AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2020:000010

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

BETWEEN/

RONALD KRIKKE, PIA UMANS, SEÁN HARRIS, CATHERINE HARRIS, PATRICK KENNEALLY, CAROLINE KENNEALLY, KENNETH GEARY.

APPLICANTS/RESPONDENTS

- and -

BARRANAFADDOCK SUSTAINABILITY ELECTRICITY LIMITED
RESPONDENT/APPELLANT

Judgment of O'Donnell J. delivered on the 17th day of July, 2020.

1. I agree with the outcome and order to be proposed by O'Malley J., and also with much of the reasoning in her judgment and, in particular, on the important issues of principle addressed by her which are of general importance. In relation to the resolution of this difficult case, I would reach the same conclusion as my colleague, though by a slightly different route.

2. Applications pursuant to s. 160 of the Planning and Development Act 2000 ("the 2000 Act") present some particular problems of analysis. Section 160 and its

statutory predecessor, s. 27 of the Local Government (Planning and Development) Act 1976, created what is described colloquially as the planning injunction. For the first time, it allowed members of the public – and not merely planning authorities – to bring applications to enforce compliance with planning law. That was a statutory recognition of the fact that there is a public interest, and members of the public have an interest in, the proper enforcement of planning law. The enforcement of planning law is something of benefit to those immediately affected by a development, but is also of benefit to the wider community. This, if anything, has become more apparent since the implementation in Irish law of the Environmental Impact Directive 85/337/EEC and its successors. The courts, in applying the law, must seek to find a balance between restraining unauthorised development which might be harmful to the built and natural environment and to the legitimate interests of people affected, and permitting protracted litigation to obstruct and perhaps preclude development where the breach, if one exists, may be minor and where the development is clearly permissible in principle and of benefit to the community and the wider economy.

3. There are a number of points at which a court or other decision-maker must make a decision as to whether or not a development should be halted pending a further decision. First, if an interlocutory application is brought pending the hearing of a s. 160 application, the court must consider whether the development should be restrained or permitted to proceed, pending the hearing of the application. Second, when a court, having heard an application, concludes that a development is not being carried out in accordance with permission, it will often have to consider whether to make an order restraining use of the development, or even requiring its removal, or whether to allow time to the respondent to seek to regularise the planning position, whether by way of an application for retention or substitute consent, or perhaps for

an entirely new permission. Third, in those cases where an application is made for substitute consent to An Bord Pleanála ("the Board"), that body has a jurisdiction under s. 177J of the 2000 Act (inserted by the Planning and Development (Amendment) Act 2010), where it has decided to grant leave to seek substitute consent, to give a draft direction in writing requiring a person to cease within the period specified all or part of the activity of the operations at the site of the development the subject of the application where the Board forms the opinion that the continuation of all or part of the activity or operation is likely to cause a significant adverse effect on the environment, or indeed adverse effect on the integrity of the European site. Fourth, and finally, where, as here, a decision has been made by the High Court, which it is sought to appeal, the appellate court must consider whether or not the order should be stayed pending the hearing of the appeal.

4. While in substance these decisions are very similar in that the development is either restrained, permitted to continue, or allowed to continue subject to conditions, the analysis in each case is subtly different. When, for example, the Board considers exercising its jurisdiction under s. 177J of the 2000 Act (as inserted), it will normally have available to it additional information, such as a remedial environmental impact statement, which may assist it in determining whether the continued activity, or any part of it, is likely to cause significant adverse effects on the environment. On the other hand, by contrast, a judge who has concluded that the development is not being carried out in accordance with planning permission is concerned as to whether to restrain the development immediately or to give time for an application for retention or substitute consent to be processed, but has little insight as to whether that development is likely to secure retention or substitute consent. This, in turn, is a different analysis from that which is carried out by an appellate court considering an

appeal from the same order. On that application, the appellate court must consider the possibility that the order of the lower court may be overturned on appeal, something which naturally does not figure at all in the trial judge's consideration of the appropriate order to be made on the basis of his or her judgment.

5. An application for an interlocutory injunction pending the hearing in the trial court is perhaps the most similar to the application for a stay pending appeal, since they both involve interlocutory orders in which the court's function is to seek to minimise the risk of injustice pending the trial, or the determination of the appeal, as the case may be, and it is to be expected that similar principles and techniques will be applied, such as those contained in the judgment of this court in *Campus Oil v. Minister for Industry* [1983] I.R. 88 ("*Campus Oil*"). It is, however, important to keep in mind a significant difference between the two. An application to stay a judgment of a trial court comes after there has been a final determination by a trial court of the issue. Instead of rival contentions as to the likely state of the evidence and law, with which a trial judge is presented on an interlocutory application, the appellate court has the judgment of the trial court, and an understanding of the analysis which applies on an appeal, particularly an appeal on a point of law. Thus, in *C.C. v. Minister for Justice* [2016] IESC 48, [2016] 2 I.R. 680 ("*C.C.*"), Clarke J. (as he then was) observed at paras. 41 and 44 of his judgment that the fact the case was now at an appellate stage may influence the application of the test. The very process of trial may lead to a significant narrowing and refinement of the kind of issues that remain open on appeal, and it may be possible to place greater weight on the strength or weakness of the potential appeal compared to the situation pre-trial.

6. The present case is, of course, an application to stay an order of the High Court pending appeal. The order made was to restrain the operation of the windfarm which

was found by the High Court judge to not be in compliance, and furthermore that such contravention was material. The order was made, however, with liberty to apply, and it seems that the judge contemplated the possibility of staying the order in the event that the Board granted leave to appeal, and decided not to exercise its jurisdiction under s. 177J to require the development to cease, or perhaps exercised such jurisdiction in only a partial way. This would be logical, since any decision of the Board to grant leave to apply for substitute consent under s. 177J would amount to a significant change of circumstances, both factual and legal. As such, the order of the High Court sought a balance between ensuring compliance with a detailed planning permission, a pragmatic appreciation of the fact that the development of a windfarm at the site generally had been the subject of planning permission, the nature of the deviation from that planning permission, the likelihood that the defect in that planning permission could be cured, and the surrounding circumstances of the case.

7. The question for the Court of Appeal was whether that order should itself be stayed pending an appeal against the findings of the trial judge. The Court of Appeal had to consider the possibility that the High Court judgment would be overturned. Some parts of that decision were in the alternative, namely, that the declaration under s. 5 of the 2000 Act was binding together with the finding of the High Court judge that, in any event, he considered that the development was not in compliance with the planning permission. To succeed on this aspect, the appellant would have to overturn both conclusions. Some parts of the decision stood alone, such as the finding that the inclusion of the schematic in the appendix showing the rotor blade diameter as part of the compliance submission to Waterford County Council in accordance with Condition 3 of the 2011 planning permission did not mean that the construction of

the turbines with the rotor blades with a diameter of 103 metres was now permitted by the planning permission. Finally, although not canvassed strongly at this stage, it was, in theory, possible that the Court of Appeal could determine that the High Court judge was correct to find that the development was unauthorised on any of the above headings, but nevertheless consider that, in the circumstances the court was wrong to restrain the development at all but instead ought to have permitted it to continue to operate, leaving to the Board the question of the operation of the windfarm pending the determination of the substitute consent application. If the appellant succeeded on any of these grounds, the order would not only be set aside, but it would follow that it ought not to have been made. It is that possibility (and the fact that it is only a possibility) that gives rise to the risk of injustice which the court must seek to address and minimise on an application for a stay.

8. I agree with Costello J. in the Court of Appeal and O'Malley J. in this court that the appellant has at least stateable grounds of appeal which might, if accepted, lead to the outcome that the order of the High Court ought not to have been made. If that was to transpire, it would also follow that the developer would have suffered a loss for the period during which it was subject to the High Court order (which, on this hypothesis, ought not to have been made). This possibility gives rise to the need to consider whether it is possible to avoid the risk of injustice to the appellant without imposing a corresponding or greater risk upon the respondent, who maintains that the appeal will fail.

9. It is clear that the judge hearing this matter in the Court of Appeal did so under considerable pressure of time and during a lengthy and busy list, and gave the application an admirable hearing and delivered a carefully reasoned decision. However, I agree fully with O'Malley J. that, from this remove, it appears the

decision gave too much weight to the financial loss which might be suffered by the appellant developer if the appeal were to succeed. I also agree that it follows that insufficient weight was given to the public interest in the enforcement of planning law and, in this case, the law protecting the environment, which should have significant weight. It was, I think, insufficiently appreciated that the approach in *Campus Oil* was not intended to create a set of rigid rules, but rather to restore flexibility. An overly rigid application of the *Campus Oil* criteria can lead to an applicant with a flimsy case nevertheless obtaining an interlocutory injunction, which in many cases determines the practical outcome of the dispute. It has come to be recognised that the approach is subject to a number of exceptions. Where, for example, the underlying assumption that there will be a full trial of the issues is not necessarily correct, as it is not in many cases, then the approach can lead to injustice and it is now recognised that, in such circumstances, the court must consider the merits of the case in greater depth. Moreover, as has been pointed out, those exceptions are to be found in many of the areas where interlocutory injunctions are often sought.

10. A related problem arises in the field of public law where application of a *Campus Oil* type of 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 v. Minister for Justice* [2012] IESC 49, [2012] 3 I.R. 152, 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.

11. It is worth, however, pausing to consider why this is 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 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.

12. 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.

13. In some routine cases, such as commercial cases between solvent parties, or perhaps standard personal injury actions against defendants indemnified by insurance companies, it may be possible to avoid the risk of serious injustice relatively easily, and, in particular, where an unsuccessful defendant seeking a stay agrees to pay

interest on the award in the event that the appeal does not succeed. In those circumstances, such as applied in *Redmond v. Ireland* [1992] 2 I.R. 362 ("*Redmond*"), it can be said that there is little injustice to the plaintiff in staying the judgment pending appeal, particularly if there is a real risk that the plaintiff would not be in a position to repay the award – or any part thereof – in the event of a successful appeal. Even then, if the delay between the determination of the trial court and an appeal decision is long, this simple solution is not perfect, and appellate courts must sometimes make finely-balanced decisions to seek to avoid the inevitable risk of injustice that occurs once it is accepted that there is a viable appeal which might overturn the decision of the trial court, and where circumstances may change between the date of the decision in the trial court and that of the appellate court. Where the competing interests are not capable of being reduced to monetary terms, or where, even in such cases, there is nevertheless a real risk arising that a stay will cause harm that cannot be remedied, the calculation involved becomes more complex again: see, for example, *Emerald Meats Ltd. v. Minister for Agriculture* [1993] 2 I.R. 443 ("*Emerald Meats*"). When the claim is not primarily monetary, which is often the case in the public law field, the difficulties can become a more acute.

14. Here, it seems to me that there is a clear risk of injustice, whatever course is adopted on the stay application. The risk exists because of the unavoidable time which must elapse between the determination of the High Court and an appellate hearing and decision, and the possibility (at least) that the determination of the appeal will alter the position that has applied since the High Court decision. The risk can be reduced, but not eliminated. Thus, in this case, if no stay is granted but the Court of Appeal nevertheless were to allow the appeal, then it would follow that the windfarm ought

not to have been restrained from operating even on the limited basis contemplated by the High Court judge. The developer would suffer loss and would not be able to recover that loss, either from the appellants or anyone else. On the other hand, if the stay is granted, but the appeal fails, it would follow that the windfarm would have been permitted to operate at a time when it should not have been allowed do so, the law would not have been enforced for that period, the environment would not have been protected, and, as O'Malley J. points outs, the developer would have been permitted to benefit from the unlawful operation of the development, and the court hearing the appeal would have no jurisdiction to seek to recover or reduce that profit, and there would, in any event, be no obvious party to whom those profits could be paid.

15. There is therefore, in my view, when properly analysed, an unavoidable risk of injustice in the event that the order made on the stay application is different to the order made on the outcome of the appeal proper. In truth, the risk of harm on either side is not commensurable, and it is, perhaps, therefore incorrect to speak of a balance being equal between them. It is, perhaps, preferable to say merely that there is a risk of injustice whatever route the court takes, and that that risk cannot be removed, as it can in more clear-cut monetary cases, by mechanisms such as agreements, partial payments, and undertakings in relation to the award of interest.

16. In circumstances where there is an unavoidable risk of injustice on either side, and no simple rule of thumb which can reduce it, the court must necessarily reach a nuanced decision. The first thing which a court should do is exactly what Costello J. did in the Court of Appeal, which was to seek to fix an early hearing of the appeal, and thus reduce the extent of any injustice to either side that may be caused by a mismatch between the order made on the stay application, and that made on the

outcome of the case. Thereafter, there are a number of interrelated factors to which a court may properly have regard in order to resolve the application as fairly as possible. The first is that the order was made by a trial judge after a lengthy hearing and who had, therefore, an opportunity to assess the facts and law, and the attitude of the parties, in much greater detail than is inevitably available to a court hearing a preliminary stay application. Second, in this case, the order was itself limited: it was not an order restraining development permanently. Third, where the possibility of injustice arises because of the difference between the order made on the stay application and that made after the appeal has been decided, it may make sense to seek to align the decision on the stay application, so far as possible, with the likely outcome of the appeal. In difficult circumstances, some weight should be attributed to the decision of the trial court, and the limitations on the scope of appellate review. In this regard, I see the merit of the judgments delivered by Egan J. in *Redmond* and *Emerald Meats*. In the context of an application for an interlocutory injunction pending trial, in *Merck Sharp and Dohme v. Clonmel Healthcare* [2019] IESC 65 (Unreported, Supreme Court, O'Donnell J., 31st July, 2019), I said, at para. 62 of the judgment, that:-

> "if the question of adequacy of damages is evenly balanced, it may not be inappropriate to consider the relative strengths and merits of each party's case as it may appear at the interlocutory stage. Courts are correctly reluctant to express views in cases which are to come to trial. However, it would be absurd if this rule of abstention were to result in a court conducting an agonised and necessarily imperfect assessment of a number of variable factors in a field with which it has little familiarity, and where the evidence is indirect, written and

untested, all the while averting its attention from the area (perhaps of pure law) in which it can justifiably claim expertise".

An appellate court has the significant advantage of having the judgment of the trial court and can make some assessment of the arguments to be made. Without making any detailed or precise prediction of the likely outcome of the appeal, the court may be entitled to consider whether it has been demonstrated either that the appellant's case is strong, or that the harm the appellant will suffer is out of all proportion to the damage to the public interest of not being able to enforce the decision of the High Court for some months pending the decision on the appeal.

17. Applying this approach, it appears to me that it would not have been correct in the immediate aftermath of the decision in the High Court to have stayed the order of the High Court pending appeal. The order of the High Court was carefully gauged and intended to be temporary in nature. Moreover, it envisaged planning engagement by An Bord Pleanála with the issue pursuant to its specific statutory jurisdiction under s.177J. Any adjustment of the High Court order would be made in the light of further information as to the progress of the application and a more detailed assessment by An Bord Pleanála of the impact, if any, on the environment of the relative difference between the development permitted and that constructed. Without making a detailed prejudgment of the prospects of the appeal, it is possible, I think, to say that, taking the judgment as a starting point, the appeal, while stateable, cannot be characterised at this stage at least (and acknowledging that the complexion of any case can change after detailed argument) as having a really strong prospect of success. If so, it may be a counsel of prudence to leave the order of the trial judge in place. It is also relevant that, even if the appellant were to succeed on the legal issue of the status of the s. 5 declaration, it would still have to overturn the trial judge's

own independent determination that the development was a material deviation from the permission. This was, moreover, the second such determination having regard to the substance of the decision of the Board on the s. 5 declaration. In the uncertain terrain surrounding this appeal, those independent conclusions by decision-makers with differing and overlapping expertise represent important fixed points upon which some reliance could be placed, at least tentatively. While it is a finely balanced case and many courts might not have made an order with immediate effect, I would not have interfered with the trial judge's order, and granted a stay.

18. However, as O'Malley J. points out, there are two very material changes of circumstances, which must be considered. First, the effect of An Bord Pleanála's agreement with, among others, the applicants in this case in the separate judicial review proceedings, is that the application for substitute consent could not be processed as expeditiously as the trial judge would have been entitled to assume. This would have the effect of transforming the High Court order from something temporary and transient into something which, if not permanent, then would at least be of indefinite duration, increasing the potential loss to the developer, and significantly so. Furthermore, the recent decision of this court in *An Taisce v. An Bord Pleanála* [2020] IESC 39 (Unreported, Supreme Court, McKechnie J., 1st July, 2020) means that it is even more uncertain when An Bord Pleanála might be able to exercise a jurisdiction to consider an application for substitute consent in this case.

19. I do not think the High Court judge would have made the order he did if it was to amount to a permanent restraint on the operation of the development, and if such an order had been granted, I would have granted a stay, perhaps upon terms. Such an order would appear disproportionate to the fact that permission had been granted for a windfarm development, and there was little clear-cut evidence that the

development in operation was any more intrusive or offensive than the development for which permission had been granted; the fact that the developers had acted in good faith, and had immediately applied for substitute consent; and the fact that the application had not already been determined by the time of the High Court hearing was through no fault of the developer, but rather because the Board had initially concluded that the deviation was so limited in its effect that it fell to be dealt with by retention application rather than substitute consent.

20. For those reasons, I agree with O'Malley J. that, while the residents have been successful in their appeal in respect of the applicable law, I would not now set aside the order of the Court of Appeal. To do so would render the High Court order operative in circumstances not contemplated by the judge making the order. In the absence of a viable substitute consent pathway, it would, I think, have been necessary to fashion some more nuanced compromise order. Consistent with the approach set out in this judgment, and given that the Court of Appeal has now heard the substantive appeal, I would leave the stay in place, and allow that court to come to its own conclusion in respect of this matter in the light of the decision it comes to on the substantive appeal.