[2020] ICSC 22

AN CHÚIRT UACHTARACH
SUPREME COURT

S:AP:IE:2018:000167

Clarke C.J.
O'Donnell J.
Charleton J.
Irvine J.
Baker J.

IN THE MATTER OF SS. 50, 50A, AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN/

KLAUS BALZ AND HANNA HEUBACH

APPLICANTS/APPELLANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CORK COUNTY COUNCIL, CLEANRATH WINDFARMS LTD.

NOTICE PARTIES

Judgment of O'Donnell J. delivered on the 5th day of May, 2020.

1. On the 12th of December, 2019, this court delivered a judgment in the appeal by Klaus Balz and Hanna Heubach (who I will hereafter call "the applicants") against the judgment and order of the High Court (Haughton J.) of the 30th of May, 2018. The High Court refused leave to appeal to the Court of Appeal. This court granted leave to appeal by a determination issued on the 14th of February, 2019. These dates, as will become apparent later, are of some significance.

2. The judicial review proceedings sought to challenge the grant of planning permission by the respondent An Bord Pleanála ("the Board") for the erection of a windfarm consisting of eleven turbines at Bear na Gaoithe, County Cork, close to the premises occupied by the applicants. The notice party, Cleanrath Windfarm Ltd. (who I will hereafter call "the developer"), is part of a substantial group which operates, it appears, a number of windfarms.

3. Among the issues raised by the development of windfarms is the question of noise. In 2006, the Department of the Environment issued guidelines for planning authorities, known as the Wind Energy Development Guidelines ("WEDG"), derived in turn from a UK document entitled "The Assessment and Rating of Noise from Windfarms", issued by the Energy Technology Support Unit ("ETSU") of the Department of Trade and Industry in the UK in 1996. The guidelines were issued under s. 28 of the Planning and Development Act 2000 ("PDA 2000") and therefore the planning authority was obliged to have regard to them, but was not bound by them.

4. In this case, one of the matters which the applicants sought to argue was that the guidelines were inadequate and out of date, and also to argue for lower levels of permitted noise from windfarm developments. The Inspector appointed by the

Board considered this submission irrelevant, and it appears the Board adopted the Inspector's report in this regard. This court decided, in essence, that while the Board could consider and, if it considered it appropriate, reject the submission made on behalf of the applicants, it was not entitled to reject it as irrelevant. Accordingly, the court concluded that the decision of the Board to grant planning permission was invalid.

5. It should be said that the legal flaw which gave rise to the court's decision was an error entirely of the Board and was not encouraged by the developer, either explicitly or tacitly. The developer had indeed made submissions both in reliance on, and by reference to, the guidelines, but also on the basis that a lower standard might be considered appropriate. As the judgment noted, the outcome of the case would undoubtedly be frustrating for both the developer and even to the applicants. In the developer's case, this was now the second planning permission which had been found to be invalid and considerable time had elapsed in the planning process, in circumstances where deadlines were approaching, and in any event where commercial considerations meant that delay could be damaging to the viability of the project. From the applicants' point of view, it had, by the same token, been necessary for them to take the considerable risk of initiating proceedings because they considered, correctly as it transpired, that their objections had not been properly considered. The end point is, however, that the applicants' success is partial and perhaps temporary: the development has been advanced considerably and may yet proceed. There is an important balance created by the planning system. It is inevitable that there will almost always be a significant imbalance between both the resources available to a developer and those of an applicant wishing to object to the development, and a similar disparity in the economic or other benefit which can

be expected to be obtained from a planning decision. The developer stands to benefit, perhaps substantially, if permission is obtained: the applicants are in no better position if the development is refused than they were before the development was mooted. It is accordingly an important part of the development control system that there should be an independent body or bodies which will assess an application for permission and consider whether it is consistent with proper planning and development, and therefore consistent with the public interest.

6. In this regard, it is noteworthy that it was stated at para. 56 that the objection made on behalf of the applicants was somewhat diffuse and unsupported by any expert report referring to the particular development, and that it would not have been unreasonable for a planning authority or the Board to continue to give weight to the existing guidelines and to be slow to depart from them. Nevertheless, submissions have to be considered on their merits.

7. The court indicated that it would invite submissions from the parties on the final order to be made and, in particular, the possibility of remittal of the matter to the Board, and, if so, at what stage of the process.

8. The developer has taken the view that remittal is neither possible nor desirable. It is apparent from further correspondence and debate in this court that the developer does not maintain that remittal is not possible as a matter of law. Rather, the developer anticipates the possibility of further challenges to the validity of any decision which might issue after remittal to the Board. Instead, the developer decided to immediately initiate an application for substitute consent pursuant to Part XA of the PDA 2000 (as inserted by the Planning and Development (Amendment) Act 2010 ("the 2010 Act")). The regime for substitute consent contemplates a two-stage process: first, an application to the Board for leave to seek substitute consent,

and second, if leave is granted, a decision on the merits of the application. One factor which may permit the Board to grant leave to seek substitute consent is if a developer considers that, in the light of a final decision of a court, the permission granted for the development "*may be* in breach of law, invalid, or defective in a material respect" (PDA 2000, s. 177C (*Emphasis added*)). Accordingly the developer relied on this provision to initiate the application for substitute consent in the immediate aftermath of the judgment, and, as it happens, before any order of *certiorari* quashing the permission had been made.

9. Under s. 177J of the PDA 2000 (as inserted by the 2010 Act), where the Board is considering an application for substitute consent (the applicant having been given leave), the Board may give a direction to cease activity on the site where the Board is of the opinion "that the continuation of all or part of the activity or operations is likely to cause significant adverse effects on the environment or adverse effects on the integrity of a European site".

10. Part XA of the PDA 2000 (as inserted) contemplates a relatively speedy decision on the application for leave. In this case, the Board has given an indicative date for decision of the 5th of May, 2020. Counsel for the Board indicated that if leave was granted, it could be some time before a decision was made on the question of substitute consent a timescale which, in any event, may have to be revised in the light of the restrictions on working created by the current COVID-19 pandemic.

11. In the immediate aftermath of the judgment, the applicants indicated that they considered that the developer was continuing to develop the site, and indicated that they intended to make an application to the court to seek injunctions restraining such work. The court indicated that it did not consider that any such relief came within the nature of the appeal, but that it would sit to consider what orders might

be made that were within the pleadings and arose consequent on the determination of the appeal. As already indicated, the developer expressed the view that remittal was neither possible nor desirable, and the Board indicated that, in those circumstances, it did not wish to make any submissions on the matter. On the 8th of January, 2020, the developer indicated that the development had the benefit of the REFIT 2 Support Scheme for Renewable Energy Generation ("the REFIT 2 Scheme"), but that, in order for the windfarm to continue to be eligible for REFIT support, the development was required to have valid development consent in place. It was stated that, upon the order of *certiorari* becoming operative, the development would not have the benefit of valid development consent, and "may lose its REFIT 2 benefit". The loss of that benefit would have commercially catastrophic consequences, it was contended, and in the circumstances it was indicated that the developer intended to apply to the Supreme Court for a stay on the execution of its order of *certiorari* quashing the decision of the Board to grant permission in the case, pending the determination by the Board of the application for leave to apply for substitute consent, and, if such leave was granted, the determination of the prospective application for substitute consent.

12. There was an oral hearing in this court on the 29th of January, 2020, at which the applicants disputed the developer's contention that it would suffer catastrophic consequences if a stay was not granted, and furthermore raised issues as to works they had contended had been carried on by the developer following the judgment of this court. Accordingly, the matter was adjourned to allow evidence to be put before the court by both parties, and for submissions to be exchanged. A date for hearing was fixed for the 30th of March, 2020.

13. The anticipated hearing before the Supreme Court was not possible because of the restrictions on movement implemented as a result of the development of the COVID-19 pandemic. Accordingly, the court directed an exchange of further submissions to narrow the issues between the parties, and fixed a remote hearing, which was conducted on the 24th of April, 2020. At the conclusion of the hearing, the court indicated its ruling, and that reasons for such, would be furnished in due course. This judgment sets out those reasons.

Facts

14. It is clear that the developers had been attempting to develop a windfarm at this site for some considerable time. The first application was made almost seven years ago, and resulted in permission from Cork County Council which was, however, quashed by the High Court. The issue in these proceedings concerns the permission for the construction of 11 turbines which was granted by the Board in 2017 on appeal from Cork County Council, which had granted permission, but for fewer turbines. These proceedings were commenced, and the High Court judgment was issued on the 30th of May, 2018. In October, 2018, and while the application for leave to appeal to this court was pending, the developer notified the applicants of its intention to commence work on the development. Correspondence ensued and the applicants threatened enforcement proceedings, but none were commenced. As set out above, on the 14th of February, 2019, this court granted leave to appeal. Immediately thereafter, the applicants' solicitor wrote to the developer's solicitor, reserving their position on the question of seeking orders staying or restraining the carrying out of such works, and inviting the developer to cease the work in the light of the extant appeal. The developer responded robustly, pointing out that no order

had been sought restraining the work at any point in the proceedings since they had been commenced, that a considerable quantity of work had been done by that stage, and that work would continue. It was also stated that more than €40 million had been committed to the development by that date, and concern was expressed that if the development was halted, it might lose the benefit of the REFIT 2 Scheme.

15. It is clear that in the period between October 2018 and December 2019, considerable work was carried out to the point where the windfarm was largely constructed. The developer had decided to proceed with only nine of the eleven turbines, omitting the turbine closest to the applicants' dwelling. The reduction to nine turbines also had the effect that it removed the need for a substation on the site, and instead it was proposed to connect the site to a substation at the associated Derragh windfarm development. The developer now contends that this has the effect of significantly reducing any noise which may be experienced at the applicants' dwelling.

16. Between October, 2018, and the 9th of December, 2019, site clearance works were carried out, and all but one of the nine turbines fully installed. The last turbine (No. 6 on the site map) was partially installed but, due to bad weather, work had to cease. This was then the state of affairs on the site at the date on which the judgment was delivered. It is said on behalf of the developer that, due to health and safety concerns, it considered that the turbine should not be left in an unfinished state. When the weather improved, Turbine No. 6 was completed on the 16th and 17th of December, and further necessary site clearance works were carried out up until the 20th of December, and it appears that the turbines have been commissioned .

17. An affidavit was sworn by Mr. David Murnane, a director of the developer, for the purposes of verifying the statements made in the correspondence. He explained that

the development had the benefit of the REFIT 2 Scheme. He further exhibited a REFIT 2 letter of offer dated the 17th of October, 2018. Provision 4 of that letter provided:-

> "Full planning permission is required at all times in respect of your project in order to remain compliant with REFIT 2 terms and conditions. Planning permission for the merged site must remain valid."

The reference to the merged site was the merging of the Cleanrath and Derragh windfarms, both of which were owned by the developer.

18. The REFIT Scheme is a price support scheme devised by the State, which guarantees certain prices for electricity generated, for a fixed period up until 2032, and thus, it is to be assumed, renders the generation of electricity through renewable energy commercially viable. The applicants exhibited the full terms of the REFIT Scheme originally issued in 2012, and updated thereafter. Paragraph 7.4 provides that a "letter of offer" will not be made in any case unless "(i) in the case of proposed projects planning permission has been obtained for the construction and this is demonstrated to the Minister in the application or it is demonstrated that planning permission is not required in any individual case".

19. Paragraph 9.2 of the conditions of offer in the scheme provides that, *inter alia*:-

> "[*V*]alid planning permission must continue to be held by the applicant until the plant has been constructed. In cases where planning permission expires prior to construction, evidence of the grant of a planning permission extension in time or evidence of new planning permission grant must be submitted without delay to the Minister. Where a project that has not yet been constructed is not capable of demonstrating valid planning permission or proving that it is not required, the Minister may withdraw any offer of REFIT 2 support for that project."

20. Mr. Murnane stated that the total investment in the merged project including the related Derragh windfarm amounted to almost €72 million, and that the loss of the guaranteed minimum price that would be available under the REFIT 2 offer "would have commercially catastrophic consequences for the project in terms of losing the guaranteed minimum price up to 2032". Mr. Murnane also stated that the Minister for Communications, Climate Action and Environment had extended the required "connected date" from the 31st of December, 2017 to the 31st of December, 2019, and furthermore extended the requirement of having a power purchase agreement in place from the 30th of September, 2018 to the 31st of March, 2020. Finally, he also stated that, in addition to the omission of the proposed Turbine No. 11 (being the turbine closest to the applicants' property), it was considered that the installation of Serrated Trailing Edges ("STE") on the blades of the constructed turbines would have an additional noise reduction effect. A report was exhibited to the effect that the omission of the two turbines and the inclusion of STEs would have a positive effect on the noise levels of the property, with a reduction calculated in the order of 6dB.

21. Ms. Hanna Heubach swore a replying affidavit, which took issue with a number of the contentions. An affidavit was sworn by Mr. Dick Bowdler, an expert whose views had been relied on in the original planning application, who contested the calculations contained in the expert report exhibited by Mr. Murnane, and, in particular, the conclusion that there would be a reduction capable of being measured at 6dB. In particular, he considers that the use of STEs may increase the relevant sound levels, because the major benefits to be obtained occur at high frequencies, whereas at lower frequencies – which may be of more relevance at the applicants' dwelling – there may be some increase. However, as I read Mr. Bowdler's affidavit,

while he challenges the methodology, some of the calculations, and the degree to which it can be contended that there will be any reduction in noise, he does not suggest that the impact of noise on the applicants would be increased, and I think it is to be assumed that there would be some amelioration of the noise, although there remained dispute and uncertainty as to the precise effect.

Jurisdiction

22. The applicants initially contended that the court had no jurisdiction to stay the making of an order of *certiorari*. However, they accepted, latterly, that there was jurisdiction, but that the court should not exercise it here. The applicants placed considerable reliance on the decision of the United Kingdom Supreme Court in *Ahmed v. Her Majesty's Treasury* [2010] UKSC 2, [2010] 2 A.C. 534.

23. In that case, the UK Supreme Court had found that portions of Orders in Council made by the UK government purporting to freeze assets of Al-Qaeda and the Taliban and persons suspected of association with those organisations, in purported implementation of a resolution of the Security Council of the United Nations, was *ultra vires* the powers conferred by the United Nations Act 1946, at least in certain respects, and should be quashed. Subsequently, the Treasury applied to the courts to suspend the order for a period of time to permit, among other things, a provision to be introduced by primary legislation to the same effect. A majority of the Supreme Court (Lord Hope of Craighead dissenting) refused that application.

24. The majority judgment was delivered by Lord Phillips of Worth Matravers. He accepted that the court had jurisdiction to suspend or stay an order of *certiorari* but, using forceful language relied on heavily by the applicants herein, he considered that the problem was that the suspension of the *certiorari* order would not alter the

legal position. The Orders (or at least the impugned provision) were *ultra vires,* and therefore void. Suspension of the order of *certiorari* would, however, give an impression that the provisions remained in force, and therefore financial institutions might be persuaded to comply with them. This was indeed the object which the UK Government sought to achieve in applying for the stay. The court, he considered, should not lend itself to a procedure designed to obfuscate the effects of its own judgment.

25. Lord Hope, for his part, delivered a detailed dissenting judgment. He pointed out that in the analogous case of *Kadi v. The Council of the European Union* (Joined Cases C-402/05P and C-415/05P) [2009] A.C. 1225, the ECJ had suspended for a period of three months the coming into force of its judgment on comparable provisions which had been introduced by the EU to give effect to the UN Resolution. He considered that the court had the power to suspend or stay any order of the court. It was conceded that this was not a case of giving only prospective effect to a judgment of the court: rather it was accepted that an order of *certiorari* when made would have the effect that the relevant provisions were void *ab initio*. On established principles, however, it was the order of the court which disposed of the proceedings and not the issuing of the reasons for its decision in the form of a judgment. In this case, there could be beneficial consequences to staying the order, and accordingly the court should do so.

26. The applicants rely on the analysis of Lord Phillips. The position of the developer, they say, is adopting a "Janus like" position, in that it wishes to be allowed to contend for opposite conclusions in different respects, namely that the planning permission is invalid for the purposes of making an application for substitute consent pursuant to Part XA of the PDA 2000, but at the same time that it remains

valid for the purposes of the terms of the REFIT Scheme. This, it is said, is a classic case of obfuscating the effect of the court's judgment.

27. The respondents, for their part, rely on the fact that a jurisdiction clearly exists to stay the order of a court, and point to the position which applies even where it may be determined that primary legislation is inconsistent with the Constitution in certain circumstances, as discussed in the judgment of this court in *P.C. v. The Minister for Social Welfare (No. 2)* [2018] IESC 57. The developer also points to the decision of the Court of Appeal of England and Wales in *R. (Rockware Glass) v. Quinn Glass Limited and Chester City Council* [2006] EWCA Civ. 992, where the Court of Appeal, in the judgment of Buxton L.J., held that it had, in the particular circumstances of the case, power to stay an order of *certiorari* of planning permission to allow an application for further permission. In that case, it was acknowledged, however, that the considerations of health and safety and the interests of employees and other third parties led the court to conclude that it should impose the stay for the purposes of permitting a fresh permit under the integration, pollution prevention and control regime.

Discussion and Decision

28. It is now accepted that the court has jurisdiction to stay an order or to postpone the making of any order (which may have the same effect). That indeed is an important element in the court's capacity to do justice in any individual case. Otherwise, the court would be unable to distinguish between cases of flagrant, deliberate, and serious breach on the one hand, and perhaps innocent and limited error for which the party indeed may not themselves be responsible, but where, nevertheless,

serious and disproportionate consequences could ensue if effect was given to an order of the court immediately.

29. The question, however, of whether it is appropriate to make an order with immediate effect arises with particular force where there is, moreover, a jurisdiction to cure the error. This may occur in the context of judicial review where perhaps an order may be found to be invalid because of procedural error or failure, which does not reflect in any way on the merits of the case. Where a substantive decision may be made which may have the same effect as the impugned decision, a question arises as to what the position should be in the meantime.

30. An analogous issue arises in the field of planning law because of the possibility of retention permission and, in those cases where developments are affected by European law, the provisions for substitute consent. Indeed, the very existence of the jurisdiction under s. 177J to make orders restraining the carrying on of a development or other operation pending the decision on whether or not to grant substitute consent is a recognition that a determination of invalidity does not automatically mean that what was permitted under the invalidated permission should cease, or any works reversed. At a more mundane level, in applications under s. 160 of the PDA 2000, it is relatively common for courts to exercise a discretion as to whether to adjourn the proceedings themselves, or put a stay on any order for a limited period to permit the regularising of the permission if possible, or at least to permit a decision to be made on the planning merits.

31. Nor do I accept that there is anything particularly Janus-faced or inconsistent in the court staying an order. It is not a case of different things being said to different parties: in such a case, the court says the same thing to everyone, namely, that while factual matters have been established sufficiently to justify an order, there are

considerations of justice which require the court to exercise some discretion as to the timing of the enforceability of any such order. This is, admittedly, a more complex position than a blanket position where an order is made immediately on the delivery of judgment in all cases, but life is not always clear-cut and there may be cases where the decision of a court, if it is to do justice in a complex situation, must be capable of nuance.

32. However, a real difficulty does arise in the context of judicial review, particularly in the nature of *certiorari*. The proposition that any decision if found to be invalid in any respect is therefore void *ab initio* means that once a judgment is given to that effect, parties may be entitled to treat the order or decision (although not necessarily steps taken under it) as a nullity, in which case it may be doubted that a stay on a formal order has any real effect in law. I do not think a court should shrink from the fact that in some cases it may even be necessary to conclude that the effect of the stay is to give temporary validity to the decision or order which the judgment has found to be invalid, but the very difficulty of such a concept illustrates the fact that the exercise of any such jurisdiction must be exceptional. The normal sequence is, and must be, that once a judgment is given, the formal order should follow as a matter of course, and there is a significant and heavy onus upon a party which would seek to invite the court to distinguish between the terms of its judgment and the giving effect to that judgment by a formal order.

33. In this case, it is important to consider what consequences would follow if the order sought by the developer was made in this case, that is, if the court were to make an order of *certiorari* but stay it pending the determination of the Board on the application for substitute consent, or if, which it appears would amount to the same

thing, the court would simply adjourn the making of the formal order pending the decision of the Board. The consequences of any stay appear to be two-fold.

34. First, the developer says that the primary object of the application is to permit the development to maintain its eligibility for the REFIT 2 Scheme in circumstances where it has a pending application for substitute consent which, if ultimately granted, would have the effect of providing valid permission covering the period of the invalidity necessarily identified by the judgment of the court. In circumstances where it had a perfectly valid permission until the delivery of the judgment of the court, and where any frailty in the permission is not attributable to any error or fault on its part, but rather because of the stance taken by the Board, and where it may yet obtain a valid substitute consent, then it is argued that it should be protected against the possibility of a temporary and curable invalidity which would nevertheless put it in breach of the terms of the REFIT 2 Scheme. If that scheme is not available, it is contended by the developer that it would suffer catastrophic financial loss in that it would not have available to it the guaranteed floor price established by the scheme up until 2032. This might be described as the REFIT 2 eligibility consequence of a stay.

35. The second aspect of a stay would, it appears, be that the development would be protected against the possibility of enforcement proceedings under s. 160 of the PDA 2000. It would appear (although this was not debated in argument and therefore this conclusion must be tentative) that unless the planning permission is formally quashed by this court, such proceedings could not be commenced, or successfully maintained. Conversely, if an order of *certiorari* is made then any s. 160 proceedings would be bound to succeed on the issue of whether or not the development was permitted by planning permission, albeit that there would remain

significant arguments as to whether the court should proceed to hear and determine the case in the light of the application for substitute consent, and what – if any – remedy might be granted, and, if so, on what terms. This is the planning enforcement consequence of a stay.

36. There are a number of factors which the court must consider. I conclude that although the applicants have challenged every aspect of the evidence adduced on behalf of the developer, the developer has nevertheless established that if the court were to make an immediate order of *certiorari*, that would put the developer, at a minimum, at risk of loss of the REFIT 2 Scheme. I am also prepared to accept that loss of the REFIT 2 Scheme would be seriously financially damaging to the developer. The very fact that it was felt necessary to provide a price floor guarantee for renewable energy providers, extending until 2032, seems itself to be sufficient evidence of a shared understanding of participants in the market and those State authorities interested in encouraging the provision of renewable energy that such a guarantee is necessary to encourage operators to undertake a substantial capital investment in developing alternative energy plants. It follows that there must be at least a reasonable apprehension that, without such a guarantee, the prices which may be available on the market would mean that a development such as this would not be economically viable. I am also prepared to accept that the developer has a real prospect of obtaining substitute consent. If such substitute consent was granted but an order of *certiorari* had been made in the meantime, it would appear to follow that there would have been a period during which the development did not have the benefit of a valid planning permission, albeit that such permission was later given, and would, as a matter of law, cover the period of invalidity once granted. In such

circumstances, the developer could have lost the benefit of the REFIT 2 Scheme for no good reason.

37. On the other hand, the evidence of the developer in relation to the REFIT 2 Scheme is somewhat limited. Indeed, it was the applicants who exhibited the scheme proper. All Clause 4 of the extension agreement provides is that the Minister *may* withdraw the benefit of the scheme: the developer has not explained why it considers the Minister would do so in circumstances where it is clear that any invalidity in the planning permission may be temporary (if the developer is correct) and due, moreover, to no fault on the developer's part. In circumstances where it appears to be public policy to encourage the generation of electricity by renewable energy, it is not apparent why it is apprehended that the Minister would not be prepared to permit the developer to continue to benefit from the REFIT 2 Scheme if it was granted substitute consent. Nevertheless, the evidence does establish that the quashing of the planning permission would certainly put the developer at risk of losing the REFIT 2 Scheme and, given the scale of the investment in the merged development, it has a legitimate interest in seeking to avoid or minimise that risk.

38. It is not, however, that the grant of a stay would necessarily avoid the loss of the scheme. That depends on the view that the Minister (and perhaps ultimately a court) might take of the meaning of validity within the scheme, and the effect of the stay order by this court. It is, moreover, a legitimate objection that the court is being asked to make a decision benefitting one party to a contract (in this case the scheme) in the absence and to the possible detriment of the other party. These are significant considerations and reasons for caution. Nevertheless, given the scale of the investment, the likely timescale of the availability of the REFIT 2 Scheme, the potential impact of any temporary period of invalidity, the capacity of a substitute

consent decision to show that the developer had, and was entitled to have, a valid permission, and the fact that the impact on the REFIT 2 eligibility is an unfortunate consequence of the proceedings rather than their object, all lead to a conclusion that, absent other countervailing features, the balance of justice would favour staying the order in this case, perhaps upon terms.

39. However, the position is a lot less clear and satisfactory in relation to the continued operation of the windfarm. There is a signal absence of evidence from the developer in relation to its intentions in that regard. Nor is there any evidence of the impact of not being able to run the windfarm for a limited period pending the Board's decision. It may be that the developer's view was that this would be a matter in due course within the jurisdiction of the Board in the event that an application for leave to apply for substitute permission was granted, and it certainly is to be inferred that the developer intends to continue to operate the windfarm since the developer has argued that the omissions of the turbine and the substation will have the effect of reducing the noise effect on the applicants' dwelling. However, in circumstances where the grant of the unusual and exceptional relief sought by the developer would have an effect on its capacity to continue to operate the windfarm, there is little, if any, satisfactory evidence about the developer's intention, the necessity to operate the windfarm, and conversely the impact on it of not being able to do so, pending the decision on substitute consent. The developer has maintained this application almost exclusively by reference to what it has described as the primary issue of its eligibility for the REFIT 2 Scheme.

40. Against these arguments in favour of a stay a number of factors must, however, be weighed. The applicant has succeeded in these proceedings, the effect of which is that the developer cannot now assert an entitlement to operate the windfarm in

accordance with the law. However, if the order is stayed, and the windfarm continues to operate, the applicants are in effect put in the same position as if they had lost rather than won this appeal. If the Board were to refuse leave, or not to grant substitute permission, then the developer would have had the capacity to operate the windfarm, and benefit from REFIT, when on this hypothesis it would not have been entitled to do so.

41. Furthermore, the applicants argue that the difficulties that are now faced by the developer are a consequence of its own conscious decision to proceed with the development in the face of the appeal to this court, and in the knowledge that that appeal might succeed. The present difficulties, in the applicants' view, are therefore no more than the predictable consequences of the risk the developer knowingly took.

42. The fact that the developer proceeded with the development is of some relevance in this case, since it increases the amount of the investment put at risk, and therefore the damage likely to be caused if it is not able to obtain the benefit of the REFIT scheme. However, I would not be particularly critical of the developer in this regard. It seems clear that there were other constraints at play, beyond purely legal considerations. In particular, it seems that there were tight deadlines for eligibility for, and access to, the REFIT 2 Scheme. The developer was faced with the unenviable choice of commencing a substantial development under the shadow of an appeal, or waiting an unspecified period for a final decision, at which point the development may have become economically unviable. Accordingly, I would not criticise the developer for making the decision to proceed or, conversely, give particular weight to the fact that the development has been substantially carried out.

43. In this case, however, the developer proceeded to continue to carry out completion works on the site after the delivery of this court's judgment. That is a fact to which significant weight must be given. This is not because of some offence to the *amour-propre* of this court. Furthermore, it follows from the matters set out above that the continued working on the site could not be said to be a breach of any order of the court. Indeed, even if an order of *certiorari* had been made, that would not in itself have restrained the work, or made it a contempt of court to do so, although it may have put the developer at risk of enforcement proceedings by the local authority, or by interested individuals However, the delivery of a judgment by a court is not a legally irrelevant event which parties are entitled to ignore.

44. The fact that a court delivers judgment and then offers the parties an opportunity to make submissions in relation to the terms of the order to be made and the relief to be granted, together with the fact that, normally, the formal order of the court dealing with the proceedings will not issue until all matters are concluded, is one more illustration of the requirement of fair procedures and that parties are given the opportunity to make submissions before orders are made affecting them. The opportunity given is not, and has never been understood as, an opportunity to press on with works and seek to achieve something that might not be permitted or be lawful if the order is made in terms of the judgment already delivered. All parties are obliged to respect the decisions of the court, and if one party does not do so, and attempts to obtain some advantage, justice may require that the court takes steps to ensure that a party does not benefit thereby. Where a person carries on with work in the face of proceedings, a court may take the unusual step of granting a mandatory injunction to require the works to be reversed, and that position must apply with, if

anything, greater force when such steps are taken in the light of an adverse judgment of the court, but before a formal order.

45. There are two additional matters which weigh in the balance. First, the developer could have made an application to this court after the judgment, but before carrying out any works, notifying the court and the other parties, and seeking clarification if such works could or would be permitted, and, if necessary, seeking a short stay of the nature it now seeks on a more extended basis to permit the identified works to be carried out. It is not suggested that the matter was of such urgency that such an application could not have been brought.

46. The second factor is the lack of evidence in relation to this matter. The explanation given by the developer that health and safety concerns meant that Turbine No. 6 could not be left in the state it was in as of the 12th of December is tenuous. As the applicants observe, the particular health and safety concerns are not identified, still less substantiated by evidence. Furthermore, it is not explained why it was decided that the only way in which the turbine could be protected, and such health and safety concerns allayed, was by completing the turbine, clearing the site, and allowing the windfarm to be commissioned.

47. Furthermore, although it is self-evident that these works were carried out in the knowledge of the judgment of the court, no explanation was offered by Mr. Murnane as to the company's reasoning or justification for taking this course. It was not suggested that the company had been advised or took the view that the steps it was taking were lawful. No reference was made to the fact of the judgment at all. It is difficult to avoid the conclusion that the developer decided to press on in the belief that it would be in a stronger position in fact (and perhaps in law, since

initially it seemed to take the view that the permission was only necessary to complete the development) if it did so.

48. As the judgment in this case observed, it is easy to imagine that the entire course of these proceedings has been a source of considerable of frustration to the developer. It appears permission for this windfarm was first sought more than seven years ago. There is no doubting the controversy that now surrounds the development of wind energy, and the strong views which are held on either side of the debate, but it is in the public interest that the question of whether it is consistent with proper planning and development to develop a particular windfarm on a particular site should be decided in accordance with the law, on the planning merits, and by reference to the best available knowledge or science. It is undoubtedly frustrating for a developer to at least twice receive permission and to have it determined that such permission was invalid. On the other hand, windfarms are very substantial developments normally in remote and scenic areas, which will moreover stay in place for a very long time. The very public policy that encourages development of alternative energy – and, moreover, provides financial incentives to do so – also requires that the interests of members of the public and those entitled to participate in the decision-making process are respected, and that the process is conducted in accordance with the law. Substantial enterprises should be expected to respect the adjudications of the courts.

49. There are therefore a number of competing factors in this case. However, taking the developer at its word, that its primary concern is the grant of a stay to avoid the prospect that it may be contended that even a temporary invalidity in its planning permission would lose its REFIT 2 eligibility, and accepting moreover that the loss of such eligibility would have severe financial consequences, I would, notwithstanding the conduct of the developer, be disposed in principle to grant a

stay pending the Board's decision. In that regard, I would take into account the fact that, from the applicants' point of view, while anything that hinders the development may be said, in some zero sum game, to be of benefit to the applicants, as a matter of fact, the applicants will not be directly affected by the access or lack thereof of the developers to the REFIT 2 Scheme.

50. However, I do not consider that the developer has adduced sufficient, or indeed any, evidence of the necessity to stay the order for the purposes of allowing the windfarm to operate. Nor is there evidence of the damage that the developers may suffer if it cannot do so. Furthermore, the continued operation of the windfarm does affect the applicants in a real way, even if the developer contends that the adjustments it has made may reduce the impact of noise at the applicants' dwelling. I also take into account the fact that the developer has had the benefit of a *de facto* stay for over four months since delivery of the court's judgment.

51. Finally, it is necessary to take into account the developer's actions as outlined above. In all the circumstances of the case, therefore, I would accordingly only be prepared to grant the stay sought on terms that the developer undertake not to operate the windfarm pending the decision of the Board. This would be of substantial benefit to the applicants since it is an outcome that would not be achieved if an immediate order of *certiorari* was made, as it would still be necessary to bring proceedings under s. 160 of the PDA 2000, in which case the court would still have a discretion in relation to the hearing of the case and the precise terms of any order that might be made. Since this is a complex issue, and in any event the situation may develop, I would also give the parties liberty to apply. The developer was notified that it had seven days within which to offer such an undertaking, otherwise the order of *certiorari* would be made.

52. Finally, I should say that the Board took no part in the hearing on the stay application, since once the question of remittal to the Board was not involved, they had no direct interest in whether a stay should be granted or not. However, the Board was represented, and counsel was able to assist the court both in understanding the likely timeline for any application for leave to seek substitute consent, and moreover the further steps that might be involved should leave be granted. While it may well be that the Board has limited resources and pressing demands on its time, and, furthermore, that all proceedings involving public participation must now be reviewed in the light of the difficulties created by COVID-19 restrictions, I would wish to express my view, nevertheless, that this degree of uncertainty surrounding a substantial development is undesirable and not in the interest of the public, or indeed of the private parties involved. In circumstances where the invalidity of the planning permission and the consequent necessity for a substitute consent application is entirely due to a flawed procedure adopted by the Board itself, there is, in my view, a strong case for expediting the procedure in this case, so far as possible.

Donal O'Donnell

5/5/20