THE HIGH COURT
JUDICIAL REVIEW

2019 No. 239 J.R.

BETWEEN

SPENCER PLACE DEVELOPMENT COMPANY LIMITED

APPLICANT

AND

DUBLIN CITY COUNCIL

RESPONDENT

Judgment of Mr Justice Garrett Simons delivered on 6 September 2019.

Introduction

1. This judgment addresses the question of which party should bear the costs of the within judicial review proceedings. The proceedings were dismissed in their entirety for the reasons set out in a reserved judgment dated 30 May 2019, *Spencer Place Development Ltd. v. Dublin City Council (No. 1)* [2019] IEHC 384 ("*the principal judgment*").

2. There is significant disagreement between the parties as to which of them should bear the costs of the proceedings. The parties are not even in agreement as to the jurisdictional basis on which costs should be awarded. The Applicant contends that the proceedings are subject to the special costs rules applicable to environmental litigation under section 50B of the Planning and Development Act 2000 ("*the PDA 2000*"), whereas Dublin City Council maintains that the conventional costs rules under Order 99 of the Rules of the Superior Courts apply.

Structure of this Judgment

3. The dispute between the parties centres primarily on whether the proceedings are subject to the costs rules under section 50B of the PDA 2000. In order to put this dispute in context, it is necessary (i) to rehearse briefly the procedural history of the case in order to identify the nature of the "decision" or "action" being challenged; and (ii) to consider the provisions of section 50B. The detailed discussion of the issues then commences at page 11, paragraph 29 below.

4. I will use the shorthand "*the special costs rules*" or "*costs protection*" when referring to the costs rules under section 50B of the PDA 2000.

Procedural History

5. The underlying dispute between the parties had concerned the interpretation of a set of statutory guidelines issued by the Minister for Housing, Planning and Local Government. The guidelines were issued pursuant to section 28 of the PDA 2000 and have a particular legal status. The guidelines are entitled "*Urban Development and Building Heights*" and were issued in December 2018 ("*the building height guidelines*"). The dispute centred on the interaction between the guidelines and statutory planning schemes adopted in respect of strategic development zones ("*SDZs*").

6. The judicial review proceedings were nominally directed to a document prepared by the Dublin City Planning Officer on 31 January 2019. This document was entitled "Briefing Note on City Development Plan and Height Guidelines" ("*the briefing note*"). The briefing

note was presented to the elected members of Dublin City Council at a meeting on 4 March 2019.

7. In truth, the application for judicial review was anchored upon two planning applications made by the Applicant which were then pending before the Local Authority. These two planning applications provided the context for the judicial review proceedings. But for the existence of these planning applications, the Applicant might not have had the requisite "sufficient interest" to maintain the proceedings. Moreover, the fact that the statutory deadline for determining the two planning applications was set to expire on 31 May 2019 was expressly relied upon by the Applicant for the purposes of securing an expedited hearing and determination of the proceedings. (The proceedings were instituted on 23 April 2019 and were brought to a conclusion some five weeks later, with the delivery of the principal judgment on 30 May 2019).

8. The relief sought in the Statement of Grounds was somewhat unusual in that an order of *certiorari* setting aside the briefing note had not been sought. Instead, a declaration was sought to the effect that the legal interpretation in the briefing note was *ultra vires* and/or incorrect as a matter of law. Two other declarations were sought in respect of the interaction between statutory guidelines and the determination of planning applications for development within the area of any SDZ planning scheme.

9. The gravamen of the Applicant's complaint had been that Dublin City Council had committed itself to an allegedly erroneous interpretation of the building height guidelines, and that this error would adversely affect the outcome of the two planning applications.

10. The thrust of the proceedings was thus directed to the future outcome of the two pending planning applications. The Applicant had sought to obtain declaratory reliefs from the High Court as to the interaction between the building height guidelines and existing planning schemes. Had the declarations sought by the Applicant been obtained, then this would have had the legal consequence that Dublin City Council would be required to apply the building heights guidelines in a manner beneficial to the Applicant in determining the two planning applications *in futuro*.

11. The Applicant had been careful, in advancing its proceedings, to emphasise that the briefing note had *not* been issued pursuant to any "provision" of the PDA 2000. The Applicant's position in this regard is summarised as follows in its written legal submissions of May 2019.

> "20. The Briefing Note itself does not invoke any provision of the 2000 Act nor does the Council plead that the Briefing Note was prepared under the 2000 Act. As such there is no basis for contending that the application for leave to apply for judicial review is governed by the procedures contained in section 50 of the 2000 Act. Furthermore, it cannot be said that *Section 50(2)* is clearly and definitively capable of being construed as applying to acts of the planning authority which are not contemplated by any statutory provision under the planning code.

[…]

22. This rationale does not apply to the issuing of a Briefing Note purporting to provide a legal interpretation of Ministerial Guidelines which is not issued pursuant to any statutory provision of the 2000 Act. It is submitted that where a restriction is being imposed upon the exercise of a right in a statute, it should be capable of being construed in a clear and definite fashion. It cannot be said that *Section 50(2)* is clearly and definitively capable of being construed as applying to acts of the planning authority which are not contemplated by any statutory provision under the planning code."

*Footnotes omitted.

12. On this basis, the Applicant contended that it was unnecessary for it to comply with the procedural requirements under section 50 and 50A of the PDA 2000. Thus, for example, the application for leave to apply for judicial review was made on an ex parte basis. Similarly, a subsequent appeal against the principal judgment has been filed with the Court of Appeal without seeking a certificate for leave to appeal pursuant to section 50A(7) of the PDA 2000. As discussed presently, the absence of a challenge to an identified "decision" or "action" under the PDA 2000 is relevant in determining whether the special costs rules apply to the proceedings.

Strategic Environmental Assessment Directive

13. There is one other aspect of the procedural history which should be highlighted at this stage. As appears from the principal judgment, the proceedings gave rise to an issue of EU law. More specifically, an issue arose as to whether, in interpreting the building height guidelines, it would be legitimate to have regard to the outcome of the strategic environmental assessment carried out as part of the process leading up to the issuing of the guidelines in December 2018. One of the steps required as part of the assessment of draft guidelines is the publication of a document referred to as an "SEA Statement". As explained at paragraphs [98] to [107] of the principal judgment, the SEA Statement published in respect of the building height guidelines was directly relevant to the disputed interpretation of the guidelines.

14. The obligation to carry out a strategic environmental assessment ("*SEA*") arises as a matter of EU law under Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("*the SEA Directive*"). The requirement to subject *planning guidelines* to an SEA has been transposed into domestic law by way of an amendment to section 28 of PDA 2000 introduced under the Planning and Development (Amendment) Act 2018.

15. The relevance of all of this to the within costs application is as follows. It is a prerequisite to the availability of the special costs rules that the proceedings entail a challenge to a decision or action made or taken pursuant to a statutory provision which gives effect to one or more of four specified EU Directives. The SEA Directive is one of the four.

16. It has to be said that the Applicant's reliance on the SEA Directive for the purposes of the within costs application is somewhat opportunistic. The Applicant had maintained the position throughout the substantive hearing in May 2019 that regard should not be had to the SEA Statement when interpreting the guidelines. In particular, counsel on behalf of the Applicant had submitted that the building height guidelines must be interpreted on their own terms, and that it was not permissible to have regard to an "extraneous" document, such as the SEA Statement, as an aid to interpretation. None of the grounds of challenge pleaded by the Applicant in its Statement of Grounds had sought to invoke the SEA Directive.

17. Put shortly, the Applicant had adopted the position in May 2019 that the SEA Statement and the SEA Directive were irrelevant to the issues in dispute in the proceedings. In no sense can the Applicant be said, therefore, to have brought these proceedings in order to vindicate an alleged infringement of the SEA Directive. It represents a volte-face for the Applicant now to champion the SEA Directive.

18. It would seem anomalous that a developer who, far from alleging a breach of EU law, had steadfastly maintained the position that the SEA Directive was irrelevant should seek to avail of costs protection. Certainly, as a matter of EU law, it is arguable that costs protection is principally intended for "members of the public concerned" (as defined) who allege an infringement of the public participation provisions of EU environmental law or a contravention of national environmental law in a field covered by EU law. As discussed below, however, the costs protection provided for under national law is more widely available than strictly required by EU law. This is as a result of the manner in which the Oireachtas has framed the special costs rules under section 50B of the PDA 2000.

Section 50B of the PDA 2000

19. Insofar as relevant to these proceedings, the key provisions of section 50B (as most recently amended in October 2018) are as follows.

> "50B.(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,
> (iii) any failure to take any action,
>
> pursuant to a statutory provision that gives effect to—
>
> […]
> (II) Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, or
> […]

(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) The costs of proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant to the extent that the applicant succeeds in obtaining relief and any of those costs shall be borne by the respondent or notice party, or both of them, to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief."

20. As appears, the normal rule under Order 99 of the Rules of the Superior Courts is disapplied. Instead, the default position is that each party bears its own costs. An applicant who has been *successful* in the proceedings may be awarded all or part of their costs.

21. The interpretation and application of section 50B has proved controversial, and has given rise to a significant number of High Court judgments, not all of which are consistent with each other. This controversy has resulted in an undesirable situation whereby a separate lengthy hearing in respect of costs is often required subsequent to the delivery of judgment on the substantive issues in judicial review proceedings. The parties thus incur *further* costs in determining the incidence of the original costs. It is to the credit of the parties in the present case that they adopted the pragmatic approach of having the issue of costs determined solely on the basis of written legal submissions. This obviated the need for a separate hearing in respect of costs, and thus reduced the amount of additional costs incurred.

Heather Hill Management Company CLG v. An Bord Pleanála (No. 1)

22. For the reasons set out in my judgment in Heather Hill Management Company CLG v. An Bord Pleanála (No. 1) [2019] IEHC 186 ("*Heather Hill*"), I am satisfied that it follows from the language of section 50B (as amended) that the qualifying criteria for costs protection under the section are directed to the *type* of decision or action which is the subject of the judicial review proceedings. The decision or action must be one made or taken pursuant to a "statutory provision" which gives effect to one or other of four EU Directives enumerated under section 50B. If the proceedings come within section 50B, then costs protection applies to the "proceedings" in their entirety. There is no requirement to apportion costs as between different grounds of challenge. This follows from the fact that there is no reference whatsoever in section 50B to the "grounds" of challenge.

23. Notwithstanding that the special costs rules are located within the PDA 2000, the benefit of the rules is not necessarily confined to decisions or actions made or taken under the planning legislation. The term "statutory provision" is defined under section 50B(6) as meaning a provision of an enactment or instrument under an enactment. It follows that a challenge to a decision made under an Act *other than* the PDA 2000 will be subject to the special costs rules where that decision can properly be characterised as having been made pursuant to a "statutory provision" which gives effect to one of the enumerated EU

Directives. Thus, for example, judicial review proceedings which challenge a decision to grant an industrial emissions licence under the Environmental Protection Agency Act 1992 (as amended) would, in principle, be subject to the special costs rules.

24. Whereas neither party in the present case has strenuously argued that *Heather Hill* was incorrectly decided, it should be noted that that judgment is under appeal to the Court of Appeal (Court of Appeal 2019 No. 204). There is an alternative analysis of section 50B abroad which insists that the special costs rules only apply to those grounds of challenge which allege an infringement of the provisions of one or other of the four EU Directives enumerated under section 50B. On this analysis, costs have to be apportioned between different grounds of challenge, with some grounds attracting costs protection but others being subject to the conventional costs rules under Order 99.

25. Were this alternative analysis to be applied to the present case, then the Applicant would undoubtedly be disqualified from benefiting from costs protection. As explained earlier at paragraphs 13 and onwards, far from seeking to vindicate an alleged infringement of the SEA Directive, the Applicant asserted that the Directive had no relevance to the proceedings. None of the Applicant's grounds of challenge related to the SEA Directive.

26. For the purposes of the present judgment, I propose to proceed on the working assumption that the principles in *Heather Hill* should be applied. Thereafter, the parties would appear to have an unrestricted right of appeal against any costs order made. The parties would be entitled, in the context of such an appeal, to dispute the correctness of the judgment in *Heather Hill.*

27. The Applicant has already filed an appeal in respect of the principal judgment in the present case (Court of Appeal 2019 No. 309). If there is to be an appeal on the costs issue, then, presumably, it can be listed together with the substantive appeal.

28. In the event that either party considers that this costs ruling is subject to a requirement for leave to appeal under section 50A(7) of the PDA 2000, then my initial tentative view would be that leave should probably be granted. The correct interpretation of section 50B is uncertain given inconsistencies in the case law from the High Court, and an authoritative judgment from the Court of Appeal would appear to be in the public interest. Of course, any decision on whether to grant leave to appeal must await an application to the court. I reiterate that the view expressed above is tentative only, and expressed without the court having had the benefit of argument from both parties on this issue.

Detailed Discussion

Jurisdictional Basis for Cost Order

29. The first issue to be addressed is to identify the jurisdictional basis for the making of any costs order. More specifically, it is necessary to determine whether the special costs rules under section 50B of the PDA 2000 apply or those under Order 99 of the Rules of the Superior Courts.

30. The qualifying criteria for costs protection under section 50B are directed to the type of decision or action which is the subject of the judicial review proceedings. The decision or action must be one made or taken pursuant to a "statutory provision" which gives effect to one or other of four EU Directives enumerated under section 50B.

31. In order to determine whether the special costs rules apply, therefore, it is necessary first to identify the "statutory provision" pursuant to which the decision or action impugned in the proceedings was made or taken. The administrative measure challenged in the present case consisted of the issuing of a briefing note to the elected members of Dublin City Council. The briefing note had been prepared by the City Planning Officer and addressed the interpretation of building height guidelines issued by the Minister for Housing, Planning and Local Government. There is no obvious statutory basis for the issuing of such a briefing note by a planning authority.

32. The Applicant had advanced these proceedings on the explicit basis that the briefing note had not been issued pursuant to any "provision" of the PDA 2000. On this basis, the Applicant contended that it was unnecessary for it to comply with the procedural requirements under sections 50 and 50A of the PDA 2000.

33. The consistent position of the Applicant throughout the hearing before this court in May 2019 had been that the briefing note was not itself a measure taken pursuant to any "provision" of the PDA 2000. It was not a "decision" or "action" for the purposes of sections 50 and 50A. Rather, the Applicant's case was premised on a concern that Dublin City Council would, by relying upon an allegedly erroneous interpretation of the guidelines, contravene its obligation to comply with the building height guidelines when it came to adjudicate on the two planning applications then pending before it. Put shortly, the case was directed to the *future outcome* of the planning applications.

34. Having consciously chosen to frame the case as one which did *not* seek to challenge an extant planning decision, the Applicant cannot now invoke section 50B on the basis that the PDA 2000 was, in fact, engaged all along. The Applicant is not entitled to approbate and reprobate.

35. For the purposes of the costs application, the Applicant now adopts a more nuanced approach. The Applicant puts forward two related contentions as follows.

    (i). The proceedings concerned the correct interpretation of the building height guidelines. The making of statutory guidelines under section 28 of the PDA 2000 is now—as a result of amendments introduced under the Planning and Development (Amendment) Act 2018—subject to assessment for the purposes of the SEA Directive. The SEA Directive is one of the four EU Directives enumerated under section 50B. On this basis, it is contended that section 28 represents a "statutory provision" which gives effect to the SEA Directive and thus the special costs rules under section 50B are triggered.

(ii). The Applicant seeks to characterise the case as one which had been concerned in substance with a "threatened" contravention of section 28(1C) of the PDA 2000. That subsection provides that planning authorities shall, in the performance of their functions, comply with specific planning policy requirements. The argument runs to the effect that were Dublin City Council to fail to interpret the building height guidelines correctly when adjudicating on the two planning applications pending before it, then this would have contravened section 28(1C). On this argument, the proceedings fall within the scope of section 50B as interpreted in the light of article 9(3) of the Aarhus Convention. (See, in particular, paragraphs 26 and 32 of the supplemental written legal submissions).

36. The first of these two contentions can be disposed of shortly. It is a prerequisite to the triggering of section 50B that the judicial review proceedings seek to challenge a "decision" or "action" made or taken pursuant to a statutory provision which gives effect to one or other of the four enumerated EU Directives. This prerequisite is simply ignored in the Applicant's first contention. It is not sufficient that proceedings concern the "interpretation" of a statutory provision which gives effect to one of the four EU Directives. Rather, there must be an identified "decision" or "action".

37. There is more substance to the second of the Applicant's two contentions. Certainly, had the Applicant *awaited* the outcome of the decision-making process in respect of the two planning applications before instituting proceedings, an attractive argument could then have been made to the effect that judicial review proceedings—which challenge a decision to refuse planning permission on the basis that the decision does not comply with the building height guidelines—might, in principle, fall within section 50B. It could be argued, for example, that the decision to refuse planning permission is a "decision" made pursuant to section 34, section 170 and section 28(1C) of the PDA 2000. Alternatively, it could be argued that a failure to properly interpret and apply the building height guidelines represents a failure to take "action" pursuant to section 28(1C). It might then be said that these sections represent "statutory provisions" which give effect to the SEA Directive.

38. It is unnecessary for the purposes of this judgment to attempt to resolve any of these interesting issues of statutory interpretation. This is because there is a fundamental obstacle to the Applicant relying on section 50B. The fact that the judicial review proceedings had been brought on a *quia timet* basis, i.e. in anticipation of a decision being reached in contravention of section 28(1C), precludes any reliance on the special costs rules. It is clear from the express language of section 50B that for the special costs rules to apply it must be possible to identify a decision, action or omission which had been made or taken *prior to* the institution of the judicial review proceedings.

39. It follows, therefore, that on its ordinary and natural meaning, section 50B does not apply to proceedings which merely allege an apprehended contravention of section 28(1C). If an applicant wishes to avail of costs protection, they must await an actual "decision" or "action".

40. It is necessary next to consider whether the ordinary and natural meaning must be departed from in favour of a purposive interpretation of section 50B. This is addressed under the heading below.

Aarhus Convention

41. The Applicant has sought to call in aid the provisions of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("*the Aarhus Convention*") in support of its interpretation of section 50B of the PDA 2000. Relevantly, the Aarhus Convention provides that certain proceedings must meet a "not prohibitively expensive" requirement. This requirement is replicated in certain EU environmental legislation, e.g. the Environmental Impact Assessment Directive (2011/92/EU) ("*the EIA Directive*") and the Industrial Emissions Directive (2010/75/EU).

42. The Aarhus Convention identifies two types of proceedings to which the "not prohibitively expensive" requirement applies. The first concerns challenges to decisions, acts or omissions in respect of development consent ("permits"). These requirements are reflected in EU environmental legislation such as, for example, the EIA Directive and the Industrial Emissions Directive. The structure of section 50B of the PDA 2000 is broadly similar, save for the important distinction that costs protection under the section is directed to the type of proceedings rather than to the grounds of challenge.

43. The second type of proceedings which attract costs protection under the Aarhus Convention are proceedings which challenge acts and omissions which contravene provisions of national law relating to the environment. This is provided for under article 9(3) as follows.

> "3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

44. The provisions of article 9(3) are not directly applicable within the domestic legal order. A national court is, however, under an obligation to interpret national procedural law, to the fullest extent possible, in a manner which is consistent with its provisions. See Case C 470/16 North East Pylon, [58]. This interpretative obligation is subject to the *contra legem* principle.

45. The Applicant contends that the term "contravene" under article 9(3) must be interpreted as including not only actual contraventions of national law but also *threatened* contraventions. In support of this contention, the Applicant cites the following passage from the "Aarhus Convention: An Implementation Guide" (2nd ed., 2014) at page 194.

> "What can be reviewed? Under the Convention, members of the public have the right to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment. *First, as regards 'contravening national law relating to the environment', it does not have to be established prima facie, i.e., before the review, that there has been a violation. Rather, there must have been an allegation by the member of the public that there has been an act or omission violating national law relating to the environment (see ACCC/C/2006/18 (Denmark) discussed above).** Second, national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment. Thus, also acts and omissions that may contravene provisions on, among other things, city planning, environmental taxes, control of chemicals or wastes, exploitation of natural resources and pollution from ships are covered by paragraph 3, regardless of whether the provisions in question are found in planning laws, taxation laws or maritime laws. This was illustrated in the Compliance Committee's findings on communication ACCC/C/2005/11 (Belgium),424 where the Committee assessed Belgian planning laws under article 9, paragraph 3, and in its findings on Bulgarian planning law in communication ACCC/C/2011/58.425."

*Emphasis (italics) added.

46. With respect, I do not think that the sentence emphasised above bears the interpretation contended for by the Applicant. The sentence merely indicates that a contravention of national law relating to the environment does not have to be proved or established before proceedings can be instituted. It is sufficient that a contravention is alleged. The sentence does not address the separate issue of the *timing* of a contravention. It certainly does not indicate that costs protection must be available in the case of a threatened or apprehended contravention, i.e. on a *quia timet* basis. Such an interpretation cannot be reconciled with the express reference to "acts" or "omissions" in the qualifying words "acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment". The wording of the Aarhus Convention indicates that some event—an act or omission—must have occurred which involves a contravention of national environmental law.

47. The Applicant had advanced its case at the substantive hearing in May 2019 on the explicit basis that the issuing of the briefing note *per se* did not breach any provision of the PDA 2000. On the Applicant's case, a contravention of national environmental law would only crystallise if the (allegedly mistaken) interpretation of the building height guidelines set out in the briefing note were to be relied upon in determining the two planning applications. No "act" or "omission" had yet occurred as of the date the proceedings were instituted. The Applicant cannot therefore rely on the special costs rules under section 50B.

48. There is no inconsistency between an interpretation of section 50B which requires an applicant to await the making of a "decision" or "act" before qualifying for costs protection and the provisions of the Aarhus Convention. The wording of section 50B is consistent with that of article 9(3) of the Aarhus Convention insofar as it refers to "actions" or omissions". This language can only be understood as referring to actual decisions, i.e. it does not authorise pre-emptive challenges.

49. Moreover, the interpretation does not preclude an applicant from *ever* relying on the special costs rules to challenge an alleged failure to comply with statutory guidelines by reference to the requirements of the SEA Directive. Rather, it simply indicates that the special costs rules cannot be relied upon in the case of proceedings which are *premature*. This is consistent with the proper administration of justice.

50. For the reasons set out at paragraphs [30] to [37] of the principal judgment, an application for judicial review on this basis was premature. The Applicant should, instead, have awaited the outcome of the planning process before having recourse to the courts by way of judicial review.

51. Had the Applicant awaited the outcome of the planning process, and instituted judicial review proceedings at that stage, it could have argued that the special costs rules applied. Dublin City Council would, at that stage, have made a "decision" pursuant to section 34 and section 170 of the PDA 2000. This "decision" would in principle be subject to the requirements of section 28(1C) of the PDA 2000. The Applicant could then argue that any or all of these three sections represented a "statutory provision" which gave effect to the SEA Directive.

52. Finally, for the sake of completeness, it should be noted that the approach of the Applicant in the present case is distinguishable from the applicant company in *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála (No. 5)*. In the latter case, the applicant company had expressly sought to characterise certain administrative measures taken by An Bord Pleanála in advance of an oral hearing on a planning application as constituting "decisions", "actions" or "omissions" for the purposes of section 50 of the PDA 2000. There was then a dispute as to whether the legislation clearly defined these concepts. By contrast, the Applicant in the present case has been consistent in saying that the briefing note had not been issued pursuant to any provision of the PDA 2000.

Findings of Court on Jurisdictional basis for Costs Order

53. For all of the reasons set out above, I am satisfied that the special costs rules under section 50B do not apply to these proceedings.

Order 99

54. These proceedings are subject to the conventional costs rules under Order 99 of the Rules of the Superior Courts. The Supreme Court has recently confirmed in its judgment in *Godsil v. Ireland* [2015] IESC 103; [2015] 4 I.R. 535, [52] that the general rule that costs follow the event represents the starting point for any costs application. No special reason has been advanced as to why the Applicant, as the unsuccessful party in the proceedings, should not be liable to pay Dublin City Council's costs. In circumstances

where the Applicant was unsuccessful and the judicial review proceedings were dismissed in their entirety, the Applicant is liable to pay the costs incurred by Dublin City Council in respect of the proceedings.

Conclusion and Form of Order

55. The special costs rules under section 50B do not apply on a *quia timet* basis, i.e. in anticipation of a decision being reached in contravention of a "statutory provision" which gives effect to one or other of the four EU Directives enumerated under the section. Rather, for the special costs rules to apply it must be possible to identify a decision, act or omission which had been made or taken *prior to* the institution of the judicial review proceedings.

56. The within proceedings are subject to the costs rules under Order 99 of the Rules of the Superior Courts. The costs thus follow the event.

57. I propose to make an order directing that the Applicant do pay the costs of Dublin City Council in respect of and incidental to the within proceedings, such costs to be taxed in default of agreement. The costs are to include the costs of the two sets of written legal submissions and all reserved costs.