

JUDICIAL REVIEW

2021/750JR

**IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT, 2000
(AS AMENDED)**

BETWEEN:-

**WENDY JENNINGS
AND
ADRIAN O’CONNOR**

APPLICANTS

AND

**AN BORD PLEANALA,
IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

AND

COLBEAM LIMITED

NOTICE PARTY

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Judgment of Mr Justice Holland, delivered the 14th of January 2022

INTRODUCTION & THE EVIDENCE

1. This judgment concerns the question of a stay of development on foot of an impugned planning permission pending trial of this judicial review.

2. The Applicants seek to have quashed the Board's decision dated 3 June 2021 to grant planning permission ("The Impugned Permission") to the Notice Party, "Colbeam", for, essentially, construction of 698 student bedspaces on a site at Our Lady's Grove, Goatstown Road, Dublin 14. That permission was granted pursuant to the Planning and Development (Housing) and Residential Tenancies Act 2016 ("the 2016 Act") as applicable to Strategic Housing Developments. The Applicants live nearby and consider that the permission would permit significant over-development of the site.

3. The Impugned Permission records the Board's screening decision that Appropriate Assessment for purposes of Habitats law was unnecessary. It also records the Board's exclusion by way of preliminary examination of the necessity to screen for sub-threshold Environmental Impact Assessment.

4. The application for leave to seek judicial review was formally moved for "clock-stopping purposes on 27 July 2021 and such leave granted ex parte on 19 October 2021 on terms which included a stay restraining development on foot of the Impugned Permission. That stay was amended and continued from time to time. At present Colbeam is in effect restrained from starting site clearance, site preparation, demolition, tree removal and excavation works on foot of the Impugned Permission.

5. Counsel for Colbeam "informally" appeared and was heard on 19 October 2021, inter alia as to the urgency of the matter from Colbeam's point of view. Essentially Colbeam said then and repeated since that it is committed to a demanding and tight Works Programme commencing on 1 November 2021 with a view to completion in mid-2024 with a view to letting the development to students of nearby UCD for the academic year starting September 2024. It says that if it misses that deadline and given a planning permitting condition limiting use of the property to student accommodation, it will be unable to let the accommodation until for the following academic year and will suffer significant financial losses. It says the Works Programme cannot accommodate more than very short delay of weeks or perhaps a few months such that a stay on development would cause such losses.

6. In contrast, the Applicants say that failing a stay and by way, primarily, of removal of trees from the site, irreparable environmental harm (in the form of both loss of the intrinsic value of the trees and of their value as a bat and bird habitat) would ensue. Thereby, they say, that their proceedings would be rendered moot and they would be deprived of effective remedy as to some of the grounds on which they have been granted leave to seek judicial review.

7. Two motions are pending and were heard together. One, in part the subject of this judgment, is by Colbeam, seeking to vary a stay restraining development on foot of the Impugned Permission and seeking to have the further prosecution of these proceedings made conditional on the Applicants' proffering a substantiated undertaking in damages and disclosing their means to meet any liability on such undertaking. In the other motion the Applicants seek a protective costs order. The questions of an undertaking in damages and disclosure of means and a protective costs order will be the subject of a second judgment. Notably, these motions have generated 5 sets of written submissions, running to over 50,000 words and over 130 pages: also well over 70 authorities of various kinds. That is no criticism.

8. While the questions of an undertaking in damages and disclosure of means as a condition of further prosecution of these proceedings are not the subject of this judgment, it is relevant to the question of a stay to observe that the Applicants have explicitly not given or offered to give an undertaking in damages or to disclose any matters relevant to the real worth of such an undertaking if given.

9. Colbeam has also issued a motion seeking to identify and have joined to the proceedings, supposed supporters of the Applicants, for the purpose of requiring an undertaking in damages from them and seeking costs against them in due course. That motion has not yet been heard.

10. Though at liberty to do so since my order of 15 November 2021, which liberty was given to assist expedition of the proceedings, the Board and Colbeam have not yet filed opposition papers.

THE GROUNDS

11. The Applicants seek relief on grounds which may be briefly, if somewhat incompletely, summarised as follows:

Grounds	
Domestic Law	
1.	Material Contravention of the Development Plan as to provision of open space
2.	Material Contravention of the Development Plan as to Institutional Lands and as that designation of the site imposes requirements as to (a) open space (b) maintaining the open character of the lands, (c) residential densities and/or (d) Future Institutional Use/Additional facilities.
These grounds allege breach of s.9(6)(c) of the 2016 Act in granting permission without considering whether such material contravention could be justified by reference to S.37(2)(b) PDA 2000 ¹ .	
3.	The Board acted <i>ultra vires</i> in granting permission without provision for Part V social housing in breach of s.96 PDA 2000 Act and s.15 of the 2016 Act.
4.	Error in justifying, under s.37(2)(b) PDA 2000 and by reference to SPPR3 ² of the 2018 Building Height Guidelines ³ , material contravention of the Development Plan as to building height - SPPR3 does not apply to the lands, which are suburban greenfield lands.
5.	Alternatively, non-compliance with SPPR3 resulting in <ul style="list-style-type: none"> • Contravention of the sunlight/daylight requirements/criteria of §3.2 of the Height Guidelines and the <i>Sustainable Urban Housing: Design Guidelines for New Apartments</i> (2020) and so of S.9(3) of the 2016 Act. • Contravention of the BER Guidelines <i>Site Layout Planning for Daylight and Sunlight: A Guide to Good Practice</i> (BR 209) and/or BS 8206-2 <i>Code of Practice for Daylighting</i>, 2008⁴ and/or • material errors of fact.
6.	Alternatively, contravention of SPPR3 in failing to assess the adequacy of public transport capacity before granting planning permission in material contravention of the Development Plan
7.	Contravention of S.37(2)(b)(i) PDA 2000 as mandated by S.9 of the 2016 Act in failing to identify any or adequate basis for concluding the proposed development was of national and strategic importance
8.	Material contravention of the Development Plan <ul style="list-style-type: none"> • as to protection of trees • of a Zoning Objective in breach of S.9(6)(b) of the 2016 Act

¹ Planning & Development Act 2000

² Specific Planning Policy Requirement as contemplated in S.28(1C) PDA 2000

³ Urban Development and Building Heights: Guidelines for Planning Authorities (2018)

⁴ as revoked and replaced by BS EN 17037:2018

Grounds	
	<ul style="list-style-type: none"> not justified pursuant to s.37(2)(b) PDA 2000
9.	Contravention of S.8(1)(a)(iv)(II) of the 2016 Act obligation on Colbeam to publish a notice identifying how the proposed development would materially contravene the Development Plan
10.	Contravention of Article 299B(1)(b)(i) PDR 2001 ⁵ and/or Article 4(5) of the EIA Directive ⁶ - it was not open to the Board to exclude the possibility of significant effects on the environment at preliminary assessment and without screening, as Colbeam’s Ecological Impact Assessment Report identified that the site was suitable as a habitat for foraging and commuting bats and that 4 trees for removal were potentially suitable as bat roosts. Similar assertions are made as to birds.
11.	Contravention of Article 297(1) PDR 2001 in that the planning application form failed to accurately identify the land ownership of Roebuck House.
European Law Grounds	
12.	Contravention of Article 12 of the Habitats Directive ⁷ , Article 299(C)(1) PDR 2001 and/or Article 27 of Habitats Regulations ⁸ by failure to apply the correct legal test in respect of bats entitled to strict protection and/or the preliminary examination EIA determination was based on inadequate information contrary to Article 4(4) of the EIA Directive.
Validity Grounds	
13.	State failure to properly transpose Article 12 of the Habitats Directive requiring strict protection of species - such that Articles 51 and 54 of the Habitats Regulations’) are <i>ultra vires</i> and invalid.
14.	Article 299B(1)(b)(i) PDR 2001 as to preliminary examination is <i>ultra vires</i> and invalid as inconsistent with the EIA Directive and/or failing to properly transpose Article 4(3) of the EIA Directive.
15.	Article 299B(1)(b)(i) PDR 2001 is <i>ultra vires</i> and is not permitted by S.3 European Communities Act 1972 and so is invalid pursuant to Article 15.2.1 of the Constitution.

12. On consent of all parties the Validity Grounds have been adjourned generally with liberty to re-enter and they have not featured in the consideration of the pending motions nor did the State participate in the hearing of those motions. The Respondent Board participated in the hearing of those motions but not as to the question of a stay – the question the subject of this judgment.

THE MOTION FOR A STAY

13. Colbeam now seeks to amend the stay to permit works on foot of the Impugned Permission to the point at which, by reference to its exhibited sequential programme of intended works (“the Works Programme”), the site will, in the spring of 2022 and by reason of site clearance, site preparation, demolitions, tree removal and excavation works, be ready for hand over to the main

⁵ Planning and Development Regulations 2001

⁶ Directive 85/337/EEC as amended

⁷ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7)

⁸ European Communities (Birds and Natural Habitats) Regulations 2011 - SI No 477 of 2011

building contractor. At that time Colbeam intend to seek renewed consideration of the question of a stay. The Applicants now seek a continued stay. The Board is neutral on the issue of a stay.

Onus of Proof

14. Whether, technically, this is an application by Colbeam to set aside or to vary a stay obtained ex parte or an inter partes application by the Applicant for a stay is immaterial: the Applicants bear the onus of proving that a stay pending trial should be granted – see **McDonnell v. Brady**⁹; **Sweetman v. Cork County Council**¹⁰ and **O’Brien v. An Bord Pleanála**¹¹. That is not disputed.

Are Colbeam Otherwise Ready To Commence Works?

15. On various occasions over time since these proceedings started Colbeam have pressed the court as to the alleged urgency of applications to vary the stay. The premises of such submissions included the Works Programme in which tree removal and demolitions of the former Grove Afterschool Care facility on-site were to start on 1 November 2021. When I questioned the urgency of the matter I was told for Colbeam that the programme was tight and, though I did and do not fully understand what is meant, that contingencies were “built in” to it such that delay of even weeks would imperil completion of the development. The explanation of this, or perhaps part of it, was that Colbeam intended a modular building method in which, to a considerable degree, the buildings are constructed in modules off-site and assembled on-site. This building method, I am told, is considerably less weather-dependent and so requires less provision in a works programme for contingencies than would otherwise be normal. In fairness, Counsel for Colbeam from time to time accepted, if perhaps sotto voce, that delay to the hearing of the motion and, I infer pending its decision, could be dealt with by Colbeam without great prejudice but the general assertion of urgency was such that the motion was listed in earlier course than would otherwise have occurred. The Chronology as relevant to this issue is set out hereunder.

⁹ [2001] 3 IR 588 §598

¹⁰ [2021] IEHC 350 §6.10

¹¹ [2017] IEHC 510 §12

Chronology

Date	Event	Comment
27 July 2021	The Applicants formally moved the application for leave to seek judicial review and so “stopped the clock” for purposes of time limits for making such applications. The application was adjourned to 13 October 2021.	
28 & 29 July 2021 &	Colbeam ask the Applicants for copies of their judicial review papers so that Colbeam could deliver its Statement of Opposition “ <i>as expeditiously as possible</i> ”. asserted “ <i>pressing commercial urgency</i> ” such that if the progress of the development was delayed “ <i>even by a couple of months</i> ”, Colbeam would lose at least one years’ revenue and suffer very significant financial loss.	Colbeam also referred to other similar proceedings by a different applicant as to the same Impugned Permission in which a stay was varied to permit the site to be secured. Those other proceedings were since withdrawn.
30 July 2021	The Applicants declined to furnish the judicial review papers until leave had been granted.	
	The leave application was adjourned to 19 October 2021.	
14 October 2021	Colbeam again sought copies of the Applicants’ judicial review papers.	
	The Applicants sent their judicial review papers to the Board, State Respondents and Colbeam. The Applicants confirmed their intention to seek a stay of development. The Applicants noted that such a stay had been granted in the other similar proceedings and that Colbeam was seeking to lift or further vary it.	No Opposition papers have been delivered since.
19 October 2021	I granted the Applicants’ ex parte application for leave to seek judicial review. Counsel for Colbeam “informally” appeared and was heard, inter alia as to the urgency of the matter from Colbeam’s point of view.	This stay has been extended from time to time to date.

Date	Event	Comment
	<p>The Applicants sought a stay and did not proffer an undertaking in damages. I stayed interference with the trees on site and gave liberty to the parties to issue motions returnable for 8 November as to the question of a stay and an undertaking in damages – providing for replying affidavits and written submissions also in time for that date.</p>	
<p>2 November 2021</p>	<p>Colbeam issued the present motion as to the stay and seeking an undertaking in damages and disclosure of Applicants’ assets – the “Stay/Undertaking motion”.</p> <p>It is grounded, inter alia, on the Affidavit of Kenneth Birrane sworn 29 October 2021. Inter alia, Mr Birrane exhibited the Works Programme and asserted that delay in completion of the works <i>“even by a number of weeks”</i> or in implementation of the permission <i>“for any appreciable period”</i> would lose a year’s rent of a little over €9,000,000 and incur additional losses of around €1,200,000 and further unquantified losses. He asserted a <i>“real pressing commercial urgency”</i> and anxiety for an <i>“accelerated hearing as expeditiously as possible”</i>. <i>“Colbeam will co-operate with the fixing of the earliest possible hearing”</i>.</p> <p>Mr Birrane asserted that Colbeam <i>“is already taking the following steps”</i> and listed essentially various submissions to the Planning Authority for purposes of conditions of the Impugned Permission which required compliance before development commenced.</p>	<p>Colbeam did not make the condition compliance submissions until 30 November 2021.</p> <p>Condition 1 of the Impugned Permission includes a general requirement that where other planning conditions require details to be agreed with the planning authority the developer shall agree such details in writing with the planning authority prior to the commencement of development.</p> <p>Those other planning conditions to be satisfied before development commences include</p> <ul style="list-style-type: none"> • agreement of an apartment naming and numbering scheme and associated signage (condition 7) • submission for written agreement of a Stage 2 Detailed Design Stage Storm Water Audit (condition 10) • entry into water and/or waste water connection agreement(s) with Irish Water (condition 11) • agreement of a construction waste and demolition management plan (condition 15) • agreement of a construction management plan (condition 16) • agreement of the form and amount of and lodgement of
<p>undated but filed in court 8 November 2021</p>	<p>Applicant’s Submission in the Stay/ Undertaking motion.</p> <p>This stated, inter alia:</p> <ul style="list-style-type: none"> • <i>“... the Notice Party is not in a position to commence development as there is no evidence that it has</i> 	

Date	Event	Comment
	<i>satisfied the pre-commencement conditions.”</i>	security for satisfactory completion and maintenance until taken in charge of roads and services (condition 17)
8 November 2021		For Court administrative reasons the matter was further adjourned to 15 November 2021
15 November 2021	<p>The case came before me.</p> <p>I gave the Applicants liberty to issue a motion for a protective costs order (“PCO Motion”).</p> <p>To aid expedition of the proceedings, I gave the Board and Colbeam liberty to file opposition papers on terms that, even if the Applicants’ Protective Costs Order application failed, the Board and Colbeam would not recover the costs of filing those opposition papers.</p> <p>I continued the stay.</p>	<p>The Board and Colbeam have not availed of this liberty to file opposition papers nor indicated why they have not done so. This is despite Mr Birrane’s assertion on affidavit that <i>“Colbeam will co-operate with the fixing of the earliest possible hearing”</i>.</p>
19 November 2021	The Applicants issued the PCO Motion.	
25 November 2021	<p>The pending motions were mentioned before me.</p> <p>I listed Colbeam’s Stay/Undertaking motion for hearing on 15 and 16 December 2021.</p> <p>I continued the stay.</p>	The Applicants’ PCO motion was later assigned the same hearing date.
	<p>By a further Affidavit for Colbeam Mr Birrane elaborated on the significance of the Work Programme and explained the intended modular construction method. He said <i>“At best, the programme of works allows for a delay of four to six weeks. A delay of greater order of magnitude would make delivery of the student accommodation development impossible.”</i></p>	Despite the Applicants’ submissions on the issue, filed in court 8 November 2021, Mr Birrane said nothing as to Colbeam’s compliance with Planning Conditions requiring compliance prior to commencement of development.
15 December 2021	<p>The Stay/Undertaking and PCO motions come on for hearing.</p> <p>I enquired of Counsel what the position was as to satisfaction of the pre-commencement conditions.</p>	

Date	Event	Comment
	Counsel for Colbeam said he would make inquiries.	
	<p>Affidavit of Sadhbh O'Connor Planning Consultant, sworn for Colbeam.</p> <p>Inter alia, this records that:</p> <ul style="list-style-type: none"> • Various expert reports were required for compliance submissions to the Planning Authority as to pre-commencement conditions. • She received these reports from Colbeam in “November 2021” (she does not state the date). • Having reviewed these reports, she submitted to the Planning Authority on 30 November 2021 Colbeam’s pre-commencement condition compliance submissions in respect of conditions 7, 9, 11, 13, 15 and 16. • On 8 December the Planning Authority expressed dissatisfaction with the compliance submissions as to Conditions 15 and 16 – respectively the Construction Waste and Demolition Management Plan and Construction Management Plan. • She said, “This issue will be remedied without difficulty”. • Revised reports will be submitted “before Christmas”. • The Stage 2 Detailed Design Stage Storm Water Audit (condition 10), has not been submitted but will be before Christmas. • Due to pressure of work it typically takes the planning authority 6 to 10 months to approve such plans. • In other projects, this planning authority has been willing to facilitate the enabling works pending approval of the reports, by the developer appointing an “assigned certifier” to liaise with the Building Control section of the Planning Authority and agree a 	<p>Ms O’Connor does not</p> <ul style="list-style-type: none"> • explicitly state what, if any, pre-commencement condition agreements Colbeam and the Planning Authority have yet made • explicitly state whether the condition 11 agreement has been made with Irish Water. • address the issue of agreement of the form and amount of and lodgement of security for satisfactory completion and maintenance until taken in charge of roads and services (condition 17). <p>Conditions 9 and 13 are pre-occupation conditions, not pre-commencement conditions.</p>

Date	Event	Comment
	<p>schedule of works to be carried out prior to issuing a commencement notice.</p> <ul style="list-style-type: none"> • <i>“I would anticipate that Colbeam will be in a position to commence those works the first week in January”.</i> • She cites her practice’s involvement in another “large scale” project in the functional area of this Planning Authority in which the Planning Authority <i>“permitted the developer to carry out enabling works, including demolition and removal of a 2,629 square metre structure and site clearance works prior to the serving of a commencement notice”.</i> • Colbeam is <i>“ready willing and able to commence such engagement prior to the end of this year and would be in a position to carry out such works as the planning authority may approve within days thereafter”.</i> 	
16 December 2021	<p>2nd day of hearing of Stay/Undertaking and PCO motions. Colbeam submits the Affidavit of Sadhbh O’Connor sworn 15 December 2021</p>	

16. At the date of issuing this judgment I do not have a more up-to-date account of the matters set out above. Accordingly certain content of this judgment may read somewhat anachronistically in light of any occurrences since, of which I am unaware – for example by way of Colbeam’s compliance with pre-commencement planning conditions¹².

17. On the second day of the hearing and having had only limited opportunity to consider the O’Connor Affidavit, I expressed considerable misgivings to counsel for Colbeam as to the position regarding Colbeam’s compliance with pre-commencement conditions and the resultant question whether, and if so when, it was or would be in a position to start works on foot of the Impugned Permission. He advised me and I entirely accept that Colbeam’s legal team learnt only on foot of my enquiry the day before of the matters addressed by Ms O’Connor in her affidavit. I gave counsel time to take further instructions from Colbeam as to why it had not instructed its legal team, and so in

¹² See post-script below.

turn the court, of these matters before the hearing commenced – not least in the context of its repeated assertions of urgency and of the prospect of considerable loss by even modest delay in commencing development. Counsel reverted to assure the court that his instructions were that Colbeam had not appreciated the significance of the issue, had not intended to mislead the Court and that the arrangements described by Ms O'Connor were commonplace in the context of delay by overstretched Planning Authorities in concluding compliance agreements.

18. Even if they are commonplace, and leaving aside whether they are legal, I have difficulty accepting that a clearly very substantial developer such as Colbeam, which intends embarking on a multi-million euro development, must be managed by professional managers and which clearly has access to professional planning advice, would not itself appreciate, when swearing affidavits emphasising the urgency of the matter and the dire consequences of even modest delay by reason of the proceedings, first the necessity to fully instruct its legal team on all other matters likely to delay the development and second that the delay resulting from making even those arrangements described by Ms O'Connor, will be such that development could not start in any event until January 2022. This is all the more so when the Applicants' submissions had specifically raised the absence of evidence of compliance with pre-commencement conditions as long ago as 8 November 2021.

19. Specifically, Colbeam had not disclosed that it had no pre-commencement condition compliances until as late as 8 December as compared to a Works Programme start date of 1 November for tree removals and demolitions. And even yet it is clear from Ms O'Connor's affidavit that Colbeam's ability to start works in early January is entirely dependent on the Council's being willing to make a very particular form of agreement, as to the matters of the Construction Waste and Demolition Management Plan and a Construction Management Plan, in lieu it would seem of compliance with the pre-commencement conditions of the Impugned Permission and permitting development to commence without prior service of a commencement order for Building Control purposes.

20. Counsel for Colbeam suggested that the Construction Management Plan would in practice not be required until construction commenced in the spring. I have no evidence to that effect and Ms O'Connor does not say so in her affidavit. The fact remains that the relevant planning condition requires compliance before development commences. In any event, and absent evidence to the contrary, I think I am entitled to infer that even in practice, the Construction Waste and Demolition Management Plan will be required to manage the demolitions of the existing buildings necessary to clear the site which demolitions, by the Works Programme, had been due to commence on 1 November 2021. And I have noted, in the comments column of the chronology above, other issues as to pre-commencement conditions which Ms O'Connor does not address.

21. Leaving aside the question of legality of the particular form of agreement described by Ms O'Connor and the question whether the Planning Authority will make such an agreement, assuming it is both made and legal it seems that Colbeam, on its best case scenario, will not be in a position

until some time in January 2022 to start development pursuant to the Impugned Permission and to commence tree removal, demolition and other works which had been due to start on 1 November. Colbeam is at least two months behind its Work Programme already for reasons apparently unconnected with the proceedings.

22. As an issue distinct from the legality of such arrangements between developers and planning authorities, it is quite unsatisfactory that the position as to compliance with pre-commencement conditions came to light only on foot of my inquiry during the first day of hearing. I can only be explicitly critical of Colbeam in that regard. I expressed the view at the hearing and counsel for Colbeam, entirely properly, agreed that its position was entirely unsatisfactory. Judicial review is not the same as adversarial private litigation in that it is concerned with public rights and interests and ensuring proper public administration. As a result all parties, including Notice Parties, have a duty of co-operation with the court including a duty to bring relevant matters to the Court's attention¹³.

23. Not least as the matter arose in the middle of a 2-day hearing already overburdened with complex issues and was not argued in detail, I explicitly refrain from any finding as to the legality of any such contemplated arrangements with the Planning Authority as those described by Ms O'Connor. No doubt any questions of legality involved will be considered by the parties and the Planning Authority. And in any event it remains to be seen whether any such arrangements will be made in this case. Further, I am anxious not to precipitously interfere in arrangements designed to overcome genuine practical difficulties. On the other hand, nothing in this judgment should be taken as, even implicitly, lending imprimatur to such arrangements - either in this case or more generally. But it is possible to make at least some general observations.

24. First, planning conditions requiring agreement of detail between a developer and a Planning Authority before commencement of development are generally simply expressed, clear and mean what they say – the relevant agreements must be made before the development commences and development purportedly on foot of the planning permission carried out before the relevant agreements are made is development in breach of the relevant planning conditions.

25. My first observation relates to the status of works done before compliance with pre-commencement conditions. In **Luxor v Wave Point**¹⁴ Burns J identified:

“30. ... the central question – has an unauthorised development occurred as a result of the failure of the Respondent to lodge the construction management plan together with the other documentation (which was filed after the works commenced and these proceedings were instituted) prior to works starting at the site.

¹³ See *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2004] UKPC 6 [2009] 1 WLR 1988. *The Duty of Candour and Third Parties*, Gray, [2010] JR 149, *Judicial Review Handbook*, Fordham, 6th Edition §10.4.4

¹⁴ *Luxor Investments Ltd v. Wave Point Ltd* [2018] IEHC 775 (High Court, Burns J, 20 December 2018)

31. *The wording of the planning permission is clear and unambiguous. The matters referred to at Paragraphs 1, 2, 3, 4, 7, 8 and 10 clearly required that further documentation be lodged with the planning authority and agreement reached in relation to same prior to the development commencing. Failure to do this obviously means that development carried out is not carried out in compliance with the planning permission and accordingly is unauthorised development. Case law regarding conditions of this nature interpret such conditions in a similar manner. The Supreme Court, in **Conroy v. Craddock** (Unreported, Supreme Court, 31st July 2007) stated at p. 11 of its judgment, in relation to such a condition: "It goes without saying that there has been a breach of condition 5 in the sense that no plans were submitted before the commencement of the development".*

26. Burns J was, albeit in a different practical context to the present, pressed as to "industry norms" as to phased development asserted to affect how pre-commencement conditions were complied with. Assuming those norms she declined to have regard to them "should I find that the planning permission did in fact require the construction management plan to be submitted and agreed prior to the commencement of the works." And she stated: "Hence the work carried out at the site by the Respondent is unauthorised development as the terms of the planning permission have not been complied with."

27. Burns J ordered the filing of a construction management plan with the planning authority. It is not clear from her judgment and I do not have a copy of the relevant order, but Counsel for Colbeam was in the case and tells me and I accept, that Burns J did not restrain development pending agreement of the construction management plan. However, that must be understood in context. Burns J was exercising a discretionary jurisdiction under S.160 PDA 2000 – it was a planning injunction case - in circumstances in which her declining to award costs and explanation for that course display at least some sympathy for the developer on the particular facts of that case. Notably, the Applicant's real underlying complaint was of trespass and nuisance by the works affecting his adjoining property – which trespass and nuisance had ceased. Perhaps most importantly, that Burns J did not restrain development does not undermine or affect her finding of unauthorised development.

28. In **Murtagh Construction v Hannan**¹⁵ Clarke J., considered a similar issue – though not to a final conclusion: having observed that "From a general perspective it might well be possible to describe the [developer's position] as being "reasonable". Clarke J., said:

4.7 *However, the fact remains that a planning permission is a public law document establishing the rights and obligations not only of developers and local authorities but also of interested members of the public generally. Planning permissions also must be taken to mean what they say. A planning permission which is properly construed as requiring that an agreement on some particular point of detail is to be reached in advance of the*

¹⁵ Desmond Murtagh Construction Limited (In Receivership) & ors -v- Hannan & ors [2014] IESC 52

commencement of development means just that. The development cannot lawfully be commenced until the relevant agreement is reached. If it is commenced prior to agreement, such a development is unauthorised. I cannot, therefore, agree that, in the absence of an appropriately determined variation of the planning permission, such a requirement can, in some way, be ignored. The fact that construction deadlines (again, it would appear, tax driven) might have made it difficult to achieve an appropriate variation in time or to bring proceedings designed to require the council's agreement, does not, in my view, affect the legal position."

29. Clarke J., then addressed but did not decide the question whether belated compliance with a pre-commencement condition could "*cure the problem or to render it immaterial in substance*" and explained why he thought these issues in the end not decisive on the particular facts of that case. He concluded:

"4.9 However, it seems to me that there is at least an arguable case that a development which is subject to a planning condition which, properly construed, means that development should not commence until certain matters of detail are agreed, cannot, in the absence of such agreement, be said to have been completed or progressed in accordance with the relevant planning permission, at least for as long as the relevant matters of detail remain unagreed."

30. I am, of course, bound by the view of the law as to commencement of development in advance of compliance with pre-commencement conditions as set out by Burns J in **Luxor** and the Supreme Court in **Conroy** and in **Murtagh Construction**.

31. My second observation is that a practice, if it exists, of the building control function of a local authority permitting the factual commencement of development on foot of a planning permission in advance of the service of a commencement notice may require further examination in its own right. Certainly any suggestion that permitting the factual commencement of development on foot of a planning permission in advance of the service of a commencement notice as a means of avoiding or postponing the pre-commencement requirements of a planning condition would require close examination. And building control law should not be confused with planning law – they may address overlapping practical issues but they are distinct.

32. For the reasons given, I draw no conclusions on the foregoing issues save that it is not yet clear when Colbeam will be able to commence development in accordance with the Planning Permission or that any development in advance of compliance with the pre-commencement requirements of the planning conditions would be lawful or that any development in advance of compliance with the pre-commencement requirements of the planning conditions but on foot of the type of arrangement described by Ms O'Connor would be lawful.

33. On the basis of the foregoing, some further observations are appropriate:

- Technically, none of the foregoing prevents my lifting the stay. But it is important to state that lifting the stay would not render lawful any development otherwise unlawful having regard to the questions raised above as to the necessity to timely compliance with pre-commencement planning conditions or building control law and the legal status of development effected prior to such compliance.
- The urgency urged by Colbeam as a basis for lifting the stay is the less compelling in light of the lack of clarity as to whether and when Colbeam may, for reasons unconnected with the proceedings, start development.
- The question arises whether, and if so how, Colbeam's inadequately explained failure to bring these issues to light in the proceedings in a timely fashion in fulfilment of its duty of cooperation with the Court may affect the determination of the motions before me.

34. As to the last of these observations, the Applicants cite **Hoey v Waterways Ireland**¹⁶. Mr Hoey sought an interlocutory injunction preventing the Defendants disposal of his derelict barge which it had, 10 years earlier, removed to storage from the Barrow navigation in which it had sunk, interfering with navigation. The interlocutory injunction application had not been expeditiously prosecuted. Charleton J observed:

"..... an application for an interlocutory injunction is a plea to the courts holding equitable jurisdiction that justice should respond by the making of an order compelling a defendant to stop doing something, a prohibitory injunction, or should do something, a mandatory injunction, in the face of what is claimed to be an infringement of the plaintiff's rights that is so serious that such action is needed, even prior to a full trial, and where a judge will have only a limited knowledge of the facts, usually deposed to on affidavit, and in circumstances where a full review of the law may be difficult. For reasons set out below, every such order carries consequences for the parties and, mindful of that, the granting of an interlocutory injunction is a serious step, one potentially fraught with the danger of injustice, for a court to make."

"What the course of this case exemplifies, and what is in the nature of a plaintiff having applied for an injunction prior to trial, is that a plaintiff has asserted: this is urgent, this is an infringement of rights where unless a plaintiff responds speedily, serious harm will be done. That is what an interlocutory injunction is about. Yet, the case languished for nine years. There is an obligation on a plaintiff, having made such an assertion, through applying for an interlocutory injunction, to consistently pursue the path of urgency by seeking to bring forward the full trial. Consistent with the principle that delay can equate to acquiescence, failure to follow through on promptness may have consequences at the full trial. More

¹⁶ Hoey v. Waterways Ireland [2021] IESC 34 (Supreme Court, Charleton J, 28 May 2021)

importantly, having sought the urgent aid of the courts through an interlocutory application, a plaintiff is required to consistently seek the disposal of the case through application to preparation and in seeking an early hearing.”

35. These observations in **Hoey** primarily apply to applicants for interlocutory injunctions and apply also to applicants for stays of impugned decisions in judicial review. As, in the present case the onus of proof as to a stay is on the Applicants, they primarily apply to them. But in my view they are also relevant where a Notice Party resists a stay on grounds of the urgency of proceeding with development pursuant to an impugned permission. In my view a Notice Party in judicial review bears a similar onus of cooperation with the court as do Applicants and Respondents. I need not decide if their respective duties are co-extensive. It suffices to say that Colbeam should have brought to my attention and that of the other parties, in a timely manner, their position as to compliance with pre-commencement conditions and its effect on their capacity to lawfully start works and they did not do so in a timely manner. Very properly, if perhaps inevitably, Counsel for Colbeam agreed that Colbeam did not do so in a timely manner.

Failure to deliver Opposition Papers.

36. As the chronology above records, as early as late July 2021 and in the context of asserted “*pressing commercial urgency*” Colbeam sought copies of the Applicant’s judicial review papers so that Colbeam could deliver its Statement of Opposition “*as expeditiously as possible*”. The Affidavit of Kenneth Birrane sworn 29 October 2021 expressed anxiety for an “*accelerated hearing as expeditiously as possible*”. such that “*Colbeam will co-operate with the fixing of the earliest possible hearing*”. Colbeam has had the Applicant’s judicial review papers since 14 October 2021. On 15 November 2021 and explicitly to aid expedition of the proceedings, I gave the Board and Colbeam liberty to file opposition papers. Admittedly this was on terms that, even if the Applicants’ Protective Costs Order application failed, the Board and Colbeam would not recover the costs of filing those opposition papers but I cannot imagine that the costs involved are significant in comparison to the quantum of losses Colbeam fears. As at the hearing of 15 and 16 December Colbeam had not availed of that liberty. I am unaware if it has done so since. It does seem to me that Colbeam’s failure to avail of the liberty to file opposition papers tends to diminish its protestations of urgency.

37. However I do not attribute weight to this issue as bearing on the urgency or lack of it on the question of a stay as the issue was not argued save in one respect to which I refer below and given the pressures on the SID list I think it likely that the availability of a hearing date is likely to be more causative of any delay and any resultant loss to Colbeam. In addition, the Board’s opposition papers will also be required before a trial date can be set and so Colbeam’s filing opposition papers might well not have expedited trial in any event.

Other Principles Applicable

Okunade, Hoey, Dowling, Merck, O'Brien

38. The law as laid down in **Okunade**¹⁷ is now well-known (at least to the relatively few citizens likely to have the interest and fortitude necessary to read this judgment) and undisputed. Clarke J set the scene in stating that whether a stay or an interlocutory injunction is granted or refused *“There is an inevitable risk that, with the benefit of hindsight, and after a full trial has been conducted, an injustice may be seen to have been done.”* He considered that *“... the problem stems from the fact that the court is being asked, on the basis of limited information and limited argument, to put in place a temporary regime pending trial in the full knowledge that the court does not know what the result of the trial will be.”* And *“a risk of injustice is an inevitability in those circumstances ...”*. From these premises he concluded that *“... the underlying principle must be that the court should put in place a regime which minimises the overall risk of injustice.”*

39. In **Hoey**¹⁸ a unanimous Supreme Court decided a private law interlocutory injunction. Charleton J made the general observation that *“In every application prior to trial, the danger emerges of a wrong decision since the court is then only dealing with affidavit evidence and has a limited view of the issues. As Lord Hoffman put the matter in Films Rover Ltd v Connon Film Sales¹⁹ this prompts the court towards the least risk of injustice; see also Clarke J in Okunade v Minister for Justice and Equality²⁰.”*

40. Despite the argument that its application in a public law challenge would amount to a denial of an effective remedy Clarke J in **Okunade** considered the “Campus Oil test” applicable to private law injunctions and as summarised as follows, to apply also, as *“a useful starting point”* with a view to minimising the risk of injustice in applications for stays of the type at issue in the present proceedings:-

- *The party seeking the injunction must show that there is a fair or bona fide or serious question to be tried.*
- *If that be established, the court must then consider two aspects of the adequacy of damages. First, the court must consider whether, if it does not grant an injunction at the interlocutory stage, a plaintiff who succeeds at the trial of the substantive action will be adequately compensated by an award of damages for any loss suffered between the hearing of the interlocutory injunction and the trial of the action. If the plaintiff would be adequately compensated by damages the interlocutory injunction should be refused subject to the proviso*

¹⁷ Okunade v Minister for Justice and Equality [2012] IESC 49, [2012] 3 IR 152

¹⁸ Hoey v Waterways Ireland [2021] IESC 34 (Supreme Court, Charleton J, 28 May 2021)

¹⁹ [1987] 1 WLR 670, 680

²⁰ [2012] 3 IR 152 at [67].

that it appears likely that the relevant defendant would be able to discharge any damages likely to arise.

- *If damages would not be an adequate remedy for the plaintiff, then the court must consider whether, if it does grant an injunction at the interlocutory stage, a plaintiff's undertaking as to damages will adequately compensate the defendant, should the latter be successful at the trial of the action, in respect of any loss suffered by him due to the injunction being enforced pending the trial. If the defendant would be adequately compensated by damages, then the injunction will normally be granted. This last matter is also subject to the proviso that the plaintiff would be in a position to meet the undertaking as to damages in the event that it is called on.*
- *If damages would not adequately compensate either party, then the court must consider where the balance of convenience lies.*
- *If all other matters are equally balanced the court should attempt to preserve the status quo.*

41. Clarke J preferred the phrase “*least risk of injustice*” to “*balance of convenience*”. (Costello J described this as “the critical issue” in **Callaghan -v- An Bord Pleanála**²¹). Significantly, Clarke J held that the Campus Oil test required some adjustment when applied in public law cases such as judicial review:

“[104] As to the overall test I am of the view, therefore, that in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply the following considerations:-

(a) the court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;

(b) the court should consider where the greatest risk of injustice would lie. But in doing so the court should:-

(i) give all appropriate weight to the orderly implementation of measures which are prima facie valid;

(ii) give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,

(iii) give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;

²¹ [2017] IEHC 312 (High Court, Costello J, 15 May 2017)

but also,

(iv) *give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.*

(c) *in addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,*

(d) *in addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."*

35 The flexibility of the Campus Oil test was reinvigorated by the Supreme Court in **Merck Sharp and Dohme v Clonmel Healthcare**²². Campus Oil was to the fore though the case concerned a private law injunction,. O'Donnell J held that *"any application should be approached with a recognition of the essential flexibility of the remedy and the fundamental objective in seeking to minimise injustice, in circumstances where the legal rights of the parties have yet to be determined."* O'Donnell J preferred to consider adequacy of damages as part of the balance of justice:

"It is not simply a question of asking whether damages are an adequate remedy. As observed by Lord Diplock, in other than the simplest cases, it may always be the case that there is some element of unquantifiable damage. It is not an absolute matter: it is relative. There may be cases where both parties can be said to be likely to suffer some irreparable harm, but in one case it may be much more significant than the other. On the other hand, it is conceivable that while it can be said that one party may suffer some irreparable harm if an injunction is granted or refused, as the case may be, there are nevertheless a number of other factors to apply that may tip the balance in favour of the opposing party. This, in my view, reflects the reality of the approach taken by most judges when weighing up all the factors involved."

He also considered it important to keep in mind that, the interests that the law exists to protect often extend beyond the purely financial.

In an observation with present resonance, O'Donnell J considered that *"Part of the difficulty in this case is that each party asserts an interest which, if valid, is something encouraged by the law."* In this case the Applicants assert environmental concerns and Colbeam seek to build strategic housing amidst a housing crisis.

²² [2019] IESC 65

42. In **Dowling**²³ the Supreme Court confirmed that in considering interlocutory restraint of action said to be justified by a national measure whose validity is challenged on the basis of EU law, the *Okunade* test applied but a court should also have regard to the question posed in **Atlanta Fruchthandelsgesellschaft**²⁴ of whether a party might be deprived of an effective remedy by the court's decision. That said, Clarke J considered it at least arguable that on the test in EU law the strength of the case needs to be established to a higher degree than the “*arguable case*” hurdle in *Campus Oil*. “*Thus, if anything, applying Irish national rules may afford greater protection ...*”.

43. In **Dowling** the Supreme Court noted that the test in EU law also requires that there be a risk of damage both “*serious*” and “*irreparable*” if a stay is refused²⁵. Clarke J observed that if the risk is of purely financial damage, there will be no risk of serious injustice, for a party who wins can be properly compensated in damages - “*at least in most cases*”. Clarke J cited EU caselaw to the effect that “*..... purely financial damage cannot be regarded in principle as irreparable. However, it is for the national court hearing the application for interim relief to examine the circumstances particular to the case before it.*” As the Supreme Court put it the question is whether damages are “*truly*” an adequate remedy.

44. In **Dowling** and as to the least risk of injustice test the Supreme Court considered that “*The important point to emphasise is that the risk of injustice works both ways.*”

45. The Supreme Court in **Dowling** also elucidated in the EU Law context cases expressing concerns similar to those expressed in *Okunade* as to the public interest that “*matters of considerable weight have to be put into the balance to outweigh the desirability of enforcing, in the public interest, what is on its face the law*”.

46. The requirement specified in *Okunade* to give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful clearly applies to a measure compelling or disadvantaging the applicant in judicial review. It does not map precisely onto a judicial review of a permission or licence granted to a notice party. In **O'Brien v An Bord Pleanála**²⁶ Costello J, resolved this dissonance as follows:

“I would add that all due weight should also be given to the consequences for the notice party as the party prohibited from acting upon the measure under challenge in

²³ *Dowling v. Minister for Finance* [2013] 4 IR 576

²⁴ *Atlanta Fruchthandelsgesellschaft v Bundesamt für Ernährung und Forstwirtschaft* (Case C-465/93) [1995] ECR I-3761

²⁵ Citing *Zuckerfabrik Süderdithmarschen AG Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* (Joined Cases C-143/88 and C-92/89) [1991] ECR I-415

²⁶ *O'Brien -v- An Bord Pleanála* [2017] IEHC 510 (High Court, Costello J, 24 July 2017)

circumstances where that measure may not be found to be unlawful. This arises particularly in the context of judicial review of planning decisions, such as this case, where objectors to the grant of planning permission apply for judicial review and the notice party who is in receipt of a grant of planning permission finds that the decision is stayed on the basis of an order obtained ex parte when leave to seek judicial review is granted and he therefore cannot act upon the grant of planning permission.”

47. Perhaps a similar mapping difficulty and dissonance arises as to the Okunade obligation to give all appropriate weight to the orderly implementation of measures which are prima facie valid. I would resolve it in a manner analogous to Costello J’s resolution in **O’Brien**²⁷ by giving all appropriate weight to the orderly implementation of a licence or permission by the recipient of that licence or permission by his/her relying upon it to do that which is licensed or permitted. Of course what is the appropriate weight will vary between cases and by reference inter alia to any underlying public interest in the activity licensed or permitted. As will be seen, this latter issue is likely to be particularly relevant in the case of planning permission for strategic housing development.

Krikke

48. In **Krikke v Barranafaddock Sustainability Electricity Ltd**²⁸ the Supreme Court considered the question of a stay pending appeal on a planning injunction restraining operation of a windfarm in breach of the applicable planning permission²⁹, failing which stay the wind farm operator would suffer large uncompensateable losses.

49. O’Donnell J in the Supreme Court observed that in the field of public law a *Campus Oil* approach:

“..... can tend to give too much weight to the asserted impact on an individual or business unless it is recognised that the enforcement of the law is itself an important factor and that even temporary disapplication of the law gives rise to a damage that cannot be remedied in the event that the claim does not succeed. The real insight of Okunade was to require that weight be given to this factor in any application for an interlocutory injunction. C.C. showed that this factor was also to be taken into account in any application for a stay pending appeal.

It is worth, however, pausing to consider why this factor is important and should be addressed in any application for an injunction or a stay which would have the effect of disapplying a measure which is prima facie valid. It arises – perhaps most clearly – in the case

²⁷ O’Brien -v- An Bord Pleanála [2017] IEHC 510 (High Court, Costello J, 24 July 2017)

²⁸ Krikke v. Barranafaddock Sustainability Electricity Ltd [2020] IESC 42 (Supreme Court, O’Donnell J, 17 July 2020) §§11 & 12

²⁹ The developer had put in 103 metre turbine blades rather than the 90 metres permitted. It is fair to record also that the developer had proceeded in good faith on the basis of misconceived communications with the planning authority.

of a challenge to the constitutional validity of legislation. Such legislation is enacted by the Oireachtas pursuant to its constitutional obligation. It is of general application. An individual ought not be permitted to obtain from a court an order disapplying the law, either individually or generally, merely by asserting a stateable, though perhaps weak, case and a fear of substantial damage. If an injunction is granted and the claim nevertheless fails, there is no easy way of repairing the damage to the rule of law caused by the fact that the law has been (wrongly) suspended. That is why a court must take that factor into account on any application for an interlocutory injunction and consider whether a speedy trial is possible, the strength of the case, and the reality of irreparable harm.

The starting point is, however, the application of a law validly enacted by the body entrusted with that task by the Constitution. Even where the challenged measure is made pursuant to statutory power and is of more limited application, the temporary disapplication of a measure which is ostensibly valid is a serious matter, and the fact that there is no remedy should it transpire that the challenge was not justified is a matter that must be weighed in the balance on any application for an interlocutory injunction or stay pending trial, and perhaps even more so where a stay is sought pending appeal.”

50. Inasmuch as in the present case a breach of Habitats Directive obligations is alleged, it is noteworthy that O’Malley J for the Supreme Court in *Krikke*, observed that:

*“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* this Court rejected an argument that the Okunade test breached the principles of effectiveness or equivalence.”*

Massey, Comerford and the Urgency of SHD

51. In **Massey v An Bord Pleanála**³⁰, McDonald J considered a stay application in a challenge to the Board’s decision deeming an intended wind farm strategic infrastructure development for the purposes of the Planning and Development (Strategic Infrastructure) Act 2006 (“the 2006 Act”) such that the intending developers could make their planning application directly to the Board. Notably, that decision did not permit development. The stay would merely have prevented the making of an application for planning permission to the Board.

52. Counsel for the Applicant argued that the weight to be given to the factors identified in *Okunade* as relevant to the refusal of a stay is diluted by the fact that the Court has already been

³⁰ *Massey v An Bord Pleanála*, Ireland & The Attorney General & Innogy Renewables Ireland Limited; Record No. 2020/480JR Ex Tempore McDonald J 11 September 2020 (available on transcript)

satisfied when granting leave to seek judicial review that the Applicant has substantial grounds for the relief claimed by him. Counsel also argued that judicial review, an express element of the planning code under section 50 of the 2000 Act would be an ineffective remedy without a stay. McDonald J rejected that submission and applied Okunade as binding him to the effect that a stay will only be granted where the Applicant establishes that the greatest risk of injustice will arise if a stay is refused. *“There is nothing automatic about the grant of a stay.”*

53. McDonald J applied Okunade as recognising that:

“the outcome of a stay application is likely to give rise to some level of injustice to either party, in particular the party who fails to secure the outcome that is wished for. The test laid down in Okunade is designed to assist the Court in arriving at a decision which causes the least level of injustice. This is the best that the Court can do at this interlocutory stage of proceedings when the Court is regrettably in no position to determine who will ultimately succeed in the proceedings.”

McDonald J worked through the criteria identified by Clarke J in Okunade³¹. He cited Krikke in terms set out above and noted that it recognised that weight should be given to the protection of EU environmental rights. It struck McDonald J that:

“... where judicial review proceedings relate to the grant of planning permission, the risk of injustice if a stay is refused may, depending on the circumstances and the evidence placed before the Court, be more readily apparent. As, for example, where there is a reasonable basis for concern that if the construction works proceed there will be irreparable harm done to the environment, in such circumstances the refusal of a stay may well make the proceedings moot. That consideration is absent here.”

54. McDonald J counterpoised Okunade in giving *“all due weight to the consequences for the applicant if there is no stay and if the measure impugned is subsequently found to be unlawful”* with *“the consequences for the Notice Party if the stay is granted and if the decision of the Board is subsequently found to be lawful”*. McDonald J recognised the importance of the evidence on such issues: *“With some justification both sides have criticised the evidence which has been adduced on the other side in relation to this element of the test. I believe it is fair to say that there is a lack of specifics on both sides in relation to the respective losses to which they will be exposed depending on the outcome of this application. Both sides have approached the issue at a level of generality which makes it difficult for the Court to accurately assess the extent of the damage and, accordingly, the extent of the injustice to which either side might be exposed depending on the outcome.”* He described the evidence on both sides, as having *“been put at a level of generality which is unhelpful.”* On the question of losses to the intending developer if the impugned decision was stayed, McDonald J said: *“There are various possibilities outlined in the affidavits [for] the Notice Party, but they are for the most part possibilities. On the other hand I accept that a developer of a project like this is likely to*

³¹ §104

suffer some damage as a consequence of delay and there will obviously be no means by which the developer could ever be compensated but that if a stay is granted.”

55. Ultimately, on the inter partes questions of injustice as between the applicants and the notice party McDonald J, on the evidence available to him, found the risks finely balanced and so considered whether some other factor tilted that balance. He found it in the public interest in giving effect to the terms of the 2006 Act which has the benefit of the presumption of constitutionality and reflects the will of the Oireachtas to interfere in a radical way with the planning code to process Strategic Infrastructure Development applications in a different way to other planning applications. The 2006 Act, unusually, had been explicitly enacted in the common good and explicitly intended that Strategic Infrastructure Development applications be determined expeditiously. And so he refused to stay the impugned decision.

56. However McDonald J made clear that the public interest factor he had identified *“will not always or even mostly trump the position of the parties, everything will depend on the circumstances of an individual case as disclosed in the evidence which the parties have chosen to put before the Court.”* And he again cited the paucity of that evidence in the case before him.

57. Some days earlier, in **Comerford v An Bord Pleanála**³² McDonald J had considered a stay application in a judicial review which sought to prevent the Board from deciding a Strategic Housing permission application under the 2016 Act. Again applying Okunade as to the public interest and citing Krikke and considering where the greatest risk of injustice would lie, McDonald J noted the unusual scheme under the 2016 Act of direct application to the Board for permission and the duty of expedition imposed on the Board – to the unusual extent that S.9(13) imposes, in effect, a fine on the Board for breaching the time limit for making a decision. He discerned:

“..... that the Oireachtas in enacting the 2016 Act clearly intended that applications for permission in respect of strategic housing development, as defined, should be pursued with urgency. It appears to be clear that all of this was done with a view to addressing what I believe it is fair to say is the current homelessness crisis in this country. Whether the 2016 Act was the correct way to proceed for that purpose is not a matter for this Court. It is a matter of policy for the Oireachtas and the Oireachtas, comprising the elective representatives of the people, has determined that this is the way in which the homelessness crisis in this country should be addressed.

58. In Comerford, the intending developer had sworn that delay of four months would cost it in the region of €2.3 million. McDonnell J agreed that there wasn't a great deal of detail in the affidavit but considered that *“... at the very least there is the possibility that some damage will arise. As the*

³² Comerford et al v An Bord Pleanála, The Minister for Housing Planning and Local Government, Ireland & The Attorney General and Dublin City Council and Cairn Homes Properties Limited Record No. 2020/499JR Ex Tempore McDonald J 4 September 2020 (available on transcript)

decision of the Supreme Court in Krikke makes clear, some weight should be given to this factor but it is only a factor to weigh in the overall balance, it isn't in any sense a determining factor." I think it is important to state that, in saying the prospect of financial loss to the developer wasn't a determining factor, McDonald J was considering the particular facts of that case and emphasising (as do I) that by no means will it inevitably be that the prospect of even large financial loss will inevitably "trump" other potential injustices.

59. As in Massey, on the inter partes questions of injustice as between the applicants and the notice party McDonald J, on the evidence available to him in Comerford, found the risks finely balanced and so considered whether there was some other factor that tilted that balance. As in Massey, McDonald J found it in the public interest in minimising interference with the operation of, and in giving effect to the intention of the Oireachtas as reflected in the terms of the 2016 Act:

"But in this case there is the additional factor which seems to me to strongly tilt the balance in favour of the refusal of a stay and that is the public interest in giving effect to the provisions of the 2016 Act. I do not wish to suggest that this will always tilt the balance in this way in favour of a stay, everything will depend on the evidence in an individual case and the extent to which any countervailing factors may be identified on the evidence and the strength of those countervailing factors".

60. Accordingly in Comerford McDonald J refused a stay to prevent the Board from deciding a Strategic Housing permission application pending trial. However McDonald J was dealing with proceedings seeking to prevent the Board from deciding a Strategic Housing Permission application – not proceedings, as here, impugning such a decision once made. McDonald J made it clear that if permission were granted and challenged the outcome of an application to stay that decision pending trial of a judicial review could well be different - particularly if such permission *"may have a more direct and immediate impact in terms of the European environmental point that may be in issue"*.

61. While there are differences between the Massey and Comerford cases and the present case, Massey and Comerford do illustrate the operation of the public interest in these matters and in the operation of the statutory scheme in question. As O'Malley J observed in Krikke, *"It is also appropriate to take into account the importance to be attached to the particular scheme concerned."* – by "scheme" she meant the statutory scheme. While the 2016 Act wasn't explicitly enacted in the common good, its general scheme is similar to the 2006 Act and Comerford illustrates the particular urgency of SHD applications as part of addressing a homelessness crisis.

62. The urgency of SHD applications is readily apparent from the scheme of the 2016 Act – features such as direct planning applications to the Board, the time-limited operation of the Act, truncated procedures (in comparison to "ordinary" planning applications) and the duty of expedition on the Board. The only explicit mention of urgency in the Act is found in an oddly-focussed part of

the Act. Nonetheless the express reference is there: S.18 of the 2016 Act amends S.143 PDA 2000 to the effect that before deciding whether to hold an oral hearing in an SHD application:

“..... the Board —

- (i) shall have regard to the exceptional circumstances requiring the urgent delivery of housing as set out in the Action Plan for Housing and Homelessness, and*
- (ii) shall only hold an oral hearing if it decides, having regard to the particular circumstances of the application, that there is a compelling case for such a hearing.”*

The phrase *“exceptional circumstances requiring the urgent delivery of housing”* is emphatic and falls not far short of the colloquial description of a *“housing crisis”*. The necessity of a *“compelling case”* for an oral hearing amplifies the emphasis.

63. The Oireachtas has chosen to include student accommodation of 200 or more bedspaces in the definition of Strategic Housing Development to be advanced by the Act. As McDonald J said, whether the 2016 Act was the correct way to proceed is a matter of policy for the Oireachtas and is not a matter for this Court to question. The same goes for the inclusion of student bedspaces in the definition of Strategic Housing Development. Accordingly I must take it that the proposed development is one which will in some greater or lesser degree, respond to the *“exceptional circumstances requiring the urgent delivery of housing”*.

Arguability of Claim

64. As has been seen, Clarke J in Okunade held that the party seeking the injunction must show a fair or bona fide or serious question to be tried. In **Hoey**³³ Charleton J said that *“While many expressions have been used as to the nature of the test as to what kind of case the plaintiff is putting up at interlocutory stage, the principles in Okunade and in Merck Sharpe and Dohme are unchanged.”* Nonetheless the expression Charleton J chose was that the Plaintiff must show a *“reasonably arguable case”*. He contemplated what is *“reasonably arguable, as opposed to speculatively or distortedly argued”*. This, and his observation that *“literally anything may be argued”*, may be seen as raising the bar somewhat above mere arguability. However Charleton J clearly saw the grant of leave to seek judicial review as implying that the test was satisfied *“leave to commence judicial review requires some ground to be put forward that is not contradicted by existing law and which is reasonably arguable”*. In planning judicial review *“substantial grounds”* are required before leave is granted. And that the Applicants have an arguable case is not disputed. The Applicants have surmounted this hurdle.

65. Counsel for the Applicant noted the absence of opposition papers as bearing on the issue of the strength of the case in that in Okunade it was held that in considering the grant or refusal of a

³³ Hoey v. Waterways Ireland [2021] IESC 34 (Supreme Court, Charleton J, 28 May 2021)

stay “the court could place all due weight on the strength or weakness of the applicant’s case”. But that observation was “subject to the issues arising in the judicial review not involving detailed investigation of fact or complex questions of law”. Even considering only the Applicant’s papers, I do not think this is such a case. And Notice Party has put much of its case on affidavit.

Adequacy of Damages

66. In my view it is readily apparent that damages will not adequately remedy damage resulting from the works intended if the stay is lifted. I am also of the view, for reasons set out below, that if the stay is continued and the Applicants fail at trial damages will not adequately remedy damage likely to have been wrongly suffered by Colbeam by reason of delayed development in circumstances in which the Applicants have proffered no undertaking in damages and there is no reason to believe that, had they done so, it would have had the necessary practical substance.

67. Given I consider damages will be inadequate to both sides and that such inadequacy relates to the capacity of damages to mitigate any injustice resulting from my decision as to a stay and so to the nature of that injustice, it seems to me consistent with the flexibility of approach advocated in **Merck** and with the view that the overarching aim is to minimise the risk of injustice in the particular circumstances of the case, to consider adequacy of damages and risk of injustice in an overall assessment.

Potential Loss to Colbeam and the significance of an Undertaking in Damages to the Question of a Stay.

68. In principle the prospect of commercial risks to the recipient of a planning permission if its operation is stayed pending judicial review is relevant to the balance of injustice – see, for example **Callaghan v An Bord Pleanála**³⁴. Colbeam say that a particular feature of their intended development is that they must have it built and ready for letting by August 2024 or they will miss the letting season for the 2024/2025 academic year and be unable to let the accommodation until autumn 2025. This at a loss of rental revenue of about €9ml and incurring finance and other costs of about €1ml. Condition 2 of the Impugned Permission prohibits use of the premises other than as student accommodation.

69. The Applicants have, with some justification, criticised the premises of and the vagueness of the evidence of such anticipated losses. But in my view it is readily to be inferred that failing letting for the 2024/2025 academic year substantial losses are likely accrue to Colbeam – though I am not

³⁴ [2017] IEHC 312 (High Court, Costello J, 15 May 2017)

to be taken as accepting that net losses in the order of the figures cited by them are probable even failing letting for the 2024/2025 academic year.

70. Colbeam have also tendered evidence that the works programme is “tight” (my word, not theirs) such that delay of even weeks (and they are over 2 months behind already) would imperil their ability to have the development built and ready for letting by August 2024. They say that their Works Programme is based on a modular building system of construction of significant elements of the buildings in factories off-site and so assumes less time-contingency than programmes based on more traditional building methods in that modular building is considerably less weather-sensitive. On its face the exhibited and detailed Works Programme conforms to Colbeam’s position. Counsel for the Applicants says this Works Programme and the account given of it for Colbeam were given by Mr Birrane on affidavit and that though a director of Colbeam he is not identified as an engineer. In my view while Mr Birrane clearly has an interest in the matter and his affidavits may be approached with some proper reserve, it is unreal to suggest that the director of a company having spent considerable monies and effort to date and about to embark on a clearly multi-million euro development is disqualified from giving the evidence he has given on these issues.

71. The Applicants have, again with some justification, criticised the premises of and the vagueness of the evidence in this regard but have themselves adduced no evidence – for example from an engineer or a project-manager – contradicting Colbeam on this issue or indeed any issue as to the Works Programme or its urgency. On the evidence before me I do not think I am in a position on the evidence to substantially doubt Colbeam’s position on these questions. I might imagine that such programmes are inherently and necessarily flexible in a world in which factors such as weather and supply chains are more or less unreliable. But perhaps more important for present purposes than detailed analysis of the time-sensitivity and flexibility of the Works Programme is the fact that this case is likely not to come on for trial for some time yet even if expedited. Colbeam’s failure to avail of the liberty to expedite filing of its opposition papers does not impress in this regard. All that said, I do not ultimately consider that I can infer that Colbeam’s fears of “missing” the letting season for the 2024/2025 academic year by reason of the continuation of a stay in these proceedings are unfounded. Nor do I have any evidence that they are unfounded even as to the period from now to handover to the main contractor.

72. Colbeam may have “overegged the pudding” in its headline loss figure of €10,200,000. I must look to the realities in that regard insofar as discernible on the limited evidence to hand. If Colbeam fails to quickly solve its pre-commencement condition compliance difficulties it may suffer no losses at all by reason of a stay and as a matter of causation. I will refrain from putting a figure on its likely losses even by way of an estimate: the evidence does not allow it. However I am of the view that, assuming it solves its pre-commencement condition compliance difficulties, Colbeam will likely suffer significant losses by reason of a stay. In discussion at hearing counsel for the Applicants in the end did not disagree – though emphasised the question of the weight of the issue. It is by no means inconceivable that such losses will be in a seven-figure sum.

73. As **Dowling** records, “..... purely financial damage cannot be regarded in principle as irreparable. However, it is for the national court hearing the application for interim relief to examine the circumstances particular to the case before it.” The words “in principle” and the second sentence should not be overlooked.

74. The Applicants have declined to offer undertakings in damages. That simplifies the matter: per Krikke “*there is no remedy should it transpire that the challenge was not justified*”.

75. Alternatively, assuming I were to make further prosecution of these proceedings conditional on the Applicants’ giving an undertaking in damages, and as such an undertaking would tend to tilt the balance to the Applicant when considering the issue of a stay, I will assume for the sake of argument that the Applicants give undertakings. How far should I see that as tilting the balance in their favour in considering the issue of a stay?

76. Colbeam’s motion to compel the Applicants to disclose their financial affairs awaits hearing. But the Applicants bear the onus of proving a stay should be granted so it is not unreasonable to note that it was open to them to volunteer at least some such information in support of their application for a stay and they did not. Adrian O’Connor identifies himself as a “Chief Executive” but does not say of what or at what salary or anything about his financial affairs or capacity to meet any liability on an undertaking in damages. Likewise, all we know of Wendy Jennings is that she is a “marketing executive”. Clarke J had such issues in mind when he considered that damages could be adequate to a Plaintiff and no real injustice will have been suffered by the refusal of an injunction, “*provided that the defendant is likely to be a mark*”: likewise in his referring to the “*proviso that it appears likely that the relevant defendant would be able to discharge any damages likely to arise*”.

77. I emphasise that in here considering the question of an undertaking in damages I am considering its relevance only to the question of the reparability of harm to Colbeam. I am not considering the separate question whether further prosecution of the proceedings should be made conditional on such an undertaking.

78. The evidence on neither side of this balance is satisfactory or even helpful, much less convincing. Doing the best I can on thin evidential gruel, I think it likely that, if Colbeam suffer significant losses, the Applicants’ undertakings in damages, if given, would be unlikely to appreciably meet Colbeam’s losses and the balance of injustice in this respect tilts in Colbeam’s favour and against the granting of a stay.

A further Issue as to Undertakings in Damages

79. The Applicants make another point as to the bearing on the question of a stay of the issue of an undertaking in damages. While wider questions of the applicability of the “Not Prohibitively Expensive” rule of Article 9(4) of Aarhus will be addressed in my second judgment, the Applicants point out that Colbeam and the Board accept that the NPE rule applies to Grounds 10 and 12 as to bats and birds. These are EIA and “Habitats” grounds.

80. The Applicants correctly suggest – citing **Commission v UK Case C-530/11** and an Aarhus Compliance Committee findings as to UK practice³⁵ - that where the NPR rule applies the analysis of exposure of an applicant for judicial review to expense must encompass exposure on an undertaking in damages. The Compliance Committee said that such undertakings:

“may entail potential liabilities of several thousands, if not several hundreds of thousands of pounds. This leads to the situation where injunctive relief is not pursued, because of the high costs at risk, where the claimant is legitimately pursuing environmental concerns that involve the public interest. Such effects would amount to prohibitively expensive procedures that are not in compliance with article 9, paragraph 4.”

81. In **Commission v UK**³⁶ the CJEU held that the NPE rule did not prohibit undertakings in damages but the court must make sure that the resulting financial risk for the claimant is also included in the various costs generated by the case when it assesses whether or not the proceedings are prohibitively expensive. In **Edwards**³⁷ the CJEU held that the NPE rule pertains, in environmental matters, to the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights, and to the principle of effectiveness, such that procedural rules governing actions for safeguarding an individual's rights under European Union law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law³⁸. THE NPE rule means that those covered by it should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result.

82. As relates to grounds 10 and 12 at least it seems to me that it will not be open to impose a requirement of an undertaking in damages involving full exposure to the potential losses which may flow from a stay in this particular case. Given that the whole purpose of the NPR regime is to facilitate “wide access to justice” and that the CJEU has emphasised the necessity that interim

³⁵ Findings And Recommendations of the Aarhus Convention Compliance Committee with Regard to Communication ACCC/C/2008/33 Concerning Compliance by the United Kingdom

³⁶ C-530/11

³⁷ R (on the application of Edwards and another) v Environment Agency and others C-260/11

³⁸ citing Case C-240/09 LZ1 [2011] ECR I-1255, §48

measures³⁹ must be available to protect alleged EU rights pending trial (including from the risk of the dispute becoming moot) it may seem paradoxical that protection from a requirement of an excessive undertaking in damages could work against an applicant as to the “*least risk of injustice*” test when considering a stay. But such interim measures are required to prevent “serious and irreparable” harm - see **Dowling**⁴⁰. Interestingly, the CJEU In **Commission v UK**⁴¹ held that factors relevant to the assessment whether expense was excessive includes “*the importance of what is at stake for the claimant and for the protection of the environment,*”. It seems therefore that the court can consider the importance of the environmental issues at stake and the question of seriousness and irreparability of the likely environmental harm in seeking to resolve any paradox.

The Role of Property Rights in the Balance of Injustice

83. Weighing environmental considerations against potential financial loss is often, and is here, in the realm of comparing apples and oranges. There is no necessary or predetermined or “one size fits all” outcome to this balancing exercise. Cases turn on their particular facts.

84. Colbeam says it has a presumptively valid permission to develop its property and will incur considerable financial loss if much delayed in doing so by a stay. That is undoubtedly a weighty consideration – if not as weighty as Colbeam assert. But I should bear in mind the observation of Advocate-General Kokott in **Case C 530/11 European Commission v United Kingdom**:

“96. However, protection of the environment is capable of justifying a restriction on the use of the right to property. This applies also to interim measures to preserve the status quo whilst a court reviews an environmental law permit. The restriction on the right to property and other freedoms is founded primarily on the fact that the projects which it is sought to pursue require approval on grounds of environmental protection. If the requirement for approval is justified, that justification extends in principle also to interim relief with a view to preventing the de facto pre-emption of the main proceedings while the approval is subject to ongoing judicial review.”

In the same case the Court said⁴² that:

“..... the right to property is not an absolute right, but must be viewed in relation to its social function. Its exercise may therefore be restricted, provided that those restrictions in fact correspond to objectives of general interest and do not constitute, in relation to the aim pursued, disproportionate and intolerable interference, impairing the very substance of the

³⁹ Both interim injunctions and interlocutory injunctions (in the sense in which those terms are used in Irish procedural law) come within the general ambit of interim measures as that term is used in European Union law - Dowling, v The Minister for Finance, Respondent - [2013] 4 IR 576

⁴⁰ Dowling v. Minister for Finance [2013] 4 IR 576

⁴¹ C-530/11

⁴² Citing Case C-416/00 *Križan and Others* [2013],

right guaranteed (..... Protection of the environment is one of those objectives and is therefore capable of justifying a restriction on the exercise of the right to property”

85. These extracts are obviously notable for the view that protection of the environment is capable of justifying a restriction, by way of interim measures pending determination of judicial review, on the exercise of rights of property. But they seem to me also to reflect a view that, at least in EU Environmental law contexts in which a right of judicial review of environmental law permits is afforded (viz. Article 11 of the EIA Directive⁴³), judicial review is not an extraneous interference in a system which has already produced a permit: it is, rather, internal and integral to the environmental law permitting system itself. Ceteris paribus, such a view would tend towards the grant of stays on impugned decisions pending trial of judicial review. At a very general level, this would seem consistent with the high level of environmental protection enjoined in Article 191 TFEU⁴⁴ and Article 37 CFEU⁴⁵.

“Irreparable & Serious Harm” - Tree Loss, Bats & the Prospect of Replanting

86. **Krikke** requires that I consider “*the reality of irreparable harm*”. **Dowling** suggests in the context of EU law that the harm must be not merely irreparable but serious. Such realities may be nuanced and the confidence with which they can be predicted may be limited at the interlocutory stage.

87. The proposed development will result in the removal of 35 of the 57 trees on site and they will be removed in early course if a stay is refused – assuming Colbeam is in a position to start development. The Applicants correctly emphasise the virtual certainty of that loss if a stay is refused as opposed to what they say (and Colbeam dispute) is the contingent and uncertain prospect of damage to Colbeam if a stay is granted.

88. The Applicants say that the trees are significant in their own right and that some are also significant as potential bat roosts.

89. As to the trees’ significance in their own right the Applicants say removal would materially contravene a Development Plan objective specific to the site to “Protect and Preserve Trees and Woodlands” and, more generally, Development Plan §8.6.2.2 which requires the preservation of trees and woodlands as far as practicable. The Local Authority opposed the intended removal of 35

⁴³ Directive 2011/92/Eu Of The European Parliament And Of The Council Of 13 December 2011 On The Assessment Of The Effects Of Certain Public And Private Projects On The Environment As Amended By: Directive 2014/52/Eu Of The European Parliament And Of The Council Of 16 April 2014

⁴⁴ The Treaty On The Functioning Of The European Union

⁴⁵ Charter Of Fundamental Rights Of The European Union (2010/C 83/02)

of the 57 trees on site as a “*wholesale loss of trees across the site*” including high-quality oaks in material contravention of the Development Plan and recommended refusal on this account. The Board found no material contravention in this regard. The Applicants say that they have a strong case that this is a material contravention of the development plan which the Board failed to recognise and justify as such via s.9(6) of the 2016 Act and s.37(2) PDA 2000.

90. However Colbeam’s planning report to the Board points out that a full reading of the relevant texts of the Development Plan reveals such phrases as “*as far as practicable*” and “*wherever possible*” and that new developments shall “*have regard to*” objectives to protect and preserve trees and woodlands and that the plan contemplates replacement planting where tree removal is necessary to remove trees to facilitate development. These wordings the Board’s inspector considered “*sufficiently flexible to allow for the removal of a number of trees and that the proposed development would not be a material contravention of the plan*” and “*the proposed tree loss would be adequately compensated by the [proposed] planting*”. He noted the retention of a significant number of trees and tree lines along the southern and western site boundaries which provide the greatest screening amenity value to the proposed open space and to the amenities of adjacent properties.

91. I assume in the Applicant’s favour, without so deciding, that the prospect of replacement planting in mitigation of tree loss is irrelevant to whether there is a material contravention - on the basis that to “*protect and preserve*” is not at all the same thing as to “*replace*”. However my present concern is not whether there was a material contravention but is to weigh the harm in the form of tree loss which will result from any refusal of a stay. To that issue the prospect of their replacement planting is relevant.

92. The Applicant’s complaint is essentially procedural – that the Board failed to apply via s.9(6) of the 2016 Act and s.37(2) PDA 2000 as its route to permitting tree removal. Of course that is a highly important procedure – material contravention of a democratically-adopted development plan made by a Planning Authority having constitutional status⁴⁶ is no small matter. And if the Board had considered the issue in that way the outcome of the Impugned Decision might have been different.

93. That said, it is clear, standing back from the Impugned Decision to take an overview, that the Board, in a presumptively valid decision, has considered the loss of the trees environmentally acceptable, at least when balanced against those virtues of the proposed development which they saw as justifying its grant of the Impugned Permission.

94. While the question of material contravention will at trial be a matter of law for the court, the weight, in the balance of injustice in considering a stay, of the more general environmental

⁴⁶ See Art 28A of the Constitution.

acceptability of the tree loss is an issue as to which the Board's expert judgement is entitled to considerable weight; greater weight than the judgement of a judge on that issue. Nonetheless I will briefly further consider the evidence on the question.

95. There is no dispute as to what, physically, will be removed, but some dispute as to its quality. The only expert evidence to hand is that of Colbeam's Tree expert report and Landscape Development report to the Board dated January 2021. For present purposes, and leaving aside sub-categories, trees are categorised by that expert as follows:

- Category A. Typically a good quality specimen value considered to make a substantial Arboricultural contribution.
- Category B. Typically of moderate quality
- Category C. Typically generally poor quality trees that may be of only limited value
- Category U. Unsustainable trees – poor quality, dead, dying or otherwise unsustainable.

Colbeam's Tree expert found 57 trees on site, of which 9 were Category U, leaving 48 sustainable trees. Of these 48 none were in category A: all were either category B or category C and, by my count from Appendix 2 of the exhibited Arboricultural Report, 10 were early mature oaks – all category B. The Local Authority identifies all these oaks as *"early mature with the potential to develop into substantial trees in the long-term"* and as having *"high biodiversity potential"*.

According to Colbeam's Tree expert of those 48 trees, 26 (19 category B and 7 category C (including by my count from the Arboricultural Report, 9 oaks) and 10-15 metres of tree line will be removed: 24 trees and 100 metres of tree line will be retained. 56 new trees will be planted, resulting in an increase from 48 to 78 sustainable trees and of 100 metres of tree line. The replanting will include 17 semi-mature trees of which 5 will be oaks. It will also include 39 "extra Heavy Standard Planting" trees of 4 to 4.5 metres height and of which 9 will be oaks.

96. Overall, while the Applicants are in a sense correct that tree loss will be irreversible if a stay is refused, I do not see that loss in the absolute terms for which they contend. While replanting may well be irrelevant to the question of material contravention, as to the question of the balance of injustice and in the context of the presumed validity of the Impugned Permission and curial deference to the Board's expert judgment on the overall acceptability of the combination of tree loss and replanting, it seems to me that the position is considerably more nuanced.

97. Of course, if the stay is removed and the Applicants succeed at trial the Impugned Permission will be quashed, the development frustrated and, ceteris paribus, the prospect of replanting will recede. However Counsel for Colbeam fairly and sensibly conceded that in that instance his client would be unable to resist injunction proceedings to compel replanting. Of course replanting under enforcement in an undeveloped site might not be the same as that contemplated in the Impugned Permission and any resultant deficit would not be counterbalanced by what the Board sees as the virtues of the proposed development. But such replanting would at least aim at

remediation and it seems to be at least the case that appreciable mitigation by replanting would be possible and as a matter of probability could be forced on Colbeam if needs be. I accept that that prospect could be in practice complicated by a subsequent planning application on the site and I do not suggest that this prospect of mitigation is a complete answer to the Applicants' concerns. But the prospect of mitigation does deserve appreciable weight in balancing the risks of injustice. So, overall, while the loss of the trees would indeed be irreversible in the strict sense, and I do not accept the Colbeam submission that the intended tree removal is *de minimis*, its environmental consequences in terms of the intrinsic value of the trees are not so absolute given the prospect of mitigation – not least by the prospect of replacement of at least some of the existing “early mature” oaks by “semi mature” oaks.

98. What I have, perhaps not entirely accurately, termed the intrinsic value of the trees is not, however, the only environmental issue requiring consideration in the context of the prospect of tree-felling. The Applicants also assert that 4 trees for felling are potential bat roosts and they invoke Article 12 of the Habitats Directive as to strict protection of species including bats. They have adduced no expert evidence and the “Bat Expert” for Colbeam has sworn an affidavit strongly disputing the Applicants' inexpert critique of his work. While only by a ground survey, nonetheless no actual bat roosts were found in those trees and all 4 were considered of “low suitability” for bat roosts. Those trees are to be removed only after more detailed expert examination for bat roosts closer to the time of removal and under bat expert supervision by a soft-fell method designed to allow bats to escape unhurt if present. If bats are found present, work must cease pending application for and decision on the grant of a derogation licence under Article 16 of the Habitats Directive.

99. In a number of cases the court has pointed out that a planning permission does not absolve a developer from compliance with other regulatory regimes or protect it from prosecution for offences under those regimes: S.10(6) of the 2016 Act provides that “(6) *A person shall not be entitled solely by reason of a permission under section 9 to carry out any development.*”. Article 12 (strict protection of species) and Article 16 (derogations from Article 12) are carried into effect by Articles 51 and 54 of the Habitats Regulations 2011⁴⁷. Notably, Art 51(2) provides that

“Notwithstanding any consent, statutory or otherwise, given to a person by a public authority or held by a person, except in accordance with a licence granted by the Minister under Regulation 54, a person who in respect of the species referred to in Part 1 of the First Schedule—

- (a) deliberately captures or kills any specimen of these species in the wild,*
- (b) deliberately disturbs these species particularly during the period of breeding, rearing, hibernation and migration,*
- (c) deliberately takes or destroys eggs of those species from the wild,*
- (d) damages or destroys a breeding site or resting place of such an animal, or*

⁴⁷ European Communities (Birds and Natural Habitats) Regulations 2011

(e) keeps, transports, sells, exchanges, offers for sale or offers for exchange any specimen of these species taken in the wild, other than those taken legally as referred to in Article 12(2) of the Habitats Directive, shall be guilty of an offence.”

100. A lengthy account of the caselaw on this issue is not required here. One may cite such decisions as **Redmond v An Bord Pleanála**⁴⁸, **Highlands Residents Association v An Bord Pleanála**⁴⁹ and **Clifford & O’Connor v An Bord Pleanála**⁵⁰. For example, in **Highlands Residents**⁵¹, and in contrast to the present case, bat roosts were found. McDonald J, having considered the evidence of the Board’s analysis of risk to bats said:

“The key point is that, [the developer] has committed to complying with the licencing regime under the 2011 Regulations. As Simons J. emphasised in Redmond⁵², the grant of planning permission does not obviate the requirement to comply with the 2011 Regulations. Thus, if [the developer] wishes to proceed with the demolition of the derelict farm buildings in which the bats have been found to be roosting and if it wishes to attempt to capture those bats, it will have to act under the terms of derogation licence issued by NPWS under the 2011 Regulations.

For completeness, it should be noted that, although Article 12 (1) (a) of the Habitats Directive expressly requires member states to take requisite measures to establish a system of strict protection for (inter alia) bats and to prohibit “all forms of deliberate capture or killing of specimens of these species in the wild”, Article 16 of the Directive permits, subject to certain very strict conditions, Member States to derogate from the provisions of Article 12 where there is no satisfactory alternative and where the derogation is not detrimental to the maintenance of the population of the species concerned. In this case, such a derogation licence has been issued by NPWS. That derogation licence is not challenged in these proceedings. Since any such derogation licence is a matter to be determined by NPWS rather than by the Board, it seems to me that the applicants attack on the observations made by the inspector do not give rise to a ground of complaint as against the Board. Crucially, the decision of the board does not permit any of the proposed interference with bats. Any such interference will have to be addressed appropriately under the 2011 Regulations, if it is to be lawful .”

101. Notably, bats had been found roosting in the buildings for demolition in Highlands yet the challenge failed. No bats have been found roosting in the 4 trees in question in this case and those trees are of “low suitability” for bat roosts. And if bat roosts are found, works must cease pending

⁴⁸ [2020] IEHC 151 from §105

⁴⁹ [2020] IEHC 622 at §119. It states, inter alia, “Crucially, the decision of the board does not permit any of the proposed interference with bats. Any such interference will have to be addressed appropriately under the 2011 Regulations, if it is to be lawful.”

⁵⁰ [2021] IEHC 459 at §85 – as to the grant of planning permission in the absence of a derogation licence: “the grant of planning permission does not render the development lawful”.

⁵¹ *Highlands Residents Association v. An Bord Pleanála* [2020] IEHC 622 (High Court (Judicial Review), McDonald J, 2 December 2020)

⁵² *Redmond v. An Bord Pleanála* [2020] IEHC 151

grant of a derogation licence. While the issue of bats is not without some weight as to the question of a stay, I do not see it as determinative. Not least, removal of the stay will not authorise any act or omission illegal by virtue of Article 51 of the Habitats Regulations 2011.

102. Similar comments can be made as to the prospect of finding bats in the buildings for demolition – which the Ecological Impact Assessment submitted with the Planning Application described as of low suitability for bat roosting, having a flat roof and so no roof space. No evidence of bats was found in the buildings. And I have seen no evidence that the site is significant from the point of view of birds.

103. I have before me two affidavits of Nicolas Fettes, ecologist, sworn for Colbeam. He was involved in the preparation of the Ecological Impact Assessment and Appropriate Assessment Screening report submitted with the planning application. No countervailing expert affidavit was sworn for the Applicants such that, if relevant, his evidence, at least generally speaking, is uncontradicted save by inexpert averments. Of course those affidavits were not before the Board when it made its decision and so their relevance at trial to the legality of the impugned decision might well be limited, if relevant at all. However in this present application his evidence is relevant to the factual prospect, or absence of it, of serious and irreparable ecological harm if a stay is refused and it seems to me admissible for that purpose.

104. I do not propose to recite Mr Fettes' evidence in detail save to observe that he predicts, after mitigation, no residual impacts on ecological receptors. He disputes as incorrect the inexpert assertions in the Statement of Grounds, and similar inexpert assertions by Ms Jennings on affidavit, that the site is of considerable significance for bats and that there is significant bat activity on site and that it is very clear that the development will disturb bats. He emphasises that no bat roosts were found on the site. He describes the intended soft-felling of trees under supervision of a bat expert and confirms that "*in the unlikely event that bats are found*" either in tree-felling or at any time during construction works the works must cease pending a derogation licence.

105. In view of the foregoing, damage is likely to be caused if a stay is refused but I am not persuaded that the reality of such damage is that it is likely, at least after replanting, to be irreparable and serious.

The Public Interest Factors & the Scheme of the 2016 Act

106. As in Massey, on the inter partes questions of injustice as between the applicants and the notice party McDonald J, on the evidence available to him in Comerford, found the risks finely balanced and so considered whether there was some other factor that tilted that balance. As in

Massey, McDonald J found it in the public interest in minimising interference with the operation of, and in giving effect to the intention of the Oireachtas as reflected in the terms of the 2016 Act.

107. Colbeam says, correctly, that it has a presumptively valid permission for a Strategic Housing Development entitling it, in Okunade terms, to *“all appropriate weight to the orderly implementation of measures which are prima facie valid”*. As explained earlier, in my view that implies weight to permitting Colbeam to act on its permission.

108. That raises the question of what weight is appropriate. The Applicants submit that *“The permission in this case does not involve any public project for which there is a strong public interest. In fact it is a private commercial development.”* While for various purposes contrasting public projects with private commercial development may be useful and various political and ideological views are possible, they are irrelevant here. What matters much more than its public or private status is any underlying public interest which the project serves. The Oireachtas has clearly discerned a housing crisis and enacted a means of seeking to address it, via planning law, by way of private commercial development. It is not for judges to critique that choice. In my view the observations of McDonald J in Comerford are apposite: *“..... that the Oireachtas in enacting the 2016 Act clearly intended that applications for permission in respect of strategic housing development, as defined, should be pursued with urgency. It appears to be clear that all of this was done with a view to addressing what I believe it is fair to say is the current homelessness crisis in this country. Whether the 2016 Act was the correct way to proceed for that purpose is not a matter for this Court. It is a matter of policy for the Oireachtas and the Oireachtas, comprising the elective representatives of the people, has determined that this is the way in which the homelessness crisis in this country should be addressed.”* Clearly the urgency in processing the application identified by McDonald J proceeds from an urgency in carrying out the development once permitted. Colbeam says it intends just that. It is the development that's in the public interest as opposed to the identity of the person who is developing it. In fairness, after some discussion, counsel for the Applicants did not press the point.

In Okunade terms, this seems to me also to be a factor arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings.

CONCLUSION on the issue of a Stay.

109. Costello J in the Court of Appeal in Krikke tellingly acknowledged, in terms applicable to the present case, that in assessing where the “least risk of injustice” lay there was no truly satisfactory solution.

110. With considerable hesitation I have decided that to give significant weight to Colbeam's inadequate disclosure of its position as to pre-commencement conditions by granting a stay I might otherwise have refused would be disproportionate in the particular circumstances of this case. That should not be considered to diminish my deprecation of its failure in this regard. I am moved in particular by the simple fact that unless and until Colbeam's position as to pre-commencement conditions is resolved in accordance with law it will be unable to start development even if I refuse a stay. None of the foregoing is to rule out the possibility of other consequences of Colbeam's inadequate disclosure.

111. For reasons set out above, I find neither side's dire predictions of the consequences of an adverse outcome on the issue of a stay very convincing. On balance, and against the background of a presumptively valid permission, I do not think Colbeam should be put to appreciable risk of large losses by reason of the prospect of tree loss in the context of the mitigation, including replanting, proposed or, if the development does not proceed, the mitigation which can be imposed. I consider that strict protection of bats will be achieved, if bats are found on site, by the other means described above and will not be imperilled if a stay is refused.

112. I am also significantly moved by the public interest considerations identified in Okunade and the caselaw since. There is a clear public interest that presumptively lawfully permitted development of strategic housing identified by statute as urgently required to address a housing crisis should not be delayed. It is not for the court to second-guess the decision by the Oireachtas to include student accommodation in the category of strategic housing development. Like McDonald J in **Massey** and in **Comerford**, I emphasise that the public interest is not inevitably or invariably a "trump card". Not least, in a particular case, the weight of the countervailing public interest in environmental protection and the avoidance of serious and irrevocable environmental damage may well outweigh it. But not so on the facts of this case – at least for purposes of the limited lifting of the stay now sought.

113. I have not ignored the point that if the trees are removed at least some part of this judicial review will become moot. That weighs in favour of a stay but in my view is not decisive in this case. While in Massey McDonald J noted that the prospect of a moot did not arise and he contemplated the prospect of irreparable environmental harm as telling in favour of a stay, McDonald J's rejection of the submission that judicial review would be an ineffective remedy without a stay seems relevant. As McDonald J said, "*There is nothing automatic about the grant of a stay*".

114. I emphasise that if the issue of a stay again arises at the point of hand over of the site to the main construction contractor, these issues will be considered afresh in the circumstances of that point in time and there is no presumption that the same decision as to a stay, as that now made, will be then made.

115. Accordingly, I will vacate the stay on the Impugned Decision only as to those elements of the Works Programme which precede handover of the site to the main construction contractor: that is to say, Line 17 on the Works Programme. The stay remains in place as to all works from handover of the site to the main construction contractor as that is the basis on which the Notice Party addressed the issue of a stay.

116. I will deal with costs on the issues I have now decided, in my second judgment as the two motions were heard together.

117. This judgment is delivered electronically. I direct that the parties correspond with a view to agreeing the terms of the orders to be made on foot of this judgment as to all matters arising thereon - such communications to be completed within fourteen days of electronic delivery of this judgment. Forthwith thereafter the result of such correspondence is to be notified by email from the solicitor for the applicants to the registrar. Thereafter I will give further directions, electronically, as to how the matter is to be dealt with.

DAVID HOLLAND
14 January 2022

Post-Script

Shortly after signing this judgment to be delivered on 14 January 2022 I received by e-mail via my judicial assistant a letter dated 12 January 2022 from Colbeam's solicitors, copied to all parties. It gave an updated account of Colbeam's dealings since the hearing on 15 and 16 December 2021 with the planning authority as to compliance with pre-commencement planning conditions. It recorded that Colbeam has made additional compliance submissions. It also recorded written agreement with the planning authority on Condition 17 as to security for satisfactory completion and maintenance of the development (assessed at €0) and agreement of quantum with the planning authority on Condition 18 as to planning contributions, of which confirmation of timing of payment is awaited.

It does not seem from that letter that since the hearing compliance agreements have been made other than as to Conditions 17 and 18.

I advised the parties by e-mail that I did not consider that the contents of this letter required amendment of this judgment other than by this post-script or further evidence or submissions.

DH