[2023] IEHC 317

THE HIGH COURT
JUDICIAL REVIEW

[2023 No. 407 JR]

IN THE MATTER OF SECTIONS 21B AND 3 OF THE FORESHORE ACT 1933, AS AMENDED AND IN THE MATTER OF SECTION 50B OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

IVAN TOOLE
AND
GOLDEN VENTURE FISHING LIMITED

APPLICANTS

AND

THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE AND MINISTER OF STATE FOR THE DEPARTMENT OF HOUSING, LOCAL GOVERNMENT AND HERITAGE WITH SPECIAL RESPONSIBILITY FOR PLANNING AND LOCAL GOVERNMENT

RESPONDENTS

AND
RWE RENEWABLES IRELAND LIMITED
AND
MINISTER FOR AGRICULTURE, FOOD AND THE MARINE

NOTICE PARTIES

(No. 2)

JUDGMENT of Humphreys J. delivered on the 16th day of June, 2023

1. In *Toole and Anor v. Minister for Housing and Ors (No. 1)* [2023] IEHC 263 (Unreported, High Court, 22nd May, 2023), I granted an interim stay on works being carried out pursuant to a foreshore licence. I am now dealing with a contested application to continue the stay on an interlocutory basis.

Legal principles

2. As set out in the No. 1 judgment, the basic test for a stay arises from *American Cyanamid v. Ethicon Ltd* [1975] A.C. 396, [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504, [1975] LS Law Pat 1, [1975] FSR 101, 1975 RPC 513, [1975] UKHL J0205-1, *Campus Oil Ltd v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88, [1984] I.L.R.M. 47, [1983] 5 JIC 1703 and *Okunade v. Minister for Justice & Ors* [2012] IESC 49, [2012] 3 I.R. 152, [2013] 1 I.L.R.M. 1, [2012] 10 JIC 1602. The test involves consideration of the question of an arguable case or a fair question to be tried, the adequacy of damages and any undertaking in that regard, and the least risk to injustice as well as all other relevant circumstances. These basic tests have been considered in a number of cases including *Dowling & Ors v. Minister for Finance & Ors* [2013] IESC 37, [2013] 4 I.R. 576, [2013] 7 JIC 3102 and *Krikke v. Barranafaddock Sustainability Electricity Ltd* [2020] IESC 42, [2020] 7 JIC 1702 (Unreported, Supreme Court, 17th July, 2020), which confirmed that this approach applies in the context of EU law and does not breach the principles of effectiveness or equivalence.

3. The applicants bear the onus of proof, even in the context of continuing a stay that has already been granted on an interim basis, see: *McDonnell v. Brady & Ors* [2001] IESC 88, 3 I.R. 588, [2001] 10 JIC 3103 and *Sweetman v. Cork County Council and An Bord Pleanála* [2021] IEHC 350, [2021] 5 JIC 1805 (Unreported, O'Regan J., 18th May, 2021).

4. I will turn now to the three limbs of the test.

Arguability or fair question to be tried

5. The arguability of the applicants' case was not hugely contested. The fact that leave has already been granted has an obvious relevance to this aspect.

6. While I noted in the No. 1 judgment the dangers of getting too involved in the strength of the arguments, that was in a context where there would be an expectation that there will in fact be a full hearing. I fully recognise the point made by O'Donnell J. in *Krikke* at para. 9 that if that is unlikely then the court would have to look more closely at merits in a context where the injunction hearing would determine the proceedings in substance. This is not such a case. All merits-related issues will be up for discussion at the substantive hearing.

7. The opposing parties made certain points in relation to delay but those were in reality advanced under the balance of justice heading, and I will consider them in that context below.

Adequacy of damages

8. The broad approach taken as to the adequacy of damages in the No. 1 judgment was that damages were unlikely to be a relevant or satisfactory alternative to an injunction where the issue was environmental harm, and I would reiterate that approach here. Admittedly, the parties were in some dispute as to whether there will in fact be any harm, or whether the applicants' complaints are more of a technical nature. Nonetheless it seems to me that the basic complaint, namely the lack

of legally compliant appropriate assessment, is such that it creates the possibility of environmental harm and therefore creates a situation where, if that is borne out, damages are unlikely to be an adequate remedy.

9. While the question of an undertaking as to damages was referenced in submissions, it was not particularly pressed in oral submissions. If any opposing party wants to pursue that specifically it can apply in that regard and if so the issue can be more fully debated.

The least risk of injustice

10. A wide volley of points were advanced as to why the balance of justice allegedly favours refusal of a stay. The public interest was heavily relied on, and the fact that the project, if and when completed, is intended to form a significant part of the State's renewable energy infrastructure. Much emphasis was given to the policy on combating climate change.

11. Such arguments do create a delicate challenge for the court, which I will try to explain as follows.

12. First of all, and in favour of the responding parties, the climate emergency goes well beyond the realm of opinion and must be recognised as being in the category of established fact. The UN Environment Programme summarises the situation thus in public domain information: "The science is clear. The world is in a state of climate emergency, and we need to shift into emergency gear. Humanity's burning of fossil fuels has emitted enough greenhouse gases to significantly alter the composition of the atmosphere and average world temperature has risen between 1.1 and 1.2°C. And for every degree in rising temperatures, the cost of adaptation will rise exponentially. GHG emission must peak now yet the gap between ambition and action is growing" (https://www.unep.org/climate-emergency).

13. On the other hand, how any particular public body or the State as a whole will respond to that is, generally speaking, a matter of policy for the decision-maker in the absence of there being a specific justiciable standard. Thus, for example, permission was granted for a facility requiring an production of 450M litres of milk involving 0.513Mt of CO_2 or equivalent emissions (see para. 68 of *An Taisce – National Trust for Ireland v. An Bord Pleanála* [2022] IESC 8, [2022] 1 I.L.R.M. 281, [2022] 2 JIC 1602). That level of emissions will be repeated on an annual basis into the future (see para. 13). But it was said that some of these would have happened anyway, that effects could be mitigated and that remaining effects were accounted for in climate plans, and indeed it was argued at trial that if Ireland had not hosted the project, some other country would have done so, leading to more emissions overall – an argument that I will admit I found particularly impactful in cramping any otherwise potentially critical impulses (see *An Taisce – National Trust for Ireland v. An Bord Pleanála* [2021] IEHC 254 at para. 42). A court is ill-equipped to gainsay contentions of the latter type.

14. A further point in favour of the responding parties is the inherent desirability that public law decisions would be given effect. I noted in the No. 1 judgment that *Okunade* added emphasis to this aspect, and I should record that O'Donnell J. had previously made that point in *Krikke* at para. 10: "A related problem arises in the field of public law where application of a *Campus Oil* type of approach can tend to give too much weight to the asserted impact on an individual or business unless it is recognised that the enforcement of the law is itself an important factor and that even temporary disapplication of the law gives rise to a damage that cannot be remedied in the event that the claim does not succeed. The real insight of *Okunade v. Minister for Justice* [2012] IESC 49, [2012] 3 I.R. 152, was to require that weight be given to this factor in any application for an interlocutory injunction."

15. One then turns to the counter-arguments.

16. A primary difficulty for any court is the need to avoid taking a position on the desirability or otherwise of any given political or policy initiative. Yes, one can recognise that the Dublin Array is seen by the executive as a major and necessary piece of infrastructure, but it is not the job of the courts to facilitate things that any given executive wants at any given time, or to agree with the executive or any decision-maker as to the desirability of a contested policy or project. The fact that something is important to one of the parties to litigation can be reflected in a court's efforts to case-manage proceedings and determine any legal issues in an expeditious manner, but beyond accepting the obvious point that any given broad policy objective may well be legitimate or even necessary (whether that be development, environmental protection, or something else), the desirability to developers or to the State and its organs of any given project is not *in itself* a reason to refuse an injunction, above and beyond the factors that flow from the presumption that the decision was validly made, together with any legally relevant harm that would result from the grant of a stay. For the avoidance of doubt, lest anyone contrive to misunderstand the position, it is not the job of the court to *thwart* executive policy either, whether in the name of checks or balances or otherwise, or even to promote the environment other than insofar as that flows from legally operative instruments to that end. A similar logic applies to most other things – a court doesn't protect human rights because that is a good thing to do, or because it agrees with such principles, but because it

is mandated to do that by the Constitution and the laws. Don't look down, in other words. Any "desirable" jurisprudential edifices that a court might occasionally construct aren't necessarily erected on the kind of immutably solid foundations that some people might hope for.

17. For the avoidance of doubt, that isn't to advocate absolute positivism – but rather to say that the non-positivistic nature of human rights for example is ultimately founded in constitutional and international text to that effect. If, instead of asserting the inherent rights of the individual, as the UN Universal Declaration did a decade later, the Constitution hypothetically said that human rights were a necessary fiction and were limited to what was created expressly by it and not otherwise, then the court would have to operate on that basis. But it doesn't say that.

18. Nor do I mean to deny the creativity of the judicial process. To claim that judges merely call balls and strikes would just be a "fairy tale" (see *per* Lord Reid in "The judge as lawmaker" (1972) 12 *Journal of the Society of Public Teachers of Law* 22, *North East Pylon Pressure Campaign Ltd v. An Bord Pleanála* [2016] IEHC 300, 2016 WJSC-HC 4214, [2016] 5 JIC 1215 (Unreported, High Court, 12th May, 2016) at para. 53). But such creativity only operates within limits, and is more often called for at the edges of the law, where the tectonic plates of social change and change in legal thought and text come into contact, throwing up new jurisprudential landforms that need to be judicially mapped for the first time. Advocates have a critical role in activating the second of those energies for change, by bringing forward new points and concepts and thereby shaping the law one way or the other.

19. A further difficulty with the opposing parties' position here is that, while one's instinctive reaction to the climate emergency might be that measures to combat the emergency must themselves be necessary on an emergency basis, such a posture would be destructive of environmental law overall, especially since virtually all projects now are meant to be sustainable. Initiatives don't become emergency measures just because they are proposed now. It is not the position that when officialdom gets around to doing something, that something becomes *ipso facto* extremely urgent at that moment. It is not for the court to assess whether governments generally around the world have been attending to the climate emergency with all due expedition; people can make their own minds up about that. But it is a matter of record that the rates of climate change have been discussed since the Swedish scientist Svante Arrhenius's paper of 1896 (*On the Influence of Carbonic Acid in the Air upon the Temperature of the Ground*, Philosophical Magazine and Journal of Science, series 5, volume 41, April 1986, pp. 237-276), and climate change science has been a mainstream issue for the past 40 years.

20. The notice party conveniently refers to a report of the Intergovernmental Panel on Climate Change (IPCC) dated 20th March, 2023, implying that we are dealing with just-breaking-news here, but for some reason best known to itself doesn't refer to the fact that the IPCC has been in existence since 1988, and has been warning in increasingly emphatic terms of the human causes of climate change ever since its first report.

21. The need for renewable energy now doesn't in itself create a basis to bypass the application of appropriate assessment and the right to an effective remedy through judicial review, particularly given how foreseeable such issues have been.

22. On the other hand, energy security in the context of what was referred to in submissions by the State as the "immediate crisis" of "Russian aggression" genuinely *is* an emergency of an unforeseeable nature. But this factor is pitched in the State's affidavit at a very general level. Reducing dependence on Russian energy, as argued, is of course a wholesome and desirable objective, and even environmental considerations, while extremely important, must to some extent (like many other considerations in war-time) accommodate themselves to the fundamental threat to international peace and security created by Russia's unlawful war of aggression. However, the State's affidavit doesn't specify how all of this high-level analysis actually lands in practice. To what extent is Ireland actually dependent on Russian energy, what will it take to reduce or eliminate such dependency and in what timescale will same be achieved? Alternatively, how and when specifically would the proposed array contribute to the reduction of the dependency of Europe more widely on Russian energy? That is not clarified. Maybe if it is clarified in some detail that factor can be reconsidered but it seems to be implicit in the State's affidavit that Irish dependence on Russian energy is limited anyway.

23. In Case C-441/17R *Commission v. Poland* (Court of Justice of the European Union (Grand Chamber), 20th November, 2017, ECLI:EU:C:2017:877), the court stated:

> "54 In that regard, in the context of the assessment of urgency, the Court recalls that the procedure for interim relief is not designed to establish the truth of complex facts that are very much in dispute. The Court hearing an application for interim measures does not have the means necessary in order to carry out such examinations and in numerous instances it would be difficult for it to manage to do so in good time (orders of the President of the Court of 24 April 2008, Commission v Malta, C-76/08 R, not published, EU:C:2008:252,

paragraph 36, and of 10 December 2009, Commission v Italy, C-573/08 R, not published, EU:C:2009:775, paragraph 22).

55 It must also be pointed out that the Court hearing an application for interim measures must postulate, solely for the purpose of the assessment of the existence of serious and irreparable damage, that the complaints put forward in the main proceedings by the applicant for interim measures might be upheld. The serious and irreparable damage whose likely occurrence must be proven is that which would result, where relevant, from the refusal to grant an application for interim measures in the event that the action in the main proceedings was subsequently successful, and it must therefore be assessed on the basis of that premiss, although that does not mean that the Court hearing the application for interim relief takes a position on whether the complaints put forward are well founded (see, to that effect, orders of the Vice-President of the Court of 19 December 2013, Commission v Germany, C-426/13 P(R), EU:C:2013:848, paragraphs 51 and 52, and of 14 January 2016, AGC Glass Europe and Others v Commission, C-517/15 P-R, EU:C:2016:21, paragraph 30)."

24. Simons J. applied this in *Friends of the Irish Environment Ltd v. Minister for Communications* [2019] IEHC 555, [2020] 3 I.R. 162, [2019] 7 JIC 2312:

"109. The limitations on the ability of a court hearing an application for interim measures to reach findings of fact in respect of alleged harm to the environment have been adverted to by the CJEU in Case C 441/17 *R Commission v. Poland* (Białowieża Forest), albeit in the specific context of infringement proceedings against a Member State. The CJEU suggested that a court hearing an application for interim relief cannot make findings of fact but should postulate, solely for the purpose of the assessment of the existence of serious and irreparable damage, that the complaints put forward in the main proceedings by the applicant for interim measures *might* be upheld. This approach seems appropriate in circumstances, such as those in the present case, where the respondent has declined to engage with the allegations of environmental harm.

110. The risk of harm to the environment is, self-evidently, a weighty factor to be considered in the balance in deciding whether or not to grant an interlocutory injunction. I am not satisfied that the State respondents have, as yet, been able to point to any countervailing factor which might legitimately be weighed against this risk."

25. The point made in *Commission v. Poland* is reinforced by the judgment in Case C-721/21 *Eco Advocacy v. An Bord Pleanála* (Court of Justice of the European Union (Second Chamber), 15th June, 2023, ECLI:EU:C:2023:477) at para. 37, to the effect that a risk is present if it cannot be ruled out:

"... it follows from the Court's case-law that the requirement of an appropriate assessment of the implications of a plan or project under Article 6(3) of Directive 92/43 is conditional on there being a likelihood or a risk that the plan or project will have a significant effect on the site concerned. Having regard to the precautionary principle, in particular, such a risk is deemed to be present where it cannot be ruled out, having regard to the best scientific knowledge in the field, that the plan or project at issue might affect the conservation objectives for the site. The assessment of that risk must be made in the light, in particular, of the characteristics and specific environmental conditions of the site concerned by such a plan or project (judgment of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, C-411/17, EU:C:2019:622, paragraph 134 and the case-law cited)."

26. All of this has some resonance here in that there doesn't as of the date of hearing of the interlocutory injunction application seem to be a fully developed contest on the critical factual point being made by the applicants, namely that all possible information was not before the decision-maker on the date of grant of the licence, but rather the centre of gravity of the debate would seem at this stage to be likely to be on the legal relevance, if any, of the fact that some data might not have been analysed as yet.

27. The fact that the foreshore licence, like any public law decision, is *prima facie* valid has some weight but it doesn't fully answer the question as to the balance of justice.

28. Likewise the fact that the Minister sees the process as detailed and rigorous and as having involved submissions, consultations and independent reports doesn't answer the question either. The screening in of the relevant special protection area (SPA) to some extent favours the applicants rather than the Minister. The fact that the Minister considered the possible impacts and that some mitigation measures were proposed does not automatically amount to an answer to the legal point made by the applicants.

29. The opposing parties were on firmer ground when complaining that the applicants did not make the precise arguments now being made when they contributed during the process. However, EU law is clear that that does not in itself debar them from arguing the existence of scientific doubt, although such an argument doesn't carry a right to bring in new evidence. That is totally consistent

with *Reid v. An Bord Pleanála (No. 1)* [2021] IEHC 230, [2021] 4 JIC 1204 (Unreported, High Court, 12th April, 2021). But that is what the applicants are saying they want to do here. They are complaining that the terms of the licence itself failed to exclude scientific doubt by reference to the indicative locations of works, and the possibility of that being changed depending on data that had not been fed into the process even though it was available. Whether that argument is correct can be left to the trial.

30. As regards alleged delay by the applicants, that is discussed in the No. 1 judgment and the basic position remains broadly as set out there. I do not think that the applicants can be massively faulted in that regard, even accepting that they could have acted sooner.

31. Much emphasis was placed by the opposing parties on the alleged lack of merits of the applicants' case and alleged weaknesses in their arguments, but it seems to me that those issues are best left for the substantive hearing, not least for the reasons discussed in the No. 1 judgment.

32. As regards the submission that the AA screening determination was not challenged within a three-month period, that is cautiously phrased in submissions as not being an outright time objection, but unfortunately it is yet another example of the misconception that an applicant somehow should be required to challenge interim steps in the process. That is clearly incorrect, and the problems with that have been pointed out on numerous occasions. Any applicant that attempted to challenge the AA screening determination before a final decision would be firmly told that their proceedings were premature. It is really impossible to improve on the submission of counsel, quoted at para. 33 of *Quinn v. An Bord Pleanála* [2022] IEHC 699, [2022] 12 JIC 1608 (Unreported, High Court, 16th December, 2022) and relying on *Northeast Pylon Pressure Campaign Ltd*, *North Westmeath Turbine Action Group v. Westmeath County Council* [2020] IEHC 505, [2020] 10 JIC 2205 (Unreported, High Court, 22nd October, 2020) and *Spencer Place Development Company Ltd v. Dublin City Council* [2020] IECA 260, [2020] 10 JIC 0202 (Unreported, Court of Appeal, 2nd October, 2020): "Sartre said in *Nausea* that three o'clock is always too late or too early for anything you want to do, and the opposing parties tend to argue that it is always three o'clock for an applicant for judicial review".

33. A loosely-related complaint is made that the decision was not challenged within three months from the date on which it was actually made, but it was challenged within three months from its publication and that issue is addressed in the No. 1 judgment on the basis of a logic which the opposing parties haven't particularly displaced at this stage.

34. Before concluding I should specifically mention two further stand-out factors as to why the balance of justice favours continuing the interim stay for the time being. The first significant factor is that the Minister's approach here in providing for indicative locations for works, and the possibility of change in the works depending on data which were available but had not actually been fully considered prior to the settling of the terms of the licence, could arise in many other cases of offshore developments. The sort of arguments that are deployed against a stay in the present case, such as the importance of building offshore wind generators, would equally apply to any other situation where these problems arose, so any individual case could be hustled aside on similar arguments. There is a public interest in determining such issues at least in one case, and it may as well be in the first such case.

35. This is relevant because this case will almost certainly be moot if the interim stay is discharged. The works itself to which the foreshore licence relates can be completed in a matter of months. The applicants are entitled to an effective remedy under EU law, equivalent to the right of access to the court under the Constitution. That is not absolute, but it is certainly a major factor. It is one thing to refuse to halt a process where the process itself contains a possible ultimate remedy for an applicant. It is quite another thing to allow a process to continue which will result in the elimination of any such remedy.

36. It is part and parcel of the right to an effective remedy that the court has to make serious attempts to leave open the possibility of the parties obtaining a benefit in the event that their position is successful. It is at the same time true, as the notice party submits, that the entire process of constructing the offshore development won't be moot because there are other steps to be taken, each of which can be challenged in turn, but that does not get away from the fact that this particular case will be moot.

37. The final factor on which considerable weight has to be placed is that I have now fixed a very early hearing date, commencing on 21st June, 2023, so the fact that any interlocutory injunction will only last for a relatively limited time has got to be relevant. O'Donnell J. made the point in *Krikke* that the court can reduce any injustice by fixing an early date (para. 16).

38. Also relevant is that on a realistic basis, the terms of the interim stay were such that they would continue until further order, so even if the interlocutory stay were to be refused, that would amount, in effect, to a discharge of the interim stay, and the applicants could legitimately seek a stay on that discharge to facilitate an appeal. Given the proximity of the hearing date, that would fulfil the function of an interlocutory injunction anyway. The State unconvincingly argued that there

would be "nothing to stay". That is firstly incorrect – it utterly confuses a situation where a moving party never had anything and is then refused anything it asks for, with a situation where a party is given something which the court then decides to take away. In the latter situation, there is something before the court that has an edge that can be blunted by a temporary stay on the discharge of the earlier order. But more significantly, the State's posture here is not just wrong but somewhat disingenuous, because there isn't a chance in a million, if the State were to get an interim injunction in another case which was then sought to be discharged, that they would say, in effect, "oh well, it's too bad that there's nothing anyone can do because there is nothing to stay". On the contrary, there are many examples of the State creatively straining the jurisprudence to seek to preserve the *status quo* despite adverse rulings as seen from their point of view. In *Conway v. An Bord Pleanála* [2023] IEHC 178 at para. 96, I recently indicated a willingness to consider arguments about suspending a hypothetical declaration even though the State hadn't explained how that was meant to work. Contrary to what seem to be the logical implications of the State's submission here, there cannot be a completely different rule book for the little people. (For another example of an attempted argument that would result in the law being totally inconsistent depending on whether it was applied in favour of or against the State, see *Cork County Council v. Minister for Housing, Local Government and Heritage, Ireland The Attorney General* [2021] IEHC 683, [2021] 11 JIC 0502 (Unreported, High Court, 5th November, 2021) para. 44.)

39. Normally, an early hearing rather than a battle on interlocutory stays or injunctions is going to conserve resources all round, and the fact that an early hearing will be facilitated in the coming days seems to me to be relevant to the balance of justice here. Overall and without taking from the points in favour of the responding parties, the balance of justice and the assessment of all relevant factors, as they currently appear, favour continuing the existing stay at the present time. That in no way detracts from or reflects on the strong contest on the merits to which the court can look forward.

Order

40. For the foregoing reasons, it will be ordered that:

(i) the existing stay do continue until further order; and

(ii) unless the parties apply otherwise at the substantive hearing on 21st June, 2023, the foregoing order be perfected forthwith thereafter on the basis of costs being reserved.