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DEMYSTIFYING THE COST OF ENVIRONMENTAL JUSTICE ON THE ISLAND OF IRELAND

A practical guide and recommendations for reform

Foreword by Marc Willers KC
Afterword by Clíona Kimber SC

Disclaimer: Given the enormity of the topic and uncertainty surrounding the various issues involved, this 'living' handbook is subject to update, and naturally selective and constrained in its analysis. **This handbook does not contain legal advice** and no liability is accepted in respect of its contents. Unless otherwise stated, the opinions, interpretations and conclusions expressed are those of the contributors and do not necessarily reflect the views of EJNI as an institution or the individuals or organisations consulted as part of this study.

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Foreword

I was delighted to be asked to contribute a foreword to this handbook on *'Demystifying the cost of environmental justice on the island of Ireland'* and to have the chance to congratulate its authors on their comprehensive review of the complexities associated with environmental litigation both north and south of the border, the practical advice they give to potential litigants and their important recommendations for the reform of the costs regime in both jurisdictions.

Humanity faces a triple planetary crisis of its own making, in the form of dangerous climate change, pollution and biodiversity loss. All three are interlinked, caused by human activity and must be resolved if we are to have a viable future on this planet. Climate change is already having disastrous effects, as people around the world experience droughts of increased intensity and severity, water scarcity, wildfires, rising sea levels, flooding, melting polar ice and catastrophic storms compounding biodiversity loss that arises from other damaging human activity. At the same time the pollution of our atmosphere, rivers and seas seems to go on unabated, causing untold harm to human health, animals, plants and the planet's ecosystems, without which we would not be able to exist.

Faced with these existential threats and in the absence of political will or leadership it is no wonder that individuals and NGOs have turned to the law and that we have seen a global rise in environmental and climate justice litigation in recent years. Here, in Europe, there have already been some major victories. Our domestic courts and the European Court of Human Rights have handed down groundbreaking decisions which: hold governments to account for their failure to set, and then meet, greenhouse gas emissions reduction targets necessary to keep global warming below 1.5°C above pre-industrial levels; and require governments to regulate polluting activities and enforce existing legislation which is designed to protect the environment.

There is considerable scope for strategic environmental and climate litigation to be brought on the island of Ireland which builds on those victories and forces our politicians to take the necessary steps to tackle climate change and preserve our environment for current and future generations. There is also potential for transboundary, or multi-state, litigation to be used by both Irish and Northern Irish NGOs to hold the governments of Ireland and Northern Ireland (and the UK in the absence of a functioning devolved government) to account for climate and environmental policy failures which impact the whole island.

Yet none of this litigation would be possible without the provision of adequate funding to pay for the cost of bringing such a case before the courts or there being protection for litigants, in one form or another, from the risk of a prohibitively expensive adverse costs order being made in the event that a case is unsuccessful; and it is that practical reality which brings me back to the handbook.

Marc Willers KC addressing conference delegates at 'Demystifying the cost of environmental justice' conference Queen's University Belfast, June 2024. Photograph: Emma Cassidy/PILS NI.

It is a principle of the Aarhus Convention that access to environmental justice is not prohibitively expensive. Yet, as the authors of this handbook explain, the cost of bringing

environmental and climate cases before the courts can be a significant barrier to environmental justice on the island of Ireland. They note that legal aid provision on both sides of the border is rarely granted in environmental justice cases, creating real problems for the majority of people that simply cannot afford to bring such cases before the courts. They also note that those problems are compounded by restrictive costs rules and practices on both sides of the border. In Northern Ireland it is possible for litigants to rely on third party funding and to raise funds to support their cases using crowd funding platforms but, somewhat surprisingly, lawyers are prohibited from working on a contingency basis under what is commonly known as a 'no foal, no fee' arrangement. Meanwhile, in Ireland, lawyers can enter into 'no foal, no fee' agreements if they wish to do so but there is very little scope for reliance on third party funding due to the ancient rules on champerty.

The authors of this handbook make specific recommendations for reform of the costs' regimes on both sides of the border. If implemented, they would help ensure that access to environmental justice is not prohibitively expensive and create a fairer and more accessible set of legal systems in both jurisdictions on the island of Ireland. I am sure that this handbook will be an essential guide for lawyers, NGOs, campaigners and all those contemplating environmental litigation in both jurisdictions. I hope that its recommendations for reform of the costs' regimes in both Ireland and Northern Ireland bear fruit, and that citizens in both jurisdictions then can use the law to hold their governments and politicians to account. Whilst we cannot expect that our courts will be able to ensure that the triple planetary crisis we face is averted, we should not underestimate the effectiveness of the law and what can be achieved when it is used as a tool to secure environmental justice.

Marc Willers KC,

5th December 2024.

Introduction

In June 2024, the first all-island conference on costs and funding was held in Queens University Belfast. The conference, '*Demystifying the cost of environmental justice on the island of Ireland*', was organised by Environmental Justice Network Ireland (EJNI), the Climate Bar Association, Public Interest Litigation Support NI (PILS), Friends of the Earth Northern Ireland and Queen's University Belfast Centre for Sustainability, Equality and Climate Action. With presentations from litigants and legal experts from across the island, the central message that emerged from the conference was that **the potential extent of the cost of taking legal action to protect the environment in Ireland and Northern Ireland remains substantial and that this, combined with difficulty accessing funding for environmental cases, presents a significant barrier to environmental justice**. This barrier also raises **red flags around Ireland and the UK's compliance with the Aarhus Convention**, which establishes rights around access to justice that include ensuring that costs are '*not prohibitively expensive*'.

Maria McCloskey (PILS NI), Geraint Ellis (No to Cloghan Point), Lisa Dobbie (No Gas Caverns) and Judy Osborne (Friends of the Irish Environment) discussing the litigation experience, June 2024. Photograph: Shea Anderson/EJNI.

Another key takeaway from the conference and our supporting research since then, is that **the rules on legal costs and funding also differ on either side of the border and that these differences have important implications**:

- The island of Ireland is one biogeographic unit, and many environmental challenges are transboundary in nature. Different procedural and legal rules mean that it is hard to navigate the legal systems, and this stymies cooperation and the ability of citizens to challenge issues that impact on a cross-border basis.
- Treaties like the Aarhus Convention hold potential to shield against negative environmental impacts of post-Brexit regulatory divergence by enforcing similar regulatory requirements in both jurisdictions. If the Aarhus Convention is to fulfil this potential, law makers will have to commit to engaging in good faith with the Convention's principles and this includes ensuring compliance with Aarhus rules on ensuring that costs are not prohibitively expensive.

The rules on costs and funding on both sides of the border are complex and this complexity is in part due to the many different forms that legal action can take. Recent trends in environmental and climate litigation demonstrate growing emphasis on human rights-based litigation, substantive public law actions against states for breach of duty, breach of statutory duty, failure to implement EU law amongst other grounds, and in private law actions based on rights in domestic legislation, or nuisance-based claims. We have also seen activist shareholder challenges using company law, consumer-led challenges to greenwashing claims and the use of financial regulation to address climate issues. How these novel types of challenge interact with the rules around legal costs and the funding of legal cases in Ireland and Northern Ireland, and in particular with the access to justice rights enshrined in the UNECE Aarhus Convention, is a moving picture.

For this reason, the first edition of this 'living' handbook on costs will focus (in the main) on the rules around costs and funding in both jurisdictions as they apply to the dominant mode of challenging the state and public bodies on the island of Ireland - namely through the process of judicial review. **Judicial review is a legal process that allows individuals, groups, and organisations to challenge the legality of decisions, acts or omissions made by bodies when they are carrying out public functions**. What is being challenged in this context is the **way** that the decision was reached and not the substance of the decision itself, i.e. it is about procedure and process, unless certain circumstances arise that trigger review of the merits of the actual decision at issue.

Guidance on judicial review in general has been produced for both Ireland and Northern Ireland by organisations such as the Public Interest Law Alliance (PILA), a project of Free Legal Advice Centres FLAC based in Dublin, and the Public Interest Litigation Support (PILS) Project in Belfast in conjunction with Arthur Cox solicitors. These resources are detailed in the 'Practical guides' section below. There has also been extensive commentary on the merits and challenges associated with the use of judicial review specifically for environmental challenges, set out in the 'Further reading' section below.

In addition to general considerations such as the requirement to exhaust all adequate alternative remedies before launching an application for judicial review, there are other important considerations (relevant in both jurisdictions) involved in the decision to embark on this course of action in the context of environmental actions:

- **Not everyone is entitled to take a judicial review**. It generally depends on whether a litigant can show that their personal interests are directly affected, or they have suffered some sort of impairment of their rights. This is known as 'standing' and the rules on this issue determine who can take a judicial review. See 'Further Reading' for discussion on standing and judicial review.
- **Legal action may not be the correct intervention**. There may be alternative dispute mechanisms that may be more appropriate, e.g. complaint to national ombudsman or oversight bodies like the European Commission or complaints to international oversight bodies such as the Aarhus Convention Compliance Committee, UN treaty bodies and special procedures.
- **The ultimate goal of taking a challenge is of critical importance.** Judicial review may not be able to deliver the remedy required and exploration of other legal avenues may be required.
- **Wider strategic considerations are also important.** Just because a challenge might be considered an 'easy win' or clear cut in law, does not necessarily mean that it is going to result in a wider beneficial outcome and actions can (in some cases) have negative knock-on effects.
- **The nature of litigation that falls within the 'environmental justice' sphere is constantly evolving.** As ideas about the intersectionality of environmental justice have evolved and merged with the rights-based approaches of the climate justice movement, the nature of legal challenges has also evolved beyond the traditional 'environmental and planning' context. As highlighted above, other legal avenues are now being used for cases that involve accusations of greenwashing, defamation (particularly SLAPPs) or concerning rights to protest.

It is also important to consider recent international and domestic case law, as these judgments continue to influence not only the potential costs of challenges, but the scope and effectiveness of judicial review in an environmental context. In addition, recent legislative developments (particularly in Ireland through the Planning and Development Act 2024) could, if commenced, significantly alter the existing regime around legal costs. Finally, all the considerations discussed in this short guide must be viewed in the context of compliance with the Aarhus Convention, which establishes important obligations on both Ireland and the UK regarding access to justice – including **access to remedies that are not prohibitively expensive**. This guide will now explore these important considerations in more detail, before turning to the costs regimes and funding rules applicable in each jurisdiction.

The litigation landscape

The international context

Verein KlimaSeniorinnen Schweiz and Others v. Switzerland (European Court of Human Rights)

In November 2020, after exhausting domestic remedies, the Klimaseniorinnen, an association of over 2,000 senior Swiss women together with four individual women over the age of 80, submitted an application to the European Court of Human Rights (ECtHR) against Switzerland. In their application, the Swiss senior women complained that they are at an increased risk due to the health impacts on older women of heatwaves that are becoming more intense and frequent because of climate change and these impacts are already significantly affecting their lives, health and wellbeing. They argued that the inadequate ambition of Switzerland's climate targets and its insufficient climate policies violated their rights protected by the European Convention on Human Rights (ECHR), particularly their right to life (Article 2 ECHR) and their right to respect for private, family life and the home (Article 8 ECHR). They also argued that the summary dismissal of their case by the domestic courts, without properly considering the merits of their case, breached their right to a fair trial (Article 6 ECHR) and their right to an effective remedy (Article 13 ECHR).

In its April 2024 ruling, the ECtHR found by a 16-1 majority that Switzerland had failed to comply with its positive obligations under Article 8 by failing to put in place an adequate domestic regulatory framework for addressing climate change, including by failing to quantify Switzerland's remaining carbon budget, to meet previous emission reduction targets and to act to reduce emissions in good time. The Court also found a violation of Article 6(1) because the domestic courts failed to engage seriously with the action. In doing so, the Court stressed the important role of national courts and access to justice in the area of climate litigation. A noteworthy feature of the ruling was that the ECtHR, citing intergenerational burden sharing and the Aarhus Convention, broadened its standing rules for NGOs to litigate personal rights under the Convention in climate cases – even though the ECtHR held that the four individual women (who were members of the NGO) did not have standing themselves to advance the claim.

Finch v Surrey County Council (UK Supreme Court)

This case involved a judicial review challenge to the grant of planning permission for the extraction of oil at Horse Hill, Surrey. The environmental impact assessment (EIA), required as part of the planning permission, did not include an assessment of the 'scope 3 emissions' (i.e. the downstream emissions from the eventual use of the extracted oil). The applicant, a local resident, applied for judicial review of the Council's decision to grant planning permission, on behalf of Weald Action Group. The judicial review application was unsuccessful before the High Court and the Court of Appeal. In June 2024, the UK Supreme Court, by a 3-2 majority allowed the appeal and found the planning permission had been unlawfully granted in breach of the requirements of the EIA legislation. The central question was whether the downstream emissions constitute '*direct or indirect … effects of the project*' within the meaning of the EIA legislation, such that they should have been included as part of the EIA. The Supreme Court found that the Court of Appeal had erred in its finding that it was within an individual planning authorities' discretion to evaluate whether there is sufficient causal connection between the extraction of the oil and its eventual combustion. Leaving such a matter to the evaluative judgment of the decisionmaker would risk inconsistent and arbitrary decisions being made by different planning authorities when faced with similar issues. The majority of the Supreme Court found that the downstream

Climate activists from Switzerland celebrate as they leave the European Court of Human Rights (ECHR). Photograph: Ronald Wittek/EPA

emissions were '*effects of the project*' and therefore should have been assessed because it was inevitable that if the oil were extracted, it would be refined and burnt as fuel. There is also an established methodology for estimating combustion emissions so it would not have been a difficult task. Commentators have noted that the majority were careful to confine their judgment to the facts of the present case (scope 3 emissions from the extraction of fossil fuels) and to highlight the potential challenges Brexit poses to the continued robustness of EIA laws in the UK.

Significant recent case law on the island of Ireland in 2024

There have been a number of significant recent cases in **Northern Ireland**. In general terms, the October 2024 Supreme Court judgement in *In the matter of an application by Noeleen McAleenon for Judicial Review* [2024] UKSC 31 established some important points regarding the 'supervisory' role of judicial review. A full analysis of this case has been undertaken here. Another case of note from October 2024 was *In the matter of an application by Derry city and Strabane District Council for judicial review* [2024] NIKB 84, where a local council brought a judicial review against the Northern Ireland Department for the Economy regarding the granting of three mineral prospecting licences, which were ultimately deemed unlawful by the NI High Court. In addition to these cases of general interest, there are recent cases of particular note in the context of costs and funding:

No Gas Caverns (NI Court of Appeal)

On 3 February 2022, the campaign group No Gas Caverns Ltd and Friends of the Earth Ltd filed a judicial review of the decision taken by the Northern Ireland Department for Agriculture, Environment and Rural Affairs (DAERA) to grant three marine licences which would allow the construction of a massive fossil fuel development on the East Antrim Coast. The grounds of challenge were based on both environmental and constitutional matters. In 2023, at first instance the case was dismissed on all grounds. On 18 October 2023, No Gas Caverns Ltd and Friends of the Earth Ltd submitted a Notice of Appeal. Two grounds of appeal were pursued: first, that the matter was significant, controversial, and cross cutting and therefore should have been referred to the cross-party Executive Committee for consideration; and second, that the first instance Judge had erred in his factual conclusion that the Community Fund was not considered by the Minister. The appeal was heard by the Court of Appeal (NI) and Lady Chief Justice Keegan delivered the judgment of the Court on 17 June 2024. The appeal succeeded on both grounds and the licences were quashed. In July 2024 the Minister for DEARA announced that it would be appealing the judgment to the UK Supreme Court, with the justification that it has implications for ministerial decision-making in the context of climate change and the definition of matters which are cross-cutting, significant and controversial and which therefore require referral to Northern Ireland's Executive Committee. It is yet to be confirmed that the case meets the strict admissibility criteria of the Supreme Court.

Campaigners supporting the 'No Gas Caverns' legal challenge at Browns Bay Beach, Islandmagee, County Antrim in January 2024. Photograph: Friends of the Earth NI

Stop Whitehead Oil Terminal (NI High Court)

On the 27th of June 2024 the campaign group Stop Whitehead Oil Terminal (SWOT) lodged a judicial review challenging the Department of Infrastructure's failure to 'call-in' the decision by Mid and East Antrim Council approving a multi-million pound expansion of an oil terminal at Cloghan Point on the shores of Belfast Lough. The Department for Infrastructure confirmed by letter that it did not believe the project had sufficient impact for it to be called in. The applicant was granted leave and with the support of the PILS project sought to have the council's decision to grant planning permission quashed and declared unlawful. This case raised fundamental public interest concerns around

how projects like this are approved when the Climate Change (Northern Ireland) Act 2022 contains a clear net zero commitment; and why local communities at Whitehead are forced to take legal action while ministerial 'call in' powers to scrutinise decisions are left unused.

On the 9 September, the applicants were fully vindicated with an order made by consent by the High Court quashing the approval to expand the oil terminal. The separate challenge against the Department for failing to call-in the expansion project under the powers of the Planning Act (Northern Ireland) 2011 was adjourned generally.

Campaigners from 'Stop Whitehead Oil Terminal' celebrate as they leave Belfast High Court in September 2024. Photograph: Emma Cassidy/PILS.

Clean Air Case NI – the Diesel Emissions Case (NI High Court)

In September 2023 Friends of the Earth NI brought a judicial review against the Department for Infrastructure for its failure to fully test diesel vehicles in Northern Ireland for harmful diesel emissions at state mandated MOT vehicle testing. This departmental failure had been unchallenged for almost two decades meaning that for that time, no diesel car in Northern Ireland was adequately tested for harmful emissions.

The case was taken with pro bono legal support obtained through PILS and the Director of PILS was also instructed as Friends of the Earth's solicitor. Judgment is awaited, and the outcome of this case could have important implications for costs recovery in strategic environmental litigation where pro bono legal assistance provided.

Climate Case Northern Ireland (NI High Court)

In October 2024, an application for judicial review was made to the High Court on behalf on an individual applicant in relation to the failure of the Northern Ireland government to implement a number of crucial provisions of the Climate Change (Northern Ireland) Act 2022. The case was granted leave on all grounds and set for hearing in March 2025.

In **Ireland** there have also been a range of significant recent cases, especially with regard to climate planning, where there is a history of robust civil society legal challenges, discussed in more detail here.

Community Law and Mediation Centre and others v. Ireland (Climate Action Plan 2024 Case) (Irish High Court)

The key issue in this case is whether Ireland's Climate Action Plan 2024 (CAP24) complies with Ireland's Climate Action and Low Carbon Development (Amendment) Act 2021 and constitutional and European human rights law. Community Law and Mediation Centre (CLM) and three other plaintiffs (a grandfather, a toddler, and a youth climate activist) are seeking a declaration from the High Court that the CAP24, the instrument by which the government sets out the roadmap for meeting Ireland's legally binding carbon budget, fails to meet the legal standards set by the Climate Action and Low Carbon Development (Amendment) Act 2021 and so undermines the state's efforts to reduce emissions in line with the carbon budgets; and was prepared, submitted and approved in breach of the 2021 Act. In addition, they argue that CAP24 violates the fundamental rights (including the rights to life and equality before the law) of the three individual applicants, marginalized groups that CLM works with, and future generations, as protected by the Irish Constitution, the European Convention on Human Rights and the European Union Charter of Fundamental Rights. The case aims to build on the recent ECtHR ruling in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*. The case is likely to give the Irish courts an opportunity to revisit the restrictive approach taken to NGO standing by the Irish Supreme Court in *Climate Case Ireland* in light of the *Klimaseniorinnen* ruling. In September 2024, CLM and the three co-plaintiffs were granted leave by the Irish High Court to proceed with the case.

Climate Action Plan 2023 Case (Irish High Court)

The Climate Action Plan 2024 case is running in parallel to a challenge to the Climate Action Plan 2023 (CAP23) being taken by Friends of the Irish Environment, represented by CLM. This challenge argues that the CAP23 breaches the Climate Action and Low Carbon Development Act 2015 (as amended) because: it fails adequately to quantify the emission reductions expected from CAP23 and to show how it is consistent with Ireland's carbon budgets; and because it fails to show any further measures necessary to ensure Ireland lives within its 2021-2025 carbon budget. The hearing date for the CAP23 challenge is 28 January 2025.

Developments in costs and funding rules

In **Northern Ireland** there have been no significant recent developments in the context of costs and funding since the Costs Protection Regulations NI were amended in 2017 to allow for Protective Costs Orders in environmental cases. However, upcoming case law (i.e. the *Diesel Emissions Case*) may have significant implications as discussed above. It is worth noting that although there have been no major recent alterations to the costs regime, concerns remain as to the level of compliance of the current arrangements with the Aarhus Convention and these are discussed below.

In **Ireland** the picture is more complex as there have been both recent significant case law and legislative amendments to the existing costs regime. These developments are just the latest in a series of changes to the costs regime which has created a general sense of uncertainty about the potential cost implications for litigants. In 2022, a senior EU official characterised the case law of Irish national courts as having '*meandered through different interpretations of costs rules and has left many environmental litigants unable to predict with any certainty their costs exposure*'.

In *Commission v. Ireland* [2009], the Court of Justice of the European Union (CJEU) confirmed that the prohibition on excessive costs did not prevent national courts from making an order for costs, provided the amount of costs involved complied with the 'not prohibitively expensive standard' of Article 9(4) of the Aarhus Convention. As a result, the 'losers pays' rule in environmental cases was effectively scrapped. In addition, section 50B of the Planning and Development Act 2000 (as amended by section 21 of the Environmental (Miscellaneous Provisions) Act 2011 (EMPA 2011)) protected applicants from costs in certain types of environmental and planning cases, stating that '*each party to the proceedings, including the notice party, shall bear its own costs*', but with provision in s.50B(2A) for the successful party to recoup their costs. This provision sought to strike a balance by removing the risk of being ordered to pay the costs of the other side in the event that the plaintiff is unsuccessful, while preserving the option of 'no-foal, no-fee' litigation by retaining the possibility of recouping costs if successful Similar costs provisions apply under sections 3 and 4 of the EMPA 2011 for cases involving breaches of environmental legislation or licenses that lead to environmental harm. These legislative reforms resulted in a tangible increase in legal proceedings in both planning and environmental law in Ireland, demonstrating the chilling effect that the potential for significant costs had previously created.

The scope of the application of the cost protection rules in judicial review was elaborated on in a CJEU judgment in *NEPPC* (C-470/16) and by the Irish Supreme Court more recently in the *Heather Hill* case which clarified that environmental litigants are only liable for their 'own costs' even in 'mixed cases' where the case also raised grounds that fell outside of the costs protections established by section 50B/the relevant EU Directives containing such costs protections. According to the CJEU and the Irish Supreme Court in Heather Hill, all grounds raised by an applicant are covered by the own costs rule in a case involving section 50B. This means that additional grounds of claim that would not ordinarily be covered by the costs protection rules gain costs protection by association, in order to provide certainty to an applicant for judicial review. Combined with the availability of 'no foal, no fee' legal assistance (not available in Northern Ireland due to legal professional body restrictions), current costs barriers, while not absent, had at this point been significantly ameliorated, albeit with remaining issues around 'own costs'. In practice, some concerns have also been reported that not all organisations were effectively able to utilise 'no foal, no fee' assistance in the context of the very tight timeframes that apply in the case of planning judicial review (eight to twelve weeks from final

decision date) (e.g. See Ireland Report, Finding Common Ground, Hough (2023) para 7.2).

The relative certainty and predictability about the legal costs regime after the Supreme Court's 2020 *Heather Hill judgment* may be dramatically changed by the Planning and Development Act 2024 (once it is brought into law). In general terms, the new legislation has been the subject of significant criticism surrounding access to justice (e.g. creating restrictive standing rules) and public participation in environmental decision making. For example, section 289 of the Planning and Development Act 2024 expressly encourages the High Court to consider partially invalidating or quashing a decision or remitting it with directions to the decisionmaker rather than striking down an entire decision. This new provision could make judicial review a less effective tool for resisting environmentally harmful activities.

Clíona Kimber SC, Donnchadh Woulfe BL, Alison Hough BL and Laura Neal, solicitor Friends of the Earth NI discussing the costs regimes across the island of Ireland, June 2024. Photograph: Shea Anderson/EJNI.

Compliance with the Aarhus Convention

'[It's] disappointing to find that extensive and often protracted litigation continues to be necessary to identify the correct scope of application of the "not prohibitively expensive" rule'. Aine Ryall 'Environmental Law Enforcement: Emerging Challenges' 2021

The Aarhus Convention enshrines the principles of environmental democracy into international law. Both the UK and Ireland are signatories of the Aarhus Convention. In the context of costs, the Aarhus Convention is of critical importance because it places an obligation on its signatories to ensure that access to justice is not prohibitively expensive (Article 9).

According to Brennan et al., the Aarhus Convention has the potential to be very influential in maintaining coherence of environmental governance on the island of Ireland post-Brexit, operating in conjunction with a range of other international instruments that the EU, UK, and Ireland are all party to such as the Good Friday/Belfast Agreement (GF/BA), the ECHR, the Espoo Convention and the Basel Convention among others. In this regard, an all-island approach to implementation of the Aarhus Convention could buffer against the worst effects of Brexit-related divergence.

However, this potential is inhibited because of non-compliance with the Aarhus Convention in both jurisdictions, including access to justice issues such as 'own costs', standing, standard of review, and procedural dysfunction/delay. This non-compliance has been the subject of complaints to the Aarhus Convention Compliance Committee (ACCC), the oversight body of the Aarhus Convention.

The Irish Research Council funded '*Finding Common Ground*' project led by Alison Hough BL undertook a comprehensive review of compliance with the Aarhus Convention on the island of Ireland in 2022. In the context of costs and funding, this research found potentially non-complaint features of the existing regimes on either side of the border.

In **Northern Ireland,** in addition to issues surrounding public participation (in particular, the absence of equal rights of appeal) and access to information (i.e. pervasive issues around transparency in decision-making), the cost of judicial review is one of the key areas of concern regarding non-compliance with the Aarhus Convention. This is partly aligned with concerns regarding the UK as a whole (see e.g. Decision VII/8 by the ACCC**)**, although there are some distinctive features which exist in NI that compound broader issues with UK-non-compliance.

Although a regime of costs-capping now exists (see below), campaigners have criticised the costs cap of £35,000 for applicants who are successful, describing this aspect of the provisions as making environmental judicial review cases potentially 'too expensive to win'. For example, where the applicant's own costs are far more than the £35,000 which they are entitled

to recoup from a public authority on a successful judicial review, then they must pay this difference. The prohibition on contingency fees in Northern Ireland (discussed below) and limited availability of legal aid means that the applicant is almost always exposed to a risk of costs should they win or lose.

In addition, the requirement to bear own costs can still result in cases being prohibitively expensive, with judicial review 'own costs' running into hundreds of thousands of pounds. For example, in *ACCC/C/2013/90* the communicant cited own costs of £160,828.63 (para 43). However, the ACCC have indicated that as long as the court makes judicious use of the discretionary capacity to increase the costs cap for successful applicants, the provisions do not necessarily render proceedings prohibitively expensive.

Another unique feature of the Northern Ireland system when compared to the Irish or English systems is the prohibition by the Law Society NI on solicitors offering 'contingency' or 'no-win, no-fee' costs basis for clients (not to be confused with percentage fees which are not allowed in either jurisdiction). Also described as 'no-foal, no fee' arrangements, in this type of agreement a legal professional undertakes the work for the client on the basis that if the case fails the legal professional will not charge a fee, relieving the client from the burden of own costs in the event that they lose. It would be expected that the prohibition on such arrangements would impact on ability to obtain representation because, as mentioned above, 'own costs' can still be so very substantial as to represent an unacceptable risk to an individual wishing to take a public interest case.

In **Ireland**, in addition to issues with standing and standard of review, more financial support is required to ensure that access to justice is 'not prohibitively expensive'. Court costs remain a barrier to access to justice, and in the context of a drastically underfunded and dysfunctional Civil Legal Aid scheme, there is no assistance for applicants seeking to challenge environmental decisions or bring environmental actions, as legal aid is mostly restricted to family law cases by funding restrictions. NGOs cannot obtain legal aid for environmental (or any) cases due to the statutory restriction of legal aid to 'natural persons'. The extent of the coverage of the costs rules is uncertain in its practical application and is the subject of considerable litigation. In respect of judicial review, applicants must go through the leave stage of judicial review to litigate the costs issue, with no guarantee that there their costs will be covered by costs protection. Even the leave stage application can amount to tens of thousands of euros, particularly if unsuccessful. This uncertainty is unacceptable. The lack of meaningful civil legal aid in environmental cases and for environmental NGOs is therefore particularly significant in this context.

A particular issue is the extent of applicants' liability for their 'own costs'. The current arrangements and costs protective orders work for well-established environmental NGOs who have easier access to legal professionals willing to run public interest court cases pro-bono (for free) or on a 'no foal, no fee' basis (getting paid only if they win). However, preliminary research shows that some community-led campaigns/grassroots organisations, new NGOs or individuals have encountered issues utilising 'no foal, no fee' assistance.

The Planning and Development Act 2024 (not commenced at date of publication) has further implications for compliance with the Aarhus Convention. This root-and-branch reform of the planning system repeals and replaces around 50 per cent of the previous Planning and Development Act, running to several hundred pages of legislation. The new Act retains the costs protection system with the starting point remaining that each side bear their own costs, with discretion to award costs to a successful applicant to the extent they succeeded in obtaining relief and awarded against a respondent to the extent that they were responsible for the relief granted (similar to the existing provisions). The new act (s.293) will broaden the grounds for awarding costs against an applicant, with the usual discretion to award costs against a vexatious applicant, or because the way the proceedings were conducted and additional provisions where the court determines the application was brought to delay a development or to extract money/gifts. This dovetails with new requirements that an applicant for judicial review will be required to file an affidavit swearing that the judicial review is not sought for either of these purposes.

The new Environmental Legal Costs scheme, if commenced, proposes to determine entitlement and scale of costs on application to the Minister, and the Minister will determine scale and level of entitlement to costs. Given the Minister (representing the government) is the most frequent respondent in environmental judicial

review, this seems like a conflict of interest and does not bode well for the fair application of the scheme. Also, application for legal aid can only be made as a preliminary application after initiation of a judicial review case (when considerable costs will already have been incurred). This clearly breaches the principle of certainty and does not implement either the Aarhus Convention or the EU law requirement that access to justice is not prohibitively expensive laid down by Articles 3(7) and 4(4) of Directive 2003/35/EC, Article 11(4) of Directive 2011/92/EU as amended by Directive 2014/52EU, and Article 16(4) of Directive 2008/1/EC as amended, and articulated by the CJEU in cases such as Commission v Ireland (C-427/07) (para 92), 'Edwards' (C-260/11), Klohn v An Bord Pleanála (C- 167/17). This radical overhaul of the costs system has thrown this recently settled area of law into further disarray.

The combination of a dysfunctional Civil Legal Aid scheme with new potential limitations on 'no foal, no fee' arrangements is also highly problematic. As pointed out by Professor Aine Ryall, the introduction of such measures tends to backfire, resulting in more legal challenges not less, because such restrictive measures inevitably conflict with EU laws and international law norms surrounding access to environmental justice.

Costs in environmental litigation

General comments

It is important to note that the 'costs' of taking environmental litigation cases may encompass not only legal costs but the expense associated with pre-litigation steps, acquiring expert evidence, organisational costs and resources (time, administration, staff etc) in addition to connected 'extra-legal' costs including the procurement of communication experts. There are also potentially costs for persons other than the applicant in judicial review e.g. the costs for potential intervenors.

In both jurisdictions, **'Legal costs'** can refer to a wide range of expenses from court fees to fees for solicitors and barristers. There are always two sets of legal costs to bear in mind – yours and the other side's. Depending on the circumstances and nature of the proceedings, both may need to be paid if the action is lost.

Costs for the purposes of court proceedings fall into two categories:

i. Outlays or disbursements: Items of expenditure that are incidental to litigation. These include fees that must be paid to the court to lodge proceedings, printing costs, or the cost of obtaining expert reports.

ii. Professional fees: specifically referring to the fees that solicitors and barristers charge for their services.

An organisation cannot recover the cost of time spent on the work that goes into pre-litigation steps. This is significant in the context of judicial review considering the requirement that an applicant exhausts all adequate alternative remedies before launching an application. The costs expended in pursuing those remedies are not recoverable despite the requirement to do so ahead of launching judicial review proceedings. Equally, the time put into supporting an applicant in their judicial proceedings is not recoverable under a costs order. Therefore, only the work time of barristers and solicitors can be recovered. A costs order will not always compensate you for the money that you spend on any research or expert reports that you need to establish your claim.

The normal rule in cases is described as 'costs follow the event' which simply means that the losing party pays the winning party's costs. However, the court can deviate from it in certain circumstances. For example, the court may order no costs be payable by any party, which means that each party is responsible for their own costs only and does not pay any other party's costs. The court may even order the winner to pay the loser's costs (or some proportion of the loser's costs) if the winner has behaved unreasonably. These are, however, all exceptional cases and not the norm.

There are many different factors that influence 'cost' in the context of a judicial review. For example, there are tight timescales and deadlines which mean that legal advice will almost certainly be required as soon as a decision on whether leave will be given to lodge a judicial review is made. This means that is generally good practice to have a legal 'fighting fund' in place before submitting a leave application. There are also other costs associated with, for example:

- **Third party interventions**: Costs are always ordered at the court's discretion. However, the general rule for cost orders in respect of third party interventions is that intervenors bear their own costs. This means that cost orders are not ordinarily made either in favour or against intervenors. The exception to this rule is that the court may order costs against an intervenor where the court considers it just to do so. In most instances, this only occurs where an intervenor conducts itself improperly. Costs may be ordered against an intervenor where they, in substance, act like a party to the proceedings, or their impropriety causes delay or results in the parties to the proceedings incurring additional costs.
- **Expert witnesses**: Expert witnesses are usually instructed by a party to the litigation in relation to a particular issue. The costs of expert witnesses vary widely across subject matters and in relation to the nature of the expertise required and the complexity of the case. The costs of instructing expert witnesses form outlays incurred by that party which ultimately form part of its overall legal costs to take the proceedings.

The rules and procedures for calculating legal costs vary between Northern Ireland and Ireland.

For **Northern Ireland,** an accessible summary of the rules around costs has been developed by the PILS Project.

- See the PILS Project for more information on costs implications during court proceedings: https://pilsni.org/resources/costs-navigating-negotiating-costs/.

Full information on the court's discretion and the rules that apply to cost orders in Northern Ireland are available at Order 62 of The Rules of the Court of Judicature (Northern Ireland) 1980.

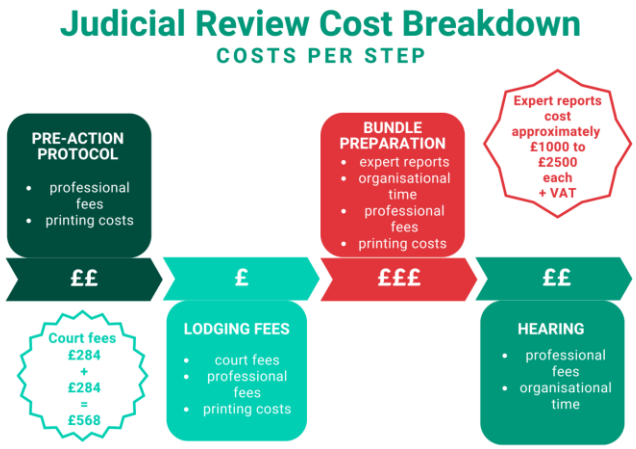

Image: The Pils Project "Costs: Navigating & Negotiating Costs

In Northern Ireland, the general rule is that the successful party will recover their costs from the other party to the litigation – unlike the situation in Ireland (see below), the loser pays principle remains fully operational for cases in Northern Ireland. This creates a serious deterrent for many environmental organisations owing to exorbitant costs and the uncertainty of knowing the full scope of the costs that the other party has incurred.

While cost orders are *usually* made at the end of the proceedings or after the final judgment, the court may make a costs order against one of the parties at another stage in the proceedings, for example, after leave is decided or following an interlocutory application, where the court views that the circumstances of the case require such an arrangement. Practically, costs simply operate as a form of 'reimbursement' for the successful party. However, it is also noteworthy that there has been a recent trend for the award of costs to be reduced where not all grounds of judicial review challenge have been upheld.

In summary, each party will have to pay professional fees and outlays and may be able to recover some or all of that sum if the court makes a cost order in their favour. Ultimately, this means that organisations in Northern Ireland require large financial resources to pursue litigation.

For **Ireland,** the general rule under Order 99 Rules of the Superior Courts (2017) and the Legal Services Regulatory Authority Act 2015 (s.169) (LSRA 2015) is that 'costs follow the event' meaning the person gets their costs for those parts of the case which they win from the losing side, and the losing side have to cover their own costs plus the winner's costs. However, the LSRA 2015 specifically excludes from the general rule cases under s.50B of the P&D Act 2000 as amended, which, as discussed above, sets out specific costs rules in planning & environmental judicial review. Cases involving breaches of certain EU environmental legislation are also subject to the specialised 'own costs' rules described above (s.3&4 of the EMPA 2011). The courts do have considerable discretion to award costs for a successful applicant or against them should the circumstances of the case seem to require it (e.g. 'vexatious' cases taken purely to cause a nuisance to others).

Outside of judicial review, the courts have no real restriction beyond the guideline in Order 99 that costs should 'follow the event' or be awarded against the losing party. however, in the awarding of costs, and can make no order for costs where litigation is taken in the public interest. If there is a dispute about the amount of costs sought to be imposed, under the Chapter 2 of the LSRA 2015 (commenced in 2019) disputes now go for adjudication to the Office of the Legal Costs Adjudicator, established in 2019 (formerly the Taxing Master). Costs awarded will be those strictly necessary to the running of the case (like court filing fees and costs of posting documents and putting together evidence for court, the work of barristers and legal work by solicitors), known as 'Party-Party costs'. Extra costs that go over and above the bare minimum required to run the case are known as 'legal practitioner and client' costs or 'solicitor-client costs'. These are less commonly awarded against the losing party, and usually only in unusual circumstances or in light of some poor conduct during the case.

Section 169(1) of the Legal Services Regulatory Authority Act 2015 provides several factors for the court to consider when deciding whether to award costs against a losing party, and to what extent, including, but not limited to:

• The conduct of the parties before and during the proceedings.

• Whether it was reasonable for a party to raise, pursue, or contest one or more issues in the proceedings.

• Whether a successful party exaggerated their claim.

• Whether a party made an offer to settle the subject matter of the proceedings, and if so, the date, terms, and circumstances of that offer.

• Whether the parties were invited by the court to settle the claim, by mediation or otherwise, and the court is of the view that one or more than one of the parties was unreasonable in refusing to engage in the settlement discussions or in mediation.

Therefore, it is possible for the respondent in a civil suit in Ireland to limit costs from a certain date by a practice known as 'lodgement' or by making a settlement offer at the outset that ultimately turns out to be the same as or greater than what the party ultimately recovers in court. The winner will then only recoup costs up to the date of the 'lodgement' or settlement offer, on the basis they turned down a reasonable offer and incurred court costs unnecessarily. This practice is not usual in judicial review.

The general rule under Order 99 is varied in environmental judicial review cases (section 50B Planning and Development Act 2000) and cases of harmful breaches of environmental legislation or licensing conditions (sections 3 and 4 EMPA 2011), in the manner set out below.

"In addition to the costs of taking a case and efforts to help with fundraising to cover these costs, there are also ***benefits from considering the 'wrap-around' support that may be assist with the process****. This might for example, involve an established NGO or other organisation assisting with media or communications. Getting in contact with international experts and groups with experience of litigation (for example, Climate Litigation Network) may also be useful as they can provide international and comparative perspectives."*

Dr Orla Kelleher, Maynooth University

Protection against costs

What are conditional fee arrangements?

Conditional fee arrangements refer to financial arrangements made between a client and their solicitor where the client only pays their own legal costs if they win their case. They are commonly known as 'no-win, no fee' or 'no foal, no fee' arrangements. In **Northern Ireland**, conditional fee arrangements are not permitted as they are subject to a prohibition under Regulation 17 of the Solicitors Practice Regulations 1987 (as amended). In **Ireland**, conditional fee arrangements are allowed.

What is a 'protective costs order'?

A protective costs order (PCO) is a court order that impose a limit on the costs that can be awarded against an unsuccessful applicant who brings a court case which addresses public interest issues. In **Northern Ireland**, there are specific rules setting out caps on legal costs in environmental cases. The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 provide a framework for fixed costs in legal challenges of environmental decisions. Under these provisions the maximum amount recoverable from a losing applicant was capped at £5,000 where the applicant was an individual and at £10,000 in other cases (for example where the applicant was a Non-Governmental Organisation). If the application succeeded, the amount recoverable from the respondent was £35,000. The 2013 Regulations have been amended by The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017, which came into force on 14, February 2017. The 2017 Regulations provide the courts with greater flexibility when setting the cost caps which apply to the applicant and the respondent in environmental cases.

The costs expended in pre-litigation steps are not recoverable even if you've been granted a PCO. As a guide, the own costs incurred by the applicants in ACCC/C/2013/90 (UK) were in excess of £160,000, in 2014 for a NI High Court judicial review. The total costs of the case were unknown. The consequence of this is that clients are faced with a difficult choice or gamble: to obtain a PCO and then have the security of knowing what their maximum costs exposure will be if they lose but then only limited recovery of their own costs if they win; or run the risk of being required to pay all of the respondent's costs as well as their own.

In **Ireland**, the Planning and Development Act 2000 as amended by the EMPA 2011 protects applicants from costs in certain types of environmental and planning cases, stating that '*each party to the proceedings, including the notice party, shall bear its own costs*', but with

Case Study: *Diesel Emissions Case (Clean Air Case NI)*

Friends of the Earth (FOE NI) availed itself of the caps imposed on environmental litigation under The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 in the diesel emissions case. After lodging proceedings, FOE NI obtained a PCO fixing that, in the event that FoE NI is unsuccessful, the maximum amount that the Department can recover in costs is capped at £10,000. After a successful application to The PILS Project in respect of pro bono legal assistance, The PILS Project also agreed to indemnify FOE NI which means that, if they are unsuccessful, The PILS Project will pay the £10,000 costs order. The *Diesel Emissions Case* also highlights an, as yet, untested provision under the Aarhus Regulations which applies where pro bono legal assistance has been utilised by the successful applicant. Where free legal representation has been used in litigation that does not fall within Aarhus Convention costs protection, the traditional position was that if successful, the beneficiary of the pro bono legal representation was unable to recover its costs from the losing party because having utilised pro bono representation, they essentially had no costs to recover.

The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017 at regulation 3(7) would appear to suggest that where the litigation is about something that falls under the scope of the Aarhus Convention, some element of costs recovery is available where the successful applicant is a beneficiary of pro bono legal assistance. This provision is as yet untested as judgment in the *Diesel Emissions case* has yet to be handed down.

provision in section 50B(2A) for the successful party to recoup their costs.

Special cost rules apply to certain types of proceedings e.g., those covered under section 50B of the Planning and Development Act 2000 as amended and sections 3 and 4 of the EMPA 2011. The special costs rule is a departure from the standard rule that 'costs follow the event' (in Order 99 of the Rules of Superior Courts) and means that each side bears their own costs, with the court having discretion to award a successful applicant their costs or some of their costs provided they have not, for example, acted in a way that is frivolous or vexatious. The PCO is then an application to the court (if necessary) to confirm that the special costs rules apply. Applicants will not always need to apply for a PCO because it may be agreed between the parties in pre-litigation correspondence.

Funding legal costs

Climate and environmental litigation is often a lengthy and expensive process. The availability of funding has significant bearing on an applicant's ability to pursue and develop litigation strategies.

Can I access legal aid in environmental cases?

Legal aid is a service which assists individuals to obtain financial support to secure legal services and representation that they could not otherwise afford. Legal aid is only available in relation to specific kinds of cases. The rules around accessing legal aid are different north and south of the border.

In **Northern Ireland** legal aid is generally not available in environmental cases in practice. However, although there are some exceptions for limited categories of applicant (e.g. people below a certain income threshold and who have good prospects for their case). This is because where a case is of a wider public interest or other parties equally impacted could take action, legal aid will not be available. Legal aid is also not available for organisations. It is therefore not a potential source of support if an organisation is bringing a case in its own name but might be available where an organisation is supporting an individual applicant. In that case, legal aid is administered by the Legal Services Agency Northern Ireland and a solicitor will be required in order to make a legal aid application.

Although legal aid provides complete costs protection, in that you will never have to pay any other party's costs or the fees of your solicitors and barristers even if you lose every aspect of your case (unless you are charged a 'contribution' towards legal aid depending on your financial means), legal aid can be difficult to obtain for a simple but very good reason: it is drawn from public money (taxes) and thus the government needs to justify spending taxpayer money on private cases and cannot be seen to be insufficient in its enquiries (Judicial Review in Planning and Environmental Cases in Northern Ireland – A Guide for Litigants in Person).

In **Ireland,** the grant of civil legal aid in Irish environmental cases even for individual litigants is '*an extreme rarity*' (*Conway v Ireland*). It was also established clearly by *FIE v Legal Aid Board* (2020 IEHC 454) that NGOs were not allowed to access the Irish Civil Legal Aid scheme owing to the statutory restriction of legal aid to 'natural persons' *the Attorney General* [2017] 1 IR 53, 69).

The uncertainty around the practical application of costs rules and the lack of meaningful civil legal aid in environmental cases and for environmental NGOs is particularly significant. Court costs are a huge barrier to access to justice and in the context of a drastically underfunded and dysfunctional Civil Legal Aid scheme (Hough. A, Common Ground Report) there is no publicly funded assistance for applicants seeking to challenge environmental decisions

The Planning and Development Act 2024 (not yet commenced) sets out to radically alter this situation and would establish a bespoke environmental legal aid scheme accessible by all applicants including NGOs and grassroots unincorporated associations where they meet the standing criteria. However, there are many issues with the proposed scheme as outlined above.

> *"**Treat your campaign like a business**. Appoint key officers and a management team. Incorporate – this limits liability, there is transparency in accounts, it is easier to apply for grants and it is more professional. Have a communications and PR person who manages social media and interactions with the press to ensure consistent and professional messaging."*
>
> Maria O'Loan, Tughans Solicitors Belfast.

Can I access funding for my case via third parties?

Third-party funding refers to investment by a third party in dispute resolution proceedings in respect of which it has no direct interest. Rules around funding legal costs via third parties vary on either side of the border. The laws of champerty and maintenance came into force in Ireland under the Maintenance and Embracery Act 1634. Since then, such laws have been removed in Northern Ireland, but they remain in force in Ireland, as the Supreme Court confirmed in *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2017] IESC 27. However, the High Court judgment of Egan J. in *Atlas GP v Kelly & Ors,* [2022] IEHC 443 *(the Killiney Residents SLAPP cases)* makes it clear that fundraising may take place within an affected group (e.g. in this case a group of residents in a neighbourhood affected by the development) who would have the same rights to standing. The court referred to judicial statements on the relaxation of

maintenance and champerty reflecting modern values and the legal system, but for now they seem to remain unchanged. The rules on champerty in **Ireland** provide very limited possibilities for crowdfunding. These limits on funding of claimant costs remain an issue and have led to an overreliance on law firms acting unpaid for many years on very labour-intensive litigation. A related issue is the absence of provision for formal 'class actions' or multiparty litigation in Ireland. This creates a gap in the context of collective redress, an issue of significance with regards to environmental damage.

However, in **Northern Ireland** there are no restrictions on third parties helping to fund litigation. In September 2017, the Lord Chief Justice of Northern Ireland's office published its *Review of Civil and Family Justice in Northern Ireland* which reviewed the rules and procedures of litigation in the north. In a footnote in its discussion on third-party funding [p.79], the report stated that '*there appears to be no apparent restriction on third-party funding in Northern Ireland*'. It goes on to say in the body of the text that '*funding represents a potential alternative to legal aid and… could facilitate access to justice for members of the public*'.

General fundraising can also be boosted via crowd funding platforms such as CrowdJustice and Crowdfunder. CrowdJustice is the leading online fundraising platform specifically designed for people-powered legal action that enables individuals, groups and communities together to make change through the law.

In addition to general fundraising, there are a number of potential sources of third-party funding (e.g. Law for Change, or other philanthropic organisations. However, it should be noted that demand for funds is very high and that these organisations usually only support cases of strategic/international significance. These organisations also require applications to be supported by a legal opinion.

The PILS project can provide financial support for each step in the proceedings that have a significant public interest including outlays, costs indemnity, and professional fees in different ways. However, generally The PILS Project does not provide financial support to cover professional fees.

> "***Start a legal fighting fund on day one***. *This will allow you to access legal or professional advice early in the process and will demonstrate to potential funders that you will be able to actually proceed with a case rather than having to withdraw because of lack of funds. Every information event should be a fundraising event.*"
>
> Laura Neal, Solicitor, Friends of the Earth Northern Ireland

Can I access *'pro bono'* legal help?

Pro bono work is legal advice or representation provided free of charge by legal professionals in the public interest. In **Northern Ireland**, Pro Bono Costs Orders can be made in environmental cases under The Costs Protection (Aarhus Convention) Regulations (Northern Ireland) 2013 on application to the court by a successful party that has obtained professional legal advice or representation pro bono. If granted they require the losing party to pay a sum (calculated by reference to what a fee-paying party would have recovered) into a fund which distributes the money to agencies and projects that provide free legal advice. PILS notes that Pro Bono Costs Orders help to even the playing field between parties in litigation. Presently, where an organisation is receiving services pro bono, the opposing party does not bear a costs risk, whereas the organisation bears a significant risk of costs if they are not successful. Where legal practitioners have access to Pro Bono Costs Orders, they are able to use the risk of costs as an incentive for the opposing party to consider settling the case.

In **Ireland**, there is no restriction on legal professionals offering their service on a pro-bono basis, and doing so has not so far affected later recovery of costs. There is a strong pro-bono culture in the legal profession in Ireland, with many participating in the PILA Pro-bono Pledge, which had in excess of 40,000 hours committed by lawyers in 2023, although many of these hours go to advising in non-contentious matters (e.g. research or advocacy projects).

The vast majority of contentious (court-related) environmental law work is undertaken on a 'no foal, no fee' basis in Ireland. In practice, this system works well where there are already established working relationships with

professionals operating in the environmental field (e.g. large environmental NGOs or those individuals and groups engaging in litigation regularly). However, research has shown that for grassroots groups that form ad hoc in response to an environmental or planning crisis in their local area, it can be extremely difficult to get in contact with a legal professional and convince them to take a judicial review within the very tight timeframes imposed of eight to twelve weeks depending on the nature of the decision being reviewed. There are also difficulties for inexperienced groups in getting assistance because they do not have the knowledge and experience to correctly identify key legal issues and to prepare and present required evidence and documents for the legal team's review in a tight timeframe. Such groups might also not have engaged in preliminary participation processes in the correct way in order to create the best possible conditions for court challenges. They may be a spontaneous alliance of individuals who are not used to working together and have not yet established agreement on key issues and approaches. All this makes it difficult for new groups and litigants to get professionals to work with them, and it makes it more difficult and time consuming for those professionals who agree to work with inexperienced groups pro-bono. For these reasons, the system works well for established litigants only.

Do conditional fee arrangements offer an alternative to funding?

As highlighted above, in **Northern Ireland** conditional fee arrangements are prohibited. However, in **Ireland** another option is the 'no-foal no-fee' arrangement. This enables a litigant who has a case with a high likelihood of success to obtain the services of legal professionals, who are prepared to undertake the case on the basis that their fees will be paid from any costs ultimately recovered. While this is an opportunity, there are disadvantages. It is only suitable for cases with a high prospect of success, as the legal professionals will not take on a highly speculative case simply in order to make a strategic case. Also, in cases where there is no prospect of an orders for costs in favour of the applicant at the end of the proceedings, the legal professionals are unlikely to take on the case in the absence of any other sources of funding. Finally, in lengthy or highly complex legal challenges which might not conclude for years, a no foal, no fee arrangement places a burden on the legal professionals to carry all the risk and defer obtaining payment for their services for many years, and this will deter certain legal professionals who do not have the financial capacity to carry such a case.

Monye Anyadike-Danes KC discussing the rules around funding environmental litigation with solicitors Fred Logue and Maria O'Loan, June 2024. Photograph: Shea Anderson/EJNI.

Afterword

The importance of costs reform

Ireland's 2023 *Report of the Citizens Assembly on Biodiversity Loss* stated that;

'*The Assembly believes that the State has comprehensively failed to adequately fund, implement and enforce existing national legislation, national policies, EU biodiversity-related laws and directives related to biodiversity. This must change*.' (Recommendation 2)

In both Ireland and Northern Ireland, while some of the failures of enforcement can be attributed to a lack of a sense of urgency in the need for environmental justice, the structure of the law and legal procedures are also a barrier to enforcement. The law is unclear, the proofs are complex, the methods of enforcement are fragmented, the public enforcers are spread across a variety of bodies and regulators, and the procedural pathway is not clear.

Achieving environmental justice is not a single problem with a single solution, but a multi-faceted problem that requires many changes, large and small, in many areas. However, one of the biggest barriers to enforcement is the cost of obtaining justice. While enforcement of environmental law should primarily be by public regulators, when the cost of bringing enforcement actions is too prohibitive for under-resourced local authorities, enforcement has to be taken by private parties, or not at all.

In this context, the reality of private environmental litigation as an integral part of the enforcement of environmental law must be recognised, supported and facilitated, if we are to achieve the step-change in environmental protection needed in the present time. Emerging trends in environmental litigation indicate that options beyond judicial review must be explored. To that end, there must be significant changes to the costs regime for actions by private parties, built around a central focus on the polluter pays principle, in every situation where that is possible.

But what changes are needed? The handbook, in summary, identifies that in both jurisdictions on the island of Ireland there are significant barriers created by:

- The high potential costs of environmental litigation (despite the existence of some costs protections);
- The lack of class actions, which would allow costs and costs risk to be spread and pooled;
- The absence of a clear position on litigation funding; and
- The absence (or difficulty accessing) of legal aid for environmental damage.

Civil reform proposals

In Northern Ireland there have been no substantive reforms in this area since 2017. Given the significant concerns that remain around compliance with the Aarhus Convention's requirements that legal action should not be 'prohibitively expensive', proposals for reform of elements of the costs and funding system in Northern Ireland are overdue.

In Ireland, there have been significant recent calls for reform around the costs of litigation more generally, but these have touched only tangentially on the costs of environmental litigation. For example, in 2020 the EU Bar Association and Irish Society of European Law published a report in relation to litigation funding and class actions in Ireland, in the context of access to justice. Later that year a civil law review group prepared a *Review of the Administration of Civil Justice Report* ('Kelly Report')), which highlighted the conflicting policy considerations surrounding the issue of third-party litigation funding, namely the importance of access to justice and the significant risk of "commoditisation" of litigation. An action plan to implement the recommendations in the Kelly Report was published by the Department of Justice in Ireland on 27 May 2022 (*Civil Justice Efficiencies And Reform Measures – A Civil Justice System for the 21st Century* 'Departmental Report'). It proposes to implement the recommendations in the *Review of the Administration of Civil Justice Report*, with progression dates in early 2024. It also took the view that the weighing of policy considerations regarding third-party funding should await completion of the more detailed examination of

this subject being undertaken by the Law Reform Commission. On 17 July 2023, the Law Reform Commission published a comprehensive Consultation Paper (*Consultation Paper on Third Party Litigation Funding*) setting out various considerations regarding the potential legalisation of third-party litigation funding in Ireland, the Commission is now in the process of preparing a final report setting out its recommendations.

While there is some tangential reference to the role played by third-party litigation in environmental protection and enforcement of environmental law in these reviews, the treatment is not comprehensive.

Specific proposals on litigation funding

In Northern Ireland, third party funding is permitted. However, as this handbook has shown, in Ireland third party funding is unlawful, except where it comes within limited exceptions to the rules against maintenance and champerty. This makes Ireland an outlier in the common law world. In this regard, third-party funding arrangements are permitted in the UK, the US, Canada, Australia and New Zealand, among other common law jurisdictions. This issue has also been the subject of proposals for reform, both at national (e.g. the issue was raised in the Law Reform Commission's 2023 consultation paper) and EU level (via a European Parliament resolution requesting that the European Commission draft a Directive regulating third-party funding in the 27 Member States. No substantive developments have yet taken place, however it is worth noting developments in international commercial law in this area, e.g. The Courts and Civil Law (Miscellaneous Provisions) Act 2023 amended the Arbitration Act 2010 to permit third-party funding of international commercial arbitration.

Sectoral developments on class actions

In terms of legislation, while there is a significant amount of change on the horizon in relation to class actions, or what is termed multi-party litigation, again to date, this has been focused on consumer actions and this has not included multi-party litigation for environmental cases.

Comhshaol, the Climate Bar Association, published a report at its Symposium in 2022, which included a detailed paper, *Enhancing Access to Environmental Justice: A New Class Action Procedure for Environmental Law in Ireland***.** The paper, available on the Climate Bar website, is one of the few which examines the case for a class action procedure in Ireland that will be effective for claimants seeking to enforce environmental law and be compensated for injuries and violations related to environmental matters. It provides an overview of the procedures available in Ireland and their shortcomings, outlines the benefits of a class action procedure in light of the above, examines the approach of other regimes, and details how these comparisons can help build towards a comprehensive procedure for the Irish context.

Civil Legal Aid

As this Handbook has noted, civil legal aid is not in practice available for environmental actions in Ireland and is accessible in only very limited circumstances in Northern Ireland.

In Ireland, a Civil Legal Aid Review Group, was established in 2022 to review the operation of the civil legal aid scheme and make recommendations for its future. It is not yet known whether environmental law will be included in any of the proposals for reform. However, it is notable that the Government did not wait for the Civil Legal Aid Review to be completed, before introducing a bespoke proposed Environmental Legal Aid scheme in the PADA 2024, which if brought into law would result in the introduction of a legal aid scheme that would be run and operated by the relevant Minister, and which would restrict the costs that would be recoverable by the legal teams of the successful applicant to those deemed appropriate by the Minister. This would be applicable in any judicial review taken under the Planning Acts. Given the Minister is frequently a respondent in planning judicial review it seems likely that the level of costs recoverable could be set quite low. It is currently unclear exactly how the scheme would operate in practice as it is only described in broad outline in the Act, with the detailed conditions for its operation (including eligibility criteria and level of recoverable costs) remain to be fleshed out in secondary legislation.

Conclusion

This Handbook plays a vital role in shining a spotlight on the structural issues around costs of environmental litigation on the island of Ireland,

considering the rules around costs and funding in both jurisdictions and identifying many of the structural blocks, the uncertainty around the application of the special costs rules, and whether there will be any changes brought about in Ireland following the *Planning and Development Act 2024* to these special costs rules in the future.

Following the reporting of the Citizens Assembly on Biodiversity, and its forthright criticism of environmental law enforcement in Ireland, and persistent criticism stretching back for decades of the performance of environmental enforcement bodies in Northern Ireland, bodies looking at structural reforms might consider how the costs regimes on both sides of the border can function to make it easier for private parties to play their part in enforcing environmental law.

Clíona Kimber SC

5th December 2024

Preliminary recommendations for reform

1. **Legal aid**

In **Northern Ireland**, the availability of legal aid has systematically been restricted across a broad spectrum of public interest cases - not just those which have an environmental or climate purpose. The issue remains that many cases that are of clear public interest value ought to be brought and are not due to the restrictions imposed on the use of legal aid. A Departmental review of the criteria that is applied when considering if an applicant or case is meritorious enough to warrant the provision of public funding would be a major leap forward. Such a review should be cognisant that many environmental and climate change based legal challenges that are truly strategic in nature, if successful, deliver little personal gain to those applicants that step up to take them. However, they ultimately benefit the public interest both now and for future generations.

In **Ireland**, deficiencies in the legal aid system need to be addressed, such as the inability under current law for NGOs/organisations to access civil legal aid. More funding for coordination and capacity building in the NGO sector is needed so the NGO community and the public are facilitated in exercising their right of access to justice in appropriate circumstances. While an improvement on the previous costs rules, the current own costs rules introduced in 2011 could be improved by provision of expert assistance in engaging in public participation processes and in preparing case briefs for legal professionals to review in the tight time limits applicable in judicial review.

2. **Legalisation of third-party funding**

In **Northern Ireland** third-party funding is allowed. In **Ireland**, the rules on maintenance and champerty currently place significant restrictions on third party funding. In a 2023 consultation paper, the Law Reform Commission (LRC) identified three potential means of legalising third-party funding:

- the 'preservation' approach: abolishing the torts and offences of maintenance and champerty but preserving the rules of public policy behind the torts and offences:
- the 'abolition' approach: abolishing the torts and offences of maintenance and champerty outright; and
- the 'statutory exception' approach: retaining the torts and offences of maintenance and champerty but creating statutory provision permitting third-party funding in some cases as an exception to these torts and offences.

It also identified five possible regulatory models for third-party funding:

i. a voluntary self-regulatory regime, as in England and Wales, with the third-party funding sector in control of regulating itself;
ii. an enforced self-regulatory regime, as in Hong Kong, with the state reserving a supervisory role to regulate the third-party funding sector more intrusively if self-regulation is insufficient;
iii. a regulatory regime structured primarily around certification by the court as to the reasonableness and fairness of the third-party funding agreement, as recommended by the New Zealand Law Commission for class or collective actions;
iv. a licensing regime administered by an existing regulator, such as the Central Bank of Ireland or the Legal Services Regulatory Authority; and
v. a licensing regime administered by a new and specialist regulator established specifically to regulate third-party funders and funding.

The LRC further noted that an effective regulation model framework might involve a combination of methods together with legislative provision.

3. **Establishment of provision of formal 'class actions'**:

Another related matter is the lack of formal 'class actions' or multiparty litigation in Ireland (Kelly, 2020). The 'Report of the EU Bar Association and the Irish Society of European Law relating to Litigation Funding and Class Actions' (EU Bar Association & ISEL, 2020) recommended the introduction of both third party funding, and class actions, and recommended implementation of the LRC's recommendations from 1995 that formal class action mechanisms be introduced, and the review of the non-binding EU European Commission Recommendation 2013/396/EU encouraging member states to establish collective redress mechanisms.

4. Measures to facilitate more pro bono legal work

Measures to facilitate more pro bono work in both jurisdictions could include a separate government professional indemnity scheme that barristers and solicitors could sign up to when dealing with pro bono cases in the public interest, and rules that their private professional indemnity premiums would not be affected by any loss or claim in relation to their pro bono work. Other measures could include special tax-write offs for time given to pro bono work or Continual Professional Development points that could be accrued by way of pro bono.

5. Adjustments to court costs

Adjustments could be made that would reduce the financial burden on litigants, e.g. filing costs, stamp duty on court filings and lawyers' fees.

6. Removal of 'no win, no fee' prohibition in Northern Ireland for environmental cases.

Solicitors are legally prohibited from offering conditional fee arrangements in Northern Ireland (unlike Ireland, or England). However, that legal prohibition is ultimately created by the profession itself (being Law Society NI created rules, as approved by the Lord/Lady Chief Justice as appropriate). Therefore, ultimately it seems the profession as a whole could remove the prohibition. There is a justification for an exemption to the rules specifically for environmental cases because of the disproportionately high potential costs in these cases and the high level of public interest/public benefit that may derive.

7. Research on the costs of emerging litigation types

More research is needed into non judicial review avenues for environmental litigation and the barriers in these areas. As highlighted in the opening paragraphs of this briefing, new avenues of approach are being tested for environmental litigation in other jurisdictions, such as tort-based actions, actions for breach of duty/statutory duty. There are huge uncertainties surrounding the availability of costs protection in these types of cases, and other issues with linking them to environmental claims. Further research is needed into emerging claim forms and how these would work in the two jurisdictions examined in this report. In addition, this area grows increasingly complex as a result of Brexit and the Windsor Framework mechanisms designed to maintain parity of EU protections between Northern Ireland and Ireland, and further research is forthcoming on the environmental implications of this.

8. Capacity building of the public and civil society

The State in both jurisdictions has obligations under the Aarhus Convention (as does the EU) to engage in capacity building of the public including civil society in the area of access to justice and exercise of Aarhus rights in general. This obligation is sorely neglected with little effort made by authorities to educate the public in how to use the legal system. Research suggests that establishing a government funded, independent, NGO led Aarhus Centre on an all-island basis that would provide assistance, information, networking and capacity building to individuals and NGOs would be a viable option to fulfil capacity building obligations and would be acceptable to the NGO community. Such an organisation could help individual and organisation-based litigants contact lawyers interested in

providing pro bono assistance, and filter cases on their merits for access to pro bono litigation experts. This could ensure pro bono hours are used more efficiently, and that new litigants are enabled to access pro bono assistance in a timely fashion.

Capacity building and resourcing of a body to assist those seeking to defend the environment could also usefully direct people away from court litigation to administrative decision-making bodies where these can more effectively and cheaply address concerns that are raised in a given case. Also, where those interested in environmental protection feel let down by lack of access to the court or ineffective processes, an Aarhus Centre could effectively link them with domestic (e.g. Ombudsman type bodies) or international complaints mechanisms like the Aarhus Convention Compliance Committee in order to have their concerns addressed.

9. Protection of Environmental Defenders

Many individuals and organisations who engage in protection of the environment via litigation including judicial review are subject to 'SLAPP' (Strategic Lawsuits Against Public Participation but now becoming a handle terms for any attempt to discourage environmental protection via legal system abuse or misuse). These SLAPP suits can take the form of defamation actions, or a range of other types of claim, including maintenance, champerty, breach of covenant and many other types of legal action. SLAPPs can result in drastically increased costs for environmental litigants as they may have to deal with the costs of several sets of proceedings, and will not have control over the costs in an action initiated by another party. There are complaints of SLAPP before the Aarhus Convention Special Rapporteur on Environmental Defenders, Michel Forst, at the time of writing from both jurisdictions. In **Ireland**, the new provisions introduced by the EU in the SLAPP Directive do not do enough as they are restricted to cross border cases. The Irish legislation being brought forward as an amendment of the Defamation Act 2009 (Defamation (Amendment) Bill 2024 currently in the legislative process), also does not sufficiently protect from SLAPP type cases as it is limited to defamation actions (when SLAPP actions are much broader) and sets the threshold quite high for dismissal. Current rules on dismissal for vexatious litigation also set the bar very high for dismissal and are hard to use. In **Northern Ireland**, while cases such as Kelly v O'Doherty [2024] NIMaster 1, provisions such as the s. 195 of the Economic Crime and Corporate Transparency Act 2023 and the UK Government Call for Evidence on SLAPPs in 2022, signal at a new direction in this area, there is a lack of dedicated measures designed to assist environmental litigants when faced with SLAPP.

More needs to be done to tackle the issue of legal abuse via SLAPP suits, including comprehensive legislation to protect environmental defenders.

10. Legislative Reform

In **Ireland**, The Planning & Development Act 2024 seeks to introduce changes including standing changes, changes to the rules in relation to unincorporated associations, new costs rules proposed in the Planning Act 2024 represent a negative trajectory in an area which was already beset with issues related to compliance with the Aarhus Convention. The legislation urgently needs to be amended prior to commencement to avoid Ireland being in breach of its EU and UN commitments. As mentioned above, legislative measures to enable early strike out of SLAPP cases need to be considered, and proposals before the Dail for amendment to the Defamation Act 2009 need to be revised to reflect the very real problem of SLAPP in Ireland. Introduction of multi-party litigation, and reform of outdated maintenance and champerty rules would also result in improvement in the costs of environmental litigation. In **Northern Ireland**, legislation is urgently needed to assist environmental litigants facing SLAPP. Reform of solicitors' professional regulations could assist in tackling costs issues by relaxing contingent fee rules.

Resources

Practical guides and online resources

Web address	Jurisdiction	Description
PILS NI: Costs: Navigating & Negotiating Costs	Northern Ireland	PILS online article covering general costs.
PILS NI Website: Pro Bono Costs Orders	Northern Ireland	PILS online article covering Pro Bono Costs Orders.
PILS NI Website: Protective Costs Orders	Northern Ireland	PILS online article covering Protective Costs Orders.
PILS: Judicial Review in Northern Ireland	Northern Ireland	PILS online article covering how to take a Judicial Review in Northern Ireland.
The British and Irish Legal Information Institute	NI/ Ireland	A highly useful free database of decisions across UK, Irish and EU Courts.
Judiciary NI Portal	Northern Ireland	Many judgments of the High Court and Court of Appeal in Northern Ireland are publicly and freely available on the Judiciary NI Portal.
The Rules of the Court of Judicature (Northern Ireland) 1980.	Northern Ireland	Full information on the court's discretion and the rules that apply to Cost Orders are available at Order 62.
Judicial Review in Planning and Environmental Cases in Northern Ireland – A Guide for Litigants in Person	Northern Ireland	This guide is the product of a series of discussions with people who are passionate about environmental protection and sustainable development and are keen to use their rights under the law to see their environment appropriately cared for.
William Orbinson and Fionnuala Anne Connolly, Planning Judicial Review in Northern Ireland, 2024.	Northern Ireland	A useful guide for judicial review practitioners in all fields; but particularly to those involved in actual or anticipated judicial review challenges relating to planning decisions.
NGO 2022: Guide to the Judicial Review Procedure in the Republic of Ireland	Ireland	This project is a cross-border collaborative effort between law firms and NGO partners to develop guidelines on recourses to action for the NGO community in the areas of UN and EU mechanisms, judicial review and the appointment of an amicus curiae.
NGO 2022: Guide to the Judicial Review Procedure in Northern Ireland	Northern Ireland	This project is a cross-border collaborative effort between lawfirms and NGO partners to develop guidelines on recourses to action for the NGO community in the areas of UN and EU mechanisms, judicial review and the appointment of an amicus curiae.
PILS: Navigating and Negotiating Costs	Northern Ireland	PILS has produced an accessible resource explaining how costs work in Northern Ireland such as i) specific legal meaning of costs ii) what costs are recoverable/ not recoverable.

Further Reading

Citation	Jurisdiction	Description
Finding Common Ground: Report on Aarhus Implementation – IRELAND	All-Island	This Report identifies issues with the implementation of the Aarhus Convention in Ireland. It includes a range of recommendations to address such gaps including reforms to improve access to justice such as removing the existing legal ban on third-party funding, addressing deficiencies in the legal aid system, measures to encourage pro-bono legal assistance such as tax-write offs and Continual Professional Development.
Public Interest Litigation in Northern Ireland	Northern Ireland	PILS has commissioned this report to research the public interest landscape because of its recognition, in 2023, that we are living through a turning point in access to justice in Northern Ireland.
Ryall, A. (2017) 'The Aarhus Convention: A Force for Change in Irish Environmental Law and Policy?' In: *The Making of a New European Legal Culture: the Aarhus Convention*. Groningen: .Europa Law Publishing	Ireland	This book provides analysis using a legal cultural approach from 8 member states about how the Aarhus Convention has been implemented and what are the legal cultural enablers and obstacles to the full development of environmental democracy in different jurisdictions. Áine Ryall contributes the analysis to how the Aarhus Convention can provide a force for chance in Irish Environmental Law and Policy.
Ryall, A (2020) 'Regulating the Cost of Access to Justice in Environmental Matters in the Member States of the European Union' In: Moscati, MF, Palmer, M and Roberts M (eds). *Research Handbook on Comparative Dispute Resolution*. Cheltenham: Edward Elgar. [Details]	Ireland	This chapter examines access to justice in environmental matters through the lens of European Union (EU) law and the obligation on member states to provide access to review procedures that are not prohibitively expensive.
Ryall, A, (2021) 'Environmental Law Enforcement: Emerging Challenges'. *Irish Planning and Environmental Law Journal*, 28 (3):107-113 [Details]	Ireland	This article examines the pressing issues in enforcing environmental regulations in Ireland and highlights the complexity of modern environmental challenges, such as climate change, biodiversity loss, and waste management, and critiques the current legal frameworks' effectiveness in addressing these issues.
Ryall, A (2022) 'Standards for Effective Access to Justice in Intersecting Legal Systems'. *Irish Planning and Environmental Law Journal*, 29 (2):43-48 [Details]	Ireland	This article explores the challenges and standards necessary for ensuring effective access to justice within the context of overlapping legal frameworks. Focusing on the Irish planning and environmental legal systems, the article examines how procedural and substantive requirements align with broader principles of justice and fairness.

'Challenges and Opportunities for Irish Planning and Environmental Law' Ryall, A (2018) 'Challenges and Opportunities for Irish Planning and Environmental Law'. *Irish Planning and Environmental Law Journal*, 25 (3):104-111 [Details]	Ireland	This article explores the challenges and standards necessary for ensuring effective access to justice within the context of overlapping legal frameworks. Focusing on the Irish planning and environmental legal systems, the article examines how procedural and substantive requirements align with broader principles of justice and fairness.
Commission Notice on Access to Justice in Environmental Matters	Europe	A useful guide on the application of EU law, both legislation and cases.
Judicial Review Practice Direction 3/2018	Northern Ireland	A revised practice direction for judicial reviews, with central themes of partnership, cooperation, efficiency and expedition. It elaborates on areas of pre-proceedings, pre-leave, post-leave, bundles of documents, standard directions and skeletons arguments.
Analysis of the impact of proposals to reduce legal costs in Ireland (2022)	Ireland	A report by the Bar of Ireland and Law Society of Ireland.
Litigation Costs in Ireland – What You Should Know (2016)	Ireland	An online article by Terry Gorry & Co. Solicitors regarding costs and litigation in Ireland. It covers categories of legal costs, taxation of costs, party and party costs, security for costs, taxation of party and party bill of costs, solicitor fees and costs, summary bill of costs, legislation and requisition to tax.
Recovery of Litigation Costs: Overview	Ireland	A Practice Note providing an overview on rules and practice related to the recovery of litigation costs in Ireland. It covers how parties can obtain a costs order from the court, interest on a costs award, security for costs, and whether a court can order the payment of a costs order in foreign currency or in instalments. It also considers the enforcement of contractual costs provisions and how courts address costs related to an interim application, the costs of appeal, and in the context of a settlement. This note also looks at the how effective Ireland's legal costs framework is in managing the costs of litigation, and the recent developments and legislative reforms related to this topic.
Supreme Court Ruling on Costs in Environmental Cases (Heather Hill	Ireland	Mason Hayes & Curren article detailing the significance of the *Heather Hill* judgment concerning the cost rules in environmental cases.

Management Company CLG & Anor v An Bord Pleanála)		
Consultation Paper: Third-Party Litigation Funding	Ireland	A comprehensive Law Reform Commission Paper which includes an examination of the current Irish legal position, policy considerations for legalising third-party funding and models of legislation and regulation.
Litigation Crowdfunding and Access to Environmental Justice	Ireland	Trinity College Law Review article focused on the benefits and challenges of litigation crowdfunding for access to environmental justice.
Joint Report of the EU Bar Association and the Irish Society of European Law relating to Litigation Funding and Class Actions	Ireland	The report assesses whether litigation in Ireland is being stifled through a lack of third-party litigation funding and class actions in this jurisdiction.
Explanatory Memorandum to The Costs Protection (Aarhus Convention) (Amendment) Regulations (Northern Ireland) 2017	Northern Ireland	This Explanatory Memorandum has been prepared by the Department of Justice to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.

Contacts

Organisation and Contact	Jurisdiction	Description
Public Interest Litigation Support Address: Community House City Link Business Park 6A Albert Street Belfast, BT12 4HQ Phone number: +44 (0)28 9099 4258 Contact email: info@pilsni.org)	Northern Ireland	The PILS Project is a non-profit membership-based organization that seeks to break down the barrier of the cost of litigation to help launch meaningful public interest legal challenges. PILS can provide financial support for each step in the proceedings that have a significant public interest including outlays, costs-indemnity, and professional fees in different ways. However, generally the PILS project does not provide financial support to cover professional fees. The PILS project can act as your organisations solicitor or enlist one of the skilled barristers or solicitors from the PILS Project's Pro Bono Register.
CrowdJustice Address: 3 Southview House, St Austell Enterprise Park, Carclaze, St Austell, Cornwall, United Kingdom, PL25 4EJ	Northern Ireland	CrowdJustice is the leading online fundraising platform specifically designed for people-powered legal action that enables individuals, groups and communities together to make change through the law.
Urgenda Address: De Juliana Nicolaes Maesstraat 2-224 1506 LB Zaandam The Netherlands Phone number: 020 – 33 00 566 Contact email: info@urgenda.nl	Netherlands	The Dutch Urgenda Foundation aims for a fast transition towards a sustainable society, with a focus on the transition towards a circular economy using only renewable energy.
Climate Litigation Network Address: Wibautstraat 131-D 1091 GL Amsterdam The Netherlands Contact email: clngeneral@climatelitigationnetwork.org	Netherlands	The Climate Litigation Network works with local partners to bring ground-breaking litigation to compel national governments to adopt ambitious climate plans. There are now over 100 cases against governments around the world.

Law for Change Contact email: info@lawforchange.uk	England and Wales	The Law for Change Fund resources legal actions giving a voice to under-represented people and communities with limited access to justice.
PILA Address: 5/86 Dorset Street Upper, Dublin 1, Ireland, D01 P9Y3 Phone number: +353 1 906 10 10	Ireland	PILA is a public interest law network that seeks to engage the legal community and civil society in using the law to advance social change.
FLAC Address: Free Legal Advice Centres | 85/86 Dorset Street Upper, Dublin 1, Ireland, D01 P9Y3 Phone number: +353 1 906 10 10	Ireland	A human Rights Organisation which exists to promote equal access to Justice for all. Their work to achieve our mission and vision will be guided by the following core values.
Climate Bar Association Address: Distillery Building 145-151 Church Street Dublin 7 D07 WDX8 Contact email: climatebar@lawlibrary.ie	Ireland	Climate Bar Association is a Specialist Bar Association, which aims to pursue practical green and environmental initiatives within the Law Library and surrounding neighbourhoods. This ties in with the Law Library's own green status as well as outreach to the community in Dublin 7. CBA is a think-tank of environmental law expertise and thought leaders in environmental law and biodiversity protection for the Irish legal community and for Irish society.
Environmental Justice Network Ireland Contact email: ciara@ejni.net / caitlin@ejni.net Address: 18 Ormeau Avenue, Belfast BT2 8HS	All-Island	Established in 2019 EJNI is a not-for-profit that aims to advance environmental justice for a peaceful society, a healthier democracy and sustainable economy. This community of practice connects interdisciplinary academic researchers, NGOs, environmental lawyers and community activists to address the root causes of environmental injustice across the island.
Friends of the Earth Ireland Address:	Ireland	Friends of the Earth Ireland is an NGO and community at the heart of the growing movement for a just world with zero

9 Upper Mount Street, Dublin 2, D02 K659, Ireland. Contact email: info@foe.ie Phone number; +35316394652		pollution. They are part of the world's largest grassroots environmental network.
Friends of the Earth Northern Ireland Address: Friends of the Earth Northern Ireland, Gordon House, 22-24 Lombard Street, Belfast BT1 1RD Phone number: 028 9023 3488	Northern Ireland	Friends of the Earth Limited is a not-for-profit committed to ensuring each generation can enjoy an environment that's getting better, a safer climate, abundant nature, healthy air, water and food. It includes a growing and diverse network of people coming together to transform the environment into one which is flourishing, sustainable, and socially just.
Community Law Mediation Address: Northside Civic Centre, Bunratty Road, Coolock, Dublin 17, Ireland Phone number: +353 01 847 7804	Ireland	CLM is an independent community focused law centre, established in 1975. They provide free legal advice, mediation and education services in communities impacted by social exclusion, disadvantage and inequality. They also work to advance policy and law reform, informed by the issues coming through their services.
FP Logue LLP Address: FP Logue LLP Lenin House Rear 25 Strand Street Great Dublin 1 Ireland Phone: +353 1 531 3510 Contact email: info@fplogue.com	Ireland	FP Logue LLP isa law firm based in Dublin, specialising in environment, technology, data protection and information law.

Table of cases

Citation	Jurisdiction	Summary
Kelly v An Bord Pleanála [2022] IEHC 238.	Ireland	The judgment discusses the standing criterion of 'sufficient interest' in planning cases and the implications of the Aarhus Convention on environmental matters.
O'Keefe v An Bord Pleanála [1993] 1 IR 39 at 72).	Ireland	Standard of Judicial Review in Ireland.
Heather Hill Management Company CLG & Gabriel McGoldrick v An Bord Pleanála, Burkeway Homes Ltd and the Attorney General (Notice Parties) [2022] IESC 43, [2022] 2 ILRM 313	Ireland	A landmark case where the Supreme Court clarified that a PCO is available to applicants on all grounds in their proceedings even where only certain of those grounds may cite environmental law concerns and challenges.
FIE v Legal Aid Board (2020 IEHC 454)	Ireland	The exclusion of NGOs from legal aid provision in Ireland was established clearly by *FIE v Legal Aid Board* ((2020 IEHC 454) owing to the statutory restriction of legal aid to 'natural persons'.
Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223	UK	Or the 'Wednesbury test' – standard of review in Northern Ireland and Great Britain.
Persona Digital Telephony Ltd v Minister for Public Enterprise [2017] IESC27.	Ireland	Supreme Court confirmed archaic champerty and maintenance rules remain – third party funding forbidden.
C-260/11 The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others (2013)	Great Britain and Northern Ireland	The ruling addressed whether the UK's approach to costs in environmental litigation complied with the Aarhus Convention and specifically the principle that access to justice should not be prohibitively expensive.
Verein KlimaSeniorinnen Schweiz and Others v. Switzerland	European Court of Human Rights	The European Court of Human Rights (ECtHR) found by a 16-1 majority that Switzerland had failed to comply with its positive obligations under Article 8 by failing to put in place an adequate domestic regulatory framework for addressing climate change, including by failing to quantify Switzerland's remaining carbon budget, to meet previous emission reduction targets on time.
R (on the application of Sarah Finch) v Surrey County Council [2021] EWCA Civ 1685.	UK	The Supreme Court ruling in Finch v Surrey County Council (2023) addressed whether environmental impact assessments (EIAs) should include the downstream greenhouse gas (GHG) emissions resulting from the eventual combustion of oil extracted from a proposed project. The case focused on the Horse Hill oil site in Surrey, where planning permission had been granted without assessing these emissions. The Supreme Court ruled that the grant of planning permission was unlawful because it failed to account for the downstream emissions.

No Gas Caverns Ltd and Friends of the Earth Ltd [2024] NICA 50	Northern Ireland	NI Court of Appeal quashed the approval of marine licences for the construction of a large underground gas storage caverns beneath Larne Lough. The court found that the decision to approve the licences should have been referred to Northern Ireland's Executive Committee in that it was '*significant, controversial, and cross-cutting*'.
Stop Whitehead Oil Terminal	Northern Ireland	High Court quashed the planning permission granted by the Mid and East Antrim Borough Council to expand the Cloghan Point Terminal at Whitehead.

Glossary

Term	Definition
Costs Capping Orders	A costs capping order is an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made.
Protective Costs Orders	PCOs are court orders that impose a limit on the costs that can be awarded against an unsuccessful applicant who brings a court case which addresses public interest issues. An applicant who applies for a PCO will either not be liable for the other party's costs or will only be liable up to a fixed amount, if the case is lost. If the applicant is, on the other hand successful, then s/he may recover all or part of the costs from the other party.
No foal no fee / conditional fee arrangements	The concept of 'no win no fee' also known as 'no foal no fee' is common practice amongst solicitors in Ireland. This fee arrangement means that a solicitor will not charge for their service if a client's case is unsuccessful – if you do not win your case, you do not have to pay your legal fees. On the other hand, if your case is successful, either by way of settlement outside of court or in front of a judge in court, then your legal fees will be payable.
Outlays/ disbursements	Outlays are items of expenditure that are incidental to litigation. These costs include fees you have to pay to the court to lodge proceedings, printing costs, or the cost of obtaining expert reports.
Applicant	The party (individual or group) applying for judicial review or making the application for judicial review.
Leave	Permission of the court required to proceed to a full hearing of a judicial review case.
Litigant in person/ personal litigant	An individual who takes a case to court without legal representation.
Notice party	A party whose interests are directly affected by an ongoing judicial review.
Pre-action	Before an action is formally begun by lodging the appropriate documents in court – an important stage where the parties to an intended case are expected to negotiate with good faith to try to resolve their dispute without litigation.
Remedy/ Relief	What a party seeks from the court in a case brought by the said party.
Respondent	The 'defendant' in a judicial review; known as 'respondent' as the party responds to the applicant's challenge.
Standing	The legal capacity of a party to bring a case before the court.
The Aarhus Convention	The Aarhus Convention is an international multi-lateral environmental agreement which came into force in 2001, with the aim of enhancing access to environmental information, participation in the

	decision-making process and the right to review administrative decisions. The Convention is based on three pillars and requires Parties to the Convention to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters. Article 9(4) of the Convention, requires that Parties to the Convention must provide adequate and effective remedies, including injunctive relief as appropriate, and should be fair, equitable, timely and not prohibitively expensive.
Maintenance	Maintenance involves the provision of financial assistance in which the funder has no interest.
Champerty	Champerty is a form of maintenance where funding is provided in exchange for a share of the proceeds of the litigation.
Pro-bono/low-bono	Work (usually legal) undertaken without charge, or at a significantly reduced rate.