**THE HIGH COURT**

**COMMERCIAL**

**[2016 No. 324 J.R.]**

**BETWEEN**

**JOHN CALLAGHAN**

**APPLICANT**

**AND**

**AN BORD PLEANÁLA, IRELAND AND ATTORNEY GENERAL**

**RESPONDENTS**

**AND**

**NORTH MEATH WIND FARM LIMITED AND ELEMENT POWER IRELAND LIMITED**

**NOTICE PARTIES**

**JUDGMENT of Ms. Justice Costello delivered on the 15th day of May, 2017**

1. On the 23rd May, 2016, Binchy J. granted the applicant leave to seek various reliefs by way of judicial review against the respondents. In addition, on that date, he granted the applicant a stay on the decision of the first named respondent (the Board) to designate the proposed development of the notice parties as Strategic Infrastructure Development (SID) within the meaning of s. 37A to L of the Planning and Development Act 2000 (as amended).

2. Following service of the proceedings upon them, the notice parties applied to have the proceedings entered into the Commercial List of the High Court and this was ordered on the 10th June, 2016. On that date, the notice parties sought an order setting aside the stay on the decision of the first named respondent granted by Binchy J. on the 23rd May, 2016.

3. The application was heard by Binchy J. on the 28th and the 29th June, 2016, and he delivered a written judgment on the 21st July, 2016. His order was delivered on 28th July, 2016, and provided: -

> *"It is ordered: -*
>
> *(1) the stay herein granted by order dated the 23rd day of May 2016 on the decision of the First Named Respondent on Application 17.PC0214 the subject matter of the within proceedings be set aside to the extent of enabling the Notice Party to submit a planning application to the First Named Respondent and to permit the first named respondent to process that application in the ordinary way.*
>
> *(2) the said stay remain operative so as to preclude the First Named Respondent from making a decision on any planning application submitted.*
>
> *(3) when the First Named Respondent considers that it is ready to make a decision upon the said planning application it shall notify the Applicant and the Notice Parties and at that point the parties shall have liberty to apply and bring to the Court's attention any specific commercial prejudices that may come to light between the date of delivery of [Binchy J's] judgment and the date upon which they received notification from the Bord that it is ready to make a decision upon the planning application.*
>
> *And the court indicating at this time, the Court's intention that absent any such specific prejudice the aforesaid stay on the delivery of a decision by the Bord should remain in being up until the date of delivery of the decision of the Court of Appeal on the certified point of exceptional public importance."*

4. The application with which I am concerned, is to discharge or vary the order of Binchy J. in the following circumstances.

**Background**

5. The notice parties are engaged in the development of wind farms. Originally, they sough to develop a wind farm at Emlagh, Co. Meath, comprising of 46 wind turbines situate in three clusters ("the Emlagh development"). Prior to submitting that planning application, the Board had designated that development as SID for the purposes of s. 37A of the Planning and Development Act 2000 (as amended).

6. The section made no provision for the involvement of the public in any way in the designation of an application as SID by the Board. The applicant issued judicial review proceedings claiming, among other matters, that this absence of the involvement of the public invalidated the decision. The proceedings were against the same respondents and same notice parties under record number [2014 No. 647 J.R] and were admitted into the Commercial List of the High Court under record number [2014 No. 170 COM].

7. The leave application and the substantive proceedings were dealt with by way of a single combined "*telescoped*" hearing by me. I delivered decision on the 11th June, 2015. I dismissed the claims of the applicant, but I subsequently certified one of the matters raised by the applicant as constituting an issue of exceptional public importance in respect of which I granted leave to appeal. That issue was: -

> *"Is the statutory scheme contained in the Planning and Development (Strategic Infrastructure) Act, 2006 when construed in the light of sections 50(2) and 143 of the Planning and Development Act 2000 such that it is necessary to read into the scheme a right for interested members of the public to be heard prior to An Bord Pleanála reaching an opinion pursuant to s. 37A of the Planning and Development Act 2000?"*
>
> *("the single certified point")*

8. The applicant issued his notice of appeal on the 25th August, 2015, and it was listed for hearing on the 4th October, 2016.

9. On the 20th November, 2015, the Board notified the parties that it intended to give its decision on the application for the Emlagh development. The applicant applied to the Court of Appeal for a stay on the Board's consideration and the decision of the application on the 4th December, 2015 pending the outcome of the appeal on the single certified point. Finlay Geoghegan J. gave judgment refusing to grant a stay on the Board's consideration and decision of the application on the 9th December, 2015.

10. The Supreme Court refused the application for leave to appeal the judgments I gave in the High Court on the 11th June, 2015, on the substantive matter and the 24th July, 2015, on the certification of the single certified point. The Supreme Court further refused an application for leave to appeal from the judgment of the Court of Appeal refusing the stay application on the 9th December, 2015.

11. On the 4th February, 2016, the Board refused the notice parties' application for planning permission for the Emlagh development.

12. The notice parties, therefore, applied for a smaller wind farm development on part of the site comprised in the Emlagh development. This was referred to as the Castletownmoor Wind Farm. It involved 25 rather than 46 wind turbines and was situated in what was in the centre of the three clusters in the original Emlagh development application. ("the Castletownmoor development")

13. On the 11th May, 2016, the Board designated the Castletownmoor development to be Strategic Infrastructure Development. The applicant applied on an ex parte basis for leave to seek judicial review of that decision of the Board of the 11th May, 2016, on grounds which were largely the same as those in the first set of proceedings relating to the Emlagh development.

14. As stated above, Binchy J. heard a two-day application to set aside or vary his orders staying the decision of the Board of the 11th May, 2016. He varied it in the manner set out by order dated the 28th July, 2016.

15. On the 4th October, 2016, the Court of Appeal heard the appeal in relation to the single certified point arising in the Emlagh development proceedings. On the 21st December, 2016, the Court of Appeal dismissed the single certified point. On the 13th March, 2017, the Supreme Court granted the applicant leave to appeal in respect of the single certified point.

16. Meanwhile in these proceedings, the single issue which had not been raised in the Emlagh development proceedings was ruled upon by Haughton J. He refused the application for judicial review on 28th March, 2017. On the 27th April, 2017, he refused to grant a certificate of leave to appeal in respect of that issue.

17. Further to the order of Binchy J. of the 28th July, 2016, the first notice party submitted an application for permission to the Board in respect of the Castletownmoor development. By letter dated the 21st April, 2017, the Board's solicitors notified the parties to these proceedings that it was ready to make a decision on that application for permission. Accordingly, the notice parties brought this application seeking to vary or discharge the stay so as to permit the Board to make its decision on the application submitted for permission in respect of the Castletownmoor development.

**The Jurisdiction of the Court**

18. The first matter for consideration is the scope of the discretion of the court. While all parties were agreed that the court had jurisdiction to hear and determine the motion, the applicant argued that the court was not at large in assessing the application. He said the application had been brought pursuant to the order of Binchy J. who granted the parties liberty to apply. This meant that the court's discretion was circumscribed. It was not a *de novo* hearing of the application to discharge or vary the stay granted. This court is not a Court of Appeal. This was analogous with the principles of *res judicata*.

19. The notice parties argued that the court is not so circumscribed and should hear the application *de novo* and determine it in accordance with the principles set out by Clarke J. in the Supreme Court in *Okunade v. Minister for Justice* [2012] 3 I.R. 152 at p. 193.

**Application is Moot**

20. I have carefully read the judgment of Binchy J. of the 21st July, 2016, and the order of the 28th July, 2016. It is clear to me that the stay granted was to "*remain in being up until the date of delivery of the decision of the Court of Appeal on the certified point of exceptional public importance*".

21. The Court of Appeal delivered its judgment on the 21st December, 2016, dismissing the appeal. It follows that there is, in fact, no stay on the decision, the subject matter of these proceedings. Binchy J's order makes it clear that there is no stay on the delivery of a decision by the Board. The Board is not only free to deliver its decision, but is statutorily obliged to do so as expeditiously as possible.

22. The parties have proceeded on the mistaken belief that the order staying the decision of the Board to designate the proposed development as SID must operate until the determination of the proceedings. Expressly, this is not the case. This is so based on the order and on the judgment which states at para. 33 that the order is pending the decision of the Court of Appeal and:

> *"I consider that the stay upon the delivery of a decision by the Bord upon any planning application received from the notice parties should remain in being up until the date of the delivery of the decision of the Court of Appeal on the certified point of exceptional public importance". (Emphasis added)*

It follows that this application is in fact moot, as there currently is no stay on the decision of the Board the subject of these proceedings. The fact that the Supreme Court gave liberty to appeal the decision of the Court of Appeal does not alter this.

23. Had the applicant wished to extend the stay after the order of the Court of Appeal refusing the appeal, he could have applied to the Supreme Court for a continued stay at the same time as he applied for leave to appeal to the Supreme Court. For reasons which have not been disclosed to the court, it would appear that this did not occur.

**Decision on Jurisdiction**

24. While the following is not, in fact, necessary for the purposes of my decision on the notice of motion, I feel it is appropriate to deal with the arguments advanced in case of appeal.

25. I disagree with the fundamental argument advanced by the applicant in relation to the jurisdiction of the court. The implication of the argument is that there may be one and one only application to vary or vacate a stay granted in a judicial review application

determined on the merits. This is the necessary implication of the applicant's argument that if a stay is granted on an ex parte basis, and is subsequently varied or vacated on terms and the court gives the parties liberty to apply then – absent an appeal – the court subsequently dealing with the matter is confined to issues identified in the original judgment.

26. I do not agree with this submission. There is no reason in principle why this is so. A decision to vacate or vary a stay is not a final decision in the sense of a determination by the court at the end of a full hearing, whether a judicial review or a plenary hearing. If new circumstances arise, it seems to me that a court must consider the issues on the merits at the time the application comes before it. The prior decision may be binding insofar as there were findings of fact which have not changed, but the court, hearing the second application, must be entitled to revisit all issues in the light of the new circumstances. Of course, the second application must be brought bona fide. It must be justified by same significant development of fact or law which has arisen since the first application. The moving party may not artificially create new circumstances by purporting to advance arguments which were open to him at the first hearing but, for whatever reason, were not brought forward at that time. The second hearing must not amount to an abuse of process.

27. In this case, the applicant's proceedings have been heard and determined and he has lost on all points, save for the one that is common to the prior proceedings, the single certified point, which was adjourned to await the outcome of the appeal. Secondly, the Court of Appeal has heard and rejected the appeal in respect of the single certified point. The Supreme Court has agreed to allow the applicant to appeal that decision. No date for the directions in respect of the appeal has yet been given and thus, it is a matter of speculation as to when the appeal may actually be heard and when judgment might be expected to be delivered. Tentatively, it might be reasonable to assume, that no decision will be given for another year on the appeal.

28. This is in marked contrast to the situations that existed before Binchy J. in May, 2016. At that stage, the judicial review proceedings had yet to be heard and determined, the appeal before the Court of Appeal was still pending and it was anticipated that the issue of the validity of the single certified point would be determined by early 2017, i.e. a total delay of approximately seven months. It was not clear whether the Board would be in a position to make a decision on the application for permission before the Court of Appeal could rule on the appeal. The purpose of the stay was to govern any difference between the date when the Board would be in a position to make its decision and the date when the Court of Appeal could do so. Not vice versa. Thus, the stay was in fact limited in time, depending on how long the Board took to consider the application.

29. The Board is now in a position to deliver its decision so the continuation of the stay (if it still applied) operates to delay the notice parties in their application for planning permission. Thus it seems to me that it was reasonable for the notice parties to apply to vary or discharge the stay (if it still applied) at this point. The application ought to be decided on the merits of all the facts as they now exist. The changes may or may not be such as to warrant a variation of the order, but the court ought not to be confined to determining whether or not these were alterations on the facts within the contemplation of the first judge hearing the first application where the first judge quite evidently may not have had any such altered circumstance in mind when make the first order.

30. Secondly, it seems clear to me that Binchy J. envisaged that his order was an interim measure. This is clear from the terms of the order itself and also from the terms of his judgment. At para. 33, he stated: -

> *"Accordingly, I will make the following orders which I consider to be a reasonable via media pending the decision of the Court of Appeal."*

31. Having specified the three points already cited, he continued: -

> *"Without wishing to restrict any of the parties as to the nature of any such application, by this I particularly have in mind that the notice parties shall be at liberty to bring to the attention of the court any specific commercial prejudices that may come to light between now and the date upon which they receive notification from the Bord that it is ready to make a decision upon the planning application. Absent any such specific prejudice however, I consider that the stay upon the delivery of a decision by the Bord upon any planning application received from the notice parties should remain in being up until the date of delivery of the decision of the Court of Appeal on the certified point of exceptional public importance."*

32. It is clear to me that he did not intend that his judgment should govern the period after the date of the delivery of the Court of Appeal. He also expressly stated that he did not wish to restrict any of the parties as to the nature of such an application. This would be inconsistent with a liberty to apply for the purposes of construing an order. This is reinforced by the fact that he indicated that it would not be necessary that any subsequent application to vary the stay should be heard by him. This further reinforces my view that he believed, as do I, that any judge hearing such subsequent application would consider the matter *de novo* in light of whatever fresh evidence was produced to the court. They were not to be confined to specific commercial prejudices that may come to light between now and the date upon which they receive notification from the Board that it was ready to make a decision upon the planning application. He was merely pointing out that this would be particularly germane.

33. Thirdly, it is clear that in reaching a decision of this nature, the court is balancing the position pro tem rather than determining once and for all what is to happen pending the outcome of the proceedings. In this case, Binchy J. clearly considered the estimated time the Court of Appeal would take to dispose of the appeal and the estimated time for the Board to reach its decision on the application for planning permission. It was not clear whether judgment might be given before the Board would be in a position to make a decision on the application for planning permission. As I have already noted, he delivered a judgment on the 21st July, 2016, and anticipated that the Court of Appeal judgment would be delivered in early 2017. Thus, his balance of the interests of the parties has to be viewed in the context of a delay of less than seven months from July, 2016 (taking into account the time required by the Board to consider the application.) What the court is now asked to consider is whether a further, lengthier delay commencing in May 2017, would be just in all the circumstances.

34. The applicant argues that the logic of Binchy J's order applies mutatis mutandis to an appeal to the Supreme Court. I do not accept that this is so because of the fact that it involves a further, lengthier stay. It is undeniable that the notice parties have to bear development costs which can only be recouped if and when the development commences and, presumably, they commence generating income. Development delays are, therefore, clearly at the expense of the notice parties, and if sufficiently grave, may render a project uneconomical. Therefore, the application to vary the stay (if it still applied) ought to be considered *de novo* to do justice to both parties.

35. For these reasons, I am of the opinion that the court is entitled to consider this application *de novo* and is not confined to considering whether the evidence of additional prejudice outlined by the notice parties as having arisen between May, 2016 (when the application was heard by Binchy J.) and May, 2017 (when the application to vary his order came on for hearing before me).

Consideration of the application

36. In *Okunade*, Clarke J. said that the court should consider the following matters: -

> *"(a) the court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so, then;*
>
> *(b) the court should consider where the greatest risk of injustice would lie. In doing so the court should: -*
>
> > *(i) give all appropriate weight to the orderly implementation of measures which were prima facie valid;*
> >
> > *(ii) give such weight as is 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 which arose on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings; but also,*
> >
> > *(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful;*
>
> *(c) the court should, in those limited cases where it was relevant, have regard to whether damages were available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,*
>
> *(d) subject to the issues arising in the judicial review not involving detailed investigation of fact or complex questions of law, the court could place all due weight on the strength or weakness of the applicant's case."*

37. In this case, the critical issue is where the greatest risk of injustice would lie. In assessing the four subparagraphs under (b), Binchy J. observed: -

> *"(i) How will a stay affect the orderly implementation of a measure which is prima facie valid?*
>
> *... The overall delay, therefore, (from the time of the granting of the initial stay on 23rd May, 2016) is likely to be between seven and eight months. In my view, therefore, if the stay is continued, it will impact significantly upon the orderly implementation of an administrative measure, which it may be observed was designed to speed up the planning process for development qualifying as SID.*
>
> *(ii) What is the public interest in the orderly operation of the particular scheme?*
>
> *It is the stated policy of the Oireachtas to pursue the development of renewal (sic) energy and wind power, in particular. Specific objectives have been set for the year 2020. Section 37 of the Act of 2000 was subsequently inserted into that Act, specifically to facilitate the fast tracking of developments deemed to comprise strategic infrastructure. It is clear therefore that there is a public interest in the orderly operation of the scheme.*
>
> *(iii) Are there any additional factors which might heighten the risk to the public interest identified above?*
>
> *The notice parties contend that the Castletownmoor development will meet 2% of the State's renewable energy targets. Even if this figure is not correct, it is likely that the Castletownmoor development will make a significant contribution to those targets."*

38. Each of these factors applies in respect of the motion before me. The only difference is that the delay identified in respect of (i) will be longer. The significance of the impact of the delay has to be seen in the context of the fact that the SID planning process was specifically created to facilitate fast tracking of developments deemed to comprise strategic infrastructure.

39. Turning to the fourth point identified by Clarke J. in considering where the greatest risk of injustice would lie: what would be the consequences for the applicant if the Board is permitted to deliver its decision on the application for planning permission and the applicant ultimately succeeds in respect of his appeal pending before the Supreme Court? The sole consequence for the applicant in that event is that he will have to issue fresh judicial review proceedings with a view to obtaining an order quashing any decision of the Board, if it grants planning permission to the notice parties for the Castletownmoor development. It is, of course, perfectly possible that the Board may not grant planning permission to the notice parties as occurred in the case of Emlagh Farm. Therefore, to that extent, this concern is speculative. However, it is, of course, one possible outcome.

40. However, even if the applicant is correct in this regard, in truth, it does not amount to a very grave prejudice. Both the notice parties and the Board in submissions to the court indicated that, in the event that the Board were to grant the notice parties planning permission and the applicant was to seek judicial review quashing that decision on the grounds described as the single certified point, and in the event that the Supreme Court determined the appeal in favour of the applicant, neither of those parties would contest the right of the applicant to an order quashing the decision to grant planning permission for the Castletownmoor development in the circumstances. The notice parties clearly indicated that this was a commercial risk that they were prepared to take. The Board indicated that obviously it would abide by and apply the decision of the Supreme Court when delivered.

41. It seems to me, therefore, that the position in respect of the applicant remains as it was before Binchy J. when he stated at para. 31 of this judgment: -

> *"Accordingly, the position as regards prejudice to the applicant in the event of the stay being set aside is not materially different to that obtaining when Finlay Geoghegan J. gave her decision on the first application for a stay. The extent of the prejudice that may be suffered by the applicant is that if the Bord issues a planning decision in favour of the notice parties, the applicant will have to issue a second set of judicial review proceedings with a view to quashing that decision, and the applicant is in that position whether the decision of the Bord on any planning application that may be made by*

*the notice parties issues before or after the decision of the Court of Appeal."*

42. The only difference in this case is that the reference to the decision of the Court of Appeal should be a reference to the decision of the Supreme Court.

43. Of course, in this case, the applicant will definitely be required to issue such proceedings before the decision of the Supreme Court, as the Board is in a position to deliver its decision at present (assuming it decides to grant the notice parties planning permission). Thus, he will need to issue the proceedings not knowing if he will be successful before the Supreme Court. There is, therefore, a degree of risk and expenses associated with those proceedings. However, it seems to me that the risk in relation to costs is, in fact, relatively modest. He will incur the costs of drafting and issuing the proceedings. However, he will do so having the comfort of knowing that if he succeeds in the appeal before the Supreme Court, effectively he will have an uncontested application. If he loses, then he will likely lose these costs. But in those circumstances, his costs exposure (if any) to the respondent and notice parties should be relatively minor, particularly in view of the fact that the issues would largely duplicate existing proceedings while his own costs likewise should be modest in view of the fact the issues and drafting will largely duplicate what has gone before.

44. In summary, therefore, I do not believe that the applicant has identified a very grave prejudice in the event that there is no stay on the decision of the Board to designate the Castletownmoor development as SID and it proceeds to issue its decision on the application for planning permission.

45. On the other hand, the notice parties have identified significant commercial risks if the Board is not in a position to deliver its decision on the planning application for the Castletownmoor development until the outcome of the Supreme Court appeal on the single certified point. In summary, the notice parties state that there are many necessary steps which need to be followed prior to the commencement of actual development. and which cannot commence until it is known whether or not the Board has decided to grant the notice parties planning permission and, if so, upon what terms.

(i) It will not be able to apply for authorisation to build a generation station. The notice parties will need to apply pursuant to s. 16 of the Electricity Regulation Act 1999 (as amended), for authorisation from the Commission for Energy Regulation to construct a generation station. Section 16 of the Act provides that an application under s. 16 of the Act must be in accordance with the terms of a notice issued by the Commission. Condition 3 of the notice states that an application shall be accompanied by two copies of the documents and particulars specified in Part II of the Schedule I of the notice. These include the planning permission. It is to be noted that details set out in Part I of the Schedule I are analogous to the details required for an application for planning permission. Para. 19 of Part 1 requires the applicant to: -

> *"give details of all applicable statutory or other consents, permissions or licenses held, applied for or being applied by the applicant, or by affiliates of the applicant, necessary for the construction and operation of the proposed generating station, including planning permission (or exemption from planning permission)".*

The applicant argued that this meant that it would be sufficient to have an application for planning permission pending (as in this case) and it is not necessary to have a grant of planning permission. Therefore, it is said the notice parties' argument based upon s. 16 is simply wrong. This submission appears to be inconsistent with the requirements of Condition 3 which I have quoted above.

(ii) It will not be able to commence necessary pre-commencement negotiations with the planning authority. All permissions for large projects, including wind farms, will include "pre-commencement" conditions which requires certain matters of detail to be agreed between the developer and the planning authority prior to commencement of the development, in line with the principle set out in the grant of planning permission. The development cannot commence until the planning authority has agreed to the detail of those issues. Mr. O'Donovan on behalf of the notice parties stated that, in the experience of the directors of the notice parties, the implementation of the planning conditions takes a considerable period of time after any grant of permission is received.

(iii) It will be delayed in finalising its designs. Once planning permission has been granted in respect of any wind farm development, it is necessary to complete final design prior to commencing any works. Mr. O'Donovan identifies that the ground conditions at the locations of the turbines and civil and electrical engineering works (if permitted) will require further investigation prior to the commencement of the engineering design. He says that there is an approximately seven-month process for the detailed design of the wind farm works. As the parameters of the engineered design are largely set by the planning permission, they cannot be commenced prior to the grant of permission.

(iv) It will be delayed in obtaining approval from Eirgrid plc in relation to the design for a grid connection. Mr. O'Donovan said that in his experience getting the design for the grid connection requires certain elements of the design to be submitted and approved by Eirgrid plc. before subsequent elements of the final design can be progressed. In the past, in relation to similar sized projects this has taken between seven and ten months. This likewise cannot commence until the grant of planning permission has issued.

(v) It will not be able to commence contract negotiations. Mr. O'Donovan says as a matter of practicality the notice parties are precluded from commencing the procurement process until planning permission is granted. He says that the procurement process is detailed and encompasses the following areas: civil and electrical works; turbine specification and procurement (estimated three to six months); and negotiation of turbine delivery, operations and maintenance contracts (which typically take up to six months to negotiate and finalise).

(vi) It will be delayed in seeking finance until all the other matters identified have been resolved. Mr. O'Donovan says that the development will be on a project finance basis which will be subject to an intensive due diligence process by the lender's legal and technical advisers. He says that the due diligence phase of the project cannot commence unless and until all legal issues as to the validity of any planning permission have been determined and all the matters referred to in points (i) to (v) have been progressed or completed. Less weight may be attributable to this point as the applicant correctly pointed out that all issues as to the validity of the planning permission cannot be resolved until the Supreme Court delivers judgment on the pending appeal.

(vii) The notice parties may be disadvantaged by being unable to participate immediately in the proposed new support scheme for renewable energy generation. The Minister for Communications, Energy and Climate Action has stated in Dáil Éireann on 21st March, 2017, that it is expected to introduce a successor scheme to the REFIT 2 support scheme. This will follow on from a public consultation period and an application to the European Union for State Aid clearance during

> 2017. The notice party anticipates that a necessary precondition to availing of the scheme will be a grant of planning permission for the wind farm in question. It is a requirement of the European Union that there be a competitive bidding process and the notice parties are concerned that if there is a delay in the issuing of the grant of planning permission (on the assumption that the decision of the Board is to grant planning permission) they may lose out in this process to other developers who will have the benefit of a grant of planning permission prior to the grant the notice parties will receive following the decision of the Supreme Court on the appeal.

The applicant did not dispute many of these points (other than I have set out). He pointed out that they were vague or hypothetical or otherwise not substantiated.

46. I cannot agree with the applicant. Many of his arguments in this regard were already rejected by Binchy J. in his judgment of the 21st July, 2016. For instance, he accepted that even if the notice parties' evidence that the development will meet 2% of the State's renewable energy targets was incorrect, nonetheless he held it was likely that the Castletownmoor development will make a significant contribution to those targets. Likewise, he held that even if it is true to say that a considerable amount of the funds already invested (approximately €8 million) must relate to the part of the original proposed development (the Emlagh development), which is not proceeding as planning permission was refused by the Board, it must equally be true to say that a considerable portion of the expenditure to date may be attributed to the Castletownmoor application because the original Emlagh application also included a development of wind turbines at Castletownmoor.

47. I agree with all what he stated at para. 29: -

> *"It is self-evident that if, by reason of the continuation of a stay, the notice parties suffer a delay in the processing of their planning application, and are subsequently successful in the proceedings before the Court of Appeal and their planning application, that there will be a period,* ***directly attributable to the stay****, during which they will not be able to avail of any commercial opportunities that arise and/or that they will simply be delayed in getting the project up and running and developing an income stream. … While at this remove it is not possible to put precise figures on any such losses as might arise, or indeed to be certain that they will arise at all, what is clear is that such losses if they did arise would be directly attributable to the imposition of the stay."*

48. In this case of course it is necessary to substitute a delay "in receiving a decision on the application for planning permission" for the reference "to processing of their planning application" and to refer to the proceedings before the Supreme Court rather than the Court of Appeal.

49. What may not have been emphasised to Binchy J., but was emphasised before me, is the fact that the notice parties have carrying costs which involve incurring interest without earning income. Furthermore, it is now certain that the stay alone would be holding up progress on the development, if the Board grants planning permission. It seems to me therefore, that alone is sufficient to establish that a stay will result in additional costs and probably very substantial costs to the notice parties.

50. I do not accept that the objections of the applicant to the grounds advanced by the notice parties in fact provide an answer to their claims that they will suffer prejudice arising from the delay. I believe that they will suffer significant prejudice. On the other hand, the sole prejudice identified and relied upon by the applicant is, when examined closely, relatively minor when balanced with a scale of the prejudice identified by the notice parties.

51. For these reasons, if I were called upon to exercise my discretion to vary or discharge a stay on the decision the subject matter of these proceedings, I would be prepared to discharge the stay on the basis that the greater risk of injustice would lie in staying the Board further in the circumstances of this case.