THE COURT OF APPEAL

2014 No. 1037

Finlay Geoghegan J.
Irvine J.
Hogan J.

BETWEEN/

WILLIAM HENRY BAILEY

APPELLANT

- AND -

KILVINANE WIND FARM LTD.

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 16th day of March 2016

1. This is an appeal from a judgment of the High Court delivered by Peart J. on 27th September 2013: see *Bailey v. Kilvinane Wind Farm Ltd.* [2013] IEHC 509. In these proceedings the applicant, Mr. Bailey, seeks orders pursuant to s. 160 of the Planning and Development Act, 2000 ("the 2000 Act") requiring the dismantling of three wind turbines owned and operated by the respondent company, Kilvinane Wind Farm Ltd. ("Kilvinane") on the ground that, as constructed, these turbines amount to an unauthorised development as their location varies from and their dimensions exceed that permitted by a planning permission granted by An Bord Pleanála ("the Board") in July 2002. Mr. Bailey is a litigant in person.

2. In the High Court Peart J. refused on discretionary grounds to make the orders sought and the applicant now appeals to this Court.

3. Kilvinane itself is a small hamlet situated about 7km. east of Dunmanway, Co. Cork. The turbines are located in an irregularly shaped area of farmland consisting of about 43ha. Some farm buildings are also situated on the site. There are approximately 28 dwellings within the immediate vicinity of the site and the applicant's house (where he lives with his wife and extended family) is about 1km distant. Mr. Bailey has lived in that house for upwards of 23 years. Other local residents live somewhat closer to the turbines, albeit that Mr. Bailey is the sole applicant in these s. 160 proceedings.

The original planning permission of August 2001

4. The starting point for any consideration of the planning issues at the heart of this appeal commences in February 2001 when the original planning application for what was to be originally five turbines was lodged with Cork County Council. Planning permission for the construction of four wind turbines at Kilvinane was originally granted to the principal and director of Kilvinane, Mr. Leonard Draper, by the relevant planning authority, Cork County Council, on 29th September 2001. That decision to grant permission was then appealed by seven objectors (of which Mr. Bailey was one) to the Board. The Board subsequently granted permission (subject to conditions) on 19th July 2002.

5. The permission granted by the Board was in respect of four turbines with a hub height of 65m. and a rotor diameter of 57m. Condition No. 1 of the planning permission provides that:

> "The development shall be carried out in accordance with the plans and the particulars lodged with the application as amended by the details received by the planning authority on the 9th day of August 2001, except as may otherwise be required to comply with the following conditions"

6. Only three turbines (which, for convenience, I shall describe as T1, T3 and T4) have in fact been erected. They were constructed between October 2005 and June 2006. The installation of a planned T2 was postponed pending the securing of additional capacity by Kilvinane on the national grid.

7. The dimensions of the turbine which were, in fact, constructed are as follows:

	Height of Hub	**Rotor Diameter**
T1	55m.	58m.
T3	60m.	80m.
T3	60m.	80m.

8. It will be seen that the rotor diameter of T1 as it was constructed is only 1m. greater than that permitted by the terms of the 2002 planning permission, whereas in the case of both T3 and T4 the rotor diameters are in each cases 23m. greater than permitted. As we shall see presently, the final location of all three turbines following construction was somewhat different to that specified and described in the planning permission: T1 was now built 20m. east of the original position, T3 was built 20m. south west of the original position and T4 was built 19m. north of the original position.

9. It would seem that for various reasons Mr. Draper was not entirely satisfied with the planning permission which he had actually received. At various stages since 2002 he has sought to have either the terms of the permission granted varied or modified in one way or another or, at least, that he be permitted to deviate to some degree from the terms of that permission by changing either the

height of the hub or the dimensions of the rotors. To that end Mr. Draper has had frequent discussions with the planning authority, namely, Cork County Council, at various stages between 2003 and 2006.

Discussions with planning authorities

10. The first contact which Mr. Draper had with the planning authority appears to have been on 3rd March 2003 when he wrote to Mr. Gunkel of the planning department of the Council stating:-

> "We would like to explore the possibilities of increasing blade tip height on my wind farm site.
>
> The original hub height will remain the same at 65m., but the blade length will increase from 28.5m. to 35.m., an overall increase in blade tip height of 6.5m. My reasoning for this is to reduce noise level, being restricted to 40dba to nearest residence, most manufacturers have addressed this problem by using a variable speed machine with a longer blade length, this enables them to run at a slower speed and at the same time maintain maximum efficiency."

11. There then followed an exchange of correspondence between the planning department and Mr. Draper in which the Council invited Mr. Draper to submit revised zone of visual interest mock-ups so that the potential visual impact on the landscape could be further assessed. This was done by Mr. Draper's engineering consultants, Fehily Timony, on 1st April 2003 when the latter firm sent on to Mr. Draper printouts of the wire frame views showing:-

> "• Five turbine layout with 55m. hub height and 52m. blade diameter, as in the EIS.
>
> • New four turbine layout with 65m. hub height and 90m. blade diameter."

12. The planning office responded on 23rd May 2003 stating that:-

> "I am to advise that the planning authority does not have an objection to a small increase in blade length to 35m."

13. There the matter seems to have rested. Some two years later, however, there was a further exchange of correspondence on this topic. On 10th August 2005 Mr. Draper wrote to Mr. Gunkel in the following terms:-

> "As per telephone conversation today I wish to formally seek your approval to reduce the hub height of the turbines from 65m. to 60m. and to extend the blade length from 35m. to 40m. The reasons for this being that these are the only turbines that are available to us at this time, in order to get our project built in the timeframe allowed by [Commission for Energy Regulation]."

14. The planning department responded on 29th August 2005 stating:-

> "There is no objection to proposed turbine amendments."

15. Some seven weeks later in October 2005 Mr. Draper wrote again to Mr. Gunkel on this occasion raising a query regarding the possible movement of the turbines themselves:-

> "Dear Bob,
>
> Is it possible please to have clarification for our due diligence on the following:-
>
> ☐ What is the tolerance in movement of the turbines from the grid co-ordinates submitted for planning, i.e. 10, 15, 20m.?
>
> ☐ Reason – so that better ground foundations can be found."

16. The following year Mr. Draper wrote to Mr. Gunkel on 5th July 2006 stating that they had just constructed three turbines on the wind farm giving an output of 4.850 M.W. Mr. Draper then gave the co-ordinates for the three turbines – T1, T3 and T4. T1 was now built 20m. east of the original position, T3 was built 20m. south west of the original position and T4 was built 19m. north of the original position.

17. Mr. Draper continued:-

> "The changes were required to give firmer foundations. The last time we spoke on the phone you gave us the ok to extend the blade length to 40m. and to reduce the hub height to 60m. in order to stay within the 100m blade/tip height. Can we have written confirmation of this please (for our own records)."

18. On 3rd October 2006 the Council's planning department responded, stating:-

> "I am to advise you that the revised turbine locations and the extension of the blade length to 40m. and reducing the hub height to 60m. are acceptable to the planning authority. Apologies for the delay."

19. As it happens, the copy of this letter of 3rd October 2006 on the planning authority's file (and which is exhibited in Mr. Bailey's grounding affidavit) bears the date stamp 18th April 2011. This apparent discrepancy between the date of the letter and date on which the letter was entered on the file is one of the matters which greatly disturbs Mr. Bailey.

20. In October 2006 the three turbines were connected to the national grid and became operational.

Further applications for planning permission

21. In 2007 Kilvinane applied for an extension of the planning permission up to July 2010 and this was duly granted. A further extension was granted in 2010 which extended the duration of the permission up to July 2013. Mr. Bailey made no objection to these applications for an extension of the permission.

22. On 12th November 2010 Kilvinane lodged a new planning application (ref. 10/781) to permit it to replace the permissions for T1 (which had been constructed) and T2 (for which permission had been granted, but had never been constructed). It also sought

permission to construct a fifth turbine, T5. The application was in the following terms

T1 (as constructed)	55m	Proposed 80m	Hub Height
	58m	Proposed 90m	Rotor Diameter
T2 (never constructed)	80m	Proposed	Hub Height
	90m	Proposed	Rotor Diameter
T5	80m		Hub Height
	90m		Rotor Diameter

23. The November 2010 application generated a good deal of local objections, as well as support from others residents in the locality. The application seems, however, to have alerted some local residents to the fact that the dimensions of the existing turbines (T3 and T4) did not conform to the original July 2002 permission as granted. A month later in December 2010 Kilvinane was awarded a 5.8MW supply contract, a significant increase from the original 4.5MW contract it had secured in early 2005. The Council granted permission on 21st June 2011. This decision was then appealed to the Board by Mr. Bailey.

24. On 7th November 2011 Mr. Draper submitted a further planning application (Ref. 11/676) on behalf of Kilvinane. In this application it was sought to replace T3 and T4 with larger turbines (new proposed hub height 67 metres and rotor diameter 90 metres). This application was, however, refused by the Council by decision dated 10th January 2012. Mr. Draper then appealed to the Board. I will deal presently with the Board's decisions in respect of these planning applications.

The section 5 reference

25. On 27th April 2011, two local residents, Mr. Patrick O'Brien and Ms. Claire O'Brien, sought a reference under s. 5(4) of the 2000 Act as to whether the as-built three turbines constituted exempted development. The s. 5 reference from Mr. O'Brien and Ms. O'Brien prompted a number of memoranda within the Planning Authority. The initial memorandum was prepared by Ms. A. O'Keeffe, an executive planner. She described the chronology of changes to the plans permitted under the original permission 01/980 thus:

> "A letter from the developer was submitted to the planning authority on 21st May 2003 seeking to alter the blade length from 28.5m. to 35m. by giving a rotor diameter increase from 57m. to 70m. The reason given was to reduce noise levels by using a variable speed machine with longer blade length. The senior planner at the time reported that the planning authority had no objection to the increase in blade length to 35m. and a letter dated 23rd May 2003 issued [to] the developer stated that the planning authority did not have an objection to a small increase in blade length to 35m.
>
> A request by the developer to locate the transformers outside the turbine mast was not supported. A second and subsequent letter dated 3rd October 2006 issued to the developer from the planning authority stating that the revised turbine locations and the extension of the blade length to 40m. and reducing the hub height to 60m. was acceptable to the planning authority. The file available to me in Skibbereen did not include correspondence or drawings from the developer submitted to the planning authority on 6th July 2006 regarding this change in location or an increase in blade length to 40m. It is noted that the location of the turbines is not referred to in the referrer's submissions."

26. The memorandum then referred to the submissions advanced by the O'Briens, Mr. Bailey and Mr. Draper. The submissions on behalf of Mr. Draper stated that it was not the purpose of s. 5 reference "to address or decide whether a particular development is authorised by a planning permission or unauthorised". The submission also went on to state that the development was authorised, and incorporated only "immaterial deviations from the permission granted following consultation in good faith with the planning authority".

27. The memorandum went on to discuss the relevant statutory provisions and the governing permission. It then suggested that the key issue arising on the referred question was whether:

> "The alterations to the permitted wind farm constitute material alterations for permission granted under 01/980… and, as such, whether the development as constructed is or is not development and is or is not exempted development".

28. The matter was considered by a Mr. Kevin Irwin, the senior planner attached to the Western Division, on 26th May 2011. He stated:-

> "The applicants seek to determine whether Cork County Council considers that the development in question is development as defined for the purposes of planning legislation and, if so, whether the development is exempted development. Having regard to s. 3 of the 2000 Planning and Development Act, it is clear that the works involved – the erection of wind turbines – is development.
>
> The application is somewhat unclear as to what aspect of the development they want considered. Generally, applications for s. 5 declarations relate to development that has, or has not, implied consent: that is development which does not require planning permission in the first instance. It would appear that this request relates to the difference between the permitted development and the as constructed development.
>
> The development under review was constructed on foot of planning permission granted by An Bord Pleanála in 2002 and therefore has express consent. The developer subsequently sought to ascertain from Cork County Council whether the proposed modifications to the height of turbines and the length of the rotor arms constitute a material change from the permission granted by ABP: [the] applicant proposed a reduction the height of the hub height from 65m. to 60m. and an increase in rotor length from 28.5m. to 40m. In correspondence with the developer in 2006, Cork County Council confirmed the proposed changes were acceptable to the planning authority. The developer erected the turbines in line with this confirmation.
>
> The adjudication on the matter at issue was made by Cork County Council in 2006. The applicant was informed that the changes imposed were not material and thus did not require fresh planning application: exempt development. It is the view of Cork County Council that the erection of the wind turbines is considered to be development, the modifications to the height of the turbines and the length of the rotor arms is, however, not considered to be material and, therefore, constitutes exempted development."

29. On 17th June 2011 the O'Briens appealed this decision to An Bord Pleanála. The Assistant Director of Planning at the Board, Mr.

Philip Jones, took the view in a memorandum for the Board dated 27th July 2011 that the reference really concerned a case of unauthorised development and, as such, it fell outside the ambit of s. 5(4) of the 2000 Act. The Board disagreed, however, and by decision dated 12th August 2011 directed that the referral had been properly made and decided to send the case for inspection and review.

30. The parties made further submissions and an inspector (Mr. B. Wyse) appointed by the Board also concluded that this matter did not come within the scope of s.5 of the 2000 Act. In its decision of 23rd December 2011 the Board disagreed with the conclusions of the inspector and reversed the decision of the County Council. In its decision the Board stated as follows:-

> "(a) The erection of the turbines comes under the scope of the definition of development contained in s. 3 of the Planning and Development A ct 2000,
>
> (b) The re-location and alterations to turbines, including the modifications to the overall height of the turbines and the length of the rotor arms/blades do not come within the scope of the permission granted,
>
> (c) There is no provision for exemption in the said relocation and alterations to the turbines provided for in either s. 4, as amended of the said Act, or Article 6 of the Planning and Development Regulations 2001, and
>
> (d) Therefore, the construction of the wind turbines as currently erected on site including alterations and modifications of the turbines height and rotor arms/blades is development and is not exempt to development.

NOW, THEREFORE, An Bord Pleanála, in exercising the powers conferred on it by s. 5(3)(a) of the 2000 Act, hereby decides that the alterations of the turbines and the wind farm at Kilvinane and Garranure at Ballincarriga, Dunmanway, Co. Cork is development and is not exempted development."

31. In the wake of this decision to the effect that the decision did not constitute exempted development, Kilvinane sought to challenge the legality of this determination. On 20th February 2012, Kilvinane were accordingly granted leave by the High Court to apply for judicial review (2012, 129 JR) of the decision of the Board on the s. 5 referral. While the Court was not provided with copies of those proceedings, it appears from the affidavits filed in the present proceedings that the challenge was essentially on the basis that the s. 5 reference was not a valid one and, accordingly, that the Board had no jurisdiction to determine that the as constructed turbines constituted development which was not exempted development. It was further contended that the Board had failed to consider whether any deviation from the terms of the planning permission was a material one and that it had failed to give reasons for its decision.

The decisions of the Board in November 2012 regarding Kilvinane's applications for planning permission

32. So far as the Kilvinane application for planning permission was concerned, permission had first been granted (subject to conditions) by Cork County Council on 21st June 2011. Mr. O'Brien, Mr. Bailey, and Mr. Draper all variously appealed to the Board against this decision to grant permission. On this occasion the Board again appointed Mr. B. Wyse as an inspector, presumably given his familiarity with the site. The inspector recommended that planning permission should not issue because the proposed development would "constitute modifications/extensions to an unauthorised wind farm and that, therefore, it would be inappropriate for the Board to grant permission." Arguments advanced by the objectors based on shadow flicker, visual impact and noise were, however, rejected by the inspector.

33. In its decision of 6th November 2012 in respect of Ref. No. 10/781, the Board agreed with the conclusion of its inspector but for somewhat different reasons. The Board stated:

> "1. On the basis of the submissions made in connection with the planning application and the appeal, it appears to the Board that the proposed development would constitute modification extensions to an unauthorised development. It is considered therefore, that it would be inappropriate for the Board to consider a grant of permission for the proposed development in such circumstances.
>
> 2. Having regard to the scale of the development proposed and that of the overall wind farm proposed in appeal reference number PL 88.240143 and the pattern of development of the area, where several residences are located in close proximity to the wind farm, the Board is not satisfied that the proposed development would not seriously injure the residential and visual amenities of the area, in cumulative terms, by reason of noise, shadow flicker and the scale of the increased height of the proposed development. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.
>
> 3. It is considered that the environmental reports submitted with the application does not provide an adequate basis upon which to assess the application. It does not provide comparable data of development as permitted under appeal reference number PL 04.127137 which differs from the existing turbines in place, the proposed development, and the cumulative impact with the appeal reference number PL. 88.240143 which is also before the Board. In particular, noise, shadow flicker and visual impact on the individual residences over and above the impacts that would have arisen had the wind farm been constructed are not clarified, on this basis the Board is not satisfied that further development would not seriously injure the residential and visual amenities of the area. The proposed development would, therefore, be contrary to proper planning and sustainable development of the area."

34. On the same day the Board issued a substantially identical decision in the corresponding appeal from the refusal of Cork County Council to grant permission (Ref. No. 11/676) and also refused permission for this proposed development (*i.e.*, the proposed replacement of T3 and T4).

35. On 17th December 2012 Mr. Draper applied for and obtained leave pursuant to s. 50 of the 2000 Act (as amended) for leave to apply for judicial review in respect of these decisions of the Board to refuse to grant permission.

36. It has since been clarified, however, that it had been agreed between Mr. Draper/Kilvinane and the Board that both sets of judicial review proceedings (i.e., the Kilvinane proceedings 2012, No. 129JR challenging the decision on the s. 5 reference and the Draper proceedings 2012, No. 1036JR challenging the refusals of planning permission) should be adjourned generally pending the outcome of the s. 160 proceedings which were then due to be heard before the High Court within a matter of days. It would appear from the judgment of the High Court that this was a matter of which he was unaware. No steps have subsequently been taken to prosecute those judicial review proceedings.

The pending application of Kilvinane for substituted consent
37. On 27th May 2014 Kilvinane applied to the Board for substituted consent pursuant to s. 177C of the 2000 Act (as inserted by s. 57 of the Planning and Development Act 2010) in respect of the wind farm. It contends that there are "exceptional circumstances" within the meaning of s. 177D of the 2000 Act such as would justify the grant of such consent. Leave to apply for such consent was granted by the Board by decision dated 21st April 2015. Pursuant to this leave Kilvinane then applied on 14th October 2015 for substituted consent in respect of this development. This application was still outstanding as of the date of the hearing of the appeal in this Court on 2nd and 3rd December 2015.

The case advanced by the applicant
38. As I have already noted, the applicant (who is a retired chartered engineer) lives with his family at a house and farm in Kilcasan, about 1km. distant from the turbines. His case essentially is that, as constructed, the turbines do not meet the specifications provided for in the original planning permission. The three turbines were actually constructed at locations some 20m. distant from those specified in the 2002 permission and Kilvinane have also erected three turbines with significantly greater blade length then permitted.

39. Mr. Bailey acknowledges that this development does not greatly impinge on his enjoyment of his house (owing to the presence of intervening woodlands). He does, however, say that his enjoyment of his farmlands and the rural neighbourhood is affected. He also states that his neighbours are more immediately affected by the operation of the turbines and that this is a matter of concern to him. A number of local residents have sworn affidavits in support of the present application: they complain of the noise caused by the turbines and the interference with television reception. They also complain in vigorous terms of how the amenities of their properties have been affected by the "flicker shadow" and how the dazzle of the turbines sometimes makes it dangerous to operate farm machinery.

40. Mr. Bailey says that he, along with the local residents, first became aware of these deviations from the terms of the planning permission in January 2011 as a result of inspecting the November 2010 application for permission. He also stated that despite frequent inspections of the planning file he could find no reference on that file to the correspondence between Kilvinane and the planning authority sanctioning or permitting a deviation from the terms of the planning authority, although Kilvinane claimed in the 2010 planning permission to have obtained such an agreement from the planning authority. He purchased a copy of the entire file of the planning application from Cork County Council on 24th May 2011, but this file contained no details of any such letters or correspondence.

41. Mr. Bailey maintains that he only received such correspondence after intimating that he would initiate a formal complaint under the Freedom of Information Act 1997. So far as the argument made by Kilvinane to the effect that any changes from the terms of the planning permission could not have been material because otherwise such changes would have come to his attention and those of other local residents prior to 2011, Mr. Bailey says that "the assessment of such heights and dimensions" requires "professional skill and land surveying instruments" which he did not possess.

42. Nor does Mr. Bailey accept the arguments advanced by Mr. Draper regarding the necessity for a change of location of the turbines. There was no flexibility in terms of location built-into the planning permission and Kilvinane's geo-technical investigations did not warrant this change in location. Mr. Bailey is adamant that the real reason for the change in location was to facilitate the enlargement of the turbines.

The case made on behalf of Kilvinane and Mr. Draper
43. The affidavits sworn on behalf of the respondent take issue with Mr. Bailey's standing to take these proceedings. In his affidavit Mr. Draper makes the point that Mr. Bailey's house is shielded by woodland from the turbines. Mr. Draper stated that he lived with his wife and two children within 160 metres of T1 and that his parents live approximately 200 metres from T1. This was closer than Mr. Bailey or any of the local residents who swore affidavits in support of these proceedings, yet "neither I nor my parents have experienced any of the adverse effects purportedly suffered" by the other local residents. Mr. Draper emphasised the point that prior to the submission of the revised planning permission in November 2010 "no issue had ever been raised by any party in relation to the wind turbines constructed or the operation of the wind farm facility."

44. Mr. Draper explained the necessity to move the location of the three turbines which, as constructed, were located by up to 20m. distant in each case from the original site location on the basis that these changes were necessary to give firmer ground foundations. He said that the original ground conditions were unsuitable. To this end Mr. Draper drew attention to paragraph 5.3 of the *Windfarm Development Guidelines* (2006) published by the Department of Environment, Heritage and Local Government which provide:

> "Provision must be made for carrying out site-specific geo-technical investigations in order to identify the optimum location for each turbine. These investigations may suggest minor adjustments to turbine location. In order to accommodate this practice there should be a degree of flexibility built into the planning permission and the EIS. The extent of flexibility will be site specific but should not generally extend beyond 20 metres. Any further changes in location beyond the agreed limits would require planning permission."

45. Mr. Draper then draw attention to the delays which were caused by the fact that in response to a large increase in the number of wind farms making application for connections to electricity and transmission networks, the Commission for Energy Regulation introduced a moratorium on such applications in 2003. By the time the Kilvinane project was ready to proceed in 2006, the turbines which were due to be installed on the wind farm were no longer being supplied in the State. There were only two European manufacturers (Enercon and Gamesa) with the requisite technology and specifications "required to meet the standards prescribed in the grid code." Due to a European wide wind energy building boom, only Gamesa were in a position to supply the turbines which met appropriate technological and environmental standards.

46. At the time Gamesa manufactured only two types of turbines. The "G58" turbine had a rotor diameter of 58m., while the "G80" had a diameter of 80m. Gamesa indicated that these were the only turbines available within any reasonable period required by the financial close of the project. Mr. Draper further says that the larger "G80" turbines were recommended by Gamesa, as the "G58" turbine was deemed suitable for one location only due "to the low wind speed and turbulence and maximum gust potential." He stresses that at all material times the Council was fully aware in correspondence of the modifications required both in terms of location and the rotor diameter and that the Council was fully of the view that these changes were not material and did not necessitate a fresh application for planning permission.

47. Mr. Draper also drew attention to the fact that the project had entailed a significant investment of some €5.7m. and that there were significant borrowings. It should be said, however, that during the course of the hearing before this Court it emerged from a consideration of the 2014 accounts filed by Kilvinane that the company did not appear to have any borrowings and that the large

sums originally borrowed to fund the project had been repaid.

48. Mr. Draper also noted that the project had three employees and supplied wind energy to some 3,000 Irish households.

The decision of the High Court
49. In the High Court the case proceeded on the basis of the affidavit evidence only, so that there was no oral evidence or cross-examination of the various deponents on their affidavits. Both sides had also adduced affidavits (Mr. David Moore on behalf of the applicant and Mr. Kevin Harty and Mr. Harold Walsh on behalf of the respondent) from experts dealing with issues in relation to planning, engineering, site surveys and the energy generating capacity of the wind turbines as they were constructed. Given, however, that there was no cross-examinations of these deponents and no fact finding made in relation to the matters canvassed by these affidavits, this Court is simply not in a position to adjudicate on the rival contentions made by the respective experts.

50. Having set out his summary of the evidence in a detailed judgment, Peart J. concluded that relief should be refused for a variety of discretionary reasons.

51. First, Peart J. was clearly influenced by the fact that the pending judicial review applications might have a material bearing upon the present application:

> "The fact that the reference under s.5 by the O'Briens has resulted in a view being expressed by An Bord Pleanála as to the materiality of the deviations, and that it constitutes unauthorised development, is something which has occurred after the planning authority gave the 'green light' to the respondent to proceed. That decision is under judicial review at the moment, as are later decisions in relation to the later applications for planning permissions. The outcomes of those various judicial review proceedings could have a bearing on the issues at the heart of the present case. I agree that it would be premature for this Court to anticipate the conclusions that may be reached by ordering that the existing turbines be dismantled and taken down so that the entire wind farm operation should cease to exist. That would be a drastic and draconian step to take."

52. Peart J. also thought that it was a "noticeable feature" of the case that "the planning authority does not appear to have concerns which lead it to bring an application under s. 160, or even support the present application." Peart J. acknowledged that this, of course, was "not determinative", adding, however, that the applicant was "entitled to go it alone on the basis of the grounds which he believes would justify this Court in making the order sought."

53. Peart J. also considered that the fact that Mr. Bailey was "not adversely affected by this development to any significant degree" was, to some extent, a relevant factor:

> "His house is protected to an extent from it by intervening forestry, even though his enjoyment of his farmland is, he says, diminished. In truth, he is bringing this application on behalf of those who are worse affected than he is. He is known to have considerable knowledge and expertise on the subject of wind farms and wind turbines. Indeed he has amply demonstrated that expertise by the manner in which he has made his arguments and submissions to this court."

54. Peart J. then stated that he agreed with Kilvinane that it was likely that the objections being mounted in this application stem from an objection to this development per se, rather than from the fact of the alleged deviations from the permission granted:

> "That seems clear from the fact that the wind farm operated for some five years without anybody even noticing the deviations, such as they are. It seems to me that when the applicant inspected the file in respect of application Ref. 10/781, he discovered certain matters which he decided at that stage could form the basis for mounting further objections to this development, which he has always objected to where possible. He has always had objections to the development of this wind farm in his area. He was apparently the only appellant against the initial decision by Cork County Council to grant permission for the development in 2002. He has also lodged objected to the two later applications for permissions which have been referred to above. That is not a criticism of course. Any person is entitled to object to a planning application. It is a very important part of the democratic process that persons should be able to raise objections. But it does throw light on the motivation for the present application in circumstances where he acknowledges in his affidavit grounding the application that he personally, or his family, suffer only a very limited prejudice from the development as built."

55. Peart J. then went on to address the manner in which the applicant had liaised with the planning authority:

> "In my view, the conduct of the respondent is not to be criticised in the way in which it dealt with this development. It consulted the planning authority, and in so far as it needed or wished to deviate somewhat from the permission granted, it consulted in advance and achieved the agreement of the authority before proceeding. In those circumstances I agree that it would be manifestly unjust to "to have the draconian machinery of the section brought into force against a person who behaved in good faith throughout" - to quote the words of Keane J. (as he then was) in *Dublin Corporation v. McGowan* [1993] 1 I.R. 405. Similar sentiments are expressed by O'Sullivan J. in *Altara Developments Ltd v. Ventola Ltd* [2005] IEHC 312,….. I refer also to the judgment of Smyth J. in *Sweetman v. Shell E & P Limited* [2006] IEHC 85, and respectively agree with the approach to the exercise of discretion set forth by Smyth J."

56. Peart J. then concluded his judgment thus:

> "In my view an order under s. 160 would be draconian indeed, and a disproportionate hardship, particularly where there are other proceedings awaiting determination which may affect matters in issue in these proceedings. It would certainly be premature to anticipate those conclusions by any order under s. 160 at the present time. If in due course all the pending litigation turns out unfavourably for the respondent, he may be left in a situation whereby the determination that the development is unauthorised remains intact, despite the manner in which it has conducted itself in relation to the development after the first permission was granted. What should happen thereafter in such an event is not something to be speculated about at this stage."

57. It may be observed at this juncture that at least part of the reasoning of Peart J. has been overtaken by subsequent events. While Peart J. considered that the making of any s. 160 order would be premature and disproportionate given that the judicial review proceedings were awaiting determination, it is clear from subsequent events that these proceedings have been all but abandoned.

58. It is, in addition, unfortunate that Peart J. was not informed of the true state of affairs regarding these separate judicial review

proceedings at the date of the hearing, since a conscious decision had been *already* been taken by Kilvinane *prior* to the hearing to have those proceedings adjourned pending the outcome of the s. 160 hearing before Peart J. Given the importance which was attached to this matter, it is, candidly, difficult to understand why Peart J. had not been informed of the true state of affairs during the course of the hearing before him.

Whether Mr. Bailey has the appropriate interest in maintaining these proceedings

59. The planning injunction provided for in s. 160 of the 2000 Act traces its lineage to the original s. 27 of the Local Government (Planning and Development) Act 1976 ("the 1976 Act"). The original s. 27 jurisdiction was designed fundamentally to overcome difficulties associated with the traditional injunction armoury in the environmental context and, specifically, the need to demonstrate that the unauthorised development complained of interfered with some vested legal right (whether in the lands or otherwise) of the party seeking such injunctive relief.

60. While s. 27 of the 1976 Act removed the necessity to demonstrate that some formal legal right of the plaintiff was interfered with, in many other respects the accumulated experience and practice of the courts in traditional injunction cases have nonetheless been grafted on to both the original s. 27 jurisdiction and its statutory successor, namely, the s. 160 jurisdiction. In *Avenue Properties Ltd. v. Farrell Homes Ltd.* [1982] I.L.R.M. 21, 26 Barrington J. pointed out that the breadth of the s. 27 jurisdiction was such that applicants for relief could range from:

> "A crank or busybody with no interest in the matter at one end of the scale to, on the other end of the scale, persons who have suffered real damage through the unauthorised development or who, though they have suffered no damage peculiar to themselves, have brought to the attention of the Court outrageous breaches of the Planning Acts which ought to be restrained in the public interest."

61. This was one of the reasons why Barrington J. concluded that it was "all the more important that the court should have a wide discretion as to when it should and when it should not interfere." He also suggested that the exercise of the court's discretion "should be influenced, in some measure, by the factors which would influence a Court of Equity in deciding to grant or withhold an injunction." The approach of Barrington J. in Avenue Properties has been consistently followed for the last thirty years or more: see, *e.g.*, the judgment of Blayney J. for the Supreme Court in *White v. McInerney Construction Ltd.* [1995] 1 I.L.R.M. 394, 380 where this passage from *Avenue Properties* was expressly approved as an "admirable" statement of the law.

62. Accordingly, factors such as the extent to which an applicant stands affected by the development, the motive for the proceedings and whether any breach of the planning rules was trifling and immaterial are all relevant factors in considering whether or not s. 160 relief should be granted. Thus, for example, if the present proceedings had been brought by an applicant living far distant from Kilvinane or whose real motivation was to thwart the operation of this wind farm for his own economics ends a court would be naturally less likely to grant relief than if the plaintiff lived nearby and sought to prohibit unauthorised development which interfered with the amenities of his or her own property. Any court would likewise be less disposed to grant such s. 160 relief where the breach complained of was purely technical or insubstantial.

63. I should pause to stress that this approach would not involve an examination of the applicant's *locus standi* as such. Of course, every citizen has the right to apply under s. 160 of the 2000 Act and their right to seek relief cannot be excluded ex ante on some jurisdictional ground – as would have happened prior to the enactment of the original s. 27 by the 1976 Act - on the basis that they are not affected by any breach of the planning laws or that no legal right of theirs had been infringed. But if an applicant is not affected by the breach of which he or she complains or if it should transpire that their real motive or objective is for purposes unrelated to planning or environmental considerations, then these factors are relevant to the exercise of discretion by the court in the context of the s. 160 jurisdiction.

64. This was the very point made by McKechnie J. in *Leen v. Aer Rianta c.p.t* [2003] 4 I.R. 394. In that case the applicant objected to a breach of planning conditions attached to a planning permission granted to the then operator of Shannon Airport, Aer Rianta. The applicant was not a local resident and nor was he affected in any way by the breach of the planning permission of which he complained. McKechnie J. observed that he had a "strong suspicion" that one the applicant's motives in bringing this matter before the courts "is related to the use of Shannon Airport by United States of America military personnel". He added ([2003] 4 I.R. 394, 401:

> "Whether or not this is so is, in my view, not relevant to his standing to bring these proceedings [having regard to the language of s. 160 of the 2000 Act]….[T]he motive of the applicant as it impacts on his ability to bring these proceedings is not relevant…His motive is, of course, relevant to the exercise by this court of its discretion when it comes to consider what relief it might grant to him."

65. It is against that background that the question of whether Mr. Bailey has a sufficient interest in maintaining the proceedings may be examined in the context of the *discretionary exercise by the Court of its s. 160 jurisdiction* in the manner contemplated by *Avenue Properties* and the subsequent case-law. Is he affected by the wind farm and what are his reasons for taking these proceedings? These are certainly factors which the High Court considered as part of a general review as to whether it was appropriate to grant relief. These considerations may now be examined in more detail.

66. First, as the above quoted passages show, Peart J. attached some weight to the fact that the Council had not, qua planning authority, decided to take any enforcement action. For my part, I should have thought that this was largely a neutral factor, since the whole object of s. 160 (and its statutory predecessor, s. 27 of the Local Government (Planning and Development Act 1976) is to provide that, in the words of Henchy J. in *Morris v. Garvey* [1983] I.R. 319, 323:

> "We are all, as users or enjoyers of the environment in which we live, given a standing to go to court and to seek an order compelling those who have been given a development permission to carry out the development in accordance with the terms of that permission."

67. If, therefore, the fact that a planning authority elected not to take action in respect of development which was otherwise unlawful was to be a major factor in any assessment of the entitlement of a local resident to seek relief under s. 160 of the 2000 Act, this would tend to undermine the effectiveness of the s. 160 procedure itself.

68. That is not to say that the inaction of the planning authority could never be relevant to any assessment of the relevant discretionary factors. In some other circumstances, the inaction of the planning authority might help to show that the breach complained of was indeed simply trifling or transitory: see, *e.g.*, the judgment of Herbert J. to this effect in *Grimes v. Punchestown Developments Ltd.* [2002] 1 I.L.R.M. 419. Nevertheless, in the generality of cases, the inaction of the planning authority is largely a

neutral factor and it is certainly not one which could deprive an otherwise meritorious applicant of his or her entitlement to obtain s. 160 relief where the unauthorised status of a particular development had been clearly established.

69. Nor can I, with respect, agree with the observations of Peart J. to the effect that this applicant is not a person adversely affected by the operation of the wind farm "to any significant degree". It is true that there are other local residents who would appear to be more directly affected than Mr. Bailey (as the various affidavits filed on behalf of such residents in these proceedings clearly indicate) given that his own house is screened in large measure by woodlands from the noise and shadow flicker generated by the turbines. This, however, does not mean that Mr. Bailey is not affected: indeed, the evidence clearly shows the contrary, as it is not disputed that his enjoyment of his farm and the local countryside is, at least to some degree, affected.

70. In my view, on any analysis of this issue for the purposes of considering the discretionary factors potentially affecting the exercise of the s. 160 jurisdiction, it is sufficient to state that as a neighbour who lives nearby and whose amenities are affected by the operation of the wind farm, Mr. Bailey has a sufficient interest in these proceedings.

71. It is probably not necessary to express any final view on the conclusions of Peart J. to the effect that Mr. Bailey had an objection to the installation of the wind farm *per se* and that this was the real motivation for the proceedings. It should, however, be stated that Mr. Bailey was simply one of seven original objectors in 2001: he was not the only appellant to An Bord Pleanála as the trial judge had stated in error in his judgment.

72. But even if Mr. Bailey had a longstanding objection to the operation of the wind farm, this does not mean that he was not entitled to object to the fact – if it be the case – that the wind farm was operating in a manner which was not authorised by the terms of the 2002 planning permission. The present proceedings were not brought for any ulterior motive on the part of the applicant. The present case cannot, therefore, be compared with cases such *Altara Developments* where the applicant developer sought to invoke the s. 160 proceedings effectively for the purposes of discommoding a rival developer and thereby frustrating that defendant's capacity to complete a housing development which would be in direct competition with the housing development which the applicant company had just brought to bring to the market.

73. Inasmuch, therefore, as the High Court held that for the purposes of the exercise of the discretion conferred by the s. 160 jurisdiction the applicant did not have a sufficient interest in bringing these proceedings or that his motives for doing so might be somehow suspect, I believe that Peart J. was in error.

Is the development unauthorised?

74. The next question to be determined is whether the development at issue in these proceedings is unauthorised, although this is a matter on which the High Court appears to have refrained from offering a concluded view. There is no doubt but that the question of which body – namely, whether An Bord Pleanála or the courts – should determine the question of whether a particular development is unauthorised is one which does not admit of an easy answer. If the courts were to claim the right to determine this question even in s. 160 proceedings it might effectively require the judiciary to pronounce on the question of the planning permits, thus usurping the exclusive role in such matters which the Oireachtas has seen fit to vest in An Bord Pleanála. It might, on the other hand, seem anomalous that the courts should not have the right to pronounce on such questions save in the context of s. 160 proceedings.

75. One way or the other, however, it seems clear from the Supreme Court's decision in *Grianán an Aileach* that the courts enjoy a jurisdiction in s. 160 proceedings to determine that a particular development is unauthorised. This, in any event, is what the very language of s. 160 of the 2000 Act mandates.

76. As I noted in a judgment I delivered as a judge of the High Court, *Wicklow County Council v. Fortune* (No.3) [2013] IEHC 397, a particular difficulty arises where (as in the present case) An Bord Pleanála has already determined that an individual development is not exempted development on a s. 5 reference. In *Fortune (No.3)* I considered that the effect of *Grianán an Aileach* was impliedly to preclude the courts from re-opening this question in s. 160 proceedings where An Bord Pleanála had already pronounced on this question in a s. 5 reference.

77. In my view, however, it is not necessary for this Court in this appeal to determine this rather difficult legal question. I have come to this conclusion because, even if *Fortune (No.3)* was wrongly decided and this Court were indeed free to consider the question of whether a particular development is unauthorised for the purpose of s. 160 proceedings - the prior determination of An Bord Pleanála regarding the question of whether the development constituted exempted development on a s. 5 reference notwithstanding – the evidence plainly shows (as I later hope to show) that the T1, T3 and T4 developments are indeed unauthorised. As I now propose to demonstrate, the turbines which were, in fact, constructed deviate significantly so far as both location and (save in the case of T1) rotor diameter is concerned.

The deviations from the locations specified in the planning permission

78. As I have already stated, it is accepted that the three turbines are each located between 19m. to 20m. distant from the location specified in the 2002 planning permission. While I am prepared to accept that the reason for the change of location was because, as stated by Mr. Draper in his letter to the planning authority on 5th July 2006, this was necessary to give the turbines firmer foundations, this does not mean that the construction of the turbines nearby represented a non-material deviation from the terms of the planning permission.

79. There may well indeed be cases where the construction of a turbine 20m. away from the original location might well not amount to a material breach of the terms of the planning permission. Given, however, that the movement of the turbines in the present case was clearly relevant on planning grounds and also actually or potentially impacted on third parties (such as local neighbours), this is not such a case..

80. A consideration of the case-law on this topic to date suggests that the question of material/non-material deviations from the terms of an existing permission has been approached from a practical and common sense perspective: is the deviation of such materiality that it would realistically impact on the rights or interests of third parties or be such as would affect planning considerations.

81. The first case, *Kenny v. Dublin City Council* [2009] IESC 9, may be regarded as an example of a case where the breach was inconsequential or trivial. In *Kenny* the Supreme Court held – albeit in the context of judicial review rather than s. 160 proceedings – that they admitted non-compliance with a stipulation in a planning permission that a line of trees be located 10m. from the building was, in the circumstances, an "inconsequential discrepancy." In that case all bar 16 of the 275 trees in the tree line complied with the 10m. requirement. Of the 16 non-compliant trees, 14 of them were located 8m. away and 2 were 5m. away. The expert evidence was that it would have been impossible to lay services immediately adjacent to the building had the 10m. requirement been complied

with in every case.

82. The decision of Finnegan J. in *Cork County Council v. Cliftonhall Ltd.* [2001] IEHC 85 represented something of a borderline case. Here permission had been given for the construction of six apartment blocks. The ridge height of one of the blocks was 0.5m. higher than the ridge height of 11.55m. shown on the plans. While the "footprint" of the development had deviated from the plans, the local planning office did not consider this to be material. Finnegan J. said that "in deference to [the Council's] expertise and specialist knowledge" he proposed to regard this deviation as immaterial.

83. So far as the height was concerned, Finnegan J. noted that the deviation was 7% in the case of one of the blocks. The judge held that "with some reluctance" that this was "immaterial in the context of the entire development of six blocks." He added that:

> "In reaching this conclusion I am influenced by the photographs exhibited in the application. Careful consideration of these satisfies me that to reduce the ridge height…even by 1.3m. would not materially alter the effect of the development in terms of visual impact [whether] on the locality in general or the occupiers of houses [on a nearby road.]"

84. The final example is supplied by *Cork County Council v. Slattery Pre-cast Concrete Ltd.* [2008] IEHC 291. In that case the defendant company had obtained permission for a small scale pre-cast concrete production facility over an area of 0.9 acres of the site. Over time the production facility expanded so that it covered 10 acres at the time of the proceedings. There had also been an enormous intensification of user of the lands, going far beyond that which might ever have been anticipated at the time of the grant of permission in 1997. It is scarcely surprising that Clarke J. held that this all represented an unauthorised deviation from the terms of the permission by reason of the expansion of the site and the material change in the use of the lands.

85. So far as the present case is concerned, one is obliged to conclude that a deviation in terms of location of some 19m. to 20m. from that sanctioned by the planning permission is material. It must be borne in mind 43ha. (or some 106 acres) site on which is the wind farm is located, while large, is not huge. There are, moreover, some 28 dwellings in the immediate vicinity of the site. It is quite possible – indeed likely - that the movement of a large turbine 20m. in one direction or another could well have significant impacts in terms of sight lines, noise and shadow flicker for local residents.

86. In arriving at this conclusion I have not overlooked the *Windfarm Development Guidelines* (2006) published by the Department of the Environment, Heritage and Local Government on which the defendant particularly relies and which are set out elsewhere in this judgment. It is true that para. 5.3 of the Guidelines envisages that there should be a degree of flexibility built into planning permissions so as to allow location adjustments of up to 20m. following site-specific geo-technical investigations. But this particular planning permission allowed for no such deviations and, in any event, these Guidelines cannot change the law or impel any contrary conclusion so far as material deviation is concerned.

87. The same reasoning also applies in the context of the diameter size of the turbines. As constructed the two turbines, T3 and T4, each have a rotor diameter of 90m, which is 23m. larger than that sanctioned by the 2002 planning permission, thus very significantly extending the sweep of the rotor circumference. The sweep of the rotor diameters thus rises from 57ð (57 x 3.1416 = 179m.) to 90ð (57 x 3.1416 = 283m.). It is impossible to say that such a large and appreciable increase in the diameter size of the rotors beyond that sanctioned by the planning permission is not material. The potential impact in terms of sightlines (and other visual impacts), noise, shadow flicker and the overall footprint of these larger turbines on third parties is simply too great.

88. I take a different view, however, in the case of the T1 turbine. Applying the approach indicated by Finnegan J. in *Cliftonhall,* I cannot say that the deviation of 1m. in terms of the length of a rotor diameter (58m. as compared with 57m.) is material.

Conclusions

89. In conclusion, therefore, I find myself coerced by this clear evidence to find that the three turbines which were constructed represent unauthorised development having regard to the extent of the deviation from the 2002 planning permission in terms of (i) location and (ii) (save in the case of T1) rotor diameter size. This conclusion accords, in any event, with the conclusions which have already been reached by An Bord Pleanála in the earlier s. 5 determinations.

If the development is unauthorised, should this Court refuse on discretionary grounds to grant an order under s. 160 of the 2000 Act?

90. In view of these conclusions regarding the unauthorised nature of the development, the next question is whether an order under s. 160 should be refused on discretionary grounds. The starting point, however, must be that the applicant is *prima facie* entitled to such relief, subject only to the question of discretion.

91. It may be said immediately that the breaches disclosed here are not *de minimis* or trifling. Unlike, for example, the location of a small number of trees in *Kenny*, the movement of the location of the three turbines of distances of up to 20m. from that specified in the plans for which planning permission was granted has the potential to have appreciable consequences in terms of visual impact and noise for the neighbours living in the immediate vicinity. These are also relevant planning considerations.

92. These changes are permanent and long-lasting. The present case may accordingly be contrasted with cases such as *Grimes v. Punchestown Developments Ltd.* [2002] 1 I.L.R.M. 409 where Herbert J. indicated that even if it had been established that the use on a once-off basis of a racecourse for a popular music concert was an unauthorised use, he would, in any event, have declined to grant such relief on such discretionary grounds, saying ([2002] 1 I.L.R.M. 409, 415):

> "….it would be unjust and disproportionate to insist upon the letter of the law being observed when there is no evidence of any demonstrable or significant or lasting or even transitory damage to or interference with the planning and development of the Punchestown area."

93. In the present case there is clear demonstrable evidence of interference by the turbines with the enjoyment by Mr. Bailey, his family and other local residents of their property and other local amenities. For all the reasons already stated, such interference is, moreover, relevant to planning considerations. All of this re-inforces the case for the making of the appropriate s. 160 orders.

The assurances given by the local authority and whether the defendant acted in good faith

94. Now that the prematurity argument which had been advanced to the High Court has fallen away, the fundamental case concerning the exercise of the discretion as whether to make an order under s. 160 of the 2000 Act which has been put forward by the defendant and Mr. Draper, is that they relied on the assurances given by the planners in the local authority that the deviations from the terms of the permission were not material.

95. It would have to be said that the circumstances in which these assurances were given by the local authority have some curious –

even unsettling – aspects. First, there is the fact that the letter from the Council dated 3rd October 2006 which contains the assurances is dated stamped 18th April 2011. Second, it may be noted when Ms. O'Keeffe, the executive planner attached to the Council who considered the matter in April 2011, noted that the file available to her "did not include correspondence or drawings from the developer submitted to the planning authority on 6th July 2006 regarding this change in location or an increase in the blade length to 40m." Third, the planner who signed the letter of 3rd. October 2006 on behalf of the Council subsequently performed consultancy work on behalf of the defendant in relation to this very issue following his retirement.

96. It is true that there are cases where the bona fides of the developer have been clearly established. A good example is supplied by the Supreme Court's recent decision in *Derrybrien Development Society Ltd. v. Saorgus Energy* [2015] IESC 77. In that case a developer obtained a series of planning permissions for a wind farm at various dates in the late 1990s. In 2008 the Court of Justice held that the grant of permission without subjecting this particular application to an appropriate environmental impact statement amounted to a breach of EU law and that the approach to this general question which the Irish authorities had adopted rested on an incorrect interpretation of the EIA Directives: see Case C-215/06 *Commission v. Ireland* [2008] E.C.R. I-4911 at paras. 94-112.

97. The Supreme Court nevertheless refused on discretionary grounds to grant an order under s. 160 of the 2000 Act. One of these discretionary factors was that the developer had acted bona fide and borne no responsibility for the legal lacuna which the Court of Justice decision had exposed regarding the legal manner in which the relevant EIA Directives had been transposed and subsequently interpreted by the Irish planning authorities. As Denham C.J. put it:

> "There is no doubt of the respondents' *bona fides*. They acted at all time in the belief that they were in accordance with planning permissions granted by Galway County Council. The wind farm has no responsibility for any inadequacy in any planning permission which might be held to exist if this issue were to be decided on this appeal."

98. In the earlier decision of *Altara Developments* an issue arose as to the meaning of a phrase which had been contained in a condition attached to a planning permission which required a certain road development to be completed before the developer could next proceed with the construction of the second phase of a particular development. O'Sullivan J. refused to grant a s. 160 order on discretionary grounds, saying:

> "Most of all I am taking into account that the respondent has proceeded with caution and care in dealing with this development. It had been advised that it was in compliance condition 2(3) even before the serving of the warning notice by the County Council and in response to the service of that warning notice entered negotiations with the local authority.
>
> This is not a case of a developer pushing ahead regardless. On the contrary it has proceeded since November 2004 with the active support and blessing of the planning authority and in the reasonably held opinion that it was not in breach of the planning permission."

99. It is true that in the present case the developer did indeed contact the planning officer and to that extent there is a similarity with the situation in *Altara Developments*. But there the similarity ends.

100. It is inherent in the doctrine of good faith as a general principle of law that any party seeking to avail of that principle should show appropriate regard for the rights of third parties who might reasonably be affected by their actions. There is nothing at all to suggest that either the developer or, for that matter, the Council official in question gave any consideration to this issue. In such circumstances no sensible developer could reasonably suppose that a planning authority could informally sanction such deviations from location and rotor diameter without a formal assessment of the potential planning and environmental impact of these changes and especially their potential effects on third parties.

101. It is obvious that any thing other than trifling changes in terms of the location of the turbines and the size of the diameter of the rotor blades could have major implications for local residents in terms of visual impact, sight lines, noise and shadow flicker. Viewed objectively, therefore, one could not say that any conclusion that the development had been constructed in accordance with the terms of the planning permission or that these admitted deviations were not material was one which, adopting the language of O'Sullivan J. in Altara Developments, a developer could reasonably hold. This was especially so when no consideration whatever was given to the rights of the neighbours who lived in the immediate vicinity of the wind farm as to the potential effects of these changes.

102. This is illustrated by the Supreme Court's decision in *Morris v. Garvey* [1983] I.R. 319. Here the developer had constructed a block of apartments just beside the applicant's residence. The planning permission had required that the gable wall of the apartment building would be nine feet away from the boundary at the front of the applicant's house and eleven feet away from the rear. The evidence established, however, that the gable wall was constructed five feet away from the front and only six feet at the rear. The Supreme Court was later to note on the evidence that the amenities of the applicant's home had been "unlawfully diminished" and that the deviations from the planning permission were apt to produce "unsightly results."

103. In the High Court Costello J. had made an order under s. 27 of the 1976 Act requiring the demolition of the unauthorised structures. This order was upheld by the Supreme Court, despite the fact that an official of the planning authority had expressed the opinion to the developer that the deviation from the permission was not material. As Henchy J. explained ([1983] I.R. 319, 324-325):

> "It is true that an official of the planning department…stated (no doubt in good faith) that he did not look on the unpermitted work as involving any material deviation from the terms of the permission. Having regard to the uncontroverted evidence as to the extent of that deviation and as to its effects (in particular, on the amenities of the applicant's home), Mr. Justice Costello rightly refused to act upon that opinion. If he wished to retain the unpermitted walls, the respondent should have applied for a fresh development permission – thus enabling the applicant, or any member of the public – to raise such objection as might be thought warranted. In such circumstances the opinion of a planning official – no matter how genuinely given – cannot be allowed to defeat the rights of the public and, in particular of a next-door neighbour."

104. In my view, the present case is indistinguishable from Morris v. Garvey. If this Court were to allow the private views expressed by a planning official in correspondence with the defendant regarding the materiality of the deviations from the planning permission to defeat the rights of the applicant, it would tend to undermine a pillar upon which the entire edifice of the planning process was erected, namely, the right of the third party objector. But even more to the point, the reasonableness of any reliance placed on that letter from the official is wholly undermined by the absence of any consideration in that correspondence for the potential impact of any such deviation on the rights of third parties. In the meantime the defendant has also continued to operate the wind farm in a highly profitable manner, even though it has now over three years since An Bord Pleanála has ruled that these developments were

unauthorised. These considerations are sufficient to negative the argument that the defendant acted reasonably and in perfect good faith.

The economic and financial consequences of the making of any s. 160 order
105. There remains for consideration the economic and financial consequences of any order made under s. 160. The appellant has sought orders under s. 160 prohibiting the use of the turbines along with an order requiring the defendant to dismantle the turbines. There is obviously a difference between the orders in terms of their reversibility and I propose to address these issues separately.

Should the court make an order restraining the use of the turbines?
106. There is no doubt but that any order made restraining the use of the turbines would have serious economic consequences for the defendant. But it either must have known or ought to have known for some time that such deviations from the terms of the 2002 planning permission exposed it to the risk of enforcement action. The defendant nonetheless continued to operate in a very profitable fashion, for it emerged during the course of the hearing that the substantial borrowings which it initially took on as part of the capital set up costs have all been repaid.

107. The defendant, moreover, has continued to operate since 2012 in circumstances where it knew that the operation of these turbines was unauthorised. It commenced two sets of judicial review proceedings seeking to challenge the adverse determinations of An Bord Pleanála, but, for reasons already noted, may have been done at least partly for tactical reasons and these proceedings have all been but subsequently abandoned.

108. It is true that there is a public interest in ensuring that alternative, non-carbon based renewable energy sources are brought to the market, but this cannot give this wind farm – or, for that matter, any other wind farm – a licence to breach the planning laws. Nor could it be said that the consequences for third parties in the present case would be remotely as serious as in *Leen*, where McKechnie J. drew attention to the serious economic consequences which would flow for the region and the State if he were to make an order effectively shutting down Shannon Airport by reason of an admitted breach of key conditions in a planning permission.

109. While I acknowledge that any order under s. 160 will have significant economic consequences for the defendant, this cannot fundamentally cut across the right of the court to ensure that the planning laws are upheld. As Gannon J. stated in *Dublin County Council v. Sellwood Quarries Ltd.* [1981] I.L.R.M. 23, 24:

> "An order of the nature sought would have very damaging consequences for the respondent and for those in their employment and for those to whom they are bound in contracts…Nevertheless, I cannot decline to make some form of restraining order unless some alternative course can be devised consistent with the proper implementation of the requirements of the Planning Acts on the part of both parties….."

110. There is, in any event, a public interest in ensuring that the planning laws are adequately enforced and the judicial failure to make mandatory orders in s. 160 proceedings may dilute this effective enforcement and encourage others into thinking that they might profit from their own breaches of the planning laws: see, *e.g.,* the comments of Kearns P. to this effect in *Wicklow County Council v. Kinsella* [2015] IEHC 229 who thought that such a development, were it occur, "would be incredibly destructive" of planning law.

111. I would therefore reject the contention that this Court ought to refuse on discretionary grounds to make the s. 160 orders sought. I would accordingly grant an order restraining the operation and use of the T1, T3 and T4 turbines. I would also propose that the defendant should have liberty to apply to this Court to vacate this order in the event that the Board were to grant an order for substituted consent for the turbines as constructed.

Whether the Court should make an order requiring the defendant to dismantle the turbines?
112. Slightly different considerations come into play insofar as the applicant has sought an order requiring the defendant to dismantle the turbines. An order of this kind would have very serious cost implications which would bear heavily upon the defendant and it would to all intents and purposes have irreversible consequences. That in itself should not be a dispositive consideration in circumstances where the Court was otherwise satisfied that there had been a manifest breach of the planning laws.

113. It must be recalled, however, that An Bord Pleanála has already given the defendant leave to apply for substituted consent within the meaning of s. 177C of the 2000 Act in respect of this wind farm as constructed. As I have already noted, that application to the Board was pending at the date of the hearing before this Court and it may be anticipated that a final decision is some several months away. If the Board were indeed to grant the defendant such substituted consent – and I express no view at all on the merits of any such application – this would have the effect of regularising the planning status of the wind farm as constructed.

114. This Court should, however, finally determine this appeal and not leave any part of its decision dependant on the outcome of the application before the Board. In these circumstances, it seems to me that the fairest and most just order for this Court to make is grant an order requiring the defendant to take all appropriate and necessary steps to dismantle the T1, T3 and T4 turbines. I would, however, place an immediate stay upon the coming into force of such an order to enable the application for substituted consent currently pending before An Bord Pleanála to be determined. To this end I would propose that the parties be heard prior to the finalisation of the precise terms of any such stay.

Conclusions on the exercise of discretion
115. For all of those reasons, therefore, I would reject the contention that this Court ought to refuse on discretionary grounds to make the s. 160 orders sought. I would accordingly grant an order restraining the operation and use of the T1, T3 and T4 turbines with liberty to the defendant to apply to vacate the order if consent is granted by the Board for the turbines as constructed.

116. I would also make an order requiring the dismantling of these three turbines. For the reasons just stated, however, that order will be stayed pending the outcome of the Board's determination upon the defendant's application for substituted consent, with liberty to the defendant to apply to vacate the order if consent is granted by the Board for the turbines as constructed.

117. I would, however, invite the parties to make further submissions on the precise terms of these orders in the light of the findings and analysis contained in this judgment.