THE COURT OF APPEAL

Court of Appeal Record No. 2019/53

Woulfe J. **Neutral Citation Number [2023] IECA 235**

Whelan J.

Pilkington J.

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED), AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT, 2000

Between

DIAMREM LIMITED

Applicant/Appellant

-and-

CLIFFS OF MOHER VISITORS CENTRE LIMITED AND CLARE COUNTY COUNCIL

Respondents

JUDGMENT (No.2) of Mr. Justice Woulfe delivered on the 4th day of October, 2023

Introduction

1. This is a judgment in relation to costs arising from the judgment of the Court (Woulfe J.; Whelan J. and Pilkington J. concurring) delivered on the 5th November, 2021 ("the principal judgment"): see [2021] IECA 291. The Court dismissed the appellant's appeal against the decision of the High Court to refuse to make orders under s. 160 of the Planning and Development Act 2000 ("the 2000 Act"), in respect of the relocation of a public car park operated by the respondents at the Cliffs of Moher Visitor Centre (the "Visitor Centre") in County Clare, on the ground that the application was not commenced within the statutory time period.

2. With regard to costs, as the appellant had been entirely unsuccessful in this appeal, the provisional view expressed by the Court in our judgment was that the respondents were entitled to their costs of the appeal. The parties were, however, given liberty to contend for an alternative order, and given liberty to apply for a supplemental hearing on the issue of costs.

3. By letter dated the 18th November, 2021, the solicitors for the appellant sought a supplemental hearing on the issue of costs, and suggested that it would be appropriate to deliver written submissions in advance of any such hearing. Detailed written submissions as to costs were subsequently delivered by the parties, and following same the Court indicated in May, 2022 that it did not propose to schedule a supplemental hearing on costs, but would deliver a written ruling in the light of the written submissions. The Court subsequently became aware that the Supreme Court was due to hear an appeal dealing with potentially relevant costs issues in the case of *Heather Hill Management Company CLG v. An Bord Pleanála* in July, 2022, ("*Heather Hill*") and in those circumstances the Court notified the parties that it felt it appropriate to

await the judgment of the Supreme Court in that case before delivering any costs ruling in this matter. The Supreme Court delivered judgment in the *Heather Hill* appeal on the 10th November, 2022: see [2022] IESC 43. The parties were then given liberty to make supplemental written submissions in the light of that judgment, and the respondents availed of that opportunity. The solicitors for the appellant indicated that they had not received any instructions to deliver supplemental submissions.

Submissions of the Appellant

4. In its written submissions dated the 9th December, 2021, the appellant submits that these s. 160 proceedings fall within the terms of s. 4(1) of the Environment (Miscellaneous Provisions) Act 2011 ("the Act"), and accordingly s. 3 of the Act applies to these proceedings to displace the usual rule that costs follow the event.

5. Section 3(1) of the Act provides that, subject to certain exceptions, in proceedings to which s. 3 applies, each party shall bear its own costs. Section 4 then specifies the proceedings to which s. 3 applies, and provides *inter alia* as follows:

> (1) Section 3 applies to civil proceedings…instituted by a person –
>
> (a) for the purpose of ensuring compliance with, or the enforcement of, a statutory requirement or condition or other requirement specified in or attached to a…permission…specified in subsection (4), or
>
> (b) in respect of the contravention of, or the failure to comply with such …permission…,
>
> and where the failure to ensure such compliance with, or enforcement of, such statutory requirement, condition or other requirement referred to in paragraph (a), or such contravention or failure to comply referred to in

paragraph (b), has caused, is causing, or is likely to cause damage to the environment.

(2) Without prejudice to the generality of subsection (1), damage to the environment includes damage to all or any of the following:

…

(c) soil;

(d) land;

(e) landscapes and natural sites;

(f) biological diversity, including any component of such diversity,…

(h) cultural sites and built environment…

6. Section 4(4) specifies that section 4 applies to a permission granted pursuant to the 2000 Act.

7. The appellant refers to various authorities which have held that proceedings under s. 160 of the 2000 Act are civil proceedings within the terms of s. 4(1)(a) and/or (b) of the 2011 Act. It refers also to the Court of Appeal judgment in *O'Connor v. Offaly County Council* [2021] 1 I.R 1 ("*O'Connor*"), where Murray J. held that an unsuccessful claimant in proceedings who merely relies on s. 3 of the Act at the conclusion of his case does not have to establish that his claim enjoyed a reasonable prospect of success; the only requirement as to the merits of the case is that it not be frivolous or vexatious, as per s. 3(3)(a) of the Act.

8. The appellant submits that these s. 160 proceedings come within both of the categories of proceedings specified in s. 4(1) of the Act. As regards s. 4(1)(a), the appellant sought both (i) to ensure compliance with a "statutory requirement", namely a requirement to obtain planning permission for the relocated car parking area, and (ii) to ensure compliance with conditions 1, 3 and 7 of the planning permission for the Visitor Centre

which was granted in 2002 ("the 2002 permission"). As regards s. 4(1)(b), these proceedings were also proceedings instituted by the appellant in respect of the contravention of, or the failure to comply with, the 2002 permission.

9. The appellant notes the "damage to the environment" requirement in s. 4(1) of the Act. Section 4(1) states that s. 3 applies to the specified proceedings where the failure to ensure such compliance with, or enforcement of, the statutory requirement, condition or requirement referred to in para. (a), or the contravention or failure to comply referred to in para. (b), has caused, is causing, or is likely to cause, damage to the environment. It cites *Callaghan v. An Bord Pleanála (No.2)* [2015] IEHC 357, where the High Court held that this provision required there to be a causative link between the failure to ensure compliance with, or the enforcement of, a statutory requirement and damage to the environment, which may have been caused, is continuing, or is likely to be caused in the future.

10. It is submitted that the respondent's failure to obtain permission for the relocated car park and/or its failure to comply with the conditions attached to the 2002 permission "has caused, is causing, or is likely to cause, damage to the environment". In *O'Connor v. Offaly County Council* [2017] IEHC 606, Baker J. held, at para. 65, that the test in s. 4(1) is one which requires an applicant to go beyond mere assertions of damage or likely damage to the environment, and to make out a stateable argument that damage to the environment is occurring or is likely to occur.

11. The applicant states that the relocated car park (which was only intended to be temporary) has permanently replaced wet grassland and possible neutral grassland habitats, citing a report described as the Doherty Environmental Screening Report. It is submitted that this permanent loss of natural grassland adjacent to the Cliffs of Moher falls within the meaning of damage to the environment in s. 4(2) of the Act, specifically

damage to (c) soil, (d) land, (e) landscapes and natural sites, and (h) cultural sites and built environment, which damage it is said has clearly been caused by the relocated car park. Further, in respect of (f) biological diversity, it is said that the Cliffs of Moher is a designated SPA for which the bird species Chough is a conservation interest, and that there was evidence of negative impacts to this bird species as a result of the relocation of the car park. The appellant again cites the Doherty Environmental Screening Report, and also another report known as the Ecofact Report.

12. In the alternative, the appellant relies on the decision of Humphreys J. in *North East Pylon Pressure Campaign Limited v. An Bord Pleanála (No.5)* [2018] IEHC 622 ("*NEPPC (No.5)*"). In that case Humphreys J. referred certain questions in relation to the 2011 Act to the Court of Justice of the European Union ("CJEU"). Humphreys J. held that, insofar as the "not prohibitively expensive" ("NPE") rule laid down by Article 9(4) of the Aarhus Convention and Article 11(4) of Directive 2011/92 is concerned, it was clear from the judgment of the CJEU that the requirement to demonstrate damage to the environment was not compatible with European Union ("EU") law. However, this did not necessarily render the special costs provisions in the Act invalid; the Court could leave the statute in place and achieve the same result as provided for in s. 3 by using the general discretion of the court as to costs, as set out under Order 99 of the Rules of the Superior Courts. In doing so the Court could apply a similar approach as found in s. 3 to any cases where there is no link to damage to the environment.

13. The appellant submits that in the present case, even if the test of establishing damage to the environment was not met, the Court should adopt the same approach as Humphreys J. and seek to achieve the same result as if s. 3 applied to the proceedings, by ordering that each party should bear its own costs of the appeal.

Submissions of the Respondent

14. In their written submissions dated the 16th December, 2021, the respondents contend that they are entitled to the costs of the appeal, as reflected in the provisional view expressed by the Court in the principal judgment. As regards the appellant's claim that the appropriate order is that there be no order as to costs, the respondents state that this position runs entirely contrary to the position adopted by the appellant in the High Court, where it consented to an order for the respondents' costs, with a stay pending final determination of the within appeal.

15. The respondents submit that none of the grounds advanced by the appellant justify this Court departing from its provisional view as to costs. They argue that the appellant has not discharged the onus, which it bears, of demonstrating why the respondents are not entitled to their costs of the appeal.

16. As regards the 2011 Act, the respondents fully contest the application of s. 3 to these appeal proceedings. They submit that, in order for the appellant to obtain costs protection under s. 3, it must satisfy two criteria:

(a) That the appeal proceedings fall within the type of proceedings specified in s. 4(1)(a) or (b); and

(b) that there has been past, is present, or will be future environmental damage.

17. In respect of the first criterion, the respondents state that nowhere in the reliefs sought by the appellant (in its originating notice of motion) did it seek orders to force the respondents to obtain planning permission. The appellant sought orders that the respondents comply with the conditions of the 2002 permission, and in particular conditions 3 and 7; an order prohibiting the use of the relocated car park; a decision that the continued use of the temporary car park was inconsistent with the 2002 permission, and certain interim and/or interlocutory relief.

18. The respondents submit that while the wording of the reliefs sought by the appellant does fall within s. 4(1)(a) and/or (b), that is not the end of the matter. There is a requirement to consider whether the proceedings were commenced "for the purpose" of s. 4(1)(a) or (b). In order to assess whether the proceedings were commenced for such purpose, an assessment is required not only of the pleadings, but also of whether as a matter of reality the proceedings were commenced objectively for that purpose. Only where proceedings are in reality commenced for the purpose of s. 4(1)(a) or (b) can costs protection apply. Where proceedings are commenced to achieve a collateral or irrelevant purpose vis-a-vis s. 4, as is the case in this appeal, such proceedings will not fall within s. 4 of the Act.

19. The respondents rely on two decisions of the High Court in support of the above propositions. In *Rowan v. Kerry County Council* [2012] IEHC 544 ("*Rowan*"), an unsuccessful applicant in judicial review proceedings submitted that each party should bear its own costs, and that such outcome was mandated by the terms of s. 3(1) of the Act. The applicant contended that the proceedings were brought to ensure compliance with a condition of a planning permission, and thus (it appears) fell within s. 4(1)(a) of the Act.

20. It seemed to Birmingham J. that, given the structure of the proceedings and the nature of some of the arguments advanced, it was necessary to consider whether as a matter of reality and substance the proceedings were designed to ensure compliance with a condition, "because of concern that non-compliance will result in damage to the environment in the sense of jeopardising the safety of people". Having noted some of the evidence he held that in substance the proceedings were not designed to secure compliance with a condition lest non-compliance result in damage to the environment. They could not, in his view, be said to be proceedings instituted for the purpose of

securing compliance, but were issued to advance the applicant's private agenda to prevent a neighbouring landowner building a house. He concluded that so viewed the proceedings were not ones to which the 2011 Act applied.

21. In *CLM Properties Limited v. Greenstar Holdings Limited* [2014] IEHC 288 ("*CLM*"), the issue arose as to whether the proceedings instituted by the plaintiff were "for the purpose of ensuring compliance with or the enforcement of a statutory requirement" and thus fell within s. 4(1)(a) of the Act. Finlay Geoghegan J. considered the approach adopted in *Rowan*, and agreed with Birmingham J. that while the pleadings are the starting point of any consideration, the Court should look at the question as to whether, as a matter of reality and substance, the proceedings are for the purpose of ensuring compliance with or enforcement of either a statutory provision or condition. The plaintiff had submitted that the Court must consider the nature of the proceedings objectively, and insofar as part of the observations of Birmingham J. might imply that the Court should take into account the subjective intention of the plaintiff in issuing the proceedings, Finlay Geoghegan J. did not propose following this approach. It did appear to her that the court must consider objectively the purpose of the proceedings, and whether their objective purpose is of ensuring compliance with or the enforcement of a statutory requirement or condition.

22. Finlay Geoghegan J., having highlighted some of the pleadings and evidence, concluded that the proceedings were not proceedings for the purpose of ensuring compliance with or the enforcement of a statutory requirement or condition within the meaning of s. 4(1)(a) of the Act. In reality and substance, the purpose of the proceedings was to obtain payment to the plaintiff of monies allegedly due to it by the first and second named defendants for work done by the plaintiff at specified landfill sites operated by those defendants. The alleged statutory obligations of those

defendants and failure to comply formed part of the legal basis of the plaintiff's claim to be entitled to recover the sums allegedly due.

23. On the basis of an objective analysis of the within appeal, the respondents submit that the purpose of these proceedings was to force the closure of the car park in order to facilitate the appellant's commercial park and ride facility, and for that reason the proceedings do not fall within s. 4(1)(a) or (b) of the Act. They suggest that it is clear from the first paragraph of the Court's judgment herein that this Court also understood that to be the purpose of the proceedings.

24. As regards the second criterion, damage to the environment, the respondents submit that the Court must consider on an objective basis whether, on the facts before it, the alleged failure or breach has caused, is causing, or is likely to cause damage to the environment. The respondents highlight the causative link required by the High Court in *Callaghan*, as previously mentioned at para. 9 above.

25. It is submitted that there is no evidence in this case, nor was it the purpose of bringing the proceedings, that the subject matter of the appeal "has caused, is causing, or is likely to cause damage to the environment". The respondents argue that the within application was clearly motivated by commercial interest, and that the purpose thereof was commercial gain. They do not suggest that an application for a planning injunction can never be commercially and environmentally motivated, but they submit that it is evident in this case that this application was commercially driven. They suggest that no allegation of damage to the environment was made in the detailed s. 160 proceedings, and that these proceedings were directed instead at the cost, expense, and business interests of the appellant.

26. The respondents next address the appellant's contention that, if the appeal fails the environmental damage limb of the test in s. 4 of the Act, then the decision of Humphreys

J. in *NEPPC (No.5)* should be followed. The appellant had argued that the Court should utilise the discretionary solution fashioned by Humphreys J., who stated that the Court's discretion as to costs should be exercised to achieve a result compatible with the spirit of the Act and to avoid the distinction as prohibited by EU law, so that the Court is required to make no order as to costs if that would have been the result under the Act but for the condition of environmental damage.

27. The respondents submit, however, that in order to get to that point, the appellant is required to show that the appeal falls within s. 4(1)(a) or (b) other than establishing environmental damage, but for the reasons set out by them the appellant has not demonstrated this. In any event, it is said to be arguable that all that is required in respect of interpretation by the courts is the requirement that the NPE rule is applied in matters falling within Article 9(3) and (4) of the Aarhus Convention, and that this is what was suggested to be the case by Costello J. in her judgment in the Court of Appeal in *Heather Hill*: see [2021] IECA 259, at para. 182.

28. As regards the NPE rule, the respondents contend that under Article 9(3) of the Aarhus Convention this rule only applies to certain types of proceedings, being proceedings to challenge acts and omissions by private persons and public authorities "which contravene provisions of its national law relating to the environment". Furthermore, they submit that it is apparent from the wording of Article 9 that the Aarhus Convention does not prevent costs orders being made against applicants, but rather requires that any such costs order not be prohibitively expensive.

29. As such, were this Court to find that the NPE rule applied to this appeal (and it is the respondents' position that this is not the case), nothing prevents this Court from making a costs order against the appellant so long as it is not prohibitively expensive. That submit that the CJEU has adopted both subjective and objective criteria in this regard,

and consequently the costs must neither exceed the resources of the applicant nor appear objectively unreasonable. There is, however, no information before this Court as to the resources of the appellant, and this is said to be as a result of the failure of the appellant to bring a formal application for costs protection under s. 7 of the Act.

Replying Submissions of the Appellant

30. The appellant then delivered replying submissions dated the 11th February, 2022. As regards the respondents' reliance on the fact that the appellant made no formal application under s. 7 of the 2011 Act prior to this Court delivering the principal judgment, the appellant submits that s. 7 is permissive rather than mandatory, and that this Court held in *O'Connor* that a party may rely on the provisions of the Act either in an application brought before or during the course of the proceedings, or alternatively in a costs application at the conclusion of the proceedings.

31. As regards the type of proceedings falling within s. 4(1)(a) and (b) of the Act, the appellant submits that this case can be distinguished from the two decisions relied upon by the respondents. They suggest that in *Rowan* an important factor in the Court's conclusion that the proceedings fell outside s. 4 was that the alleged damage to the environment in the sense of jeopardising the safety of people would not be prevented, even if the applicant were successful in the proceedings. In contradistinction, they submit that in these proceedings, if the appellant had been successful, the proceedings would have prevented the continuation of the car park which it alleged caused environmental damage.

32. As regards the respondents' reliance upon *CLM*, the appellant notes that those proceedings were held by the High Court to have been instituted for the purpose of obtaining payment to the plaintiff of monies allegedly due to it by the first and second

named defendants for work done by the plaintiff. Whilst the appellant seeks damages in a related set of proceedings referenced by the respondents, the purpose of these s. 160 proceedings was to prohibit the continuation of the car park, not to obtain the payment of monies.

33. The appellant argues that whilst this Court has held (at para. 1 of the principal judgment) that the removal of the car park would facilitate the park and ride operation in which the appellant has an interest, the proceedings are also of public interest and involve environmental issues. The fact that a public interest and the appellant's interest are both engaged does not preclude the proceedings coming from the scope of s. 4, in accordance with the decision of the High Court in *Hunter v. Nurendale* [2013] IEHC 430.

34. In terms of the "damage to the environment" requirement, insofar as that remains a part of the text of s. 4, it is submitted that the appellant need only have a stateable argument that damage to the environment is occurring or is likely to occur as a result of the car park the subject of the proceedings. The appellant sets out evidence from the Ecofact Report which it says was part of the affidavit evidence before the Court regarding negative effects on a particular bird species known as Choughs, which it is said used grassland areas such as the area where the car park is located for foraging. It is submitted that this evidence established a stateable case that damage to the environment was occurring or was likely to occur as a result of the car park the subject of these proceedings.

35. The appellant cites a recent decision of the High Court in *Enniskerry Alliance v. An Bord Pleanála* [2022] IEHC 6 ("*Enniskerry*"). In that case Humphreys J. granted a declaration that the 2011 Act applied to one of the applicant's grounds for judicial review, on the basis that the applicant's essential case on this ground was that the

impugned development would have an ecological impact, because it would cause damage to or removal of hedgerows. Applying that reasoning to the instant case, the appellant suggests that the essential case made by it is that the car park is unauthorised and that this has had, is having and will have an ecological impact, namely the permanent removal of foraging habitat for the Chough.

Replying Submissions of the Respondents

36. The respondents then delivered replying submissions dated the 25th February, 2022, in response to the appellant's replying submissions. They note the appellant's reliance upon the *Enniskerry* decision, and that the appellant had sought to apply that reasoning to the present case, as set out in the previous paragraph above. The respondents submit that the appellant's summary of the "essential case" made by it was not the case run by the appellant in either the High Court or on appeal in this Court. Moreover, on any objective review of the pleadings in this matter, no such case was pleaded. They argue that the appellant's attempt to liken its case to that of the ground of challenge in *Enniskerry* cannot therefore be made out.

37. The respondents state that there is no mention of protecting the removal of foraging habitat for the Chough in the grounding affidavit of the appellant (sworn by John Flanagan on the 19th July, 2016); rather, that matter is found in the Ecofact Report dated the 10th February, 2017, which was brought into evidence in March, 2017, over seven months after the proceedings issued. They note that this was in the context of an application for security for costs, during which no application for costs protection was made by the appellant. As regards the Doherty Environmental Reports dated the 11th January, 2017 and April 17, these were put into evidence by the respondents in May, 2017. Moreover, the Ecofact Report and the Doherty Environmental Reports concerned

a "Part 8" proposal in 2017 to carry out upgrading works to the car park, and did not concern the planning permission by reference to which the appellant sought a planning injunction.

38. The respondents submit that it is hard to understand how documents put in evidence over seven months after the proceedings commenced (and evidence that relates to a Part 8 proposal in 2017 to carry out upgrading works to the car park, which proposal was not under challenge in these proceedings or any other proceedings) could ever be evidence to demonstrate that these proceedings were *instituted* on the basis that the "car park was unauthorised and that this has had, is having and will have an ecological impact, namely the permanent removal of foraging habitat for the Chough". On the contrary, these proceedings were instituted solely to obtain commercial benefit, being the restraint of car parking at a most popular tourism attraction, so as to coerce a transfer of visitors to the appellant's commercial park and ride service.

Further Authorities and Supplemental Submissions

39. The complexity and fluidity of the law as to costs in this area is illustrated by the fact that further authorities arose and further submissions were delivered, even after two rounds of written submissions as summarised above. The respondents drew the Court's attention to a costs judgment delivered by Holland J., since the last written submissions were filed, in *Jennings v. An Bord Pleanála* [2022] IEHC 249 ("*Jennings*").

40. The respondents highlighted paras. 197 and 198 of that judgment, where Holland J. considered the scope of proceedings referred to in s. 4 of the Act. He stated that "the question is whether in reality and substance they are for the purpose – the object – of ensuring compliance with or enforcement of the statutory provision", and added that "proceedings advanced for a collateral purpose do not come within the section", citing

Rowan and *CLM*. One might note that while Holland J. refers to "the section", his comments appear directed towards s. 4(1)(a) which relates to proceedings instituted "for the purpose" of ensuring certain matters. There was no separate consideration of s. 4(1)(b), which relates to proceedings instituted "in respect of" certain matters. I will return to this potentially important distinction in due course.

41. Holland J. went on to consider the breadth of the "damage to the environment" criterion in s. 4(1) of the Act. He noted the approach of Humphreys J. in *NEPPC (No.5),* who stated that the Act applies to "a development causing identified specific and tangible ecological harm such as impact on specific species, habitats or natural resources, above and beyond impact of a type that can be alleged in respect of any development", and who later added: -

> "Not the sort of harm that arises in every case, such as alleged sub-optimal land use by erecting a commercial building on land that would have been better developed for public uses, or the common or garden harm of replacing grass with concrete, but more tangible harms like cutting trees, removing hedgerows, causing an adverse effect on species or habitats, or causing pollution."

42. This approach did not find favour with Holland J., who preferred "a less rather than more demanding approach to the damage criterion" (at para. 225). He noted how s. 4(2) of the Act lists types of environmental damage, not all of which are ecological. He regarded the breadth of types of environmental damage listed as striking, and felt that some of the listed types of such damage overlapped notably with considerations historically in this jurisdiction termed "planning" rather than "environmental" – for example, "landscapes and natural sites"; "conditions of human life"; and "cultural sites and built environment".

43. It seemed to Holland J. difficult to reconcile a restricted view of "damage" with its definition in s. 4(5) of the 2011 Act, as including "any adverse effect on any matter" specified in s. 4(2). He noted how Baker J. in *O'Connor* referred to the definition as being in broad terms, and how Murray J. in *O'Connor* records Hogan J. in *McCoy v. Shillelagh Quarries* [2015] IECA 28 to the effect that damage to the environment is generously defined in s. 4. It seemed to him that a broad interpretation of environmental damage, as required by s. 4(1) and (5) of the Act, was not merely desirable as minimising the effects of its imposition as a criterion for costs protection, as criticised by the CJEU in *NEPPC*. Such an interpretation was also available on ordinary principles of statutory interpretation, and already established by the Court of Appeal in light of the fact that in *O'Connor* neither the Court of Appeal nor the High Court required a narrower, or indeed any particular, definition of environmental damage. A broad interpretation was also available in light of certain other factors, as set out at para. 232 of his judgment.

44. As set out at para. 3 above, this Court subsequently became aware that the Supreme Court was due to hear an appeal in *Heather Hill* dealing with potentially relevant costs issues, and in those circumstances the Court notified the parties that it felt it appropriate to await the judgment of the Supreme Court in that case before delivering any costs ruling in this matter. The Supreme Court delivered judgment in *Heather Hill* on the 10th November, 2022: see [2022] IESC 43. While the main focus of Murray J's judgment for the Court was upon s. 50B of the 2000 Act, he also considered the provisions of the 2011 Act. He explained that it seemed clear that Part 2 of the 2011 Act is directed to the implementation of Article 9(4) of the Aarhus Convention insofar as it applies to Article 9(3), as well as Article 9(1), which deals with proceedings to obtain access to information on the environment.

45. At para. 190, Murray J. stated as follows:-

> "Even on the broad interpretation of [the 2011 Act] adopted in *Jennings*, proceedings in which it is sought to challenge acts or omissions of public authorities which contravene provisions of national law relating to the environment will only engage s. 4 if the applicant can establish that the failure to ensure compliance with those provisions "has caused, is causing or is likely to cause, damage to the environment". While the decision in *NEPPC* means that for at least *some* challenges it will be necessary to disapply this requirement, there is no basis for disapplying the clear language of the Act in proceedings concerned solely with national environmental law. Therefore, looking solely at the text of the provision, this will inevitably knock out at least some actions that are covered by Article 9(3) and in respect of which it is not possible to establish that the grant of the consent in question "is likely to cause…damage to the environment". I note that the precise implications of this requirement have given rise to some debate across the judgments of Holland J. in *Jennings* and of Humphreys J. in the *East Meath* and *Roscam* cases: Holland J. favours a "broad" and a "relatively undemanding approach" to the question of damage, while Humphreys J. concluded that the phrase had to have some meaning, and required "specific and tangible ecological harm". It is not necessary to resolve this issue here – what is relevant is that even on the broadest interpretation there will be cases in which Article 9(4) is engaged without it being possible to establish such damage…"

46. As set out at para. 3 above, the parties were given liberty to make supplemental submissions in the light of the Supreme Court judgment in *Heather Hill*, and the

respondents availed of that opportunity and filed supplemental submissions dated the 27th January, 2023.

47. In their supplemental submissions the respondents address the position adopted by the Supreme Court in *Heather Hill* in respect of the NPE rule, as provided for under the Aarhus Convention. They do so in the context of the appellant's argument that, if the provisions of the Act do not apply because it cannot meet the damage to the environment requirement, the NPE rule under EU law and/or the Aarhus Convention applies instead to these proceedings to displace the usual rule that costs follow the event.

48. The respondents note that Murray J. in *Heather Hill* provided a helpful review of the implications of the CJEU decision in *NEPPC*. They submit that this review supports the position that Articles 9(3) and (4) of the Aarhus Convention do not have direct effect, and cannot be relied upon directly. As such, in order to rely on the NPE rule as provided for under the Aarhus Convention, a party must demonstrate an interpretative obligation to do so.

49. The respondents note that Murray J. explained that one of the conclusions to be drawn from the decision of the CJEU in *NEPPC* was that there would 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 Article 9(3) and Article 9(4) of the Aarhus Convention. He went on to state as follows (at para 204):

> "The interpretative obligation is one that arises only within those parts of national law that are in a "[field] covered by EU environmental law". This does not merely reflect what the CJEU said, but it is consistent with the rationale for the proposition in the first place: national courts must in certain circumstances

interpret their domestic legislation "to the fullest extent possible" so as to ensure consistency between that law and Articles 9(3) and (4) to ensure that there is "effective judicial protection in the fields covered by EU environmental law". The obligation does not arise outside that context."

50. The respondents state that some guidance was provided in *Heather Hill* as to what is meant by "national law…in a field covered by EU environmental law", but they state that the law in this regard is not entirely clear. They submit that if the Court agrees that the Act cannot be availed of by the appellant, then the NPE rule can only be applied if it is found that the national environmental law at issue in the proceedings falls within the field of EU environmental law. Even if this is so, it is the respondents' position that insofar as the NPE rule applies to some or all of the proceedings, this does not require that no order as to costs is made, but rather that any costs order made as against the appellant is not prohibitively expensive.

Discussion

51. It seems to me from the very extensive submissions that the following questions arise, or may arise, for decision on this costs application:

(i) Do these 160 proceedings come within the categories of proceedings specified in s. 4(1)(a) or (b) of the Act?

(ii) If so, has the appellant met the "damage to the environment" requirement in s. 4(1)?

(iii) If the Act does not apply because the appellant cannot meet the damage to the environment requirement, does the NPE rule apply instead to these proceedings to displace the usual rule that costs follow the event?

The First Question

52. As set out above, s. 4(1)(a) of the Act provides that s. 3 (which contains the rule that each party shall bear its own costs) applies to proceedings instituted "for the purpose" of ensuring compliance with, or the enforcement of, a statutory requirement or condition attached to a planning permission. At the outset one might observe a potential difficulty in applying this provision, arising from the fact that a person may institute proceedings, and particularly proceedings such as s. 160 proceedings, for more than one purpose or reason.

53. The more narrow or more direct purpose of the proceedings, as reflected in the pleadings, may be that of ensuring compliance with, or the enforcement of, the statutory requirement to obtain planning permission for the impugned development, or alternatively ensuring compliance with a condition attached to a planning permission as granted. At the same time, however, there may also be a wider or more indirect purpose, in the sense that the person's overall reason for instituting the proceedings may be to try to stop the development because, for example, it might damage that person's commercial interests. This wider purpose could also be viewed as the person's underlying motivation for instituting the proceedings, or as their subjective intention.

54. This difficulty in identifying the "purpose" for which the proceedings were instituted is I think reflected in the two authorities relied upon by the respondents, *Rowan* and *CLM*. As set out at para. 21 above, in *CLM* Finlay Geoghegan J. agreed with Birmingham J. in *Rowan* that whilst the pleadings are the starting point for any consideration, the court must consider objectively the question as to whether, as a matter of reality and substance, the proceedings are for the purpose of ensuring compliance with or enforcement of either a statutory provision or condition. Insofar as part of the observations of Birmingham J. might imply that the court should take into

account the subjective intention of the plaintiff in issuing the proceedings, she did not propose following this approach.

55. In the present case, as in all s. 160 applications, the only formal pleading is the originating notice of motion, although the affidavits to some extent fill the gap and also serve as *quasi*-pleadings: see *South Dublin County Council v. Balfe* (Unreported, Costello J., 3rd November, 1995). As regards the originating notice of motion in this case dated the 20th July, 2016, the principal judgment set out (at para. 28) some of the orders sought pursuant to s. 160 of the 2000 Act, and the reliefs sought appear to suggest that the proceedings were instituted for the purpose of ensuring compliance with conditions attached to the 2002 permission.

56. The principal judgment also sets out, at paras. 29 – 32, a summary of the series of affidavits exchanged between the parties during the course of these proceedings. A consideration of that summary again suggests that the proceedings were instituted for the purpose of ensuring compliance with the conditions attached to the 2002 permission, and in particular condition 3.

57. It may well be the case that an objective analysis of the entire series of affidavits also suggests that the appellant's underlying motivation for instituting the proceedings, or the appellant's subjective intention, was to force the closure of the car park in order to facilitate the appellant's commercial park and ride facility. However, as per Finlay Geoghegan J. in *CLM,* I do not propose following an approach which takes into account the underlying motivation or subjective intention of the appellant in instituting these proceedings. In my opinion, as a matter of reality and substance, the proceedings were instituted for the purpose of ensuring compliance with the conditions attached to the 2002 permission, and thus the proceedings fall within s. 4(1)(a) of the Act.

58. While there is some difficulty in applying s. 4(1)(a) of the Act, and even if I am incorrect in my conclusion as to its application in this case, it seems to me that the proceedings clearly fall within s. 4(1)(b) in any event. As set out above, s. 4(1)(b) provides that the s. 3 "own costs" rule also applies to proceedings instituted by a person "in respect of" the contravention of, or the failure to comply with, a permission granted pursuant to the 2002 Act.

59. In my experience the words "in respect of" are invariably given a very wide meaning. By way of authority one might note the recent decision of this Court in *Donnelly v. Vivier & Co. Ltd* [2022] IECA 104, where Ní Raifeartaigh J. observed that the phrase "in respect of a contract" has a very wide meaning. In support of this proposition, Ní Raifeartaigh J. referred to the judgment of Lightman J. in *Albon v. Naza Motor Trading Sdn Bhd* [2007] 1 WLR 2489 at paras. 26 – 27, where he said as follows:

> "Accordingly the formula of words in CPR 6.20(5) "in respect of a contract" does not require that the claim arises under a contract: it requires only that the claim relates to or is connected with the contract. That is the clear and unambiguous meaning of the words used. No reference is necessary for this purpose to authority and none were cited beyond *Tatam v. Reev* [1893] 1 Q.B. 44. If such a reference were needed, I would find support in a passage which I found after I had reserved judgment in the judgment of Mann C.J. in *Trustees Executors and Agency Co. Ltd v. Reilly* [1941] VLR 110 at 111: 'The words "**in respect of**" are difficult to definition, but they have the widest possible **meaning** of any expression intended to convey some connection or relation between the two subject-matters to which the words refer.'" (Emphasis in the judgment of Lightman J.)

60. Applying that very wide meaning to the phrase in the present context, it seems to me impossible to gainsay that these proceedings relate to or are connected with the contravention of, or the failure to comply with, the 2002 permission. Thus, the proceedings come within the categories of proceedings specified in s. 4(1)(b) of the Act.

The Second Question

61. The second question is whether the appellant has met the "damage to the environment" requirement in s. 4(1) of the Act. As regards this requirement, I agree with the finding of Baker J. in *O'Connor* that the test in s. 4(1) is one with requires an applicant to go beyond mere assertions of damage or likely damage to the environment, and to make out a stateable argument that damage to the environment is occurring or is likely to occur.

62. As set out above, there has been some debate as to the scope of the "damage to the environment" requirement across the judgments of Holland J. in *Jennings* and of Humphreys J. in the *East Meath* and *Roscam* cases. For my part, I prefer the broad approach to the question of damage, as favoured by Holland J. I agree with Holland J. that it is difficult to reconcile a restrictive view of "damage" with its definition in s. 4(5) of the 2011 Act, as including "any adverse effect on any matter" specified in s. 4(2).

63. Has the appellant made out a stateable argument that the alleged failure or contravention has caused, is causing or is likely to cause some damage to the environment, *i.e.* some adverse effect on any of the matters specified in s. 4(2) of the 2011 Act, such as soil or land or biological diversity?

64. In his third affidavit sworn on behalf of the appellant on the 3rd March, 2017, sworn following a motion for security for costs brought by the respondents, Mr. Flanagan exhibited the Ecofact Report which stated as follows (at p. 3):

> "The Cliffs of Moher is designated a SPA, and is also a protected National Heritage Area (Cliffs of Moher pNHA000026). The Annex 1 bird species Chough *Pyrrhocorax pyrrhocorax* is a conservation interest of this SPA and this species uses grassland areas (such as the area where the temporary car park is located) for foraging. Although this bird species breeds on cliffs within the SPA boundary, it can be expected to forage widely in suitable habitats in the area – both within and adjoining the SPA. This bird species will therefore be directly affected by the proposed development as a result of loss of foraging habitat, and also displacement from adjoining areas due to disturbance."

65. By way of response to the points raised in the Ecofact Report, the respondents exhibited a report from Doherty Environmental dated April, 2017. This report acknowledged the presence of the Chough bird species in the vicinity of the Cliffs of Moher, but argued that the presence of the existing car park and the resultant loss of green field land has not resulted in the loss of suitable Chough foraging habitat, has not undermined the availability of suitable Chough foraging habitat, and has not resulted in likely significant effects to the conservation status of the breeding Chough population supported by the Cliffs of Moher SPA.

66. Notwithstanding the dispute between the environmental experts, and having regard to the low bar which the applicant is required to meet, it seems to me that the applicant did make out at least a stateable argument that the alleged failure or contravention by the respondents has caused *some* adverse effect on soil and land, and probably also on biological diversity.

67. As set out at para. 38 above, the respondents appeared to place some reliance on the fact that the relevant evidence as to environmental damage was not put into evidence by the appellant until some months after the proceedings were instituted, and that this was done in the context of an application by the respondents for security for costs. In my opinion neither of these matters makes any difference, as long as the necessary evidence has been adduced by some party at some stage of the proceedings, and I am satisfied that the appellant has done so in this case.

The Third Question

68. In the light of the above answer to the second question, the third question no longer arises.

Conclusion

69. In conclusion, I am satisfied that s. 3 of the 2011 Act applies to these proceedings. In the circumstances the appropriate order is that each party shall bear its own costs of the appeal, subject to the following *proviso*.

70. The appellant has also sought an order that the respondents shall pay to the appellant the costs of the written submissions on costs. The respondents' position was that costs should follow the event in respect of the appeal, to include the costs of submissions in respect of costs. In circumstance where the appellant has been entirely successful on the costs issue, I am satisfied that it is entitled to the order sought.

71. As this judgment is being delivered electronically, I note that each of Whelan J. and Pilkington J. have indicated their agreement with it, and with the orders I propose.