Neutral Citation: [2014] IEHC 4

THE HIGH COURT

COMMERICAL

[2013 No. 864 J.R.]

[2013 No. 175 COM]

BETWEEN

VIRIDIAN POWER LIMITED AND HUNTSTOWN POWER COMPANY LIMITED

APPLICANTS

AND

THE COMMISSION FOR ENERGY REGULATION

RESPONDENT

AND

GAS LINK INDEPENDENT SYSTEM OPERATOR LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Brian J. McGovern delivered on the 10th day of January 2014

1. These proceedings are concerned with the legality of two measures:

> (a) a Decision which the Commission for Energy Regulation ("CER") adopted on 21st August, 2013, entitled '*Access Tariffs and the Financing of the Gas Transmission System* (CER/13/191)' ("the Decision") whereby the CER purported to restrict the ability of the applicants (and other shippers on the Irish Gas transmission system) to buy and sell the necessary rights to use the gas transmission system to ship gas; and
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> (b) the '*Commission's Instruction'* issued on 13th December, 2013, whereby the CER issued directions to Gas Link Independent System Operator Ltd. ("Gas Link") to take certain steps to give effect to the decision ("the Directions").

2. The applicant was given leave to apply for judicial review and the hearing of the substantive application has been fixed for 13th May, 2014. In this interlocutory application, the applicants seek:

> (a) a stay on the implementation of the CER's '*Within Day Capacity Direction'* and the Decision insofar as it relates to Within Day Capacity;
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> (b) in the alternative, an injunction restraining the CER from purporting to give effect to or requiring Gas Link to give effect to, the Within Day Capacity Direction (and, insofar as it may appear necessary or appropriate, the Decision insofar as it relates Within Day Capacity); and
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> (c) to the extent necessary, an injunction restraining Gas Link from adopting any amendments to its Code of Operations to give effect to the Within Day Capacity Direction.

3. Bord Gáis Éireann ("BGÉ") owns the Irish gas transmission network which consists of transmission pipes which are used to transport large volumes of natural gas. The notice party, Gas Link, is a wholly owned independent subsidiary of BGÉ and is the operator of the transmission network. BGÉ and Gas Link are remunerated for the ownership and operation of the gas transmission system through the payment of regulated tariffs for the purchase and use of entry capacity to, and exit capacity from, the gas transmission system.

4. Gas capacity that is acquired directly from Gas Link is known as "*Primary Capacity*", the price of which is regulated. Primary capacity can be booked on an Annual, Month Ahead, Day Ahead or Within Day basis. Primary Capacity which is acquired but not needed can be sold on and is then known as "*Secondary Capacity*", the price of which is not regulated.

5. The first named applicant is engaged principally in the business of generating electricity and owns a power station in Finglas, Dublin, known as the 'Huntstown 2' power station. The second named applicant owns another power station in the same area known as 'Huntstown 1' power station. Both applicants hold shipping licences granted by CER which allow them to "*ship*" gas on the transmission network, that is, to use capacity in the transmission network to transport gas for use at their power stations. A single wholesale market for the trading of electricity in Ireland was introduced in 2007.

6. Currently, the applicants, together with other large daily metered customers ("LDM users") can buy Within Day gas capacity at exit which enables them to buy Primary Capacity up to 3.00am on the gas day (which runs from 6.00am to 6.00pm), thus enabling the purchase of Primary Capacity after the Single Energy Market ("SEM") forecasts for dispatching are available and when the applicants are in a position to make an informed decision as to what capacity (if any) they require that day. The applicants claim that the availability of Within Day capacity and the facility of buying Primary Capacity at the exit up to 3.00am on the day enable the applicants to match capacity to demand and to avoid purchasing capacity which they may not need.

7. For the purpose of this application, it is not necessary to go into great detail about the technical issues that will arise at the hearing. The following brief outline of the background will suffice.

8. The CER, acting pursuant to s. 13 of the Gas (Interim) (Regulation) Act 2002 ("the 2002 Act"), introduced two reforms modifying

the structure for recovering from the different categories of users of the gas transmission system in Ireland the revenue required by Gas Link to operate that system. The Decision of the CER was made on 21st August, 2013 (CER/13/191) ("the Decision"). The Decision's objective is to ensure continued revenue for Gas Link to cover its capital investment in the transmission system on a fair and equitable basis against all gas transmission users.

9. The Decision, and corresponding Directions to Gas Link to amend the Code of Operations governing relations between Gas Link and users of the gas transmission system, has two effects. Firstly, the Secondary Transfer Direction prevents certain categories of users (namely, those users, such as the Applicants, who purchase gas transmission capacity in the system from Primary Capacity purchasers, such purchase being of capacity as between different exit points in the system and at lower cost), from shifting the burden of remunerating the costs of their network access onto other parties. Secondly, the Within Day Capacity Direction requires the removal of Within Day sales of short-term capacity. The respondent claims that the reforms were motivated by the fact that the continued presence of these purchasing options would allow certain categories of users, including the Applicants, to avoid committing to primary capacity bookings, again shifting the burden of remunerating the costs of their network access onto other parties.

10. The Decision required that both of these Directions be implemented as soon as practicable in the gas year 2013/2014, together with changes to the 2013/2014 tariff regime, which were put in place pursuant to another CER Decision of 21st August, 2013. The Directions form part of a package of regulatory reforms which fit together and which the CER claims are necessary and are aimed at ensuring a fair and efficient recovery of revenues for Gas Link. The Secondary Capacity Transfer Direction has already been put into effect since 1st October, 2013, and the respondent claims that consumers have already adjusted their purchasing accordingly. The respondent maintains that the anticipated solution to the capacity purchasing problem and its current inequitable effects depends upon the Directions and the 2013/2014 tariff regime being applied together.

11. As this is an application for a stay and/or an injunction pending the hearing of the challenge to the Direction made by the respondent, the parties are in agreement that the principles set out in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] IESC 49, and in *Curust Financial Services Ltd. v. Loewe-Lack-Werk* [1994] 1 I.R. 450, apply.

12. Pending the hearing of this application, the respondent agreed to extend the deadline for the implementation of the Decision and Directions until 4th November, 2013, and later to 6th January, 2014, on which date the Within Day Trading Directions come into force. However, at the hearing of this application, the respondent agreed to postpone the implementation of the Within Day Capacity Direction until today (10th January 2014).

13. In *Okunade*, Clarke J. at para. 9.42 set out the test for a stay in judicial review proceedings as follows:

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

14. The applicants, in their written submissions, state that the following principles can be derived from *Okunade* and from *Dowling v. Minister for Finance* [2013] IESC 37:

> *(a) Does the applicant have an arguable case?*
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> *(b) Where does the greatest risk of injustice lie, appropriate weight being given to:*
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> > *(i) the orderly implementation of measures;*
> >
> > *(ii) any public interest in the orderly operation of the particular scheme in which the measure under challenge was made;*
> >
> > *(iii) 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; and*
> >
> > *(iv) 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 the limited cases, where relevant, are damages available and adequate and is an undertaking furnished?

(d) If the matters do not involve detailed investigation of fact or complex questions of law, what is the strength or weakness of the applicant's case?

15. The respondents to this motion have not attempted to suggest that there is no arguable case raised by the applicants and I approach this matter on the basis that the first test has been satisfied.

16. The applicants claim that if a stay is refused and it is not possible to bid into the Single Energy Market ("SEM") "*overrun costs*" they will suffer irreversible and severe harm which they estimate to be approximately €15m. The respondent says that the question of overrun costs that might be incurred by the applicants is uncertain and that they have not met the test laid down in the *Curust* case where Finlay C.J. at p. 471 held that the applicant would be required, in circumstances where an injunction is sought and financial loss and damage is claimed, to establish, as a matter of probability, that they would suffer the losses claimed were a stay to be refused. The respondent claims that this burden has not been discharged by the applicants.

17. The respondent raises a number of other objections to the application for a stay and/or injunction pending the hearing. In the first place, they say that this is a case raising complex questions of fact and law and it is not possible to make an assessment of the strength of the applicants' case at this interlocutory stage, having regard to the evidence currently before the court. The respondent also takes issue with the applicants' submission that the question of an undertaking as to damages should not be taken into account in this case. The respondent argues that if it is prevented from putting into effect the market reform which it intended, losses will be incurred by other consumers of gas which can be measured in monetary terms and that the respondent has a responsibility to such users. The applicants do not offer any undertaking to make good such direct financial loss which would result from the intervention of a stay insofar as a financial burden will fall on those categories of users who do not or cannot avail of the Within Day Capacity product. In this context, the respondent relies on the remarks of Laffoy J. in *Broadnet v. ODTR* [2000] 3 I.R. 281, where she says at p. 302 :

"It would be patently unfair and unjust to allow the proceedings to continue without the applicant carrying the risk of the loss occasioned thereby, if they are unjustified."

The applicants have informed the court that they are not in a position to give an undertaking as to damages in this application.

18. During the hearing and in the written submissions, an argument was canvassed around the necessity for the respondent to notify the Commission of the European Union of the changes. It seems to me that it is not necessary for me to resolve this issue for the purpose of deciding whether or not to grant the reliefs sought in this motion. Suffice it to say that I am satisfied that the respondent has raised a credible argument that it does not need to notify the Commission and that any steps that it has taken in that regard were taken simply out of an abundance of caution.

19. Finally, the respondent claims that this application should fail because of the delay in bringing the judicial review proceedings.

20. I will deal with the delay point first. On 31st May, 2013, the respondent published a consultation paper giving the applicants a clear indication of the proposal to remove Within Day Capacity purchases at exit. On 14th July, 2013, the applicants submitted a detailed response to the consultation paper in which they set out their case for challenging the respondent's proposal to remove Within Day Capacity purchases at exit. It also attached a summary of an economic report providing an overview of criticisms of the economic analysis underpinning the Decision.

21. On 21st August, 2013, the Decision was published, the effect of which would have been clear and obvious to the applicants. From that date, the applicants were on notice that following the issuing of Directions to the notice party (Gas Link) and consequential amendment to the Code of Operations, both Directions would be implemented "*as soon as practicable in the gas year 2013/14".* On 1st October, 2013, the Secondary Transfer Capacity Direction took effect. On 18th October, 2013, the respondent determined that the Within Day Capacity Direction was to take effect on 26th November, 2013, subsequently being extended to 2nd December, 2013, on the request of certain industry participants. On 25th October, 2013, the applicants' solicitor set out in considerable detail, by way of letter addressed to the respondent, the applicants' case and requested a stay. The respondent replied on 4th November, 2013.

22. It was only on 19th November, 2013, some two days before the expiry of the three-month period for issuing an application for judicial review that the applicants proceeded by *ex parte* motion for leave to apply for judicial review and to have the matter entered in the Commercial List.

23. Having considered the matters outlined in the affidavits put before the court, I conclude that there was unnecessary delay in bringing the application by the applicant. I am not satisfied, however, that the delay is sufficient of itself to refuse the reliefs sought, having regard to the fact that the implementation of the Direction had not taken place at the date of the *ex parte* application to the High Court. However, the delay is such that it is sufficient to weigh in the balance whether or not to grant the reliefs sought in this motion when considered with the other points raised in argument.

24. In an affidavit of Mr. Denis Cagney sworn on 6th December, 2013, on behalf of the respondent, he sets out a number of consequences that would follow the granting of a stay in this matter. He says it would have the following effect:

"(a) Firstly, the significant financial benefits to other users of the gas system and, in particular, to residential customers, by way of ensuring a more equitable distribution of the cost burden of financing the system, and preventing further rises in tariffs, would not be realised.

(b) Secondly, considerable financial and practical inconveniences will result for other such third parties if the reform package is stalled by the grant of a stay from progressing to its complete implementation. This is because the tariffs for 2013/2014 had already been determined on the basis of both Directions taking effect. Therefore, further adjustments will be required to resolve the inevitable revenue recovery shortfall in the short-term.

(c) Thirdly, and relatedly, if a stay is granted, the current inequitable distribution of the burden of providing Gas Link's revenue will continue"

In the event that a stay was granted and subsequently lifted, the respondent would be faced with an almost impossible task of attempting to remedy the situation where additional burdens had been suffered by third party users during the interim period.

25. It is an important part of the respondent's case that the reforms prompting the Decision and Directions were a complete package involving the Within Day Capacity Direction and the Secondary Transfer Capacity Direction, the latter of which has been in effect since 1st October, 2013. They were not to be treated in isolation. The Decision and Directions were aimed at curtailing the significant reduction in primary bookings of capacity on the transmission network by power generators, including the applicants, and large industrial and commercial users. The respondent argues that such users, who have a consumption profile involving peaks and troughs, have been and will continue to favour short-term and flexible capacity products at the expense of primary bookings of capacity on the transmission system. These reductions in Primary Capacity bookings raised a serious regulatory problem which was sought to be addressed by the respondent. The respondent argues that it has an obligation to ensure that the gas network, which has been constructed to meet all gas consumers' requirements, can operate to its fullest capacity.

26. The Decision which is being challenged in these proceedings is one made by the respondent pursuant to s. 13 of the Gas (Interim) Regulation Act 2002. In the *Okunade* case, the court held that, so far as the "*balance of convenience*" test is concerned, appropriate weight should be given to the entitlement of a public authority to carry out its remit and to implement an order or measure which is at least *prima facie* valid, even if arguable grounds are put forward suggesting invalidity. At para. 9. 30 of his judgment, Clarke J. said:

> *"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 a 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. 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 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'.*
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> *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." [Emphasis added]*

27. I accept that the granting of a stay or an interlocutory injunction in respect of a measure adopted pursuant to statue is something that should be done only sparingly by the courts on the basis that a law passed by the Oireachtas enjoys the presumption of constitutionality and regularity.

28. In *Okunade*, Clarke J. stated at para. 9.32:

> *"It is also, in my view, appropriate to take into account the importance to be attached to the operation of a 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."*

He went on to add that, of course, there might be weighty factors that apply on the other side and that 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 and being forced to comply with the challenged measure in circumstances where it may ultimately be found to be unlawful.

29. The applicants argue that if a stay is granted it will preserve the *status quo*. I do not agree. It seems to me that the *status quo* had already been changed when the respondent made the Decision and Directions. The Secondary Capacity Transfer Direction and the Within Day Capacity Direction were intended to be an integrated scheme to regulate the natural gas sector under the 2002 Act, giving effect to Directive 98/34/EC concerning the internal market in natural gas. They were not intended to be implemented as separate steps. I am satisfied that the evidence adduced on affidavit shows that while a significant detriment to the applicants may possibly arise if a stay or injunction is not granted, there is also the possibility of a significant detriment to other gas consumers for whom the respondent is responsible if a stay or injunction is granted and I have to balance these competing interests.

30. The applicants have made out an arguable case that they may suffer losses, but I am not satisfied that they meet the *Curust* test. They do not claim that they are certain to suffer losses. Whether they suffer losses or not is dependant on whether they will be able to recover overrun costs from the SEM electricity pricing mechanism. The applicants concede that these losses may not be suffered if they can bid in overrun costs in the SEM, but they complain that the respondent and its committee (the SEM committee) are refusing to provide any clarity with regard to this matter. The applicants' claim for losses that may be incurred seems to fall somewhat short of establishing the proposition as a matter of probability. They are conditional on a Decision of the SEM committee.

31. I also must have regard to the fact that the respondent claims that not only is it acting pursuant to statute, but also in the public interest.

32. In my view, the applicants have failed to establish that there is a real risk of injustice to them if a stay or injunction is refused. In coming to my decision, I have regard to the delay in bringing this application. The *ex parte* application was brought some six weeks after the Secondary Transfer Direction came into effect. I also have regard to the fact that while the applicants assert that they may suffer loss, they have not met the test in the *Curust* case, and in any event, the respondent has made out a credible case that the potential for loss and damage to the respondent, the users and the public resulting from a stay being granted is both real and substantial. No undertaking as to damages has been offered by the applicants that would ameliorate the situation in the event that a stay was granted, and, ultimately, the actions which are challenged were found to be lawful. Applying the *Okunade* test, it seems to me that the applicants have not met the requirements set out in that case. Furthermore, I do not believe that the applicants have met the test set out in *Dowling v. Minister for Finance* [2013] IESC 37. In assessing "*. . . where the least risk of injustice lies*", I find it impossible to hold that this lies with the granting of the reliefs sought at this interlocutory hearing.

33. I refuse the reliefs sought in this interlocutory motion and will not grant a stay or an injunction pending the hearing of the judicial review application.