THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 57

Record No. 2016/286

Ryan P.
Hogan J.
Gilligan J.

BETWEEN

SEAN BYRNE (a minor)

Suing by His Father and Next Friend

SEAN BYRNE

Respondent

- AND -

SEAN Ó CONBHUÍ (otherwise SEAN MacCONBHUÍ,

otherwise JOHN CONWAY)

- AND -

JAMES LEO CONWAY (otherwise

SEAN otherwise SEAMUS Ó CONBHUÍ otherwise CONWAY)

Appellants

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 9th day of March 2018

1. This is an appeal from a decision of the High Court (McDermott J.) delivered on the 29th April 2016. In that judgment McDermott J. dismissed the appellant's application for a review of taxation of costs which had been awarded to the plaintiff/respondent: see *Byrne v. Ó Conbhuí* [2016] IEHC 219. The substantive proceedings themselves had involved an action for damages for personal injuries brought by the plaintiff which he sustained as a five year old boy when playing with other children on a metal shipping container on land occupied by the two defendants (who are brothers) as far back as April 1996. The injuries in question were (fortunately) relatively minor involving as they did a fracture to a left elbow.

2. Although the proceedings themselves were commenced in 1996, they did not come on for trial until May 2004 when Kearns J. found the two defendants jointly and severally liable for the plaintiff's injuries under the provisions of the Occupiers Liability Act 1995, together with an award of costs. Subsequent to the hearing of the substantive action, the first defendant, Mr. Ó Conbhuí made a number of applications to the Supreme Court, including an application to stay the order for costs. An application for an extension of time to appeal to the Supreme Court was ultimately dismissed in January 2011, so it was only at that point that the substantive proceedings finally concluded.

3. A number of orders for costs in favour of the plaintiff were ultimately made against this defendant, Mr. Sean Ó Conbhuí, in the course of the proceedings. A lengthy and complicated taxation of costs ensued. This concluded on the 7th October 2014 with the final ruling of the Taxing Master. (I shall return presently to deal with the Taxing Master's report). Mr. Ó Conbhuí then sought a review by the High Court of the taxation pursuant to the provisions of Ord. 99, r. 38(4) of the Rules of the Superior Courts.

The report of the Taxing Master

4. As McDermott J. recounts in his judgment, the complicated history of the taxation proceedings is set out in the report of Taxing Master Mulcahy dated the 8th May 2015. She recounted how there were numerous adjournments until the plaintiff's bill of costs came before her in June 2012. Among the grounds of objection on the part of Mr. Ó Conbhuí was that he had made an application for a grant of legal advice and representation to the Legal Aid Board which was ultimately unsuccessful. On the 27th November 2012 Taxing Master Mulcahy advised that she would proceed with the taxation.

5. As McDemott J. put the matter in his judgment:

> "The Taxing Master did not consider that Mr. Ó Conbhuí would be prejudiced by appearing in person without representation since lay litigants regularly appear in taxations before her. Her practice is to outline the procedure followed in guiding them through the process. She takes care to ensure that a lay litigant is asked for his/her submissions and given an opportunity to comment upon all matters that arise. The Taxing Master states that she carried out a detailed examination of the nature and extent of the work done by the solicitor and counsel and other items irrespective of whether the party opposing a taxation is represented or not. She also considered that the first defendant had experience in appearing on his own behalf and making applications in the Superior Courts and was aware that he had acted as a McKenzie friend on behalf of other lay litigants in High Court proceedings. No issue is taken with the manner in which the taxation process or hearings were conducted by the Taxing Master."

6. Pausing at this point, it is only fair to record that at the hearing of the before this Court Mr. Ó Conbhuí also acknowledged the fair manner in which the Taxing Master conducted the hearing.

7. McDermott J. then proceeded to summarise the report of Taxing Master Mulcahy in which she highlighted the following matters:

> "Liability was an issue throughout the proceedings with both defendants denying any liability for the accident and for the injuries sustained by the infant plaintiff. An engineer was engaged to inspect the locus and to advise on liability. Proof of whether there was reckless disregard for the plaintiff depended on various factors set out in s. 4(2) of the Occupiers Liability Act1995 and it was necessary for the solicitor for the costs to carry out investigations to establish whether the premises was an open space and had been used by children to play on for a significant period prior to the accident; whether children regularly used the container as a climbing frame and whether the container was grossly unsafe and unsuitable for that purpose. The first named defendant denied that he was the owner or occupier of the land and the container and it was necessary for the solicitor to carry out investigations with a view to establishing the ownership of the property on which the accident had occurred. That task was made more difficult because the first named defendant had operated under a number of different aliases with two different addresses and it was necessary for the solicitor to carry out extensive investigations into the identity of the first named defendant. Difficulties were encountered serving papers on the first named defendant. Written statements were taken from several individuals … setting out their dealings with the defendant and their knowledge of the lands upon which the accident had occurred. A handwriting expert was engaged to compare the first named defendant's handwriting on an executed deed with a view to proving his identity …"

8. McDermott J. recounted that:

> "A further issue in respect of planning permission sought by the first defendant concerning the development of the lands arose and discovery was sought. The defendant declined to make submissions on the solicitor's general instruction fee and counsel's brief fees. Having heard submissions from Mr. McEvoy on behalf of the solicitor, the Taxing Master delivered an *ex tempore* ruling on the solicitor's general instruction fee on 16th December 2013. She considered a sum of €10,000.00 to be a fair and reasonable fee for the work which had been carried out and was necessary in order to prosecute the plaintiff's claim. The total costs measured in respect of the order of 10th May 2004 amounted to €22,871.58. Section 17(3) of the Courts Act 1981, as amended by s. 14 of the Courts Act 1991, resulted in an adjustment in accordance with the section. The total costs assessed against the first named defendant in respect of the substantive High Court action amounted to €10,868.00. The first defendant was then advised that he had a right to bring in objections to the allowance or disallowance of any items in the Bills of Costs."

9. Following that ruling Mr. Ó Conbhuí then delivered the following "grounds of objection" on the 28th December, 2013:-

> "1. Since my only involvement in this case is as an environmentalist, my ordinary right to financial assistance with securing profession advice and representation of the court of the taxing master is enforced by the provisions of the Aarhus Convention.
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> 2. I have applied to the member state concerned for such assistance and have been informed by its agent, the Legal Aid Board, that I comply with the means requirements for such assistance, but a final decision on my application has not yet been made.
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> 3. In deciding that I am competent to, *inter alia*, properly prepare my rebuttal of the costs claimed and then lay my case in rebuttal properly before the court, the taxing master has erred in law and misdirected herself by hearing and deciding the bills of costs which are before her court in this case.
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> 4. I believe that proper advice from appropriate legal professionals which show that a question arises in respect of these taxations as to want of jurisdiction arising from lateness."

10. While these objections were raised in respect of each bills of costs considered, Mr. Ó Conbhuí also objected "to being forced to represent myself by the State's failure/neglect/refusal to afford me appropriate financial assistance with the Access to Justice to which I am entitled, *inter alia*, by the provisions of the Aarhus Convention". He claimed that he required the expert advice of Legal Costs Accountant and/or representation by a barrister in order to ensure a fair hearing on the taxation issues.

11. McDermott J. then proceeded to summarise the events which took place after that date:

> "The Taxing Master's report describes how, having lodged objections on 28th December 2012 the defendant failed to appear when they were listed for hearing on 5th February 2013. The objections were then listed on 12th April 2013 when leave was granted to him to amend the title to the objections. Directions were furnished to him to lodge written submissions in support of the objections. The matter was listed for hearing on 30th July 2013.
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> On 30th July 2013, the first defendant sought an adjournment of the hearing of the objections pending the provision of appropriate assistance to him "in accordance with justice in environmental matters". The Taxing Master was advised that his application for legal aid had been refused and a new one had been submitted, though no evidence of this was produced. He was also invited to specify the provisions of the Aarhus Convention under which he claimed to be entitled to representation in the taxation of costs and on what basis he was involved in the proceedings as an environmentalist. The matter was again listed for mention on 11th October 2013 by which stage the first defendant had not complied with the directions to furnish copies of all applications made by him or on his behalf for legal aid and a copy of correspondence with the Board concerning same. On 14th October, the first defendant furnished a copy of his correspondence with the Legal Aid Board which included copies of applications made by him or on his behalf.

12. The defendant's objections were listed for hearing on the 25th October 2013 when the Taxing Master was advised that he had made a second application to the Legal Aid Board under the Aarhus Convention on the 19th July 2013 but had been notified the previous day that his application had been refused, i.e., the 24th October 2013. Written submissions had not been filed in support of his objections and directions were furnished to the parties to lodge written submissions with a new date for hearing fixed for the 27th January 2014.

13. Two of the bills of costs were taxed on the 16th December and the 27th December 2013. Objections were brought in by the first named defendant in respect of allowances on the bill taxed on the 16th December but he did not specify the items to which objection was taken. It was not clear whether the objections related to both bills. They were deemed to be in respect of both matters.

14. The taxation was then listed for hearing on the 17th February 2014, the 10th March 2014, the 28th April 2014 and the 28th August 2014. On each date the defendant failed to appear. On 28th August 2014 the objections were listed on a peremptory basis for hearing on the 7th October 2014. The first defendant appeared on that date and made submissions but withdrew before the ruling on his objections was delivered.

15. McDermott J. then summarised the conclusions of the Taxing Master thus:

> "The Taxing Master considered the objections advanced by the first defendant. She noted that the proceedings were instituted against the defendant in his capacity as the owner/occupier of the land/container on which the accident occurred. The defendant did not adduce any evidence during the taxation that he was involved in the proceedings as an environmentalist, nor did he offer any explanation as to how the provisions of the Aarhus Convention applied to him. He failed to furnish information which had been previously directed to address the issue at the hearing of objections on 7th October 2014 from which he withdrew."

16. McDemott J. then continued:

> "At the hearing of the objections on 7th October 2014, it was noted by the Taxing Master that the first defendant confirmed that he had no objection to the allowance or disallowance of any item in the Bills of Costs. He accepted that the sums allowed were probably fair but did not have any expertise to assess them. He did not object to the manner in which the costs had been taxed and his objection was based on the fact that the Taxing Master had proceeded with taxation in the absence of his having professional advice, representation and assistance. The applicant has maintained this stance on this application for review of taxation. He does not express any dissatisfaction with the quantum of any of the allowances or disallowances that were made or the manner in which the taxation of the bills was conducted apart from the fact that the hearings continued without his being provided with legal aid."

17. Mr. Ó Conbhuí has now appealed to this Court against this decision of McDermott J.

The appeal to this Court

18. It is only fair to say that Mr. Ó Conbhuí has not challenged the substantive merits of the ruling of Taxing Master Mulcahy in this Court either. His objection rather is that had legal aid been available to him before the Taxing Master he would have been in a position to have had his interests better protected and in a more professional manner. To this end he has invoked the provisions of the Aarhus Convention (1998) and he maintains that its provisions regarding the limitation on costs in environmental matters are applicable to the present case by reason of the fact that he is an environmental campaigner. He also requested the court to permit a McKenzie friend to address the Court on his behalf.

19. I propose to deal with these submissions in reverse order. It is, however, first necessary to observe that the delays which have beset this litigation to date reflect very poorly on the proper and efficient administration of justice and, indeed, on the legal system as a whole. This appears to have been a relatively routine personal injuries claim which took eight years to have come on for hearing and a further fourteen years before the taxation of costs could be finally disposed of. In the context of the present appeal it is, perhaps, now unnecessary to explore the reasons for this delay. It is sufficient to say that the delays appear to have been a product of an over-burdened judicial and taxation system, coupled with an indulgence towards litigants in person which is, perhaps, not always warranted.

20. One way or another, delays of this gross magnitude – with their potential for huge unfairness - should serve as a stark reminder to the legal system that by assigning the administration of justice to the judiciary, Article 34.1 of the Constitution presumes and presupposes that this will be done efficiently and with dispatch. It simply cannot be right that almost twenty two years after this accident one important aspect of what appears to be no more than a routine personal injuries action remains unresolved

Whether Mr. Ó Conbhuí's McKenzie friend could represents him in court

21. Mr. Ó Conbhuí first asked this Court to permit a McKenzie friend to represent him in court by pleading his case. This Court ruled against that application and it may now be convenient to give the reasons for that ruling.

22. Save, perhaps, for those persons who by reason of physical disability are not capable of representing themselves, the Supreme Court has already made it clear that a litigant may either appear in person or be represented by legal professionals such as solicitors and counsel: see Re Coffey's Application [2013] IESC 11, [2014] 2 I.R. 125. This right of audience does not, however, extend to McKenzie friends. As Fennelly J. said ([2014] 2 I.R. 1225, 138):

> "In conclusion, the general rule is clear. Only a qualified barrister or solicitor has the right, if duly instructed, to represent a litigant before the courts. The courts have, on rare occasions, permitted exceptions to the strict application of that rule, where it would work particular injustice. The present case comes nowhere near justifying considering the making of an exception …"

23. This matter was further clarified by McKechnie J. when delivering the judgment of this Court in Allied Irish Banks plc v. Aqua Fresh Fish Ltd. [2017] IECA 77 when he said:

> "….it is worth noting that an individual may be able to avail of the services of a McKenzie friend, so called after the title of the action clarifying the role of such a person (McKenzie v. McKenzie [1970] 3 W.L.R. 472). In his judgment in that case, Davies L.J. adopted the following statement made as far back as *Collier v. Hicks* (1831) 2 B. & Ad. 663 at 699:
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> > 'Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices.'
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> That such a statement correctly represents the law was first confirmed in this jurisdiction in *R.D. v. McGuinness* [1999] 2 I.R. 411, and was latterly reaffirmed in *Stella Coffey*. …A McKenzie friend can offer much assistance in a variety of ways to the party with whom he/she is associated; this includes giving advice, prompting new lines of thought, making suggestions, having available relevant documentation, preparing for what is anticipated and identifying what is next required, to give but some examples. However, such person has no right of audience and cannot act as an advocate. The party himself must articulate the case which he is asserting. The McKenzie friend must perform his function in a manner consistent with accepted court practice and procedure, and must show due respect for acknowledged court decorum; further, he must remain fully detached from the opposing parties, their witnesses and all persons present in support of them. Overall he is expected to behave in such a manner as reflects the mutuality of respect essential for all players participating in the administration of justice.
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> Permission to be assisted by such a friend can only result from a successful application to that end. This will always be a matter of discretion for the judge in charge, who may decline or accede to such request, either unconditionally or subject

to such conditions as the circumstances may require, an example of which could perhaps be the preservation of the *in camera* rule. Such permission may be withdrawn at any time. The requesting party must demonstrate that the application is *bona fide* and genuinely made: if there is evidence to the contrary at that time, the request should be refused *ab initio*; moreover, if subsequent events should establish such evidence, or if an ulterior motive should become apparent, any such permission previously granted should be immediately terminated."

24. It is thus clear from both Coffey and *Aqua Fresh* that the role of the McKenzie friend is simply to assist with papers, make notes, quietly make suggestions and so forth, but save, perhaps, in the case of physical disability or other exceptional circumstances, this does not extend to a personal right of audience in favour of the McKenzie friend on behalf of the litigant concerned. This was further confirmed by the recent Practice Direction CA07 dated the 31st July 2007 which stated that save in exceptional circumstances, McKenzie friends do not enjoy a right to address the court.

25. It was for these reasons that the Court declined to permit Mr. Ó Conbhuí's application to have his McKenzie friend address the Court.

The Aarhus Convention

26. I now turn to the issue of the Aarhus Convention. The Aarhus Convention is a United Nations sponsored regional convention for Europe, the full title of which is the *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*. The Convention was opened for signature in June 1998, some two years after the accident in the present case occurred. Ireland signed the Convention on the 25th June 1998, and ratified it on the 20th June 2012. The European Union also approved the Convention by means of Council Decision 2005/370/EC of 17th February 2005 (O.J. 2005, L 124).

27. The scope of application of the Aarhus Convention is principally governed by Article 6(1)(a) which provides that each Contracting Party shall "apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in Annex 1." The activities listed in Annex 1 are those which, subject to certain thresholds, most immediately affect the environment such as, for example, metal production and waste management. Paragraph 19 of Annex 1 provides that the provisions of the Convention will also apply where "public participation is provided for under an environmental impact assessment procedure in accordance with national legislation."

28. Article 9(2) of the Convention guarantees that interested parties shall have "access to a review procedure before a court of law… to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6." Article 9(4) of the Convention further requires that these procedures shall not be "prohibitively expensive." It is important here to stress that this obligation *only* applies to environmental litigation which concerns decisions which are otherwise captured by the operation of Article 6 and, by extension, the enumerated list of activities set out in Annex 1.

29. The Aarhus Convention has been partially transposed by the law of the European Union in respect of three distinct – if admittedly important – areas, namely, public access to information regarding the environment, environmental impact statements and integrated pollution control. This partial transposition has been achieved by means of a number of Directives, most notably the re-cast version of the Environmental Impact Assessment Directive, Directive 2011/92/EU. Insofar as these Directives are directly effective, then *to that extent* the Convention is directly enforceable in national courts by virtue of EU law. The fact, therefore, that the European Union has adopted measures "designed to implement the Convention in its laws means that, at least in that indirect way, the Aarhus Convention has some application in Ireland": see *Conway v. Ireland* [2017] IESC 13, [2017] 1 IR 53, 59, *per* Clarke J. There can, however, be no suggestion that the present case - concerning as it does the taxation of costs in a routine personal injuries case - involves or engages any of these Directives in any way whatsoever.

30. It is accordingly important to stress that the Aarhus Convention is not *otherwise* part of the law of the State. Article 29.6 of the Constitution provides international agreements of this kind do not form part of the domestic law "save as may be determined by the Oireachtas". The Long Title to the Environment (Miscellaneous Provisions) Act 2011 ("the 2011 Act") admittedly declares that one of the objects of the Act is "to give effect to certain articles in the Convention" and s. 8 of the 2011 Act provides that the Court shall take judicial notice of the terms of the Convention. These provisions took effect on the 23rd August 2011: see Article 2 of the Environment (Miscellaneous Provisions) Act 2011 (Commencement of Certain Provisions) Order 2011 (S.I. No. 433 of 2011).

31. Yet for all that - as the Supreme Court pointed in *Conway* - the Oireachtas has refrained from stating that the Aarhus Convention is in fact part of the law of the State for the purposes of Article 29.6 of the Constitution. Save for the particular instances of those cases coming within the scope of EU law and the relevant Directives I have just mentioned, no Irish court can *as such* give effect to the provisions of the Aarhus Convention for the simple reason that it has not been directly made part of our law by the Oireachtas for the purposes of Article 29.6 of the Constitution. There are by contrast many instances of where international treaties and conventions have been made part of the law of the State by an Act of the Oireachtas: thus, for example, s. 20B of the Jurisdiction of Courts and Enforcement of Judgments Act 1988 (as inserted by s. 1 of the Jurisdiction of Courts and Enforcement of Judgments (Amendment) Act 2012) provides that the Lugano Convention "has force of law in the State."

32. What has happened instead is that with the enactment of the 2011 Act the Oireachtas has in some contexts and for some purposes sought to approximate our domestic law to the requirements of the Aarhus Convention, but, to repeat, without saying that the Convention is, in fact, part of our domestic law. The 2011 Act thus provides for a significant amelioration of the costs rules in litigation concerning planning and the environment. While issues have arisen in other litigation as to the scope of these provisions and the extent to which the traditional costs rules were thereby modified, it is unnecessary to explore these questions in the present case because, as McDermott J. pointed out in his judgment in the High Court, the present case does not concern environmental litigation at all, but is rather a straightforward personal injuries case.

33. Section 4(3) of the 2011 Act expressly provides that these provisions do not apply to proceedings "for which damages arising from damage to persons or property are sought." There is, accordingly, simply no basis at all therefore for Mr. Ó Conbhuí's contention that he is somehow protected by the Aarhus Convention so far as this case is concerned, even if he is also an environmental activist in the manner which he claims.

34. For good measure I would also draw attention to the fact that the present proceedings commenced in 1996 and accordingly pre-dated the conclusion of the Convention in 1998 and, even more pertinently, ante-dated the enactment of the 2011 Act by some fifteen years. This is yet a further reason why neither the Convention nor the 2011 Act can apply to the present case because as Charleton J. observed in *Sweetman v. Shell E & P Ireland Ltd.* [2016] IESC 58, the 2011 Act does not have retrospective effect and applies only to future litigation commenced *after* the commencement date of the 23rd August 2011. The 2011 Act, accordingly, does not apply:

> "…. to litigation already issued prior to [its] commencement….. It applies to all future litigation started after the commencement date of the Act of 2011. This is because the award of costs is not essentially procedural. An expectation as to the recovery of costs affects both the decision to commence a case and the necessary and legitimate prediction that it would be funded if successfully prosecuted or successfully defended by the party required to answer a legal action."

Whether to make a reference to the Court of Justice

35. Mr. Ó Conbhuí also pressed the Court to make a reference under Article 267 TFEU to the Court of Justice of the European Union, contending that this Court was a court of last resort for the purposes of the CILFIT doctrine: see Case 238/81 *CILFIT v. Ministero della Sanita* [1983] E.C.R. 3415. He submitted, in essence, that the 2011 Act had not faithfully given effect to the requirements of EU law. One might respond to this submission as follows:

36. First, it is clear from the earlier decision of this Court in *Sony Music Entertainment Ire. Ltd. v. UPC Communications Ireland Ltd.* [2016] IECA 231 that this Court has already ruled that it is not a court of last resort for the purposes of Article 267(3) TFEU. In *Sony Music* this Court followed the decision of the Court of Justice in Case C-99/00 *Lyckeskog* [2000] E.C.R. I-4839. In that latter case the Court of Justice held that the Court of Appeal for Western Sweden was not such a court of last resort, precisely because of the possibility that the decisions of that Court could be the subject of an appeal to the Supreme Court. The Court of Justice added in that case:

> "If a question arises as to the interpretation or validity of a rule of Community law, the Supreme Court will be under an obligation, pursuant to the third paragraph of Article 234 EC, to refer a question to the Court of Justice for a preliminary ruling either at the stage of the examination of admissibility or at a later stage."

37. Article 234 EC is now re-numbered as Article 267 TFEU in the wake of the Treaty of Lisbon.

38. This Court then commented:

> "It is clear that our system of appellate review is not dissimilar. Thus, following the coming into force of the 33rd Amendment of the Constitution Act 2013 on 28th October 2014, the Supreme Court may give leave to appeal from a decision of this Court where the case meets the constitutional standard. Article 34.5.3 of the Constitution now provides that the Supreme Court may grant leave if it is satisfied that the "decision involves a matter of general public importance" or if the interests of justice so requires. That is the test which applies in all cases for leave to appeal from the Supreme Court is sought and it plainly satisfies the Lyckeskog requirements."

39. It would appear, in any event, that the Supreme Court has already considered in at least one case whether it should make an Article 267 TFEU reference to the Court of Justice in the course of determining an application for leave to appeal to that Court from a decision of the Court of Appeal in accordance with Article 34.5.3 of the Constitution: see *Dowling v. Minister for Finance* [2016] IESCDET 40. All of this is sufficient to demonstrate that this Court is not a court of last resort for the purposes of Article 267(3) TFEU.

40. Second, it is clear, in any event, that no issue of EU law arises. The Aarhus Convention is not part of EU law either, save to the extent that its provisions are reflected in the specific Directives (such as the re-cast Environmental Impact Assessment Directive) of which I have already spoken. Outside of the scope of these specific Directives, EU law does not concern itself with the extent to which the Aarhus Convention has (or, as the case may be, has not) been properly transposed into the domestic law of the Member States. To repeat again: the question of the extent to which the Convention should apply to proceedings such as personal injuries actions is entirely a matter of Irish law for the Oireachtas to determine. And the Oireachtas has so determined the matter by providing in s. 4(3) of the 2011 Act that the modified costs rules contained elsewhere in that Act do not apply to personal injuries actions of this nature.

41. As, therefore, no question of EU law is raised by these proceedings, the issue of a reference to the Court of Justice simply does not arise.

Conclusions

42. For the reasons stated, therefore, I would dismiss this appeal.