



Oifig an
Rialaitheora Pleanála
Office of the
Planning Regulator

fieldfisher

Addendum Report on Scale of Fees

March 2025

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1 - Introduction

On 30 May 2023 the Minister for Housing, Local Government and Heritage (the Minister) requested the Office of the Planning Regulator (the OPR) to develop a synthesis of evidence on legal costs in Judicial Review proceedings of planning and environmental matters in order to inform proposed changes to the existing rules on costs in planning and environmental litigation under Section 50B of the Planning and Development Act 2000.

Following this request, the OPR engaged Fieldfisher Ireland LLP (Fieldfisher) to provide an overview of the operation of the legal costs system in Ireland in planning and environmental litigation having regard to Ireland's obligations under the Aarhus Convention and EU law. In this regard, Fieldfisher prepared and delivered a report entitled "*Research Report on Legal Costs in Planning and Environmental Judicial Reviews*", in December 2023 (the Principal Report). Part of the Principal Report contained an analysis of a dataset comprising information on legal costs from 46 planning/environmental judicial reviews from An Bord Pleanála (the Board) between the period 2012 - 2022, including costs paid to its own legal advisers and costs paid to applicants who were successful in all or part of a challenge to a decision of the Board.

The Department of Housing, Local Government and Heritage (DHLGH) by letter to the OPR dated 20th December 2024 requested further analysis of the evidential base in order to support the work of the Inter-Departmental Group on Environmental Legal Costs, as an addendum to the Principal Report.

Following the request from the DHLGH, the OPR engaged Fieldfisher to prepare an addendum report (the/this Report) addressing the following research objectives:

- Utilising a model Scale of Fees (provided), determine what approximate costs savings would have accumulated to the State, had the model applied to the sample of planning judicial reviews contained in the Principal Report; and
- Analyse the costs comparisons and provide a factual summary as to what the data demonstrates for consideration in the implementation of the Scale of Fees as established in Part 9, Chapter 2 of the Planning and Development Act 2024.

Fieldfisher was provided with a draft scale of fees model (the draft Scale of Fees) which was furnished to the OPR by the DHLGH on a strictly confidential basis for the purposes of preparing this Report. The draft Scale of Fees was prepared on behalf of the Inter-Departmental Group on Environmental Legal Costs and has not yet been signed off by the Inter-Departmental Group for consideration of Government.

Fieldfisher was subsequently requested to highlight any issues that they perceived with the practical application of the draft Scale of Fees. However, this is distinct from the quantum of the scale of fees which is a matter for the Minister for the Environment.

2 - Statutory Framework

The Planning and Development Act 2024 (the 2024 Act) was signed into law on 17 October 2024 and will be implemented on a phased basis. The relevant provisions concerning costs in Part 9 are not yet commenced as at the date of this Report.

The 2024 Act includes provisions relating to a successful applicant's entitlement to recover costs in certain proceedings.

Chapter 2 of Part 9 of the 2024 Act sets out the costs relating to "*Aarhus Convention proceedings*" which is defined in Section 291 of the 2024 Act and includes Part 9 judicial review proceedings. Section 292 of the 2024 Act provides that Chapter 2 applies to Aarhus Convention proceedings and any appeal, case stated or motion¹ in relation to such proceedings. It also applies to a reference under Article 267 of the Treaty on the Functioning of the European Union made by a court dealing with Aarhus Convention proceedings or an appeal in relation to such proceedings and to any interim or interlocutory applications arising from any proceedings or matters referred to above.

Section 293(1) of the 2024 Act provides that, subject to certain exceptions, each party (including a notice party) to proceedings to which Chapter 2 applies shall bear its own costs. This reflects the current position under Section 50B(2) of the Planning and Development Act 2000 (as amended) (the 2000 Act).

Section 293(2) of the 2024 Act provides that the costs of proceedings may be awarded to a successful applicant to be borne by the respondent or notice party or both of them depending on whose actions or omissions contributed to the applicant obtaining relief, as is the case in Section 50B(2A) of the 2000 Act at present.

Notwithstanding the above, the Court has the power to award costs against any party in the circumstances identified in Section 293(3) of the 2024 Act, again similar to Section 50B(3) of the 2000 Act.

Section 293(4) of the 2024 Act provides that the costs that a party is ordered to pay to an applicant shall not exceed the monetary amount prescribed under Section 294 unless the court is satisfied that due to the exceptional circumstances presented by a particular case there is a reason of exceptional public importance for awarding costs exceeding that amount and it is in the interests of justice to do so. This is where the divergence from the current costs regime under the 2000 Act begins.

Section 294 of the 2024 Act provides the Minister for the Environment, Climate and Communications (the Minister for the Environment) with the power to prescribe by way of regulations monetary amounts in relation to, inter alia, the costs awarded to a successful applicant in proceedings to which Chapter 2 applies. Section 294(2) of the 2024 Act provides that the Minister for the Environment may prescribe different amounts in respect of any or all of the following:

¹ Falling under Section 298 of the 2024 Act

- (i) Different types of legal work conducted by legal practitioners;
- (ii) Different types of legal proceedings and applications;
- (iii) Different court jurisdictions in which proceedings are taken;
- (iv) Proceedings of different durations;
- (v) Work carried out by different categories of legal practitioners, including by reference to the amount of experience possessed by, and the nature of legal qualification of, the legal practitioner.

At the time of this Report, no regulations have been made by the Minister for the Environment under Section 294(2).

3 - Context and Scale of Fees

This is a comparative analysis of the draft Scale of Fees provided by the DHLGH to the OPR with the cost dataset provided by the Board and referenced in the Principal Report and under section 1 above. The purpose of the analysis is to identify what approximate costs savings would have accumulated to the State, had the draft Scale of Fees applied to the sample of planning/ environmental judicial reviews contained in the Principal Report.

As noted at section 1 above, the draft Scale of Fees was prepared on behalf of the Inter-Departmental Group on Environmental Legal Costs and has not yet been signed off by Government. It is therefore assumed to be a working draft of what a potential scheme might look like pursuant to the Minister for the Environment's powers under Section 294(2) as outlined above.

By way of overview, the draft Scale of Fees contains six distinct parts which each attract a fixed single fee, as follows:

Work Stream	Single Legal Fee (Exclusive of VAT)
Part A – prior to issue of proceedings	€7,500
Part B – from the issue of proceedings to the date of the hearing	€12,000
Part C – the hearing	€10,000
Part D ¹ – any domestic appeal – i.e. Court of Appeal or Supreme Court	€15,000
Part D2 – any CJEU reference	€15,000
Part E – work required after the hearing	€3,750

² The draft Scale of Fees provided to Fieldfisher did not contain a fee for domestic appeals. Clarification was sought on this point following which the DHLGH confirmed that a fee should be included for domestic appeals in the sum of €15,000 for the purpose of completeness in this research. The DHLGH has therefore confirmed that Part D of the draft Scale of Fees provided should for the purposes of this Report be taken to contain two aspects, D1 which concerns domestic appeals and D2 which concerns preliminary references to the CJEU.

4 - Research Methodology, Data Sources and Limitations on Analysis

As noted above, for the purposes of the Principal Report, the Board provided a dataset comprising information from 46 cases³ on legal costs paid to its own legal advisers and paid to applicants who were successful in all or part of a challenge to a decision of the Board (the individual case dataset). A full description of the individual case dataset is contained at sections 3.1-3.2 of the Principal Report.

Permission was obtained from the Board to use the dataset for the purposes of preparing this Report.

As set out in the statutory framework section (section 2) above, the power for the Minister for the Environment to prescribe monetary amounts in respect of Aarhus Convention Proceedings relates to the recoverability of the costs of successful applicants '*the cost-capping mechanism*'. Therefore, for the purposes of this Report, consideration has only been given to the applicant costs in the dataset for the purposes of comparison with the draft Scale of Fees. The costs paid by the Board to its own legal advisers have therefore not been considered in this Report.

There are a number of limitations to the comparison between the individual case dataset and the draft Scale of Fees which should be understood in order to contextualise this research which are set out below. At Section 6 of the Report, observations are provided on potential issues with aspects of the practical application of the draft Scale of Fees. Whilst there is some overlap between these sections as to the issues raised, they are addressing slightly different matters namely that here what is being considered are limitations on the comparison between the draft Scale of Fees and the individual case dataset whereas Section 6 considers potential issues with the application of the draft Scale of Fees in future. The following points highlight limitations to the comparison between the individual case dataset and the draft Scale of Fees.

1. Whilst the draft Scale of Fees sets out specific parameters and clear cut off points for each Part, the individual case dataset does not contain the same level of granularity for each stage considered in the Principal Report. The individual case dataset has "*round figures*" for what costs were paid to the successful applicants in the 45 cases. The dataset did not contain a breakdown of how the costs were apportioned across the different stages of the litigation spectrum. The individual case dataset indicates whether a case concluded at Leave Stage, High Court Hearing Stage or the Appeal or CJEU Reference Stage whereas the draft Scale of Fees is divided into five distinct stages: Part A (before commencement of proceedings), Part B (from commencement to trial date), Part C (the hearing), Part D (Appeals and CJEU References) and Part E (matters arising subsequent to the trial hearing).

³ Note, this was reduced to 44 cases as two cases were removed from the analysis as they were Leave Stage cases that had been contested, therefore incurring a hearing cost at Leave Stage and skewing the results. The two additional cases have been included for the purposes of this analysis as cases are being considered individually rather than averages. However, there is a case in the individual case dataset which concluded at the Appeal or CJEU Reference Stage in which no costs were paid to the Applicant. This case has therefore been excluded from the below comparison so just 45 cases are included.

2. The leave stage has been removed under the 2024 Act therefore there may be costs attributed to the leave stage (such as counsels' brief fee on the leave application) which will not arise under the cost-capping mechanism. As set out in the Principal Report, the leave stage in the individual case dataset contains a range of scenarios including cases conceded at the leave stage prior to leave being granted and cases where leave has been granted and opposition papers have been prepared.
3. There is no standalone equivalent to Part A of the draft Scale of Fees in the individual case dataset. That is in circumstances where Part A covers all steps taken before the commencement of proceedings. Where proceedings are not actually initiated, a decision-maker has no power to concede to the quashing of a decision, the Court has no power to quash a decision and the Court has no power to award costs in favour of an applicant. Therefore, in any case under the 2024 Act where the Court is empowered to make a costs order, Part A and B costs will be incurred at a minimum.
4. The High Court Hearing Stage in the individual case dataset includes cases where a matter was set down for hearing even if the matter was conceded or resolved prior to the commencement of the hearing. This takes account of the fact that brief fees for counsel and professional fees for solicitors are largely incurred prior to the hearing (typically the cut-off point is when a hearing date is assigned to a matter). In contrast, the draft Scale of Fees draws a clear line between Part B which includes preparation for hearing and Part C which is engaged from of the first day of the hearing.
5. Furthermore, there may be situations where there are multiple High Court hearings, including for interlocutory matters (e.g. costs, interrogatories, further and better particulars, discovery, cross-examination, etc.) or the modularisation of certain aspects (e.g. typically any challenge to the validity of legislation is modularised pending the hearing of the challenge to the underlying decision, but if that decision is upheld then the Court may go on to consider the legislative challenge in a subsequent hearing), and hearings post-CJEU to apply the EU law that has been interpreted by the CJEU. Whilst the draft Scale of Fees refers to '*attending for any interim or interlocutory applications*' in Part B, there is no reference to multiple High Court hearings so it is assumed that in most cases such hearings will simply incur Part C costs. The individual case dataset does not distinguish these additional hearings from the substantive hearing, so in any event there is no way of comparing with the draft Scale of Fees and it is flagged here simply to demonstrate the limitations on this analysis.
6. The individual case dataset relates to the period from 2012-2022 and includes hearings of up to 7-10 days duration which would have incurred significant fees for counsel and solicitors' professional fees. Since the establishment of the Planning and Environment division of the High Court in December 2023, the duration of hearings has generally been limited to a maximum of 3 days. There is also increased use of the expedited hearing mechanism whereby the case is heard in one day. The individual case dataset does not cover this period and therefore the costs associated with hearings in it may not accurately reflect the current costs associated with a case involving a High Court hearing. All other things being equal, a case which takes 1-3 days for hearing instead of 7-10 days will result in lower costs.

7. The Appeal or CJEU Reference Stage in the individual case dataset included cases which had a High Court hearing and either a Court of Appeal hearing, a Supreme Court hearing or a CJEU reference. It is noted that the draft Scale of Fees covers domestic appeals in Part D1 and CJEU references in Part D2. The individual case dataset does not specify whether a case was subject to a domestic appeal or a CJEU reference albeit that the data was grouped together on the basis that the cases in the individual case dataset each seemed to comprise only one of those eventualities i.e. an appeal or a CJEU reference. For the purposes of this Report, it is noted that the fees in D1 and D2 are the same (i.e. €15,000) and the comparative analysis refers to D1/D2 as alternatives. Further, as the Appeal or CJEU reference Stage also included a High Court hearing, Parts A, B, C, D1/D2 and E of the draft Scale of Fees are the appropriate comparator.
8. Both the individual case dataset and draft Scale of Fees are cumulative in that if a case in the individual dataset falls within the Appeal or CJEU reference Stage, it will also have incurred the costs associated with the Leave Stage and High Court Hearing Stage. Likewise, when considering the draft Scale of Fees, a case which concludes following a High Court Hearing will incur Part A, B, C and E costs. Similarly, if a case is conceded after leave has been granted but before the hearing, then it will incur Part A, B and Part E costs (the latter being the cost of final orders and preparing a bill of costs).
9. The draft Scale of Fees is exclusive of VAT however VAT is generally payable on legal costs. The draft Scale of Fees should account for this and consideration of the consequent savings should bear in mind that VAT will have been paid in many instances of the legal costs paid by the Board to applicants in the individual case dataset. Therefore, in order to provide a meaningful comparison in Section 5 below, VAT at 23% has been applied to each stage of the costs in the draft Scale of Fees.

Taking all of the above into account, and bearing in mind the limitations identified, this Report compares:

- the Leave Stage in the individual case dataset with the costs incurred at Part A, B and E of the draft Scale of Fees.
- the High Court Hearing Stage in the individual case dataset with the costs incurred at Part A, B, C and E of the draft Scale of Fees.
- the Appeal or CJEU reference Stage in the individual case dataset with the costs incurred at Parts A, B, C, D1/D2 and E of the draft Scale of Fees.

5 - Comparative Analysis of the Draft Scale of Fees with the Individual Case Dataset

Case No. ⁴	Stage in Individual Case Dataset	Comparative Parts in Draft Scale of Fees	Costs in Individual Case Dataset (majority of figures inclusive of VAT)	Costs in Draft Scale of Fees (inclusive of VAT)	Saving
1	Leave	A, B, E	€30,750	€28,598	€2,153
2	Leave	A, B, E	€16,000	€28,598	-€12,598
3	Leave	A, B, E	€32,275	€28,598	€3,678
4	Leave	A, B, E	€14,500	€28,598	-€14,098
5	Leave	A, B, E	€9,840	€28,598	-€18,758
6	Leave	A, B, E	€15,000	€28,598	-€13,598
7	Leave	A, B, E	€20,000	€28,598	-€8,598
8	Leave	A, B, E	€2,100	€28,598	-€26,498
9	Leave	A, B, E	€19,153	€28,598	-€9,445
10	Leave	A, B, E	€43,861	€28,598	€15,263
11	Leave	A, B, E	€83,000	€28,598	€54,403
12	Leave	A, B, E	€29,162	€28,598	€564
13	Leave	A, B, E	€26,212	€28,598	-€2,386
14	Leave	A, B, E	€76,245	€28,598	€47,647
15	Leave	A, B, E	€50,000	€28,598	€21,403
16	Leave	A, B, E	€13,091	€28,598	-€15,507
17	Leave	A, B, E	€23,000	€28,598	-€5,598
18	High Court Hearing	A, B, C, E	€225,000	€40,898	€184,103
19	High Court Hearing	A, B, C, E	€275,000	€40,898	€234,103
20	High Court Hearing	A, B, C, E	€257,500	€40,898	€216,603
21	High Court Hearing	A, B, C, E	€105,625	€40,898	€64,728
22	High Court Hearing	A, B, C, E	€41,000	€40,898	€103
23	High Court Hearing	A, B, C, E	€72,401	€40,898	€31,503

⁴ Note all figures in this Table have been rounded up from the nearest decimal.

24	High Court Hearing	A, B, C, E	€150,000	€40,898	€109,103
25	High Court Hearing	A, B, C, E	€23,500	€40,898	-€17,398
26	High Court Hearing	A, B, C, E	€53,149	€40,898	€12,252
27	High Court Hearing	A, B, C, E	€188,797	€40,898	€147,900
28	High Court Hearing	A, B, C, E	€136,000	€40,898	€95,103
29	High Court Hearing	A, B, C, E	€195,000	€40,898	€154,103
30	High Court Hearing	A, B, C, E	€171,669	€40,898	€130,772
31	High Court Hearing	A, B, C, E	€145,000	€40,898	€104,103
32	High Court Hearing	A, B, C, E	€100,000	€40,898	€59,103
33	High Court Hearing	A, B, C, E	€210,000	€40,898	€169,103
34	High Court Hearing	A, B, C, E	€250,000	€40,898	€209,103
35	High Court Hearing	A, B, C, E	€240,000	€40,898	€199,103
36	High Court Hearing	A, B, C, E	€2,094.86	€40,898	-€38,803
37	High Court Hearing	A, B, C, E	€300,000	€40,898	€259,103
38	High Court Hearing	A, B, C, E	€490,000	€40,898	€449,103
39	CJEU	A, B, C, D1/ D2 ⁵ , E	€247,067	€59,348	€187,719
40	CJEU	A, B, C, D/1D2, E	€340,000	€59,348	€280,653
41	CJEU	A, B, C, D/1D2, E	€515,000	€59,348	€455,653
42	CJEU	A, B, C, D1/ D2, E	€90,000	€59,348	€30,653
43	CJEU	A, B, C, D/1D2, E	€125,000	€59,348	€65,653
44	CJEU	A, B, C, D/1D2, E	€322,363	€59,348	€263,015
45	CJEU	A, B, C, D/1D2, E	€252,638	€59,348	€193,290
Total			€6,027,991	€1,760,438	€4,267,553

⁵ This indicates that either the fee in D1 or D2 is applicable. As D1 and D2 contain the same fee (€15,000) there is no difference in the fee payable but it is just to note that the individual case dataset contains one or other of the eventualities so D1 or D2 would apply depending on whether it is a domestic appeal or CJEU reference.

6 - Conclusions and Observations on Practical Application of the Draft Scale of Fees

Taking account of the limitations and caveats set out at section 4 above, if the draft Scale of Fees was applied to the cases in the individual case dataset this would have provided for a costs saving to the State in the region of €4.26 million. This is purely a comparative analysis of the draft Scale of Fees provided to the OPR by the DHLGH with the cost data provided by the Board in the form of the individual case dataset.

1. A number of limitations with the practical application of the model scale of fees were identified in section 4 which may merit further consideration including the cost of briefing any expert in the preparation of proceedings, which is not expressly provided for in the draft Scale of Fees.
2. The appropriate cut off point for Part A and Part B costs. Unless there are live proceedings there is no ability for a respondent to agree to quashing its decision nor for a court to quash a decision or award costs, therefore under the current draft Scale of Fees Part A and Part B costs will always be incurred. If the issuing of the Notice of Motion is included in Part A, then a respondent could potentially agree to quashing its decision as soon as proceedings issue and therefore avoid incurring Part B costs. It is also worth considering whether to shift the “trigger point” for Part B costs somewhat further than the issuance of the Notice of Motion, for example to the point in time where the default period for filing opposition papers has elapsed (in most cases this will be 8 weeks from the issuing of the Notice of Motion, but provision would have to be made for different time periods as under the expedited procedure the time period is only 3 weeks). That time period would allow a respondent to consider the merits of the case and concede if they think it cannot be defended, thereby not incurring Part B costs until they have at least had a chance to consider the case being made against them. It should be noted that the Legal Costs Adjudicator (LCA) decisions that are referred to at 3.3.1 of the Principal Report (i.e. *Friends of the Irish Environment v An Bord Pleanála* 2018/734 and *Peter Sweetman v Environmental Protection Agency* 2017/644) have broken the costs down to include section A (prior to the commencement of proceedings) and section B (from issue of proceedings to hearing), in the same way as the draft Scale of Fees. However, while that might be reasonable in circumstances where the LCA is exercising a discretionary role as to the level of fees that are incurred by the applicant for section A or section B on the basis of the evidence in each of those individual cases, more careful consideration is required where there is a blanket fee incurred for Part A and Part B under the draft Scale of Fees. It may be considered unfair on the one hand to award an applicant with Part A and B costs where their case is conceded days after proceedings issue and on the other hand award another applicant the same amount (Part A and Part B) where their case is conceded the day before hearing. Clearly the applicant in the latter case will have done significantly more work under Part B in preparation for the hearing.

3. The appropriate cut off point between Part B and Part C costs. The draft Scale of Fees draws a clear line between Part B which includes preparation for hearing and Part C which is engaged from the first day of the hearing. Under the draft Scale of Fees the costs of the hearing itself are not incurred until the first day of the hearing (rather than weeks or months in advance of the hearing, when the hearing date is fixed) and the Part B costs include the preparation for the hearing such as drafting submissions and a statement of case, and preparing books. There may be cases which are conceded close to trial which involve counsel engaging in detailed preparation for the hearing and this preparatory work is not reflected in the breakdown of the work involved on behalf of an applicant in the draft Scale of Fees. If for example, a case is conceded days before a hearing, significant preparatory work on the papers will have been carried out by the Applicant's counsel which under the existing costs regime would be reflected in the relevant counsel's brief fee and would normally be recoverable under the existing regime once a hearing date is fixed. Consideration should be given to whether the preparatory work is intended to be captured under Part B or Part C as if a case is conceded very close to the hearing date, significant preparatory work will already have been undertaken.
4. Lack of clarity where there are multiple High Court hearings, including for the modularisation of certain aspects of the substantive case or hearings post-CJEU to apply the interpretation of EU law from the CJEU. There is no reference to these in the draft Scale of Fees, so it is assumed that in most cases such hearings will simply incur Part C costs, however some of these hearings (e.g. a modularised aspect or hearings post-CJEU) may be equally as long as the substantive case. There may be no merit in making a distinction between different substantive hearings, but rather just allow for Part C costs for any "*substantive hearing*" in the High Court, however this should be clarified.
5. The cumulative nature of the draft Scale of Fees and whether the intention is that all stages are cumulative, in particular when this comes to appeal or CJEU reference stages. There could be examples of cases where an appeal is made to the Supreme Court and the Supreme Court makes a reference on a point of law to the CJEU, thereby incurring both the cost of a domestic appeal (D1) and a CJEU reference (D2). This seems appropriate, but as it involves twice the cost it should be clarified for the avoidance of doubt.
6. Amending the title of Part E "*work required after the hearing*" to "*work required after proceedings conclude*". If a case concludes after Part A or Part B only (i.e. it does not go to hearing) there will be costs associated with final orders and preparing a bill of costs that would be awarded to the applicant at adjudication, albeit there will be no judgment to consider. It is suggested that Part E costs should be awarded in every case that concludes or alternatively that another fee is considered for inclusion where cases conclude prior to Part C to cover the costs associated with final orders and preparing a bill of costs.
7. The draft Scale of Fees does not include any allowance for outlay or expenses that are incurred in addition to the professional or counsel fees for each Part. These can include vouched outlay and expenses some of which are subject to VAT such as photocopying, telephone calls, postage, and others such as commissioner's fees for swearing affidavits and stamp duty on filing documents which are not subject to VAT. Consideration should be given to whether disbursements and outlays are provided for separately in the draft Scale of Fees.

Office of the Planning Regulator

Fourth Floor (West Wing), Park House, Grangegorman,
191-193A North Circular Road, Dublin 7, D07 EWV4
opr.ie | info@opr.ie | 01 854 6700



**Oifig an
Rialaitheora Pleanála**
Office of the
Planning Regulator

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