THE HIGH COURT

COMMERCIAL COURT

[2017 No. 336 J.R.]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED

BETWEEN

CLAIRE O'BRIEN AND PATRICK O'BRIEN

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

LEONARD DRAPER

NOTICE PARTY

JUDGMENT of Ms. Justice Costello delivered on the 24th day of July, 2017

1. On the 24th April, 2017 Mr. Justice Noonan granted the applicants leave to seek judicial review of a decision of An Bord Pleanála dated the 2nd March, 2017, granting the notice party substitute consent for a wind farm at Garranure, Kilvinane and Carrigeen, Ballynacarriga, Dunmanway, County Cork and that the decision be stayed until the determination of the application for judicial review or until further order. He granted liberty to apply on 48 hours notice to either vary or discharge the stay.

2. On the 2nd March, 2017 An Bord Pleanála ("the Board") granted the notice party substitute consent pursuant to s. 177K of the Planning and Development Act 2000 as amended ("the Act") in respect of the wind farm as constructed at the lands at Kilvinane as to the dimensions and location of the three existing wind turbines.

3. The notice party applied to lift the stay granted by Noonan J. so that it may operate the wind farm pursuant to the substitute consent pending the determination of these judicial review proceedings. The applicants opposed the application. The matter was heard by me on the 18th July, 2017, and this is my decision on the application.

Background

4. The background to the application is complex and goes back to an initial grant of planning permission for the wind farm at Kilvinane in 2002. On the 16th March, 2016 the Court of Appeal in proceedings entitled *Bailey v. Kilvinane Wind Farm Ltd* [2016] I.E.C.A. 92 delivered a detailed judgment in respect of proceedings brought by Mr. Bailey pursuant to s. 160 of the Act against the wind farm operated by the respondent in those proceedings. I do not propose to repeat the facts therein set out though I reproduce a chronology of the event as follows:

26th September, 2001 Cork CC ("*the Council*") decides to grant planning permission for wind farm

19th July, 2002 An Bord Pleanala ("*the Board*") grants planning permission for wind farm.

23rd May, 2003 Council writes confirming it has no objection to proposed blade length increase.

29th August, 2005 Council writes to Notice Party indicating it has no objection to modification.

13th June, 2006 Wind farm connected to the National Grid.

3rd October, 2006 Council writes to Notice Party indicating that revised turbine locations and blade length extensions are acceptable.

8th November, 2006 Wind farm commences commercial operations.

10th November, 2010 Notice Party lodges new planning application to replace turbines and construct further turbine.

21st June, 2011 Council decides to grant planning permission for further development.

26th May, 2011 Council determines Applicants' Section 5 reference – erection of turbines constitutes exempted development on the basis that modifications are not material.

7th November, 2011 Notice Party lodges planning application to replace two turbines (T3 and T4)

23rd December, 2011 Board decides on referral of Section 5 reference that the development did not constitute exempted development.

10th January, 2012 Council refuses application to replace turbines T3 and T4

20th February, 2012 Kilvinane Wind Farm Limited given leave to challenge Board's Section 5 decision by judicial review (proceedings adjourned generally on 11th December 2012).

14th May, 2012 William Bailey institutes proceedings under Section 160.

6th November, 2012 Board refuses application to replace turbines T3 and T4.

17th December, 2012 Notice Party granted leave to challenge Board's decision refusing application to replace turbines T3 and T4; proceedings adjourned generally.

13th November, 2013 Section 160 application refused by High Court.

2nd December, 2013 Mr. Bailey appeals to the Court of Appeal.

27th May, 2014 Notice Party applies for leave to apply for substitute consent.

February, 2015 Applicants move house.

21st April, 2015 Board grants Notice Party leave to apply for substitute consent.

14th October, 2015 Notice Party applies for substitute consent.

16th November, 2015 Applicants make submission to Board.

16th March, 2016 Court of Appeal delivers judgment and holds that turbines, as constructed, are unauthorised development. Order granted restraining operation of turbines. Order granted requiring dismantling of turbines stayed pending the outcome of the application for substitute consent.

17th June, 2016 Kilvinane Wind Farm Limited granted leave to appeal to the Supreme Court.

3rd June, 2016 Board requests submission of revised remedial EIS.

29th July, 2016 Revised remedial EIS submitted to the Board.

16th September, 2016 Applicants make further submission to the Board.

2nd March, 2017 Board grants substitute consent.

22nd March, 2017 Supreme Court vacates Court of Appeal Order; makes an order directing the dismantling of the turbines subject to an indefinite stay, an order restraining the use of the turbines for a period of three months; and adjourns the appeal generally with liberty to re-enter the proceedings to either vacate the orders made or proceed with the appeal.

24th April, 2017 Applicants institute these proceedings and obtain a stay on the substitute consent order, until the determination of the application for judicial review or until further order.

29th May, 2017 Proceedings entered into the Commercial List.

4th June, 2017 Supreme Court refuses application by Mr. Bailey to restrain the operation of the turbines for a further period.

5. As of the 2nd March, 2017, the substitute consent granted by An Bord Pleanála permitted the operation for the wind farm at Kilvinane. The grant of the substitute consent meant that the stay granted by the Court of Appeal on its order directing the dismantling of the turbines and the restoration of the site was to continue for a period of eight weeks from that date with liberty to the parties to apply to the Court of Appeal or the Supreme Court within the eight weeks period in relation to the stay or to vacate the order of the Court of Appeal. This shows that the Court of Appeal was of the view that its order in relation to the s. 160 proceedings would be spent if substitute consent was granted by An Bord Pleanála. The stay for the period of eight weeks after the grant of substitute consent was to allow for any judicial review proceedings that might be brought in respect of the decision to grant a substitute consent.

6. On the 22nd March, 2017, the respondent's appeal in the s. 160 proceedings was listed for hearing before the Supreme Court. As the Board had granted substitute consent on the 2nd March, 2017, the Supreme Court vacated the order of the Court of Appeal and substituted an order of the Supreme Court which *inter alia* restrained the use of the turbines until the 21st June, 2017. Accordingly, under the terms of the order the Supreme Court as of the 21st June, 2017 the notice party was lawfully entitled to operate the wind farm pursuant to the substitute consent. It should be noted that the Supreme Court refused the application of Mr. Bailey to extend its order restraining the use of the turbines on the 14th June, 2017.

7. Thus it is the stay of Noonan J. granted on an *ex parte* basis when he granted leave to the applicants to seek judicial review of the decision of An Bord Pleanála of the 2nd March, 2017, alone which prevents the notice party from lawfully operating the wind farm in accordance with the substitute consent and the conditions therein set out.

8. Section 177O of the Act provides that a grant of substitute consent shall have effect as if it were a planning permission and where a development is being carried out in compliance with a substitute consent or any condition of such consent it is deemed to be authorised development.

Onus of Proof

9. The first issue to be considered is whether the notice party as the moving party carries the onus of establishing that the stay ought to be varied or discharged or, whether the applicants, as the parties who sought and obtained the stay on an ex parte basis, bear the burden of justifying the retention of the stay. In *McDonnell v. Brady* [2001] I.R. 588 the Supreme Court had to consider this issue. Chief Justice Keane stated at p. 598:-

> *"There seems no reason in logic why the applicant, where the grant of the stay is subsequently challenged, should not be under an onus to satisfy the court that it is an appropriate case in which to grant such a stay.*
>
> *Since, however, the finding by the learned High Court Judge that the onus was upon the respondents to satisfy him that the stay should be discharged was not challenged in this court, I proceed to consider the case on that basis."*

10. *McDonnell v. Brady* was not decided on the basis that the onus lay on the applicant to satisfy the court that it is an appropriate case in which to grant a stay where the stay granted has been challenged but clearly Keane C.J. was of the opinion that this was the appropriate approach as a matter of principle.

11. In *Powerteam Electrical Services Ltd v. ESB* [2016] I.E.H.C. 87 I held that the onus of establishing that a stay should be maintained in circumstances where an application had been brought to lift the stay lay on the applicant. However, this was based

upon the express requirements of the regulations under consideration in the context of a public procurement. It is not authority for the broad proposition that when a party seeks to discharge or vary a stay obtained on an *ex parte* basis by another party, the onus of proof rests upon the party who obtained the stay to satisfy the court that it is an appropriate case in which to grant such a stay.

12. Many of the authorities refer to the fact that the issue whether to grant a stay in judicial review proceedings is to be approached upon the same principles as the grant of an interlocutory injunction. To my mind, this means that the obtaining of a stay on an *ex parte* application is comparable to the obtaining of an interim injunction. A party who obtains an interim injunction nonetheless bears the onus of satisfying the court that it is entitled to an interlocutory injunction and the onus does not lie on the party subject to the interim injunction to establish reasons why it ought to be discharged or varied. I approach this decision on the basis that the onus rests upon the applicants to establish that the stay should be continued until the determination of the proceedings.

The Authorities
13. The parties were agreed that the test to be applied whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings is set out by Clarke J. in the Supreme Court decision of *Okunade v. Minister for Justice* [2012] 3 I.R. 152 at para. 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;*
>
> *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".*

It is also important to bear in mind Clarke J.'s observations in paras. 92 to 95 of the judgement where he stated as follows: -

> *"However, there is a further feature of judicial review proceedings which is rarely present in ordinary injunctive proceedings. The entitlement of those who are given statutory or other power and authority so as to conduct specified types of legally binding decision making or action taking is an important part of the structure of a legal order based on the rule of law. Recognising the entitlement of such persons or bodies to carry out their remit without undue interference is an important feature of any balancing exercise. It seems to me to follow that significant weight needs to be placed into the balance on the side of permitting measures which are prima facie valid to be carried out in a regular and orderly way. Regulators are entitled to regulate. Lower courts are entitled to decide. Ministers are entitled to exercise powers lawfully conferred by the Oireachtas. The list can go on. All due weight needs to be accorded to allowing the systems and processes by which lawful power is to be exercised to operate in an orderly fashion. It seems to me that significant weight needs to be attached to that factor in all cases. Indeed, in that context it is, perhaps, appropriate to recall what was said by O'Higgins C.J. in Campus Oil v. Minister for Industry (No. 2) [1983] I.R. 88. At p. 107 of the report he said the following:-*
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> > *"The order which is challenged was made under the provisions of an Act of the Oireachtas. It is, therefore, on its face, valid and is to be regarded as a part of the law of the land, unless and until its invalidity is established. It is, and has been, implemented amongst traders in fuel, but the appellant plaintiffs have stood aside and have openly defied its implementation."*
>
> *It is clear, therefore, that the apparent* prima facie *validity of an order made by a competent authority was a factor to which significant weight was attributed. While the comments of O'Higgins C.J. were directed to a ministerial order made under an Act of the Oireachtas it seems to me that there is a more general principle involved. An order or measure which is at least* prima facie *valid (even if arguable grounds are put forward for suggesting invalidity) should command respect such that appropriate weight needs to be given to its immediate and regular implementation in assessing the balance of convenience.*
>
> *[93] It is also, in my view, appropriate to take into account the importance to be attached to the operation of the particular scheme concerned or the facts of the individual case in question which may place added weight on the need for the relevant measure to be enforced unless and until it is found to be unlawful.*
>
> *[94] That is not to say, however, that there may not also be weighty factors on the other side. It is necessary for the court to assess the extent to which, in a practical way, there is a real risk of injustice to an applicant for judicial review*

in being forced to comply with a challenged measure in circumstances where it may ultimately be found that the relevant measure is unlawful. The weight to be attached to such considerations will inevitably vary both from type of case to type of case and by reference to the individual facts of the case in question."

14. These principals were applied in two judgments given in the case *Callaghan v. An Bord Pleanála* . This was in fact the second judicial review proceedings brought by Mr. Callaghan against An Bord Pleanála and related to proposals to develop a wind farm in County Meath. The first judgment was that of Binchy J. delivered on the 21st July, 2016 [2016] I.E.H.C. 488. He applied the test set out in *Okunade* to the facts of the application before him. In relation to the question "where does the greatest risk of injustice lie?" he held as follows: -

"(i) How will a stay affect the orderly implementation of a measure which is prima facie valid?

In the particular circumstances of this case, the continuation of the stay will delay the effect of the impugned decision of the Bord until such time as the Court of Appeal delivers its decision following the hearing on 4th October, 2016. It is not unreasonable to expect that the decision of that court in the matter will not issue forth until some time afterwards, perhaps in early 2017. The overall delay, therefore, (from the time of the granting of the initial stay on 23rd May, 2016) is likely to be between seven and eight months. In my view, therefore, if the stay is continued, it will impact significantly upon the orderly implementation of an administrative measure, which it may be observed was designed to speed up the planning process for development qualifying as SID."

15. Having considered the factors identified in *Okunade*, he concluded that the greatest risk of injustice lay in the continuation of the stay. He also, separately felt it was desirable to address the balance of convenience as between the parties. In paras. 29 and 30 of his judgment, he balanced the losses which the notice party had identified were directly attributable to the stay with the position of the applicant. He then made an order varying the stay by permitting the notice party to submit a planning application to the Board with a stay upon the delivery of a decision by the Board upon any planning application received from the notice party up until the date of delivery of the decision of the Court of Appeal in the first *Callaghan* litigation which would have the effect of determining these proceedings in favour of the applicant if it were successful on the appeal.

16. The Court of Appeal rejected the appeal on the certified point of exceptional importance in the first *Callaghan* proceedings and the applicant applied to the Supreme Court for leave to appeal. The notice parties applied to the High Court in the second *Callaghan* proceedings to vary the order of Binchy J. staying the delivery of the decision of the Board on the planning application of the first named respondent. In fact, the stay had expired as the Court of Appeal had delivered its decision. I so held in my judgment on the 15th May, 2017 [2017] I.E.H.C. 312. I also considered the application on its merits applying the principles set out in *Okunade*. As in the first *Callaghan* stay judgment of Binchy J., the critical issue was where the greatest risk of injustice lay. The sole consequence for the applicant in the event that the stay was lifted and the Board was in a position to issue its decision was that he would have to issue fresh judicial review proceedings with a view to obtaining an order quashing any decision of the Board if it granted planning permission to the notice parties for the proposed development. I held that this did not amount to a very grave prejudice as, if he were successful in his appeal before the Supreme Court, the Board and the notice parties indicated that any such future judicial review proceedings would effectively not be contested.

17. As against this, the notice parties identified significant commercial risks if the Board was not in a position to deliver its decision on the planning application until the outcome of the Supreme Court appeal on the single certified point remaining in the original *Callaghan* proceedings. The notice parties identified many necessary steps which needed to be followed prior to the commencement of actual development and which could not commence until it was known whether or not the Board had decided to grant the notice parties planning permission and if so upon what terms. They would not be able to apply for authorisation to build a generation station. They would not be able to commence necessary pre-commencement negotiations with the planning authority. They would be delayed in finalising the designs. They would be delayed in obtaining approval from Eirgrid Plc in relation to the design for a grid connection. They would not be able to commence contract negotiations. They would be delayed in seeking finance until all other matters identified have been resolved. They might be disadvantaged by being unable to participate immediately in a proposed new support scheme for renewable energy generation.

18. I also placed emphasis upon the fact that the notice parties had carrying costs which involved incurring interest without earning income. It was certain that the stay alone would be holding up the progress of the development if the Board granted planning permission. I concluded therefore that this alone was sufficient to establish that a stay would result in additional costs and probably substantial costs to the notice parties. On this basis, I concluded that there was a greater risk of injustice in staying the Board further in the circumstances of the case and, had the stay not lapsed, I would have discharged the stay.

The Applicants' Case for the Continuation of the Stay

19. The applicants plead at para. 38 of the Statement of Grounds that it would be just and equitable to grant a stay pursuant to O. 84, r. 20 (8) (b) of the Rules of the Superior Courts pending the final determination of the proceedings. In her affidavits sworn both to ground the application for leave to seek judicial review and in opposition to the application of the notice party to lift the stay on the operation of the wind turbines, Mrs. O'Brien detailed the damage she and her family suffered to their health and welfare. Their sleep was disturbed and they experienced a pulsing pressure in their heads and heard a grating/metallic drone/hum. Family life and relationships became very stressful. Mr. O'Brien was prescribed sleeping tablets which helped him get to sleep but which did not prevent him from waking during the night or early morning. Their three children complain of headaches and problems sleeping and noises in their heads. At para. 30 of her affidavit of the 21st April, 2017, she stated "*over time the inevitable, pervasive and inescapable turbine noise undermined our quality of life and sense of well-being to the point we saw no alternative but to abandon our family home*." In February, 2015, they moved into an old damp unattractive farmhouse at Girlough which is about one kilometre further away from Kilvinane wind farm (i.e. about 1.5 km from the nearest turbine.) She acknowledged that the house at Girlough is quieter, but said her husband has no escape from the noise during his working day on the farm. At para. 35 she stated: -

"Even though the house at Girlough is further away from Kilvinane Windfarm, we still woke at night with a grating noise and pulsing pressure in our heads – though that has lessoned over time since we moved to Girlough. We believe that this is the effect of the low frequency noise that we have been exposed to for over ten years now. We cannot see ourselves moving back to our family home in Kilvinane due to the risk that the turbines will become operational."

20. She says that since the turbines have been turned off in June 2016 there was a notable change for the better in their quality of life. Their sleep has improved and Mrs. O'Brien's tinnitus has become much less of a problem.

21. In her affidavit of the 14th July, 2017, at para. 44, she stated that if the turbines are permitted to operate they know that the noise they experienced even in Girlough will return and with it health and sleep problems. At para. 46 she confirms that since the

turbines were shut down she and her husband have given a farm worker accommodation in their family home. She states that if the turbines start up, they will once again be without habitable accommodation for their farm worker. It is clear that whatever the outcome of this application the applicants do not intend to return to live in their family home. They continue to occupy, albeit as a forced exile, a house that is 1.5 km distance from the wind farm.

22. In addition to this primary basis for retaining the stay, the applicants argue that if the court were to permit the notice party to operate the turbines this would have a detrimental effect on their faith in the regulatory and justice systems in this country. They submit that such an order in effect would reward the notice party for his illegal actions in the past for what they say was his flouting of the planning laws. It was submitted that it is deeply hypocritical for the notice party to assert the presumption of the validity of the substitute consent or the importance of the planning process in circumstances where, over ten years, the notice party and companies controlled by him and his wife operated a profitable wind farm which was an unauthorised development. They say this was particularly egregious once An Bord Pleanála held on the 23rd December, 2011, that the development was not exempted development and therefore was unauthorised. Nonetheless, the wind farm continued to be operated until the order of the Court of Appeal of June, 2016.

23. It was submitted that the court should discount the financial losses asserted by the notice party. He is the author of his own misfortune because he erected an unauthorised wind farm. He may not profit from his own wrongdoing. He has already profited while operating an unauthorised development. It was also asserted that he had not put adequate evidence before the court as to the losses which he asserts.

24. It was submitted that the court is engaged in an equitable balance in deciding where the greatest risk of injustice lies. In that regard it was urged that the prior illegal actions should be weighed in the balance against the relief sought by the notice party. Great emphasis was placed upon the judgment of the Court of Appeal in *Bailey v Kilvinane Wind Farm Ltd* [2016] I.E.C.A. 92 where the court outlined the facts upon which it based its conclusions that the respondent had not acted reasonably or in good faith. It was also submitted that the court should preserve the status quo until the determination of the judicial review proceedings. The status quo is that the turbines were not operating and this should be maintained.

Submissions of the Notice Party

25. The notice party made submissions on the application of the *Okunade* principles to the present case. Solely for the purposes of this application, he accepted that the applicants met the first limb of the test in that they had raised a fair question to be tried or an arguable case. His submissions were principally directed towards the issue of where the greatest risk of injustice would lie.

26. First, he considered the asserted basis for the stay. The applicants' complaints about the effects of the operation of the turbines relate to noise. He emphasised that the question of the noise impacts had been assessed by the expert and competent body, the Board, and it did not accept the case made on behalf of the applicants during the course of the substitute consent application to the effect that the turbines would have an unacceptable impact on residential amenity by virtue of noise.

27. Secondly, he noted that the Board has imposed a condition which requires that the noise at noise sensitive locations, including dwellings such as that formerly occupied by the applicant not exceed a level of40 dB(A) L A90. He notes that this is lower than that suggested by the currently applicable 2006 "Guidelines for Planning Authorities on Wind Energy Development" ("*guidelines*") issued by the Department of the Environment, Heritage and Local Government.

28. Thirdly, he stated that the local authority has now confirmed its satisfaction with a robust noise compliance monitoring programme prepared and submitted by AWN Consulting on behalf of the Kilvinane wind farm and the results of that monitoring programme are also required, by the terms of condition no. 5 of the substitute consent, to be submitted to the local authority.

29. Condition no. 5 of the substitute consent, which governs noise impact, provides follows:

> *"Wind turbine noise at dwellings or other sensitive receptors shall not exceed 3E2W A90 externally. Within 3 months from the date of this order, the developer shall agree a noise compliance monitoring programme for the operational wind farm with the planning authority. All noise measurements shall be carried out in accordance with ISO Recommendation R 1996 'assessment of noise with respect to community response' as amended by ISO Recommendation R 1996-1. The results of the noise compliance monitoring shall be submitted to, and agreed in writing with, the planning authority within six months from the date of this order, following agreement of the programme.*
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> *Reason: In the interest of residential amenity."*

Mr. Damien Kelly, acoustic engineer of AW Consulting stated in his affidavit sworn on the 15th June, 2017, that on the basis of his experience dealing with wind farms in Ireland, this condition is a more robust condition than that generally imposed in connection with planning permissions for wind farms in that the permitted noise level at dwellings and other sensitive receptors is lower than that typically stipulated. In response to my question during the hearing of the application, it was confirmed that this averment was not disputed.

30. The notice party emphasised that the implementation of the substituted consent pending the determination of the proceedings would not involve any new works as the substitute consent authorises the existing turbines both as to their size and location.

31. The notice party emphasised the significant financial effects of the stay. He averred that the total cost of the turnkey contract for the supply and erection of the three turbines was €4,843,802.80. The cost of connection to the electricity grid was €475,209. He says that the turbines operated from the 8th November, 2006, until the 8th June, 2016. During this period the debt associated with the capital cost of constructing the wind farm was serviced from the revenues generated by the sale of electricity to the national grid. From December, 2013 until the cessation of the operation of the turbines in June, 2016 the sale of electricity under a power purchase agreement with Airtricity yielded an average monthly revenue of circa €54,600.

32. These proceedings are listed for hearing on the 31st October, 2017. Between the 21st June, 2017 when the Supreme Court order restraining the operation of the turbines will lapse, and the hearing of the proceedings he says that in excess of €220,000 in revenue will be lost in the event that the stay is not discharged. At this point in time approximately €54,600 has already been lost as the application to lift the stay was only heard on 18th July, 2017. Therefore, on the notice party's own case, what is at issue is a loss of approximately €164,000 up to the 31st October, 2017 and whatever further losses might accrue while judgment is awaited or pending further applications in the proceedings.

33. He says that notwithstanding the fact that the turbines will not be operating, fixed overheads will still be incurred. There are

monthly payments associated with refinancing a loan of €7,300 and monthly wind farm insurance of payments of €1,302. An annual payment to ESB Networks for maintenance of the grid connection of approximately €10,000 is due in the final quarter of 2017. There are arrears of rates payable for 2016 and 2017 in the amount of €32,815. He says that the outstanding balance on the loan due to Kilvinane Wind Farms Ltd of €700,000 has been extended to 20th March, 2018. As things currently stand the sum will fall due for repayment in full on that date, though it has in the past been renegotiated. He and his wife have personally guaranteed the loan.

34. He also says that until March 2017 he was paid a salary of €11,133.21 per anum by Kilvinane Wind Farm Energy Ltd and his wife was paid a salary of €51,049.65 per anum by Kilvinane Wind Farm Ltd for the management and administration of the Kilvinane wind farm. They have ceased being paid these salaries in March, 2017 because of the lack of revenue coming into the company since June, 2016 and other continuing outgoings referred to above.

35. He notes that the stay was granted without the applicants being required to provide an undertaking as to damages and therefore any losses incurred from the 22nd June, 2017 onwards in the event that the stay is not discharged or set aside cannot be recovered from the applicants if their application for judicial review is ultimately unsuccessful.

36. The notice party emphasised that the court was concerned with the period of time between the date of its decision and the outcome of the proceedings. It was submitted that the focus should be on the existing dispute and not on the prior history of the wind farm and the various planning applications and cases and judgments. He submitted that there was a greater risk of injustice if the stay remained in place on seven grounds.

37. In carrying out the balancing exercise the court must give significant weight to the "immediate and regular implementation" of a decision of the Board which is presumed to be valid. The Board's decision to grant substitute consent is a final decision such that "but for" the existence of the stay the operation of the wind turbines could resume. He said that weight must accorded to the general public interest in the ordinary operation of the planning code.

38. He placed significant reliance by analogy on the decisions of Binchy J. and of my own in the two *Callaghan* cases cited above based on the fact that significant quantifiable and ongoing losses in the region of €54,600 per month were directly attributable to the stay. While the matter was scheduled for hearing on the 31st October, 2017, judgment will almost certainly be reserved and there can be no certainty as to precisely when judgment will be given or as to what further applications might be made thereafter.

39. He emphasised that no permanent or irreversible consequences would occur if the stay is lifted as no works require to be carried out. He emphasised that there was no undertaking as to damages in this case and the net consequence is that the losses which the notice party will suffer as a direct result of the stay being in place are not capable of compensation.

40. He disputed the arguments advanced by the applicants. He pointed out that the applicants had raised their concerns in relation to the noise generated by the wind turbines in their submissions to the Board as part of the substitute consent procedure. The Board was the expert body empowered to exercise the balance in relation to the interests of the applicant and of parties seeking planning permission. The Board decided to grant substitute consent having considered the issue of residential amenity including noise impacts. The Board imposed condition 5 for the benefit *inter alia* of the applicants in relation to noise impacts. If the stay were to be discharged and set aside and the operation of the turbines was to recommence, the noise limits established in condition 5 would apply.

41. It was argued that the previous planning history of the wind farm should not be taken into account in view of the fact that following a process of very significant public consultation the Board had granted the notice party substitute consent. This meant that the development was authorised. He submits on the basis of these points that the risk of injustice is greater if the stay is not vacated.

Discussion

42. In this judgment I am not concerned with the merits of the case (save the possible limited extent discussed below) and I am also not concerned with the merits of the decision of An Bord Pleanála. I acknowledge that there are diametrically opposed positions. One landowner has developed his land with a wind farm and wishes to operate the wind farm. His neighbour wishes to live in peace on a family farm in a family home without the intrusions from the operation of the wind farm and in particular the noise generated by the operation of the turbines. Feelings and emotions run high but they have no place in the decision I am required to make.

43. The test in *Okunade* is designed to assist the court to reach a just decision where there is a risk that the action or inaction of the court in retaining or discharging a stay may result in an injustice to one party to the proceedings, depending on the ultimate outcome of the action. I apply the four matters identified by Clarke J to the facts in this case.

44. "*(a) The court should first determine whether the applicant had established an arguable case; if not the application must be refused…*"

For the purposes of the application to lift the stay the notice party accepts that the applicants have established an arguable case.

45. *"(b) The court should consider where the greatest risk of injustice would lie. In doing so the court should: -*

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

The grant of substitute consent is *prima facie* valid and accordingly this factor is one to which the court should give weight.

46. (ii) and (iii) of (b) do not arise for consideration on the facts of this case.

47. *"(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;"*

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 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.

48. The applicants established that they suffered significant distress when they lived in their family home and that in effect they have been exiled from their family home by reason of noise generated by the wind turbines. There is less of an impact when they live in Girlough, though the noise of the turbine still impacts upon them. It obviously still continues to impact upon Mr. O'Brien when he works on the family farm and upon Mrs. O'Brien and their children when they go to the family farm.

49. On the other hand, the applicants do not intend to resume living in the family farm pending the outcome of these proceedings. Therefore, I have to assess the situation on the basis that they live 1.5 km from the nearest turbine where they accept that the impact of the noise from the turbines is less intrusive.

50. The guidelines note that noise is unlikely to be a significant problem where the distance from the nearest turbine to any noise sensitive property is more than 500 m. The home they actually occupy pending the determination of the proceedings is three times further away.

51. Mr. Kelly's evidence was that condition 5 imposes a lower noise threshold than is typically stipulated in respect of wind farms in Ireland. This evidence was not contradicted. It implies that other wind farms lawfully operate generating a greater level of noise. The level set is considerably less than light traffic or conversational speech. Greatest emphasis was placed by the applicants on sleep disturbance which does not arise in relation to working on the farm.

52. The subjective faith of the applicants in or satisfaction or dissatisfaction with the justice or regulatory systems is not a proper factor for me to have regard in reaching my decision. I do not take this into account in reaching my decision.

53. The applicants ask the court to place significant weight upon the fact that the wind farm operated as an unauthorised development for ten years. They said that the notice party should not in effect be rewarded for flouting the planning laws. I believe that it is not appropriate to give any substantial weight to the prior unauthorised development which occurred in this case. This is not because the court condones the actions of the notice party or his companies. Quite clearly the Court of Appeal did not condone those actions and I do not do so. It is because of the nature of substitute consent.

54. Substitute consent is granted *inter alia* to regularise existing unauthorised developments which required an environmental impact assessment but which did not undergo the required EIA. Such developments are thus unauthorised. It is intended in appropriate cases, as assessed by An Bord Pleanála, to authorise and therefore legalise, developments which have been carried out and which were in fact unauthorised. It is a precondition to the issue of a substitute consent that there was a prior unauthorised development. The purpose of the grant of a substitute consent is to allow the development to continue as authorised development. Once substitute consent issues, the development becomes authorised and thus lawful (on the assumption that all other licenses and authorisations that may be required to operate the development have been properly obtained).

55. The applicants' submissions in effect require the court to give significant weight to the fact that the wind farm operated as an unauthorised development as a matter of law at all times prior to 2nd March, 2017, notwithstanding the grant of substitute consent on 2nd March, 2017. I cannot approach this judgment on the basis that the applicants must succeed in these proceedings and therefore assume that the decision is invalid. On the contrary, it enjoys the presumption of validity. Therefore, the only basis upon which I can have regard to the prior unauthorised development is that notwithstanding the grant of substitute consent, it still has a lingering relevance. Counsel urged that this was based upon equitable principles. In effect, he argued that the notice party had not "done equity" and therefore was not entitled to equitable relief.

56. I cannot agree with this submission. The unlawful actions in relation to the wind farm have ceased. The notice party wishes to act in a lawful manner implementing a lawful decision which is *prima facia* valid. Frequently where applicants seek to quash grants of planning permission the courts do not restrain the developer from implementing the planning permission. As a matter of commercial prudence developers normally refrain from implementing the planning permission for fear that it may ultimately be quashed. This does not alter the fact that as a matter of practice the courts frequently did not impose a stay on the decision to grant planning permission in the circumstances. The principle is the same here, it is simply that the commercial imperative is in favour of acting on the decision rather than in favour of refraining from acting on the decision.

57. In the balance on the other side of the argument, two matters are of significant weight in my opinion. Firstly, the substitute consent enjoys the presumption of validity. The notice party is entitled to act upon the decision of the Board. In so acting no irrevocable or irreversible action will result as the decision does not require the carrying out of any works. It simply requires the restarting of the turbines.

58. Secondly, the developer is suffering significant, ongoing, *uncompensatable*, loss of revenue as a direct result of the stay remaining in place. This is uncontroverted, though the applicants contest the adequacy of the evidence adduced by the notice party. I am satisfied with the evidence adduced. A loan agreement has been exhibited and the notice party has indicated the average monthly payment received from Airtricity under a contract dated December, 2013. There is no suggestion that this is wildly inflated. In addition the notice party has identified significant carrying costs that arise whether the turbines are operating or not. The notice party and his wife have personally guaranteed the liability of Kilvinane Wind Farm Ltd in the sum of €700,000 which may be called in if the company cannot repay the loan or refinance the facility. The income of the company used to repay the loan is from power generation and clearly in the absence of power generation no income will be earned.

59. For these reasons on the facts in this case I concluded that the greatest risk of injustice lies in continuing the stay rather than in discharging it pending the outcome of the proceedings.

60. *"(c) the court should, in those limited cases where it was relevant, have regard to whether damages were available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages"*

The notice party accepts that having regarded the decision of the CJEU in *Commission v. The United Kingdom* (C-530/11) that to require an undertaking as to damages from the applicants may be legally problematic. As a result, it was accepted by both the applicants and the notice party that whatever losses the developer may suffer he cannot recover damages from the applicants. Thus, while damages could in the ordinary way compensate the notice party, as a matter of fact and law damages will not be available to the notice party and this is a factor to be weighted in favour of lifting the stay.

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

In my opinion the issues of fact and law are detailed and complex and this is not a case in which it would be appropriate to weigh the

strength or weakness of the applicants' case in determining whether to lift or vary the stay.

62. **Conclusion**

In conclusion, in my opinion the greatest risk of injustice in this case lies in leaving the stay in place. The applicants have not discharged the onus of proving that the greatest risk of injustice lies in lifting the stay and therefore they have not established to my satisfaction that the stay should remain.

63. If I am incorrect in holding that the onus of proof rests on the applicants, nonetheless I am satisfied that the notice party has established that the greatest risk of injustice lies in leaving the stay in place. The factors I have identified in my opinion are weightier than those identified by the applicant. In reaching this conclusion I do not wish to minimise in any way the personal suffering of the applicants in relation to the noise generated by the turbines Neither am I deciding that their health and wellbeing is of no significance in comparison to the monetary losses identified by the notice party, as was submitted at the hearing of this application. This judgment makes clear that the decision is more nuanced and for the reasons I have outlined above I exercise my discretion to lift the stay in these proceedings.