THE SUPREME COURT

[Supreme Court Appeal No. 10/2020]

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

BETWEEN

RONALD KRIKKE, PIA UMANS, SEAN HARRIS, CATHERINE HARRIS, PATRICK KENEALLY, CAROLINE KENNEALLY, KENNETH GEARY

APPELLANTS

-AND-

BARRANAFADDOCK SUSTAINABILITY ELECTRICTY LTD.

RESPONDENTS

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 17th day of July 2020.

Introduction

1. This is an appeal against the decision of the Court of Appeal to grant a stay on a High Court order, made pursuant to the provisions of s.160 of the Planning and Development Act 2000, pending the hearing of the substantive appeal by the respondent developer against that order. The respondent operates a wind farm in County Waterford, and the High Court order (perfected on the 6th December 2019) relates to a number (but not all) of the wind turbines erected there.

2. Section 160 of the Act, as amended, applies where an "unauthorised" development has been, is being or is likely to be carried out or continued. In such circumstances a planning authority or any other person may apply to the High Court or to the Circuit Court, depending upon market value, and the court may make any order it considers necessary to ensure, as appropriate, that the unauthorised development is not carried out or continued, or that the land is restored to its previous condition, or that the development is carried out in conformity with the permission pertaining to that development.

3. In the instant case, the High Court found that some of the turbines on the wind farm had not been constructed in accordance with the relevant permission and were unauthorised. The trial judge further found that it was not an appropriate case in which to exercise his discretion by refusing relief under s.160 and the respondent was ordered to cease operating those turbines *pro tem*. However, the trial judge envisaged the possibility that the planning status of the turbines might be regularised in an appropriate application to An Bord Pleanála and he gave liberty to apply, with a view to vacating his order, should that occur.

4. The issue of law upon which this Court granted leave to appeal was the proper approach to the question of a stay during an appeal in planning proceedings, where those proceedings concern a development that required an environmental impact assessment ("EIA"). The merits of the substantive issues in the case remain to be considered by the Court of Appeal in the pending appeal. While the submissions of the parties on those

issues and the rulings given in the High Court thereon will be described in some detail here, this is done solely in order to give sufficient detail of the context within which the stay was given.

Factual background

5. The facts of the case are fully described in the judgment of the trial judge and will only be briefly summarised here. The developer was granted planning permission by An Bord Pleanála to erect a number of wind turbines. The relevant detail, for the purposes of this appeal, is that, as particularised in the planning application process, the turbines were intended to have a rotor blade diameter of 90 metres.

6. The permission granted by the Board contained two relevant conditions. Condition 1 stipulated that the development was to be carried out in accordance with the plans and particulars lodged with the application, while Condition 3 provided that prior to the commencement of development the developer was to agree details of the turbines, including "design, height and colour", with the planning authority. In default of agreement, the matter was to be referred to the Board.

7. The compliance submission made on behalf of the respondent to the local authority proposed, in the body of the document, modifications in the height of some of the turbines. A schematic contained in an appendix indicated that the rotor blades would have a diameter of 103 metres, although this was not referred to in the body of the submission. The decision letter from the planning authority referred in its heading to the 90 meter diameter but under the heading "Condition 3" indicated that it was "noted and agreed".

8. The developer erected turbines with a rotor blade diameter of 103 metres. The tip height (that is, the highest point reached by the tip of a blade) was not altered, as the height of the turbine hubs was lowered so that the tip height remains as it was in the original proposal. The turbines became operational in 2015.

The s.5 referral

9. In 2018 the planning authority, acting under s.5 of the Planning and Development Act 2000, referred a question to the Board as to whether the deviation from the permitted blade length to the constructed blade length was or was not development, and, if it was development, whether or not it was exempted development.

10. It is relevant to note here that the Board had previously made a s.5 declaration, adverse to a developer, in respect of a wind farm in County Cork where the "as built" turbines had a rotor diameter considerably in excess of the length for which permission had been given. This had been done with the express consent of the planning authority. That case culminated in a decision of the Court of Appeal in March 2016 (see *Bailey v. Kilvinane Wind Farm Ltd*. [2016] IECA 92), which granted an order under s.160 of the Act (although the order was stayed pending the outcome of an application by the developer for substitute consent).

11. The respondent developer in the instant case submitted to the Board that the development under consideration was not to be compared with that in *Kilvinane*. The deviation was described as being immaterial in planning terms, and as making no significant changes to the environmental impacts. The developer also argued that the alteration was authorised by the planning permission. Further, it was submitted that it was inappropriate for the Board to consider the reference where, it was contended, the alteration was authorised by the decision of the planning authority in relation to the compliance submission.

12. An inspector appointed by the Board reported that she would have had no objections in principle to the alterations, given that the overall tip height was within the planning permission. However, she noted that it might be considered that the s.5 decision in the *Kilvinane* case had set a precedent, and that it was possible to conclude that the reduction in hub height and increase in rotor length did not come within the permission granted.

13. The Board determined (in a declaration issued on the 4th December 2018) that the erection of the turbines came within the definition of development, that the alterations to the turbines did not come within the scope of the permission granted and that there was no provision for exemption for such alterations. The construction was therefore development, and was not exempt development.

14. The developer took no step to challenge this determination. It did, however, make attempts to regularise the planning status of the turbines, in particular by applying for leave to seek substitute consent. This application was made on the assumption that the development was EIA development. The Board initially refused the application, apparently in the belief that it was not EIA development and that substitute consent was therefore not an appropriate procedure. That decision was the subject of separate judicial review proceedings by the present appellants and another individual. As of the time at which the trial judge delivered judgment in the instant proceedings, he was aware that the Board would be consenting to an order of *certiorari* but that there was a dispute as to what further order should be made. Ultimately, on the same day as the delivery of his judgment in these proceedings, the substitute consent matter was remitted to the Board for reconsideration.

15. Meanwhile, the planning authority commenced enforcement procedures after the issue of the s.5 declaration. An enforcement notice issued in May 2019, but has been stayed pending the outcome of judicial review proceedings by the respondent. Those proceedings, in turn, have been adjourned from time to time pending the outcome of these s.160 proceedings.

16. The appellants, who reside in the locality of the turbines, initiated the s.160 application in 2019. Since the parties have different roles in the High Court, Court of Appeal and this Court, I will for the sake of simplicity refer to them as "the residents" and to the respondent as "the developer" throughout.

The High Court judgment

17. The trial judge (Simons J. – see *Krikke v. Barranafaddock Sustainability Electricity Ltd.* [2019] IEHC 825) described the principal legal issues in the case as being concerned with the interaction between the respective competences in planning matters of the local planning authorities, An Bord Pleanála and the courts.

18. The first substantive issue was the status of the s.5 decision by the Board. The residents' position on this was that the unchallenged decision was binding and had the effect of precluding the developer from arguing that the turbines had been erected in accordance with the planning permission.

19. The developer contended that the Board had no jurisdiction under s.5 of the Act to make a finding that an unauthorised development had been carried out, and by implication would have had no jurisdiction to find that a development had not been carried out in accordance with the planning permission. The decision of the Board should therefore be interpreted narrowly, as a finding only that the erection of the "as built" turbines was development and was not exempt development, since it would otherwise have been an *ultra vires* and invalid decision. Hence, that decision could not determine the question which had to be decided by the court under s.160, as to whether the development was unauthorised.

20. In determining this issue Simons J. reviewed the authorities on the scope and operation of s.5 of the Act, commencing with a consideration of the judgment of this Court in *Grianán an Aileach Interpretative Centre v. Donegal County Council* [2004] 2 I.R. 625. He noted that the Court had referred to the possibility that a continued existence of a general High Court jurisdiction to adjudicate upon the proper construction of a planning permission would create "overlapping and unworkable jurisdictions". However, the judgment had left open the question as to what should happen where the Board had already issued a s.5 declaration before the hearing of enforcement proceedings.

21. Simons J. then referred to two High Court decisions (*Wicklow County Council v. O'Reilly* [2015] IEHC 667 and *McCoy v. Shillelagh Quarries Ltd* [2015] IEHC 838) and one Court of Appeal judgment (*Killross Properties Ltd. v. Electricity Supply Board* [2016] 1 I.R. 541 as supporting the proposition that the existence of an unchallenged s.5 declaration gives rise to a form of issue estoppel, and that a party seeking relief under s.160 could rely upon it. He accepted that an exception to this principle would arise in a case where it could cause unfairness (as discussed by Hogan J. in *Wicklow County Council v. Fortune (No.3)* [2013 IEHC 397). The existence of an unchallenged declaration would, therefore, be dispositive of many of the issues that may arise in enforcement proceedings. It would not, however, be determinative of such proceedings since it would still be necessary for an applicant to prove that the work had been carried out by the developer and that the proceedings were instituted within the seven-year limitation period. Also, it would remain open to the developer to rely on the court's discretion to refuse to make an order under the section.

22. In considering the submission by the respondent that the Board had no jurisdiction under s.5 to find that a development was unauthorised, but could only determine whether or not

it was "development" and, if so, whether or not it was exempt, Simons J. acknowledged that a statement to that effect had been made by Finlay Geoghegan J. in *Roadstone Provinces Ltd. v. An Bord Pleanála* [2008] IEHC 210. However, he observed that the judgment in that case was concerned with the *sui generis* status of pre-1964 development, and that the issue had been a narrow question as to whether the Board had jurisdiction to determine whether or not a particular development constituted a lawful continuation of pre-1964 quarrying activity.

23. Reference was made to two decisions of this Court in which some caution was expressed as to the reliance on a s.5 declaration in the context of, respectively, criminal proceedings and enforcement proceedings. In *Cronin (Readymix) Ltd. v. An Bord Pleanála* [2017] 2 I.R. 658 it was said that while a decision by a planning authority or the Board that a development was not exempt was an "authoritative ruling" on the issue, subject to the potential for judicial review, it could not result in a determination of guilt or innocence of any criminal offence under the Planning and Development Act 2000. In *Meath County Council v. Murray* [2018] 1 I.R. 189 McKechnie J. endorsed the view expressed in *Killross Properties* that neither a planning authority nor the Board could make a determination that a development was unauthorised. He stated that an order could not be made under s.160 purely on the basis of a s.5 declaration – an applicant would have to go further and establish in court that the development was unauthorised. However, he added that the "difficult" question of the court's power of review where a declaration had in fact been made did not arise in the *Murray* proceedings.

24. Simons J. found that the authorities, and in particular *Grianán an Aileach*, confirmed that the Board had jurisdiction to interpret a planning permission in the context of a s.5 reference, in order to decide whether the development in question was materially different to that authorised.

25. In paragraph 95 of the judgment he set out, in summary form, eight principles of law that he considered represented the current state of the law. These included the proposition that the jurisdiction of the Board under s.5 extends to questions of interpretation of planning permission, and that the High Court's jurisdiction on such questions was largely confined to enforcement proceedings. The Supreme Court had yet to address the specific question whether the High Court, in hearing enforcement proceedings, was bound by an earlier unchallenged s.5 declaration. However, there were three High Court decisions to the effect that the declaration could in some circumstances be binding on the parties. He saw this latter position as furthering the aim of reducing the risk of "overlapping and unworkable jurisdictions".

26. He concluded that, while there was some doubt as to the binding effect of a s.5 declaration in subsequent enforcement proceedings it must, at the very least, be given significant weight.

27. On the facts of the instant case, Simons J. found that the developer was precluded from reagitating the question whether the "as built" turbines were authorised by the planning permission. He considered that there was no unfairness in so finding, and to hold

otherwise would give rise to the type of overlapping and unworkable jurisdiction that the decisions on the operation of s.5 were intended to avoid. In the circumstances the Board's finding that the alterations did not come within the scope of the planning permission was one that was open to it.

28. In case he was wrong in those conclusions, and without prejudice to them, Simons J. then moved on to address the question of compliance with the planning permission on a *de novo* basis. He made it clear that he was carrying out this analysis *de bene esse*, in case he should be found to have erred in relation to the s.5 declaration, in order to avoid unnecessary delay and additional costs in the event of a possible necessity to remit the matter.

29. The developer's case on this aspect was, essentially, that immaterial deviations were implicitly permitted and that the deviations in this case were not "material". The trial judge rejected this view, holding that the increase of 13 metres in the rotor blade diameter was material. Further, he found that the increase was the result of a deliberate decision, made in advance of the construction work and for the purpose of enhancing the capacity of the wind farm, and was not simply the type of adjustment that might be required to address an unexpected contingency in the course of construction.

30. Simons J. also held that it was not the function of the court to engage in a detailed examination of the merits of the alterations in order to determine whether or not planning permission would have been granted for them. A developer could not "short circuit" the process in this way, especially in the context of an EIA development project. The only question for the court was whether or not planning permission was required.

31. The next issue was the effect of the compliance submission and the decision of the planning authority in relation thereto. The developer submitted, in reliance on s.50 of the Act, that this decision had not been challenged by way of judicial review and its validity could not now be questioned. (In brief, s.50 requires any challenge to a planning decision made under the Act to be brought, by way of judicial review, within eight weeks.)

32. Simons J. considered that the letter of decision could not be relied upon for two reasons. The first was that the developer had not expressly requested agreement to the increase in rotor diameter, and there was nothing in the decision to indicate that an increase to 103 metres had been agreed. Moreover, the planning permission had been for a diameter of 90 metres and the agreement of the planning authority in respect of points of detail could not be used to rewrite the permission. The planning authority would not have had jurisdiction to increase the rotor diameter. Condition 3 had specified "height" as one of the details that could be agreed, but since that condition was imposed in the interests of visual amenity it could not have been relied upon to increase the height, but only to reduce it or leave it the same.

33. Secondly, Simons J. referred to the requirement that any change or extension of projects already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment, must itself be subject to assessment. It

would not, therefore, have been open to the planning authority to authorise such an alteration without a screening process. If it had done so, in an unreasoned decision that simply "noted and agreed" the alteration, its decision would be bad on its face and s.50 of the Act could not apply. This was particularly so in the context of an EIA project. To accept that the time-limits for judicial review could constrain the court's jurisdiction in enforcement proceedings, even in the case of an obviously defective decision, would be irreconcilable with the case law of the Court of Justice of the European Union in relation to the EIA Directive, domestic time-limits and the need for effective, proportionate and dissuasive penalties for breach of the requirements of the Directive.

34. Finally, the developer submitted, as an alternative argument, that relief should be refused having regard to the broad discretion conferred by s.160. Simons J. considered this aspect under five headings identified by the Supreme Court in *Meath County Council v. Murray* [2018] 1 I.R. 189 and *An Taisce v. McTigue Quarries* [2018] IESC 54 – the nature of the breach; the conduct of the developer; the attitude of the planning authority; the public interest in upholding the integrity of the planning and development system; and the public interest in general.

35. He found that the breach was material, such that it could not be considered minor or technical. It had to be seen in the context of a development project that was subject to the EIA Directive. The capacity of the court to "forgive" a breach of this sort, in that context, was more limited.

36. Simons J. found that the developer had acted in good faith. It had engaged proactively with the planning authority. Its reliance on Condition 3 was indicative of a mistake rather than any culpable disregard. However, it was not reasonable to rely on that condition as a vehicle through which to introduce significant change. Furthermore, the developer had failed to make it clear to the planning authority that an agreement to a change in rotor diameter was being sought.

37. The fact that the planning authority had served an enforcement notice after the s.5 declaration was a factor pointing in favour of making an order.

38. The obligation of Member States to have effective, proportionate and dissuasive penalties for infringements of the EIA Directive was a matter to which weight must be given. It might be that a screening exercise might have resulted in a finding that no further EIA was required, but that did not obviate the legal obligation to carry out such an exercise.

39. Under the heading "public interest in general", Simons J. noted the developer's submission that the provision of renewable energy was in the public interest. He observed, however, that the impact of an order restraining the operation of this individual project would have a minimal effect in the national context.

40. Having considered these matters, the trial judge found that the most weighty factor in favour of granting relief against the developer was the fact that the development was of a type subject to the EIA Directive.

41. The residents, in bringing proceedings for relief under s.160 of the Act, had sought orders requiring the removal of the turbines in question and the restoration of the lands to their original condition. The orders actually made by Simons J. were more limited in scope, on the basis that the developer should be permitted an opportunity to regularise the planning situation. It may be repeated here that the trial judge was aware at this stage that the refusal of the Board to consider granting leave for substitute consent was to be quashed, although it was not clear what would happen thereafter.

42. Three declarations were made – that the planning permission did not authorise turbines of the scale and dimensions erected; that the planning authority would not have had jurisdiction to approve such changes in scale and dimensions; and that the developer was estopped from seeking to re-open the findings of the Board on the s.5 reference. The developer was directed to switch the turbines to standby mode, and was given liberty to apply to have this order vacated in the event that An Bord Pleanála should decide to grant leave for substituted consent pursuant to the terms of Part XA of the Act as amended.

43. The developer sought a stay on the order until the end of January 2020. This was refused by Simons J., on grounds recited in the order – (i) that these were summary proceedings and the court was required to act with expedition; (ii) that the unauthorised development involved a breach of the Environmental Impact Assessment Directive (2011/92/EU); (iii) that there was a need to give effect to the public interest in ensuring the integrity of the planning system; and (iv) that the grant of a lengthy stay would deprive the appellants of the benefit of the orders. However, execution of the order was stayed until 5 pm on the 20th December 2019 (the last day of the legal term).

The Court of Appeal decision to stay the order

44. The application for a stay pending appeal was heard by Costello J. on the 20th December 2019 and was determined by her in an *ex tempore* decision on the same day.

45. It is relevant to note that the judicial review proceedings in relation to the refusal of the Board to grant leave for substituted consent had been concluded, with a consent order made on the 6th December 2019 (the same day as the High Court judgment in the instant proceedings) quashing that decision and remitting the matter to the Board. However, the order of remittal was subject to, *inter alia*, a term that the Board should not process the application further until the determination of two appeals by this Court, in other proceedings concerned with the substitute consent process. Judgment has now been delivered in those matters.

46. This Court has the benefit of a full transcript of the submissions and ruling in the Court of Appeal.

Submissions in the Court of Appeal

47. Counsel were agreed on the proposition that the trial judge had reached his decision on the basis of a view that primacy in planning matters should be afforded to the decisions of the responsible planning bodies. Counsel for the residents laid heavy emphasis on this aspect of the judgment, while noting that the trial judge had also made his own

assessment, on a *de bene esse* basis, and had found that there was a material deviation from the planning permission. Emphasis was also placed on the "rule of law" considerations discussed in the judgment, with regard to the breach of the EIA Directive and the need to give effect to the public interest in ensuring the integrity of the planning system. It was submitted that the order made by the trial judge ensured some equity for the developer. It contained an inbuilt limitation and left a route open through the planning process. The grant of a lengthy stay, on the other hand, would deny to the residents the benefit of the order.

48. Counsel also pointed to the reasons given by the trial judge for rejecting the developer's case about the compliance decision – that the developer had not expressly requested agreement to the modification in question, and that the planning authority could not have authorised an increase in rotor diameter, or a change to a permitted EIA development project without giving reasons. This finding, counsel submitted, was also directed towards enforcement of the planning code. He relied upon the principles set out in the decision of this Court in *Okunade v. Minister for Justice and Equality* [2012] 3 I.R. 152 in this respect, and in particular on paragraph 104 of the judgment of Clarke J.

49. The residents continued to maintain (as they do in this Court) that they were adversely affected by noise, and relied upon affidavit evidence to that effect adduced for the purpose of opposing the stay application.

50. Counsel for the developer initially framed his application by reference to the arguability of the grounds of appeal and the balance of justice, and approached the latter aspect on the basis of comparing the impact on the developer and on the residents. If the turbines in question could not operate, and if it were to be 12 months before judgment could be given in the Court of Appeal, there would be a loss of revenue of approximately €5 million, plus ongoing contractual/operating costs in the order of €2 million. Since these were s.160 proceedings, there was no question of an undertaking as to damages and the loss would be irrecoverable even if the developer succeeded in the appeal. Furthermore, there were landowners in the vicinity who were entitled to a production-related payment from the wind farm, who would also be at a loss.

51. As far as the impact on the residents was concerned, counsel for the respondent said that there were two aspects. One was shadow flicker, which he contended had been "entirely fixed". The real issue, in his view, was noise, and he characterised the residents' position as being based on "bare assertion". The question whether the change in dimensions had led to increased noise had been the subject of extensive affidavit evidence in the High Court, with the developer making the case that the turbines as operated were within the noise limits authorised by the permission. The residents had disputed this, but the trial judge had not made any finding in this regard, and did not take it into account in deciding to make the order. Counsel questioned why, if the impact was as the residents maintained, it had taken them from 2015 to 2019 to institute proceedings. There had been no requirement to wait for a s.5 reference. They had now issued separate proceedings, in nuisance, and if successful they would receive compensation. This was to

be contrasted with the loss that might be suffered by the developer if it was subjected to the High Court order but succeeded in the appeal.

52. The finding of the trial judge that the developer had acted in good faith was also emphasised. Further, counsel submitted that the public interest was engaged by the fact that the development was producing renewable energy.

53. Counsel referred to the dispute between the parties about the status of the s.5 declaration, and to the observation by the trial judge that the appellate courts had yet to determine whether a declaration adverse to a developer would be binding. He cited the judgment of McKechnie J. in *Meath County Council v. Murray* [2018] 1 I.R. 189 for the proposition that the Board did not have the power, under s.5, to determine that a development was unauthorised.

54. The case to be made by the developer in the appeal would be that the compliance procedure, and the decision of the planning authority, were beyond challenge by virtue of s.50 of the Act. If that was correct, it would mean that there was no EIA point in the case.

55. As far as the "rule of law" argument was concerned, counsel relied upon the fact that the trial judge had granted a stay for the purpose of facilitating an appeal, so that the Court of Appeal could decide whether or not a stay should be granted pending appeal. In those circumstances, he submitted, the "rule of law considerations" had "no bearing whatsoever". Reference was also made to the fact that the developer had, without prejudice to its position, taken steps to regularise the status of the development.

Ruling of Costello J.

56. Costello J. commenced with the statement that, having regard to the principles established by this Court in *Redmond v. Ireland* [1992] 2 I.R. 362 and restated in *C.C. v. Minister for Justice and Equality and Ireland* [2016] 2 I.R. 680, the first question to be considered was whether there was any stateable or arguable ground of appeal. In considering this question, she found it important that the court should not weigh the strength of the case to be made or the likelihood of success.

57. In this regard, Costello J. accepted that, having regard to the *dictum* in the judgment of McKechnie J. in *Meath County Council v. Murray* and to the absence of any other authority from an appellate court, the developer had an arguable ground on the question of the status of the s.5 declaration. She saw the fact that the trial judge had conducted his own assessment, lest he be incorrect on this point, as underscoring this view. She also considered that the question whether EIA arguments could be relied upon by the residents, having regard to the terms of the compliance decision and the limitation period in s.50 of the Act, was arguable.

58. Costello J. then proceeded, with reference to the principles discussed in *Okunade*, to assess where the "least risk of injustice" lay. She acknowledged that there was no truly satisfactory solution to this issue, and that to grant a stay would deny to the residents the

benefit of the order they had obtained. In reaching a decision to stay the order she laid emphasis on the following factors.

59. Firstly, on the facts of the case, it was not disputed that the developer would lose a figure of between €5 million and €7 million, depending on when the appeal was finally determined. It was a significant factor that, if successful in the appeal, the developer would not be compensated for its loss.

60. Secondly, the High Court had found that the developer had acted in good faith. This was far from what Costello J. considered to be the usual situation in s.160 applications, where there had been "egregious" behaviour by developers acting virtually in defiance of the planning code. The planning authority had accepted the certification by the developer's advisors that that the design complied with the permission. While the High Court had found that this was wrong, that was not apparent to either the advisors or the planning authority and certainly it could not be said that there was any *mala fides*.

61. Thirdly, the developer had applied for leave to seek substitute consent immediately after the s.5 declaration issued, before the s.160 proceedings were initiated.

62. Fourthly, it was not the developer's fault that the Board had mishandled that application.

63. Fifthly, there were impacts upon third parties that had not been addressed at all.

64. Sixthly, the wind farm was operating within the noise parameters fixed by the planning permission and the flicker issue had been resolved.

65. Turning to the submissions made by the residents, Costello J. again stressed that she was not engaging with the merits of the decision. Undoubtedly, the courts were obliged to uphold the integrity of the planning system and to ensure that there was an effective and dissuasive remedy for breaches of EU law. However, both the planning legislation and EU law included the right of appeal.

66. Costello J. stated that the residents had "very genuine" complaints about the noise disturbance and that it was impacting on their lives in a very distressing fashion. However, the impact was within the parameters of the planning permission, and this had been decided by the planning authorities. There would have been the same noise disturbance if the rotor blades had been 90 metres. In that sense, the decision of the High Court was a "windfall" for the residents and their remedy, if any, would be in the nuisance proceedings they had instituted.

67. As a general observation, Costello J. stated that a right to appeal should not come "at immense cost", as it would if a stay was refused. In the circumstances, she considered that the least injustice would be caused by granting a stay.

Submissions in the appeal
The residents

68. The residents submit that the analysis of the Court of Appeal conflated the exercise of the discretionary jurisdiction of the High Court under s.160 with the exercise of an equitable jurisdiction. The statutory injunction available under s.160 has a distinct legal basis that differs from the general equitable jurisdiction, and the test for a stay pending appeal, involving as it does the assessment of the arguability of an appeal and the balance of justice, should be approached differently in s.160 proceedings. In this case, the significant factor was that the proceedings related to the protection of the environment, planning law and the need to ensure an effective remedy as a matter of EU law.

69. It is submitted that the erroneous approach of the Court of Appeal manifested itself in, for example, the finding that there was little evidence of practical impacts arising from the breach, and in the balancing of the developer's right to appeal against the interest in upholding the integrity of the planning system.

70. The distinguishing features of the statutory jurisdiction are specified, by reference, in particular, to *Meath County Council v. Murray*, as being:

    a) The public law function of s.160;
    b) The fact that no personal interest or harm need be established by the applicant;
    c) The considerations that govern equitable interlocutory injunctions (whether there is a fair question to be tried, whether damages would be an adequate remedy, and the balance of convenience) do not feature;
    d) No undertaking as to damages is required;
    e) The ultimate relief is always a permanent injunction;
    f) The statute provides a limitation period;
    g) Damages are not a remedy; and
    h) No other private law remedy is available.

71. It is submitted that an appellate court exercising its jurisdiction in relation to a stay application must, like the trial court exercising its discretion in deciding to make an order under s.160, operate within the parameters of the section and cannot rely on what are termed "external considerations" such as those arising in a general equitable jurisdiction. Reliance is placed here on a passage in paragraph 78 of the judgment of McKechnie J. in *Meath County Council v. Murray* [2018] 1 I.R. 189, where the distinction is discussed. The ruling of Costello J. does not reflect these significant differences, but instead approached the issue as if what was in question was an interlocutory injunction pending trial.

72. The argument here is that what was described by this Court (in *Okunade*) as a "conundrum in any case in which an interlocutory injunction is sought" does not arise in the context of a s.160 application, in that applicants do not necessarily seek to persuade the court that they will suffer a loss or damage that cannot be compensated for by an award of damages if they are successful in the trial. In the circumstances, the Court of Appeal placed too little importance on the statutory function of the section – the protection of the environment and the proper regulation of the planning and development

code. To take this approach can frustrate the requirement for an effective remedy and will inevitably weigh disproportionately in favour of the developer.

73. In this context, the residents submit that while the judgments of this Court in *Okunade v. Minister for Justice and Equality* and *C.C. v. The Minister for Justice and Equality* operate readily in the context of most judicial review or private law litigation, they do not provide a sufficient or adequate test for an application for a stay pending an appeal against an order made under s.160. Both of those authorities involved a judicially-reviewable administrative decision (a deportation order), with *Okunade* being concerned with a pre-trial injunction application and C.C. with an application for an injunction pending appeal. Both, therefore, involved a decision by the court as to whether injustice would be minimised by staying the judicially-reviewable measure pending the substantive determination of its validity by the court.

74. By contrast, s.160 proceedings do not seek judicial review relief. An application for a stay on the order of the trial court in these proceedings must take into account the fact that that court has made a finding that the development is unauthorised or does not have planning permission, in the context of a prior s.5 determination by the Board. In those circumstances, the relevant principles are those discussed in *Mahon v. Butler* [1997] 3 I.R. 369, *Meath County Council v. Murray* [2018] 1 I.R. 189 and *An Taisce v. McTigue Quarries Ltd.* [2018] IESC 54, [2019] 1 I.L.R.M. 118. Counsel summarise the effect of those principles in the context of a stay application as follows:

    (i) The jurisdiction of the court considering an application for a stay must be found within the parameters of s.160;
    (ii) An application under s.160 may be described as "summary" but can nonetheless raise complex issues;
    (iii) In exercising its statutory discretion to make an order under s.160 the trial court must act with expedition and must make findings as to whether there was a breach of a planning permission, or whether the development was unauthorised;
    (iv) The trial court must take account of the requirement for an EIA where relevant;
    (v) The trial court must take account of the public interest in the regulation of planning and development and the integrity of the planning system;
    (vi) Where the case concerns an EIA development, the court is obliged by EU law to provide an effective and dissuasive remedy; and
    (vii) The court must take account of the fact that a stay would deprive the applicants of the benefit of the orders made.

75. Emphasis is laid here on the fact that Simons J., in keeping with his focus on the primary role of the competent bodies operating the planning code, contemplated lifting his order if the respondent succeeded in obtaining leave for substituted consent. The recent decision of this Court in *Balz v. An Bord Pleanála* [2020] IESC 22 is pointed to as an example of this type of "bespoke" order that takes into account the interests of a developer and affords it an opportunity to regularise the status of the development.

76. It is submitted that to focus, instead, on the balance of financial loss can set the above principles at nought. In holding the potential loss to the developer to be a significant factor, the Court of Appeal failed to have regard to the fact that the development had been found not to have planning permission by both the Board and the High Court, and failed to advert to the principle that a developer should not be allowed to profit from unauthorised development. It must also be borne in mind that there may be no financial implications for an applicant in s.160 proceedings, since there is no requirement for an undertaking as to damages and the applicant may have the benefit of a protective costs regime under the Environment (Miscellaneous Provisions) Act 2011. Hence, a balancing exercise focussed on financial loss will tend to favour the developer.

77. The appellants submit that the Court of Appeal erred in declining to assess the strength of the grounds of appeal when considering whether they were stateable or arguable, relying in this regard on the judgment in C.C. and the authorities referred to therein. It is contended that the finding of Simons J. as to the determinative effect of the s.5 declaration is "dispositive" of the question of arguability.

78. Finally, the appellants dispute the apparent finding by Costello J. that s.160 applications usually involve "egregious" behaviour on the part of developers. It is pointed out that Simons J., in making findings of fact as to the conduct of the respondent, noted that the fact that a developer has acted in good faith is important but not determinative, and that as discussed in *Murray*, the reason for the infringement of planning control may range from genuine mistake, through to indifference and up to culpable disregard.

The developer

79. The case being made by the developer in the Court of Appeal relates in part to the interaction between the s.5 declaration made by the Board, the jurisdiction of the High Court under s.160, the role of the compliance decision by the planning authority, and the discretion of the court in a case where issues of compliance with EU law may arise. There is also an issue as to the finding by the trial judge that s.50 of the Act could not be invoked in relation to a decision that was bad on its face.

80. The developer submits that the relevant and established principles regarding a stay application are those set out in *Okunade* and C.C., and that Costello J. correctly applied those principles in reaching her decision. She found that arguable grounds had been raised. Firstly, she found that there was arguably a conflict between the decision in the High Court and the *obiter* comments by McKechnie J. in *Murray*. Secondly, the question whether the High Court was bound by an earlier, unchallenged s.5 declaration had not yet been determined by the Court of Appeal or the Supreme Court. Finally, Costello J. had noted the other grounds raised but had given less weight to them.

81. The respondent accepts that *Okunade* and *C.C.* do not preclude, in all circumstances, consideration of the strength or weakness of a ground of appeal. However, it was acknowledged in those judgments that an assessment of the merits will be more difficult

in a case involving complex questions of law. The respondent says that the two issues described above come within this description.

82. It is contended that the Court of Appeal correctly assessed, by reference to the six factors addressed by Costello J., the question as to where the balance of justice lay. It also emphasises the fact that it had made a prompt application to the Board for substitute consent, and the fact that this application could not be finalised pending the determination by this Court of an appeal in a different case. While it is possible for the Board to issue a cessation order pending its decision on such an application, it is to be noted that it could also have made a cessation order when it refused leave to apply, and did not do so. This, according to the developer, suggests that the Board did not consider that the continued operation of the wind farm was likely to cause adverse effects. Costello J. was entitled to find, in the circumstances, that there was little evidence of practical impacts arising from the breach of the planning permission as opposed to compliance with it. The same noise parameters applied, and the residents would have suffered the same disturbance.

83. The developer disputes the submission put forward by the residents that Costello J. erred in applying equitable principles more appropriate to an application for interlocutory relief, and maintains that she applied the correct test for a stay pending appeal. The suggestion that different considerations apply in s.160 proceedings is said to run counter to the judgments in *Okunade* and *C.C.*

84. The distinction between the form of statutory injunction available under s.160 and the general equitable jurisdiction to grant injunctions is acknowledged, but described as being relevant to the exercise of the substantive jurisdiction to grant the order rather than to the grant of a stay. There is nothing in either the section or the authorities to suggest that separate considerations arise in respect of a stay, and in principle the fact that proceedings may be taken in the public interest does not require that the test be applied in a different manner. The logic of applying the same standard to an interlocutory injunction as to a stay (as discussed in *C.C.*) applies with equal force to s.160 proceedings. *Okunade* and *C.C.* are both designed to apply to all types of orders.

85. It is submitted that the obligation to provide an effective and dissuasive remedy for a breach of EU law must be seen in the context of the principles of proportionality and national autonomy. It is for national law to determine the procedural rules which govern actions taken for the purpose of safeguarding rights under EU law, subject to the principles of equivalence and effectiveness. There is no obligation to modify the principles governing the grant of a stay pending appeal, merely because the underlying proceedings include an allegation of breach of the EIA Directive. Counsel points out that *Okunade* itself was concerned with rights under EU law, and that in *Dowling v. Minister for Finance* [2013] 4 I.R. 576 this Court rejected an argument that the *Okunade* test breached the principles of effectiveness or equivalence. Further, the respondent relies upon the case law of the Court of Justice of the European Union as confirming that EU law permits

retrospective authorisation of a development project in some circumstances, in order to eliminate the unlawful consequences of a breach of the EIA Directive.

Discussion

86. The first question is whether or not s.160 of the Planning and Development Act 2000 contains within it the criteria for a stay pending appeal on any order made by a trial court. If it does, then those would be the criteria to be applied and *Okunade* would not be of particular relevance. However, it seems to me that the argument of the appellants on this aspect is misconceived.

87. The section undoubtedly leaves a discretion to the trial judge as to whether an order should be made against the respondent to the application, and the authorities referred to (in particular, *Meath County Council v. Murray* and *An Taisce v. McTigue Quarries*) deal with the manner in which that discretion should be exercised. It is also undoubtedly possible, where appropriate, for the judge to decide to make an order but to put a stay on it.

88. However, the statute has nothing to say about stays pending appeal. In this context, the court considering the application for a stay is not exercising a statutory discretion under the Act, but the powers of a trial or appellate court, as the case may be, under the relevant rules of court. The need to make an application arises because the rules provide that the filing of an appeal does not, of itself, operate as a stay on the order of the trial court. The rules do not set out the criteria by which any application is to be determined, or differentiate in any way between different types of litigation. Accordingly, the relevant principles are to be found in the jurisprudence generally applicable to stays pending appeal.

89. The leading authority, therefore, is *Okunade v. Minister for Justice, Equality and Law Reform* [2012] 3 I.R. 152. Although *Okunade* was concerned with an application for a pre-trial injunction in a judicial review context, it was made clear in the judgment that the general principles applied to all forms of litigation, private as well as public. It was confirmed in *C.C. v. Minister for Justice and Equality* [2016] 2 I.R. 680 that the same principles apply to all forms of order which may be sought on a temporary basis pending a full hearing and therefore apply to the question of a stay pending appeal, although the context might require that the principles would not be implemented in precisely the same way.

90. *C.C.* also confirms that the intention in *Okunade* was not to apply different tests to ordinary civil litigation, on the one hand, and public law claims, on the other, but to identify certain features of public law litigation that may mean that the general principle – the need to minimise the risk of injustice – may need to be applied in different ways in different cases. The fact that a case is at the appellate stage, and the appellate court has the benefit of the determination made at first instance, may legitimately influence the decision to be made.

91. Finally, it was confirmed in *Dowling v. Minister for Finance* [2013] 4 I.R. 576 that the principles apply to proceedings involving issues of EU law in the same way as to purely domestic litigation, and do not breach the EU principles of equivalence and effectiveness.

92. I have come to the view that the *Okunade* and *C.C.* principles are in no way inappropriate for use in s.160 proceedings. In the discussion that follows, I do not intend to be understood as applying any form of gloss to the test, but to highlight aspects that are particularly applicable to the instant case.

93. It is acknowledged in the authorities on this topic that a decision to grant or refuse an interlocutory injunction or a stay pending appeal inevitably creates a risk of injustice, since by definition the court making it cannot know what the outcome of the trial or appeal will be. Furthermore, the court usually has limited information about the case and limited time within which to make the decision. That was undoubtedly the case here, with the stay granted by the High Court due to expire at the end of the day on which the hearing was heard, which was in turn the last day of the legal term. However, the decision must be made. The underlying principle is as stated – the court must, as best it can, act in a way that minimises the risk of injustice during the time that must necessarily elapse before a full hearing and determination.

94. In *Okunade*, the backdrop for the formulation of a test for what, in that case, was a pre-trial injunction was the analysis by Clarke J. of the traditional *Campus Oil* test as described by McCracken J. in *B. & S. Ltd. v. Irish Auto Trader Ltd.* [1995] 2 I.R. 142. The difficulty lay in the fact that the detailed rules prescribed by that test were seen to be primarily concerned with commercial or property litigation, where damages would be an adequate remedy for either side. This had led, over the years, to a need for the courts to devise variations to deal with specific problems in different types of proceedings, where interlocutory orders might have a very different impact on the parties.

95. Clarke J. therefore took the view that the detailed implementation of the principle that injustice should be minimised was likely to differ as between judicial review proceedings and, for example, commercial, property or employment disputes.

96. The first part of the *Campus Oil* test is that the moving party should establish a fair or arguable case, and that is equally applicable in judicial review proceedings. The second part, in relation to the adequacy of damages, is less likely to be relevant save in the limited category of cases where the case does in fact relate to financial interests and damages will be available. It would be unlikely to feature in an assessment of the risk of injustice in the field of immigration, because the applicant would be unlikely to be able to offer an undertaking, there would be no rational basis for calculating the financial damages to be claimed by the respondent State authorities and there would be very limited circumstances in which a successful applicant would be entitled to damages.

97. Clarke J. considered that there was one feature of judicial review proceedings, rarely present in ordinary injunctive proceedings, that required to be given significant weight. That is the importance, to a legal order based on the rule of law, of recognising the

entitlement of those who are given statutory or other power and authority to take specified actions or make legally binding decisions without undue interference.

> *"It seems to me to follow that significant weight needs to be placed into the balance on the side of permitting measures which are prima facie valid to be carried out in a regular and orderly way. Regulators are entitled to regulate. Lower courts are entitled to decide. Ministers are entitled to exercise powers lawfully conferred by the Oireachtas. The list can go on. All due weight needs to be accorded to allowing the systems and processes by which lawful power is to be exercised to operate in an orderly fashion. It seems to me that significant weight needs to be attached to that factor in all cases."*

98. In that context, Clarke J. noted that in *Campus Oil* itself, O'Higgins C.J. had stated that order challenged in the case had been made under an Act of the Oireachtas and was, therefore, valid on its face "and to be regarded as part of the law of the land" unless and until its invalidity was established.

99. The judgment in *Okunade* continues therefore, by holding that if an order or measure is *prima facie* valid, even where arguable grounds are put forward for suggesting invalidity, it should command respect such that appropriate weight is given to its "immediate and regular" implementation in assessing the balance of convenience (or, as Clarke J. suggested in *C.C.*, "the balance of justice"). It is also appropriate to take into account the importance to be attached to the particular scheme concerned. However, it is of course also necessary to assess the extent to which the party challenging the validity of the decision or measure may be subjected to real injustice if forced to comply with something that is ultimately found to be unlawful.

100. Finally, it was held that where the risk of injustice might be seen to be evenly balanced, there may be a greater scope in judicial review proceedings for taking into account the strength of the case than there would in ordinary injunction cases. This is because they are less likely to feature conflicts of evidence as to the facts of case. The court can also make some assessment of the strength of legal propositions, unless they present the sort of complex questions of law that call for "detailed argument and mature considerations" (quoting Lord Diplock in *American Cyanamid v. Ethicon Ltd* [1975] A.C. 396).

101. The Court considered this aspect again in *C.C.* Clarke J. noted the observations of McCarthy J. in *Redmond v. Ireland* [1992] 2 I.R. 362 to the effect that appeals had in some cases been seen to have been lodged for tactical reasons, and that there was a heavy responsibility on the legal advisers of a party seeking a stay to assist the court in relation to the reality of the appeal. Clarke J. considered that it was clear, therefore, that the court must form some view of the possible outcome of the appeal. As far as factual disputes are concerned, the principles set out in the *Hay v. O'Grady* line of authorities will come into play. Since the legal issues will often have been narrowed or refined as a result of the first instance decision, it is much more likely that the appellate court will be able to assess the strength or weakness of those issues – provided, again, that the issues are not such as to require detailed argument and mature consideration.

102. In applying these principles to the instant case, I would agree with the finding made in the Court of Appeal that the developer had raised an arguable ground in respect of the effect of the s.5 declaration. The question whether a party defending proceedings can, in principle, be estopped from challenging the correctness or validity of a prior decision, as part of its defence, and a possible further question as to how this might be reconciled with the jurisprudence on collateral attacks, is not simple. It does, in my view, fall into the category of cases where it would not be right to embark upon an assessment of the strength of the respective legal submissions prior to a full hearing.

103. The same can be said of the grounds relating to the assessment by the trial judge of the question whether the development did in fact come within the permission. At bottom, this may be seen as resting upon relatively straightforward findings of fact. Simons J. found that the compliance submission did not draw the planning authority's attention to the fact that a deviation in respect of rotor blade diameter was being proposed, that the deviation was deliberated and planned in advance of construction, and that it was not immaterial. However, the effect and status of the compliance decision may depend on more complex legal analysis.

104. It might, of course, be open to question whether the developer could succeed on both grounds, given that the first involves making the case that the s.5 declaration could be found invalid, despite the lapse of time and the absence of any challenge to it when issued, while the second involves asserting that the compliance decision is immune at this stage by reason of the lapse of time.

105. In considering the balance of justice, it was of course correct to take account of the potential financial loss to the developer and, further, to take account of the fact that the developer would not be compensated for any loss caused by the High Court order should it be successful in the appeal. However, I consider that the appellants are also correct in their argument that the Court of Appeal ruling does not advert to the principle that developers should not benefit from developments that do not have permission. It must be remembered that s.160 makes no provision for an award of damages, still less for any order aimed at clawing back profits from a development that should not have been carried out. There is a public interest in preventing the accrual of such profits pending an appeal, and this is a matter to be taken into account.

106. Next, it seems to me that the Court of Appeal ruling does not give sufficient weight to the relevant measures and statutory context of the dispute between the parties. Costello J. adverted to the arguments made on behalf of the residents in relation to the need to uphold the integrity of the planning system. However, in stressing the importance of the right to appeal against an adverse decision, I consider that she gave insufficient attention to the specific measures and decisions in the case.

107. Ultimately, the first part of the analysis by Simons J. upheld the validity of the s.5 declaration made by the Board. It is clear that, in the light of the authorities, he saw that declaration as having very significant legal effects. The extent to which he was right in that view is, of course, a live issue before the Court of Appeal and I express no view on it

here. However, it is necessary, for the purposes of considering the appropriate approach to the stay application, to bear in mind that this was the reason why he made the order that he did. The purpose of the order was, firstly, to ensure that the developer complied with that declaration by not operating turbines that had been found not to have planning permission and, secondly, to allow for the possibility that the Board would, through the statutory process, regularise their status, which could enable an application to the Court to consider lifting its order.

108. If the analysis of Simons J. was correct (and I stress again that I am not to be taken as expressing a view), s.5 would occupy a very important position in the planning code and would in such cases have to be viewed as the measure under challenge for the purposes of an *Okunade* assessment. As an alternative approach, Simons J. suggested that it would, at least, have to be considered as carrying significant weight. This, of course, would be a less radical approach than one which confers binding effect on the declaration and one with which it would be more difficult to disagree. It is, at the least, a considered decision offered by a specialist statutory body operating the statutory code. It would have been capable of legal challenge at the time, but rather than take that path the developer in fact took steps to comply with it. The challenge made in the proceedings was unsuccessful in the High Court, on the substantive merits as well as on the issue of the legal status. It should accordingly be seen for the purposes of a stay application as a *prima facie* valid measure. The Court of Appeal found that an arguable ground had been raised in respect of its validity (and I have agreed with that finding) but that does not mean that it should not have been accorded some weight in the overall assessment.

109. It is important to bear in mind that the trial judge did not rest his decision solely on the s.5 declaration but, in case he was wrong, conducted his own assessment and found against the developer. Of course, the invocation of s.160 does not depend upon the existence of a prior declaration under s.5, so that in many cases a judge will be undertaking this assessment as an entirely first instance exercise. As stressed by Costello J., there is a right to appeal an adverse decision. However, in my view a party seeking a stay pending appeal is not entitled to proceed on the basis that the adverse judgment carries no weight in the stay application. The fact that a court has, in a reasoned decision, reached a particular conclusion must count for something in the appellate court's considerations.

110. The orderly operation of the planning code is, in my view of high public importance. As McKechnie J. emphasised in *Murray*, the starting point is that, subject to certain exemptions, no development can lawfully be commenced without planning permission. As well as rendering the developer liable to very far-reaching orders under s.160, unauthorised development is a serious breach of the criminal law. The penalties are, McKechnie J. stated, "a significant expression of the high level of public concern there is in regulating orderly and sustainable development".

111. I think it should be stressed here that the High Court order in this case was structured in such a way as to promote positive compliance by the developer with the planning system

process, rather than simply penalising it by, for example, ordering the demolition of the turbines. This aspect, in my view, is also relevant to the "balance of justice" debate in that the developer had in fact already engaged with the system insofar as it had applied for leave for substitute consent. In that context, the court order was potentially limited in its effect to compelling the cessation of operations pending the grant of leave to pursue that route. While the developer has never conceded, as such, that the development requires further authorisation (using that word in a non-technical sense), it was nonetheless a relevant consideration for the stay application that a competent body in the planning system was seised of an application for authorisation, and that the High Court order might be vacated if leave was given. That fact was seen by the Court of Appeal as going to support the bona fides of the developer, but it was also relevant to the question whether it was unjust to impose what might have turned out to be only a short-term shutdown pending regularisation.

112. In such circumstances, it was in my view an error to consider the potential financial loss solely by reference to a worst case scenario relating to the length of time it could take before the Court of Appeal determined the matter, without reference to the possibility that the High Court might vacate its order in a relatively short period of time. It is also relevant that, as it turned out, the Court of Appeal was in a position to fix an early hearing date. The ability of the court system to bring matters on for hearing within a reasonably short period is probably the most effective protection against the possibility that serious and unjustified harm might be caused to either party pending that hearing.

Conclusion

113. In summary, I agree with certain aspects of the Court of Appeal ruling but would hold that it erred in attributing little or no weight to the matters I have referred to here. On balance, in the circumstances of this case, I would not have granted a stay. To that extent, the residents have been successful in their appeal to this Court.

114. However, the parties have already been informed, in a ruling published on the Courts Service judgments database, that while the Court would allow the appeal in principle it would not interfere with the stay granted by the Court of Appeal (see [2020] IESC 33). The principal reasons, as stated in the ruling, were, firstly, that the Court of Appeal had been able to hear the substantive appeal in early course and, secondly, that there had been a significant change of circumstances since the making of the High Court order. This second reason related to the fact that the application for leave for substitute consent could not be progressed in the way that Simons J. might have anticipated it would, because of the order made in the related proceedings that it should not be progressed until judgment was given in the pending appeals relating to the substitute consent process.

115. A further relevant circumstance now arises. Judgment was delivered in the appeals in question on the 1st July 2020 (*An Taisce v. An Bord Pleanála & Ors*. [2020] IESC 39). The Court has found that certain of the procedures provided for in the Act are inconsistent with the requirements of the EIA Directive. It is not possible to be certain what the consequences will be for cases where, as in these proceedings, a developer's application

is in being but has not received leave. In those circumstances, and given that the Court of Appeal will determine the substantive appeal in the relatively near future, it is in the interests of justice that the *status quo* should prevail pending that Court's decision. What, if anything, needs to be done thereafter is also a matter for that Court.