

SPECIAL COSTS RULES IN ENVIRONMENTAL CASES

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Introduction to the Special Costs Rules

Order 99 of the Rules of the Superior Courts – general rule provides that **costs “follow the event”**

- As amended by:
 - **Section 50B** of the **Planning & Development Act 2000** covers environmental proceedings relating to:
 1. the EIA Directive;
 2. the SEA Directive;
 3. the Public Participation Directive; and
 4. the IPPC Directive (now IE Directive)
- And by:
 - **Section 3** of the **Environment (Miscellaneous Provisions) Act 2011**

The European Backbone of the Special Costs Rules

- A combination of the Aarhus Convention, the Public Participation Directive and the EIA Directive
- **Article 9(4) of the Aarhus Convention** was transposed into Irish law via Article 11 of the EIA Directive
- **The EIA Directive** sets out three pillars of environmental justice:
 1. Access to Justice - the requirement that members of the public have **access to a review procedure before a court of law or other independent and impartial body** established by law to challenge the substantive or procedural legality of decisions, acts or omissions;
 2. Right to Participate - subject to the **Public Participation Directive**;
 3. Costs Protection - and that such procedure **must not be prohibitively expensive** (Article 10a of the EIA Directive 85/337/EEC)

Special Costs Rules – Irish implementing Legislative Provisions

Article 11 of the EIA Directive is transposed into national law through **Section 50B of the P&D Act**:

- **Section 50B(2)**: in proceedings relating to the **EIA Directive**, each party will **bear its own costs**
- **Section 50B(2A)**: costs will be borne by the respondent or notice party to the extent that their **actions contributed** to the **applicant obtaining relief**
- **Section 50B(3)**: costs may be awarded against a party where the claim is **frivolous or vexatious** or where a party is in **contempt of court**
- **Section 50B(4)**: costs may be awarded in favour of a party in a matter of **exceptional public importance AND where it is in the interests of justice to do so**

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Special Costs Rules – Irish implementing Legislative Provisions (*cont'd.*)

Section 3 of the **Environment (Miscellaneous Provisions) Act 2011** also amends Order 99 of the RSC

It **applies** to civil proceedings commenced to:

- a) ensure compliance with; or
- b) regarding the contravention of:
 - environmental licences
 - permits
 - permissions
 - foreshore leases; and
 - environmental operational consents

Special Costs Rules – Irish implementing Legislative Provisions (*cont'd.*)

Section 3 (1) – each party shall bear its own costs

Section 3 (2) – but costs may be awarded to a successful applicant

Section 3 (3) – and costs may be awarded against any party whose claim is found to be **frivolous or vexatious** or where there is **contempt of court**

Section 3 (4) – and also an unsuccessful applicant may be awarded costs if they raise an issue of **exceptional public importance AND** it is in the **interests of justice** to make the award in the special circumstances of the case

Brief Case Law

North East Pylon Case

North East Pylon Pressure Campaign Limited v. An Bord Pleanála **(Case C-470/16) 15 March 2018**

- The Special Costs rules apply to leave applications as well as to substantive applications in Judicial Review cases
- Limits the Special Costs rules in EIA challenges to the public participation elements of the process
- Extends the Special Costs rules to Appropriate Assessment challenges under the Habitats Directive

Fotovoltaic case

***SC SYM Fotovoltaic Energy SRL v. Mayo County Council [2018] IEHC 245
(4 May 2018):***

Grounds of challenge:

- (1) EIA Directive/public participation;
- (2) fair procedures; and
- (3) inadequate reasons given by the Planning Authority

Fotovoltaic case (cont'd)

Barniville J applied the CJEU's ruling in *North East Pylon*

Re: (1) the '*not prohibitively expensive*' requirement applied

Re: (2) and (3) these grounds were not concerned with national environmental law or its application and therefore the '*not prohibitively expensive*' requirement did not apply.

Merriman Case

Merriman & Ors. v. Fingal County Council, Ireland and The Attorney General, Dublin Airport Authority and Ryanair DAC [2017] No. 201 JR (4 May 2018)
(Barrett J.):

- Various grounds of challenge against the development of the Northern Runway at Dublin Airport raised by residents including:
 - (1) failure to carry out EIA;
 - (2) Protection of property rights under the Constitution and ECHR; and
 - (3) failure to carry out Appropriate Assessment.

Merriman Case (cont.)

- **Applying *North East Pylon* in finding against the Applicants, the Court held:**
 - (1) EIA costs were subject to Article 11 of the EIA Directive and Section 50B therefore Order 99 applied and therefore each party was to bear its own costs, and no order for these costs was made;
 - (2) Constitutional/ECHR costs were subject to Order 99 and therefore costs followed the event so that an order as to costs was made against the Applicants;
 - (3) AA costs were subject to Order 99 but also subject to the interpretative obligation described by the CJEU in *North East Pylon* and therefore were to be paid by the unsuccessful Applicants subject to being assessed to ensure they would not be prohibitively expensive.

Merriman

(21 December 2018) (Barrett J.) (*cont'd.*):

Main grounds for leave to appeal

- 1) Was the Court correct to divide the issues in the case for the purpose of costs protection?
- 2) Was the Court correct to conclude certain issues did not have benefit of costs protection?

In refusing to grant leave, Court held

- 1) In identifying costs rules, Court may divide up case by issues raised
- 2) *North East Pylon* confined application of Special Costs rules under Article 11 of the EIA Directive to the parts of challenge which allege a breach of the EIA Directive

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Klohn v. An Bord Pleanála **(Case C – 167/17) 17 October 2018**

Mr Klohn (a farmer) challenged a planning permission to build inspection unit for fallen animals. He lost the judicial review case and was ordered to pay the Board's costs.

The Irish Supreme Court **referred** three questions under Article 10a of EIA Directive 85/337/EEC (as amended) to the **CJEU**:

- 1) Can the 'not prohibitively expensive' rule be invoked where action brought before deadline for transposition of the rule? If yes, does it apply only in relation to costs accumulated after the date of transposition?
- 2) Does the 'not prohibitively expensive' rule have direct effect or does an interpretative obligation exist in relation to it?
- 3) Did the Taxing Master, or court reviewing the Taxing Master's decision, have an obligation to apply the 'not prohibitively expensive' rule?

Klohn (cont'd.)

Advocate General Bobek Opinion (5 June 2018):

- 1) The 'not prohibitively expensive' rule can be invoked in relation to costs incurred from the start of the first discrete stage of the procedure following expiry of the transposition deadline.
- 2) Not only is there an interpretative obligation in relation to the not 'prohibitively expensive rule', but the requirement contained in Article 11 of the EIA Directive that procedures not be prohibitively expensive also has direct effect.
- 3) The Taxing Master, or a court reviewing the decision of the Taxing Master, has an obligation to apply the 'not prohibitively expensive' rule, either directly or through the interpretative obligation.

Klohn (cont'd.)

However:-

The CJEU in rejecting the AG's Opinion held:

- 1) Courts must interpret national law in conformity with the EIA Directive, when deciding on the allocation of costs in judicial proceedings which were ongoing as at the transposing deadline, irrespective of the date on which those costs were incurred during the proceedings concerned.
- 2) While there is an interpretative obligation in relation to the 'not prohibitively expensive rule', the requirement contained in Article 11 of the EIA Directive that procedures not be prohibitively expensive does not have direct effect.
- 3) The court's obligation to apply the 'not prohibitively expensive' rule is solely an interpretative obligation, and is subject to *res judicata* not prohibiting that interpretation.

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Heather Hill Management Case

Heather Hill Management Company CLG & Gabriel McGoldrick -v- An Bord Pleanála & Burkeway Homes Ltd. (Notice Party) [2019] IEHC 186 (29 March 2019) (Simons J.)

Main grounds of challenge

- 1) Breach of Habitats Directive: The AA screening exercise was flawed, the Board misapplied provisions of the Habitats Directive and national transposing legislation
- 2) Material contravention of the Development Plan
- 3) Consent of landowner not properly obtained

Court held

- 1) S. 50B applied to ALL arguments raised
- 2) The qualifying criteria for costs protection under s. 50B were directed towards the type of decision which is the subject of judicial review, not the grounds of challenge

Heather Hill Management Case (cont'd.)

- Simons J. distinguished this case from the *Merriman* case on the main ground that the decision in the *Merriman* case was not a “development consent” decision.
- The *East Pylon Case* was distinguished on the main ground that the application for development consent had not yet been decided at the time the proceedings were instituted.
- Both cases were also distinguished on the grounds that the decisions under review were made under different statutory provisions than the one at issue in the *Heather Hill Management* case.

Horizon Gazing

Legal Aid in Environmental Cases

- ***Conway v. An Bord Pleanála*** [2018] IEHC 473 (31 July 2018) (Barniville J) [three conjoined cases]
- Applicants challenged a decision of the Board for a Strategic Infrastructure Development.
- At the leave to apply stage Conway raised the question of entitlement for Legal Aid citing:
 - The Aarhus Convention (ratified by Ireland on 20 June 2012); and
 - Article 47 of the Charter of Fundamental Rights of the European Union (2012/C 326/02)(Right to an effective remedy and to a fair trial) which specifically addresses legal aid stating “*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.*”
- The Legal Aid arguments did not arise at hearing stage, possibly because An Bord Pleanála conceded that an error was made in its decision making process and agreed to pay the applicants’ costs.

Other Relevant Costs Issues

Legal Aid in Environmental Cases (*cont'd.*)

Friends of the Irish Environment CLG v. The Legal Aid Board 2019/169 JR

- FIE CLG was established in 2000 as a company limited by guarantee and is a registered charity.
- FIE CLG applied for legal aid to the Legal Aid Board in order to challenge the Government's National Development Plan and the National Planning Framework (Project Ireland 2040) alleging inadequate environmental assessment. Those proceedings have just been decided by the High Court in a Judgment dated 29 September 2019 (Edwards J) against the Friends CLG [***Friends of the Irish Environment CLG v. Government of Ireland, the Minister for Housing Planning and Local Government, Ireland and the AG*** 2018/391 JR]
- In the ongoing costs case, FIE CLG was refused legal aid by the Legal Aid Board on the basis that legal aid is only available for individuals and not for corporate entities.

Other Relevant Costs Issues (*cont'd*)

Legal Aid in Environmental Cases (*cont'd.*)

Friends of the Irish Environment CLG v. The Legal Aid Board 2019/169 JR

- FIE CLG applied for and was given leave to judicially review this decision of the Legal Aid Board.
- In its challenge, FIE CLG cites the Irish Interpretation Act 2005, where it is provided that the word “person” shall be “read as importing a body corporate [...] as well as an individual”. The Company is relying on the Constitution to claim a right to access the courts as a corporate “person” including in circumstances where it cannot pay its lawyers.
- FIE CLG also seeks to rely upon the Charter of Fundamental Rights of the European Union and the Aarhus Convention, which require Member States to “consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice”.

Thank You



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