a right to legal aid on the applicant such as to require the court to interpret the Act as extending to bodies corporate?, and

(e) Whether the provisions of Article 9(4) of the Aarhus Convention have like effect?

The test for displacement of s. 18 of the Interpretation Act 2005

22. Section 4(1) of the 2005 Act provides:

> '*A provision of this Act applies to an enactment except in so far as the contrary intention appears in this Act, in the enactment itself or, where relevant, in the Act under which the enactment is made'*.

23. As I have noted, Hyland J. decided that the effect of this provision was that the court should approach the issue on the basis that '*persons'* would ordinarily import legal persons as well as natural persons, considering from that starting point whether a contrary intention appears in the Act. The first component of that approach is not disputed and is clearly correct.

24. In adopting and applying the second component– described by Hyland J. throughout as the '*contrary intention test'* – the applicant says that the trial judge fell into error. While not disputing the judge's description of the proper analysis, the applicant says that the contrary intention necessary to oust s. 18(c) must be '*very clear'*. In its written submissions in this appeal (and, seemingly, before the High Court) the applicant contended that this would only be the case in three situations – where there is an express deviation from the general and usual meaning of the term '*person'*, where the statutory context identifies a condition precedent that was only capable of being met by a natural person, and where to treat a reference to '*person*' as including both a natural and legal person would '*do violence'* to the provision in issue or where this would produce an

absurd result. In the course of oral submissions to this Court, these criteria were softened a little: it was accepted that it was possible for a '*contrary intention'* to be divined from the overall scheme of the Act, but that what was described as a '*high threshold'* would be required before this could happen. The trial judge in this case, it was contended, had erred fundamentally when she conducted what counsel for the applicant described as '*a line by line analysis of the Act in order ... to divine the true intention of the Oireachtas'*.

25. The critical phrase in s. 4(1) for this purpose – '*except in so far as the contrary intention appears in ... the enactment'* – has its origins in the Interpretation Act 1889, where similar language ('*unless the contrary intention appears'*) was employed generally throughout. That phrase was specifically used in presuming that the expression '*person'* referred to a body corporate in the case of provisions relating to certain offences (s. 2(1)), and to a body of persons corporate and unincorporated in other cases (s. 19). In that regard it replaced the more restrictive formula in the first such statute, which had posited a series of presumptive meanings of certain terms to be precluded only by express provision to the contrary (s. 4 Interpretation Act 1850). The formula introduced in the 1889 statute was repeated in 1923 and 1937 (s. 1(1) Interpretation Act 1923 and ss. 11-13 Interpretation Act 1937[5]). This Court has previously assumed that the slight change in language introduced to the equivalent provisions of the 2005 Act is not material (*Triode Newhill LHP Ltd. and ors. v. Murray* [2018] IECA 356, [2019] 3 IR 112 at paras. 54-55) and I think that this must be correct.

26. The essential purpose of interpretative provisions of the kind in issue here is to assist the efficiency of the drafting process by avoiding the need for repeating extensive

[5] As amended by the Interpretation (Amendment) Acts 1993 and 1997.

definition sections in each piece of legislation or, as it was put by Lord Pearce in *Sin Poh Amalgamated (HK) Ltd. v. Attorney General of Hong Kong* [1965] 1 WLR 62, 67, '*to avoid multiplicity of verbiage'*. The flexible language used in s. 4 seeks to achieve that objective while at the same time avoiding the situation in which an Interpretation Act operates so as to fundamentally change the effect of a statute by imposing a meaning which, on a proper view of the legislation as a whole, could never have been intended. In this regard, provisions of the 2005 Act governed by s. 4(1) function in the same way as most interpretation sections in an ordinary statute: they provide definitions which will govern *most* provisions of the Act in *most* circumstances. There will, however, be cases in which the proper construction of legislation according to the established methods of interpretation will require that the presumptive meaning provided for in the definition will not apply.

27. Some of the situations in which this will happen can be readily identified. First, and most obviously, the meaning provided for in the 2005 Act may be expressly disapplied. Second – and this is of particular importance when it comes to the stipulation that '*person'* includes a body corporate – it may happen that a section is concerned with a state of affairs that necessarily displaces the meaning otherwise presumed. So, for example, a provision may address a status, action or function that can only be occupied or undertaken by a natural person. This was what happened in *Law Society v. United Service Bureau Ltd.* [1934] 1 KB 343, where a reference to '*person'* in a provision referring to solicitors (when, as a matter of law, bodies corporate could not be solicitors) was found to necessarily depart from the meaning provided for in the applicable Interpretation Act. A similar conclusion was reached for the same reason in *Re Worldport Ireland Ltd. (In Liquidation)* [2008] IESC 68, [2009] 1 IR 398, where the Supreme Court decided that a body corporate could not be a '*shadow director'* under s.

27 of the Companies Act 1990 because it could never be duly appointed as a *de jure* director. Third, there will be cases in which to interpret the term '*person'* as including a body corporate will produce an absurdity, or where to construe the words used in the legislation in any other way would do violence to them (as was stated in *The State (Armstrong) v. Donnelly* [1985] IR 636).

28. It is when one moves outside these situations that the scope for real dispute arises, in particular (a) as to whether the court is entitled to infer that *the contrary intention appears in ... the enactment'* not by reason of express displacement, legal impossibility or absurdity but because the overall scheme of the legislation is not consistent with that inference, and (b) if so, what test should govern when that can be done.

29. I have already noted that in the course of his oral submissions, counsel for the applicant drew back somewhat from the absolutist position that had been adopted in written submissions and before the High Court, accepting that (as the matter was put in questioning by the court) '*it is possible for a contrary intention to be divined from the overall scheme of the Act'*. The circumstances in which this can happen are, I think, well demonstrated by, and explained in, the decision of the Privy Council in *Blue Metal Industries Ltd. and anor v. RW Dilley and anor.* [1970] AC 827.

30. The Interpretation Act under consideration there (as with the 2005 Act) provided that the singular imported the plural unless the contrary appeared from the relevant legislation. The issue before the court arose from provisions in the New South Wales Companies Act – similar (but not identical[6]) to those appearing in s. 204 of the

[6] The differences were stressed by the Supreme Court in its decision in *Re Fitzwilton plc and ors, Duggan v. Stoneworth Investment Ltd.* [2000] 1 IR 563 in which the court distinguished *Blue Metal Industries Ltd. and anor v. RW Dilley and anor.,* reaching a different conclusion on the ability of joint transferees to operate the compulsory

Companies Act 1963 (and now reflected in s. 457 of the Companies Act 2014) – which enabled the compulsory acquisition of the shares of minority shareholders who resisted a takeover which had obtained the approval of nine-tenths in value of the shares affected. The issue was whether the New South Wales provision (which referred only to transferee in the singular) applied where the offer was made by a number of companies as opposed to being made by only one member. The statute did not expressly disapply the relevant provision of the Interpretation Act.

31. Lord Morris explained the correct approach to an Interpretation Act which provided that the singular should include the plural '*unless the contrary appears*' as follows (at p. 846):

> '*... in considering whether a contrary intention appears there need be no confinement of attention to any one particular section of an Act. It must be appropriate to consider the section in its setting in the legislation and furthermore to consider the substance and tenor of the legislation as a whole'*.

32. Later he said (at p. 848):

> '*It would seem unlikely that the legislature would solely depend upon the provisions of the Interpretation Act if there was an intention to legislate with such important consequences as to give powers of compulsory acquisition not to a single acquiring company but to a group of companies. The Interpretation*

acquisition process. The conclusions of the Privy Council as to the Interpretation Act were neither relevant not considered.

> *Act is a drafting convenience. It is not to be expected that it would be used so as to change the character of legislation.'*

33. In the view of the Privy Council, the acquisition of shares by two or more companies was not merely the plural of an acquisition by one. It was, it concluded, '*quite a different kind of acquisition with different consequences'* presupposing '*a different legislative policy'*. The statutory compulsory acquisition process was '*a company structure'* provision, intended to implement the policy that once a company has become so nearly a total owner of another company, as represented by a holding of 90% of its shares, it should not be prevented by a small dissenting minority from converting the other company into a wholly owned subsidiary. Noting that individuals could not avail of the power to compel the sale of shares to them in this way, the court concluded that it was not the policy of the legislation that simply because the holders of a majority of the shares in a company had agreed to the acquisition it was appropriate to compel dissenters to sell. However, while the '*company structure policy'* did justify the conversion of a 90% subsidiary into a 100% subsidiary *via*, if necessary, the compulsory acquisition of the shares of dissentients, this presupposed a single parent company – not a multiplicity of new owners.

34. That conclusion as to the policy of the provision was reached following an exhaustive examination of the relevant statutory provisions – in fact precisely the type of '*wider and more subtle analysis'* the applicant criticises Hyland J. for avowedly undertaking in this case (see para. 31 of her judgment). The anatomy (or for that matter, correctness) of the analysis undertaken by the Privy Council is not important here: what is relevant is that while one possible policy justification for the power of compulsory acquisition

of the objector's shares (if the offer was good enough for 90% of the shareholders the remaining members should be compelled to accept it) was neutral as between a single bidder and a plurality of bidders, the actual policy identified by the court from its examination of the statute as a whole (the facilitation of corporate structuring) was not. The court was not prepared to allow the provisions of the Interpretation Act to effect a shift in that policy.

35. *Blue Metal Industries Ltd. v. RW Dilley* thus shows the necessity in applying the Interpretation Act of having regard to the overall '*substance and tenor'* of a statute, and to the importance of the assumption that the legislature did not intend to effect a significant policy change or alteration to the '*character of [the] legislation'* by virtue of the effect – unexpressed in the operative legislation in itself – of the relevant Interpretation Act. Although a short passage from the judgment of Lord Morris was cited with approval in *McGuinness v. Property Registration Authority* [2021] IECA 25 (at para. 26), neither the decision nor the precise test to be applied in this situation has been the subject of any detailed consideration in this jurisdiction. However, in my view it is clear that the test suggested there for the displacement of the presumptions introduced by the Interpretation Act based upon the '*substance and tenor'* of the legislation under consideration comports generally with the approach adopted here.

36. Three particular considerations support this. First, it is to be recalled that the presumption introduced by the Interpretation Act 1889 was itself a codification of a well-established principle of interpretation adopted at common law whereby in a public statute the word '*person' prima facie* included a corporation as well as a natural person (*Pharmaceutical Society v. London and Provincial Supply Association* (1880) 5 AC 857). The presumption so acknowledged in the pre-existing authorities fixed the issue

of whether '*person*' should be given a more extensive interpretation by reference to the overall purpose and context of the enactment as a whole. The Irish cases – even after the enactment of the Interpretation Act 1889 – have consistently approved Lord Blackburn's formulation in *Pharmaceutical Society v. London and Provincial Supply Association* (at p. 869-870) (see *R (King) v. Justices of Antrim* [1905] 2 KB 298, [1906] 2 IR 298 at p. 327):

> *'… whenever you can see that the object of the Act requires that the word "person" shall have the more extended or the less extended sense, then, whichever sense it requires, you should apply the word in that sense, and construe the Act accordingly'*

37. So, in *R (Cottingham) v. Justices of Cork* [1906] 2 IR 415 it was held that a company could be a '*person*' under liquor licensing laws even though this required the obtaining of a certificate of good character: Palles CB famously looked to the mischief of the legislation – the manner of control over the mode in which trade was carried on. The trade could be conducted by all persons natural or artificial, and the mischief was co-extensive with the trade.

38. Second, the more recent decisions have not changed this approach. I have already noted the decision in *McGuinness v. Property Registration Authority* [2021] IECA 25, in which (at para. 26) it was said of s. 4(1) that in considering whether '*a contrary intention appears*' for this purpose, it is appropriate '*to consider the section in its setting in the legislation and furthermore to consider the substance and tenor of the legislation as a whole*', (citing *Blue Metal Industries Ltd. v. Dilley*). In its submissions, the applicant referred in particular to *Director of Corporate Enforcement v. Bailey* [2011]

IESC 24, [2011] 3 IR 278 in support of its claim that the three circumstances to which I have earlier referred exhaustively defined the court's power to depart from the meaning prescribed in the Act.

39. *Director of Corporate Enforcement v. Bailey* was concerned with whether a reference to '*person*' in s. 3(1)(c) of the Company Law Enforcement Act 2001 was limited to natural persons so as to exclude from the ambit of the term an unincorporated association of persons – in that case, the firm of PwC. The issue arose because PwC had been retained by the Director of Corporate Enforcement to undertake certain tasks, and, if it were a '*person*' for the purposes of the provision, the effect of s. 3(c) would have been to render the firm an '*officer*' of the Director for certain purposes. Sections 3(1)(a) and (b) identified specific individuals as officers, and, in the course of her judgment, Denham J (as she then was) said that, having regard to s. 18(c) of the Interpretation Act, she '*would draw no inferences from paras. (a) and (b) so as to limit the general meaning of the term "a person", in the absence of any express deviation from the general and usual meaning*'. That is not to say that such an '*express deviation*' was required in all circumstances, merely that insofar as the contention advanced to the court was based on the suggestion that because s. 3(a) and (b) referred to individuals that (c) must be construed as doing likewise, a clearer displacement of s. 18(c) was required.

40. Third, and most importantly, the approach adopted in the earlier cases and reflected in *Blue Metal Industries Ltd. v. RW Dilley* mirrors the method adopted more generally in the interpretation of legislation. The sequence of decisions of the Supreme Court in *DPP v. Brown* [2018] IESC 67, [2019] 2 IR 1; *Minister for Justice v. Vilkas* [2018] IESC 69, [2020] 1 IR 676; *Dunnes Stores v. The Revenue Commissioners* [2019] IESC

50, [2020] 3 IR 480; *Bookfinders Ltd. v. The Revenue Commissioners* [2020] IESC 60; and *The People (DPP) v. AC* [2021] IESC 74, [2021] 2 ILRM 305 have put beyond doubt that language, context and purpose are potentially in play in *every* exercise in statutory interpretation, none ever operating to the complete exclusion of the other. The starting point in the construction of a statute is the language used in the provision under consideration, but the words used in the provision must still be construed having regard to the relationship of the section to the statute as a whole, the place of the statute in the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the statute. Those provisions of the 2005 Act governed by s. 4(1) have an important role in the ascertainment of the imputed legislative intent to which the process of statutory interpretation is directed, but they do not subordinate the generally applicable principles, in particular the requirement that the court ascertain the meaning of each section by reference to its language, place, function and context.

41. It follows that I agree with the approach adopted by Hyland J. to the determination of whether *'a contrary intention appears'* in the Act so as to displace the construction otherwise required by the definition of '*person'* in s. 18(c). I would frame the inquiry, as the Privy Council did in *Blue Metal Industries Ltd. v. RW Dilley* by reference to whether the '*substance and tenor'* of the Act as a whole is inconsistent with the word '*person'* as it appears in the relevant provisions of the Act as including a body corporate and would stress the conclusion reached in that case that it is not appropriate that a fundamental shift in the policy of an Act as evident from the gist of the legislation as a whole be effected *via* the application of an Interpretation Act. The language used in the Act under consideration is thus central to this exercise, but there is no requirement

that the inclusion of bodies corporate within the term be expressly negated. It is sufficient if a construction of the Act as a whole in context demonstrates a different intent. As I have earlier noted, this can certainly arise (as the applicant suggests) where as a matter of fact or law a reference in legislation can only be to natural persons and it can arise (as the applicant also suggests) where to construe the words in any other way would do violence to them. But it can also arise where the language, subject matter and context of the Act are clear and decisively probative of an intent to displace the construction that would otherwise follow from the provisions of s. 18.

42. Two final and related points should, having regard to the applicant's case, be observed in this regard. First, the applicant forcefully argued in the course of its convincing and considered submissions that while the overall scheme, and for that matter context, of an Act could be considered in determining whether the '*contrary intention'* appeared from a statute for the purposes of s. 4(1), there was a '*high threshold'* to be met in displacing the meanings provided for in s. 18. I am not certain that this description much adds to matters. It is certainly the case that the court should not lightly conclude that the draftsman has proceeded ignorant of the Interpretation Act, but the test to be applied in deciding whether that Act has been displaced by a true analysis of the statutory scheme and context should be no different from that operated where seemingly clear words in legislation are read down by reference to similar considerations (see for a recent example *The People (DPP) v. AC*).

43. Second, it was contended that the approach adopted by Hyland J. undermined the purpose of Interpretation Acts, which are designed to bring some certainty to aspects of the process of statutory interpretation. While the assumption here is correct – Interpretation Acts will in the majority of cases enable the rapid resolution of recurring

issues of phraseology – there will inevitably be situations in which a more complex analysis is necessary. *Re Worldport Ireland Ltd.* is a good example: while the High Court found that a body corporate could be a shadow director having regard to the language used in the governing sections of the Companies Act, Fennelly J., delivering the principal judgment on appeal, examined carefully the applicable provisions, concluding (at para. 43) that s. 27 of the Companies Act 1990 did not accommodate the extension of the meaning of '*person*' to include a body corporate. The reason, he said, was simple – the draftsman did not advert to the complication presented in that case, and that, properly construed and analysed, the section evinced an intention contrary to the normal rule including a body corporate within the meaning of person. The point is that there, as here, and indeed as will inevitably be the case in relation to other issues arising under other statutes, the obligation of the court is to identify and implement the actual policy of the legislation. It is not the function of Interpretation Acts to require the contrivance and application of a legislative policy that conventional principles of construction would disclose as never having been intended.

Context

44. In 1974, a Committee on Civil Legal Aid and Advice was appointed by the Minister for Justice to advise on the introduction of a comprehensive scheme of legal aid and advice and to recommend on the form, nature and administration of the scheme and on the legislation necessary to establish it. Under the Chairmanship of Mr. Justice Pringle, it reported in December 1977 (*Report of the Committee on Civil Legal Aid and Advice* Prl. 6862). That report recommended the establishment of a Legal Aid Board for the purposes of administering the comprehensive scheme proposed by the Committee. A

more limited interim scheme was also proposed, providing legal aid in more confined cases such as family law matters and landlord and tenant cases. Significantly, the Pringle Report suggested that legal aid should be available only to natural persons, and not to companies – principally because '*most bodies of this kind would be in a position to afford their own legal services'*. It also suggested that legal aid or advice should not be made available to a person who was merely acting as a representative or a group or organisation wishing to have advice or to take or contest legal proceedings in connection with matters which are primarily of interest to the organisation as such. Appended to the Report was a draft Legal Aid Bill, which specifically defined '*person'* as '*a natural person'*.

45. Notwithstanding that report, as of October 1979 there was still no legal aid in Ireland for civil matters. In that month, the European Court of Human Rights delivered its judgment in the case of *Airey v. Ireland*, in which it found that the absence of such legal aid for an applicant, who wished to pursue judicial separation proceedings but who lacked the means to employ the services of a lawyer, constituted violations of Articles 6 and 8 of the European Convention on Human Rights. The decision – which was confined on its facts to the position of individuals – was shortly followed by the introduction of a non-statutory scheme of Civil Legal Aid and Advice, administered by a Legal Aid Board established for that purpose ('*the Scheme'*). The Scheme (which was laid before the Houses of the Oireachtas in December 1979) specifically defined '*person'* as that term appeared throughout its provisions as meaning '*a natural person'* (section 1.1).

46. There can be no doubting the connection between this Scheme and the Act. The Board established under the Scheme was dissolved by the 1995 Act (s. 13) and the new Legal

Aid Board established by the Act took over the property and liabilities of the Board established under the Scheme (s. 14) and had transferred to it its staff (s. 21). To that end the Scheme was specifically defined in the Act (s. 1(1)). However, unlike the Scheme, and for that matter unlike the proposal made in the Pringle Report and in contradistinction to the draft Bill appended to that report, the Act did not expressly limit its scope to natural persons.

47. It might be said that the failure to continue in the Act the exclusion expressly provided for in the Scheme, meant that the Oireachtas intended to remove it. It might, alternatively, be said that the overall intention was to maintain the essential character of the non-statutory scheme originally put in place in 1979 so that it was simply assumed that a fundamental feature of the old scheme was retained by and inherent in the new one. Each perspective is plausible, but I do not find either of great weight in resolving the issue here. They result only in the uninformative conclusion that the Oireachtas may have intended to do no more than necessary to continue the existing scheme and thereby strictly implement perceived obligations under the European Convention on Human Rights, or that it may have intended to do a lot more (and see for the rejection of a similar argument for reading down by context *Heather Hill Management Company CLG and anor. v. An Bord Pleanála* [2022] IESC 43). The context being inconclusive, the issue must be resolved by reference to the language in the legislation alone.

48. In construing that language, it is important to bear in mind that while – understandably – the applicant was inclined to frame its case from the perspective of the needs and position of a company functioning as a charity and in the nature of a non-governmental organisation established to pursue causes of general interest, the question in issue here

is far broader. The issue is whether the Oireachtas intended to include bodies corporate generally as potential recipients of legal aid. That may, of course, include bodies such as the applicant. But it will also – and one might think would commonly – comprise trading companies.

49. The design of a means-tested scheme of legal aid and advice for legal entities presents particular issues that will not arise in the case of a system intended solely for the benefit of individuals. First, there are certain types of litigation in which only companies can engage or in which they are significantly more likely that individuals to engage – most obviously under the Companies Code itself. A legislator in putting in place a scheme of legal aid that extended to such entities would, necessarily, direct its attention to whether there were categories of corporate litigation that should be excluded from legal aid.

50. Second, while there may be situations in which litigation or advice given to individuals may also enure to the benefit of third parties, this will almost invariably be the case when a company brings or defends legal proceedings in pursuit or protection of its economic interests. In that situation it is often in reality the shareholders, related and associated companies or, and particularly if the company is in a state of actual or near insolvency, its creditors, who will benefit from the litigation. In some cases, the persons who actually benefit may not be known, as will occur when the shares are held on behalf of undisclosed beneficial owners. In a wholly commercial context, it will often occur that these persons have both the means and an incentive to participate in or fund the litigation process. So, the prudent legislator would at least wish to consider whether (and, if so, how) legal aid to artificial legal entities should be conditioned to reflect that reality.

51. Third, companies are in a different position within the litigation process to individuals in a number of respects that are potentially relevant to the calculus that might govern the decision whether or not to grant legal aid. By definition, those seeking such assistance will be in actual or prospective financial difficulty of some kind. Under s. 52 of the Companies Act 2014, a defendant may require the provision of security for costs from a corporate plaintiff if it can show that the plaintiff would not be in a position to discharge any costs awarded against it and in favour of a defendant. A legislator would wish to at least consider how a legal aid granting authority should respond to that reality in deciding whether to extend aid for the purposes of commencing an action, and to any such order if made.

52. Moreover, an individual who sues faces the prospect of costs orders which will attach to his or her personal assets. Those owning companies will not face that prospect. Instead, the risk arising from costs orders will – again if the company is insolvent or of doubtful solvency – fall on the creditors, who may have no input into the decision whether or not to sue. So, the decision whether or not to sue is, necessarily, governed by a different risk/benefit analysis and the factors to be taken into account in deciding whether to proceed to litigation may be quite distinct. On the other side of the ledger, as it were, companies are in a more disadvantageous position than individuals: they cannot generally be represented in court by a director or shareholder, so that even the most simple of litigation processes (in which a personal litigant may represent themselves) will usually require the instruction of lawyers.

53. All of these practical examples are manifestations of a fundamental reality in our law. Incorporation is a privilege, not a right, and carries with it both benefits and burdens.

These are particularly evident within the litigation process. It would be unsurprising that that reality is reflected in a differential legislative treatment of legal aid as between corporate, and natural, persons. This is not to say that such a scheme must necessarily make provision for all of the foregoing considerations, merely that the factors to be considered in determining whether to extend legal aid to bodies corporate are different and – inevitably – would be likely to impose *some* restrictions not applied to natural persons, and to require consideration of *some* additional matters that do not arise in the case of individuals seeking legal aid.

54. An example that makes the point was referred to in the course of legal argument – the United Kingdom Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('*the UK Act*'), which governs legal aid in that jurisdiction in both criminal and civil matters. That Act, and the specific Regulations made thereunder to address the provision of legal aid to bodies corporate conveniently illustrate the particular policy issues that can arise in this context. Generally, legal aid in civil matters under that Act is expressly restricted to individuals. Section 31 and Schedule 3 of the UK Act expressly enables it to be extended to bodies corporate – but only exceptionally and in the limited range of cases in which not to do so would represent a breach of the European Convention on Human Rights or (retained) rights enforceable under EU law. A specific set of Regulations (the Legal Aid (Financial Resources and Payment for Services) (Legal Persons) Regulations 2013) ('*the UK Regulations*') address applications for legal aid by such persons and – as one might expect – require the provision of information not merely as to the resources of the applicant for legal aid, but also of such information regarding its subsidiaries and related companies, and of any person with a legal or beneficial interest in the applicant. In calculating the disposable income and capital of a legal person, the authority may treat all or any part of the resources of any person with a legal and beneficial interest in

the legal person, of any director of the company and any of its subsidiaries, as the resources of the legal person itself.

The relevant provisions

55. I think it important to stress that the focus of the inquiry in these proceedings is upon a limited number of provisions of the Act. There is no doubt but that some of the provisions of the Act use the term '*persons'* in the sense of individuals, most notably those sections addressing personnel of the Legal Aid Board or its power to enter into contracts (see for example s. 21 addressing the transfer of staff from the former Board to the new one, and ss.11(7) regarding contracts for services). Similarly, there can be no question but that at least one provision envisages '*persons'* as including bodies corporate: section 36 provides that costs awarded to a person not in receipt of legal aid against a person who is in receipt of legal aid shall not – subject to identified exceptions – be made against the Legal Aid Fund. It is difficult to see that this would not capture a corporate defendant sued by a legally aided plaintiff, as otherwise only natural persons would be placed under this restriction. It was, in addition, the respondent's case that section 28(5) also referred to bodies corporate. It provides that notwithstanding any other provision of the Act, the Board '*shall'* grant a legal aid certificate to '*a person'* where the State is by virtue of an international instrument under an obligation to provide civil legal aid to that person. As I have earlier noted, this is a reference to the provisions of Conventions to which the State is a party and in which certain foreign state authorities must be provided with such legal aid. Where this arises, none of the eligibility or contribution provisions of the Act apply.

56. However, it follows from the definition of '*enactment'* in s. 2(1) of the 2005 Act that s. 18(c) is concerned with the construction of '*any part of an enactment'* and it is possible for the same word to be used in different senses in various sections of the same Act. Indeed, in *Briggs v. Gibson's Bakery Ltd.* [1948] NI 165*,* it was held that the word could, notwithstanding the provisions of the Interpretation Act 1889, have different meanings within the same section of an Act. Here, the issue is with five provisions.

57. Section 24 records the general considerations governing the grant of legal aid or advice, providing that '*a person'* shall not be granted same unless the Board is of opinion that *inter alia*:

> '*a reasonably prudent person, whose means were such that the cost of seeking such services at his or her own expense, while representing a financial obstacle to him or her would not be such as to impose undue hardship upon him or her, would be likely to seek such services in such circumstances at his or her own expense …'*

58. Section 25 defines '*legal advice'*, referring to the person seeking same, while s. 26 identifies the criteria for obtaining such advice. Section 26(2)(c) states that a person shall not qualify for legal advice in respect of '*a matter concerning which the Board considers it would be possible for the person, without hardship, to obtain the appropriate advice without obtaining legal advice under this Act.'*

59. Section 28 addresses the criteria for obtaining legal aid (as defined in s. 27 it is distinguished from '*legal advice'* by reference to representation in legal proceedings) and provides that a person shall not be granted legal aid in the absence of a legal aid certificate which, in turn, may be granted only if certain criteria are satisfied. Section

28(9) (save to the extent it is varied by ministerial order) provides that legal aid shall not be granted in respect of certain matters. These include defamation actions, disputes concerning rights and interests in or over land, licensing, conveyancing and election petitions. Section 28(9) provides for exceptions to these exclusions arising *inter alia* in Landlord and Tenant disputes concerning residential property, disputes as between spouses or cohabitants, and certain disputes relating to the family home where '*a refusal to grant legal aid would cause hardship to the applicant'*.

60. Finally, for present purposes, s. 29 addresses financial eligibility and provides for the making by an applicant of contributions towards the cost of legal aid or advice. The Act envisages that much of the detail of these matters will be addressed in Regulations to be made by the Minister under s. 37 of the Act. Section 29(3) is as follows:

> '*An applicant's financial eligibility shall be assessed by reference to the applicant's disposable income and, where appropriate, disposable capital and the contribution payable by the applicant … shall be assessed by reference to the applicant's disposable income and, where appropriate, disposable capital, as prescribed by the Minister by regulations under section 37'*.

Does the Act show a contrary intention?

61. When these provisions are read together, three things are clear. First, at every point at which the legislature has touched the question of the scope of the scheme, defined the conditions of eligibility for legal aid or advice or identified the circumstances in which those conditions may be waived or abated, it has done so using terms that one would

normally associate with the activities, needs and experiences of an individual and not of a body corporate.

62. I have no doubt that one could credibly argue that the language used in these provisions could be stretched so as to bear the construction that a company could be a '*a person of insufficient means'* (the phrase appears in the Long Title in defining the purpose of the scheme), that a body corporate can experience '*hardship'* (the phrase that appears in ss. 24, 26 and 28) or that a wholly artificial legal entity may have a '*disposable income'* as that term is used in s. 29 (as indeed the UK Regulations have done - expressly) but none of this reflects the usual and plain sense in which these terms are ordinarily employed. All of these phrases present familiar descriptions of how individuals might calibrate their own financial affairs, calculate the monies available to them to expend on '*unnecessaries'* and express when a disbursement will cause an unacceptable and disproportionate stress on their ability to meet ordinary living expenses.

63. I cannot for my part improve on the clear and practical descriptions of two of these terms suggested by the trial judge. The first appears at para. 47 of her judgment:

> '*The concept of disposable income is one that, in its ordinary and natural meaning, is associated with the income individual people have available to them after meeting their basic human needs of food, accommodation, care of dependants, transport, taxes, insurance and so on. All humans, irrespective of their situation in life, have basic needs that require to be met; and the deduction made by the Legal Aid Board is intended to allow for that and to permit an analysis of their available income, being their disposable income, to be made only after that deduction.'*

64. Of '*undue hardship'* she said (at para. 51) that '*[t]he reference to "undue" carries with it an implication of core human needs that must be met and a reluctance to impose financial hardship on persons that would impact upon their ability to meet their basic needs.*' I agree with all of this. The entire Act is framed by reference to terminology that is consistent only with the view that the scheme of legal aid and advice being put in place by the Act was to be made available to individuals, not companies, and to reflect the ordinary way we refer to our own financial affairs, not to those of corporate entities. The reference to pronouns in s. 18(c) does not detract from the fact that consistently throughout the provisions dealing with the criteria for obtaining legal aid (s. 28(2)(c)), financial eligibility and contributions (s. 29(7) and (8)) and even residence (s. 30(2)) the Act uses *only* the pronouns '*her or she'* or '*him or her'* both reflecting and supporting that conclusion.

65. Second, while it is obvious that the Oireachtas has given careful consideration to the matters for which legal aid should be made available to individuals, there is nothing in the Act that would suggest that it has given *any* consideration to the particular factors that may arise in the case of a corporate litigant. The Act (s. 28(9)(d)) states that a legal aid certificate shall not be refused by reason only of the fact that a successful outcome to the proceedings may benefit persons other than the applicant, but makes no provision for how the Board should negotiate an application relating to proceedings which, in reality, will benefit *only* some or all creditors or shareholders, and in particular what should happen when a secured creditor – potentially a well resourced one – is the only actual beneficiary of the proceedings. While s. 28(9)(a)(vii) allows the Board to refuse legal aid having regard to the resources of persons who would benefit from the

proceedings, this is only where the proceedings are brought '*in a representative, fiduciary or official capacity'* and would not encompass a company suing in its own right, but in circumstances where shareholders or creditors are the actual and ultimate beneficiaries. It may be that the more general powers vested in the Board (such as the condition identified in s.28(2)(e) that aid be granted where having regard to all the circumstances of the case including the likely benefit to the applicant it is reasonable to grant it) could be harnessed to that end, but it cannot be said that these provisions were intended to deal with the particular issues arising in the case of a corporate applicant for aid. No provision of any kind is made for assessing the financial position of companies, whether by reference to their audited accounts, gross or net profits, fixed or current assets or otherwise.

66. Moreover, it is not obvious that the legislature intended that Regulations made under s. 37 could allow the Board to compel shareholders, creditors or other beneficiaries to disclose information regarding their ability to fund the litigation, and it is similarly unclear how the Board would navigate cases in which legal aid was granted to a body corporate against which an order for security for costs would be granted (or indeed how the court in determining whether to grant such security would take account of the fact that the plaintiff was legally aided). No express provision is made for taking into account (or for that matter ascertaining) the income or assets of associated or related companies, and even if this could be done by Regulation, the statutory power to take account of assets divested by a person seeking legal aid where this divestment occurred in order to create an eligibility (s. 29(7)) would not apply to those parties. One would expect that, had it been intended that companies might avail of legal aid, consideration would be given to the exclusion of some types of litigation – resisting the winding up

of the company, participating in oppression proceedings in which the primary protagonists are the shareholders, and so forth.

67. Instead, the legislature has framed the allowances and deductions to be applied in determining financial eligibility in terms that are largely referable to individuals. Here, again, I think the trial judge put the matter particularly well (at para. 48):

> '*The deductions convey the picture of a person whose means are being assessed by looking at their gross income, then looking at what they need to live qua human person and then applying a deduction in respect of those expenses. It is accepted that people have to have a place to live, may have to support their spouse, may have to support their children (including past the age of 18 depending on the circumstances of their children), may have to support other people, may have to pay to have their children cared for, should take out life and health insurance, have to pay tax and social insurance, incur expense in going to work, may take out a loan and have to pay interest or may buy goods by hire purchase and so on. It is accepted that because humans need to engage in those activities, it is fair to consider how much money they can spend on legal services after deducting the expenses associated with the above activities.*'

68. Third, the trial judge directed some attention to s. 28(9)(a) (viii) and (ix) of the Act. These identify two of the matters in respect of which legal aid shall not be granted. They are as follows:

> *'(viii) a matter the proceedings as respects which, in the opinion of the Board, are brought or to be brought by the applicant as a member of and by*

arrangement with a group of persons for the purpose of establishing a precedent in the determination of a point of law, or any other question, in which the members of the group have an interest;

(ix) any other matter as respects which the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned.'

69. The point made by the trial judge regarding these provisions was that they were clearly intended to exclude the provision of legal aid in respect of litigation designed to benefit the members of a group. However, if '*person'* included legal persons, the wording of these subsections would arguably not exclude a legal person such as the applicant from issuing proceedings designed to benefit its members – including proceedings brought to determine a point of law with precedential value. So, a member of the applicant could not have obtained legal aid to bring the litigation which gives rise to these proceedings. Yet, she observed, if the applicant were correct in the contention it advanced, it would not be covered by these sections. She continued (at para. 55) :

'*This would make a nonsense of the sections, since their very purpose is to exclude the very type of litigation that NGO's wish to bring. This suggests to me that the legislature did not intend the reference to "applicant" or "person" to include legal persons. If the legislature had assumed such legal persons were included in the definition of "person", they would presumably have included a provision in the 1995 Act excluding from legal aid litigation brought by a person aimed at securing a benefit to its members or shareholders. Accordingly, I find*

those sections suggestive of an interpretation of the Act as applying only to natural persons.'

70. I agree, and would add this. Aside entirely from the issue of public interest proceedings, these subsections disclose a basic discordance between the overall scheme of the legislation and s. 18(c). That section, it will be recalled, does not merely refer to bodies corporate, but also '*an unincorporated body of persons'*. This, indeed, was the point in *Director of Corporate Enforcement v. Bailey,* where the issue was whether the provision in question extended to a partnership. The extension of legal aid to such associations would often be precluded by s. 28(9)(viii), but would *always* be inconsistent with s. 28(9)(ix). This follows from the fact that the section is intended to preclude legal aid for '*representative actions'* (see Whyte [1995] ICLSA 32-48) and thus mirrors the language of Order 15 Rule 9 RSC. Such an association has no legal personality and therefore sues through some or all of its members who are by definition acting for each other's benefit. If the effect is that unincorporated associations are so precluded from obtaining legal aid for proceedings they wish to bring through their members the applicant's case becomes even more challenging: it must establish that while s. 18(c) mandates the extension of the Act to legal persons, it cannot do so for unincorporated associations, although they are brought within the interpretative presumption by the same provision.

71. When considered together, these three features of the legislative scheme leave no room for doubt but that the 1995 Act was intended, and only intended, to institute a scheme of civil legal aid and advice for natural but not for artificial, legal persons. The terminology used in the Act, the evident failure to consider and address matters that would have to be factored into the decision whether to grant legal aid to a body

corporate, and the express exclusion from the scheme of proceedings intended to confer benefits on third parties, coerce the conclusion that to extend the Act to legal persons would be entirely inconsistent with the tenor and substance of the legislation, would fundamentally change its character and would impose on the legislation a new category of beneficiary of legal aid whose addition to the scheme cannot be said to have been contemplated by the Oireachtas.

The Regulations

72. That being so, it is to be expected that the Regulations (the Civil Legal Aid Regulations 1996, SI 273/1996) made by the Minister in September 1996 under s. 37 of the Act (which was passed in December of the previous year) proceed on the assumption that it is only natural persons that are contemplated by the scheme (the Act and the Regulations both came into force on the same day – 11 October 1996). It relates income to salary, and refers to wages, pension or other annuity and (and this was a feature emphasised by the trial judge) allowances that are almost exclusively relevant to natural persons, including the taking into account of spousal and other dependants, expenses of travelling to and from work, social insurance and life insurance payments, child care costs and board and lodgings.

73. The trial judge took some account of these provisions (but only because the version to which she had regard was nearly contemporaneous with the Act) on the thesis that they evidenced a contemporaneous interpretation of the Act, referring to Dodd *'Statutory Interpretation in Ireland*' (2008) at para. 13.14. Having regard to the conclusion I have reached based on the Act alone it is not necessary to treat in detail this argument, but for my part I find the proposition that the court in interpreting legislation should or may

ever have regard to regulations produced by a Government Minister – however contemporaneous they may be with the Act itself – troubling. The sole legislative power in the State is vested in the Oireachtas, and the Executive does not have the power to amend legislation so enacted. If the interpretation of legislation urged by a sponsoring Minister before parliament is inadmissible to construe the legislation, it must follow that his or her opinion of the scope of the legislation following its enactment is similarly irrelevant to the process of construction. If that is so, then I cannot see on what basis Regulations demonstrating that understanding can be consulted in the course of interpreting the Act. That, I note, was the conclusion shortly stated by McKechnie J. in *Dunnes Stores v. Revenue Commissioners* (at para. 81) – '*primary legislation cannot be interpreted via the Regulations'* (although it is to be noted that the Regulations did have a particular relevance in that case for other reasons).

Article 47(3) of the Charter

74. Neither the respondent nor the Attorney General disputed that the Charter (Article 51 of which limits its operation to fields covered by EU law) was engaged by the applicant's challenge to the National Development Plan. The issue was whether Article 47(3) afforded a basis on which the court must interpret the Act so that the legislation enabled the grant of legal aid to a body corporate for the purpose of pursuing such proceedings.

75. Article 47 provides that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in the Article comprising a fair and public hearing within a reasonable time by an independent and impartial tribunal previously

established by law. Stating that everyone shall have the possibility of being advised, defended and represented, it then stipulates:

> '*Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*'

76. The scope of this provision fell for consideration by the CJEU in *DEB*. The Article 267 Reference giving rise to that judgment was made following an unsuccessful application for legal aid submitted by the (corporate) claimant to the Berlin Regional Court. It sought the aid for the purposes of pursuing an action against Germany for financial losses allegedly incurred as a consequence of the failure of that State to transpose two Directives aimed at the liberalisation of the natural gas market. Under the applicable law, the claimant was required to make a substantial advance payment of court costs (in the region of €275,000) before it could institute its claim. It was also required to instruct a lawyer. As the company had no assets, it was in a position to do neither. The German Code of Civil Procedure allowed the grant of legal aid to a legal person, but only where the failure to pursue or defend the claim in question '*would run counter to the public interest'*.

77. Both the Berlin Regional Court and, on appeal, the Higher Regional Court refused the application for legal aid on the basis that the discontinuance of the action in question was not contrary to the public interest. The reason for that conclusion was that that decision would not affect a sizeable proportion of the population, would not have social repercussions, would not preclude the claimant from fulfilling duties in the public interest and would not result in loss of employment or injury to a great many creditors

(the claimant, which appears to have been a shelf company, had neither creditors nor employees). The Higher Court then referred to the CJEU a question as to whether – having regard to the fact that Member States may not make the award of compensation in accordance with principles of State liability in practice impossible or excessively difficult – there must be:

> '*reservations with regard to a national rule under which the pursuit of a claim before the courts is subject to the making of an advance payment in respect of costs, and a legal person, which is unable to make that advance payment, does not qualify for legal aid.'*

78. Noting that for the purposes of EU law '*legal aid'* was not limited to payment for the assistance of a lawyer but could also include '*dispensation from payment of the costs of proceedings'* (at para. 48) and stressing the relationship between provision for legal aid and the right to an effective remedy, the critical findings of CJEU were as follows.

79. First, the Court (at the very least) appears to me to have assumed that the provision for legal aid in Article 47(3) was not limited to natural persons, but extended to legal persons. While the respondent was inclined to dispute that the Court had so found, this is not consistent with the manner in which the Court analysed the issue. Thus, it stressed that the first two paragraphs of Article 47 did not exclude legal persons (para. 38), it specifically noted that the right to an effective remedy was found in Title VI in which other procedural principles are established which apply to both natural and legal persons (para. 40) and it stressed that provision for legal aid did *not* appear in Title IV of the Charter, which related to solidarity, thus indicating that the right was conceived not as one of social assistance (which, being rooted in human dignity would not be

readily applicable to legal persons – this is explained at para. 24 of the judgment). This assumption reflects the thrust of the Strasbourg jurisprudence. The European Court of Human Rights has thus considered claims that the absence of legal assistance and the fact of court fees in respect of proceedings breached the Article 6 rights of legal persons (*Granos Organicos Nacionales S.A. v. Germany* Application No. 19508/07, decision of 22 March 2012) and has recently found a breach of the provision in a case in which some of the applicants were legal entities and were refused an exemption from court fees found to be excessive, simply because they were commercial entities and the law did not permit the grand of legal aid to such bodies (*Nalbant and ors. v. Turkey* Application No. 59914/16, decision of 3 May 2022). Of course, the Strasbourg court addresses itself whether, on the facts a breach of the provisions of the Convention in issue (there, Article 6) is disclosed having regard to all the circumstances of the case, but the decisions show at the very least that a legal person can complain of a breach of that Article where it is precluded outright from obtaining legal aid.

80. Second, the CJEU found that the assessment of the need to grant a litigant such aid must be made '*on the basis of the right of the actual person whose rights and freedoms as guaranteed by EU law have been violated, rather than on the basis of the public interest of society, even if that interest may be one of the criteria for assessing the need for theaid'* (para. 42). It is to be recalled that that statement was made in a context in which the relevant national rule of civil procedure framed the test for grant or refusal of aid to a legal person by reference to the public interest. Thus, the selection procedure applied to determine who will obtain that aid must operate in a non-arbitrary manner (para. 49).

81. Third, the court identified factors that could be taken into account in determining whether to grant legal aid to a legal person, including the subject matter of the litigation,

the financial capacity and form of the company, and the financial capacity of the shareholders (paras. 52-55).

82. Fourth, it followed that the principle of effective judicial protection protected by Article 47 must be interpreted as requiring that '*it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer'* (para. 59). While this statement may not be a model of clarity, I think it hard to dispute that it follows from this part of the judgment of the CJEU that it is arguable that the court was positing a prohibition on the absolute exclusion of bodies corporate from legal aid for certain purposes. This would reflect the analysis I have identified earlier and the context, in which the effect of the specific rules for the provision of legal aid to corporate entities in the German Civil Procedure Code was to preclude the claimant in that case from obtaining assistance with the discharge of the advance payment in question. It is to be remembered that the entire point of the Reference was that a body corporate had been denied legal aid under specific rules provided in German law for the provision of such aid to such entities.

83. Fifth, it is clear from its judgment that limitations on the availability of legal aid were permissible, and that such limitations would involve a breach of Article 47 only where in an individual case they undermined '*the very core'* of the right of access to the courts having regard to whether such limitations pursued a legitimate aim, and whether there was a reasonable relationship of proportionality between the means employed and that aim. There can be no doubt but that the restrictions that could be imposed on the provision of legal aid to a body corporate could be more restrictive than those that might be imposed on an individual. And critically for present purposes, there can be no

dispute but that in deciding whether such an entity should be afforded legal aid, the court is entitled to have regard to a range of factors, *including* whether it can proceed with the litigation in question without such aid, together with other relevant aspects of the legal system in question (including provisions as to lodgement of monies as a precondition to suing and potential exposure to costs orders in the event of an adverse outcome).

84. Noting that where the CJEU refers to '*court'* in this context it is reflecting the fact that it was concerned with a case in which the grant or refusal of legal aid was determined *de novo* by the referring tribunal, and the CJEU described the assessment this entails as follows (at paras. 61-62):

> *'In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts.*
>
> *With regard more specifically to legal persons, the national court may take account of their situation. The court may therefore take into consideration, inter alia, the form of the legal person in question and whether it is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and*

> *the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.'*

The Article 47 issues

85. As I have explained earlier, the trial judge addressed the arguments in respect of Article 47 by reference to what was, in effect, an argument of *jus tertii*: the applicant had not established that the absence of legal aid had prevented it from obtaining a legal remedy in the judicial review proceedings (in fact because it was able to obtain the services of lawyers on a '*no foal no fee'* basis, it *was* able to obtain such a remedy). Therefore, the judge decided, it followed that it could not assert any breach of its rights so as to enable the agitation of its argument that the Act should be interpreted so as to allow it to apply for legal aid.

86. Here, I respectfully part company with the judge. The applicant is a body corporate which wished to apply for legal aid, and which contended that its exclusion from the relevant Legal Aid scheme because and only because it was a legal and not a natural person was in breach of its rights under EU law. It may well be that a scheme of legal aid which allowed bodies corporate to apply for and to be granted legal aid could quite properly have made provision for the refusal of legal aid to a legal entity which, as a matter of fact, had a proven track record of being able to obtain on a '*no foal no fee'* basis the services of a stable of expert environmental lawyers, but that was not the point. There was *no* scheme making such provision and the applicant was entitled to contend that the absence of a facility for its application to be even assessed demanded, in the light of the provisions of Article 47, that the legislation be construed otherwise. Here

it is to be repeated that the applicant's case is that Article 47 confers a direct right on it, which it is entitled to enforce against the State and which requires that domestic legislation be construed so as to align with that entitlement.

87. The claim must, accordingly, at the very least be considered on its merits. It can be looked at two ways. Viewed from one perspective, it might be said that the decision in *DEB* makes clear both that Article 47(3) envisages an entitlement to legal aid in some circumstances as a necessary component of the principle of effective judicial protection *and* that that right is enjoyed by natural and legal persons. While the decision leaves no doubt but that natural persons and legal persons may be treated differently for this purpose, it is at the very least arguable that the decision demands that the Member States have in place a facility for legal aid that may be availed of in cases involving litigation that engages EU law, that that system be open in principle to legal persons, and that there must be a process whereby applications for legal aid by bodies corporate in cases within the field of EU law can be assessed in accordance with the factors and considerations identified by the court in *DEB*. On this construction, and in the absence of any other system of legal aid for such cases, it might be said that the Act should be construed harmoniously with EU law so as not to impose a blanket prohibition on the grant of legal aid to bodies corporate. In *DEB* itself (as was noted by Advocate General Bobek in Case C-298/16 *Ispas* at para. 50) the CJEU assumed that generally applicable provisions of national law governing legal aid, while not intending to implement EU law, nonetheless fell within the scope of EU law for the purposes of Article 47.

88. Looked at another way, *DEB* can be explained as a case that was focussed not on legal aid as it is comprehended by the Act, but as a case concerned primarily with the

abatement of a requirement that a corporate litigant lodge a significant sum of money prior to the commencement of a legal action. The court (as the respondent argued in its submissions on appeal) was concerned not with whether legal aid must be made available to bodies corporate, but with how a scheme which in theory did apply to such entities should be operated to render it compliant with Article 47. Thus considered, it can be plausibly said that the Irish legal system viewed in a conspectus way, does not interfere with what CJEU described as '*the core*' of the right of access to court for bodies corporate such as the applicant. First, there is not only no requirement to lodge monies in Court as a precondition to pursuing legal action of the kind considered in *DEB*, but Irish law does provide to all litigants (including bodies corporate) a wide exemption from any exposure to legal costs for certain environmental claims through s. 50B of the Planning and Development Act 2000 as amended, and the Environment (Miscellaneous Provisions) Act 2011. Second, it might be said that in the light of that exemption, of the fact that individuals may avail of legal aid under the Act, of the clear and accepted differences between natural and legal persons for the purposes of granting legal aid, of the fact that Irish law – while enabling the exemption from adverse cost orders in certain environmental proceedings – allows a successful applicant to obtain its costs, and of the consideration that in Ireland there is a long tradition of lawyers providing services on a '*no foal no fee*' basis (and an economic incentive for them to so do in cases of merit), the blanket exclusion of bodies corporate from the 1995 Act is lawful.

89. Third – and this is a point made forcefully by the Advocate General in her opinion in Case C-260/11 *Edwards and ors v. Environment Agency and ors* ECLI:EU:C:2012:645 at para. 39 – Article 47 of the Charter (in contrast to Article 9 of the Aarhus Convention)

is concerned with *individual rights* and is not specifically targeted at litigation brought in the public interest. *DEB,* it will be noted, was a case in which the claimant sought to bring proceedings in its own right to recover damages consequent upon non-implementation of two Directives. The extent to which provisions of Article 47 would confer a right to legal aid in connection with proceedings such as the NDP case is, therefore, an open question, and factors permissibly brought to bear on the decision whether or not to grant such aid to a body corporate are not canvassed in *DEB*. Advocate General Kokott put the distinction as follows:

> '*Article 47 expressly relates to the protection of individual rights. The basis for the assessment of the need to grant aid for effective legal protection is therefore the actual person whose rights and freedoms as guaranteed by the European Union have been violated, rather than the public interest of society, even if that interest may be one of the criteria for assessing the need for the aid.*
>
> *Legal protection in environmental matters, on the other hand, generally serves not only the individual interests of claimants, but also, or even exclusively, the public. This public interest has great importance in the European Union, since a high level of protection of the environment is one of the European Union's aims under Article 191(2) TFEU and Article 37 of the Charter of Fundamental Rights.*'

The Aarhus Convention Issues

90. It follows that, at least to some extent, the Article 47 issues and those arising under the Aarhus Convention must be considered in tandem. The Supreme Court has recently

conducted an extensive analysis of the provisions of the Aarhus Convention and its relationship with domestic and European law insofar as the costs of certain environmental proceedings are concerned (*Heather Hill Management Co. CLG v. An Bord Pleanála* [2022] IESC 43 at paras. 23-31, 163-198, and 199-213). In summary, Article 9(2) requires access to a review procedure to challenge the legality of decisions, acts or omissions of public authorities regarding certain activities of a substantial scale having significant environmental effects, while Article 9(3) requires such access to challenge acts and omissions of private persons and public authorities which contravene provisions of national law relating to the environment. Article 9(4) requires *inter alia* that both of these procedures not be '*prohibitively expensive'*. As a matter of EU law – having regard in particular to the incorporation of aspects of Article 9 of the Aarhus Convention into the Public Participation Directives – there will be certain circumstances in which national courts applying national environmental law will be required to give an interpretation to national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Articles 9(3) and 9(4) of the Aarhus Convention. That obligation, in particular, arises in '*fields covered by EU environmental law'* (Case C-470/16 *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála* ECLI:EU:C:2018:185 ('*NEPPC'*)).

91. The applicant's argument to the effect that the '*not prohibitively expensive'* requirement imposed by Article 9(4) of the Aarhus Convention includes an obligation to provide legal aid in at least some circumstances is not complicated. The cost of legal representation for a case of the kind in issue in these proceedings is a potentially significant expense, and if a litigant cannot obtain legal representation without payment the absence of legal aid may render the cost of litigation '*prohibitive'* – particularly

when the law precludes it from bringing a case without legal representation. That there is a positive obligation on States not merely to arrange their laws so that such litigants do not face liability for their opponent's costs, or excessive court fees, but to also provide financial assistance to those who need lawyers but cannot afford them, might be said to follow the logic reflected in *DEB*. If legal aid is necessary in some cases to enable effective judicial protection, then it might be argued that it must follow that it is also required where litigation would be – without it – prohibitively expensive.

92. The applicant relies upon two authorities in support of that proposition. First, it notes the following observations of Advocate General Kokott in *Edwards* (at para. 38) :

> '*the Convention does not absolutely require, under Article 9(5), the introduction of assistance mechanisms such as legal aid, but only consideration of the 'establishment of appropriate assistance mechanisms'. However, legal aid makes it possible to prevent risks in terms of prohibitive costs in certain cases. In so far as the enforcement of provisions of EU law is concerned, legal aid may even be absolutely necessary if the risks in terms of costs, which are acceptable in principle, constitute an insurmountable obstacle to access to justice on account of the limited capacity to pay of the person concerned'*.

93. It also attaches importance to certain comments in *Conway v. Ireland* [2017] IESC 13, [2017] 1 IR 53. There, the plaintiff had sought to contend that he was entitled pursuant to the Aarhus Convention to legal aid for the purposes of proceedings brought by him to compel the restoration of a roadway and to require that a portion of another highway be designated as a motorway. The Supreme Court decided that the proceedings did not engage the Aarhus Convention at all, but in the course of his judgment Clarke J. (with

whom the other members of the court agreed) made some observations regarding the operation of the Aarhus Convention in domestic and European law. He began his analysis by observing that while it was possible that some provisions of the Convention might be directly effective in member states or might '*be required to be implemented as far as practicable by a conforming interpretation of national procedural rules'* he felt that it was also clear '*that not every provision of the Convention is directly effective or capable of such implementation'* (at para. 25).

94. The passages from the judgment of Clarke J. to which the applicant draws attention appear at paras. 31-33. There, he said the following:

> '*It is certainly arguable … that any costs which a party might necessarily have to incur in being able effectively to access justice, within the scope of the Aarhus Convention and the Public Participation Directives, would also have to be taken into account. In that context it is, perhaps, important to note that, at least in general terms, the burden of carrying litigation in a common law system falls more heavily on the parties and less heavily on the Court and its administration than is the case in may civil law systems… But a consequence of that saving in cost to the taxpayer is that a greater burden of establishing the facts and researching the law is placed on parties such that, at least in some cases, it would not be reasonable to expect a party to be able to present a case themselves without some form of legal (and perhaps other expert) assistance.*
>
> *It is at least arguable that, in the absence of legal aid, and assuming that the case is one which meets criteria such as those which I have just identified, an overall assessment of the cost of proceedings would have to take into account*

the costs which a party might necessarily have to incur to be able reasonably and effectively to achieve access to justice. It follows that there is an important question as to whether there may not at least be some cases where the State may either have to provide legal aid or provide some subsidy for parties who bring litigation within the scope of the Aarhus Convention and/or the Public Participation Directives.'

95. Referring to Article 9(5) of the Aarhus Convention (which, as I explain, expressly addresses the issue of legal aid in highly qualified terms), Clarke J. continued:

'*In that regard I have not lost sight of the point made by counsel on behalf of the State to the effect that article 9 of the Aarhus Convention itself only speaks of member states considering the adoption of a legal aid scheme. It is, however, arguable that the reason why that provision is not expressed in more definitive terms may be precisely because the legal systems of relevant states may differ significantly so that the requirement for a legal aid scheme, in order that the overall cost of relevant litigation not be prohibitively expensive, may differ radically from state to state or, indeed, between certain types of proceedings within each state.'*

96. From there, Clarke J. noted the limitations of the principle of direct effect, observing that even were it established that the proper transposition of the Public Participation Directives required the State to put in place a scheme of legal aid '*it would not necessarily follow that such obligation was sufficiently clear in the detail of its potential implementation to create directly effective rights'* (at para. 36). Clarke J. concluded by

observing the provisions of the existing legal aid scheme and noting '*the fact that the scheme seems to exclude representative bodies might well be a problem'*.

97. Given that Article 9 of the Aarhus Convention is not directly effective and, unlike Article 47 of the Charter, does not even arguably confer a right capable of being wielded against the provisions of the Act, it is my view that the essential argument advanced by the applicant here (that the Act should, to render it in conformity with the relevant provisions of the Aarhus Convention be interpreted so as to confer a right on the applicant to apply for legal aid) faces insuperable obstacles.

98. First, on its merits, the underlying claim (that Article 9(4) includes an obligation on the part of the State to provide a litigant with direct financial assistance to bring proceedings of the kind in issue here) does not strike me as strong. The Aarhus argument depends on deducing a meaning from the remarkably general term - '*not prohibitively expensive'* - which is far from obvious when that provision is placed in context. The nature and extent of the legal obligation imposed by this terminology must be deduced from (and consistent with) the text of the Convention itself. In this regard, Article 9(5) is critical. It provides:

> '*In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.'*

99. It is to my mind very difficult to see how one could deduce from a Convention which expressly and specifically requires contracting parties to '*consider'* a scheme of legal

assistance, a binding legal obligation latent in a wide phrase of general import in the preceding paragraph of the same Convention to actually have such a system in place. None of the comments of the Advocate General in *Edwards,* the observations of Clarke J. in *Conway* nor the findings of the Compliance Committee on communications ACCC/C/2009/36 (Spain), or ACCC/C/2008/33 (United Kingdom) (to which reference was made in the course of the hearing) change this. The comments of the Advocate General were not repeated in the CJEU decision in *Edwards,* which, while certainly acknowledging that the availability of legal aid was a factor to be taken into account in determining whether proceedings were prohibitively expensive, never posited a positive obligation to provide such aid. Noting that in *DEB* (upon which the Advocate General based these comments) the CJEU specifically stated that '*legal aid'* covered not merely assistance by a lawyer, but also '*dispensation from payment of the cost of proceedings'*, her comments are conspicuously tentative, as are those of Clarke J. In neither decision of the Compliance Committee is there a clear statement that (let alone explanation of how) Article 9(4) can be construed so as to convert the obligation of consideration in Article 9(5) into a duty to deliver. And finally, and perhaps most importantly of all, the issue is not what the Compliance Committee says but whether the interpretative obligation observed by the CJEU in *NEPPC* imposes an obligation to have legal aid available for environmental challenges. There is nothing in EU law that suggests that it does.

100. That this is so emerges with force from the *Commission Notice on Access to Justice in Environmental Matters* (2017/C 275/01) which addresses legal aid in the context of the Aarhus Convention, as follows (at para. 194):

> '*Article 9(5) of the Aarhus Convention requires the contracting parties to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. This provision stops short of requiring that a legal aid scheme is provided and EU secondary environmental legislation is silent on the matter. Member States may therefore choose whether or not to have a legal aid scheme which contributes to reducing the cost risk of litigation in environmental cases. However, the existence of a legal aid regime may not in itself demonstrate that costs are not prohibitive, if access to legal aid is means-tested and only open to individuals. This is because the requirement that costs must not be prohibitive applies to individuals with a capacity to pay as well as associations.*'

101. Second, there is a difference between the argument insofar as based upon Article 47 (which involves the assertion of what is said to be a right guaranteed by the Charter) and the Aarhus Convention argument which, necessarily, is based solely on the interpretative principle as expressed in *NEPPC*. Here, in my view, the trial judge was correct in the approach she adopted. The interpretative principle is one directed to whether in a particular case for a particular litigant, the proceedings are '*prohibitively expensive*'. Even if – which I doubt – the Act is properly characterised as a '*national procedural law*' of the kind envisaged in *NEPPC* (it is a free-standing substantive statute enabling the grant of legal aid in a wide range of different circumstances), I find it very difficult to see how a litigant which enjoys cost protection under domestic law (in which respect Irish law goes further than the Aarhus Convention, *Edwards* at para. 25), which has never averred that it was precluded by expense from proceeding with its case and which has in fact been in a position to instruct lawyers to represent it in the proceedings in question can get a claim that the proceedings were '*prohibitively*

expensive' and that in consequence the Act should be construed so as to allow legal aid, off the ground.

102. It is, of course, true that in *Edwards* the CJEU said (at para. 47) that the fact that a claimant has not been deterred from asserting his claim is not, of itself, sufficient to establish that the proceedings were not prohibitively expensive for him. But here, the issue goes much further: the applicant has been able to obtain the services of counsel and solicitors to advance its case, and it faces no cost liability from the State if it fails.

103. While I understand that at first glance this may appear to contradict the conclusion I have reached in relation to the Article 47 case, it merits restating that and why the arguments are different. The Article 47 case is a normative one based on an asserted right to consideration of an application for legal aid. The Aarhus Convention case is based upon a fact specific interpretative principle that attaches specifically to the rules and procedures applied to a particular and identified legal challenge. The first case might possibly require – if the applicant is correct – reinterpretation of the Act so that it can make and have considered its application for legal aid and that application must be entertained irrespective of whether the applicant can proceed with its case. It requires only proof that there is a right, and that the right has been breached through non-consideration of the application (which is admitted). The second arises only if there is in fact a '*prohibitively expensive'* procedure, so that must as a matter of evidence be established. The trial judge was, in my view, correct in concluding that it had not been so established.

Contra legem

104. While I am thus of the view that the applicant's case insofar as based upon Article 9(4) of the Aarhus Convention is misconceived, I also feel that its substantive claim insofar as based upon Article 47 of the Charter may be arguable – but is by no means clear cut. The argument is such that its resolution might conceivably merit a reference to CJEU. However, this should only be done if it is necessary.

105. Here, it is important to say something about the nature of the applicant's claim. That claim was not for orders requiring that State provide it with legal aid for the purposes of the NDP case. The relief was sought only against the Board, the Attorney General and the State being joined at the instigation of the High Court judge and for the purposes of negotiating the argument based on the Aarhus Convention. Although the Board is, of course, an emanation of the State, it can generally only act in accordance with its statutory remit. It might be argued that if the Act prevents the applicant from applying for legal aid in breach of Article 47(3) of the Charter, the provisions in the Act which so limit the scheme to natural persons should be set aside and ignored by the Court so as to give effect to the Charter rights. This case, however, was not made by the applicant, perhaps because, while the Act is the only composite legal measure in Ireland providing for a scheme of legal aid, it is not the only legal aid scheme. The State has put in place other schemes and there is no reason why it could not do so on an extra statutory basis if this was required by EU law.

106. Instead, the applicant's case was presented solely on the basis that the court should deliver a '*conforming interpretation*' of the Act. The objection to which I have just referred might perhaps be made in this context also : there is no need to deliver a conforming interpretation if there is another legal mechanism by which the alleged EU

rights could be secured. That argument does not appear to have been advanced by the respondent, which focussed instead on its contention that the interpretation urged by the applicant was not available as it would have been *contra legem.*

107. The general framework of the interpretative argument is familiar. It most usually arises in the context of provisions implementing a Directive, when the court is required in interpreting domestic legislation to do so '*as far as possible'* to achieve the result mandated by the relevant provision of EU law. However, as Advocate General Hogan stressed in the course of his Opinion in Case C-427/19 *Bulstrad Vienna Insurance Group AD v. Olympic Insurance Company Ltd.* (at para. 73), '*the key words here are, of course, 'so far as possible' … [t]he obligation on a national court to refer to EU law when interpreting and applying the relevant rules of domestic law cannot serve as the basis of an interpretation of a national law that is contra legem'*.

108. It does not need to be said that an interpretation that violates the express language of an Act is *contra legem,* nor that an interpretation that interposes into legislation a matter that brings an Act into line with EU without doing violence to the language or spirit of the legislation, is not. The courts may imply words and provisions into legislation to render it compliant with EU law even where the relevant language is unambiguous, and they may re-interpret the words used in legislation to that end. What they cannot, however, do is cross the barrier from the exercise of interpreting the Act, to a process of amending it.

109. The dividing line between the interpretation of an Act, and its amendment by construction may not always be easy to draw, but useful pointers may be had by considering whether the proposed interpretation is harmonious and consistent with the general thrust of the legislation or whether, as the English courts have put it, an

interpretation runs '*counter to the overall purpose and pattern of the provisions being construed ("the grain" of that legislation)',* per Evans-Lombe J. in *Vodafone 2 v. Commissioners of HM Revenue and Customs* [2008] EWHC 1569 at para. 70). That test will not be met where the suggested interpretation will undermine a fundamental feature of the legislation being construed. The principles expressed by McKechnie J. in *Foy v. An An t-Ard Chláraitheoir* [2007] IEHC 470, [2012] 2 IR 1 at para. 76 in the context of the interpretative obligation under the European Convention on Human Rights Act 2003 apply here also: '*[it] cannot extend to producing a meaning which is fundamentally at variance with a key or core feature of the statutory provision ... nor can it permit the destruction of a scheme or its replacement with a remodelled one.'*

110. These limitations are reflected in the decision in *Albatross Feeds v. Minister for Agriculture* [2006] IESC 52, [2007] 1 IR 221 where it was held that the provisions of a Directive could not be used to import into domestic Regulations powers of seizure, detention and recall of products: as a matter of national law the powers would have involved a significant incursion into the property rights of citizens which could be justified only through the use of express powers conferred by clear words. There, it is to be noted, even though the court was of the view that while the arguments as to EU law raised issues that would certainly have necessitated a reference to the CJEU, such a reference was not justified unless necessary to give judgment on the issues in the appeal. Because the suggested interpretation would have been *contra legem,* the Supreme Court concluded that it was not necessary to do so (see para. 64).

111. Here, it necessarily follows from the analysis I have conducted earlier of the provisions of the Act that it can only be concluded from the language used, the manner in which the Oireachtas has conditioned eligibility and contribution, the types of claim that have

been excluded from the scope of legal aid, and the express legal prohibitions on the grant of legal aid for bringing of claims for the benefit of others, that to reconstruct the Act in the manner contended for by the applicant would involve such a significant alteration to the purpose, thrust and scope of the legal aid legislation that it cannot be effected by means of the interpretative obligation contended for.

112. In particular, the *only* construction urged and, I think, the only construction that could be plausibly effected by the court would be one that dropped legal persons into the Act without restriction or qualification. That would create a significant distortion of the legislative scheme, with certain actions excluded from the benefit of the Act on the assumption that it applied only to natural persons, and none excluded to reflect the particular position of corporations. It would leave (at the very least) a significant doubt around whether, in calculating the means of a company, regard could be had to the assets and liabilities of associated companies, of shareholders or directors, or to the financial position of creditor beneficiaries. How, exactly, the Board is expected to determine if the refusal of legal aid or the imposition of a contribution by a company would cause '*undue hardship*' is not evident. It would leave it unclear whether the Minister could regulate the provision of information relating to the financial position of such entities, and would impose on the Board a burden in assessing applications by legal persons which, it seems clear to me, was never intended. And, finally, it would impose on the Act a striking incongruity: while individual persons would be subject to restrictions intended to prevent them from bringing proceedings for the benefit of others, corporate litigation which will frequently in fact be exclusively for such benefit would continue to enjoy the benefit of the legislation.

113. Accordingly, even if the Article 47 claim (or for that matter, the Aarhus Convention claim) were well founded, I do not believe it would be open to the court (as it was invited to do) to construe the Act as enabling the grant of legal aid to bodies corporate, as is contended for.

Conclusion and further submissions

114. For these reasons I have concluded that, on its proper construction, the Civil Legal Aid Act 1995 allows the provision of legal aid and advice only to individuals and not to bodies corporate. Because that limitation is inherent in '*the substance and tenor*' of the Act, and because to reconstruct the legislation so as to extend it to such legal persons would involve a significant shift of the policy evident from the Act as a whole, this conclusion is not affected by the terms of s. 18(c) of the Interpretation Act 2005. Insofar as the applicant seeks to contend that the provisions of the Aarhus Convention require a different construction, the applicant has failed to establish – as it must in order to advance this argument – that the NDP case was, in all of the circumstances, 'prohibitively expensive' within the meaning of Article 9(4) of that Convention.

115. I accept that there may be an argument that the complete exclusion of legal persons from the possibility of obtaining legal aid in cases involving issues of EU law might, at least in certain circumstances, present a breach of Article 47(3) of the Charter of Fundamental Rights of the EU. However, it is not evident to me that that argument would advance the applicant's case here. First, the applicant has not sought orders against the State that it be provided with legal aid for the NDP case. Second (and noting the fact – stressed by counsel for the respondent in his oral submissions – that

no relief was sought based on any alleged incompatibility of the Act with the Charter), there may be a difficulty in setting aside provisions of the Act that interfere with any such right, if established, because it cannot be said that the only mechanism for obtaining civil legal aid in Ireland is via the Board and under the Act. Third, the same point might be made in relation to the argument insofar as it is based upon a conforming interpretation, this being the principal point made by the applicant. Fourth, in any event, the interpretation urged by the applicant – which would involve the word 'persons' as it appears in the relevant provisions of the Act being re-interpreted so as to include legal persons – would be *contra legem*.

116. That said, I am conscious that the court did not receive extensive submissions from the parties in relation to the question of a reference and, before ruling this out completely, I propose to afford the applicant a further opportunity to consider whether it wishes to make submissions – on the assumption that the conclusions I have reached as to the proper construction of the Act and in relation to *contra legem* are correct – as to whether there is any other basis on which a reference should nonetheless be made.

117. Barniville P. and Noonan J. are in agreement with this judgment, the conclusions I have reached and the course of action I propose.