

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 202
[2021 No. 1110 JR]

**IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS
AMENDED)**

BETWEEN

**SAVE ROSCAM PENINSULA CLG, SOPHIE CACCIAGUIDI-FAHY, MARTIN FAHY AND
PHILIP HARKIN**

APPLICANTS

AND

**AN BORD PLEANÁLA, GALWAY CITY COUNCIL, THE MINISTER FOR HOUSING, LOCAL
GOVERNMENT AND HERITAGE, IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

AND

ALBER DEVELOPMENTS LIMITED

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on Friday the 8th day of April, 2022

“Confusion now hath made his masterpiece!” (*Macbeth* Act II sc. 3)

1. The board’s quotation of Macduff at the hearing of the present motion regarding protective costs (heard simultaneously with a similar motion in *Abbey Park and District Residents Association Baldoyle v. An Bord Pleanála* [2021 No. 972 JR] which will be addressed in a separate judgment) is both bold and apt. It speaks to an uncertainty in the rules on costs in environmental cases that can partly be put down to the creativity of applicants and to a lack of clarity the legislative scheme but also partly to some inconsistencies in caselaw, despite considerable effort at all levels. While I can’t pretend to be able to deliver an end to that confusion by means of the present judgment, I can suggest how that outcome might be arrived at – essentially by a combination of the Supreme Court being asked to deal with all domestic law costs issues together with all EU law costs issues that are *acte clair*, and (subject to any argument to the contrary) by the CJEU being asked to clarify any EU law costs issues that are not *acte clair*. We will return to that. To commence with the present motion regarding protective costs in these proceedings, it is situated in the context that the primary, but by no means the only, relief sought by the applicant is an order of *certiorari* pursuant to Order 84 of the Rules of the Superior Courts 1986, as amended, and Section 50 of the Planning and Development Act 2000, as amended, quashing the decision of the first respondent, An Bord Pleanála (the board), dated 28th October, 2021 (file reference 310797), authorising a proposed Strategic Housing Development (SHD) involving demolition of existing silage concrete apron, construction of 102 residential units (35 apartments, 67 houses), crèche and associated site works at Rosshill, Galway.

Relevant parties

2. The case has been adjourned as against the State. The notice party developer is not getting involved in the costs issue. Galway City Council however did make submissions on costs.

Grounds of challenge

3. A dispute arises in relation to the applicability of costs protection for grounds 1 to 7 which are as follows:
 - (i). "The Decision is invalid because the Board had no jurisdiction to grant permission in respect of a development that materially contravened the development plan in relation to zoning, and it infringed S9(6)(b) (2016 Act) and S10(2)(a) (2000 Act) in purporting to so do.
 - (ii). The Decision is invalid because the Board granted permission in material contravention of the Development Plan for the purposes of S9(6) (2016 Act) without first directing itself correctly as to the meaning of that Plan as required by S9(2).
 - (iii). The Decision is invalid because the Board failed to have any or any proper regard to relevant guidelines and policy as required by S9(2) (2016 Act) and S28 (2000 Act) before deciding to grant permission for a material contravention of the Development Plan pursuant to S9(6) (2016 Act) and S37(2) (2000 Act).
 - (iv). The Decision is invalid because the Board failed to have any or any proper regard to the National Planning Framework as required by S9(2) (2016 Act) and S143 (2000 Act) before deciding to grant permission.
 - (v). The Decision is invalid because it is not open to the Board to grant permission in material contravention of the Development Plan for the purposes of S9(6) (2016 Act) and S37(2)(b)(iii) (2000 Act) where the Development Plan is already compliant with relevant Guidelines and Government Policy.
 - (vi). Even were the Board to be correct in the above, it would still be in error in finding that the Height Guidelines warrant a grant of permission in circumstances where the predominant part of the Proposed Development would involve a 2-storey, cul-de-sac dominated approach contrary to paragraph 3.7 of those Guidelines.
 - (vii). The Decision is invalid because the Board's Inspector failed to report adequately on the submissions made, or to make recommendations in relation to them, contrary to S146 (2000 Act) as applied by S17 (2016 Act)."
4. Ground 8 in relation to roadworks has been dropped by the applicants.
5. The first sentence of ground 9 is as follows: "[t]he Application is invalid because the Developer has no interest in a part of the site, the lands comprising the L5037 Old Dublin Road, and the Council in whose charge that road is has no power to authorise the Developer carry out works on it, or to apply for permission to do so." The board disputes the application of costs rules to that sentence.
6. The second sentence is a case against the council which is as follows: "[t]he purported consent issued by Council to the Developer to apply for permission in respect of road

construction works on or beneath that road is *ultra vires* the Council and invalid” and the council says there is no costs protection in relation to that claim.

7. Ground 10 in relation to a lack of interest in certain lands has been dropped.
8. Ground 11 provides as follows: “[t]he Decision is invalid because the Board failed to carry out an EIA in accordance with the requirements of S171A and 172 (2000 Act) as applied by S20 (2016 Act), and failed to comply with A8a and A1(2)(g), 2(1), 3(1) and 5 (EIA Directive), or with S9(1) and 10(3) (2016 Act), in relation to effects on groundwater, protected sites, bats, birds, significance, alternatives, and monitoring.” In relation to that ground, the board concedes that the not-prohibitively-expensive-costs rule under the Aarhus Convention applies insofar as it relates to the EIA directive although it is not clear to me what else is meant to be covered by the ground.
9. Grounds 12 and 13 provide as follows:
 - “12. The Decision is invalid because there are gaps or lacunae in the Appropriate Assessment, contrary to Sections 177V and 177R (and, insofar as relevant Sections 177S, 177T and 177U) (2000 Act) as applied by S23 (2016 Act), and contrary to A6(3) (Habitats Directive).”
 13. The Decision is invalid because the material contravention of the Development Plan which it authorises constitutes a modification of the framework for development consent established by the Plan for which a Strategic Environmental Assessment is required by Article 3 of the Strategic Environmental Assessment Directive (2001/42), or alternatively a determination that such modification is of a minor nature and that an assessment is not required.”
10. There is no dispute in relation to those grounds because the board accepts that no order as to costs applies under s. 50B of the Planning and Development Act 2000.
11. Ground 14 relates to statutory invalidity and has been adjourned generally.
12. Ground 15 provides as follows: “[t]he Board erred in law in the manner set out in the Grounds above, in failing to exercise its powers and duties under the 2000 and 2016 Acts in accordance with the requirements of the EIA Directive, Habitats Directive and Strategic Environmental Assessment Directive where the provisions of Section 5 of the Interpretation Act 2005 require that those Acts be so interpreted.”
13. The board agrees that s. 50B of the 2000 Act applies insofar as this relates to habitats directive 92/43/EEC and SEA directive 2001/42/EC, and says that the not-prohibitively-expensive-costs rule under Aarhus applies insofar as it relates to the EIA directive. It is hard to see what else the ground applies to especially where the ground itself does not have a lot of content that is not covered elsewhere.
14. Grounds 16 to 18 relate to statutory validity and have been adjourned generally.

15. The board correctly makes the point that the motion regarding protective costs incorrectly covers all the grounds whereas in fact it should only apply to the grounds where there is a dispute: see *Shannon v. McGuinness* [1997] IEHC 54, [1999] 3 I.R. 274, *Lennon v. Cork City Council* [2006] IEHC 438, [2006] 12 JIC 1905 (Unreported, High Court, Smyth J., 19th December, 2006), *Milebush Properties Limited v. Tameside Metropolitan Borough Council* [2011] EWCA Civ. 270.

Article 9 of Aarhus

16. The Aarhus Convention was adopted on 25th June, 1998 and was ratified by the European Union on 17th February, 2005. Article 9 provides as follows:

“ACCESS TO JUSTICE

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
- (a) Having a sufficient interest
 - or, alternatively,
 - (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization

meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.
4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.
5. 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."

Questions being referred to the CJEU in *Enniskerry*

17. In *Enniskerry v. An Bord Pleanála* [2022] IEHC 6 (Unreported, High Court, 14th January, 2022), two sets of questions were referred to the CJEU in principle. The first four questions related to the scope of the not-prohibitively-expensive rule and are as follows:

- (i). Does the interpretative obligation set out in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* whereby in proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive, apply only within the sphere of EU environmental law.
- (ii). Where an applicant challenges a decision that is subject to procedures laid down in EU environmental law, is the challenge to be considered as falling within the sphere

of EU environmental law even if the grounds of challenge do not relate to EU environmental law.

- (iii). In particular, is a challenge that is not based on directive 2001/42 (the strategic environmental assessment directive), but that relates to alleged material contravention of an instrument of general application that was subject to strategic environmental assessment, to be considered as a challenge falling within the sphere of EU environmental law.
 - (iv). Is a challenge to be considered as falling outside the interpretative obligation set out in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála*, either as not being one where the application of national environmental law is in issue or as not within the sphere of EU environmental law, merely because it involves classic judicial review grounds that are not environment-specific but that are raised in the context of a challenge to a development consent or other environmental issue.
18. The second set of questions related to the issue of whether “not prohibitively expensive” costs meant no order as to costs in the absence of any defining legislation and those questions were as follows:
- (i). Does the general EU law principle of legal certainty as applied in the context of the interpretative obligation set out in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* whereby in proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive, have the effect that the domestic law of a member state should provide rules that are sufficiently certain so that an applicant can know prior to initiating proceedings whether the not-prohibitively-expensive rule applies and if so what the maximum amount of the not-prohibitively-expensive costs can be predicted to be in advance.
 - (ii). In the absence of provision in the domestic law of a member state providing rules that are sufficiently certain so that an applicant can know prior to initiating proceedings whether the not-prohibitively-expensive rule applies and if so what the maximum amount of the not-prohibitively-expensive costs can be predicted to be in advance, does the general EU law principle of legal certainty as applied in the context of the interpretative obligation set out in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* whereby in proceedings where the application of national environmental law is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive have the effect that a domestic court should disapply national procedural rules allowing for any costs to be awarded against applicants in proceedings covered by the not-prohibitively-

expensive rule thus providing for no order as to costs if the applicants are unsuccessful.

Procedural developments since the *Enniskerry* judgment

19. There have been quite a number of developments since the judgment in *Enniskerry* and without making any pretence about being comprehensive I might mention the following in particular.
20. Firstly, there have been efforts as between the applicant and the notice party in one of the two cases dealt with in the *Enniskerry* judgment to resolve the costs issue although the outcome of that remains to be determined.
21. Secondly, the board has suggested (and this is also yet to be determined) parking the reference in *Enniskerry* pending an application for leave to appeal to the Supreme Court by the applicants in *Heather Hill Management Company CLG v. An Bord Pleanála* [2021] IECA 259 (Unreported, Court of Appeal, Costello J. (Ní Raifeartaigh and Pilkington JJ. concurring) 14th October, 2021). That leave to appeal application has been made, but not yet determined.
22. Thirdly, the board is apparently proposing to appeal to the Court of Appeal against my decision in *Enniskerry* relating to the applicability of the Environment (Miscellaneous Provisions) Act 2011 in relation to one single identified ground. The applicants would also have the potential to appeal the decision in relation to the refusal of declaratory relief under s. 50B of the 2000 Act and under the 2011 Act insofar as relates to the other grounds. Neither side thinks it needs leave to appeal from the High Court for such an appeal so whether that is right or wrong possibly does not hugely matter if it is not going to be contested.
23. The board is also proposing that following such an appeal it would seek leapfrog leave to appeal to the Supreme Court, and obviously the applicants could do likewise in relation to any appeals of their own. If and insofar as my own two cents is worth throwing in to that discussion, I think the desirability or otherwise of that may hinge to some extent on whether the Supreme Court grants leave to appeal in the *Heather Hill* case, which (from my own modest and limited point of view and without in any way taking from the Court of Appeal decision in that case) might be well worth giving positive consideration to, having regard to the immense practical importance of the issue concerned across virtually the full spectrum of planning litigation. If such leave to appeal is granted, I hope I might be forgiven for saying that it might well be helpful (certainly I would see it as such) if the Supreme Court were to also give sympathetic consideration to granting leapfrog leave to appeal from any contemporary High Court decisions relating to s. 50B or the 2011 Act (not necessarily limited to the *Enniskerry* case) so that at least all points not dependent on a reference can be determined at the same time. I don't immediately think that it is automatic that such a procedure detracts from the need (as I saw it anyway) for consultation of Luxembourg in relation to the Aarhus Convention issues, but a decision on that can be made in *Enniskerry* when dealing with the board's application to adjourn the reference in due course. If granted, such a compilation of the issues being put before the

Supreme Court could possibly allow the 50B and 2011 Act questions to be put to rest insofar as that can be done, perhaps leaving the Aarhus issues to be finalised post-Luxembourg, if matters remain on their present course. Leapfrog appeal in *Enniskerry* on the 2011 Act issues could have particularly added value where it's not clear to me anyway that the court in *Heather Hill* intended to definitively resolve the interpretation of that Act, so an appeal in that case alone might not be the ideal vehicle for comprehensive assessment of the position.

24. A final procedural development is that a number of other motions about protective costs have been issued in other cases - some before me and some before Holland J., and maybe others of which I have not been informed - and as far as I know, judgment has been reserved on at least one of those motions. However, I am not sure that that in itself is a reason not to deal with the present motion as best I can.

Issues under s. 50B and the 2011 Act

25. Section 50B(1) of the 2000 Act provides as follows:

"This section applies to proceedings of the following kinds:

- (a) proceedings in the High Court by way of judicial review, or of seeking leave to apply for judicial review, of —
- (i) any decision or purported decision made or purportedly made,
 - (ii) any action taken or purportedly taken,
 - (iii) any failure to take any action,

pursuant to a statutory provision that gives effect to —

- (I) a provision of Council Directive 85/337/EEC of 27 June 1985 to which Article 10a (inserted by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directive 85/337/EEC and 96/61/EC) of that Council Directive applies,
 - (II) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, or
 - (III) a provision of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control to which Article 16 of that Directive applies, or
 - (IV) paragraph 3 or 4 of Article 6 of the Habitats Directive; or
- (b) an appeal (including an appeal by way of case stated) to the Supreme Court from a decision of the High Court in a proceeding referred to in paragraph (a) ;
- (c) proceedings in the High Court or the Supreme Court for interim or interlocutory relief in relation to a proceeding referred to in paragraph (a) or (b) ."

26. In broad terms neither s. 50B nor the 2011 Act apply to any of the disputed grounds of challenge for the reasons explained in *Enniskerry*.
27. Indeed in fairness not a lot was put forward as to how *Enniskerry* is distinguishable on the facts. Suffice to say for present purposes that the statutory provisions relied on in the disputed grounds are not the precise and limited ones to which s. 50B(1)(a) applies, and the link between any of the disputed grounds of challenge and potential ecological harm sought to be prevented is not sufficiently direct and specific as to come within the 2011 Act. So I reject the applicant's claim to be covered by the statutory no-order-as-to-costs rules, and in doing so I see the s. 50B decision at any rate as consistent with a fairly straightforward hierarchical-system-type application of the Court of Appeal decision in *Heather Hill*. The applicant seemed to broadly accept that such an outcome follows. So far, so conventional. That leaves the Aarhus Convention arguments.

Options for the court in relation to contested EU questions

28. There are only a limited number of options for the court in circumstances such as these in respect of the contested questions of European law. I could decide these questions myself, but that does not make a whole lot of sense where similar questions are already proposed for referral to the CJEU. I could park the questions pending the outcome in *Enniskerry*. The applicant was not agreeable to that for a number of reasons including that the *Enniskerry* reference has not yet been sent, that they were seeking to raise additional questions and that they would be shut out from being part of the discussion on the resolution of the questions if the issues were not referred in their case.
29. The board was concerned about whether every applicant going forward would be entitled to a reference. In that regard, subject to hearing further submissions in any given case, I would be more inclined to adopt the general approach of leaning towards listing further protective costs motions for hearing, rather than adjourning them, if at least one party was in favour of the matter being actually determined, including potentially being referred if that proved necessary, and if the motions are limited to either domestic law or *acte clair* EU law (for example if they are limited to straightforward application of existing jurisprudence regarding s. 50B or the 2011 Act) or alternatively if the motions involve some new EU law question of substance (not just a reformulation of an old question) which is not addressed in any existing reference. Otherwise one would have to give a consideration to adjourning any protective costs motions until the outcome of any CJEU references dealing with potentially overlapping questions. Such an approach would avoid duplication but would also give any particular applicant not raising EU law controversies or alternatively raising genuinely new questions a chance to have their issues considered at this stage. That doesn't mean we can have an endless process of references – after the first one or two we should have covered the main questions, and the bar to establish novelty will probably get higher as we go along.
30. I will turn now to the question of whether there should be a reference in this case.

EU law questions arising here

31. It seems to me that **the first four questions in *Enniskerry*** do arise here as submitted by the applicant.
32. As regards the fifth and sixth questions in *Enniskerry*, the applicant here argues for a somewhat different question, which is that the court should apply the existing no order as to costs standard by analogy because that is the rule that has been applied by the Irish legislature where art. 9(3) of the Aarhus Convention has applied and, therefore, there should not be a different rule simply due to the failure of the legislature to fully transpose the Aarhus Convention.
33. It seems to me that that submission raises a distinct fifth question of European law as follows:

whether art. 9(3) of the Aarhus Convention has the effect that if domestic legislation in a particular member state implements that provision in relation to specified matters by means of an express legislative rule that there be no order as to costs, leaving all other matters to be dealt with by judicial discretion which is subject to the EU law interpretative obligation that it is to be exercised in accordance with the Aarhus Convention, such discretion should be exercised in that member state along the same lines as the express legislative rule of no order as to costs.

34. In addition, the applicants relied heavily on the preamble to the Aarhus Convention and while they did not formulate an exact question under that heading, it seems to me that there is a sixth question inherent in their submission which is:

whether the concept of "national law relating to the environment" in art. 9(3) of the Aarhus Convention includes national law relating to sustainable development, having regard inter alia to the preamble to the Aarhus Convention and to the Rio Declaration on Environment and Development approved by the United Nations Conference on Environment and Development, held at Rio de Janeiro in June 1992, referred to in the preamble to the Aarhus Convention.

35. The applicant separately proposed three additional questions of European law. The first is: "[i]s it permissible for national law to confine relief under A9(3) of the Aarhus Convention to situations where the Applicant is seeking to enforce future compliance, or must A9(3) apply to remedy a past contravention?"
36. However, that wording is tendentious because the board is not arguing that art. 9(3) is limited to future contraventions. The real issue, if I may be permitted to reword the question, is along the lines of the following, seventh, question:

if the answer to the fifth question in general is no, whether art. 9(3) of the Aarhus Convention has the effect that if domestic legislation in a particular member state implements that provision in relation to the prevention of

future contraventions of national law relating to the environment by means of an express legislative rule that there be no order as to costs, leaving the remedying of past contraventions of national law relating to the environment to be dealt with by judicial discretion which is subject to the EU law interpretative obligation that it is to be exercised in accordance with the Aarhus Convention, such discretion should be exercised in that member state in relation to the remedying of such past contraventions along the same lines as the express legislative rule of no order as to costs.

37. The applicants' next proposed additional question is: "[i]s there a contravention of national law relating to the environment for the purposes of A9(3) of the Aarhus Convention where the provision pursuant to which the decision was taken relates to the environment, or is it necessary to establish that the specific ground pleaded is a ground which relates only to the environment?" That it seems to me replicates the substance of the second question in *Enniskerry*.
38. The applicants' final proposed additional question is "[i]n particular, for the purposes of question 2, is it permissible for national law to exclude from the scope of A9(3) of the Aarhus Convention all questions involving an error of legal interpretation, consideration of irrelevant material, failure to consider relevant material, breach of fair procedures, irrationality or unreasonableness?" That it seems to me is a repeat of the fourth question in *Enniskerry*.
39. For the avoidance of doubt, the question of how to exercise the discretion under O. 99 RSC does not arise at this point pending clarification of the scope of the interpretative obligation to give effect to the Aarhus Convention.
40. Having regard to the foregoing, I principle I will refer the questions identified to the CJEU, essentially because:
- (i). the questions involve matters of interpretation rather than application of EU law;
 - (ii). the issues are not *acte clair* or *acte éclairé*;
 - (iii). the answers are necessary for the decision on the remaining aspects of the motion (that is, the Aarhus aspects, having dismissed the s. 50B and 2011 Act arguments);
 - (iv). the questions add something to the issues already proposed for referral in *Enniskerry*; and
 - (v). in all the circumstances it seems to me appropriate to exercise the discretion to refer these questions.

Costs of the costs application

41. While in written submissions the applicants sought a reference on the issue of entitlement to costs protection in the costs protection application, it turned out that there was in fact

no issue about that because the board and the council agreed that there would be no order as to costs if and to the extent that the applicant was unsuccessful on the costs issue itself.

Order

42. Accordingly, the order will be as follows:

- (i). I will refuse a declaration that the applicant is entitled to a costs protection under s. 50B of the 2000 Act or under the 2011 Act;
- (ii). By consent I will order that insofar as the applicant's costs motion is unsuccessful, the applicant will not be liable for costs of that motion.
- (iii). I will in principle make a reference to the CJEU of questions along the lines of the first four questions in *Enniskerry* plus the additional three questions identified in this judgment.
- (iv). I will give the parties the *Eco Advocacy CLG v. An Bord Pleanála (No. 1)* [2021] IEHC 265, [2021] 5 JIC 2704 (Unreported, High Court, 27th May, 2021) directions;
- (v). For the avoidance of doubt I will direct that the order be perfected at this point in case any parties wish to take any procedural steps elsewhere in relation to the aspects of the motion that are being decided now; and
- (vi). the matter will be listed for mention on 9th May, 2022 for review.