THE HIGH COURT

[2016 No. 372 MCA]

IN THE MATTER OF THE PLANNING AND

DEVELOPMENT ACTS 2000-2015

AND

IN THE MATTER OF AN APPLICATION PURSUANT

TO SECTION 160 OF THE PLANNING AND DEVELOMENT ACT 2000

BETWEEN

PATRICK DALY

APPLICANT

AND

KILRONAN WINDFARM LIMTED

AND, BY ORDER, DERRYSALLAGH WINDFARM LIMITED

RESPONDENTS

JUDGMENT of Ms. Justice Baker delivered on the 11th day of May, 2017.

1. By notice of motion dated 24th November, 2016 the applicant has sought an order pursuant to s. 160 of the Planning and Development Act 2000 ("the PDA") prohibiting the respondents from carrying out works consisting of the construction of a trench and the laying of underground 38 kV cables to provide a grid connection between a wind farm at Derrysallagh, Co. Sligo to the 110 kV substation at Garvagh Glebe, Co. Leitrim. As will appear later in this judgment the application that cables already laid be removed has been withdrawn.
2. The applicant is a farmer and the registered owner of the lands in Folio SL 18888 Co. Sligo which comprises land on both sides of the public road. The question of the title is the subject matter of plenary proceedings between the parties and will not be dealt with in this judgment.
3. The first respondent, Kilronan Windfarm Limited ("Kilronan") holds the lands the subject of the wind farm development under an agreement for lease made on 27th July, 2015, and the leasehold interest was assigned to the second respondent Derrysallagh Windfarm Limited ("Derrysallagh") on 29th October, 2015. Derrysallagh is now the occupier of the lands.
4. The respondents are the developers of the wind farm in respect of which the first respondent received a grant of planning permission on 26th April, 2013 from Sligo County Council (PL 12/133), for the construction of twelve wind turbines.
5. The primary planning permission was subsequently amended under planning reference PL 13/357 on 22nd March, 2014 by alteration of the permitted noise limits.
6. Condition 3 in the permission contained the following proviso:

> "The permission shall not be construed as any form of consent or agreement to a connection to the national grid or to the routing or nature of any such connection".

7. The planning application was accompanied by an Environmental Impact Statement ("EIS") and Sligo Co. Council completed an Appropriate Assessment ("AA") and an Environmental Impact Assessment ("EIA") in regard to the wind turbine development, but not with regard to the grid connection.
8. No planning permission exists for the construction of the grid connection and the underground cable, which is to pass through three counties, Roscommon, Leitrim and Sligo. In the application for the primary planning permission, the developer anticipated that the grid connection would be by overhead connection to a different substation at Arigna and advised the planning authority of an offer from ESB Networks of a connection to that substation. However, in the events, a grid connection offer was received from ESB Networks for connection to the Garvagh Glebe substation on 29th April, 2015, almost two years from the date on which the planning permission issued. On 2nd December, 2015, after the ESB offer issued, planning permission was received from Leitrim County Council to construct an extension to the existing Garvagh Glebe 110kV substation and other associated works.
9. The applicant had lodged a submission regarding the proposed development on 29th May, 2012 in which he expressed concerns regarding the loss of amenity value, impact on his grazing rights and concerns regarding noise and visual impact.

Section 160 of the PDA

10. The originating motion seeks declaratory and injunctive relief including an order that the respondents should remove that part of the works already constructed at or near the lands of the applicant.
11. S. 160 of the PDA, as amended, provides as follows:

> "160.—(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

(a) that the unauthorised development is not carried out or continued;

> (b) in so far as is practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;
> (c) that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject.

Exempt development?

12. Section 3(1) of the PDA defines development as:

> "… the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land".

13. The laying underground of cable is the carrying out of work under and on land and involves a material change of use and is, therefore, development.

14. The respondents argue that the laying of conduit pipes is exempt from the requirement of planning permission as falling within Class 26 of Part 1 of the second schedule to the Planning and Development Regulations 2001, as amended by the Regulations of 2011, ("the Regulations") which provides as follows:

> "the carrying out by any undertaker authorised to provide an electricity service of development consisting of the laying underground of mains, pipes, cables or other apparatus for the purpose of the undertaking."

15. Derrysallagh has the benefit of an Electricity Generation Licence dated 10th February, 2016 for the generation of electricity from Derrysallagh Windfarm, and an Authorisation to construct a generating station issued by the Commission for Energy Regulation on the same date. Derrysallagh therefore is for present purposes a statutory undertaker and an electricity undertaker within the meaning of the Regulations as it is authorised *inter alia* to transmit and distribute electricity in the State.

16. In general therefore the laying of underground cables is exempt development provided that the development does not come within the category of development which is deemed not to be exempt by virtue of s. 4(4) of the PDA, namely any development in which an EIA or AA is required of the type identified in s. 171A(1) of the Act.

17. Section 4(4) of the PDA (as substituted by the Act of 2011) provides:

> "Notwithstanding paragraphs (a), (i), (ia), and (l) of subsection (1) and any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required."

18. No dispute arises with regard to the characterisation of the grid works as development, and whether the works of development are exempt depends then on the question of whether the works required an EIA/AA.

19. The circumstances in which an EIA or AA is required for a particular development are contained in s. 172 of the PDA, and Article 93 of schedule 5, part 2. para. 3(1) of the Regulations and provision is made for an EIA when a wind farm contains more than five turbines, or in the case of sub-threshold development where the planning authority or the Board determines that the proposed development is likely to have a significant effect on the environment. An underground grid is not an "installation for the harnessing of wind power", but the treatment of the grid works as exempt must be made in the context of recent jurisprudence.

Project splitting

20. The present case involves a consideration in some detail of the judgment of Peart J. in *O'Grianna & Ors. v. An Bord Pleanála* [2014] IEHC 632. Peart J. was giving judgment in an application for judicial review of a decision of Cork County Council, affirmed with variation by An Bord Pleanála, to grant planning permission for the erection of six wind turbines and associated buildings and infrastructure. The permission did not relate to grid connection works and Peart J. held that in carrying out the EIA the Board had erred in failing to have regard to the cumulative effect of the entire development including the grid connection works and that an impermissible "project split" had occurred. Peart J. concluded that the turbine development and the grid connection was "one project, neither being independent of the other" and that it was not legally correct to treat the construction of the turbines as a "stand alone project when in truth it is not". The grid works were an "integral part of the overall development of which the construction of the turbines is the first part", and the environmental impact of those connection works was required to be considered in conjunction with the consideration of the environmental impact of the primary developments.

21. Peart J. held that the project could not, for planning purposes, lawfully be split into two independent parts:

> "The wind turbine development on its own serves no function if it cannot be connected to the national grid. In that way, the connection to the national grid is fundamental to the entire project, and in principle at least the cumulative effect of both must be assessed in order to comply with the Directive."

22. Peart J. concluded, having regard to the requirements of the Directive 2001/92/EU ("the EIA Directive"), the successor of Directive 85/337, that an assessment is required as to whether there was any significant environmental impact from the grid connection development works taken on their own "or cumulatively with the wind turbine development itself".

23. The matter in issue in that case was whether the EIA required to consider the impact of the project as a whole, including the grid works. The present case raises a different question, and where permission exists for the primary development, and where taken alone the grid works are exempt under statute.

24. The planning permission in the present case contains an identical condition relating to the grid connection as was contained in the permission granted by An Bord Pleanála in *O'Grianna & Ors. v. An Bord Pleanála*, by which it was expressly stated not to comprise a permission for the connection to the grid, and Peart J. noted (at para. 29) that that condition did not make the construction of the turbine conditional upon consent being given for the connection to the national grid.

25. Peart J. did not decide the grid works required planning permission, or a separate EIA or AA. Haughton J. in *Sweetman v. An Bord Pleanála & Ors.* [2017] IEHC 46, considered the import of the decision of Peart J. in *O'Grianna & Ors. v. An Bord Pleanála* in circumstances where the question before him was whether the applicant was out of time to bring proceedings seeking judicial review of a decision of An Bord Pleanála under s.5 of the PDA. An Bord Pleanála asserted that it had in fact carried out a cumulative EIA and that the effects of the proposed development taken as a whole were acceptable from the environmental point of view. The applicant argued *inter alia*, that his challenge to the decision of An Bord Pleanála under s. 5 of the PDA could not be out of time as challenge would have been premature pending the determination of An Bord Pleanála on the application for planning permission when the grid connection was not included in the determination under s. 5.

26. At para. 12.2 Haughton J., having noted that Peart J. considered that the connection to the national grid was fundamental to the entire wind farm project, and that "in principle at least the cumulative effect of both must be assessed in order to comply with the Directive", commented as follows:

> "His decision does not go so far as to say that separate EIA / AA of the grid connection must be carried out. Nor does his decision deal with the status of an earlier s.5 declaration of exemption in respect of the grid connection, or the impact of such a declaration on a later application for planning approval."

27. The present case concerns to an extent the question observed by Haughton J. The issue here to be determined is whether it can be said that the works under construction are exempt.

28. Haughton J. correctly noted that the decision in *O'Grianna & Ors. v. An Bord Pleanála* did not address the import of a relevant s.5

declaration, and I turn to consider the argument in the present case regarding the declaration made by Leitrim County Council in relation to the grid works in its functional area.

The applications pursuant to s. 5 of the PDA

29. On 26th February, 2016, the first respondent submitted applications pursuant to s. 5 of the PDA to Leitrim County Council, Roscommon County Council and Sligo County Council for a determination in relation to the laying underground of the overall length of 9.48km of 38kV cable. The Sligo application relates to approximately 5.9km of cable within the townlands of Carrowcashel, Tullynure, Straduff, Glen and Ballynashee, Co. Sligo, of which the subject lands form part.

30. The applications under s. 5 of the PDA were accompanied by an Appropriate Assessment Screening Report and an EIA Screening and Environmental Report. The Screening Reports concluded that the proposed grid development did not fall into the class of development contained in parts 1 or 2 of Schedule 5 of the Regulations, and therefore no requirement for an EIA existed.

31. The applications to Sligo and Roscommon County Councils were withdrawn on 16th March, 2016, following the decision by Roscommon County Council on 14th March, 2016 to refer the questions to An Bord Pleanála for consideration. The affidavit of Denis Calnan sworn on 30th November, 2016 on behalf of the respondents says that the decision to withdraw the applications was made because the respondents were concerned by the length of time which the Board was taking at that particular time in considering such applications.

32. Another application for a s. 5 declaration was lodged with Sligo County Council on 6th October, 2016, in identical terms, but a decision was taken to withdraw that application on the following day, 7th October, 2016, "having regard to the advices received".

33. Leitrim County Council made a declaration pursuant to s. 5 in respect of the grid works proposed in Co. Leitrim on 24th March, 2016 in which is recorded the following conclusion:

> "…. the laying underground of approximately 2.8 km (38 kV) constitutes development and that such development is exempted development."

34. The report from Bernard Greene, senior planner with Leitrim County Council, dated 21st March, 2016 which accompanies the decision, considered the impact of the decision of Peart J. in *O'Grianna & Ors. v. An Bord Pleanála* and expressed the view that "a planning authority need not slavishly adhere to an individual High Court case without giving due consideration to the facts in questions, having regard to the fact that the parent permission has not been challenged or revoked and to the legislation which is in place at the time of decision making".

35. A similar decision was come to by An Bord Pleanála regarding a grid connection in Co. Wexford, RL3408/09/10/11 where the view of the inspector was that, as the permissions for the wind turbines had been granted before the decision in *O'Grianna & Ors. v. An Bord Pleanála*, and as the permissions were valid and beyond challenge, the development of the grid connection was capable of being considered to be planning exempt.

36. That decision, and other decisions to which the respondents refer, including a s. 5 declaration made An Bord Pleanála in similar circumstances in Co. Kilkenny, reference 10RL.3377, do not represent the law insofar as a view is taken by An Bord Pleanála or the planning authority that development of a grid connection was capable of being treated as exempt from the requirement of planning permission if the parent planning permission for the construction of the wind turbines and related works had been granted before the *O'Grianna & Ors. v. An Bord Pleanála* decision.

37. The judgment of Peart J. is declaratory of the law, a principle as old as Blackstone's Commentaries (1766), that the role of the judge was "not delegated to pronounce a new law but to maintain and expand the old one", what came to be called in later commentary the "declaratory nature" of the common law.

38. But as I explained in *Ulster Bank Ireland Limited v. Kavanagh* [2014] IEHC 299:

> "It used to be said that judges did not make law but merely declared the law as it had always been. This proposition is now recognised as overly simplistic and as having evolved to explain the role of the judge who develops the law but yet does not displace the Oireachtas as law maker. The legal fiction developed to reconcile the interpretative interplay of the roles of *stare decisis* on the one hand and the fact that the court applies the law in an individual case and may in so doing have to explain or develop a principle only tangentially dealt with in other authorities, or may have to distinguish it by reference to some others".

39. Whether this means a judicial determination of the meaning of, for example, a statutory requirement is "retrospective", was explained in In *H. v. H.* [2015] IESC 7. Clarke J., delivering the judgment of the Court, said at para. 2.3:

> "There is a sense in which any development in the common law is potentially retrospective. The court, in declaring the common law when a case comes to trial, is thereby applying the law as so declared to events which occurred, by definition, before the case came to trial. Thus, any evolution in common law principles which are determined as a result of a case heard today necessarily involves applying those principles to facts which occurred before that very evolution."

40. In *A. v. Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 I.R. 88 Murray C.J. gave an explanation of the dilemma at p. 115 as follows:

> "Thus, the conventional manner in which the law has been applied in a particular area for many decades may be greatly altered even turned on its head as a result of a particular issue being raised in a particular case at a particular point in time leading to an extension of the law by reference to general principles, the overriding of precedent or the specific interpretation."

41. That a judicial determination does not have "retrospective effect" in every sense was explained by Murray C.J. at p. 117:

> "Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law, such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position."

42. No judicial determination had been made in regard to the grid connection in the present development and accordingly the principles explained by Murray C.J. are not engaged, nor is the principle in *Henderson v. Henderson* (1843) 3 Hare 100. The view expressed by the inspector is incorrect as a matter of law and the decision of Peart J. in *O'Grianna & Ors. v. An Bord Pleanála* is applicable to planning applications where the issue of project splitting is relevant, notwithstanding that there exists an unassailable

permission for the primary development, because an application for judicial review or an appeal would be out of time.
43. The declaration made by Leitrim County Council pursuant to its statutory power under s. 5 of the PDA cannot be regarded as an authoritative determination with regard to the central issue before me as to whether the construction of the grid connection required planning permission, or whether it is as a matter of law correct to describe it as exempt from planning permission on account of falling within Class 26 of the Regulations. The s. 5 declaration was made in respect of different works in a different county, and I consider that the basis on which the declaration was made was erroneous as a matter of law, insofar as it determined the question of exemption without a proper consideration of the effect of the decision of Peart J. in *O'Grianna & Ors. v. An Bord Pleanála*.

Effect of the decision in *O'Grianna & Ors. v. An Bord Pleanála*

44. It is argued by the applicant that as a result of the decision of Peart J. in *O'Grianna & Ors. v. An Bord Pleanála*, a developer of a wind farm project is not safe to apply for planning permission for the construction of the turbines and the works associated with the turbines without agreeing a grid connection with ESB Networks, and that the only permissible way in which a planning application can be made is by application for the whole project to include the grid works. I am not convinced that the matter can be stated in such broad terms, as there may be a number of ways in which an assessment of the entire project can be dealt with by a planning authority. In the present case, however, the planning permission issued two years before the grid connection was agreed and no EIA has been carried out, of either the grid connection itself, or of the whole project to include the turbines, associated works and grid connection works.
45. In the light of the decision of Peart J. in *O'Grianna & Ors. v. An Bord Pleanála*, the grid works must be regarded as an integral part of the project as a whole and the assessment of the grid works is to be made in the context of the entire project, as must the assessment of the application for the turbines and works associated with them. That is not to say that a separate EIA will always be required with regard to the grid works and I adopt the dicta of Haughton J. in his judgment in *Sweetman v. An Bord Pleanála & Ors.* in that regard.
46. However, as the grid works are part of an overall project, and an EIA is required for the overall project, an environmental assessment must be carried out of the entire project, and, therefore, no part of the project, and *ipso facto* no individual part treated as a standalone element, can be exempt from planning. This emerges from the European jurisprudence to which I now turn.

European context

47. The approach of Peart J. to "project splitting" was taken within the context of European case law which I consider supports the proposition for which the present applicant contends, namely that grid connection works cannot be treated as exempt development.
48. Whether a particular development divided into a series of projects or sub-projects can be regarded as impermissible project splitting depends on the facts. That this is so is apparent from the opinion of Advocate General Gulmann in *Bund Naturschutz in Bayern v. Freistaat Bayern* case C – 396/92 [1994] ECR 1 – 13717 where he said:

> "71. The important question in the present connection is not, however, which projects are to be subject to an environmental impact assessment. It is whether, in connection with the environmental impact assessment of the specific project, there is an obligation to take account of the fact that the project forms part of a larger project, which is to be carried out subsequently, and in the affirmative, the extent to which account is to be taken of that fact.
> The subject-matter and content of the environmental impact assessment must be established in the light of the purpose of the directive, which is, at the earliest possible stage in all the technical planning and decision-making processes, to obtain an overview of the effects of the projects on the environment and to have projects designed in such a way that they have the least possible effect on the environment, that purpose entails that as far as practically possible account should also be taken in the environmental impact assessment of any current plans to extend the specific project in hand."

49. He goes on to provide examples:

> "72. For instance, the environmental impact assessment of a project concerning the construction of the first part of a power station should, accordingly, involve the plans to extend the station's capacity fourfold, when the question of whether the power station's site is appropriate is being assessed.
> Similarly, when sections of a planned road link are being constructed, account must be taken, in connection with the environmental impact assessment of the specific projects of the significance of those sections in the linear route to be taken by the rest of the planned road link."

50. In the context of the present case the guiding principle identified by Advocate General Gulmann is that an application must have regard to the purpose of the Directive with the practical effect that any future associated works should in general be included.
51. The ECJ did not consider it necessary to deal with the question in that case and confined its considerations to the determination of the time limits for the transposing into national law of the Directive
52. The matter however, was considered by the ECJ in *Commission v. Spain* Case C-227/01, [2005] Env. L.R. 20, where the question related to the Valencia to Tarragona railway project. The ECJ considered that it was impermissible to consider the part of the project comprising a new by-pass line to be "a mere modification of an existing project", and that "the Directive's obligation could not be allowed to be undermined by the splitting up of such a project into a number of successive shorter sections". At para. 59 of its judgment the Court pointed to the relevant criterion for the implementation of Directive 85/337 as "the significant effect that a particular project is 'likely' to have on the environment".
53. A similar approach is found in the judgment involving a power line running between Austria and Italy in *Umweltanwalt von Kärnten v. Kärntner Landesregierung* Case C-205/08, [2010] Env. L.R. 15 where the ECJ held that the whole project was such that it would require mandatory assessment under the Directive, and that the purpose of the Directive could not be circumvented by splitting a project in order to avoid assessment of its cumulative effect. The Court pointed to a number of decisions already given in which this conclusion was established, including *Commission v. Spain*; *Commission v. United Kingdom*; Case C-508/03 [2006] E.CR 1-3969 and *R. (on the application of Barker) v. Bromley LBC* Case C-290/03 [2006] E.CR 1-3949. It summarised that law as follows at para. 53:

> "moreover, the court has held that the purpose of Directive 85/337 cannot be circumvented by the splitting of projects and that the failure to take account of the cumulative effect of several projects must not mean in practice that they all cease to be covered by the obligation to carry out an assessment, when, taken together, they are likely to have 'significant effects on the environment' within the meaning of Art. 2(1) of Directive 85/337."

54. As a matter of European law the assessment of whether the grid connection works can be treated as exempted development is one that must be considered in the context of a reading that best achieves the aims and objectives of the EIA Directive. I consider that on account of the fact that the grid works cannot be lawfully separated from the project as a whole, that to treat the grid works as exempt fails to give effect to this principle.

Collateral attack on the wind farm permission

55. I am not persuaded by the argument of the respondents that the present application under s. 160 is an impermissible collateral attack on the wind farm permission. That point was considered by Haughton J. in *Sweetman v. An Bord Pleanála & Ors*. The primary planning permission is now incapable of challenge, and the present application is confined to the question of whether the grid connection works are exempted development. The assessment of the environmental impact of the project as a whole is one within the

competence of the planning authority and a number of possible scenarios may evolve, including that Sligo County Council may grant planning permission, carry out an EIA, or determine that a further EIA is required of the project as a whole. My concern is solely the question whether the works are exempt. The primary permission is not under challenge as it contains no particulars whatsoever of the grid works.

Summary on exemption

56. The onus is on the respondents to establish that the grid works are exempted development: see Hogan J. in *Wicklow County Council v. Fortune (No. 1)* [2012] IEHC 406 and McKechnie J. in *South Dublin City Council & Anor. v. Fallowvale Limited* [2005] IEHC 408. The respondents have not shown me that as a matter of law, the grid connection works can be deemed to be exempt.

57. The respondents argue that the judgment of Peart J. in *O'Grianna & Ors. v. An Bord Pleanála* is not on point. Planning permission exists in the present case for the turbine development, and is now exempt from challenge. The decision in *O'Grianna & Ors. v. An Bord Pleanála* does not mean that Peart J. was of the view that planning permission was required for the grid connection merely on account of the fact that it was part of a larger project. However his judgment, it seems to me, carries a necessary implication that because the grid connection is part of the larger project, and if one identified part of that project requires an EIA, the grid connection works cannot be considered to be exempt development, as they are part of a larger development which requires an EIA.

58. As the grid works are part of a development that does require an EIA, the local authority must carry out an environmental assessment in the context of the project as a whole of which the grid connection forms part.

59. In interpreting the provisions of the PDA which permit an exemption in certain circumstances, a court should not come to a conclusion which has the effect that a project can be impermissibly split, albeit that taken alone part of the project could readily be seen as coming within the exemption. The general principle must be that the project must be considered as a whole, and therefore any argument that an exemption can exist is one that cannot be determined without reference to that first principle.

60. Arising from the judgment of Peart J. in *O'Grianna & Ors. v. An Bord Pleanála*, and the European case law, and because the interpretation of the exemptions in the PDA must be given one that is supported by the European context, I do not consider that my decision rests on whether the respondents are correct, that the net import of the Appropriate Assessment Screening Report and the EIA Screening and Environmental Report submitted which show no likely environment impact.

61. The planning authority has not carried out an EIA and the Screening and Environmental Reports prepared by Fehily Timoney Associates on behalf of the first respondent, while they might have supported the consideration by Leitrim County Council which led to its determination under s. 5, and are to be regarded as evidence of a likely environmental impact, they are not a finding of such. The carrying out of an EIA is the function of the planning authority and one which has not yet been engaged.

62. I am not satisfied that the grid works can be characterised as exempt, and the matter of whether an EIA is required is a matter for the Board. This is the approach taken by Peart J. when the matter returned before him, and he delivered a second judgment, [2015] IEHC 248, by which he rejected the argument that the breach could not be cured by remittal to the Board, and did remit, in order that the Board could proceed in whatever way it considered proper having regard to his conclusion.

The relief sought

63. It was accepted in the course of argument that the applicant would no longer pursue application for the restoration of the lands and the removal of the conduits already laid, a prudent concession having regard to the fact that at the time the proceedings were commenced approximately 70% of the cable had already been laid in the relevant location. I propose therefore to consider the application that the respondents would cease the works, and that they be prohibited from carrying out any further works.

64. The applicant relies on my judgment in *McCoy & Anor. v. Shillelagh Quarries Ltd. & Ors.* [2015] IEHC 838 and in particular paras. 62-66 thereof, where I reviewed the factors that might influence the discretion of a court in considering whether to grant an order pursuant to s. 160 of the PDA where European environment factors are in play. At para. 66 I said the following:

> "Thus I consider that the court has discretion, that it must be exercised sparingly, that the imperative of Community law must be respected in the exercise of discretion, and that the court should have as its starting point the fact that a development is unauthorised and that it may not by the exercise of its discretion "tacitly accept" the breach to adopt the terminology of Clarke J. in *Cork County Council v. Slattery Precast Concrete Ltd*."

65. Clarke J. in *Cork County Council v. Slattery Precast Concrete Limited & Ors.* [2008] IEHC 291 favoured a similar approach, and noted that, while the court retained a discretion as to whether it might grant an order under s. 160 where it is established that there has been unauthorised development, that discretion is to be "sparingly exercised" (para. 12.1):

> "At the same time the starting point has to involve recognition that unauthorised development is unlawful and that a court should be slow to tacitly accept the unauthorised nature of a development by giving any undue leeway to the party who has been guilty of the unauthorised development in the first place."

66. Further, the present case engages the imperative to respect Community law in the exercise of discretion and the requirement under Community law for the protection of the environment as mandated by the EIA Directive. The environmental factor is a significant element in this case, and while I accept that the respondents did not act deliberately in a way that ignored the imperative of Community law, and that planning permissions exists for the primary development, their advice and understanding of the law was incorrect, and the respondents were aware of the rejection of "project splitting" by Peart J. in *O'Grianna & Ors. v. An Bord Pleanála*.

67. With these principles in mind, I turn now to consider the relevant discretionary factors.

Factors in the exercise of discretion

68. The respondents rely on a number of discretionary factors identified in the case law, as separately, and taken together, sufficient to deny the applicant relief. In particular, reliance is placed on the factors identified by the Supreme Court in *Derrybrien Development Society Limited v. Saorgus Energy Limited & Ors.* [2015] IESC 77, the relevant ones which may be usefully summarised as follows:

(a) the conduct and motivation of the applicant, including delay;

> (b) the balance of prejudice between the applicant and the respondent, it being said that the applicant suffers no prejudice and the respondent will suffer prejudice;

(c) that the breaches are technical or trivial; and
(d) the public interest.

Discretion: conduct generally and delay

69. The primary argument the respondents make is that the applicant has delayed inordinately in seeking relief, having regard to the extent of cable now laid. The concession by the applicant that he does not seek the removal of the cable deals to some extent with the argument of delay, and the justice of the matter can be dealt with by an order which concerns only the prospective application in regard to future works.

70. The respondents argue that the applicant has an ulterior motive and has shown a lack of candour. The applicant objected to the wind farm development and has sought compensation for damages for inconvenience and alleged loss of grazing rights in other proceedings, and no evidence of likely environmental impact has been adduced by the applicant in this application.

71. The planning permission for the wind farm development will not expire until April, 2023. The concern of the respondents that government grant aid was limited in time is no longer a consideration as the grant aid deadline has been extended. The applicant lives

locally and made submissions raising concerns regarding the amenities to his house and farm as well as concerns over the loss of grazing rights.
72. The applicant says that he became aware in August, 2016 that the construction of access roads into the wind turbine site had commenced, and that his legal and environmental advice had been that the works could not commence until planning permission existed for the development as a whole, including the grid works. Correspondence commenced with the secretary of the first respondent on 17th August, 2016. That letter related to the possible impact on the grazing rights and did not raise any planning, environmental or statutory concerns. The reply from the solicitors for the first respondent came on 12th September, 2016, but again confined itself to the question of the existence of grazing rights.

73. It was not until 28th September, 2016 that an initiating letter was sent by the solicitors for the applicant in which it was said that the works of laying underground cables had commenced without planning permission. An undertaking was sought, and by a letter of 4th October, 2016, the solicitors for the first respondent denied that unauthorised works were being carried out and suggested a meeting.

74. The applicant's solicitors sent a letter on 15th November, 2016, identifying the folio lands of which he is registered owner, and again pointed to the requirement for planning permission, an EIA or an AA. A formal threat to commence an application for a planning injunction under s. 160 was made.
75. A reply was received on the following day in which the solicitors for the respondents *inter alia* confirmed that Kilronan had the benefit of a road opening licence from Sligo County Council to carry out the relevant works on the public road, including the public road "outside" the folio lands of the applicant and that as a "road" for the purposes of the Road Act 1993 includes the grass margin on which most of the works were being carried out, the works were authorised and could not constitute a trespass. An offer was made to reinstate the grass verge to the satisfaction of Sligo County Council. It was said that, as the works had commenced before 4th October, 2016, the works were substantially completed and that the applicant's delay would prevent the grant of injunctive relief.

76. In the meantime, Sligo County Council sent a warning letter of 1st November, 2016, issued pursuant to s. 152 of the PDA in regard *inter alia* to the laying of the cables and conduits. It seems that no further steps have been taken by Sligo County Council.

77. Application for an injunction was sought by notice of motion issued on 24th November, 2016, returnable for 30th November, 2016.
78. The chronology on which the respondents rely is as follows:

- Works commenced on 12th September, 2016, and
- The applicant was aware of the works at the latest on 28th September, 2016, the date of the initiating letter.
- A period of eight weeks passed before the motion issued.

79. I consider that it was reasonable for the applicant to delay application for an order under s. 160 once he knew that the local authority had issued a warning letter, as he could have expected a full resolution of his environmental concerns through the Council engagement. Furthermore, I accept his evidence that it was not until 15th November, 2016, that the development works commenced at or near the boundary of his lands. I reject the suggestion that I would concern myself with the motivation of the applicant, and that he is not so much concerned with environmental questions but with his own interest arising from his grazing rights and the fact that his objection to the parent planning permission was not sustained. He is a citizen exercising a statutory right in regard to the works with which the local authority has expressed concerns.
80. The applicant has at all material times opposed the project, and has commenced proceedings seeking declaratory relief with regard to, *inter alia* his claim of the loss of, or interference to, his grazing rights. I do not accept that there is any significant delay, and delay must be considered in the context of whether it was reasonable of the applicant to negotiate, as he clearly did, and to await consideration by Sligo County Council following service by it of a warning letter.
81. Laches and delays are always a factor in an application for an injunction, because of the fact that a party may, on account of the delay or acquiescence of another, have engaged in actions which are either irrevocable or which are costly to reverse. In the instant case no specific prejudice would be caused to these respondents were the works not to conclude pending further determination by Sligo County Council regarding the planning status of the grid works. At the present time no works of any substance have been carried out on the wind farm project itself, and the timeframe for the relevant Refit grant aid has been extended.
82. In the High Court in *Sweetman v. Shell E&P Ireland* [2006] IEHC 85, [2007] 3 I.R. 13 Smyth J. held that it would exercise its discretion to grant relief on account of hardship because the delay:

> "has had the effect of very significantly increasing the financial loss that would be suffered if an order under s. 160 had the effect of delaying the completion of the development …." (para. 67)

83. These circumstances are not operative in the present case.
84. I am not satisfied that the conduct of the applicant should prevent the grant of the limited form of injunctive relief now sought.

The road opening licences: A discretionary factor

85. The question of the ownership of the road became a matter of some dispute in the course of the hearing. The respondents rely on the fact that the road is a public road and that a road opening licence exists in respect of the works, as sufficient evidence, not in regard to the planning status of the works, but as a matter to which regard should be had in the exercise of discretion under section 160.
86. Sligo County Council granted a licence pursuant to the Roads Act 1993 ("the Act of 1993") for a "road opening licence" under registration 2016 SO 0054 in respect of the works for two periods, 13th June to 13th September, 2016, and thereafter from 13th September, 2016 to 31st December, 2016. Similar licences were granted by Leitrim and Roscommon County Councils. In each case, the licence issued to the predecessor in title of Derrysallagh but nothing turns on that fact for the purposes of the present application. The licence permitted works on the public road subject to detailed conditions for reinstatement and made provision for separation distances with existing pipes and cables and other similar conditions.
87. The subject lands form part of the public road in respect which the road opening licence was granted, and the respondents argue that by virtue of the granting of the road opening licence, they are "thereby authorised to carry out the construction of the said grid connection within the public road" (para. 6 of second affidavit of Denis Calnan sworn 15th December, 2016).
88. The applicant's folio lands lie on either side of the roadway, and in general ownership of folio lands abutting the public road includes ownership of the surface of the road to the midpoint.
89. It is accepted that the road is a public road within the meaning of s. 2(1) of the Act of 1993 which defines a public road as:

> "a road over which a public right of way exists and the responsibility for the maintenance of which lies on a road authority."

90. Section 13 of that Act provides the duty and power of the local authority to maintain and construct public roads, the provision for

the so called "taking in charge" of roads.
91. The local authority has, by virtue of taking a road in charge, assumed liability and power to maintain the road but the title does not thereby vest. Butler, *Keane on Local Government* (2nd Edition, 2003) at p. 84 explains the matter as follows:

> "At common law everything between the fences including the footpaths, cycle tracks and grass margins constitutes the public road, unless there is evidence to the contrary. Unless their land has been acquired for the purposes of building the road, the owner of the land remains the owner of the soil and the space above subject to the public use of the road. This was defined in ancient times as follows:
>
> > 'The King has nothing but the passage for himself and his people, but the freehold and all the profits belong to the owner of the soil.' (One Roll.ABR.392)
>
> At common law the presumption is that the owner of the land beside the road is the owner of the soil to the centre of the road. The owner of the soil is entitled to the produce of the land, including the trees and grass growing on it."

92. It is an offence to excavate a public road without the consent of the local authority, and the road opening licence granted by Sligo County Council is given pursuant to the statutory power and subject to conditions, restrictions or requirements to which the same may be made. The road opening licences are granted pursuant to s. 13(10)(b) of the Act of 1993 as follows:

> "(b) A consent under paragraph (a) may be given by the road authority subject to such conditions, restrictions or requirements as it thinks fit and any person who fails to comply with such conditions, restrictions or requirements shall be guilty of an offence."

93. The granting of a road opening licence displaces the provisions of s. 13(10) (a)(iii) that it is an offence to excavate the road without consent, but a road opening licence does not confer a right or interest in the soil, as the purpose of the licence is to provide consent for an action which would otherwise be an offence under the Act.
94. In *McKeever v. Hay & Ors.* [2008] IEHC 145, Feeney J. held that the laying of pipes across the verge of a public road and the entry onto the lands in the absence of consent amounted to a trespass, and the placing of water pipes thereon resulted in a continuing trespass, notwithstanding that the pipes were being laid on behalf of Donegal County Council.
95. The grass verge is *prima facie* the property of the applicant, and no consent to enter has been given. Thus, *prima facie*, there is a trespass, and the road opening licence does not of itself amount to authorisation or permission to enter upon private land.
96. The applicant further argues that my discretion is engaged by the fact that the respondents do not have a licence pursuant to s. 254 of the PDA, the relevant part of which provides as follows:

> "(1) Subject to subsection (2), a person shall not erect, construct, place or maintain—
> (g) any other appliance, apparatus or structure, which may be prescribed as requiring a licence under this section, on, under, over or along a public road save in accordance with a licence granted by a planning authority under this section."

97. No such permission or licence exists in the present case and the applicant argues that the respondents are therefore *prima facie* guilty of a criminal offence.
98. However, it is accepted that the respondents are a statutory undertaker as defined by s. 2(1) of the PDA, being a body authorised to provide or carry out works for the provision of electricity under s. 2(1)(b), and hold a licence or "instrument", to use the language of s. 2(1), from the Commission for Energy Regulation pursuant to s. 16 of the Electricity Regulation Act 1999. In those circumstances I accept the argument of the respondents that the class of works engaged by them on the roadway the subject matter of the present application is one to which s. 254(2) provides an exemption from the requirements of s. 254(1) namely:
"(2) This section shall not apply to the following—

> (c) the erection, construction, placing or maintenance under a public road of a cable, wire or pipeline by a statutory undertaker."

99. Further, ss. 51 and 52 of the Electricity Supply Act 1957 ("the Act of 1957"), as amended, and s. 48 of the Act of 1999, in certain circumstances give power to local authorities and other authorities to interfere with public roads. Butler at p. 57 of his text suggests that the power of a local authority may include the power "to interfere with the rights of adjacent property owners" even without provision for compensation. For present purposes, I do not consider it necessary to decide if the provisions of the Act of 1957 or of the Act of 1999 are to be read as including a power of those authorised by a licence from a local authority to enter upon private roads, and I am prepared to accept that such proposition is at least arguable.
100. Insofar as the question of whether there was a trespass engages my discretion for the purposes of s. 160 of the PDA, the applicant has sufficiently identified the legal basis on which he makes this challenge and which he argues that the respondents have entered these lands without either planning permission, permission from him, or a statutory power so enabling them. Therefore, I do not accept that if there is a breach of the requirements of planning law, the breach is trivial in that the respondents were otherwise authorised to enter upon the lands and lay the conduits. The existence of a statutory licence or authorisation under the relevant statutory schemes cannot displace the requirement to obtain planning permission, but is a factor in favour of the respondents who cannot be said to have wholly disregarded the necessary other statutory requirements.

Discretion: the public interest

101. There are a number of public interests engaged in the present case. One coincides with the interest under Community law, the interest of the public in preserving what is recognised as being the significant amenity value of the subject lands in an isolated area of exceptional public beauty. Having regard to the prudent concession by the applicant that he will not seek the removal of the conduits already laid, the public interest in not being further inconvenienced by further road works on the site has been adequately dealt with.
102. I do not accept that what has occurred is a technical or trivial breach. It might in certain circumstances be such, were the issues solely related to the carrying out of works on the public road. However, the issue engages questions of environmental protection and the need, in the light of the judgment of Peart J. in *O'Grianna & Ors. v. An Bord Pleanála,* to have regard to the environmental framework of a wind farm project as a whole. Therefore, while I accept that no specific individual environmental factors have been identified by the expert witness who gave evidence on affidavit on behalf of the applicant, because the grid connection must be considered as part of the overall project, and as the overall project is one of significant potential for environmental damage, a description of the breach as being trivial, minor or technical fails to reflect the broader environmental context in which this application was brought. The assessment of the environmental impact is a matter for the planning authority.

Conclusion

103. For these reasons, and weighing the prejudice likely to be suffered by the respondents, the fact that the Refit grant time limits have been extended, and that the primary works are not yet commenced, I propose making a limited order prohibiting the continuation of the grid construction and laying works, but no order that the works already completed be removed or that the lands be restored.