Neutral Citation Number: [2010] IEHC 158

THE HIGH COURT

2010 1367 P

BETWEEN

ELECTRICITY SUPPLY BOARD AND EIRGRID PLC

PLAINTIFFS

AND

MICHAEL RODDY AND MARTINA RODDY

DEFENDANTS

JUDGMENT of Miss Justice Laffoy delivered on the 23rd day of April, 2010

The Application

1. This is an application for an interlocutory injunction -

> (a) restraining the defendants, their servants or agents, from preventing the plaintiffs, their servants or agents, from entering on the defendants' lands for the purposes of erecting an electric line thereon in accordance with the first plaintiff's statutory powers under s. 53(9) of the Electricity (Supply) Act 1927 (the Act of 1927), and
>
> (b) if necessary, directing the defendants to remove all obstacles and to unlock all gates on the defendants' lands which might prevent the plaintiffs from accessing those lands for the purposes of erecting an electric line in accordance with the first plaintiff's statutory powers under s. 53(9) of the Act of 1927.

Permanent injunctions in similar terms and damages are sought in the plenary summons, which issued on 12th February, 2010.

2. An issue having been raised by the defendants as to the second plaintiff's statutory entitlement to enter onto the defendants' lands, it was made clear by counsel for the plaintiffs at the hearing of the application that the relief sought on an interlocutory basis relates to the first plaintiff only and it is being sought for the purposes of enabling the first plaintiff to erect electric lines in accordance with subs. (9) of section 53. In any event, that is entirely consistent with the manner in which the application for relief is framed, although, in the notice of motion of 12th February, 2010, the application is expressed to be brought on behalf of the plaintiffs. Accordingly, I consider that it is unnecessary to address the submissions made on behalf of the defendants as to the statutory entitlement of the second plaintiff or the extent of the powers of the first plaintiff to operate and use electric lines placed over or under the land of a third party.

Factual background in outline

3. The defendants are husband and wife. The first defendant has averred that he is the registered owner of a farm at Grange Beg, Boyle, County Roscommon, the title to which is registered on Folio 14040F, County Roscommon (the subject lands). The defendants live on the farm with their ten year old son. They farm the lands in conjunction with neighbouring lands, which they have leased.

4. On 31st October, 2002 the first plaintiff was granted planning permission subject to conditions by An Bord Pleanála for the construction of a 220 kV overhead transmission line (the Line), which is part of the Flagford-Srananagh 220/110 kV project, which will extend 56 kilometres from Flagford in County Roscommon to Srananagh in County Sligo and is a major infrastructural development in the Border Midlands Western region. Work on the project commenced in 2004. The planning permission has been extended on two occasions, most recently by a decision made by Roscommon County Council on 24th November, 2009 granting a further extension of the duration of the permission for three years to 30th October, 2012.

5. As authorised by the planning permission, the Line will cross the subject lands. In order to put the Line in place over the subject lands, the first plaintiff requires to enter on to the subject lands to erect one steel lattice tower thereon and a half of another steel lattice tower, which straddles the boundary with the neighbouring property, and to put in place three high tension conduct wires together with a fibre optic communications cable and an earth wire which will be strung along the masts for a distance of 513 metres over the subject lands.

6. The first plaintiff has been in communication with the defendants and their solicitors for over six years in an attempt to negotiate terms of entry on the subject lands and statutory compensation for such entry. An original wayleave notice served on 3rd November, 2003 was replaced by the current wayleave notice (the Wayleave Notice) which was served on both defendants on 2nd February, 2005. Entry by employees of the first plaintiff onto the defendants' lands on foot of the Wayleave Notice was first refused in a letter dated 30th May, 2005 from the defendants' solicitors. An incident occurred in 2005 involving the first defendant and employees of the first plaintiff, which became the subject of a prosecution in the District Court. There is considerable controversy in the affidavits on this application as to what happened on that occasion and what the outcome in the District Court was. The controversy cannot be resolved on this application. In fact, it is a distraction from the real issues and it would be better if it had not been brought into the frame at all. For present purposes, the crucial factors are that the first plaintiff contends that it has a statutory power to enter on the subject lands and that it has complied with the statutory prerequisites to doing so. However, the defendants have persistently refused to allow the first plaintiff's employees and agents to enter the subject lands to carry out the works which have been authorised and intend persisting in that refusal.

Statutory framework

7. Section 53 of the Act of 1927, in broad terms, empowers the first plaintiff to place any electric line above or below ground across any land (subs. (1)). Before placing an electric line across any land, the first plaintiff is required to serve a notice in writing stating its intention so to place the line and giving a description of the nature of the line and of the position and manner in which it is intended to be placed (subs. (3)). That notice has come to be known as a wayleave notice. Sub-section (4), as amended, provides that, if the landowner gives consent either unconditionally or with conditions acceptable to the first plaintiff within seven days, the first plaintiff may proceed to place the line across the land. Sub-section (5), as inserted after the decision of the Supreme Court in *ESB v. Gormley* [1985] I.R. 129 pursuant to the Electricty (Supply) (Amendment) Act 1985, provides:

> "If the owner or occupier of such land … fails within the seven days aforesaid to give his consent in accordance with the foregoing subsection, the [first plaintiff] … may place such line across such land … in the position and manner stated in the said notice, subject to the entitlement of such owner and occupier to be paid compensation in respect of the exercise by the [first plaintiff] … of the powers conferred by this subsection and of the powers by subsection (9) of this section, such compensation to be assessed in default of agreement under the provisions of the Acquisition of Land (Assessment of Compensation) Act 1919 …."

Sub-section (9), which is in issue on this application, provides:

> "Where the [first plaintiff] … is authorised by or under this section to place or retain any electric line across any land … the [first plaintiff] may at any time enter on such land or building for the purpose of placing, repairing, or altering such line …."

> 8. By virtue of s. 46 of the Electricity (Supply) (Amendment) Act 1945, the expression "electric line" is defined as meaning:-

> "a wire or wires, conductor, or other means used for the purpose of conveying, transmitting, or distributing electricity and as including any transforming or other apparatus connected with such wire or wires, conductor, or other means, and as including also any casing, coating, covering, tube, pipe, or insulator surrounding any such wire or wires, conductor, or other means or any such apparatus, and as including also any post, pole, stay, erection, or structure supporting any one or more of the things hereinbefore mentioned."

Relevant recent authorities
9. There have been two decisions during the last decade on applications analogous to this application which I consider are relevant to the manner in which the Court should determine this application.

10. The earliest is the decision of the Supreme Court in *ESB v. Harrington* [2002] IESC 38 (Unreported, Supreme Court, 9th May, 2002). The relief sought by the first plaintiff in that case was an interlocutory injunction in terms similar to the first relief sought on this application in relation to the defendants' lands in County Cork. In her judgment, Denham J., having outlined the statutory provisions referred to earlier, found that the provision as to notice in s. 53, subs. (3) had been met by the first plaintiff in that case. She also found that the defendants had refused consent in accordance with s. 53(4). She continued:

> "Thus s. 53(5) … is the applicable law. Under this statute law, the defendants having failed within seven days to give consent, the plaintiff may place the line across their lands, subject to the defendants' right to compensation. If those were all the facts of the case then the matter would not need any further consideration and the defendants would fail. The only right under the statute for the defendants is compensation."

Later, having considered the provisions of the wayleave notice served on the defendants in that case, Denham J. once again stressed that the statute is clear; that s. 53(5) provides that, if the owner or occupier fails within seven days to give his consent, the plaintiff may place such line across the land.

11. The issue raised by the defendants in that case was that, the wayleave notice having stated that the first plaintiff would be prepared to act in accordance with the terms of its policy, the defendants were entitled to a hearing by the board of the first plaintiff as to their wishes in regard to the line. On that issue, Denham J. held that the defendants had raised "a fair question to be tried" as to their entitlement to a hearing by officials of the first plaintiff, as opposed to members of the board of the first plaintiff, as to the position and placing of the line proposed in the wayleave notice. 12. On the question of where the balance of convenience lay, Denham J. stated as follows:

> "In considering the balance of convenience from the defendants' viewpoint it is clear that if they have a hearing and if there is a change in the line as a consequence it would favour withholding the injunction. However, I am swayed by factors, such as the affidavits of the plaintiff as to urgency of the electricity line, as to the deposed fact that the positioning of this line cannot be altered, as to the considerable degree of communication over the last few years, and to the policy and clear words of the Act [of 1927] giving to the plaintiff the right to place the line on the lands, subject to the defendants' right to compensation.
>
> It is appropriate that the plaintiff has a policy as to communication and to hearing the views of the landowners. However, that has to be balanced against conflicting interests, including the common good."

Denham J. also held that, ultimately, damages would be an adequate remedy for the defendants. The decision of the High Court refusing the interlocutory injunction was affirmed.

13. The decision of this Court (Clarke J.) in *ESB v. Burke* [2006] IEHC 214 was also concerned with an application for an interlocutory injunction to restrain the defendants preventing the first plaintiff from entering on the defendants' property in circumstances where planning permission had been obtained and wayleave notices served. The issue raised by the defendants in that case was as to the validity of the planning permission which the first plaintiff had obtained in the context of events which post-dated the grant of the permission, it being contended that the development which it was intended to carry out was not in conformity with the planning permission. In a passage relied on by counsel for the defendants on this application Clarke J. stated:

> "Firstly I should say that, as a matter of policy, it is clear that if it were demonstrated that statutory undertakings, such as [the first plaintiff], sought to enforce their statutory powers in circumstances where the exercise itself would be in clear breach of another statutory regime, then it would be wholly inappropriate for the court to facilitate such a breach."

I respectfully agree with that view.

14. Later, Clarke J. stated that, if disputes existed as to whether it was possible to construct the electricity line in the manner then contemplated in conformity with the planning permission, the appropriate method to resolve such disputes was by an application to court under the enforcement procedures specified in the Planning and Developments Acts. Dealing with an issue as to whether the first plaintiff was complying with the concept of the "least cost technically acceptable" solution, as laid down by the Commission for Energy Regulation, he stated that the arena in which the debate should occur as to whether the proposed network was to be considered to be publicly acceptable, having regard to environmental and other factors, should be the planning arena and that issues of that type should be determined by the relevant planning authorities, subject to a challenge in the court by way of judicial review.

15. In *ESB v. Burke*, Clarke J. identified the first question for the Court as whether a fair issue had been shown to be tried, because, if it were the case that the defendants had not shown any basis upon which they would succeed at the trial, the grant of an interlocutory injunction would not arise. He found that the defendants had not established that there was a fair issue to be tried, stating that the *prima facie* legal position is as set out by the Supreme Court in *ESB v. Harrington*. He also took a similar line to the Supreme Court in relation to the question of the adequacy of damages and stated that, if the issue arose, he would not have been satisfied that damages would not be an adequate remedy having regard to the policy of the Act of 1927 and that he would consider that the balance of convenience would, in any event, have favoured the first plaintiff for reasons similar, but not identical, to those adopted by the Supreme Court in the *Harrington* case.

16. Clarke J., in granting the injunction, summed up the position as follows:

> "Finally, I should say that it seems to me that a key question in this case concerns the existence of the planning permission. The time at which the defendants had the right to have argued and decided in a public forum the merits or otherwise of there being an overhead line was during the planning process. They had the opportunity to be heard during that process, both before the local authority and before An Bord Pleanála. Those expert planning bodies took the view that it was in conformity with proper planning and development law to allow the overhead lines."

17. To complete this outline of the recent authorities, it is appropriate to record that in the *Harrington* case Denham J. stated that in *ESB v. Gormley*, Finlay C.J. had recognised the benefits of electricity lines, having stated (at p. 150):

> "Having regard to the social benefits of electricity and its contribution to the economic welfare of the State, the uncontradicted evidence adduced in this case of the necessity for and value of this transmission line to the national supply system leads to an inescapable conclusion that the power to lay it compulsorily is a requirement of the common good."

As Denham J. pointed out, the decision of the Supreme Court in *ESB v. Gormley* established the right to compensation for such compulsory acquisition of rights over a third party's land and subs. (5) of s. 53 was amended to comply with the decision of the Supreme Court.

Issues raised on behalf of the defendants
I propose considering each of the issues raised on behalf of the defendants, which I have not already addressed by reference to the manner in which they have been dealt with in the defendants' written submissions.

Urgency and delay
18. Of those issues, two can be considered together, namely, alleged delay on the part of the first plaintiff in seeking the equitable remedy of an injunction and the absence of evidence of demonstrable urgency in the first plaintiff seeking to enter on the subject lands now.

19. On the evidence put before the Court by the first plaintiff, I am satisfied that the completion of the Line, which necessitates entry on to the subject lands, is regarded by the first plaintiff, in conjunction with the second plaintiff, as a matter of urgency. On this point, I adopt the position adopted by Clarke J. in the *Burke* case in relation to a similar point - that it is for the first plaintiff to determine the sequencing of the various elements of the project and that the Court should not "second guess" the first plaintiff in its decision in that regard.

20. On the question of delay, there is no doubt that the s. 53 process has been hanging over the defendants for over six years. During that period there was a considerable amount of communication between the parties, particularly, on the issue of the compensation to which the defendants are entitled under section 53. It is true that there was a gap in communications between the incident in June 2005 and March 2008, when negotiations were re-opened by the first plaintiff. On the question of compensation, it is clear that the resolution of the dispute between the first plaintiff and the defendants as to the assessment of the compensation to which the defendants are entitled could have been referred to arbitration pursuant to the provisions of the Act of 1919 referred to in subs. (5) of s. 53 at any time. However, that the first plaintiff would not be allowed to enter on the subject lands was a fairly constant theme of the correspondence from the defendants' solicitors from March, 2008 onwards. The formal demand for access to the subject lands was made by the second plaintiff on the defendants on 10th September, 2009 and injunction proceedings were threatened. The response of the defendant was that access would not be granted. It was made clear that the defendants' opposition to the Line was based primarily on the alleged serious health risks posed by it. These proceedings and this application were initiated over four and a half months later.

21. It is undoubtedly the case that, delay on the part of the moving party in initiating an interlocutory application for injunctive relief may be a bar to such relief. Counsel for the defendants relied on the oft cited passage from the judgment of Keane J., as he then was, in *Nolan Transport (Oaklands) Ltd. v. Halligan* (Unreported, High Court, 22nd March, 1994) in which it was stated that parties seeking interlocutory relief are expected to move with reasonable expedition. There is no doubt that it is infinitely preferable that disputes between parties, such as the dispute in this case as to the entitlement of the first plaintiff to exercise a statutory right of entry on the subject lands, be determined definitively following a plenary hearing as expeditiously as is reasonably possible, rather than that there be a temporary resolution in the form of interlocutory injunctive relief pending the trial of the action. As Keane J. pointed out, "it is of the essence of such relief that if it turns out that it has been wrongly granted one party has suffered an injustice". It is also true, as counsel for the defendants submitted that, had these proceedings had been initiated in 2005, they probably would have been definitively resolved by now.

22. Taking an overview of this aspect of the matter, it seems to me that there is an element of inconsistency in the defendants' approach, in contending, on the one hand, that the first plaintiff has not established an urgent need to enter the subject lands, while, on the other hand, contending that the first plaintiff should have moved five years ago. It is reasonable to surmise that, if the first plaintiff had moved five years ago and initiated proceedings, the position of the defendants would have been that the first plaintiff's action was premature. There is a vast array of affidavit evidence before the Court on the progress of the Flagford-Srananagh project

over the past six years and also of the dealings between the first plaintiff and the defendants. Adopting a similar approach to that adopted on the issue of urgency, unless the evidence indicates otherwise, I think the Court should assume that the first plaintiff has moved at the appropriate time having regard to the overall implementation of the project. Therefore, I am satisfied that there has not been delay on the part of the first plaintiff such as would bar its entitlement to the injunctive relief sought.

23. There is no basis for the defendants' contention that, in this case, the grant of an interlocutory injunction would have the effect of disposing of the proceedings in their entirety. This is not a case in which, if the injunction is granted, the performance of a single act will conclusively and finally determine in favour of the first plaintiff its claim against the defendants, as would have happened in *Jacob v. Irish Amateur Rowing Union Ltd.* [2008] 4 I.R. 731, if the injunctive relief sought in that case had been granted. If the first plaintiff is granted the relief it claims, it will be entitled to enter on the subject lands and erect the Line and maintain it in position until the Court otherwise directs. The plaintiffs' claim for permanent injunctive relief can go to plenary hearing. If the defendants are successful in their defence of the proceedings, the consequence will be that the first plaintiff will have to take down the Line and reinstate the subject lands. The defendants may, if they wish, counterclaim in the proceedings. They also have the prospect of enforcing the undertaking as to damages, which the first plaintiff is giving to the Court on this application, and of seeking an inquiry as to damages.

Invalidity of the Wayleave Notice
24. The defendants have raised what, in my view, can only be described as a technical point on the basis of which they contend that the Wayleave Notice is invalid. The point is based on alleged inconsistency between the description of the nature of the Line in -

> (a) the planning permission of 31st October, 2002 ("five overhead wires supported on steel lattice masts") and
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> (b) the affidavit of Aisling Harpur, the first plaintiff's Wayleave Manager in relation to the Flagford-Srananagh, project sworn on 12th February, 2010 ("three high tension conduct wires with a fibre optic communications cable and two other wires") and
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> (c) the Wayleave Notice ("six continuous for double circuit lines") and
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> (d) in her second affidavit sworn by Deborah Meghen, the Manager of Transmission Projects of the Flagford-Srananagh project on behalf of the plaintiffs, sworn on 30th March, 2010, in which there is a substituted description to correct Ms. Harpur's description ("three high tension conduct wires together with a fibre optic communications cable and an earth wire").

The position of the first plaintiff is that the defendants' contention that the Wayleave Notice is invalid is based on a misunderstanding of the Wayleave Notice. It was clarified by counsel for the plaintiffs that the Line is to be a single circuit 220 kV line consisting of five wires – three continuous wires and two earth wires (one of which is an optical ground wire), which it is contended is consistent with the Schedule to the Wayleave Notice.

25. The mistake in Ms. Harpur's affidavit having been corrected, it seems to me that the point made by the defendants is indeed based on a misunderstanding of the Schedule to the Wayleave Notice, the first seven paragraphs of which appear to be, and are, according to counsel for the plaintiffs, in standard form. Only the final paragraph is subject lands specific.

26. Another point raised on behalf of the defendants is that neither the Wayleave Notice nor the planning permission contains express reference to "a fibre optic communications cable". The response of Ms. Meghen in her second affidavit to an assertion of the first defendant on affidavit that "the primary purpose of the communications component of the wire … is to facilitate the provision of services including, for example, broadband communication services" is that the assertion is incorrect. Ms. Meghen averred that the fibre optic communications cable is what is known as an OPGW (Optical Ground Wire) type of earth wire, which is an essential piece of apparatus connected with the wires which conduct the electricity and it serves the dual purpose of protecting the Line from lightening strikes and communications between the stations. The position of the first plaintiff is that that is the primary, and only, purpose for the fibre optic cable.

27. On the basis of the evidence, I am of the view that, in granting an injunction to the first plaintiff in the terms sought, the Court would not be sanctioning the carrying out of works by the first plaintiff on the subject lands which would be contrary to, or in excess of, what is authorised by the planning permission or contemplated by the Wayleave Notice. The defendants have not, in my view, raised a serious issue, technical or otherwise, as to the validity of the Wayleave Notice in the context of the clarification by the first plaintiff of the nature of the works which will be carried out on and over the subject lands.

Invalidity of the planning extensions
28. This issue was initially raised by the first defendant in his first replying affidavit, in which he contended that neither extension of the duration of the planning permission was valid and that the defendants have been deprived of the opportunity to seek judicial review of the decisions of Roscommon County Council because they were unaware of the applications by the first plaintiff to extend the duration of the planning permission. In the first defendant's final affidavit sworn on 11th April, 2010, he exhibited a letter dated 19th March, 2010 from Roscommon County Council to his solicitors in which it was confirmed that "the information with regard Application for Extension for Duration and Decision on Planning File reference 00/1949 was not published on the weekly list". It was stated that the "online versions" of the relevant weekly lists do not include applications or decisions to extend or further extend the appropriate period received by Roscommon County Council, as planning authority.

29. The basis on which it is contended that the most recent extension to the duration of the planning permission given by Roscommon County Council on 24th November, 2009 is invalid is that it fails to comply with Article 47 of the Planning and Development Regulations 2001, as inserted by the Planning and Development Regulations 2006, which provides:

> "The list made available by the planning authority in accordance with Article 27 shall, in addition to the requirements of that Article, include a list of any application under s. 42 of the Act to extend or extend further the appropriate period received by the authority during that week."

It was submitted on behalf of the defendants that the requirement of Article 47 is mandatory and, not having been complied with, Roscommon County Council did not validly extend the period, because s. 42(3) of the Planning and Development Act 2000 (the Act of 2000) prohibits a planning authority from further extending the appropriate period following an earlier decision to extend unless, *inter alia*, an application is made under s. 43 of the Act of 2000 and any requirements of, or made under, the Regulations referred to above are complied with as regards the application.

30. The answer of the first plaintiff to the contention that the extension of the planning permission is invalid is that this is an attempted collateral challenge to the decision of Roscommon County Council, which is not a party before the Court, and it is a challenge which, in any event, cannot be entertained by the Court on this application because it could only be made by way of judicial review and within the strict time limit prescribed, which has expired.

31. *Prima facie*, by reason of the provisions of s. 50 of the Act of 2000 (as substituted by s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006), it is not open to the defendants to question the validity of the extension of the planning permission granted by Roscommon County Council on 24th November, 2009 in these *inter partes* proceedings. To do so, the defendants would have to proceed by way of application for leave to apply for judicial review in accordance with subs. (2) of s. 50 within the period of eight weeks prescribed in subs. (6) of s. 50 or such extended period as might be allowed by the Court in accordance with subs. (8) of s. 50.

32. It goes without saying that the first plaintiff must comply with the law and can only execute works for which planning permission is necessary where there is a valid planning permission in force when the works are executed. If the first plaintiff were to carry out works on the subject lands in contravention of the law, as Clarke J. pointed out in the *Burke* case, the proper course would be for the defendants to invoke the enforcement provisions of the Planning code. However, as a question has been raised in relation to the validity of the extension of the planning permission which this Court does not have jurisdiction to address in these proceedings, I consider that the Court, if granting relief, should qualify it by making it clear that the erection of the Line must be carried out in accordance with a valid planning permission.

Constitutional right to bodily integrity

33. The first defendant has averred that "the fact of the matter is that the apprehended risks to health have at all times been our primary concern". I do not consider it appropriate or necessary to rehearse the conflicting views as to the risk to health arising or not arising from overhead electric power lines which are disclosed by the affidavits. As Clarke J. stated in his judgment in the *Burke* case, the public forum in which the merits or otherwise of an overhead power line should be debated is during the planning process. In fact this happened in the planning process in relation to the Flagford-Srananagh project, in that the Environmental Impact Statement (EIS) prepared by the first plaintiff in or about December, 2000 was considered by An Bord Pleanála in the context of its assessment of the first plaintiff's application for planning permission. The position of the defendants is that the EIS is now almost ten years out of date and does not take into account recent scientific developments which, it was contended, establish that overhead electric power lines present considerable danger to the health of individuals who reside in their vicinity. It follows, it was submitted, that, notwithstanding that the work the first plaintiff intends to carry out on the subject lands is authorised by planning permission, it is unlawful in circumstances where the power lines infringe the defendant's right to bodily integrity.

34. In that submission, the defendants have wandered into the difficult area of statutory authority as a defence to a claim or counter-claim in tort, because any cause of action which the defendants might have against the first plaintiff for breach of their constitutional right to bodily integrity by reason of the erection of overhead power lines on the subject lands would be an action in tort (cf. the decision of the Supreme Court in *Hanrahan v. Merck Sharpe & Dohme (Ireland) Ltd.* [1988] I.L.R.M. 629), which would raise very difficult factual and legal issues. As Lord Diplock stated in *American Cyanamid Company v. Ethicon Limited* [1975] A.C. 396, it is no part of the Court's function at this stage of litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. For present purposes, adopting the approach taken by Denham J. in the *Harrington* case but arriving at a different conclusion, I am not satisfied that the materials available to the Court disclose the defendants as having a real prospect of succeeding in their defence to the claim for a permanent injunction on the basis of infringement of their constitutional right to bodily integrity.

Conclusions on the issues to be determined on this application

35. There was some debate as to the first issue which the Court has to address on this application and that turned on whether the relief claimed by the first plaintiff is prohibitory or mandatory relief. It is acknowledged by the first plaintiff that it is seeking mandatory relief in the second paragraph of the notice of motion. In my view, in reality, it is also seeking mandatory relief in the first paragraph in that, although framed as prohibitory relief, what the first plaintiff is seeking is an order directing the defendants to allow them to enter on the subject lands for the purposes of erecting the Line. The debate then centered on the question as to what is the issue for the Court: that the plaintiff has shown "at least that it has a strong case that [it] is likely to succeed at the hearing of the action" (*per* Fennelly J. in *Lingam v. Health Service Executive* [2006] 17 E.L.R. 137); or some other test, for example, the test suggested by this Court (Kelly J.) in *Shelbourne Hotel Holdings Ltd. v. Torriam Hotel Operating Company Ltd.* [2008] IEHC 376 - "that the court should adopt whichever course would carry the lower risk of injustice if it turns out to have been the 'wrong' decision"; or merely that the first plaintiff has shown that there is a serious issue to be tried.

36. Irrespective of the answer to that question, on the basis of the recent authorities which I have outlined in some detail earlier and, in particular, the decision of the Supreme Court in the *Harrington* case, I am satisfied that the first plaintiff has met the higher standard of showing that it has a strong case that it is likely to succeed at the hearing.

37. In relation to the remaining issues – the adequacy of damages and where the balance of convenience lies – I am satisfied that, in any event, even if the defendants were to successfully defend the first plaintiff's application for a permanent injunction and demonstrate that an interlocutory injunction should not have been granted, ultimately, damages would be an adequate remedy for the defendants, again following the decision of the Supreme Court in the *Harrington* case. In that event, the defendants could enforce the undertaking as to damages which the first plaintiff is giving to the Court on this application.

38. Again, following the decision of the Supreme Court in the *Harrington* case, I find that the balance of convenience favours the granting, rather than the withholding, of an interlocutory injunction in the terms sought subject to the qualification referred to for reasons that are analogous to the reasons adumbrated in the judgment in that case.

Order

39. There will be an order, which will recite the first plaintiff's undertaking as to damages, granting the first plaintiff the order sought pending the trial of the action, subject to the qualification that the Line is erected in accordance with a valid planning permission.