THE HIGH COURT
COMMERCIAL
JUDICIAL REVIEW

[2017 No. 745 J.R.]
[2017 No. 197 COM]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

BETWEEN

SC SYM FOTOVOLTAIC ENERGY SRL

APPLICANT

AND
MAYO COUNTY COUNCIL

RESPONDENT

AND
AEOLUS WIND FARMS LIMITED
AND
ESB NETWORKS LIMITED

NOTICE PARTIES

Judgment of Mr. Justice David Barniville delivered on the 20th day of February, 2018

Introduction

1. I gave judgment in this case on 24th January, 2018. In my judgment I refused the applicant's application for an extension of time to seek reliefs by way of judicial review in respect of a decision made by the respondent, Mayo County Council (the "Council") on 6th June, 2017 pursuant to s. 5 of the Planning and Development Act 2000 (as amended) (the "2000 Act (as amended)").

2. Having been adjourned from time to time following the delivery of my judgment, I was informed on 7th February, 2018 that the applicant wished to appeal. I was informed that two issues might require consideration in that context. The first was whether a certificate pursuant to s. 50A(7) of the 2000 Act (as amended) was required in order to enable the applicant to appeal and, if so, whether such a certificate should be granted (the "certificate issue"). The second was whether the provisions of s. 50B of the 2000 Act (as amended) apply to the circumstances of this case such that there should be no order as to costs (the "s. 50B issue").

3. Those issues were listed for hearing before me on 9th February, 2018. With impressive industry the applicant and the first named notice party, Aeolus Wind Farms Ltd. ("Aeolus"), exchanged written submissions in the short period between 7th February, 2018 and the date of the hearing. It was clear from those submissions that the parties (including the Council) were all agreed that it was not necessary for the applicant to obtain a certificate under s. 50A(7) in order to appeal. This agreement was reached on the basis of a decision of Haughton J. in *McDonnell v. An Bord Pleanála* [2017] IEHC 366 ("*McDonnell*").

4. In the circumstances, it was confirmed at the outset of the hearing that, while it was ultimately a matter for the Court, the parties were all agreed that a certificate was not required. The terms of the order to be made were also agreed, save for the issue of costs as between the applicant and Aeolus which involved a determination of the s. 50B issue. The applicant and Aeolus were not in agreement in relation to the application of s. 50B to the circumstances of this case. The applicant's position was that s. 50B applied and that, in those circumstances, there should be no order as to costs. The position of Aeolus was that s. 50B did not apply and that an order for costs should be made in its favour as against the applicant in accordance with the normal rule in O. 99, r. 1 of the Rules of the Superior Courts ("RSC") that costs should follow the event. The Council indicated that it would not be seeking its costs against the applicant and did not wish to participate in the hearing in relation to the s. 50B issue. It sought to be excused from participation in that aspect of the hearing. I acceded to that application.

5. In this judgment, I first consider the certificate issue. I then consider the s. 50B issue, on which most of the submissions of the parties were directed.

The Certificate Issue

6. As noted above, the parties are all agreed that the applicant does not require a certificate in order to appeal my judgment refusing the applicant's application for an extension of time pursuant to s. 50(8) of the 2000 Act (as amended). Ultimately, however, the parties accept that it is a matter for the Court to determine.

7. Section 50A(7) provides as follows:-

> "(7) The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the [Court of Appeal] in either case save with leave of the Court which leave shall only be granted where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the [Court of Appeal]."

8. The issue as to whether a certification under s. 50A(7) is required in order to appeal a decision refusing to extend the period within which an application for leave to seek judicial review may be made was recently considered by the High Court (Haughton J.) in *McDonnell*. In that case the Court found that the application for leave to seek judicial review was not made within the required period and then went on to consider whether an extension of time should be granted. In considering whether to grant an extension of time in that case, the Court considered the affidavit and oral evidence before the Court as well as the pleadings and written and oral submissions. The Court refused to extend the time having considered the merits of the case and concluded that the case was not arguable and was bound to fail for a number of reasons. On that basis, the Court refused the application to extend the time and dismissed the proceedings. There was then a dispute as to whether the applicant required a certificate under s. 50A(7) to appeal. Haughton J. referred to the decision of the Supreme Court in *A.B. v. Minister for Justice, Equality & Law Reform* [2002] 1 I.R. 296 ("*A.B.*"), in which the Supreme Court held, in the context of a statutory provision very similar to s. 50A(7), namely, s. 5(3)(a) of the Illegal Immigrants Trafficking Act 2000, that no certificate was required in order to appeal a decision refusing to extend time to bring proceedings. The Supreme Court noted that the issues involved in an application for an extension of time might be substantially different from those involved in the application for leave itself and that under the provisions of the statutory provision at issue there was no ouster of the right of appeal from a refusal to extend time. The Supreme Court held that the refusal by the High Court to extend time was not a "*determination*" of an application for leave within the meaning of the relevant statutory provision. The decision

in *A.B.* was followed and applied by the Supreme Court in *A. v. Minister for Justice & Equality* [2013] IESC 18 ("*A*").

9. Haughton J. had considered the merits of the case in adjudicating upon the application to extend time. He refused to extend time not based on any time considerations "*but did so solely on the basis that on fuller consideration of the relevant grounds with the benefit of full pleadings, replying affidavits and submissions, those grounds were not arguable*" (para. 15). He stated that had the grounds been arguable he would have been disposed to extend time. In those circumstances, Haughton J. held that his decision to refuse to extend time based on a consideration of the merits of the applicant's case was a "*determination*" of the judicial review and that a certificate was required. His earlier ruling that the application was made out of time was not based on a consideration of the merits of the application. It did not require a certificate.

10. In the present case, in considering the applicant's application to extend time, I did not consider the merits of the applicant's challenge to the s. 5 declaration. I reached my conclusion on the applicant's application to extend time based on the statutory test in s. 50(8) of the 2000 Act (as amended). I was not satisfied that there was "*good and sufficient*" reason for extending the period within which to make the application for leave and that the circumstances that resulted in the failure to make the application for leave within the required period were not outside the control of the applicant. It should be noted, however, that in granting the applicant leave to seek judicial review, subject to the time issue on 2nd October, 2017, the High Court (Noonan J.) had already found (on an *ex parte* basis) that the applicant had established substantial grounds for challenging the Council's s. 5 declaration. To that extent, therefore, the High Court had already given some initial consideration to the merits of the applicant's case.

11. However, in circumstances where I did not consider the merits of the applicant's case, in deciding the extension of time issue, in my view, the position here is the same as it was in *A.B.* and *A.* and is different to the position faced by Haughton J. in *McDonnell*. In those circumstances, in refusing to extend time, this is clear from the decisions of the Supreme Court in A.B. and A. that I did not reach a "*determination*" in respect of the applicant's application for leave to seek judicial review or of its application for judicial review. Therefore, s. 50A(7) does not apply and the applicant does not require a certificate in order to appeal from that decision.

Section 50B Issue

12. Section 50B of the 2000 Act (as amended) provides as follows:-

> *"(1) This section applies to proceedings of the following kinds:*
>
> *(a) proceedings in the High Court by way of judicial review, or of seeking leave to apply for judicial review, of —*
> *(i) any decision or purported decision made or purportedly made,*
>
> *(ii) any action taken or purportedly taken, or*
>
> *(iii) any failure to take any action,*
>
> *pursuant to a law of the State that gives effect to —*
>
> *(I) a provision of Council Directive 85/337/EEC of 27 June 1985 to which Article 10a (inserted by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directive 85/337/EEC and 96/61/EC) of that Council Directive applies,*
>
> *(II) …*
>
> *(III) …*
>
> *(b) an appeal (including an appeal by way of case stated) to the [Court of Appeal] from a decision of the High Court in a proceeding referred to in paragraph (a);*
>
> *(c) proceedings in the High Court or the [Court of Appeal] for interim or interlocutory relief in relation to a proceeding referred to in paragraph (a) or (b).*
>
> *(2) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (S.I. No. 15 of 1986) and subject to subsections (2A), (3) and (4), in proceedings to which this section applies, each party to the proceedings (including any notice party) shall bear its own costs.*
>
> *(2A) …*
>
> *(3) The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so —*
>
> *(a) because the Court considers that a claim or counterclaim by the party is frivolous or vexatious,*
>
> *(b) because of the manner in which the party has conducted the proceedings, or*
>
> *(c) where the party is in contempt of the Court.*
>
> *(4) …*
>
> *(5) In this section a reference to 'the Court' shall be construed as, in relation to particular proceedings to which this section applies, a reference to the High Court or the [Court of Appeal], as may be appropriate."*

13. Section 50B was inserted by s. 33 of the Planning and Development (Amendment) Act, 2010 following the decision of the European Court of Justice in *Commission v. Ireland* (Case C-427/07) [2009] ECR I-06277 to give effect to certain European Union

obligations of the State.

14. The applicant contends that s. 50B applies to these proceedings and that the appropriate order for costs to be made is that provided for in s. 50B (2), meaning, that each party should bear its own costs. Aeolus, however, contends that s. 50B does not apply and that the normal rule in O. 99, r. 1 of the RSC that costs follow the event applies. It is necessary, therefore, to consider the respective contentions of the parties and to determine whether s. 50B applies in circumstances where I have refused the applicant's application to extend time to seek leave to challenge the Council's s. 5 declaration.

(a) The Applicant's Contentions

15. The applicant submits that s. 50B should be interpreted in light of Ireland's obligations under EU law and in a manner which is consistent with the purposes of the "access to justice" provisions contained therein. It observes that one of the principal grounds advanced by it in challenging the s. 5 declaration (which, as pointed out earlier, was found by the High Court (Noonan J.) to constitute a "*substantial ground*" within the meaning of that term in s. 50A(3)(a) of the 2000 Act (as amended)) was that the s. 5 declaration was made in contravention of s. 4(4) of the 2000 Act (as amended) which provides that development should not be exempted development if an environmental impact assessment (EIA) or an appropriate assessment (AA) of the development is required. The applicant sought to make the case that the s. 5 declaration related to a development which required but had not been subjected to an EIA.

16. The applicant submits that an application for an extension of time under s. 50(8) comprises part of "*proceedings in the High Court … seeking leave to apply for judicial review*" under section 50B(1)(a). It notes that the term "proceedings" is used in s. 50B(1) and section 50B(1)(a). While noting that the 2000 Act (as amended) does not provide a definition of the word "*proceedings*", the applicant seeks to rely on various legal dictionary meanings of that term where the term is defined in *Murdoch and Hunt's Dictionary of Irish Law* (6th Edition) as a meaning "… *any step in a legal action*" and in *Black's Law Dictionary* (10th Edition) as meaning (*inter alia*) "the regular and orderly progression of a law suit, including all acts and events between the time of commencement and the entry of judgment". The applicant submits that an application for an extension of time under s. 50(8) is a "*step in a legal action*" and that it falls within the wide meaning of the term "*proceedings*" in those dictionary definitions. The applicant also relies on the recent decision of Sales J. in the High Court of England and Wales in *Stretchline v. H. & M.* (UK) [2014] EWHC 3605 (Ch.).

17. The applicant also relies on the fact that s. 50B was enacted to give effect to, and to reflect, the requirements arising under EU law in terms of "*access to justice*" which were designed (amongst other things) to prevent proceedings, and access to justice, from being prohibitively expensive.

18. The applicant contrasts the broad language used in s. 50B with the more confined language used in section 50A(7). Section 50B refers to "*proceedings*" whereas s. 50A(7) refers to the court's "*determination*" of an application for leave or of an application for judicial review on foot of such leave.

19. The applicant submits that had the Oireachtas intended to exclude from the scope of s. 50B applications for an extension of time, it could have expressly done so but did not.

20. The applicant further submits that a conclusion that s. 50B does extend to applications for an extension of time is not inconsistent with the previous decisions of the High Court in *J.C. Savage Supermarket Ltd. v. An Bord Pleanála* [2011] IEHC 488 (Charleton J.) ("*J.C. Savage*"), *Kimpton Vale Development Ltd. v. An Bord Pleanála* [2013] 2 I.R. 767 (Hogan J.) ("*Kimpton Vale*"), or *McCallig v. An Bord Pleanála* [2014] IEHC 353 (Herbert J.) ("*McCallig*").

21. The applicant also places considerable weight on the opinion of Advocate General Bobek in *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála* (*Case C-470/16*) (opinion delivered on 19th October, 2017), ("*North East Pylon (Case C-470/16)*"). It contends that, while not binding upon me, the opinion nonetheless contains a persuasive analysis on the access to justice and cost protections envisaged under EU law, which rules run directly contrary to the narrow construction of s. 50B advanced by Aeolus. The opinion of Advocate General Bobek was delivered in the context of a reference made by the High Court (Humphreys J.) in *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála (No. 2)* [2016] IEHC 490 ("*North East Pylon (No. 2)*").

22. Finally, insofar as it is suggested by Aeolus that a construction of s. 50B as applying to applications for an extension of time would be open to abuse and would lead to unmeritorious applications for extensions of time to challenge decisions without any risk on costs, the applicant refers to the provisions of s. 50B(3) which could be invoked in respect of any such abuses.

(b) Aeolus's Contentions

23. Aeolus contends that s. 50B does not apply to the application to extend time to challenge the s. 5 declaration for two independent and distinct reasons. First, it submits that s. 50B does not apply to challenges to s. 5 declarations at all. Second, it submits that s. 50B does not apply to an application for an extension of time where the merits of the case are not considered, irrespective of the subject matter or grounds of the intended challenge.

24. It relies on the decision of Charleton J. in *J.C. Savage* and that of Hogan J. in Kimpton Vale. It submits that Charleton J. in *J.C. Savage* made it clear that s. 50B applies to three categories of cases, only one of which is potentially relevant here namely, cases concerning Council Directive 85/337/EEC (as amended) (the "EIA Directive"). It submits that the provisions of s. 50B are confined to proceedings which seek judicial review of a decision, purported decision, action or failure to act that is subject to the public participation provisions of the EIA Directive and that many decisions made pursuant to the 2000 Act (as amended), such as a s. 5 declaration, will not attract the special costs rules in section 50B. This is because a decision under s. 5 of the 2000 Act (as amended) is not subject to the public participation provisions of the EIA Directive as a EIA is not required or permitted to be carried out in the context of a s. 5 declaration.

25. Aeolus submits that Hogan J. in *Kimpton Vale* considered the application of s. 50B to a s. 5 declaration and that he followed the judgment of Charleton J. in *J.C. Savage* and concluded that s. 50B did not apply to the application for judicial review at issue there. Aeolus, therefore, contends that s. 50B would not apply to the challenge to the s. 5 declaration in this case even if it had been made within time.

26. The second reason advanced by Aeolus is that s. 50B does not apply to an application for an extension of time where the merits of the case are not considered, irrespective of the subject matter or grounds of the intended challenge. In support of this contention, it relies on the decision of Herbert J. in *McCallig*. It submits that the "*proceedings*" to which s. 50B is intended to apply are proceedings in which a determination is made on the application for leave to apply for judicial review or on the judicial review itself (or

on appeal or interim or interlocutory relief in those proceedings). It submits that where an extension of time has been refused in circumstances where the merits of the case are not considered, there has been no determination (relying by analogy on the decision of Haughton J. in *McDonnell*).

27. Aeolus further submits that an application to extend time is a preliminary step which an applicant must take as a result of its failure to make an application for leave in time and that if that application is unsuccessful there will be no proceedings to which s. 50B can be applied. It also submits that if s. 50B does apply to an application to extend time this would lead to unmeritorious applications for extensions of time to challenge decisions with no risk of an adverse costs order.

28. Finally, Aeolus submits that if the applicant cannot rely on s. 50B then the provisions of O. 99 of the RSC apply and that, in accordance with the ordinary rule that costs should follow the event, Aeolus should be entitled to its costs against the applicant. It relies on various cases in which a notice party was held to be entitled to its costs: *O'Connor v. Nenagh Urban District Council* [2002] IESC 42; *Usk District Residence Association v. Environmental Protection Agencies* [2007] IEHC 30; *Callaghan v. An Bord Pleanála & others* [2015] IEHC 618; *Telefonica O2 Ireland Ltd. v. Commissioner for Communication Regulation* [2011] IEHC 380 and Vodafone Ireland Ltd. v. Commissioner for Communication Regulation [2015] IEHC 443. Aeolus submits that it was intimately connected to the decision under challenge, intimately involved in the defence of its legitimate interests and that its involvement was justified, necessary and reasonable. Aeolus points to the contributions which it made towards the opposition to the application for an extension of time over and above those made by the Council.

29. The applicant confirmed at the hearing that there was no dispute in relation to the necessary involvement of Aeolus or in relation to the legal principles on costs to be applied in the event that the Court were to find that s. 50B did not apply.

Discussion and Analysis

30. The relevant provisions of s. 50B have been quoted earlier. The background to the enactment of s. 50B has been discussed in a number of the cases. Essentially, it was necessitated by Ireland's obligations under Article 10a of the EIA Directive as inserted by Directive 2003/35/EC of the European Parliament and of the Council of 26th May, 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice the EIA Directive. Article 10a has since been replaced by Article 11 of Directive 2011/92/EU of the European Parliament and of the Council of 13th December, 2011 on the assessment of the effects of certain public and private projects on the environment, which essentially codified the EIA Directive ("Directive 2011/92").

31. Article 11 of Directive 2011/92 regulates access to review procedures and provides as follows:-

> *"1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:*
>
> *…*
>
> *have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.*
>
> *2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.*
>
> *3. …*
>
> *4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.*
>
> *Any such procedure shall be fair, equitable, timely and not prohibitively expensive."*

32. As noted by Charleton J. in *J.C. Savage* the European Court of Justice ruled in *Commission v. Ireland (Case C-427/07)* [2009] ECR I-06277 ("*Commission v. Ireland*"), that Article 10a of the EIA Directive was not properly implemented in Ireland by the application of the ordinary jurisdiction as to costs under O. 99 of the RSC. Section 50B was enacted following that decision of the European Court of Justice.

33. The provisions of s. 50B have been considered by the High Court in a number of cases since its enactment. In order to consider the scope of the section and to assess whether the applicant is correct in contending that s. 50B applies to its application for an extension of time to challenge by way of judicial review the Council's s. 5 declaration in this case or whether Aeolus's contention that s. 50B does not apply to challenges to declarations made under s. 5 of the 2000 Act (as amended) or to applications for extension of time is correct, it is necessary briefly to refer to some of the leading cases which have considered the scope of section 50B. It is also important to note that several issues concerning the scope of s. 50B were raised before the High Court (Humphreys J.) in *North East Pylon (No. 2)* in which the Court referred seven questions to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union. The Advocate General delivered his opinion on that reference in *North East Pylon (Case C-470/16)* on 19th October, 2017 and the judgment of the CJEU is due to be delivered on 15th March, 2018. I will have to consider what the effect of the imminent delivery of that judgment by the CJEU is on the issue which I have to decide. While the possibility of me deferring my judgment on the issue of costs was raised in the course of submissions on the costs issue, neither party forcefully urged me to do so.

34. The first of the series of cases on s. 50B which I will briefly address is the decision of Charleton J. in the High Court in *J.C. Savage*. That case involved a challenge to the grant of planning permission by An Bord Pleanála to Lidl for the development of a supermarket in Swords. The applicants were a neighbour and the owner of an existing supermarket. The focus of the challenge was on a condition attached to the permission which allowed a revised carpark layout and landscaping scheme to be agreed with the planning authority prior to the commencement of the development. The proceedings were withdrawn prior to the hearing dates. The respondent did not seek its costs. However, Lidl, which was a notice party, did seek its costs pursuant to O. 99, r. 1 of the RSC. The applicants argued that there should be no order as to costs in light of the provisions of section 50B(2). The applicants contended that s. 50B applied to all planning judicial reviews and not merely to those engaging the specific Directives referred to in section 50B(1)(a). Charleton J. rejected that contention. Having set out the background to the enactment of s. 50B by reference to Article 10a of the EIA Directive and the decision of the European Court of Justice in *Commission v. Ireland*, Charleton J. observed that *"[w]here a national measure is passed in order to give effect to an obligation of the State which arises from European law, such*

national legislation must be construed so as to conform to that legislative purpose" (para. 3.8). He referred in that context to the decision of the European Court of Justice in *Marleasing S.A. v. La Commercial Internacional de Alimentacion S.A. (Case C-106/89)* [1990] ECR I-04135. He also referred to *Pfeiffer and others v. Deutsches Rotes Kreuz (Case C-397/01)* [2004] ECR I-08835 were the European Court of Justice stated that:-

> *"… when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC …" (para. 113).*

35. Charleton J. concluded that:-

> *"This principle of conforming interpretation between Irish statute law and the European legislation which necessitated that measure cannot be used beyond the scope of its proper purpose so as to impose a solution which contradicts the plain terms of national law, even though such a strained interpretation may be in conformity with an obligation under a Directive. The limit of the duty of the national courts is to interpret national law in the light of any European law obligation as far as this is possible." (para. 3.10)*

36. Then, in a passage which has been much quoted in subsequent cases, Charleton J. stated that there was nothing in the legislative history of s. 50B which showed any intention on the part of the Oireachtas to provide that the new costs rules in s. 50B was to apply to all planning cases. He continued:-

> *"The immediate spur to legislative action was the decision of the European Court of Justice in Case C-427/07. Nothing in the judgment would have precipitated the Oireachtas into an intention to change the rules as to the award of costs beyond removing the ordinary discretion as to costs from the trial judge in one particular type of case. Specified, instead, was litigation that was concerned with the subject matter set out in s. 50B(1)(a) in three sub-paragraphs: environmental assessment cases, development plans which included projects that could change the nature of a local environment, and projects which required an integrated pollution prevention and control licence. By expressing these three, the Oireachtas was not inevitably to be construed as excluding litigation concerned with anything else. Rather, the new default rule set out in s. 50B(2) that each party bear its own costs is expressed solely in the context of a challenge under any 'law of the State that gives effect to' the three specified categories: these three and no more. There is nothing in the obligations of Ireland under European law which would have demanded a wholesale change on the rules as to judicial discretion in costs in planning cases." (para. 4.0).*

37. Charleton J. further stated that the "*ordinary words of the section make it clear that only three categories of case are to be covered by the new default costs rule*" (para. 4.1). He stated that the intention of the Oireachtas was clear both from the "*plain wording*" of s. 50B and from its context. He continued:-

> *"The new rule is an exception. The default provision by special enactment applicable to defined categories of planning cases is that each party bear its own costs but only in such cases." (para. 4.1).*

38. Charleton J. concluded, therefore, that since the litigation at issue did not concern a project which required an EIA, the ordinary default rule that costs should follow the event applied unless there were exceptional circumstances.

39. It is significant in the context of the present case that it was not an issue in *J.C. Savage* that the particular development required an EIA. Nor did the case involve a declaration made under s. 5 of the 2000 Act (as amended). One of the grounds which the applicant wished to advance in the present case to challenge the s. 5 declaration was that the Council ought not to have utilised the s. 5 procedure in circumstances where, the applicant contends, an EIA was required in respect of the grid connection the subject of the development at issue and that as a consequence s. 4(4) of the 2000 Act (as amended) precluded the making of the s. 5 declaration.

40. The decision of Charleton J. in J.C. Savage was followed by the High Court (Hedigan J.) in *Shillelagh Quarries Ltd. v. An Bord Pleanála and others* [2012] IEHC 402 ("*Shillelagh*"). In that case, Hedigan J. adopted the approach taken by Charleton J. in *J.C. Savage* and endorsed the principles which Charleton J. had set out at paras. 4.0 to 4.2 of his judgment. However, Hedigan J. noted that in its decision which was under challenge An Bord Pleanála had described the development the subject of the proceedings as being in a class that required an EIA. Hedigan J. held that as the project was one which required an EIA, it fell within the limited class of cases envisaged by s. 50B and that the relevant parties, therefore, should bear their own costs.

41. These principles were also applied by the High Court (Kearns P.) in *Indaver NV t/a Indaver Ireland v. An Bord Pleanála* [2013] 1 I.R. 357 although in that case Kearns P. awarded costs against the applicant in a case which was withdrawn prior to hearing on the grounds set out in s. 50B(3) by reason of the manner in which the proceedings had been conducted. In *Kimpton Vale* the application of s. 50B was considered in the context of a security for costs application which was made in the course of a challenge to a decision made by An Bord Pleanála that the construction of two 1.2 metre fences on particular lands did not constitute exempted development. The decision was taken pursuant to s. 5 of the 2000 Act (as amended). However, the case did not involve any argument that the Board either had carried out an EIA in a deficient manner or had not carried out an EIA when it ought to have done so. In considering the security for costs application, the Court had to consider whether there was in fact any real prospect of an award of costs being made against the applicant were it to be unsuccessful in the proceedings. Hogan J. referred the background to the enactment of s. 50B and to *J.C. Savage* and *Shillelagh*. He noted that s. 50B had been interpreted as giving effect to specific European Union obligations in three particular areas, including environmental impact assessment. He stated that:-

> *"These European Union obligations arose from the three specific Directives which were promulgated as a means of giving effect to the [Aarhus] Convention at union and member state level through the medium of union law". (para. 19).*

42. Much of the discussion in the judgment in that case concern the potential application of the Environment (Miscellaneous Provisions) Act 2011 (the "2011 Act") and whether the decision in *J.C. Savage* had been overtaken by that Act. That is not an issue which arises in the present case. The issue here is whether the applicant's application for an extension of time to challenge the s. 5 declaration falls within s. 50B(1) or not. There is no suggestion that the provisions of the 2011 Act apply.

43. Hogan J. stated that while he might have reached a different conclusion to Charleton J. in *J.C. Savage* if the matter were *res integra*, he did nonetheless follow J.C. Savage and concluded that s. 50B did not apply to the application for judicial review before the Court. Since the applicant would, therefore, be open to the ordinary rules as to costs if it were to lose the proceedings and since it was not in a position to meet any such costs, Hogan J. made the order for security for costs. However, it should be said that

somewhat presciently Hogan J. noted that the "*potential for anomaly*" in the application of s. 50B could not be denied. He stated that:-

> *"Where, moreover, the judicial review proceedings involve claims which partially fall within the three nominate categories in s. 50B and which partially fall without, there may well be difficulties in ascertaining when the new costs rules begin and end." (para 48).*

44. A case in which some of the claims at issue fell within one of the categories in s. 50B(1) and some fell without did in due course come along and resulted in another written judgment. This occurred in *McCallig*. A significant portion of the judgment of the High Court (Herbert J.) in that case concerned whether the provisions of the 2011 Act could apply retrospectively to that case. Herbert J. held that they could not. The provisions of s. 50B did, however, apply and Herbert J. cited with approval the principles outlined and the conclusions reached by Charleton J. in J.C. Savage. The applicant had advanced two grounds in support of her challenge to the decision of the respondent to grant planning permission to one of the notice parties. The first ground was based on purely national law issues unrelated to the environment. The second ground engaged EIA issues. The applicant was partially successful in the case but not in relation to the EIA aspects of the case. The respondent and the relevant notice party argued that s. 50B applied to the entirety of the proceedings and that there should, therefore, be no orders to costs. However, the applicant contended that s. 50B only applied to that part of her challenge based on EIA grounds (in which she failed) and that O. 99 applied to the balance of her claim (in which she succeeded). Herbert J. agreed with the applicant. He held that s. 50B applied to the EIA aspects of the applicant's claim but not in relation to the other parts of her claim. In explaining his conclusion, Herbert J. stated as follows:-

> *"In my judgment 'proceedings' as used in s. 50B(1) only refers to that part of judicial review proceedings which challenge a decision made or action taken or a failure to take action pursuant to one or more of the three categories therein specified. 'Proceedings' is not defined in the Act of 2010, in the Planning and Development Act 2000, or in the Interpretation Act 2005. … In my judgment it cannot be considered that the legislature intended so radical an alteration to the law and practice as to costs as to provide that costs in every judicial review application in any planning and development matter, regardless of how many or how significant the other issues raised in the proceedings may be, must be determined by reference only to the fact that an environmental issue falling within any of the three defined legal categories is raised in the proceedings. Such a fundamental change in the law and practice as to awarding costs is not necessary in order to comply with the provisions of the Directive. It would encourage a proliferation of judicial review applications. Litigants would undoubtedly resort to joining or non-joining purely planning issues and environmental issues in the same proceedings so as to avoid or to take advantage of the provisions of section 50B(2). This is scarcely something which the legislature would have intended to encourage." (para. 44).*

45. In refusing to award the applicant the entire costs of the proceedings, Herbert J. held that she was entitled pursuant to O. 99 of the RSC only to costs relating to that part of her claim on which she was successful and which did not concern any EIA issue.

46. Therefore, insofar as part of the applicant's claim concerned EIA issues, s. 50B(2) applied to the costs in relation to those issues. However, with regard to the other non-EIA grants advanced, the ordinary principles contained in O. 99 RSC applied.

47. In *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála (No. 1)* [2016] IEHC 300, Humphreys J. refused to grant the applicants leave to apply for judicial review in respect of a planning inquiry into the North-South electricity interconnector. He did so on the basis that the application for leave was premature. The respondents and the notice party then sought their costs against the applicants. Humphreys J. delivered judgment on those applications in *North East Pylon (No. 2).* In that judgment, Humphreys J. decided to refer seven questions to the CJEU for a preliminary ruling under Article 267 of the TFEU. A number of the questions referred are potentially relevant to the issue I have to decide on the costs application in the present case. Among the questions referred were questions seeking to ascertain the ruling of the CJEU on whether the provisions of Article 11 of Directive 2011/92 requiring that a procedure be "*not prohibitively expensive*" (the "NPE rule") applied to applications for leave to seek judicial review, whether the NPE rule applies to proceedings found to have been brought prematurely and whether the NPE rule applies to all parts of the case or merely to the EU law elements of the challenge or those elements related to issues regarding the public participation provisions of Directive 2011/92. Advocate General Bobek gave his opinion on the reference in *North East Pylon (Case C-470/16)* on 19th October, 2017. The applicant has relied on aspects of the Advocate General's opinion in support of its contention that the provisions of s. 50B apply to a refusal to extend the time to apply for leave to seek judicial review where one of the grounds sought to be raised in support of the challenge to the relevant decision made under s. 5 of the 2000 Act (as amended) is that the decision should not have been taken without an EIA. It is necessary, therefore, to examine some aspects of the Advocate General's opinion.

48. The focus of the opinion is on Article 11 of Directive 2011/92 (originally Article 10a of the EIA Directive). Advocate General Bobek stated that the NPE rule is applicable to all the procedures referred to in Article 11, including review before a court of law or an independent and impartial body established by law (para. 30). He stated that by virtue of Article 11(1) of Directive 2011/92, the scope of the NPE rule therefore includes review procedures before courts "*to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive*" which he described as "'*judicial proceedings' in this area of environmental law*". (at para. 32). He explained that the NPE rule is "*a specific expression within Directive 2011/92 of a more general principle of access to justice in EU environmental law as is evident from the Court's case law*" (giving the case of *Edwards and Pallikaropoulos (Case C-260/11)*, EU:C:2013:221, para. 33, as an example) and the Aarhus Convention (para. 33). He further stated that the NPE rule "*also reflects the broader EU law requirement that all national procedures fall within the scope of EU law are precluded from being 'prohibitively expensive' in the light of Article 47 of the Charter of Fundamental Rights of the European Union …, which enshrines the right to effective judicial protection*" and that "*[p]rohibitively expensive justice means no justice*" (para. 34). The Advocate General described the objective of Directive 2011/92 as being the granting of "*wide access to justice*", meaning access to justice which is "*extensive, comprehensive and wide ranging*" and stated that the "*very objective of Article 11 is indeed specifically to ensure the broadest possible access to review*". He stated that such access covers all elements including costs (para. 38).

49. The Advocate General further stressed the requirement of predictability as constituting an integral part of the assessment as to whether costs are prohibitively expensive. He noted that this had already been confirmed in the case law of the CJEU in relation to the NPE rule under Directive 2011/92 (referring to *Commission v. United Kingdom (Case C-530/11),* EU:C:2014:67, para. 58) and that the importance of predictability had also been recognised by the CJEU more generally in relation to the costs of (non-environmental) legal proceedings (para. 40). The Advocate General noted that among the issues which arise in relation to the scope of the NPE rule are the challenges which it covers, the stages at which challenges can be brought and whether challenges can be divided up so as to identify specific parts which are "*subject to the public participation provisions of this Directive*" under Article 11(1) of Directive 2011/92 and those which are not (see paras. 40 to 48).

50. The Advocate General then answered the first question referred which was whether the NPE rule applies in the same way to

applications for leave to seek judicial review as it does to the judicial review challenges themselves. He opined that the NPE rule does apply to applications for leave. He further stated that the answer to that question did not change where the application for leave is rejected because it was brought too early. He concluded that:-

> *"… the fundamental objective of Article 11 would be undermined if an applicant would only know whether or not the action was taken at a correct stage, and whether or not he or she would be exposed to prohibitive costs, after the case was instituted and the costs incurred, as a result of a failure by the Member State to determine, in advance, clearly and unambiguously the stage at which a procedure may be initiated." (para. 60)*

51. The second question referred was whether the NPE rule applies:

> (i) to all elements of the proceedings by which the legality of a decision, act or omission is challenged; or
>
> (ii) only to the EU law elements of the proceedings; or
>
> (iii) only to the issues regarding the public participation provisions (para. 62).

The Advocate General expressed the view that:-

> *"… the NPE rule applies to all grounds, pleas or arguments (elements) based on substantive or procedural infringements of Directive 2011/92 or other instruments of EU law and raised in the context of a challenge to a decision, act or omission subject to the public participation provisions of that directive. Where such a challenge involves grounds, pleas or arguments alleging infringements of both EU and national law, the NPE rule will generally apply to the challenge and the outcome of the case as a whole." (para. 64)*

52. He further expressed the view that:-

> *"… what is decisive in determining whether the NPE rule applies is the subject matter of the individual procedure leading to the decision, act or omission being challenged. If the nature of that subject triggers the public participation rights and obligations under the Directive, then the challenge as a whole is covered by the NPE rule. The NPE rule applies generally to the 'review procedures' referred to in Article 11, not to specific grounds raised in the context of those procedures." (para. 74).*

53. The Advocate General further stated that no distinction is made between grounds of challenge based on infringements of the right to public participation and those alleging other illegalities affecting the EIA or alleging other illegalities concerning the decision-making process into which the EIA has been integrated. Nor, the Advocate General stated, is any distinction made (in Article 11) between grounds based on infringements of EU law and those based on national law (para. 75). It had been argued by the respondents and the notice party in that case that the NPE rule could not relate to those elements of challenges which were based on national law alone. The Advocate General did not agree. In response to the argument that the interpretation offered by the Advocate General might appear to be "*too broad and over inclusive*", the Advocate General disagreed and stated that "*at least in the light of the circumstances of the present case*" the NPE rule must apply to the action as a whole (paras. 78-79). He offered a number of reasons for that. The first was that any unpredictability as to which side of the line a ground fell would act as a disincentive to an applicant to allege that ground which would be in conflict with the NPE rule. The second was that existing case law of the CJEU already confirms that other EU environmental legislation and rules on access to justice at national level in the case of a challenge raising the conformity of the activities of Member States with such legislation must be interpreted in light of Article 9 of the Aarhus Convention which includes the NPE rule and which also applies to challenges based on other alleged infringements of EU law and not merely the public participation provisions of Directive 2011/92. The third reason was that as regards distinctions between elements based on alleged breaches of EU law and others based on national law, there would be issues of practicality and predictability in separating out the issues. Significant stress was placed by the Advocate General on the question of unpredictability for claimants. The fourth reason offered by the Advocate General was the alleged failure by Ireland to be more clear in its implementation of Article 11(2). The Advocate General felt that if Ireland had been, the grounds of challenge might naturally have been separated out into distinct challenges subject to different substantive and procedural requirements (para. 89).

54. The Advocate General concluded by stating that:-

> *"In conclusion, the separation or dividing up being proposed is to my mind conceptually odd. It would not only be additionally laborious for national judges to deal with costs applications, but, above all, it would generate unpredictability for litigants, thus potentially discouraging them from bringing any environmental claim at all." (para. 90)*

55. While acknowledging that tying the applicability of the NPE rule to a challenge as a whole and its outcome and not to the individual grounds raised, might result in "*an over inclusion of an EU law-derived protection in relation to costs of litigation in matters where EU law is not strictly speaking relevant*", the Advocate General opined that as a matter of policy he could not see "*what great dangers would be presented by 'accidentally' rendering some elements of an environmental challenge not prohibitively expensive*". (para. 91).

56. In response to the argument that the broad application of the NPE rule to challenges without distinction as between the various grounds of challenge raised could lead to abuse and an applicant might "sneak in" a spurious EU law based claim in order to benefit from the NPE rule, the Advocate General expressed his view that such a scenario was hypothetical in the case before him but that if it were to arise it could be dealt with by means of the application of the EU principle of abuse of law. Alternatively, it could be dealt with according to national rules governing vexatious, frivolous or spurious applications (paras. 94 and 95).

57. As noted earlier, it is expected that the CJEU will deliver its judgment on the reference on 15th March, 2018.

Application of Above Principles

58. I first identify the relevant grounds of challenge which the applicant sought to advance in respect of the s. 5 declaration which it sought to challenge in these proceedings and examine by reference to these grounds whether s. 50B can apply. I then consider in that context whether the fact that the relevant decision sought to be challenged was taken pursuant to s. 5 of the 2000 Act (as amended) removes it from the scope of section 50B. I then examine the issue as to whether an application for an extension of time which is unsuccessful can attract the provisions of section 50B. I then consider how best to resolve the current issue in light of the various grounds of challenge which the applicant sought to raise in respect of the s. 5 declaration and in light of the views of the Advocate General and the impending judgment of the CJEU.

(a) Grounds of challenge

59. As I stated at para. 49 of my judgment of 24th January, 2018, the applicant sought to advance three main grounds of challenge to the s. 5 declaration. It was alleged that:-

> (1) The Council erred in law in finding the development the subject of the s. 5 declaration to be exempted development where it was part of a project which required an EIA;
>
> (2) The Council failed to comply with fair procedures and failed to respect the property rights of affected landowners (including the applicant) by failing to notify them of the making of the application for the s. 5 declaration and affording them an opportunity to make submissions in relation to it;
>
> (3) The Council erred in failing to give any or any adequate reasons for its decision that the proposed development the subject of the s. 5 declaration was exempted development.

60. Grounds (2) and (3) are purely national law grounds. Ground (1) is potentially an EU law and, in particular, an EIA based ground. The case which the applicant sought to make in respect of Ground (1) was that the Council was precluded from making the s. 5 declaration by reason of the provisions of s. 4(4) of the 2000 Act (as amended) which provides that a development shall not be exempted development if an EIA of the development is required. Simply put, the applicant wished to argue that since the Bunnyconnellan wind farm development required an EIA (which was carried out by An Bord Pleanála) and since the development the subject of the s. 5 declaration was to effect a grid connection from that wind farm development to the Glenree substation, an EIA was required in respect of that grid connection and had not been carried out. On that basis, it was alleged that by virtue of s. 4(4), it was not open to the Council to make a declaration under s. 5 that the proposed development was exempted development. Therefore, the very case which the applicant sought to make was that an EIA ought to have been carried out but was not carried out. The question arises then as to whether a case which the applicant wished to make in the judicial review proceedings was in respect of a decision taken "*pursuant to a law of the State that gives effect to*" a provision of the EIA Directive to which Article 10a of that Directive (now Article 11 of Directive 2011/92) applies. To ascertain this, it is necessary to look again at Article 11(1) of Directive 2011/92 which applies the NPE rule to procedures before a court "*to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of [the] Directive*" (Article 11(1) of Directive 2011/92, formerly Article 10a of the EIA Directive). Insofar as the applicant sought to make a case that the Council ought not to have made the s. 5 declaration on the basis that an EIA ought to have been carried out in respect of the development but was not carried out, strictly speaking it could be said that the decision sought to be challenged had not been "*subject to the public participation provisions*" of the relevant Directive. However, having regard to the underlying purpose of the EIA Directive and its codified replacement in Directive 2011/92 and having regard to the purpose of s. 50B which was to give effect to Ireland's EU law obligations under that Directive, it seems to me that it would be an unnecessarily narrow reading of Article 11(1), and would potentially seriously undermine the purpose of that provision, to exclude from its scope those cases where it is claimed that the public participation provisions ought to have been activated by the decision-maker but allegedly unlawfully were not. A conclusion to the contrary would certainly run against the entire tenor of the opinion of Advocate General Bobek in the reference in *North East Pylon (Case C-470/16).* I acknowledge that the procedure under s. 5 of the 2000 Act (as amended) does not and cannot involve public participation in the form of carrying out of an EIA by the planning authority. However, where the very case which an applicant seeks to make is that the use of the s. 5 procedure was not appropriate because public participation in the form of an EIA was required as a matter of law, in my view an interpretation of the s. 50B(1) which brings such challenges within the scope of those provisions is more consistent with and better achieves the purpose and objective of the section and of Article 11 of Directive 2011/92 (formally Article 10a of the EIA Directive) than one which does not.

(b) Potential application of s. 50B to challenge the s. 5 declaration

61. There is nothing in any of the case law to which I have been referred and in particular in *Kimpton Vale* which persuades me that a decision made by a planning authority pursuant to s. 5 of the 2000 Act (as amended) cannot in principle attract the special cost rules in s. 50B and, in particular, the NPE rule. While *Kimpton Vale* was a challenge to a s. 5 declaration, the challenge did not involve any EU law ground and, in particular, did not involve any allegation that it was inappropriate to use s. 5 on the grounds that an EIA was required.

62. In my view, therefore, reading s. 50B(1) in light of its purpose and objective and, in particular, in a manner as to best conform to the purpose and objective of what is now Article 11 of Directive 2011/92 (formally Article 10(a) of the EIA Directive), those provisions do apply to a claim that the use of s. 5 of the 2000 Act (as amended) was inappropriate having regard to the provisions of s. 4(4) on the grounds that an EIA was required.

(c) Potential application of s. 50B to applications for extension of time

63. It is next necessary to address the question as to whether s. 50B can apply to an application for an extension of time, which is unsuccessful. The main argument advanced by Aeolus to resist the application of s. 50B in such situation is that it would be abused by the applicants who might seek to challenge decisions out of time and to seek extensions of time in circumstances where they would face no risk on costs. The main ground advanced by the applicant to support its case that s. 50B does apply in such situations is that if it did not the requirement of predictability for applicants which is discussed at length by Advocate General Bobek in the reference *North East Pylon (Case C-470/16)* would be fundamentally undermined in circumstances where an applicant would not know in advance as to whether a consideration of its application for an extension of time would involve a consideration of the merits of the case or would proceed on the basis of an application of the test in s. 50(8) without considering those merits (as was done in the present case) albeit in circumstances where the merits had to a degree been considered by Noonan J. on the application for leave.

64. In my view, the provisions of s. 50B can apply in an appropriate case to an application for an extension of time under s. 50(8) where the decision sought to be challenged was one subject to the public participation provisions of the EIA Directive/Directive 2011/92 or where the case sought to be made is that the decision ought to have been subject to those provisions. I agree that predictability is required and that an applicant would not necessarily know when making its application for an extension of time whether the court dealing with that application under s. 50(8) would embark upon a consideration of the merits of the case or not.

65. I also agree that the term "*proceedings*" as used in s. 50B(1) and s. 50B(1)(a) has a broad meaning and can cover "*any step in a legal action*" and an act or event occurring as part of the progression of a case between the time of commencement of the case and the entry of judgment with the dictionary definitions relied on by the applicant. While noting, as Herbert J. did in *McCallig*, that the term "*proceedings*" is not defined in s. 50B or elsewhere in the 2000 Act (as amended) or in the representation Act 2005, it can be contracted with the term "*determination*" used in s. 50A(7), which has a much moreover more confined meaning. In my view, the

term "*proceedings*" as used in s. 50B(1) and s. 50B(1)(a) is wide enough to encompass an application for an extension of time under s. 50(8) of the 2000 Act (as amended)

66. I do not believe that an interpretation of s. 50B which brings within its scope applications for an extension of time would lead to significant abuses with people seeking to apply for leave to challenge decisions well out of time without risk of expose to an adverse costs order. In my view, the provisions of s. 50B(3) would be available to prevent any such abuse of section 50B. It would be open to the Court to apply the provisions of s. 50B(3) to disarray s. 50B(2) if the Court considered that the claim was frivolous or vexatious or by reason of the manner in which the applicant has conducted the proceedings. The Court has, therefore, sufficient armoury to deal with any abusive applications of the type referred to by Aeolus.

67. In conclusion, it seems to me that an interpretation of s. 50B which brings within its scope applications for an extension of time under s. 50(8) in cases where it is sought to challenge a decision which was subject to the public participation provisions or where it is sought to make the case that the decision ought to have been subject to those provisions best conforms to the purpose and objective of the EIA Direction and its codified replacement, Directive 2011/92. I should make it clear that it is, I believe, relevant to my conclusion on the application of s. 50B that the grounds which the applicant sought to advance were found by Noonan J. to be "*substantial*" grounds, subject to the time issue, which I have decided against the applicant. I am not necessarily saying that my conclusion would be same if the extension of time application was heard and determined in advance of any finding that "*substantial*" grounds existed. I do not have to decide that issue here as it did not arise on the facts of this case.

(d) Application of s. 50B where different grounds challenge

68. The next issue to consider is how to deal with the fact that in addition to seeking to raise a ground of challenge which might potentially would attract the provisions of s. 50B (an EIA related ground of challenge) (Ground (1)), the applicant in the present case also sought to raise two grounds of challenge (Grounds (2) and (3)) which were based exclusively on Irish law (fair procedures and alleged failure to provide adequate reasons).

69. If I were to apply the approach taken by Herbert J. in *McCallig*, I would have felt comfortable in seeking to separate that ground which may engage s. 50B from those grounds that do not. I would, therefore, have been disposed to hold that in respect of Ground (1), the alleged failure to carry out an EIA and instead to use the procedure under s. 5 of the 2000 Act (as amended), the provisions of s. 50B(2) would apply whereas in respect of the other two grounds raised (Grounds (2) and (3)) they would not. I would have been inclined, therefore, to seek to divide up the costs order as between the ground that did attract s. 50B(2) (Ground (1)) and those grounds that did not (Grounds (2) and (3)). Practically, the most straightforward way of doing so would have been to direct that in respect of Ground (1) which the applicant sought to advance, s. 50B(2) applied and there would be no order as to costs. However, in respect to the other two grounds (Grounds (2) and (3)) which the applicant sought to advance the provisions of s. 50B does not apply, the ordinary costs rules in O. 99 RSC would apply, and Aeolus would be entitled to its costs against the applicant in relation to those two grounds. Again practically speaking and doing the best that I could to accommodate the fact that different grounds were sought to be advanced this would have lead me to the conclusion that Aeolus would be entitled to two thirds of its costs against the applicant.

(e) Impact of Advocate General opinion and imminent CJEU judgment

70. That is the conclusion I would have reached on this application for costs were it not for the fact that Advocate General has offered his opinion on the appropriateness or rather the non-appropriateness of dividing up grounds of challenge and applying the NPE rule only to those grounds of challenge in the proceedings which engaged EU law or specifically issues regarding the public participation provisions. The Advocate General has given his opinion that it is not appropriate to separate out costs in that way as it would, amongst other things, in his view infringe the requirement of predictability. The Advocate General's opinion, therefore, casts some doubt as to whether the approach adopted by Herbert J. in *McCallig* and the approach which I was disposed to adopt in this case is permissible as a matter of EU law. That is an issue on which the CJEU may well rule in the judgment which it is expected to deliver on 15th March, 2018.

71. In my view, in these circumstances it would be appropriate for me to await the delivery of that judgment before confirming my decision on how the costs issue should be determined. It may be that the CJEU will not agree with the opinion of the Advocate General that it is not possible to separate out cost issues as was done by Herbert J. in *McCallig* and as I would have done were it not for views of the Advocate General and the imminent judgment of the CJEU.

72. The possibilities are, therefore, that I would make no order as to costs under s. 50B(2) in respect of Ground (1) which the applicant wished to advance but would allow Aeolus its costs in respect of the other two grounds which the applicant sought to advance. Pragmatically this would lead me to find that Aeolus would be entitled to two thirds of its costs against the applicant. The other possibility is, depending on the decision of the CJEU, that it would make no order as to costs on the basis that s. 50B(2) applies to the entire proceedings and that it is not permissible to separate out the EU/public participation grounds of challenge from those bases solely on national law. Until the CJEU gives the judgment I cannot finally determine this issue. However, my decision will be that one of the two possibilities identified above is correct. Which one it is will depend on the judgment of the CJEU.

73. In those circumstances, I propose to list the proceedings for mention before me on 21st March, 2018 so that the parties can inform me as to the judgment of the CJEU on the reference in *North East Pylon (Case C-470/16).* I would envisage that the hearing on that date will be very short in light of the judgment of the CJEU.

Conclusion

74. On the certificate issue, I have concluded that the applicant does not require a certificate under s. 50A(7) in order to appeal my refusal to extend the time of the applicant to apply for leave to seek judicial review under section 50(8).

75. On the s. 50B issue, I have identified the two possible orders on costs that I could make on the basis of my conclusion that s. 50B does apply to a challenge (or at least a ground of challenge) to a decision under s. 5 of the 2000 Act (as amended) where the case sought to be made is that the public participation provisions of the EIA Directive/Directive 2001/92 ought to have been applied and that, as a consequence, the procedure under s. 5 was inappropriate. This is so notwithstanding that I refused to grant the extension of time sought under s. 50(8) in circumstances where the Court (Noonan J.) had previously found on the ex parte application for leave that the grounds sought to be advanced were "*substantial*". However, in light of the views expressed by Advocate General Bobek in his opinion delivered on 19th October, 2017 in *North East Pylon (Case C-470/16)* and the imminent judgment of the CJEU in that case, I cannot finalise my judgment on which of the two possible orders I should make until the CJEU delivers its judgment. I have decided, therefore, to list the proceedings for mention before me on 21st March, 2018 by which time the CJEU will have given its judgment and I can be satisfied whether I am precluded from making the order I was disposed to make,

namely, that Aeolus should recover two thirds of its costs from the applicant or whether I am required to make no order as to costs under s. 50B(2) on the grounds that I am not permitted to separate out the EIA ground from the two grounds based solely on national law and to apply s. 50B(2) only to the EIA ground.

76. I will defer making the final orders, the terms of which have been agreed, save in relation to costs, until on or shortly after the adjourned date.