

THE HIGH COURT**Record Number: 2012 No. 166 MCA****Between****William Bailey****Applicant****And****Kilvinane Wind Farm Limited****Respondent****Judgment of Mr Justice Michael Peart delivered on the 27th day of September 2013:**

1. In these proceedings the applicant, who is not legally represented, seeks a mandatory injunction pursuant to s. 160 of the Planning and Development Acts 2000 - 2011 requiring the respondent to cease operating a wind farm on its lands, to remove it and reinstate the lands on which the development has been constructed, on the basis that it constitutes unlawful development. While a planning permission was granted to the respondent in 2002 by Cork County Council, the applicant contends that the wind turbines on the wind farm have been erected in contravention of that planning permission. He is fortified in that view by a certain decision of An Bord Pleanála ("the Board") obtained on foot of a s. 5 reference made on appeal to the Board by neighbours of the applicant, Mr and Mrs O'Brien, which I shall refer to in some more detail in due course. I shall set out a brief chronology of events leading up to the present application.

Background:

2. On 28th February 2001 the respondent applied for planning permission for 5 wind turbines to be constructed on lands owned by Leonard Draper, who is a director of Kilfinane Wind and rotor span of 57 metres, giving a total height of 93.5 metres. According to the respondent, the application was indicative only in relation to the type of turbine to be used.

3. That application was granted by the planning authority, but the decision was appealed to the Board, which in turn granted planning permission for 4 turbines by Decision dated 19th July 2002:

4. In March 2003 the respondent wrote to Cork County Council to inquire if the blade length of the turbines could be increased, resulting in a total height of 100 metres. The proposal was that the blade length on each turbine would increase from 28.5 metres to 35 metres. A wire frame drawing accompanying the request in fact showed a proposed hub height of 110 metres.

5. On the 23 May 2003 the Cork County Council wrote confirming that there was no objection to the proposed blade length increase.

6. There was a delay in the commencement of construction because, according to Mr Draper, a connection to the national grid did not become available until 2006. He says that by the time the respondent came to acquire turbines for the commencement of this project in 2005 the turbine models available differed from those which had been available when planning permission was applied for in 2003. Accordingly, on 10th August 2005 the respondent wrote to Cork County Council seeking approval for a modification in the turbines from those requested in 2003 to turbines of lower hub height (65 metres down to 60 metres), but increased blade length (35 metres to 40 metres). This would result in the turbines being the same height of 100 metres as proposed in 2003, but lower than the 110 metres indicated by the wire frame drawings just referred to. The County Council again stated in reply that they had no objection to the proposed alterations.

7. According to the respondent, when construction commenced on the site certain problems were encountered in relation to suitable ground conditions for the erection of the turbines. To address those difficulties and to satisfy the requirements and specifications of supplier of the turbines, the respondent wrote again to the County Council and asked what, if any, tolerance there was in relation to moving the site of the turbines somewhat from the precise locations shown on the grid-coordinates which were submitted with the planning application. The County Council stated that a tolerance of 20 metres from the original positions would be considered acceptable.

8. In the event 3 only of the 4 turbines for which planning permission was granted were constructed.

9. According to Mr Draper, turbine No. 1 ("T1") is smaller than that allowed in the planning permission since it has a reduced hub height of 55 metres instead of 65 metres, and a very slightly larger rotor span of 58 metres instead of 57 metres. Turbines T3 and T4 have a hub height of 60 metres and a rotor span of 80 metres.

10. On 5th July 2006 the exact grid coordinates of these turbines were furnished to the County Council, and once again the respondent sought confirmation that all was in order. On 6th July 2006 the County Council replied to confirm that it was happy with the grid locations and with the hub heights and blade lengths.

11. In October 2006 the wind farm was connected to the national grid, and continued in operation for several years without complaint from any party, either in relation to location, the size and scale of the turbines or the manner in which the wind farm operated, including noise.

12. On 12th November 2010, the respondent lodged a new planning application to permit it to replace T1 and T2 and to construct a further turbine (T5). This application has Planning Ref. 10/781.

13. In my opening paragraph I mentioned briefly a Section 5 reference by a Mr and Mrs O'Brien. This refers to a reference to the County Council under Section 5 which was lodged on 29th April 2011 by Patrick and Claire O'Brien. They referred to the as-built descriptions of the turbines in this new application 10/781, compared to the dimensions permitted under the original planning permission (01/980), and sought a declaration from Cork County Council pursuant to Section 5 as to whether or not the erection of

the turbines (as built) was or was not development, and whether it was exempt development.

14. On 26th May 2011 the County Council notified the respondent, and presumably Mr and Mrs O'Brien, of its decision that the erection of the turbines was considered to be development, but that the modifications in relation to the turbines were not considered to be material, and therefore constituted exempted development. This decision was appealed to An Bord Pleanála in June 2011 by Mr and Mrs O'Brien. The respondent and the present applicant, William Bailey, submitted observations and submissions. The view of the Inspector was apparently that the materiality of any deviation from the planning permission was not a matter for An Bord Pleanála.

15. However, by its Decision on the 23rd December 2011 the Board decided that the deviations did not come within the scope of the permission granted, and that the development as constructed was development, and not exempted development. The respondent has instituted judicial review proceedings in respect of that decision, in which it is argued, inter alia, that the Board exceeded its jurisdiction by, in effect, determining that the development was unauthorised, and also that the Board failed to give any reason for its decision. Those proceedings have not been concluded by the time this matter came on for hearing before me.

16. On 7th November 2011 a further planning application was lodged by the respondent - Planning Ref. 11/676 in order to permit the respondent to replace turbines T3 and T4.

17. Ultimately on 8th November 2012, both of the said planning applications, namely 10/781 and 11/676 were refused by An Bord Pleanála. The inspector had apparently recommended refusal on the basis that the development was unauthorised development, even though he considered that as far as the merits were concerned the applications were acceptable, save as regards 'wind-take'. The Board agreed that it was precluded from granting the applications, but, according to the respondent, even though it seemed to agree with the inspector's views as to the merits of the applications, it refused on the merits as well, and even though it disagreed with its inspector in relation to the wind-take issue.

18. The respondent decided that it would seek leave to judicially review these refusals by the Board, and on 17th December 2012 leave was granted by the High Court. The decisions are challenged on the basis, inter alia, that the Board erred in concluding that it was precluded from granting the permissions for the new development, and also that the Board had offered no reasons for deviating from the views of the Inspector as to the merits of the applications, and seemed in fact to be mistakenly of the view that it had agreed with the inspector. Those applications for judicial review have not been determined by the time the present application came on for hearing before me.

19. On 14th May 2012 the present applicant, William Bailey, commenced these proceedings under section 160 of the Planning & Development Acts, wherein he seeks the cessation of the development at the wind-farm, the removal of three turbines and the reinstatement of the lands.

20. The applicant and his family have lived in their present family home for the past 20 years or so, which is approximately 1 kilometre from the respondent's wind farm.

21. He says in his first affidavit that the 3 turbines which were erected on foot of planning permission 01/980 have been erected in breach of the conditions of that permission in as much as they are located at locations which differ from those shown in that application, and have blade lengths which are longer than permitted.

22. He says that it was in January 2011 that he became aware for the first time of the possibility that the development was not built in accordance with the permission granted, when he looked into the respondent's second application for permission (10/781). That was the first time he became aware of possibility that there had been deviations from the first permission, and he believes that no other local resident became aware of this possibility before that date.

23. When he looked at the planning file for application 10/781 he could find no reference to the planning authority having allowed any amendment or alteration to the location of the turbines or the alteration to the permitted blade length. His view in any event would be that the planning authority has no power to allow those alterations or deviations, which would have the effect of altering the decision of An Bord Pleanála. He says also that he has found no evidence that the planning authority undertook any assessment of the desirability of the development as constructed on the local residents, or even notified them or any public representatives of the departure from the conditions specified by An Bord Pleanála, or took any steps to ensure any public notification.

24. The applicant in this affidavit expresses great concern over the provenance of a letter dated 3rd October 2006 which he discovered on the planning file 10/781. That concern arises from the fact that the letter on the file is date-stamped 18th April 2011, yet it purports to be in response to a letter dated 6th July 2006. That concern and others which he has are extensively set forth in paragraph 17 and its sub-paragraph in this first grounding affidavit.

25. The applicant believes from his own investigations that the development is unauthorised development within the meaning of the Planning Acts.

26. He acknowledges in this affidavit that this development does not impact greatly on his own home as there are intervening woodlands between his property and the wind farm. However, he says that it impinges on his enjoyment of his surrounding farmland and his enjoyment of the rural neighbourhood generally. The fact that it causes upset and distress to some of his neighbours is something which also concerns him greatly. It is notable that it is he alone who is the applicant in these proceedings, and that while some neighbours have sworn affidavits broadly supporting the applicant's case and arguments, they are not themselves parties to the proceedings. He does not represent those neighbours. These proceedings are proceedings brought on his own behalf. I mention that in passing, given his reference to his home not being affected by the development as such, given the fact that there is forestry between his house and the wind farm.

27. Leonard Draper of the respondent company has stated in his first replying affidavit that the applicant seems to be relying on a nuisance being suffered by his neighbours rather than by himself. He refers to the fact that while some of those neighbours have sworn affidavits in support of the applicant's proceedings, those affidavits were sworn about a year prior to the commencement of these proceedings. He notes also that none of those deponents lodged an appeal to An Bord Pleanála in relation to the applicant's planning application 10/781 for 2 additional turbines.

28. Mr Draper makes the point additionally that the deponents who are supportive of the applicant's application purport to complain about the wind farm development itself, even though it is clear that a permission was granted in 2002 after a full and proper planning process, and that the only issue at the moment is whether or not the turbines have been erected in compliance with that permission.

29. Mr Draper does not believe that the turbines as built are significantly larger than permitted. He says that the dimensions of the turbines which are in situ was determined by the availability of particular turbines and the standards prescribed, and he makes the point that in any event the locations and dimensions were submitted in advance to Cork County Council so that there would be no problem raised afterwards in relation to any deviation from the permission granted. He believes that the agreement by the County Council to the minor deviations as to location and dimensions was an entirely appropriate exercise of the flexibility which is afforded to the planning authority in and about the construction of the development.

30. He submits also that the fact that these deviations are very minor is manifest from the fact that the development was operating for some five years before the applicant or anybody else in the immediate vicinity notified any complaint in that regard. He suggests that the alterations are of such insignificance in relation to the overall scale of the development as not to have been even noticed by those living in that vicinity.

31. Two further affidavits were filed by each deponent, in which neither can agree with much of what the other says. That is not surprising given their respective interests in this matter. It is inevitable that there will be charge and counter-charge, and unsurprising that neither will give ground. I do not propose to set out that charge and counter-charge in detail. The issues between the parties are clearly set forth in all those affidavits, and many of them are not directly relevant to the issues which I have to decide.

32. Whatever about events since 2002 in relation to the further applications for planning permission, and the Section 5 reference by Mr and Mrs O'Brien, and the various judicial review cases that are ongoing as recorded above, the fact remains that a planning permission granted on foot of application 01/980 has existed at all material times. It has been the subject of two renewals since it was granted.

33. The issue raised by the present proceedings is whether the 3 turbines as erected and constructed under that planning permission (which permitted 4 turbines) have or have not been constructed in accordance with that planning permission by reference to their size and location, and whether they should now be dismantled and removed by order of this Court at the suit of the applicant.

34. The respondent contends that the deviations from the planning permission are minor and immaterial, and permitted by Cork County Council, and that the turbines are substantially in accordance with the permission granted, and are therefore not unauthorised development. It is submitted that they are not outside the scope of the permission granted. The respondent submits that the applicant has not discharged the onus of proof upon him to demonstrate that there has been a material deviation from the permitted development resulting from the as built development. In his affidavits the applicant has attempted to demonstrate this.

35. The respondent emphasises the fact that it obtained a planning permission, and that prior to commencement it contacted the planning authority to inquire what variations would be acceptable. It was confirmed by the planning authority that it was acceptable to use the proposed turbines which were other than those shown in the original application. It was further confirmed to the respondent, upon request made in this regard, that it would be acceptable to locate the turbines up to 20 metres away from the original location shown on the planning application, and the respondent refers to the fact that it was not until such confirmation was received that the respondent proceeded to erect the turbines away from the original sites.

36. The respondent acknowledges that at a later stage, and in separate decisions, a view has been taken by the Board that the changes are not immaterial, but the applicant refers to the judicial review proceedings and submits that that particular issue was not in fact before the Board when it expressed its view.

37. The respondent also submits that the applicant has not discharged the onus of establishing that the development as constructed differs materially from that permitted.

38. The respondent also submits that the Court has a discretion in relation to the granting of relief under section 160 of the Acts and that there are a number of factors which it should take into account in the exercise of that discretion in favour of refusing any relief as sought, such as the lack of any identified prejudice to the applicant, the conduct of the applicant, delay in seeking relief, the bona fides of the respondent, the hardship that would result to the respondent after a lengthy period in operation if it is required to dismantle the turbines and reinstate the lands, and finally the attitude of the planning authority to the development.

39. In my view the present application can be determined without reaching any conclusions on the many issues which are between these parties, and on which they will never see eye to eye.

40. A very significant feature of the present case is that the very matters about which the applicant complains in relation to deviations from the permission granted in 2002 had been cleared by the planning authority before the respondent took any steps to install the turbines. The planning authority itself gave the respondent the 'green light' so to speak, to proceed as they intended. I appreciate that the applicant has concerns about the provenance of the letter dated 3rd October 2006, but I am not satisfied that his concerns are sufficiently grounded for this Court to discount the existence of that letter.

41. The fact that the reference under Section 5 by the O'Brien's has resulted in a view being expressed by An Bord Pleanála as to the materiality of the deviations, and that it constitutes unauthorised development, is something which has occurred after the planning authority gave the 'green light' to the respondent to proceed. That decision is under judicial review at the moment, as are later decisions in relation to the later applications for planning permissions.

42. The outcomes of those various judicial review proceedings could have a bearing on the issues at the heart of the present case. I agree that it would be premature for this Court to anticipate the conclusions that may be reached by ordering that the existing turbines be dismantled and taken down so that the entire wind farm operation should cease to exist. That would be a drastic and draconian step to take.

43. It is also a noticeable feature of this case that the planning authority does not appear to have concerns which lead it to bring an application under section 160, or even support the present application. That of course is not determinative. The applicant is entitled to go it alone on the basis of the grounds which he believes would justify this Court in making the order sought.

44. I also have regard to the fact, acknowledged by the applicant, that he himself is not adversely affected by this development to any significant degree. His house is protected to an extent from it by intervening forestry, even though his enjoyment of his farmland is, he says, diminished. In truth, he is bringing this application on behalf of those who are worse affected than he is. He is known to have considerable knowledge and expertise on the subject of wind farms and wind turbines. Indeed he has amply demonstrated that expertise by the manner in which he has made his arguments and submissions to this court.

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

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

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

48. Finally, I compliment the applicant for the way in which he prepared and presented his application to this Court, and for the courteous way in which he conducted himself at all times. However, I must refuse his application for the reasons stated.