Neutral Citation [2016] IEHC 488

THE HIGH COURT

[2016 No. 324 J.R.]

BETWEEN

JOHN CALLAGHAN

APPLICANT

AND

AN BORD PLEANÁLA

FIRST NAMED RESPONDENT

AND

IRELAND AND ATTORNEY GENERAL

SECOND NAMED RESPONDENT

AND

NORTH MEATH WIND FARM LIMITED AND ELEMENT POWER IRELAND LIMITED

NOTICE PARTY

JUDGMENT of Mr. Justice Binchy delivered on the 21st day of July, 2016.

1. On 23rd May, 2016, I granted the applicant herein leave to seek various reliefs by way of judicial review as against the respondents. In addition, on that date, I granted the applicant a stay on the decision of the first named respondent (the "Bord") which the applicant challenges in these proceedings, pending the determination of these proceedings.

2. Following the service of the proceedings, the notice parties applied to have the proceedings entered into the commercial list and this Court so ordered on 10th June, 2016. On the same date, the notice parties sought an order setting aside that part of my order of 23rd May, 2016 whereby I granted a stay on the operation of the decision of the Bord pending the determination of these proceedings. That is the application with which this judgment is concerned. The application was heard before me on 28th and 29th June 2016.

Background

3. The notice parties to the action are involved in the development of wind farms. They previously applied to the Bord for permission to develop forty-six wind turbines at Emlagh, Co. Meath (the "Emlagh Development"). Prior to submitting that planning application, the Bord had designated that development as strategic infrastructure development ("SID") for the purposes of s. 37A of the Planning and Development Act 2000. That section makes no provision for the involvement of the public in any way in such a designation.

4. Consequent upon that decision, the applicant issued proceedings against the same respondents, under Record No. 2014/647JR which were also admitted to the commercial list under Record No. 2014/170COM. In those proceedings the applicant sought, *inter alia*, declaratory orders to the effect, that the decision of the Bord that the proposed development constituted strategic infrastructure for the purposes of s. 37A(2)(a) and (b) of the Planning and Development Act 2000 (as inserted by s. 3 of the Planning and Development (Strategic Infrastructure) Act 2006 was flawed by reason of the fact that the decision was arrived at without any involvement of the public (the applicant having been denied the opportunity to make representations to the Bord in this regard). The applicant also sought an order quashing the decision of the Bord so designating the development as SID.

5. The leave application and the substantive proceedings were dealt with by way of a single combined "telescoped" hearing before Costello J., who delivered her decision on 11th June, 2015. She dismissed the applicant's claims in their entirety. Following that decision, the applicant applied for a certificate for leave to appeal, and sought a certificate on three points of law. Costello J. gave a written judgment in relation to this application on 24th July, 2015 whereby she certified that just one of the matters raised by the applicant constituted an issue of exceptional public importance in respect of which she granted leave to appeal. That issue is as follows:-

> *"Is the statutory scheme contained in the Planning and Development (Strategic Infrastructure) Act, 2006 when construed in the light of ss. 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 ?"*

That appeal has been listed for hearing in the Court of Appeal on 4th October, 2016.

6. Subsequent to the issue of leave to appeal the applicant brought forward an application for a stay on all proceedings before the Bord. Finlay Geoghegan J. gave a decision, *ex tempore*, on that application on the 9th December, 2015 and having weighed the prejudice which each of the parties said they would suffer, she declined to grant a stay to the applicant. It will be seen however that the prejudice which the notice parties at that time argued that they would suffer is no longer a factor for the purposes of this application.

7. Following upon the original decision of the Bord, the notice parties made an application to the Bord for planning permission for that development, but this application was refused by the Bord in or about 4th February, 2016. It appears that the scale of the proposed development was a significant factor in the decision of the Bord to refuse that application. As a result, the applicant brought forward a revised and scaled down proposal which was submitted to the Bord pursuant to s. 37 of the Act of 2000 in or around 4th March, 2016. This application involved the development of a wind farm consisting of twenty-five wind turbines at Castletownmoor, Co Meath.

8. Before the Bord made any decision as to whether or not this development constituted SID, the applicant became aware of the application and wrote to the Bord requesting that he be allowed to participate in the process and to make submissions to the Bord in relation to the matter. The applicant also requested the Bord to refrain from further processing the application until the decision of the Court of Appeal on the certified point of law has been delivered. The Bord declined to do so.

9. Fearing that the Bord would again decide that the development being proposed by the notice parties constitutes SID without receiving any submissions from the applicant, and that thereafter the Bord would proceed to receive and consider a planning application from the notice parties, the applicant brought forward these proceedings. However, before the leave application came on for hearing before me (and after the issue of the proceedings) the Bord, on 11th May, 2016 determined that the Castletownmoor development constitutes SID and notified the applicant of this by letter dated 16th May, 2016. In the amended statement of grounds the applicant seeks reliefs, inter alia, as follows:-

> (i) an order quashing the decision of the Bord that the Castletownmoor development constitutes SID;
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> (ii) an order quashing the decision of the Bord whereby it refused to accept a submission from the applicant regarding whether or not the said development constitutes SID;
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> (iii) a declaration to the effect that s, 37A-H of the Planning and Development Act 2000 is inconsistent with and contrary to EU Council Directives 85/337 (as amended by Council Directive 97/11 and 2003/35, as consolidated under Council Directive 2011/92/EU;
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> (iv) a declaration that the Bord, in making a determination that a development constitutes SID, without any involvement of the public, is contrary to the said directives and
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> (v) a declaration that s. 37A-H of the Planning and Development Act 2000 is inconsistent with the requirements of Council Directive 2011/92/EU and/or that Directive has not been properly transposed into Irish law.

The Applicant also seeks other reliefs but it is not necessary to set them all out for the purposes of this decision.

10. The issue between the parties in this application is whether or not the court should set aside the stay which restrains the Bord from acting upon its decision that the Castletownmoor development constitutes SID, the practical effect of which is to restrain the Bord from receiving and considering any planning application in relation to that development, pending the determination of the certified point of law by the Court of Appeal.

11. The notice parties contend that they will suffer significant commercial harm if the Bord is not free to receive, process and adjudicate their planning application pending the determination of the Court of Appeal, by reason of the additional delay that will be caused to the notice parties in the event that they are successful before the Court of Appeal, and also with their planning application before the Bord, when ultimately submitted.

12. The applicant on the other hand contends that he will suffer an irreversible prejudice if the Bord is permitted to deal with that planning application, in advance of a determination of the Court of Appeal on the certified question as to whether or not the Castletownmoor development constitutes SID. The applicant says this is so because he claims that the Bord and the notice parties have already engaged in a procedure (in relation to whether or not the proposed development constitutes SID) in a manner that may have a bearing on the decision of the Bord (unfavourably to the applicant) in relation to the planning application, when submitted. He claims, at paragraph. 25 of his affidavit grounding these proceedings, that "*it is apparent that the Bord is currently advising the developer on matters that will influence their decision and on matters which will not be disclosed to me or the general public*." The applicant has a number of objections to the proposed development and contends that if planning permission for the development is authorised, and it is constructed thereafter, that his son, who has autism, will suffer adverse health consequences because he is particularly sensitive to noise. The applicant says that he too is sensitive to noise, and that he is also concerned that the proposed development will impact adversely upon the heritage, wildlife, cultural landscape and archaeology in the area.

13. The court was referred to many authorities in connection with this application and, specifically, in connection with the criteria to be applied by the court in the consideration as to whether or not the court should grant a stay or set aside a stay already granted whereby an administrative body is restrained from continuing with the exercise of its functions, pending the conclusion of judicial review proceedings. The law in this area was reviewed in detail by Clarke J. in the Supreme Court in the case of *Okunade v. Minister for Justice* [2012] 3 IR 152 at p. 193, he sets out the test which he considers the court should apply in such circumstances:-

> *"(a) the court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so, then;*
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> *(b) the court should consider where the greatest risk of injustice would lie. In doing so the court should:-*
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> > *(i) give all appropriate weight to the orderly implementation of measures which were prima facie valid;*
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> > *(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,*
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> > *(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,*
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> > *(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful;*
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> *(c) 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,*
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> *(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."*

I will address these questions in the light of the facts in this case later in this judgment.

14. The factual background to this application and the matters to be considered on this application are very similar (save in one

material respect which I deal with below) to those that pertained when Finlay Geoghegan J. was required to adjudicate on the applicant's application for a stay upon the proceedings of the Bord in relation to the Emlagh Development. Procedurally there were some differences; on that occasion there was a planning application before the Bord and it was the applicant who was looking for a stay. On this occasion, there is not as yet a planning application before the Bord and this application is to set aside a stay already granted on an *ex parte* application to the applicant, which has the effect of precluding the Bord from considering any planning application that may be received from the notice parties in relation to the Castletownmoor development, pending the decision of the Court of Appeal. However, I don't think anything of significance turns on those procedural differences between the two sets of circumstances.

15. However, there is one substantive difference in the circumstances that now obtains than those that obtained on 9th December, 2015, when Finlay Geoghegan J. delivered her *ex tempore* judgment. That is that at the time when she delivered her judgment, the notice parties placed very significant reliance upon their eligibility to participate in a scheme known as REFIT 2, a scheme operated under the aegis of the Department of Communications, Energy and Natural Resources, which provides a tariff support scheme for wind farm operators by guaranteeing a minimum price for electricity delivered to the grid by wind farms over a fifteen year period. The notice parties expressed concern that the imposition of a stay upon the consideration by the Bord of the planning application for the notice parties could delay matters to such an extent as to result in the notice parties failing to meet the deadline for participation in the REFIT 2 scheme. Finlay Geoghegan J. compared this potentially significant commercial prejudice which the notice parties said they might suffer with the possible prejudice that the applicant might suffer if he was not then granted a stay but subsequently succeeded in obtaining an order of *certiorari* quashing the decision of the Bord (declaring the development to be strategic infrastructure) *i.e.* if he is successful before the Court of Appeal. The only prejudice that Finlay Geoghegan J. could identify was that in those circumstances, the applicant would have to issue a second set of judicial review proceedings with a view to quashing any planning permission that might be made by the Bord in favour of the notice parties. She also observed that the applicant would, if the Bord granted such permission, in any event have to issue such proceedings, whether the stay was granted or not, the only difference being that if a stay were granted, the applicant would not have to do so until after the decision of the Court of Appeal, in the event of the applicant succeeding in that appeal. Weighing this potential inconvenience of having to issue a second set of judicial review proceedings against the possible significant commercial prejudice identified by the notice parties, Finlay Geoghegan J. declined to grant the applicant a stay upon the consideration of the planning application that was then before the Bord.

16. In their opposition to this application, the notice parties in the first instance relied on the prejudice they were likely to suffer in the event that they found themselves excluded from the REFIT 2 scheme. Indeed, this was the only prejudice identified in the affidavit of Mr. Kevin O'Donovan, a director of the notice party, sworn on 2nd June, 2016 in support of this application. Subsequently, however, it became apparent that the notice party cannot now avail of the benefit of the REFIT 2 scheme because to do so, the notice party would have to have received planning permission for the development by the end of December 2015. The notice party only became aware of this from a letter that issued from the office of the Chief State Solicitor to the solicitors for all the parties on 24th June, 2016. Accordingly, and in response to this development, a further affidavit was sworn by Mr. Donal O'Sullivan, Project Manager in the employment of the second named notice party, on 27th June, 2016, in which he sets out other commercial reasons which he says support the discharge of the stay. These are:-

> (i) Firstly, Mr. O'Sullivan says that the notice parties are prejudiced by a stay on the planning process insofar as it puts them at a competitive disadvantage in the selling of electricity on a commercial basis. He sets out examples in which Apple and Facebook have invited tenders for the supply of electricity to their data centre operations, directly from generators such as windfarms. In short what he says under this heading is that if the stay is not discharged and if the applicant is ultimately unsuccessful in these proceedings, and the stay is only discharged at that juncture, the notice parties will have been prejudiced in their ability to avail of commercial opportunities which may have arisen in the intervening period.
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> (ii) Secondly, notwithstanding that the notice parties are no longer eligible to benefit from the REFIT 2 Scheme, they expect to be in a position to benefit from another scheme known as the Renewable Energy Support Scheme (RESS) which he says is expected to be available from 2016 onwards. He exhibits to his affidavit a slide presentation made to the Irish Wind Energy Association by a Mr. Eamonn Confrey of the Department of Communications, Energy and Natural Resources in relation to the RESS. This presentation discusses the possibility of developing a new support scheme for renewable electricity in light of a number of developments, including the closure of existing schemes (REFIT 2 and REFIT 3) on 31st December, 2015. A possible timeline for the introduction of a new scheme is discussed in the document but it is acknowledged that, as yet, no timeline has been determined. It is stated that the scheme will be available from 2016 onwards, subject to Government approval and State aid clearance, but as yet the scheme has not been implemented and no date has been set for its implementation. The prejudice which the notice parties assert under this heading, if the stay is continued, is that they may be delayed from availing of this scheme when it is introduced, with a consequent loss of cash flow and profits for a period of time equivalent to the duration of the stay.

17. So in summary, the prejudice which the notice parties allege that they will suffer in the event that the stay is not discharged is a loss of potential commercial opportunity and a potential delay in participating in a scheme the introduction of which has not yet been finalised. It should also be observed however that Mr. O'Donovan, in his affidavit of 2nd June, 2016, avers that work in relation to the Castletownmoor scheme has been ongoing since 2012 and that over that period of time significant costs have been incurred by the notice parties in relation to issues such as:-

> *"(i) Undertaking long term environmental surveys in the wider area, which surveys continued during quarters one and two of 2016;*
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> *(ii) Design of wind farm components;*
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> *(iii) Installation of wind monitoring mast on-site to determine the wind regime for the site;*
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> *(iv) Public engagement and stakeholder consultation; and*
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> *(v) Completion of documentation, including an EIS and NIS, submitted with the application for planning permission (i.e. the application which was refused), which it is averred was updated and intended to be submitted with the next application for planning permission in respect of the proposed Castletownmoor Windfarm Development."*

18. Mr. O'Donovan avers that in addition, the notice parties have incurred significant costs of up to €2 million securing grid capacity to connect both the development in respect of which permission has been refused, and the Castletownmoor Wind Development. Mr. O'Donovan estimates that total expenses to date are more than €5 million and further avers that the Castletownmoor Windfarm

Development will cost in the order of €170 million to construct and operate and will generate substantial amounts of electricity each year for up to thirty years. He says that for a project of this scale to be completed on time to meet Ireland's 2020 renewable energy targets, the proposed development must have planning permission in place before the end of 2016.

19. For his part, the prejudice which the applicant claims that he will suffer if the stay is lifted, is that the Bord will proceed to receive a planning application from the notice parties in circumstances where the applicant has been denied an opportunity to make submissions as to whether or not the proposed development constitutes SID. He further asserts that in the course of its dealings with the notice parties in this regard, the Bord had consultations with the notice parties which would in some way advantage the notice parties in the consideration of any planning application by the Bord. In addition, the applicant complains that, if the stay is lifted, he will be placed in a position where he may well have to prepare for an oral hearing which the Bord may convene in relation to the proposed development, at the same time that he has to prepare for the hearing in the Court of Appeal.

20. In his affidavit of 15th June, 2016 sworn in opposition to this application, the applicant says that in support of this application to set aside the stay, the notice parties rely on the same expenditure as was incurred for the Emlagh Development in order to illustrate the prejudice that the notice parties will suffer if the stay remains in place. The applicant submits that costs previously incurred relating to the larger project (the Emlagh Development) which was refused planning permission should not be considered in connection with this application and he says that in any event such expenditure is always a risk of the planning process, such risk is taken in the full knowledge that planning permission may not be granted.

21. As regards the kind of expenditure the courts should take in to account in applications of this kind, counsel for the applicant also relies on the case of *Dunne v. Dun Laoghaire-Rathdown County Council* [2003] 1 IR 567. That case involved an application for an interlocutory injunction to prevent the defendant from removing, as part of a major road building scheme, parts of a monument on lands which the defendant owned. In resisting the application and in particular in addressing the question of balance of convenience under the heading of financial loss, the defendants asserted that they would suffer losses in the region of between €50,000.00 and €100,000.00 per week by reason of disruption and delay to the project and stated that the tender price for the construction of the motorway concerned was €144 million. In addressing this, Hardiman J. stated:-

> *"These are important and weighty matters, very proper to be considered by the court in an application of this kind. But in order to be decisive in terms of the balance of convenience on this application, they must be specifically related to the relief actually sought. I do not think that the defendant's averments do this with sufficient precision. It is stated that delay in the motorway project would be expensive and, more generally, prejudicial, and there is no doubt that this is so. But there is no statement as to the precise way in which this claimed injunction and the proceedings commenced will delay the motorway. Nor has the defendant advanced any precise legal or factual basis for the losses it says will be incurred should an injunction be granted. The contract with the contractors has not been produced nor any basis of calculation or estimation suggested. The mention of the huge sum of €144,000,000 as the contract price of the South Eastern motorway is, no doubt, properly calculated to make any court hesitate on the threshold of interlocutory relief. But neither this figure nor the much smaller, still very significant, weekly figure quoted have been related in any way to the actual scope of the proposed injunction."*

22. Counsel for the applicant particularly relies upon the case of *Thomas Harding v. Cork County Council and An Bord Pleanála and others* [2008] 4 IR 318. In *Harding* the applicant had been refused leave to seek judicial review of a decision of the first named respondent, but was subsequently granted a certificate pursuant to s. 50 of the Act of 2000 to bring forward an appeal to the Supreme Court. On the basis of that certificate, the applicant applied for the continuation of a stay previously granted by the court upon the proceedings before the second named respondent. The applicant had appealed the decision of the first named respondent to the second named respondent, but did not want that appeal determined before the determination of the appeal to the Supreme Court.

23. The court granted a stay to the applicant, taking the view that if it did not do so, and if the second named respondent proceeded to determine the appeal, that determination would render moot the appeal before the Supreme Court.

24. Counsel for the applicant in these proceedings submits that the application herein is within the "four corners" of *Harding* and that the applicant must be entitled to a stay for the same reasons that the applicant was found to be so entitled in *Harding*.

25. This same submission was made to Finlay Geoghegan J. in the context of the first application for a stay. She rejected the argument that *Harding* was on all fours to the factual scenario that prevailed on that application. It was clear in *Harding* that if the Bord decided the planning appeal prior the appeal before the Supreme Court, then the Supreme Court appeal would be set at nought because in that case what was being challenged was the decision of the local planning authority. Once the Bord made a decision upon the appeal of the decision of the planning authority, the operative decision would now be that of the Bord and the decision of the planning authority would no longer be of any relevance, and consequently nor would the judicial review of that decision.

26. In this case however (as was the case before Finlay Geoghegan J. on the first application for a stay) if the Bord makes the decision on an application received from the notice parties before the decision of the Court of Appeal, the decision of the Bord will not render the decision of the Court of Appeal moot. The decision of the Court of Appeal will have the same jurisdictional consequences for the proceedings before the Bord, as regardless of whether or not those proceedings have reached the point in time of a decision. I agree with the views expressed by Finlay Geoghegan J. in this regard. The factual matrix giving rise to the decision in *Harding* is materially different to that applicable in this case; *Harding* does not assist the applicant.

27. I will address now the test set out by Clarke J. in *Okunade*, as I consider it applies to the facts of this application:-

(a) Does the applicant have an arguable case?

> The applicant was granted leave to bring forward these proceedings on the basis of the decision of Costello J. to certify that the applicant may appeal the part of her judgment of 11th June, 2015 which she certified as raising an issue of exceptional public importance, as described at para. 5 above. The notice parties submit that the mere granting of leave to seek judicial review does not of itself mean that, in the context of considering an application for a stay, the applicant has an arguable case. The notice parties rely on the decision of *Martin v. An Bord Pleanála* [2002] 2 I.R. 655 in which O'Sullivan J. said, in the context of an application to stay consideration by the Bord of a planning appeal following the grant of leave to the applicant in that case to apply for judicial review of certain decisions of the Bord:-
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> > "... [I]t seems to me that it would be improper to draw the inference that a failure on the part of any of the parties to these proceedings to bring an application to set aside the order of the High Court … in the present case confers

on the applicant's case an automatic entitlement to be treated on this application as comprising a serious issue to be tried. In my view, I must on this application apply the normal rules without any such inference.

In this instance however, I am satisfied that having determined that the applicant has substantial grounds, those grounds being the point of exceptional public importance certified for determination by the Court of Appeal, that this must constitute an arguable case for the purposes of this application.

(b) Where does the greatest risk of injustice lie?

(i) How will a stay affect the orderly implementation of a measure which is *prima facie* valid?

In the particular circumstances of this case, the continuation of the stay will delay the effect of the impugned decision of the Bord until such time as the Court of Appeal delivers its decision following the hearing on 4th October, 2016. It is not unreasonable to expect that the decision of that court in the matter will not issue forth until some time afterwards, perhaps in early 2017. 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 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.

(iv) What are the consequences for the applicant if the stay is lifted, but subsequent to that the Court of Appeal declares the impugned measure to be unlawful? The consequences for the applicant is that he will have to issue fresh judicial review proceedings with a view to obtaining an order quashing any decision of the Bord whereby planning permission is granted to the notice parties for the Castletownmoor development. But as observed by Finlay Geoghegan J. on the first application for a stay, it is difficult to see how the applicant could fail in such proceedings, and indeed this was acknowledged by Mr. Fitzsimons S.C. for the notice parties at the hearing of this application. However, the applicant might have to issue such proceedings in advance of knowing the decision of the Court of Appeal. I address this below.

(c) As to damages, the applicant submits that the authorities establish that no undertaking as to damages is required in this type of judicial review application. The applicant did not volunteer any undertaking as to damages and, in any event, it seems very unlikely that any undertaking he might give would be realistic.

(d) What weight should be placed upon the strength or weakness of the applicants' case?

I consider that I must give some weight to the fact that this Court has already held against the applicant in the first proceedings on all grounds, including the point certified for determination by the Court of Appeal. By itself, this is not determinative of this application but it is in my view a factor which leans in favour of setting aside the stay.

28. Having thus considered all the factors identified by Clarke J. in *Okunade* it seems to me that the greater risk of injustice having regard to the same lies in the continuation of the stay. However, I think it is also desirable to address the balance of convenience as between the parties, as a court would usually when considering whether or not to grant an interlocutory injunction (having found that there is an issue to be tried). Indeed it was following upon that test alone and by agreement of the parties that Finlay Geoghegan J. decided the first application for a stay. There is of course one significant difference between the circumstances obtaining on the date of that decision, on 9th December, 2015, and today and that is that the notice parties have since been informed that the proposed development can not qualify for the REFIT 2 Scheme. The initial affidavit sworn on behalf of the notice parties in opposition to this application relied heavily upon that scheme.

29. The notice parties have however identified other grounds of potential prejudice in the event that they are delayed from processing their planning application, and the applicant subsequently fails in his appeal before the Court of Appeal. It is fair to say that it is not certain that the notice parties will suffer a loss, or even that it is probable that they will do so if the stay is continued. However, it must be regarded as a very real possibility that they will do so. Even if it is true to say that a considerable amount of the funds already invested must relate to the part of the original proposed development that is not now proceeding because of the planning refusal of the Bord, it must be equally true to say that a considerable proportion of the expenditure to date may be attributed to the Castletownmoor application, as the original Emlagh application also included development of wind turbines at Castletownmoor. 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, whether through RESS or otherwise. 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.

30. Contrast that with the position of the applicant. If the stay is set aside and the notice parties subsequently obtain a planning permission from the Bord before a decision issues forth from the Court of Appeal, that planning permission will be vulnerable to being set aside if the applicant is successful before the Court of Appeal. As I said above, Finlay Geoghegan J. suggested as much in her decision on the first application for a stay (while stressing that she was not purporting to make any decision in this regard) and this was also acknowledged by counsel for the notice parties at the hearing of this application. Indeed Mr. Fitzsimons S.C. went so far as to say that the notice parties will be proceeding at their own risk and that if the applicant is successful before the Court of Appeal this would render any decision made by the Bord in favour of the notice parties null and void.

31. 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.

32. Nonetheless, if the applicant is required to issue such proceedings before the decision of the Court of Appeal, he will be doing so "on the blind", not knowing if he will be successful before the Court of Appeal. There is therefore a degree of risk and expense associated with those proceedings, which for an ordinary member of the public can not be discounted as being insignificant. He would not face that risk if the existing stay is left in place.

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

> (1) The stay should be set aside to the extent of enabling the notice parties to submit a planning application to the Bord, and to permit the Bord to process that application in the ordinary way;
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> (2) The stay should remain operative however so as to preclude the Bord from making a decision on any planning application submitted;
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> (3) When the Bord considers that it is ready to make a decision upon the planning application, it shall notify the applicant and the notice parties and at that point the parties shall have liberty to apply in the light of any developments occurring in the meantime.

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.