THE HIGH COURT
JUDICIAL REVIEW

2023 IEHC 138
Record no. 2022/859 JR

Between:

EPUK INVESTMENTS LIMITED

Applicant

and

ENVIRONMENTAL PROTECTION AGENCY

Respondent

AND

THE HIGH COURT
JUDICIAL REVIEW

Record No. 2022/860 JR

Between:

EPUK INVESTMENTS LIMITED

Applicant

And

COMMISSION FOR REGULATION OF UTILITIES

Respondent

RULING ON COSTS BY MR JUSTICE DAVID HOLLAND GIVEN ON 22 MARCH 2023

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INTRODUCTION

1. On 10 February 2023 I dismissed both of the above-entitled claims for relief by way of judicial review.[1] I will in this ruling as to costs take that judgment as read. To the extent that the brief account of the proceedings set out below is necessarily somewhat imprecise and incomplete, the content of the main judgment prevails. The main judgment will also assist as to the meaning of certain terms used below.

2. Both proceedings were tried together in a 3-day trial. Incorporated in the trial was, in each case, a motion by the Respondents (the "CRU" and the "EPA") to exclude expert evidence tendered by the Applicant ("EPUKI"). But those motions took up very little time as the parties all but rested on their written submissions on those regards.

3. The CRU and the EPA seek their costs as following the event of the dismissal of both proceedings. EPUKI seeks that no order as to costs be made on the basis either that s. 50B PDA 2000[2] applies in both proceedings or on the basis that I should exercise my general discretion in their favour having regard to the public interest in the proceedings. Alternatively, EPUKI say that a Veolia costs order should be made as to the motions to exclude evidence and, in the case of the CRU, by reference to its failed argument that EPUKI had impugned the wrong decision.

4. In its proceedings against the EPA, EPUKI impugned the EPA's alleged decision, by way of an e-mail of 18 July 2022, adopting a particular interpretation of certain BAT[3] Conclusions issued by the European Commission, to be applied by the EPA in awarding Industrial Emissions Licenses ("IEL") for, inter alia, Open Cycle Gas Turbine electricity generation plants ("OCGTs") in Ireland.

5. In the other proceedings, EPUKI impugned the CRU's "ARHL De-Rating Decision" decision to introduce a "ARHL De-Rating" factor in Capacity Auctions in the All-Island Single Electricity Market ("SEM"). By that decision, the electricity generation capacity which a generator such as EPUKI would be allowed to bid in such auctions to provide generation capacity would be de-rated – i.e. reduced – by reference to Annual Run Hour Limits ("ARHL") imposed by the Industrial Emissions Licenses applicable to the electricity plant in question.

6. The relationship of the two Impugned Decisions, as alleged by EPUKI, lies in the fact that EPUKI interpreted the EPA's e-mail of 18 July 2022 as intimating that ARHLs would not be imposed in IELs awarded to OCGTs in Ireland, whereas the NIEA[4] is expected to impose such ARHLs in licensing OCGTs in Northern Ireland. EPUKI asserted that the combination of the imposition of ARHLs on

[1] [2023] IEHC 59.
[2] Planning and Development Act 2000 as amended.
[3] Best Available Techniques.
[4] Northern Ireland Environmental Agency.

OCGTs north of the border, their non-imposition by the EPA south of the border and the imposition by the CRU of ARHL De-Rating on new OCGTs on both sides of the Border would unlawfully disadvantage its intended operation of OCGTs at a cost to it of, it alleged, €64 million. EPUKI also emphasised what it considered would be the effect of the Impugned Decisions on its decisions as to investment in OCGTs and its return on such investments. Wisely in my view for reasons set out in the judgment, a pleaded Francovich damages claim was only tepidly pursued, if pursued at all. What matters for present purposes is that the allegation of apprehended loss illuminates the essentially – indeed predominantly - commercial purpose of EPUKI's proceedings, from its point of view.

7. I dismissed the proceedings against the EPA on the basis that the e-mail of 18 July 2022, was not in law a justiciable decision.

8. In dismissing EPUKI's proceedings against the CRU,[5] I rejected EPUKI's complaints

- of inadequate consultation before adopting ARHL De-Rating.
- that the CRU had failed to properly interpret the Industrial Emissions Directive and/or the BAT Conclusions. I held that the CRU had no role or competence in interpreting or applying those instruments.
- that the CRU had, in adopting ARHL De-Rating, also adopted the EPA's erroneous interpretation of the BAT Conclusions. I held, in essence, that the CRU had taken no view as to the error or otherwise of any interpretation of the BAT Conclusions. It simply reacted to the terms of IED permits (IELs in Ireland) imposed by the respective competent Authorities north and south of the border.
- that the CRU was obliged in its administration of the Capacity Market, and specifically as to ARHL De-Rating, to correct for the EPA's allegedly erroneous interpretation of the BAT Conclusions.
- of discrimination, irrationality and distortion of competition.

LAW AS TO COSTS

General Rule, Departure From It and Public Interest Litigation

9. S. 169(1) of the Legal Services Regulation Act 2015 ("the 2015 Act") codified what had long been the default rule that "*costs follow the event*". In **Godsil**[6] McKechnie J described that as the "*general principle*" and the "*overarching test*" the application of which is the "*overriding start point on any question of contested costs*" to which *"All of the other rules, practises and approaches are supplementary…."* In **Dunne**,[7] Murray CJ observed that:

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[5] In substance against the Single Electricity Market Committee ("SEMC") of which the CRU is the representative Defendant.
[6] Godsil v. Ireland and the Attorney General [2015] IESC 103 (Supreme Court, McKechnie J, 24 February 2015).
[7] Dunne v. Minister for the Environment [2008] 2 I.R. 775.

"The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party, has an obvious equitable basis."

10. S. 169(1) provides that:

"A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties…"

There follows a non-exhaustive list of examples of potential aspects of the nature and circumstances of the case, and the conduct of the proceedings which may inform the exercise of the discretion to depart from the default rule. They include "*whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings"*

S. 169(2) requires a court to give reasons for any departure from the default rule.

11. Order 99 RSC, as replaced after the 2015 Act came into force, provides at Rule 2(2) that subject to statute, costs shall be in the discretion of the court. Rule 3 mandates regard to s. 169(1) as applicable.

12. The phrase "*entirely successful*" s. 169 is not to be interpreted as a relentless requirement that the successful party have won every single argument and skirmish in the case. It requires an overview – who won and who lost? As McKechnie J said in **Godsil,**[8] the "*event*" to be followed in costs can usually be identified by asking the question "*who is really the winner and who is really the loser?"* In **Higgins**,[9] as cited in **Ryanair**,[10] Murray J does envisage looking beyond the overall result to consider whether the proceedings involve separate and distinct issues. If so, it is appropriate to determine which side succeeded on those issues. But in the exercise of discretion under s. 168 of the 2015 Act even the partially successful litigant may still recover full costs depending on the circumstances. Whatever may be the nuances in other cases, as applicable here, the criterion of entire success is amply satisfied where EPUKI's claims were dismissed simpliciter. The EPA and CRU were "*entirely successful*". In fairness, EPUKI did not argue otherwise.

[8] Citing Roache v. News Group Newspapers Ltd & Ors [1998] E.M.L.R. 161, Bingham M.R. at p. 166.
[9] Higgins v. Irish Aviation Authority [2020] IECA 277.
[10] Ryanair DAC v An Taoiseach [2020] IEHC 673 (Simons J).

Conduct

13. Despite the EPA's reliance on its having responded to EPUKI's initiating letter to the effect that its impugned e-mail was not a justiciable decision and the fact that the EPA's position in that regard was ultimately vindicated in my judgment, and despite EPUKI's unsuccessful attempt to shift its ground at trial, I do not consider that this is a case in which the conduct of the proceedings by the parties tells one way or the other. At trial at least,[11] the proceedings were efficiently and well-conducted by all within the proper bounds of adversarial process. That a reply to an initiating letter does not result in the scales falling from the eyes of an ultimately unsuccessful applicant, does not, at least ordinarily and absent other factors, imply misconduct of proceedings by that applicant merely because the successful respondent can say that, before proceedings commenced, "we told you so". If that were a criterion for an order as to costs grounded in conduct, it would apply in most cases and in every case once (often not very long after the reply to the initiating letter) opposition papers had been filed disputing the claim. Murray J made a similar remark, in a somewhat different context, when he said in **Chubb**[12] that *"it would be of deep concern if any State body was encouraged in the view that the refusal of persons subject to its jurisdiction to unquestioningly accept its construction of the law (whether 'as regulator' or otherwise) was of itself a form of misconduct."* Nor do I think there was in this case, as envisaged as to "conduct" by Simons J in **Ryanair**,[13] "*unreasonable pursuit of issues*".

14. It is convenient here to address also s. 50B(3) PDA 2000. It allows the awarding of costs against a party in derogation from the costs protection afforded by s. 50B(1) and because of the manner in which that party has conducted the proceedings. I do not see this provision as applicable in the present case. It seems to me that the concept of conduct in s. 50B(3) must be interpreted in the context of the categories which precede and succeed it. Preceding it is a reference to frivolous and vexatious proceedings and succeeding it is a reference to contempt of court. These references suggest that the conduct which the section contemplates, while it might not necessarily amount to what one could formally call misconduct, is at least conduct fit to be significantly deprecated by the court to an extent meriting, in effect, punishment in costs despite a norm of costs protection. I accept that, as counsel for EPUKI put it, the bar to the application of s. 50B(3) is "fairly high". In the similar context of the reference to "conduct" in s. 169(1)(a),[14] Murray J in Chubb considered it as concerned, as had been the pre-existing law, with "*improper behaviour proximately related to the action itself*".[15] While I may not have been entirely complimentary to EPUKI in my judgment, I do not see that it has been guilty of conduct such as would justify the application of s. 50B(3). Though, as will be seen, the question of such application doesn't in truth arise.

[11] A qualification I record only as I was involved no earlier.

[12] Chubb European Group SE v. Health Insurance Authority [2020] IECA 183 (Court of Appeal (civil), Murray J (Brian), 8 July 2020) §41.

[13] Ryanair DAC v An Taoiseach [2020] IEHC 673 (Simons J).

[14] 169. (1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including— (a) conduct before and during the proceedings.

[15] Citing for example Mahon and Others v. Keena [2009] IESC 78.

15. I therefore need consider no further, and leave aside in what follows, any question of conduct of the proceedings.

Nature & Circumstances Of Case & Public Interest

16. The remaining general criterion identified in s. 169 for departure from the default rule is that of *"having regard to the particular nature and circumstances of the case".* This criterion expresses a discretion which in substance predated the section and which must be exercised judicially. S. 169 is considered (**Ryanair**[16]) to have provided a statutory basis for what had been a discretion at common law but not, at least generally, to have changed the substance of that discretion. So the body of caselaw as to the discretion at common law is considered still to illuminate the exercise of the discretion now grounded in statute.

17. In **Hickwell**[17] Humphreys J recently said that

> *"The starting point on costs is the substantive result, and any discretion must be exercised with regard in the foreground to the fact that the applicants won the case and are therefore presumptively entitled to all of their costs."*

18. As to the exercise of the discretion to depart from the default rule, and having regard to cases such as Dunne, Godsil and **Callaghan**,[18] it seems to me that the following can be, non-exhaustively, stated:

i. Variation of or departure from the general rule that costs should follow the event is a matter of discretion.

ii. There is no predetermined category of cases which fall outside the full ambit of that discretion.

iii. A court minded to depart from the general rule can only do so on a reasoned basis, clearly explained, and one rationally connected to the facts of the case, to include the conduct of the participants. In other words, the discretion so vested is not at large but must be exercised judicially.

[16] Ryanair DAC v An Taoiseach [2020] IEHC 673. Simons J said, first at §11: "There is nothing in the statutory language of the LSRA 2015 which suggests that the discretion previously enjoyed by the courts under the pre-2019 version of Order 99 of the Rules of the Superior Courts has been removed. Rather, it seems to me that the type of considerations identified in the case law discussed under the next heading below — such as, for example, whether the proceedings raise issues of general importance which transcend the facts of the case and which are novel — continue to inform the exercise of the costs jurisdiction. These considerations come within the rubric of the "particular nature and circumstances of the case" as per section 169(1) of the Legal Services Regulation Act 2015."
Then, at §15, "Notwithstanding the commencement of Part 11 of the LSRA 2015, I am satisfied that the pre-2019 case law continues to have relevance. The courts have a discretion, to be exercised on a case-by-case basis, to depart from the general rule that a successful party is entitled to its costs."

[17] Hickwell v Meath County Council (No. 2) [2022] IEHC 631.

[18] Callaghan v An Bord Pleanála [2015] IEHC 618 (High Court, Costello J, 12 October 2015).

iv. As a departure from a general rule, the exercise of a discretion to decide that costs should not follow the event is exceptional.

- That is not to use the word "exceptional" in any highly exaggerated sense. But it does reflect the words "*entitled*" and "*unless*" in s. 169(1) and the considerable weight, the normative quality, the "*obvious equitable basis*", and the quotidian application of the general rule that costs do indeed follow the event and that it is the "*overriding starting point*".
- That exceptionality is also reflected in the fact that the Oireachtas imposed, in s. 169(2), a statutory obligation on judges to give reasons justifying departures from the default rule. S. 169(2) does not use the word "*justify*" but justification is inherent in the concept of a reason.
- The general rule should be departed from only when justice demands.

v. While s. 169 does not use the word, it is clear that circumstances justifying departure from the general rule must be "*special*".

vi. The discretion must be exercised on a consideration of the "*circumstances of a case as a whole".*

vii. Decided cases indicate factors which may be relevant in deciding whether to depart from the general rule. But it is the relevant factors in the context of the individual case, which determine the issue. It would neither be possible nor desirable to attempt to list or define what all those factors are. It is usually a combination of factors which is involved.

viii. It follows from a consideration of the "*circumstances of a case as a whole"* that the presence or absence of a particular factor does not invariably decide the issue. It remains very much the situation that one cannot rigidly define or prescriptively describe the type, kind or category of case which by virtue of such classification, will always fall within the rule or within the exception, as the case may be. Cases will inevitably be borderline – some of which will sit either side of the rule. To determine the issue will require a case-by- case analysis.

ix. In a case in which departure from the general rule is urged on the basis of the public importance of the case or that the plaintiff was acting in the public interest or that there was a public interest the decision of the case, that the plaintiff had or had not a private interest in the case or its outcome is relevant to the exercise of the discretion. A private interest may dilute a losing party's claim to be a public interest litigant, but it is not, per se, a bar to the exercise of the discretion in favour of a losing party.

x. As very many cases involve some element of public interest, and as that is especially so of public law litigation such as judicial review (the fundamental project of which is *the*

"maintenance of the highest standards of public administration"[19]*),* the nature, importance and degree of that interest is likely to be relevant to the determination of the question whether to depart from the general rule. The question is not merely whether a public interest was engaged but whether it was, in all the circumstances sufficient - of such special and general importance - to warrant departure from the general rule.

xi. A further factor is whether the legal issues raised, rather than the subject matter itself, were of special and general public importance.

xii. By way of a personal addition to this list, it seems to me to follow from the principles set out above that the weight to be given to a particular factor is relative, not absolute, and will vary with context and circumstances. For example, the same public interest which might tip the balance in favour of an unsuccessful Plaintiff with no private interest in the outcome of the case might not tip the balance in in favour of an unsuccessful Plaintiff with a great private interest in the outcome.

xiii. On all occasions when departure from the general rule is urged, the onus to demonstrate that departure is proper rests on the party seeking it.

Sweetman

19. In **Sweetman**[20] the concept of "public interest litigation" was elucidated to the effect that,

> *"…… the exercise of the courts discretion to depart from the normal rule that costs follow the event is governed by two principles:—*
> *1. That the plaintiff or applicant concerned was acting in the public interest in a matter which involved no private personal advantage; and*
> *2. That the issues raised by the proceedings are of sufficient general public importance to warrant an order for costs being made in his favour."*

Clearly, private personal advantage is not longer prohibited, though it remains a relevant factor. However Sweetman remains of considerable interest as deriving from considerable authority[21] and as requiring,

- that the applicant have been *"acting in the public interest".*

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[19] R v Lancashire County Council, ex parte Huddleston – [1986] 2 All ER 941; Saleem v Minister for Justice, Equality and Law Reform [2011] IEHC 55; Murtagh v. Judge Kevin Kilrane [2017] IEHC 384 (High Court, Barrett J, 14 June 2017); Environmental Trust Ireland v. An Bord Pleanála [2022] IEHC 540.
[20] Sweetman v An Bord Pleanála [2007] IEHC 361.
[21] Cited by way of example are Harrington v. An Bord Pleanála (Unreported, High Court, Macken J.,11th July 2006), Dubsky v. Ireland (Unreported, High Court, Macken J., 13th December 2005), Dunne v. The Minister for the Environment Heritage and Local Government and Others (Unreported, High Court, Laffoy J., 18th March 2005), McEvoy v. Meath County Council [2003] 1 I.R. 203 and Sinnott v. Martin [2004] 1 I.R. 121.

- Not merely issues of general public importance but the sufficiency of those interests to depart from the default rule as to costs.

It does seem to me that the threshold is likely to be higher where, as in Sweetman, the loser sought costs as opposed to where, as here, the loser seeks rather that no costs be awarded against it. But the essential principles remain the same.

<u>O'Brien & Ryanair</u>

20. Though the facts in **O'Brien v Clerk of Dáil Eireann**[22] were novel and very different from those in the present case, nonetheless the judgment of Ní Raifeartaigh J, in awarding costs against the plaintiff, seems to me to assist as to cases in which both private and public interests are at play. She said:

> *"… it seems to me that the plaintiff brought the proceedings primarily to protect and vindicate his own personal interests, but that the issues raised necessarily would have a consequential impact upon other persons who found themselves in the same position in the future and therefore, that the issues raised were of general public importance, and that he voiced his recognition of this aspect of the proceedings in the course of his evidence. However, it was not a case of a plaintiff who brought proceedings in respect of a matter of general public importance without any potential for personal benefit. It was the more typical case of a plaintiff who brought proceedings in respect of a constitutional issue for personal reasons, in this case, in order to have his position vindicated, albeit not through an award of damages, which, as a side-effect, would necessarily have implications for other persons who might find themselves in a similar position in the future and therefore, it had a public interest dimension. This factor, therefore, does not particularly appear to me to advance the plaintiff's case for costs."*

And later:

> *"…. there was an insufficient degree of novelty in the legal issues raised to warrant the exercise of what is undoubtedly an exceptional jurisdiction to depart from the normal rule."*

21. In **Ryanair,**[23] in awarding costs following the event of dismissal of the proceedings, Simons J held that under s. 169(1), the phrase *"particular nature and circumstances of the case"* *"is broad enough to allow the court to consider whether the issues raised in the proceedings were of general public importance, and, if so, whether this justifies a modified costs order."* As to costs, he considered the balance to lie between indulging unmeritorious litigation and deterring litigation in the public interest – even if it is unsuccessful. He listed features including the following relevant here:

[22] O'Brien v Clerk of Dáil Eireann [2017] IEHC 377 (High Court, Ní Raifeartaigh J, 2 May 2017).
[23] Ryanair DAC v An Taoiseach [2020] IEHC 673 (Simons J).

- *"(iii) the strength of the applicant's case: proceedings might touch upon issues of general importance but the grounds of challenge pursued might be weak;*
- *(iv) whether the subject-matter of the litigation is such that costs are likely to have a significant deterrent effect on the category of persons affected by the legal issues; and*
- *(v) whether the issues touch on sensitive personal rights."*

22. Simons J also said:

> *"First and foremost, regard must be had to the fact that these proceedings have been taken by a well-resourced company in pursuit of its own commercial interests. Of course, the mere fact that an applicant has a personal or pecuniary interest in the outcome of judicial review proceedings does not necessarily preclude the making of a modified costs order in its favour.*
> *…………*
> *Nevertheless, the existence of a significant commercial interest in the outcome of the proceedings on the part of an applicant is a relevant consideration in allocating costs. At least part of the rationale for the making of modified costs orders is to ensure that the risk of having to pay the other side's costs does not deter parties from pursuing proceedings which are in the general public interest. The costs of judicial review proceedings before the High Court will run to tens of thousands of euro, and an adverse costs order could be financially ruinous for many individuals. This rationale is not engaged in circumstances, such as those of the present case, where an applicant has the financial resources and commercial incentive to pursue litigation undeterred by costs concerns."*

23. Simons J concluded that *"the allocation of costs does not require to be adjusted by reference to the alleged public interest in the proceedings nor to their alleged mootness. These proceedings are taken by a well-resourced company, for whom costs are not a deterrent, in pursuant of its own commercial interests …"*

<u>Section 50B & Heather Hill</u>

24. **Section 50B PDA 2000** (as amended) provides (as here directly relevant):

> *"(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,*
> *…..*
> *pursuant to a statutory provision that gives effect to —*

……..

(III) a provision of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control to which Article 16 of that Directive applies, 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.

25. The precise scope of s. 50B was long controversial. However the Supreme Court recently decided the issue in **Heather Hill**.[24] It rejected restriction of the scope of s. 50B to particular judicial review grounds alleging breach of the Directives listed in s. 50B and held that "*Any challenge to a decision made pursuant to a statutory provision which gives effect to the listed Directives falls within the costs protection provided for in* [s. 50B]."

26. It is clear from s. 50B and confirmed in **Spencer Place**[25] that, to come within the scope of s. 50B, proceedings must include an application for judicial review of a decision, act or omission. There must be a decision and there must be a challenge to the legality of that decision or to the process leading to that decision. Judicial review which seeks a declaration in isolation, divorced from a challenge to a decision, will not benefit from s. 50B. One may add the possibility of a purported decision to this description of the position. I agree in general with EPUKI's submission[26] that the decision of the Court of Appeal in Spencer Place as to the scope of s. 50B must be considered with care given the later decision of the Supreme Court in Heather Hill. However, I don't think the latter upset the former in the respects canvassed above.

27. In appreciable degree by analogy with the substantive decision in **Spencer Place**, I decided in the main judgment in the EPA case, that EPUKI had not, within the meaning of s. 50B(1)(a)(I), impugned a justiciable "decision" by the EPA. As to costs in **Spencer Place**, both the trial judge and the Court of Appeal decided[27] that the briefing note in question in that case[28] was not a decision and was not a decision taken pursuant to any statutory provision and, accordingly, that s. 50B did not apply. So too in the present case.

[24] Heather Hill Management Company CLG and Gabriel McGoldrick v An Bord Pleanála and Burkeway Homes Ltd and the Attorney General [2022] IESC 43 ([2022] 2 I.L.R.M. 313).

[25] Spencer Place Development Company Limited V Dublin City Council [2021] IECA 314 (Costs Judgment) §§27 et seq.

[26] Letter of 16 March 2023.

[27] Though disagreeing in other respects.

[28] A Briefing Note on the Dublin City Development Plan and the Building Height Guidelines prepared by the City Planner, and presented to, and "noted" by, the elected members of the City Council. The gravamen of Spencer Place's complaint was that the City Council had thereby committed itself to an allegedly erroneous interpretation of the Guidelines and that this error would adversely affect the outcome of two planning applications by Spencer Place.

28. The remaining question is whether there was, within the meaning of s. 50B, a *"purported decision made or purportedly made".* No cases interpreting the word "purported" in the section were cited to me – though it seems that, from the applicant's point of view, the argument could just as well have been made in Spencer Place. In context here the word "purported" seems to me to connote the decision viewed from the perspective of the decision-maker. It is a decision-maker, not the challenger of a decision, who purports to make the decision challenged and the result of that action by the decision-maker is a purported decision. I accept the submission that this phrase is designed to generally afford costs protection, via s. 50B(2), to the decisionmaker whose decision is impugned and found, by the time costs come to be decided, to have been invalid: and in that sense it has been shown to have been a purported decision. I do not think the 2011 amendment to s. 50B, inserting s. 50B(2A) to make specific provision for awards of costs in favour of successful applicants for judicial review, changes that interpretation of the word "purported".

Veolia Orders & Section 168(2)

29. **Veolia**[29] assists considerably in allowing the Courts to more precisely and fairly align costs orders to the justice of multiple issue cases - sometimes awarding less than full costs and sometimes determining costs relative to issues which have been won or lost as the case may be. Nothing I say should be seen as detracting from the utility of such "Veolia Orders" in appropriate cases.

30. Murray J in **Heather Hill**[30] saw S.168(2) of the 2015 Act as providing a statutory basis for Veolia Orders and making the scope making them more general and less confined to complex cases. S.168(2) permits, inter alia, an order that a party shall pay,

> *"(a) a portion of another party's costs,*
> *(b) costs from or until a specified date, including a date before the proceedings were commenced,*
> *(c) costs relating to one or more particular steps in the proceedings,*
> *(d) where a party is partially successful in the proceedings, costs relating to the successful element or elements of the proceedings."*

31. While of course accepting this, I think it remains the case that such orders are generally suited to longer trials of which it can be said that, had the successful party not pursued an issue in which it failed, significant, worthwhile and identifiable costs would have been saved. As at trial costs tend to come in units of a day or any part of a day, generally it seems to me that Veolia orders are unlikely to be appropriate save where the issue on which the successful party failed can be said to have added at least a day to the trial – though if only by its spilling over into part of an extra day. And Veolia Orders seem to me much less likely to be required as to short trials. It is in my view generally undesirable that Court time and resources and those of costs adjudicators be spent

[29] Veolia Water Consortium v. Fingal County Council (No. 2) [2007] 2 I.R. 81.
[30] Heather Hill Management Co. CLG v. An Bord Pleanála [2022] IESC 43 §133.

'salami-slicing' costs in a form of satellite litigation. In some cases - especially cases in which what is at stake may be modest compared to the quantum of costs or, as is generally the case in judicial review, where victory is non-pecuniary - such orders, if applied with relentless logic as between points won and lost subsidiary to the general result, can have the unjust practical effect of snatching defeat from the jaws of victory or of rendering victory substantially Pyrrhic. Only the well-resourced can afford the satisfaction of Pyrrhic victories. This is, it seems to me, an area in which the aphorism of Holmes J that the life of the law "*has not been logic but experience*" is relevant to perceiving the overall justice of particular cases as to costs.

32. Indeed, this view is in part stated in Veolia itself:

> *"The fact that an additional issue is raised should only affect costs where the raising of the issue could reasonably be said to have affected the overall costs of the litigation to a material extent."*

33. It is also to be remembered that, generally, if the victor is expected, on pain of costs, to confine himself with perfect prescience to only those points which transpire to find favour with the trial judge, or which do not find favour with the trial judge but find it on appeal, the vanquished has had from the start of the proceedings the unilateral opportunity to recognise its error, concede and thereby to end the proceedings. Thereby he can save almost all the costs – of both the victor's good points and his bad points. That is a level of control of which the eventual victor (ex hypothesi entitled to succeed) cannot, save rarely,[31] avail for as long as the loser insists on fighting.

34. These observations seem to me consistent with the view of McKechnie J in **Godsil**, as to Veolia orders, that *"Care however, must be taken: not all cases will be suitable for such analysis and even when applied, the overall picture must not be lost sight of."*

35. They also seem to me consistent with the views of Humphreys J in **Hickwell**[32] - with the generality of which I gratefully agree. Humphreys J observed[33] that:

- *"Generally, partial discounting of costs is not really an issue for short hearings in the one-to two-day category."* (I would readily extend that to three days)
- *"In order to outweigh the downsides of a discounting exercise, especially in an Aarhus Convention context, and having regard to the capacity of such an exercise to consume costs and to create satellite issues unnecessarily, discounting should normally only be considered if*

[31] Where summary judgment is available.
[32] Hickwell v Meath County Council [2022] IEHC 631.
[33] Citing Flannery & Ors. v. An Bord Pleanála [2022] IEHC 327 (Unreported, High Court, 8th June, 2022) §35 and Heather Hill Management Co. CLG v. An Bord Pleanála [2022] IESC 43, in particular §212.

an applicant falls significantly short of winning the majority of her significant and decided points." (Whether or not in an Aarhus case, the point made by Humphreys J is a general one)

- *"…….. an over-elaborate rule has an "unwieldy and counterproductive consequence" and creates the "real risk of the substantive issues ... becoming satellites to endless, expensive and time-consuming battles ... It is not evident … who benefits from this: certainly not those with a stake in the rapid disposition of legal disputes of this kind".* (Here Humphreys J was applying by analogy, to the scope for Veolia orders, a comment of Murray J in Heather Hill as to the scope of s. 50B costs protection.)

- *"While it might feel gratifying in the short term to knock a few percent off the winning party's costs because they made a few losing points, one has to look at the bigger picture. To indulge in that kind of superficially appealing exercise would massively incentivise applications by losers to avoid paying full costs, and thus would create a situation where the court would have to deal with a greatly increased frequency of second rounds of disputes. Such an approach would be a licence to argue, to disagree, to nit-pick, to rack up costs. It would create unacceptable certainty for the parties, and particularly, unfairly, for the winning party."*

- *"By contrast, an approach that necessitates the identification of a day or days that were wasted, or a discrete motion or application or piece of paperwork that was otiose, before going the route of a discount, is simple, workable, predictable, and fair."*

- *"A fraction of a day is not a severable unit of costs because costs of court hearings are billed and adjudicated generally on the basis of a fee per day, albeit with due regard to how much time and effort is involved."*

- What I have termed "salami-slicing", Humphreys J termed "*cheese-paring*" – with, it seems, an equal lack of enthusiasm for the practice.

DECISION

Section 50B

36. In the EPA case I reject EPUKI's invocation of s. 50B on the basis that there was, within s. 50B(a)(i) no impugned "*decision or purported decision made or purportedly made*". I have upheld the EPA's position that it neither made a justiciable decision nor purported to do so. As it did not purport to make a decision it follows that there was no purported decision. That the EPA's e-mail of 18 July 2022 was alleged by EPUKI to have been a decision does not make it a purported decision. Also, its impugned e-mail was not sent "*pursuant to a statutory provision*" as s. 50B requires. It was sent in a non-binding non-statutory consultation in contemplation of an IEL application not yet then made. While I would take this view merely on the wording of s. 50B, Spencer Place seems to me to confirm it.

37. In the CRU case I reject EPUKI's invocation of s. 50B on the basis that its impugned De-Rating Decision was not made, as is required by s. 50B(a)(iii) pursuant to a statutory provision that gave effect to a provision of the IED[34] or of any other Directive listed in s. 50B(a)(iii). As I found in the main judgment, the CRU in making the impugned "De-Rating Decision" did not have, or purport to exercise, any role, function or competence pursuant to any statutory provision that gave effect to a provision of the IED. The other listed directives simply don't arise for consideration in the case and EPUKI sensibly (even though incorrectly) confined its reliance to the IED.

Public Interest Litigation

38. As to the more general discretion to depart from the default rule that cost follow the event, EPUKI emphasised the public importance of the case in seeking to clarify the law as to the imposition of ARHLs in IELs and their bearing on ARHL De-Rating in the SEM. In a very general sense, the point is correct. The subject matter of the case undoubtedly relates to matters of considerable public interest, from both the environmental point of view and as to economical securing of the State's power supply.

39. But the fact remains that, as it lost its brace of actions primarily for impugning a non-decision, EPUKI chose a very ill-judged vehicle for its alleged efforts to vindicate those public interests in the abstract. I accept the submission of the ERA and CRU that this was not a case in which EPUKI merely had a private interest. It is a case in which EPUKI's private commercial interest was its clear and predominant motive in agitating the proceedings. Its central concern was to ensure that it wasn't put at a competitive and financial disadvantage by ARHL De-Rating. I have referred to the size of the alleged losses it invoked (though in the main judgment I held that "*Even prima facie I cannot see the financial and associated information provided by EPUKI as enabling an award of damages*.") And despite its acceptance of the principle of ARHL De-Rating for purposes of the proceedings, in the main judgment I inferred from the considerable sequence of events to the autumn of 2022 (the judicial review papers were filed on 7 October 2022) that "*EPUKI saw the EPA's alleged misinterpretation of BAT 40 not a problem in itself but as a potential stick with which to ward off ARHL De-Rating to which it was explicitly opposed – for reasons as to return on investment, perfectly sensible from its point of view and very easily understood from others'*."[35] At base and from EPUKI's point of view as a trading company, these were commercial proceedings. As far as EPUKI was concerned the public interest element was incidental save as a means to their commercial end. Also, I do not see that, as required in Sweetman, EPUKI was in substance *"acting in the public interest".* I should say that my view is in no way critical of EPUKI in this regard. Its interests were legitimate: but they were commercial not public. Remembering that the general rule that costs follow the event should be departed from only when justice demands, it does not seem to me that justice demands such a departure in this case by reference to the public interests engaged.

[34] Industrial Emissions Directive – agreed by all parties to be the successor to Directive 2008/1/EC of 15 January 2008 concerning integrated pollution prevention and control ("the IPPC Directive) listed in S.50B(a)(iii)(III).
[35] §201.

40. As recorded above, a further factor in deciding whether to depart from the default rule that costs follow the event is whether the legal issues raised, rather than the subject matter of the proceedings, were of special and general public importance. The subject matter here – the operation of the SEM – is clearly of public importance. The central legal issues of public importance raised in these cases were as to the interpretation of the BAT Conclusions and as to the legal implications of the interactions of the cross-border SEM with the separate regulation of IED permitting north and south of the border. However, and while, obiter, I considered the interpretation of the BAT Conclusions, the case against the ERA was decided on fairly mundane law of judicial review as to justiciability in the context of EPUKI choosing an ill-judged vehicle for its alleged efforts to vindicate public interests. While the legal bases of my dismissal of the proceedings against EPUKI were more variegated, none seem to me to have raised issues of public importance of a degree sufficient to justify departure from the default rule as to costs.[36] The decision in **O'Brien**, cited above, assists my coming to that view: inter alia, the conclusion in that case seems to me applicable here that *"there was an insufficient degree of novelty in the legal issues raised to warrant the exercise of what is undoubtedly an exceptional jurisdiction to depart from the normal rule."*.

41. I also find that relevant features listed in **Ryanair** assist:

Simons J in Ryanair[37]	Comment
(iii) the strength of the applicant's case: proceedings might touch upon issues of general importance but the grounds of challenge pursued might be weak;	In the EPA case the grounds of challenge were weak in that no justiciable decision was impugned.
	In the case against the CRU the grounds of challenge were weak in that the central flaw in the case against EPUKI was that the CRU had no role or competence as to the IED – it was an "ARHL-taker".
	More generally, and lest there be doubt, as to the weakness of the case I respectfully adopt the view of Ní Raifeartaigh J in **O'Brien**[38]: *"Of course, the fact that the judgment was lengthy does not of itself mean anything in this context, as it may simply be an indication of the prolixity of the judge …"*
(iv) whether the subject-matter of the litigation is such that costs are likely to have a significant deterrent effect on the category of	The category of persons affected by the legal issues is the category of commercial electricity generators. I have no reason to infer that litigations costs are likely to significantly deter them from asserting their rights.

[36] Counsel for the CRU summed up the position accurately when he said: "… look at the basis upon which the Court found in our favour, they are actually not points of any particular legal complication or any particular legal consequence. So the consultation point was decided on the basis that, actually, the Applicant had a reasonable opportunity to make their case. The contention that our decision was based on the EPA approach to ARHL was premised on the simple finding that one statutory body has to accept the decisions of another statutory body within their sphere of jurisdiction. The contention that we acted in breach of the IED and the CID was decided on the same point, and there was a discrimination made which the Court decided on the legally non-controversial basis that there were objective points of difference. It may have been factually controversial, Judge, but it is not a complex legal issue."

[37] All from §15.

[38] O'Brien v. Clerk of Dáil Eireann [2017] IEHC 377 (High Court, Ní Raifeartaigh J, 2 May 2017).

persons affected by the legal issues; and	
(v) whether the issues touch on sensitive personal rights.	No sensitive personal rights were at issue.

42. Finally I find particularly applicable to the present case, the passages from Ryanair set out above[39] and commencing *"First and foremost, …."*

Veolia Order

43. As to the possibility of a Veolia Order, this seems to me to have been a short trial as to which sight must not be lost of the overall picture. As a general proposition I do not see, and no-one submitted, that to any extent the EPA and CRU failed on any time- or costs-consuming issue or argument. Nor do I see that the motion to exclude evidence was clearly decided against them, (in fact the result was nuanced) or that the trial would have been appreciably any shorter or that appreciable costs would have been saved, had they conceded those motions. As Counsel for EPUKI correctly volunteered, that motion was a "*very minor aspect of matters*". Though he submitted that there should be a "*carve-out*" in that regard, I respectfully disagree. Arguments for "carve outs" for "very minor aspects" are to be discouraged as far more troublesome and time-consuming[40] than they are worth or than justice requires. I see no basis for a Veolia order by reference either to my rejection of the CRU argument that EPUKI impugned the wrong decision: it did not affect the length of the trial or increase costs in any appreciable way.

44. What is very clear is that there would have been no need for a trial at all, or for the incurring of any costs at all, had EPUKI foreseen their fate with the same perspicacity as that which they say the EPA and CRU should have displayed and for the lack of which, EPUKI say, they should suffer in costs. Had EPUKI not prosecuted its failed proceedings the EPA and CRU would have incurred no costs at all. Nor, for that matter, would EPUKI have incurred any costs.

45. It seems to me unnecessary to treat discretely of the costs of the motion to exclude evidence, given it was incorporated in the trial. If I am wrong in that regard and given the nuanced result of the motion, I would treat its costs as costs in the cause and accordingly they would follow the event of the dismissal of the proceedings. The net result is the same: the CRU and EPA will have their costs of the motion.

[39] §20.
[40] And that even if they don't consume much time.

Result

46. In the outturn, I hold that s. 50B is inapplicable in either case and for the reasons stated above I respectfully decline to exercise in EPUKI's favour, on any of the grounds it urges, my discretion to depart from the default rule that cost should follow the event. I do not see that a Veolia Order is required.

47. Accordingly, I award the costs of each set of proceedings, to include any reserved costs and the costs of the motion to exclude evidence, against EPUKI and in favour of the CRU and the EPA.

Costs of the Costs hearing

48. As the EPA and CRU have been entirely successful as to costs, the costs of the costs hearing will follow that event and I so order. I agree with Humphreys J in Hickwell that there is no need for *"a death spiral whereby every costs application sparked a further application as to the costs of the last one."* However, against the small possibility that such an order may be unfair to EPUKI in some way which has not occurred to me, and as I am conscious of the imperative of fair procedures – especially audi alteram partem – I will direct deferral of perfection of the order for 2 weeks from the date of this judgment. That will allow EPUKI to make any brief written submissions it may wish to make, within 1 week of the date of this judgment, on the issue of the costs of the costs hearing. On receipt of any such submissions I will decide how further to proceed. Otherwise, the order will be perfected on the expiry of the two weeks.

David Holland
22 March 2023