[2020] IEHC 454

THE HIGH COURT

[2019/169JR]

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT

-AND-

THE LEGAL AID BOARD

RESPONDENT

-AND-

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTY

JUDGMENT of Ms. Justice Niamh Hyland delivered 15 September 2020

Summary

1. This is a question of statutory interpretation of considerable difficulty, not least because it involves not just one word or sentence or phrase in a statute but rather necessitates a consideration of the relevant word at issue throughout the entire statute. In short, the question is whether the reference to "person" in the Civil Legal Aid Act 1995 as amended (the "1995 Act") applies just to natural persons or to both natural and legal persons. The answer to that determines who may apply for legal advice or aid under the Act.

2. The question arises where the Legal Aid Board, who are charged with administering civil legal aid under the 1995 Act, have always taken the view that civil legal aid may only be granted (assuming the necessary conditions are met) to natural persons and that legal persons are excluded from the ambit of the Act. The applicant, a company limited by guarantee, seeks various declarations to the effect that there is an entitlement on the part of legal persons as well as natural persons to apply for legal aid, in the context of a refusal by the respondent to consider its application for legal aid on the ground that it was a company limited by guarantee and thus ineligible.

3. The primary task for any court charged with a question of statutory interpretation is to ascertain what the Oireachtas intended the words or phrase to mean, considered objectively. That necessitates both examining the intention of the Oireachtas at the time the measure was adopted, and through the lens of the present day. Based on a construction of the reference to "person" or "persons" throughout the 1995 Act, considered in the context of the Act as a whole, as well as a consideration (to a significantly lesser extent) of the Regulations adopted at the time the Act was first enacted, I have come to the conclusion that where the legislature refers to "person", it intends to refer only to natural persons and not legal persons. Naturally, in so concluding, I have considered the treatment of the term "person" in the Interpretation Act 2005 (the "2005 Act").

4. The applicant also advanced a significant argument to the effect that the Charter of Fundamental Rights, specifically Article 47 on the right to an effective remedy, and the Aarhus Convention, specifically Article 9(4) which requires that identified procedures relating to environmental law remedies not be prohibitively expensive, imposed an obligation to interpret the 1995 Act so as to include legal persons in the definition of

persons. Having joined Ireland and the Attorney General to these proceedings as notice party to ensure that the argument in respect of Aarhus be thoroughly addressed, I conclude that the right to an effective remedy under the Charter does not require the reference to person in the 1995 Act to include legal persons. In respect of the Aarhus argument, I find that, given the special costs regime applicable in Ireland to all persons litigating certain environmental matters, including the applicant, and the evidence provided by the applicant on affidavit as to its access to legal representation, it is not prohibitively expensive for it to access judicial review procedures. Therefore, in order to achieve the result sought by Article 9(4) in this respect, it is not necessary to construe the Act as covering legal, as well as natural persons, including the applicant.

Facts

5. The applicant was established to advance aims of environmental protection and is a non-profit making company. It is, in common parlance, known as an "NGO" i.e. a non-governmental organisation.

6. On 18 April 2018, the applicant wrote to the respondent seeking legal aid to bring proceedings challenging the adoption by Ireland of the National Planning Framework and National Development Plan. The judicial review proceedings were subsequently brought by the applicant. They are entitled Record No. 2018/391 *Friends of the Irish Environment v. Government of Ireland, Minister for Housing, Planning and Local Government, Ireland and the Attorney General Minister* (the "Friends litigation"). The proceedings have been heard and determined by Barr J. against the applicant ([2020] IEHC 225). The decision of the High Court has been appealed by the applicant.

7. Following an exchange of correspondence on 12th November 2018, the respondent refused the applicant's application for legal aid on the basis that as the application had been made by an organisation rather than a person, it was not possible to provide legal services to the applicant. The applicant sought to appeal and on 28 January 2019, Mr. Sugrue, Assistant Director of the respondent replied indicating that the respondent could not process an application for legal services made by a company limited by guarantee. The respondent committed to reflect further on the question. On 11 February 2019 Mr. Sugrue replied indicating the respondent was satisfied with the response in the letter of 28 January 2019.

8. The applicant now seeks to challenge that refusal on the basis that the 1995 Act, properly construed, entitles both legal and natural persons to seek legal aid. It stresses that it is not seeking an Order that legal aid be granted to it but rather that it is entitled to seek legal aid in the same way that a natural person would be so entitled.

The 1995 Act

9. The Long Title to the Act states that it is "*An Act to make provision for the grant by the State of legal aid and advice to persons of insufficient means in civil cases*". An applicant is defined as a person who makes an application for legal aid or advice or both and includes a person in respect of whom a request has been made by a coroner. There is no definition of person or persons in the definition section. The Act establishes the Legal Aid

Board and provides that its principal functions shall be to provide, within the Board's resources and subject to the Act, (a) legal aid and advice in civil cases to persons who satisfy the requirements of the Act, and (b) a family mediation service. The Act distinguishes between legal advice and legal aid, the latter being defined as representation in civil proceedings or at an inquest. To obtain legal aid, it is necessary to be granted a legal aid certificate, as such assistance necessitates a more significant financial commitment on the part of the Legal Aid Board than advice. Certain matters are identified for which legal aid or advice will not be provided. These include matters concerning which the Board considers it would be possible for the person "without hardship" to obtain the appropriate advice without obtaining legal advice under the Act (s. 26(2)(c)).

10. Section 24 and s. 29 have aptly been described by counsel for the respondent as setting the overall framework for the grant of aid and advice. Section 24 provides that a person shall not be granted legal aid or advice unless:

    (a) a reasonably prudent person, whose means were such that the cost of seeking such services at his or her own expense, while representing a financial obstacle to him or her would not be such as to impose undue hardship upon him or her, would be likely to seek such services in such circumstances at his or her own expense,

    and

    (b) a solicitor or barrister acting reasonably would be likely to advise him or her to obtain such services at his or her own expense.

11. Section 29 is concerned with financial eligibility and provides that (subject to the Act) a person shall not qualify for legal aid or advice unless (a) he or she satisfies the requirements in respect of financial eligibility, including those requirements in Regulations made under s. 37 and (b) pays to the Board a contribution towards the cost of providing the legal aid or advice. The Board may waive that contribution on the ground that a failure to do so would cause undue hardship to the applicant (s. 29(2)(b)).

12. Section 29(3) provides that an applicant's financial eligibility, and the amount of their contribution, shall be assessed by reference to the applicant's disposable income and where appropriate disposable capital. Section 29(6) provides that certain negative consequences flow insofar as the availability of legal aid or amount of contribution payable is concerned if, in the opinion of the Board, "*the behaviour of the person applying for or in receipt of legal aid or advice is such that the costs of providing the legal aid or advice concerned are likely to be increased unnecessarily"*.

13. Disposable income and capital in relation to an applicant mean his or her income or capital after making such deductions or allowances as may be specified by the Minister in Regulations made under s. 37 (s. 29(8)).

14. To obtain a legal aid certificate, in addition to meeting the requirements under s.24, s. 29 and the Regulations, an applicant must meet certain additional requirements that relate largely to the likelihood of success and the reasonableness of granting the aid (s. 28(2)). However, even if an applicant does not meet the criteria, there is a "catch all" type provision whereby a legal aid certificate may be granted to a person in certain circumstances including where the State is, by virtue of an international instrument, under an obligation to provide civil legal aid to the person, notwithstanding any other provision of the Act (s. 28(5)).

15. Section 28(9) provides that legal aid will not be granted in respect of specified "designated matters". Certain of the designated matters merit careful scrutiny in the context of the issues raised in these proceedings, in particular, sections 28(9)(a)(viii) and (ix) (discussed in greater detail below) which exempt from legal aid matters brought by an applicant as a member of a group of persons that share the applicant's interest in the matter, including where the proceedings are to establish a precedent in the determination of a point of law.

16. Equally, although legal aid is excluded in respect of "designated matters", the Act identifies certain matters where a legal aid certificate will be granted although they fall within the designated matters. Many of these can only relate to natural persons. For example, despite disputes concerning rights and interests in or over land and conveyancing being designated matters, legal aid may be granted in respect of proceedings *inter alia* under the Landlord and Tenant Acts insofar as they relate to residential property, the Family Home Protection Act 1976, the Family Law Act 1981, or disputes between spouses as to property (s. 28(9)(c)); or as to property between persons who are or had been living together as man and wife, or who have or had agreed to marry; or where the subject matter of the dispute is the applicant's home and the applicant suffers from an infirmity of body or mind, or may have been subjected to duress, undue influence or fraud and the refusal would cause hardship; or where a grant of representation is at issue and a refusal to grant legal aid would cause hardship to the applicant. Similarly, despite licensing being a designated matter, legal aid may be provided where the grant of the licence would cause hardship.

17. There are certain areas where a person will be granted legal advice notwithstanding any other provision of the Act, namely where persons are (a) complainants in a prosecution for sexual offences, including rape, aggravated sexual assault and incest, and (b) alleged victims of human trafficking (sections 26(3A) and (3B)).

18. Similarly, notwithstanding any other provision of the Act, a legal aid certificate will be granted to a complainant for the purpose of them being represented in an application in s. 4A of the Criminal Law (Rape) Act 1981 or to an accused in connection with a cross examination referred to in s. 14C of the Criminal Evidence Act 1992, or in respect of an application under s. 19A of the Criminal Evidence Act 1992 or to a party in connection with a cross examination under section 16 of the Domestic Violence Act 2018.

19. Section 33 deals with costs and entitles the Board to certain money or property. Section 33(8) provides the Board may waive such rights to the extent that the money or property consists of a house or portion thereof, a periodical or lump sum payment of maintenance, the first €2,500 of moneys payable by way of arrears of maintenance or by way of arrears or lump sum under various Acts including Social Welfare Acts, Health Acts, Unfair Dismissals Act, and Anti-Discrimination Acts. Section 33(8)(b) provides that the Board may waive any right to any money or other property if not to do so would be likely to create hardship for the recipient of legal aid or advice.

20. Section 37 provides for the making of regulations for the purpose of giving effect to the Act including in respect of the maximum amount of disposable capital and income in order that a person may be eligible to obtain legal aid or advice.

The 1996 Regulations

21. Before describing the Regulations, I should explain why I am treating them as being relevant at all to the construction of the Act. The respondent submitted that, unusually, the Regulations themselves may be used in ascertaining the intention of the Oireachtas on the basis of the maxim "*contemporanea expositio est optima et fortissima in lege*" (see Dodd, Statutory Interpretation, paragraph 13.14) which translates as "*the contemporaneous interpretation is the best and strongest in law*". Dodd observes that an aspect of this maxim is that statutory instruments issued contemporaneously with a statute may be used to show how the statute was understood by those to whom it was addressed and thus may be relied upon as evidence of the contemporaneous understanding of the statute. For this purpose, it seems to me that only the regulations made contemporaneously can be relied upon. I have therefore only considered the Civil Legal Aid Regulations 1996 (SI No. 273/1996) (the "1996 Regulations") and not the amended version in being at the date of the hearing.

22. Regulation 13 provides that, subject to sections 24, 26, 28 and 29 of the 1995 Act, a person shall not qualify for legal aid or advice unless he or she satisfies the requirements in respect of financial eligibility and pays the Board a contribution. In respect of disposable income, it is defined as income as assessed in accordance with the provisions of the Regulations less the following allowances:

- An amount per annum in respect of the applicant's spouse
- An amount per annum in respect of the applicant's dependants (being children under 18, children over 18 pursuing full-time education, dependent relatives or others residing with the applicant who have no independent means of support)
- Rent paid by the applicant
- Rates paid by the applicant
- Payments made by an unmarried applicant living with his parents towards household expenses

- Mortgage repayments
- Expenses incurred in travelling to and from work
- Hire purchase payments
- Interest paid on loans
- Social insurance contributions
- Payments made towards life or health insurance
- Income tax payments
- Payments made in respect of boards and lodgings
- Expenses incurred on child care facilities

When disposable income is being assessed, the above allowances are deducted to arrive at the amount relevant to financial eligibility.

The Interpretation Act

23. Two sections of the 2005 Act are of significance, either in whole or part, to the questions raised in these proceedings: sections 18 and 4(1). Section 18 provides in relevant part as follows:

> *The following provisions apply to the construction of an enactment:*
>
> *(a) Singular and plural: A word importing the singular shall be read as also importing the plural, and a word importing the plural shall be read as also importing the singular;*
>
> *(b) Gender.*
>
> *(i) A word importing the masculine gender shall be read as also importing the feminine gender;*
>
> *(ii) In an Act passed on or after 22 December 1993, and in a statutory instrument made after that date, a word importing the feminine gender shall be read as also importing the masculine gender;*
>
> *(c) Person:*
>
> *"Person" shall be read as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons, as well as an individual, and the subsequent use of any pronoun in place of a further use of "person" shall be read accordingly.*

24. Section 4(1) provides in relevant part:

A provision of this Act applies to an enactment except in so far as the contrary intention appears in this Act, in the enactment itself, or, where relevant, in the Act under which the enactment is made.

How to approach the interaction between the 1995 Act and the 2005 Act

25. There was a considerable debate between the parties as to the correct way to address the interaction between the two Acts. The applicant submitted that, having regard to s. 18 of the 2005 Act, one starts by treating the references in the 1995 Act to "person" as including both natural and legal persons, and only then considering whether a contrary intention appears in the Act (subject to the arguments made by the applicant in relation to the nature of the applicable test, discussed below). On the other hand, the respondent argued that it is necessary to consider the meaning of "person" in the context of the 1995 Act and only once that exercise has been carried out, to consider the relevant provisions of the Interpretation Act 1937.

26. I need not delay in resolving this debate since s. 4(1) of the 2005 makes it plain how the matter is to be approached. It provides that a provision of the Act "applies" to an enactment except insofar as the contrary intention appears in the enactment. The relevant enactment here is of course the 1995 Act. Therefore, in reading the reference to person or persons in the 1995 Act, the reader proceeds as per the approach in s. 18(c) i.e. that "person" would ordinarily import legal persons as well as natural, while considering whether a contrary intention appears in the 1995 Act. That is the exercise I must carry out in deciding the questions of interpretation raised by these proceedings.

The correct approach when applying section 4(1)

27. In deciding whether to apply the approach in s. 18(c) to the word "person" in the 1995 Act, s. 4(1) identifies that it is necessary to consider whether a contrary intention appears in the Act. Despite this clear identification of the relevant test, the applicant nonetheless argued that the meaning of "person" as including both natural and legal persons could only be displaced in three circumstances: first, as per the words of Denham J. in *Re Bovale* [2011] 3 I.R. 278, where there was "any express deviation" from the general and usual meaning of the word "person"; second, as in certain UK cases identified by it, where the statutory context identified a condition precedent that was only capable of being met by a natural person; and third, where to treat the reference to person as including both natural and legal persons would do violence to the section, as referred to in paragraph 10.59 of Dodd on Statutory Interpretation in Ireland. It was argued that the test in Ireland as to the existence of a contrary intention was in fact higher than that in the U.K.

28. *Re Bovale* was concerned with a situation where the Director of Corporate Enforcement sought disqualification orders pursuant to s. 160 of the Companies Act 1990 against the respondents. The respondents sought an order to strike out evidence where that evidence came from the reports of a firm retained by the Directors to conduct an examination of the company's books. The Companies Act permitted the Director to perform his functions through or by an officer of the Director. The question was whether a legal person, i.e. the firm that examined the company's books, was an officer of the Director. Section 3 of the 2001 Act defined officer of the Director as follows:

"officer of the Director" means—

(a) an officer of the Minister assigned to the Director,

(b) a member of An Garda Síochána seconded to the Director, or

(c) a person employed by the Minister or the Director under a contract for service or otherwise,

It was argued that the reference at (c) to a person employed by the Minister or Director under a contract for service or otherwise could only be a reference to a natural person. Denham J. rejected that argument, holding as follows at para. 20:

> *"In a specific submission on statutory interpretation, counsel for the appellants referred to s.3 of the Act of 2001 where "officer of the Director" is defined. The precise terms of the section are set out earlier in this judgment. Counsel submitted that paragraph (a) referred to "an officer" of the Minister; paragraph (b) referred to "a member of An Garda Síochána"; and paragraph (c) referred to "a person" employed by the Director, and, that this properly construed referred to an individual person only. I am satisfied that this is incorrect. While both paragraphs (a) and (b) refer to specific individual persons the term in paragraph (c) is to "a person". This term is universally recognised, as in the Act of 2005, to include both an incorporated company and an unincorporated body. I would draw no inferences from paragraphs (a) and (b) so as to limit the general meaning of the term "a person", in the absence of any express deviation from the general and usual meaning. Thus "a person" under the definition of "officer of the Director" in s.3 of the Act of 2001 may include an unincorporated body, such as PwC."*

29. The applicant relies heavily on the reference to the absence of "*any express deviation"* and asserts this means that, when one is considering the existence of a contrary intention in respect of the use of the term "person", one must see an express deviation from the universally recognised term of person being one that includes incorporated and unincorporated bodies.

30. In my view, the reference in *Bovale* to an "*express deviation*" does not bear the weight sought to be attributed to it by the applicant. First, when one looks at the entirety of the sentence relied upon by the applicant, it is unsupportive of its argument. Denham J. refers to drawing "no inferences" from paras (a) and (b) to limit the general meaning of the term "person". If the test as adopted by her required an express deviation, then there would be no need to look for inferences. In fact, correctly interpreted, the paragraph quoted above indicates that Denham J. had carried out the standard exercise of considering whether the statute displayed a contrary intention by – in that case - looking for inferences. When she saw no such contrary intention, she was observing that in the absence of any such implication, express deviation would be required i.e. that where the contrary intention does not appear, then there must be an explicit disavowal of what she described as the "universally recognised" approach. This is not a formulation of an

alternative test: rather it is an observation that where no contrary intention can be discerned, then the statute must explicitly deviate from the normal rule.

31. Second, no reference was made to s.4(1) of the 1995 Act in the judgment of Denham J. If the paragraph in question was intended to be a formulation of a specific test applicable to any reference to persons i.e. the explicit deviation test, that would have constituted a significant departure from the contrary intention test in s. 4(1). The applicant's argument, taken to its logical conclusion, would mean that the judgment in *Bovale* had implicitly resulted in an amendment to the wording of s. 4(1) such that, insofar as "person" is concerned, it should be read as referring to both a natural and legal person unless there was an express deviation in the relevant statute. That is quite a different test from that expressed in s. 4(1). That approach would require express wording excluding the wider meaning of "person", whereas the contrary intention approach necessitates a much wider and more subtle analysis i.e. divining whether, in the context of the 1995 Act, the drafters intended that an intention different to that expressed in s. 18(c) would apply.

32. In this case, were the test to be whether there was an express deviation from the reference to a person including both natural and legal persons, the answer would have to be no. At no point does the 1995 Act explicitly disavow the construction as person as including both natural and legal persons. The case would be at an end, with a result in favour of the applicant. Yet there is no reference at all to s. 4(1) by Denham J. or the contrary intention test. Further, both Hardiman J. and Fennelly J. also delivered judgments and although they agreed with the judgment of Denham J., neither averted at all to the issue of what the word "person" meant in that statutory context.

33. Third, even leaving aside s. 4(1), there is no discussion at all by Denham J. of what is the applicable test when seeking to displace the general and ordinary meaning of person; no weighing of the pros and cons of a stricter as opposed to more permissive meaning; and no identification of the reasons one might displace the contrary intention test, which derives from the common law. It is hard to believe that Denham J. intended such a radical result, displacing over one hundred years of common law and altering the meaning of a statutory provision, by the reference to an express deviation. For those reasons, I conclude that Denham J. in referring to an express deviation was simply observing that, in the absence of her finding any implication in the remainder of the section displacing the meaning of person contained in the Act, the only way that meaning could be altered would be by an express deviation.

34. Nor am I persuaded by the second limb of the applicant's approach i.e. that the definition of "person" can only exclude legal persons where the legislation in question contains a separate requirement that cannot be satisfied by a legal person - what counsel for the applicant describes as a "condition precedent". Undoubtedly, the existence of a condition precedent explains why some of the English cases opened by the applicant interpreted person as excluding "legal person" – for example, in *Law Society v. United Service Bureau Limited* [1934] 1 KB 343, where an Act governing the conduct of solicitors could only be read as referring to natural persons because only natural persons could serve

articles of clerkship or sit for the final examination, or*, Pharmaceutical Society v. London and Provincial Supply Association Ltd* (1880) 5 App Cas 857 where an Act prohibiting the sale of unregulated pharmaceutical products by members of the pharmaceutical society could only be read as applying to natural persons because only natural persons could join the pharmaceutical society and be regulated by them. However, to interpret those cases as meaning that it is only where a legal person cannot satisfy all relevant requirements in the Act that the reference to person can exclude a legal person is not warranted by the case law opened. Those cases did not consider the breadth of what may be encompassed by a "*contrary intention*" in the relevant statute.

35. No statement in any case law was identified by the applicant to the effect that the finding of a contrary intention is limited to the "condition precedent" type situation and had any such statement been identified, it could not in any case have trumped the express wording of s. 4(1). Those cases were clear cut; because a legal person could not meet the requirements imposed upon a person in the relevant Act, it was clear that Act did not intend a reference to "person" to apply to legal persons as the Act would have been inoperable in key respects were that to be the case. Those cases demonstrated the application of that uncontroversial approach: but they did not establish an immutable rule that it was only in such circumstances that legal persons could be excluded from the definition of person.

36. Finally, in respect of the applicant's third argument that a contrary intention can only be discerned where interpreting "person" to include a legal person could "do violence" to the wording of the statute, this argument derived exclusively from the summary of *State (Armstrong) v. District Justice Donnelly* [1985] I.R. 636 at paragraph 10.59 of Dodd on Statutory Interpretation in Ireland, the case itself not being opened. That summary did not refer to any discussion of s. 4(1) and nor did it suggest that only an interpretation that did violence to the language of the section could displace the usual approach of including a legal person when considering the statutory meaning of person. Rather it simply summarised a case where the court was deciding whether the word "conviction" was to be interpreted as reading "convictions". The High Court decided it could and the Supreme Court overturned that decision, deciding that when reference was made to the use of the word conviction elsewhere in the statute, it would alter and do violence to the meaning of certain sub-sections if "conviction" was to be read as "convictions". The case seems to be simply an example of a court construing a word by reference to the statute as a whole, a principle that is wholly unexceptional. Undoubtedly where an interpretation does violence to the meaning of sections of an act, a contrary intention is being displayed; but there is no basis for asserting that to demonstrate a contrary intention one must demonstrate any other approach would do violence to the wording of a statute.

Does the 1995 Act display a "contrary intention"?
Arguments of the parties

37. Applying what I have found to be the correct test in analysing the Act, i.e. the contrary intention test, the applicant argues against the proposition that any contrary intention appears in the Act for the following reasons:

- the long-established approach of interpreting person as including a legal person, not just under the current Interpretation Act of 2005 but under the previous Interpretation Act of 1937 and before that under the common law.

- The multiplicity of references to person or persons are capable of applying to both natural and legal persons in the Act, (for example s. 24(b): *Without prejudice to the other provisions of this Act a person shall not be granted legal aid or advice unless, in the opinion of the Board …. a solicitor or barrister acting reasonably would be likely to advise him or her to obtain such services at his or her own expense* could refer to a natural person or a legal person equally). It accepts that certain references to persons in the Act are capable of applying only to natural persons but asserts that no uniformity of approach is required and that the provisions granting an entitlement to persons to apply for civil legal aid (subject to the conditions of the Act) are capable of being interpreted as referring to both natural and legal persons.

- It points to the fact that the Legal Aid Board accept on affidavit that it provides legal services to state bodies from other jurisdictions (such as a local authority in England and Wales) in child abduction cases where it is required to do so under the relevant Convention.

38. The respondent argues that the following aspects of the Act and regulations made thereunder are sufficient to establish an intention by the legislature to exclude a reference to legal persons contrary to the meaning ascribed by s.18(c):

    - the Long Title to the Act can only apply to natural persons;

    - the reference to "he or she" and "him or her" throughout the Act as opposed to using one pronoun (explicitly envisaged by s. 18(c) of the Interpretation Act) or all pronouns (he, she or it) makes it clear that the Act was intended to apply only to human persons;

    - the language of the Act, in particular the references to "persons of insufficient means", "hardship to persons" "disposable income", and the "behaviour of persons" suggest the applicability of the Act only to natural persons;

    - the express entitlement to legal advice or legal aid notwithstanding the provisions of the Act in respect of certain matters that could only apply to human persons;

    - the exception to the exclusion of designated matters in respect of matters that could only apply to human persons;

    - the terms of the Regulations adopted under s. 37, which identify criteria for assessing financial eligibility that could only apply to human persons.

39. To those matters identified by both parties, I must add the provisions of s. 28(9)(a)(viii) and (ix) quoted above, which appear to me of potential significance in attempting to divine the intention of the legislature.

40. When considering the intention of the Act in this regard, it is important to distinguish between those references to persons that apply to all persons seeking to avail of legal aid i.e. those relating to financial eligibility under s. 29 and those references that are not generally applicable. Obviously, references that apply to all persons seeking to come under the Act are particularly significant since if legal persons cannot meet them, then the "condition precedent" type approach exemplified by the UK case law opened by the applicant comes into play.

41. The first matter to consider is the applicant's submissions on the long-established interpretation of the word "person" to cover both natural and legal persons both under common law and statute. There is no doubt that this is the case, as demonstrated by the English case law referred to above, and by the terms of the 1937 and 2005 Act. All that means, as identified above, is that one starts with the approach that "person" means natural or legal person unless a contrary intention is identified in the legislation.

Long Title

42. Turning to the Long Title to the Act, it provides that the Act is to make provision for the grant by the State of legal aid and advice to persons of insufficient means in civil cases. The respondent argues that "insufficient means" must refer to a natural person only. Were the term "insufficient means" to be used in isolation, it might carry an implication that sufficiency of means is to be judged by what is necessary to live i.e. basic human needs and the means required to attain those. However, the context in which the term is used here - to make provision for the grant by the State of legal aid and advice - suggests that the sufficiency at issue is in respect of the ability to pay for legal aid and advice. In other words, it indicates that the Act is designed to make provision for legal aid and advice to persons who otherwise would not be able to afford it due to the insufficiency of their means. Persons in this context could refer to either legal or natural persons and so this reference does not in my view assist in understanding the intention of the Oireachtas in respect of the meaning of "*person*".

Pronouns in the Act

43. The next aspect of the Act to be considered is the use of the pronouns "he or she" throughout the Act. The applicant dismisses the significance of the use of the gender-specific pronouns in the 1995 Act by reliance on that part of s. 18(c) of the Interpretation Act 2005 that provides that "*the subsequent use of any pronoun in place of a further use of "person" shall be read accordingly.*" However, as pointed out by the respondent, the Oireachtas has not used any single pronoun but instead has repeatedly used "*he or she*" and "*him or her*" when referring to 'persons' or 'applicants' who may be eligible for the provision of legal services from the respondent. The legislature could of course have used either "he" or "she" or indeed "it", having regard to s. 18(b) and (c) as a shorthand for "*he, she and it*". However, it did not do so. Nor, as pointed out by the respondent, did

the legislature use "*he, she or it*" or to, by or upon "*him, her or it*". Rather, again and again throughout the Act, including in the sections controlling eligibility, being s. 24 and s. 29, repeatedly employed only the gender-specific pronouns, "*he or she*" and "*him or her*". By using two out of the three available pronouns (where one would have been sufficient), but never using the pronoun relating to legal persons, this implies the exclusion of legal persons from the ambit of the Act. In other words, had the legislature used one pronoun, or all three pronouns, no implication could have been drawn that legal persons were excluded. However, the exclusive use of "he or she" where it was unnecessary to do so carries a certain implication that the Act was intended only to apply to natural persons.

44. Similarly, s.7 provides that the Minister may, by order, issue to the Legal Aid Board such general directives as he or she considers necessary. The respondent points out that the Minister can only be a natural person, and that Oireachtas has chosen to use the same formulation of gender-specific pronouns to describe the persons or applicants who are eligible to apply for legal services as it has employed to refer to the Minister. This is a slight argument but it does indicate a certain consistency in the description of gender in the Act.

Controlling parts of the Act

45. Turning now to the type of language employed in the Act, it is argued that certain of the language used is incompatible with the characteristics of a legal person. I will focus upon the use of such language in the controlling parts of the Act i.e. the parts that any person seeking legal advice or aid must comply with since, if I conclude that such language can only apply to natural persons, then it is difficult to conclude that legal persons are intended to be covered by the Act.

46. Taking an applicant's disposable income and capital first, those concepts are used throughout s. 29 as relevant to the determination of financial eligibility. The scheme of the Act is that the Minister prescribes a certain level of disposable income and disposable capital under the regulations and if an applicant's income or capital exceeds those levels, then the applicant shall not be eligible to obtain legal aid or advice. Further the level of disposable income and capital shall also be relevant to the setting of the contribution to be paid by an applicant. Disposable capital and income are arrived at by identifying the amount of capital and/or income after making such deductions and allowances as may be specified by the Minister in regulations made under s. 37(see s. 29(8)).

47. Even before considering the deductions and allowances identified by the Regulations, the notion of a legal person having a "disposable income" is an uneasy one. The concept of disposable income is one that, in its ordinary and natural meaning, is associated with the income individual people have available to them after meeting their basic human needs of food, accommodation, care of dependants, transport, taxes, insurance and so on. All humans, irrespective of their situation in life, have basic needs that require to be met; and the deduction made by the Legal Aid Board is intended to allow for that and to permit an analysis of their available income, being their disposable income, to be made only after that deduction. It is much more difficult to apply this term to a legal person, since its

"disposable" income will depend entirely on the nature of the legal entity and its activities. For all those reasons, the use of the concept of disposable income is in my view incompatible with the notion of a legal person.

48. In respect of the Regulations, the list of allowances (set out above) that may be deducted to arrive at the amount relevant to financial eligibility are almost exclusively relevant to natural persons. The deductions convey the picture of a person whose means are being assessed by looking at their gross income, then looking at what they need to live *qua* human person and then applying a deduction in respect of those expenses. It is accepted that people have to have a place to live, may have to support their spouse, may have to support their children (including past the age of 18 depending on the circumstances of their children), may have to support other people, may have to pay to have their children cared for, should take out life and health insurance, have to pay tax and social insurance, incur expense in going to work, may take out a loan and have to pay interest or may buy goods by hire purchase and so on. It is accepted that because humans need to engage in those activities, it is fair to consider how much money they can spend on legal services after deducting the expenses associated with the above activities.

49. Were legal persons to be covered by the legal aid scheme, one would expect to see a necessarily different analysis of their income and relevant deductions. Entirely different considerations would apply given that legal persons do not have spouses, children, other dependants, jobs and so on. One would expect to see concepts such as profit and loss, capital expenditure and operating expenditure, creditors and debtors factored into the analysis of whether legal advice/aid should be given to that legal entity. The framework relevant to deductions for natural persons is wholly inappropriate for legal persons. Considering same, it is difficult to escape the conclusion that the understanding of the relevant Minister, Mervyn Taylor, in enacting the Regulations was that the Act was intended to provide for legal advice/aid to natural persons only, and that the financial thresholds were designed exclusively with natural persons in mind.

"*Undue Hardship*"

50. The next word that was identified by the applicant as implicitly excluding legal persons from the ambit of the 1995 Act was hardship. Various dictionary definitions of the word define it as "severe suffering or privation" or a condition that causes difficulty or suffering. The natural and ordinary meaning of the word suggests suffering on the part of a human persons although it does not seem to me that it entirely excludes suffering on the part of a legal person. The word "hardship" appears eight times in the Act. For example, at s. 24(a), it is provided that a person shall not be granted legal aid unless, in similar circumstances, a reasonably prudent person, whose means were such that obtaining services at their own expense would represent a financial obstacle but would not impose undue hardship on that person, would be likely to seek such services at their own expense. The intention of that sentence appears to be to ensure that aid or advice is only given to people for matters which, if they could afford it, they would pay for themselves,

presumably with a view to testing the significance of the matters in question to the persons concerned.

51. However, the legislature does not require that they must be so committed to the necessity for legal advice/aid that they would suffer "undue" hardship to obtain it. That natural sense of that sentence is that it is intended to apply to human persons i.e. that the legislature recognises that it would be disproportionate to apply a test that would impose undue hardship. The reference to "undue" carries with it an implication of core human needs that must be met and a reluctance to impose financial hardship on persons that would impact upon their ability to meet their basic needs. On the other hand, it is difficult to understand what "undue hardship" would be in the context of a legal person, particularly bearing in mind the duties of directors not to continue trading where they know their actions would cause loss to creditors or would allow the company to incur debt when they know it is unlikely the debt will be paid as it falls due. In this context the term "undue hardship" is strongly suggestive of hardship caused to human persons rather than legal persons.

"Behaviour"

52. Next, it was suggested by the respondent that the reference to the "behaviour" of the person at s. 29(6) as a basis for refusing to provide aid or advice or increasing the contribution of the person towards such aid or advice, points towards an interpretation of person as excluding legal persons. However, in my view, both natural and legal persons can exhibit either positive or negative behaviour; the term behaviour is not exclusively or largely associated with natural persons. Therefore, the use of the term "behaviour" does not add to the argument that legal persons are excluded from the scope of the Act.

Sections 28(9)(a)(viii) and (ix)

53. Although not focused upon to any great extent by the parties, sections 28(9)(a)(viii) and (ix) of the 1995 Act are in my view very relevant to the construction of the references to 'persons' in the 1995 Act. These sections exclude from legal aid:

> *(viii) a matter the proceedings as respects which, in the opinion of the Board, are brought or to be brought by the applicant as a member of and by arrangement with a group of persons for the purpose of establishing a precedent in the determination of a point of law, or any other question, in which the members of the group have an interest;*
>
> *(ix) any other matter as respects which the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned.*

54. The intention appears to be that proceedings should not be funded where they are intended to bring about benefit to a group of persons, and the applicant is bringing the proceedings in his or her capacity as a member of that group. In *Conway v. Ireland*

[2017] 1 I.R. 53 Clarke J. suggests those sections demonstrated an understanding that a legal person such as an NGO could not qualify for legal aid under the 1995 Act:

> *"[38] Furthermore, there are potentially difficult issues which would arise were it to be suggested that any obligation to provide legal aid in cases in which the Aarhus Convention and/or the Public Participation Directives were engaged could be met within the context of the Irish civil legal aid scheme as presently constituted. Although not relevant to this case, given that Mr. Conway has brought these proceedings in his own name and on his own behalf, the fact that the scheme seems to exclude representative bodies might well be a problem given the status given to non-governmental organisations in the Convention and the Directives."*

55. The purpose of these sections is instructive. They are clearly intended to exclude the provision of legal aid in respect of litigation designed to benefit the members of a group. Yet, if "person" included legal person, their wording would arguably not exclude a legal person such as the applicant from issuing proceedings designed to benefit its members, including proceedings brought to determine a point of law with precedential value. This is because the relevant sections exclude applicants who are "members" of a group. So Mr. David Healy, who swore the grounding affidavit on behalf of the applicant, and is a member of the applicant, could not have got get legal aid to bring the Friends litigation. But the applicant, not being a member of a group and arguably not *"acting on behalf, of a group of persons having the same interest in the proceedings concerned*" (since a company does not necessarily act on behalf of its members) might not be covered by the sections. This would make a nonsense of the sections, since their very purpose is to exclude the very type of litigation that NGO's wish to bring. This suggests to me that the legislature did not intend the reference to "applicant" or "person" to include legal persons. If the legislature had assumed such legal persons were included in the definition of "person", they would presumably have included a provision in the 1995 Act excluding from legal aid litigation brought by a person aimed at securing a benefit to its members or shareholders. Accordingly, I find those sections suggestive of an interpretation of the Act as applying only to natural persons.

Lack of reference to situation of legal persons

56. Finally, had it been intended that the Act cover legal persons, it might have been expected that it would address its mind to certain situations that would only be applicable to legal persons, bearing in mind the very different type of considerations that will inevitably apply to the grant of legal aid or advice to legal persons as opposed to natural persons. But despite the detail of the Act when it addresses itself to the nuances of the types of situations where legal aid/advice will or will not be available to natural persons, there are no equivalent provisions applicable only to legal persons. That omission appears significant, though by no means determinative, to me.

Provision of services to state bodies by Legal Aid Board

57. In support of its interpretation of the 1995 Act, the applicant relies upon the fact that the Legal Aid Board, exceptionally, provides legal services to state bodies from other

jurisdictions in child abduction cases where it is required to do so under the relevant Convention. The applicant did not point to any provision of the Act where there is an explicit recognition of the entitlement of such legal persons to access legal services. Accordingly, I do not consider that the practice of the Legal Aid Board in this respect, any more than its usual practice of excluding legal persons, is relevant to the question of what "person", properly construed, means in the Act.

Legislative history of the 2005 Act

58. Case law makes it clear that it is not permitted to look at the parliamentary history of an Act, i.e. the progress of the Bill through the Oireachtas including its wording at different stages, the Dáil debates, any amendments suggested by Seanad and so on. It is equally clear, as noted by McKechnie J. in *DPP v. Brown* [2018] IESC 67 that, on the other hand, the legislative history of an Act may be considered by a court where it is seeking to ascertain the intention of the legislature.

59. In this case, neither party pointed to the legislative history of the Act in the material placed before the Court but following discussion of the matter at the hearing, helpfully provided the Pringle Report on the provision of legal aid of December 1977, and the Non-Statutory Scheme for Legal Aid of 1980 that preceded the 1995 Act. The Pringle Report, which recommended the establishment of a system of civil legal aid to natural persons, explicitly excluded companies in its recommendations. Following that Report, the judgment of the European Court of Human Rights in the case of *Airey v. Ireland* [1979] 2 E.H.R.R. 305 was delivered.

60. That decision found that, in failing to have any system of civil legal aid for a plaintiff who was seeking a legal separation in family law proceedings, Ireland was in breach of the ECHR, specifically Article 6(1), the first sentence of which provides: *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*. The Court did not find a system of legal aid was required: rather it found that provision should be made for same where the absence of aid would make it impossible to ensure an effective remedy. Following the decision in Airey, the Non-Statutory Scheme was established, which defined "person" as a natural person.

61. The applicant pointed to the fact that the 1995 Act, contrary to the recommendations in the Pringle Report and the Non-Statutory Scheme, did not exclude legal persons from its ambit. In response, the respondent noted that there are certain places in the 1995 Act where person is used not to denote a person receiving legal aid/advice but for quite different uses and that in those situations it might be appropriate that person would also refer to legal persons.

62. It is useful to recall that the sole purpose of the analysis of the Act, the 1996 Regulations and its legislative history is to decide whether a contrary intention has been indicated by the Oireachtas in the context of s. 18(c) of the 2005 Act. Although an explicit exclusion of legal persons from the ambit of the Act would have put the matter beyond doubt, the

failure to do so even where the Non-Statutory Scheme had explicit wording to that effect does not confirm that legal persons are included. The context in which the non-statutory scheme was adopted, i.e. the decision in *Airey*, is potentially of relevance, since the human rights breach identified by the ECtHR was the failure to afford natural persons civil legal aid. No breach was identified because of the lack of provision of civil legal aid for legal persons. Seen in that light, the adoption of the 1995 Act was at least partly to render Ireland compliant with its obligations under the ECHR by providing civil legal aid to natural persons to vindicate their human rights. That is suggestive of an intention to provide civil legal aid to natural persons only.

Conclusion on statutory interpretation

63. In summary, having regard to my analysis of the Act and the Regulations above, I am of the view that it displays the requisite contrary intention, i.e. an intention to displace the normal rule of construction that "person" includes both natural and legal persons. Accordingly, I conclude the Act was not intended to afford civil legal aid or advice, subject to the conditions of the Act, to legal persons.

Lack of an appeal

64. It was contended by the applicant in its written legal submissions that a separate ground for quashing the decision of the respondent was that there had been a failure to afford the applicant an appeal against the respondent's decision, as required by the Regulations as amended. The factual chronology set out in Section II of the respondent's Statement of Opposition and in the Verifying Affidavit of Thomas O'Mahony sworn 18 December 2019 makes it clear that the applicant's application was the subject of a review by Mr John Sugrue, Assistant Director of the respondent, as required by the Regulations. On receipt of the outcome of the review, the applicant did not seek to appeal same, quite understandably given that the decision was that the entire ambit of the Act did not apply to the applicant as a legal person whereas the function of the appeal committee envisaged under Article 12 of the Civil Legal Aid Regulations is to consider an appeal in respect of the merits of a decision on a valid application for legal services made by eligible persons. Given that I have found that the applicant was not an eligible person being a company limited by guarantee and not a natural person, it had no entitlement to an appeal under the Regulations. I therefore reject the argument that the lack of an appeal is a basis for quashing the decision of the respondent.

Section 28(9)(a)(ix)

65. Separately, the applicant argues that the respondent's decision ought to be quashed on the standalone basis that the respondent erred in referring to and relying on s. 28(9)(a)(ix) of the 1995 Act in its decision. This provision has been discussed above but in short provides that legal aid shall not be granted where the application is made by a person who is a member of a group in any matter "*as respects which the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned*". The respondent pleads that this was not a standalone reason for its decision (see paragraphs 11 and 17 of the Statement of Opposition and paragraph 17 of the Verifying Affidavit of Mr. O'Mahony). I agree. A consideration of the correspondence makes it clear that,

although s. 28(9)(a)(ix) was referred to on various occasions, the clear basis for the decision to refuse to consider the applicant's application was because it was a legal person and as such, ineligible for legal advice or assistance and not because of the application of the provisions of s. 28(9)(a)(ix).

Interpretative obligation – Charter of Fundamental Rights

66. The applicant has what is describes as a fall back argument, based on what it says is an obligation of the Court to interpret the 1995 Act in accordance with the Charter of Fundamental Rights so as to ensure the availability of civil legal aid for legal persons where it was within the scope of application of EU law (as here since the litigation for which it sought legal aid was based on an alleged breach of EU environmental law). It argues that if there is a doubt about the meaning of the word person in the Act, it should be interpreted in such a way as to advance the requirements of the Charter, in this case the requirement that "*legal aid must be in principle be available to legal persons where those persons are entitled to rely on the provisions of the EU Charter of Fundamental Rights*" (paragraph 51 of the Applicant's legal submissions). The applicant describes this as a "narrow" category of person. Yet there are various provisions of the Charter that legal persons may wish to avail of, including for example the right to protection of data, the environment, and the right to property, suggesting that the category is not necessarily all that narrow. However, the core point is not the applicability of the Charter since that is not in doubt here, but rather what the Charter requires in terms of civil legal aid for legal persons. The applicant invokes Case C-279/09 *DEB* ECLI:EU:C:2010:811 which discusses whether Article 47 of the Charter (itself inspired by Article 6(1) of the ECHR) requires the provision of civil legal aid to legal persons.

67. The interpretative obligation (also known as the doctrine of harmonious interpretation invoked by the applicant was described in the recent decision of Case C-122/17 *Smith v. Meade* ECLI:EU:C:2018:631 as placing an obligation on the national court to consider the"*whole body of rules of law and to apply methods of interpretation that are recognised by those rules in order to interpret it, 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"* (paragraph 39). It is well established in EU law that the interpretative obligation does not apply if such an interpretation would be *contra legem*. Because I conclude below that there is no obligation under EU law or under the Aarhus Convention to interpret the 1995 Act as including legal persons, I do not need to consider the question as to whether, if such an obligation existed, such an interpretation would be *contra legem.*

68. For the applicant to establish the applicability of the interpretative obligation in this case, it must establish that the Charter requires that legal aid must be in principle be available to legal persons coming within the scope of the Charter. In support of that wide-ranging proposition, it relies upon. But in my view, *DEB* is not authority for the principle contended for.

69. Before considering *DEB*, it is worth recalling the provisions of Article 47. Article 47 provides that those whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy, are entitled to a fair and public hearing

within a reasonable time by an independent and impartial tribunal previously established by law and shall have the possibility of being advised, defended and represented. Article 47(3) specifies that legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

70. Article 47 is inspired in significant part by Article 6(1) of the ECHR. "Explanations relating to the Charter of Fundamental Rights" (2007/C 303/02) were published in the Official Journal, having been prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights. The preamble to their publication in the Official Journal notes that they do not have the status of law but are a valuable tool of interpretation intended to clarify the provisions of the Charter. The explanation in respect of the third paragraph of Article 47(3) of the Charter notes as follows: *"With regard to the third paragraph, it should be noted that in accordance with the case-law of the European Court of Human Rights, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR judgment of 9 October 1979, Airey, Series A, Volume 32, p. 11)*. A similar approach has been taken to the interpretation of Article 47 by the CJEU.

71. *DEB* was a reference from Germany where a company had been refused legal aid. That refusal had an additional consequence that, without legal aid, the company would also have to pay a very substantial administrative charge as the price of issuing the proceedings. Under German law, legal persons were entitled to legal aid but subject to conditions that DEB had not met. Because the national court was concerned that the principle of effectiveness of EU law might be undermined by the refusal, a reference was made asking whether the national rule was compatible with EU law. Advocate General Mengozzi carried out an extensive review of legal aid for legal persons, noting that international practice did not require States to grant legal aid to legal persons; that the ECHR as interpreted by the ECtHR did not contain any provision expressly requiring the States parties to the Convention to establish a legal aid system for the unconditional benefit of natural and legal persons; that the laws of many States make no provision for legal persons to be eligible for civil legal aid, whether profit making or not; that under the Rules of Procedure of the Courts of the European Union, legal aid for persons before the Civil Service Tribunal or the General Court is reserved for natural persons and in practice legal aid is only given to natural persons by the Court of Justice; and that, considering a sample of national practices across the EU, it is clear that there is an absence of a truly common principle in respect of legal aid.

72. In answering the national court's questions, the CJEU noted that the principle of effective judicial protection as enshrined in Article 47 must be interpreted as meaning it is not impossible for legal persons to rely on that principle. But in the remainder of its answer, it returned to the approach it had adopted in previous case law relating to the entitlement of natural persons to legal aid – that it must be ascertained by the national court if the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; if the conditions pursue a legitimate aim; and if there is a reasonable relationship of proportionality between the means employed

and the legitimate aim sought to be achieved. It confirmed that insofar as legal persons were concerned, the national court may take into account matters such as the form of the legal person; whether it is profit-making or not; the financial capacity of the partners or shareholders; and the ability of those partners to obtain the sums necessary to institute legal proceedings.

73. The essence of the CJEU's approach in *DEB* is, as in *Airey*, not that there is an entitlement to obtain legal aid, which may be conditioned; but rather that there is an entitlement to an effective remedy, and if the conditions of legal aid limit the right of access to the court such that the core of that entitlement is restricted, then those conditions might be incompatible with the right to legal aid.

74. This is a very different principle to that advanced by the applicant; the decision in *DEB* makes it very clear that, contrary to the applicant's submission, there is no requirement to the effect that legal aid must, in principle, be available to persons relying upon the Charter. Any entitlement to legal aid is therefore highly fact dependant and no general entitlement to same exists. Here, the case was not made that in the Friends litigation a lack of civil legal aid made it impossible for the applicant to exercise its right of access to the court or that it was denied an effective remedy.

75. Therefore, the conditions required for an entitlement to civil legal aid have not been met; and accordingly, there is no identified principle of EU law that affects the interpretation of the 1995 Act. That disposes of the applicant's argument based on the interpretative principle insofar as the Charter is concerned.

Interpretative obligation – Aarhus Convention

76. An argument based on the interpretative principle was also made in respect of Articles 9(4) and (5) of the Aarhus Convention. The applicant contended in its written submissions that both Article 9(4) and (5) required the interpretation of the 1995 Act so as to include legal persons in the definition of persons. However, at hearing it was accepted that Article 9(5) could not impose such an obligation, since at its highest it only obliged signatory states to "consider" the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice. It was also accepted that Article 9(4) was not directly effective but it was contended that it could impose an interpretative obligation. Again, it was accepted that any such obligation could not impose an obligation to interpret the legislation *contra legem*.

77. The respondent argued that Article 9 had no bearing on the proper construction of the 1995 Act given that Ireland had enacted special costs rules for environmental litigation to give effect to the requirements of Article 9 of the Aarhus Convention, namely section 50B of the Planning and Development Act 2000 as amended and Part 2 of the Environment (Miscellaneous) Provisions Act 2011 as amended (hereinafter referred to as the "special costs rules"), such that there are no risks of a costs order against the applicant but that where it succeeds it will get a costs order in full. Reference was made to the decision in *Kimpton Vale Developments Ltd v. Bord Pleanála* [2013] 2 I.R. 767 where Hogan J. observed that those enactments sought to approximate national law with the

requirements of Article 9(4) of the Aarhus Convention. The respondent further made the point that the State had not been joined as a party to the proceedings and the adequacy of the special costs rules or any other measure to ensure judicial procedures are not prohibitively expensive was not a matter within the knowledge of the respondent.

78. In those circumstances, it seemed appropriate to obtain the views of Ireland and the Attorney General as to how the requirements of Article 9(4) had been met by Ireland. Accordingly, I gave a decision on 9 July 2020 *(Friends of the Irish Environment CLG v. the Legal Aid Board* [2020] IEHC 347) requesting Ireland and the Attorney General to become a notice party so that submissions could be made on the following question:

> *Is there an obligation under EU law upon the High Court to interpret the 1995 Act so that the references to "person" therein include legal persons, in order to achieve the objective laid down in Article 9(4) of the Aarhus Convention, namely that the judicial procedures referred to in article 9 should not be prohibitively expensive?*

79. Written submissions were provided on this point by the applicant and by Ireland and the Attorney General. On 30 July 2020 an oral hearing took place in respect of this question, with the Attorney General and the applicant making submissions on the point. The respondent, in keeping with their position that this was not a matter within their knowledge, attended but did not make submissions.

Arguments of the parties- Applicant

80. The applicant asserts that the reference to "not prohibitively expensive" means that the 1995 Act must be interpreted to include legal persons as this would advance the aim of ensuring that proceedings were not prohibitively expensive. It relied upon Case C-470/16 *North East Pylon Pressure Campaign Ltd*. ECLI:EU:C:2018:185 where the CJEU held as follows:

> *"Consequently, where the application of national environmental law — particularly in the implementation of a project of common interest, within the meaning of Regulation No 347/2013 — is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive".*

81. On that basis the applicant argued that, insofar as a right to legal aid was an aspect of the not prohibitively expensive requirement, the court was obliged to give an interpretation of the 1995 Act that was, to the fullest extent possible, consistent with this approach. The applicant criticises the scheme applicable in Ireland in that, although the litigant is not at risk of paying the other side's costs save in exceptional circumstances, the special costs regime makes no provision for an applicant's own costs. The applicant submits that the Court must consider both the applicant's and the respondent's costs. Therefore a legal aid regime is an important factor in ensuring that such litigation is not prohibitively expensive.

82. The applicant relies on the observations of Kokott AG in Case C-260/11 *Edwards* ECLI:EU:C:2012:645 at para. 38:

> *"the Convention does not absolutely require, under Article 9(5), the introduction of assistance mechanisms such as legal aid, but only consideration of the 'establishment of appropriate assistance mechanisms'. However legal aid makes it possible to prevent risks in terms of prohibitive costs in certain cases. Insofar as the enforcement of provisions of EU law is concerned, legal aid may even be absolutely necessary if the risks in terms of costs, which are acceptable in principle, constitute an insurmountable obstacle to access to justice on account of the limited capacity to pay of the person concerned".*

83. It further relied upon the decision of the Supreme Court in *Conway* where Clarke J. observed that it would not be reasonable for a party to be expected to be able to present a case themselves without some form of legal assistance.

84. Heavy reliance was also placed upon a decision of the Aarhus Convention Compliance Committee – *Findings and recommendations with regard to communication ACCC/C/2009/36 concerning compliance by Spain* of 18 June 2010 which found that the exclusion of small NGOs from the Spanish legal aid system constituted, *inter alia*, a failure to provide for fair and equitable remedies as required by Article 9(4).

85. Evidentially, the applicant submitted that it had established it was not in a position to pay solicitors and counsel in the Friends litigation and the fact that it was able to bring the case in the High Court and lodge an appeal did not mean the proceedings were not prohibitively expensive for the purposes of the Aarhus Convention. It cited the dicta in Edwards in this regard where the Court noted at paragraph 47 that the fact that a claimant has not been deterred in practice from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him. Moreover, the applicant submitted that the facts of any given case, including this one, should not affect the interpretative weight to be given to Article 9(4). Rather the court should ask which interpretation of national procedural law is consistent with Article 9(4). As legal aid schemes are important parts of ensuring that environmental litigation is not prohibitively expensive, an interpretation allowing the applicant to seek legal aid is clearly the interpretation consistent with Article 9(4).

Arguments of the parties - Notice Party

86. The notice party supported the position of the respondent in the correct application of the Interpretation Act 2005 and asserted that there is no obligation under EU law to interpret the 1995 Act so that the references to "person" include legal persons in order to achieve the objective in Article 9(4) of the Aarhus Convention. The notice party argues that an interpretive obligation could only arise if, in its absence, the proceedings would be prohibitively expensive. This does not arise here.

87. The notice party submits that Article 9(4) of the Aarhus Convention provides that all three procedures identified in Articles 9(1) to (3) must meet minimum standards, one of which is that they ought not be prohibitively expensive. It also submits that there is no specific result required of a Member State under Article 9(5), rather it is a direction to "consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice". That there is no definition of "*not prohibitively expensive*", shows, according to the notice party, that the Convention has provided considerable leeway to Member States in how to devise ways to meet these requirements. It relies upon Article 3(8) of Aarhus which prohibits persons exercising their rights in conformity with the Convention from being harassed but notes that this provision shall not affect the powers of national courts from awarding reasonable costs in judicial proceedings, noting that this acknowledges that the Convention does not require an applicant to be freed of the burden of paying for legal costs. It refers to the Aarhus Convention Implementation Guide, which notes the Convention does not define the means for keeping the costs at an acceptable level but imposes an obligation to ensure proceedings are not prohibitively expensive i.e. it "*sets an obligation of result, which allows the Parties great discretion in how to proceed, but limited discretion in what to achieve*". The notice party focuses on the lack of any specific method of achieving non-prohibitively expensive access to justice.

88. The notice party reiterated that Articles 9(4) or Article 9(5) were not directly effective and cited Conway in which Clarke J. in *obiter* comments confirmed that as a matter of Irish constitutional law, the Aarhus Convention cannot, save to the extent that it may be "determined by the Oireachtas", become part of Irish domestic law.

89. The notice party argues that it is evident from the principles outlined in *Smith v. Meade* that the the interpretive obligation applies only to ensure that the result sought by the relevant provision is achieved and where that objective would not otherwise be achieved. Article 9(4) does not mean that national courts have a general obligation to adopt an interpretation of the law that makes proceedings less expensive: it is only if the proceedings would otherwise be prohibitively expensive that the obligation is triggered. There is no CJEU decision in which the Court has directed a specific mechanism for ensuring that national procedures are not prohibitively expensive. *Conway* is relied upon as authority for the proposition that the question of the possible establishment and implementation of a legal aid scheme for environmental matters, whether for natural or legal persons, is one for the Oireachtas to determine.

90. The notice party contends that Ireland has already fulfilled its obligations under Article 9(4) of the Aarhus Convention by its enactment of "special costs rules", whereby the litigant is not at risk of paying the other side's costs save in exceptional circumstances. This, combined with the fact that many environmental law cases are taken on a "no foal, no fee" or *pro bono* basis, means that the State has met its obligations under Article 9(4) and therefore an interpretive obligation in respect of the 1995 Act does not arise. Environmental litigation has been rendered largely risk-free for the applicant. In addition

to these special costs rules, litigants also have an ability to negotiate legal fees with their legal teams.

91. The notice party asserted that the plaintiff had not submitted any evidence that the Court could use to make an assessment that unless it imposes the applicant's desired interpretation on the 1995 Act, the proceedings are, have been, or will be, prohibitively expensive. Thus, the applicant has failed to establish an essential criterion for the interpretive obligation to arise. The only evidence exhibited is the Directors' Report and Unaudited Financial Statements for the year ended 31 August 2017, sent to the respondent in support of the applicant's application for legal aid. However, there is no affidavit evidence which demonstrates the prohibitive expense of the proceedings. There is no evidence of any costs which the applicant may have borne.

92. In response to the notice party's criticism of the absence of evidence as to the prohibitive costs of the proceedings, the applicant counters that proceedings such as those here are self-evidently prohibitively expensive for many applicants and that the willingness of lawyers to act can only be one factor in the assessment of such a system.

Decision

93. Article 9(4) provides inter alia as follows:

> *… the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.*

94. The procedures referred to are access to a review procedure concerning a request for information; that members of the public having a sufficient interest or maintaining impairment of a right can challenge a decision on information, or other decisions contravening national law relating to the environment, and that non-governmental organisations shall be deemed to have a sufficient interest or impairment subject to certain conditions.

95. The following observations may be made in respect of Article 9(4).

96. First, in Case C-543/14 Ordre des Barreaux Francophones ECLI:EU:C:2016:605, the rationale for holding it not directly effective is set out, being that the provision does not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals (paragraph 52).

97. Second, there is clearly no obligation under Article 9(4) to establish a system of legal aid. The decision of the Aarhus Compliance Committee relied upon by the applicant (which is of course not a decision by a court and is not binding on this court) was not that legal aid was required across the board, but rather that where legal aid was made available to NGOs, a decision to exclude certain types of NGOs from that scheme demonstrated that Spain had not taken into consideration the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice, thus resulting in a failure to provide for fair and equitable remedies under Article 9(4). Notably, the

Committee did not hold that the failure to provide legal aid resulted in those procedures being prohibitively expensive. At its highest the decision is an acknowledgment that legal aid may reduce or remove financial barriers to access to justice

98. Third, the obligation is to ensure that the various procedures identified in the Aarhus Convention must provide adequate and effective remedies and, *inter alia,* must not be prohibitively expensive. Parties to the Convention have an obligation to ensure that result but have wide discretion as to the means by which they achieve that.

99. Fourth, as identified in the decision of the Court of Justice in *Edwards*, the requirement that judicial review proceedings not be prohibitively expensive means that the persons covered by those provisions should not be prevented from seeking a review by the courts by reason of the financial burden that might arise as a result (paragraph 35). The fact that a claimant has not been deterred from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him or her (paragraph 47). I place particular emphasis on the use of the term "prevented": in other words, it is not enough if a party is discouraged from litigating or litigates on unequal terms. Rather a party must be prevented from litigating.

100. Turning to the requirements of the interpretative obligation, *Smith v. Meade* describes the nature of that obligation as an obligation on the national court to consider the "*whole body of rules of law and to apply methods of interpretation that are recognised by those rules in order to interpret it, 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*" (paragraph 39).

101. Here the result sought by the Convention is to ensure that the procedures identified must not be prohibitively expensive – an obligation of result. To decide whether there is an obligation to interpret the Legal Aid Act to include legal persons, I must decide whether in order to achieve the result sought by Article 9(4), it is necessary to construe the Act in this way (in circumstances where otherwise I would not so construe the Act). That in turn requires me to consider whether Ireland has already ensured that the procedures identified, in this case judicial review, are not prohibitively expensive.

102. A question arises as to whether I should do that in the abstract or with reference to this particular applicant and the case out of which these proceedings arose. I am urged to approach the matter in the abstract by the applicant. However, even a brief consideration of the law on standing makes it clear that in our legal system, cases must be decided on the particular circumstances of the parties, rather than on an abstract and generalised basis. I will therefore approach the matter by considering whether it is necessary to construe the Act to include the applicant in order to ensure that access to judicial review procedures was or is not prohibitively expensive for it: in other words, would access to judicial review be prohibitively expensive for this applicant were it to be excluded from the legal aid scheme?

103. This approach appears to me to be in accordance with the approach in *Edwards* where the Court noted that the assessment of the national court cannot be based on the estimated financial resources of an average applicant since that may have little connection with the situation of the person concerned.

104. No evidence is needed in relation to the existence of the special costs rules as these are legislative in nature. As noted by Hogan J. in *Kimpton Vale*, the long title of the 2011 Act notes that the Oireachtas sought to approximate our national law with the requirements of Article 9(4) of Aarhus. Those rules provide protection from adverse costs orders irrespective of the outcome of litigation apart from in exceptional circumstances. This protection is unusual in the Irish legal system where costs usually follow the event. It means that applicants coming within the special costs rules are provided with an unusual degree of comfort as they can litigate without the normal risks of cost orders being made against them. This has the result that the existence of the applicant is not imperilled by the prospect of adverse costs orders being made against them which it cannot fulfil, leading to its ultimate potential dissolution.

105. That addresses the risk of costs orders being made against an applicant. It does not address the other side of the coin i.e. the costs associated with paying one's own legal team. In this respect, the evidence before the Court is of importance. It is averred at paragraph 4 of the Affidavit of David Healy of 22 March 2019, member of the applicant as follows:

> *The Applicant has no means of income apart from small grants and some voluntary donations and, as disclosed in the exhibited documents, has minimal income and assets. It has no capacity to pay solicitors and counsel acting on its behalf and finds itself unable at all, unable effectively or unable to progress its proceedings with any equality of arms between it and the responding parties. I say this is particularly the case in relation to Friends of the Irish Environment v. Government of Ireland 2018/391JR … I say that the Applicant is placed at a disadvantage in relying upon an unpaid and undermanned legal team in those proceedings in circumstances where the responding parties have access to all of the resources of the CSSO, multiple government departments (and expert advisors) and whichever and however many counsel it wishes to instruct.*

106. Despite the fact that it criticises the notice party for putting no evidence before the court supporting the submission that many environmental law cases are taken on a "no foal no fee" basis, it seems to me that where the applicant frankly avers that it cannot pay solicitors and counsel acting on its behalf and where it avers that in this case its legal team were not being paid, I must conclude that in the Friends litigation, where it had the benefit of solicitors, junior counsel and senior counsel, the applicant was able to avail of legal services, whether on a pro bono, or "no foal no fee" or some other basis. It is notable that no averment is included to the effect that the applicant cannot access solicitors and counsel or has great difficulty doing so, although it does refer to an "undermanned" team.

107. The test in Article 9(4) is whether the procedures are "prohibitively expensive" i.e. whether applicants are prevented from availing of them because of the cost of same. The test is not whether applicants can avail of the procedures on precisely the same basis as respondents, with full equality of arms.

108. Here, where the applicant can avail of judicial review procedures without fear of costs orders against it and where the applicant was in a position to obtain a legal team willing to act for it, it does not seem to me that the judicial review procedure in place in Ireland is so prohibitively expensive that the applicant is prevented from accessing it.

109. In this respect the applicant's involvement in both the substantive proceedings and proceedings in the past three years is of relevance. I am acutely conscious of the warning in *Edwards* that the mere fact of the claimant asserting his or her claim is not, of itself, sufficient to demonstrate that the proceedings are not prohibitively expensive. Nonetheless the reference to "*of itself*" does permit some limited reference to be made to the activities of a party. Thus, in testing whether the system put in place by a Member State is preventing that applicant from litigating due to prohibitive expense, the activities of that applicant are of a certain relevance. Here, where Ireland has a special costs regime and the evidence demonstrates the applicant is managing to obtain legal services, the fact that the applicant has litigated a complex matter over a number of days and has lodged an appeal against the decision of the High Court suggests that the costs regime is not preventing it from litigating.

110. The notice party also invited me to consider the extent of the applicant's activities before the High Court in other environmental litigation, referring in oral submissions to the fact that the applicant has brought at least three per cases annum over the past four years and ten so far in 2020. The Central Office search facility discloses that as of 2 September 2020, the applicant had issued 10 sets of proceedings in 2020, 3 sets of proceedings in 2019, and 3 sets of proceedings in 2018. That material suggests that certainly since 2018, the applicant is an active litigant who has been in a position to bring a significant number of environmental cases. This further supports my view that, in the context of the legal regime in Ireland, access to judicial review procedures is not prohibitively expensive for the applicant such as to prevent it litigating.

111. In those circumstances, I find that access to judicial review is not prohibitively expensive for this applicant despite its exclusion from the legal aid scheme. Accordingly, it is not necessary to construe the 1995 Act as covering the applicant in order to achieve the result sought by Article 9(4) in this respect.