[2023] IEHC 263

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 THE 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 THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE

NOTICE PARTIES

JUDGMENT of Humphreys J. delivered on the 22nd day of May, 2023

1. In this application, an interim order was sought staying the effect of a foreshore licence prior to the grant of leave to seek judicial review to challenge that licence.

2. I heard the application and announced the order on 8th May, 2023 and gave reasons *ex tempore* on 9th May, 2023, although I did emphasise that the written version would be the definitive one. I am now giving that written version of the reasons, which, while restructuring the arrangement and wording somewhat (as is virtually inevitable), is intended to reflect the essential substance of the points already made.

3. The application involved submissions from the applicant and first named notice party. The State parties were notified that the matter would be listed on 8th May, 2023, albeit they might not have understood that that was in the context of a stay application specifically, but given that they had notice of the date and that they indicated they would not be attending (referencing *inter alia* a lack of papers), I didn't see their absence as a reason not to deal with the matter. Admittedly, the applicant served the Minister concerned directly rather than *via* the CSSO, which is what more properly should have happened, but the Department did pass on the letter which also expressly and prudently says that contact can be made with the List Registrar to seek access to ShareFile. In that regard it was not totally clear at that point anyway, in the absence of hearing from the State, as to why there was a difficulty accessing papers.

4. What I propose to do is to address the facts insofar as they appear to the court at this stage, the jurisdiction to grant a stay at this point in the procedure, the law in relation to the grant of such a stay and the application of that law to the facts here. For the avoidance of doubt, dealing with a matter such as this in an interim way is very much without prejudice to any particular conclusion being revisited at the interlocutory stage with the benefit of other factual material and legal submission as appropriate.

Facts

5. In 2017, the applicants' fishing business, Golden Venture, was established.

6. In 2019, the Rockabill to Dalkey Island Special Area of Conservation was defined by the European Union Habitats (Rockabill to Dalkey Island Special Area Of Conservation 003000) Regulations 2019 (S.I. No. 98 of 2019). This specified the qualifying interests of the special area of conservation (SAC) as follows:

Natural Habitat Type

Natura 2000 Code	Description
1351	Reefs

Animal and Plant Species

Natura 2000 Code	Common Name	Scientific Name
1351	Harbour Porpoise	Phocoena phocoena

7. The Natura Impact Statement (NIS) here appears to be prepared on the basis of the Geogenic reefs to which it relates being a qualifying interest falling within the reefs defined by the SAC order. Reference is made to a lack of mapping.

8. On 25th January, 2021, a previous licence was granted in favour of the first named notice party (reference FS 007029), and on foot of that the first named notice party carried out what is referred to in the papers as a "2020 site investigation campaign", although that appears to have happened in 2021.

9. The licence now under challenge was sought under s. 3 of the Foreshore Act 1933 on 1st October, 2021, to undertake geotechnical and geophysical site investigations and ecological, wind, wave and current monitoring to provide further data to refine wind farm design, cable routing, landfall design and associated installation methodologies for the proposed Dublin Array offshore wind farm off the coast of counties Dublin and Wicklow.

10. That was advertised on 17th November, 2021 and thereafter and 17 submissions were made during the public consultation process as well as 8 submissions by prescribed bodies. An appropriate assessment (AA) screening was carried out dated May, 2022 which accepted that likely significant effects could not be discounted. A marine advisory environmental screening stage report of 20th June, 2022 concluded that environmental impact assessment (EIA) was not required although reference was made to obligations to conduct an examination by the Department itself. The preliminary examination prepared by the marine advisor also dated 20th June, 2022 concluded that there was no real likelihood of significant effects on the environment and a screening determination regarding appropriate assessment was signed by the Minister on the same date.

11. That resulted in a public consultation procedure in relation to stage 2 AA which ultimately culminated in a conclusion that the proposed activity would not adversely affect the integrity of any European site having regard to mitigation measures. A conclusion statement was signed by the Minister on 23rd November, 2022.

12. As of December, 2022, in advance of the licence, the first named notice party appears to have chartered at least one of the boats required for the site investigation.

13. The impugned five-year foreshore licence itself was executed by licence agreement on 13th January, 2023. Condition 31.9 of the licence was particularly emphasised by the applicants and provides as follows:

> "The licensee shall ensure that the intertidal and subtidal geotechnical sampling locations will be selected after review of the geophysical and environmental data obtained from surveys completed under licence FS 007029 has been reviewed for the presence of potential ecological features such as Geogenic reef."

14. Notice of the licence was published in *Iris Oifigiúil* on 27th January, 2023 pursuant to s. 21A of the 1933 Act. The first named notice party then proceeded to notify interested parties that borehole drilling would commence in April, 2023. On 20th April, 2023, the applicants gave notice of an intention to bring proceedings and to seek a "stay or similar relief" (exhibit IT3). The first named applicant received a notice that, weather permitting, the array borehole element of the survey was intended to commence on 23rd April, 2023.

15. There then followed an alleged incident where one of the boats chartered by the first named notice party allegedly collided with static fishing gear belonging to the second named applicant.

Procedural history

16. On 26th April, 2023, proceedings issued and were mentioned to Holland J. Strictly speaking, the proceedings were out of time on the basis of time running from the date of the decision, but given that one can reasonably assume that the applicants were not made aware of the decision until its publication in *Iris Oifigiúil*, they should be entitled to the full period of three months in this instance running from the date of that notification, particularly having regard to the EU law elements of the case (see caselaw discussed in *Marshall v. ESB* [2023] IEHC 73, [2023] 2 JIC 1705 (Unreported, High Court, 17th February, 2023)).

17. In *Casey v. Minister for Housing Planning and Local Government & Ors* [2021] IESC 42, [2021] 7 JIC 1601 (Unreported, Supreme Court, 16th July, 2021) Baker J. held that failure to publish a licence did not make it invalid but "a person who wishes to challenge by judicial review the making of a licence may be able to rely on the absence of publication to seek an extension of time to bring judicial review should that be required" (para. 134). That is consistent with the concept that technically an extension of time is appropriate here. It may well be that due to *Casey*, the notice of the licence implies that the period for challenge is to run from the date of publication, but nonetheless in strictly technical legal terms a formal extension of time is still required if the challenge is brought outside a period of three months as measured from the date of the decision itself.

18. On the day the application was issued, the applicants contacted the first named notice party to complain further in relation to the alleged collision already mentioned.

19. On 28th April, 2023, the applicants emailed the Minister of State enclosing a motion to admit the proceedings to the Commercial Planning and Environmental List pursuant to Practice Direction HC119, although, as mentioned, it would have been preferable if the CSSO had been served on behalf of the Minister. On the same date, the motion was served on the solicitors for the first named notice party.

20. At the initial mention date, the matter was adjourned to 8th May, 2023. In fact, that was the immediately next following sitting Monday list in the Commercial Planning and Environmental List given the fact that Monday 1st May, 2023 was a public holiday (whether one wishes to celebrate it as International Workers' Day as proclaimed by the Second International in 1889, or the Celtic festival of Bealtaine, or for good measure the Roman festival of Flora, can be left to individual taste and judgement). But for that fact, the matter would have come back to the court rather sooner, so I am not sure that the applicants can really be massively faulted for any lapse of time in that regard specifically.

21. The first named notice party in any event, notwithstanding the proceedings, continued to implement the licence and was doing so by carrying out boring as of the date of the hearing of the application for interim relief. The first named notice party had chartered two boats, a tug boat, the Dutch Pearl, and a drill rig which was not self-propelling and was essentially floating infrastructure called Excalibur. There is reference on the papers to two other boats, a lookout boat, the Rós Áine, and a Voe Vanguard vessel which is currently in Pembroke although it was not totally clear to me what the relevance of these boats is.

Procedure to challenge a foreshore licence

22. The procedure for judicial review of a foreshore licence is set out in s. 21B of the 1933 Act as follows:

> "Contents of notice under s. 21A
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> 21B. (a) A notice published under section 21A shall state that a person may question the validity of any such determination by the Minister by way of an application for judicial review, under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986).
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> (b) The notice shall identify where practical information on the review mechanism can be found.
>
> (c) A person shall not question the validity of a decision made or act done or purported to be done by the Minister in relation to a relevant application otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986).
>
> (d) The High Court shall not grant leave for judicial review under this section unless it is satisfied that—
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> (i) the applicant has a sufficient interest in the matter which is the subject of the application, or
>
> (ii) the applicant—
>
> (I) is a body or organisation other than a State authority, a public authority or governmental body or agency the aims or objectives of which relate to the promotion of environmental protection, and
>
> (II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives.
>
> (e) A sufficient interest for the purposes of subparagraph (i) of paragraph (d) is not limited to an interest in land or other financial interest.
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> (f) The Court, in determining either an application for leave for judicial review under this section, or an application for judicial review on foot of such leave under this section, shall act as expeditiously as possible consistent with the administration of justice.
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> (g) In paragraph (d), 'State authority, a public authority or governmental body or agency' means—
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> (i) a Minister of the Government;
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> (ii) the Commissioners of Public Works in Ireland;
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> (iii) a harbour authority within the meaning of the Harbours Act 1946;
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> (iv) a local authority within the meaning of the Local Government Act 2001;
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> (v) the Health Service Executive;
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> (vi) a person established—
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> (I) by or under any enactment (other than the Companies Acts),
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> (II) by any scheme administered by the Government, or
>
> (III) under the Companies Acts, in pursuance of powers conferred by or under another enactment, and financed wholly or partly, whether directly or indirectly, by means of moneys provided, or loans made or guaranteed, by a Minister of the Government or by subscription for shares held by or on behalf of a Minister of the Government;
>
> (viii) a company (within the meaning of the Companies Acts), a majority of the shares in which are held by or on behalf of a Minister of the Government."

23. The marginal or shoulder note to this section, "[c]ontents of notice under s. 21A", is alarmingly obscure and, while perhaps technically not part of the Act (s. 18(g) of the Interpretation Act 2005), is the sort of misleading reference that parliamentary counsel rarely allow through.

Where such things happen they normally occur, as here, due to subsequent amendment rather than original design. This type of note is best avoided and certainly somebody looking at the arrangement of sections would not understand that the substantive judicial review procedure is to be found in a section about the contents of a notice.

24. While the judicial review provisions of the 1933 Act appear to be somewhat inspired by those for planning law generally, there are some differences, the rationale for which is not immediately obvious. Two obvious immediate differences are that the test is arguable grounds rather than substantial grounds and that there is no restriction on the right of appeal.

Jurisdiction to seek injunctive relief prior to the grant of leave to seek judicial review

25. While the applicants initially relied on O. 84, r. 20(8) RSC, that does not apply because it relates to situations where the court is granting or has already granted leave to seek judicial review.

26. However, the question of whether the court can grant injunctive relief prior to the grant of leave for judicial review has been clearly answered by the, if I may respectfully say so, clear and convincing judgment of Kelly J. in *Harding v. Cork County Council* [2006] IEHC 80, [2006] 1 I.R. 294, [2006] 2 I.L.R.M. 392, [2006] 2 JIC 2802, particularly at paras. 14 to 16, 20 and 21. That strong assertion of the entitlement to the court to provide an effective remedy even at the very initial interim stage has the implication that jurisdiction to grant an injunction or stay prior to the grant of leave can now be found (in the current renumbering of the rules) at O. 84, r. 26(1) RSC and in the inherent jurisdiction of the court.

27. *Harding* is yet another illustration of the utter centrality of the right to an effective remedy (traditionally referred to in Irish jurisprudence as the right of access to a court). The court must have whatever jurisdiction is necessary to ensure that a proper remedy is available if any given complaint is upheld, and that also implies a jurisdiction to arrange matters in the interim pending determination of the merits so that the risk of injustice is minimised and the possibility of such a remedy is preserved where possible. That applies anyway, doubly so under art. 13 of the ECHR, but in the EU law context it is further reinforced by the right to an effective remedy under Article 47 of the Charter and as reflected in numerous environmental and other directives. Paragraphs 170 to 173 of the Commission Notice on access to justice in environmental matters (2017/C 275/01) explain the position:

> "170. Interim measures – referred to as *'injunctive relief'* in Article 9(4) of the Aarhus Convention – allow a court to order that a contested decision or act not be implemented or that some positive measure be taken before the court delivers its final judgment. The aim is to avoid harm arising from a decision or act that might ultimately turn out to be unlawful.
>
> 171. In Križan [Case C-416/10 Križan (Court of Justice of the European Union, 15th January, 2013, ECLI:EU:C:2013:8, see in particular para. 109], which concerned a permit for a landfill, the CJEU was asked whether the access to justice provisions of what is now the Industrial Emissions Directive, 2010/75/EU, allowed for interim measures (despite not specifically mentioning them). It stated that 'the exercise of the right to bring an action provided for by Article 15a of [the then] Directive 96/61/EC would not make possible effective prevention of that pollution if it were impossible to prevent an installation which may have benefited from a permit awarded in infringement of that directive from continuing to function pending a definitive decision on the lawfulness of that permit. It follows that the guarantee of effectiveness of the right to bring an action provided for in that Article 15a requires that the members of the public concerned should have the right to ask the court or competent independent and impartial body to order interim measures such as to prevent that pollution, including, where necessary, by the temporary suspension of the disputed permit'.
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> 172. In *Križan*, the CJEU also recalled that the possibility of interim measures is a general requirement of the EU legal order. In the absence of EU rules, and in line with the principle of procedural autonomy, it is up to Member States to lay down the detailed conditions for granting interim measures.
>
> 173. The CJEU itself has defined criteria for deciding on applications for interim measures where it has jurisdiction itself. Orders it has made, including in the field of EU environmental law, refer to the need for the CJEU to be presented with a prima facie case, the urgency of the matter and the balance of interests."

Test for a stay

28. In *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, at p. 193, Clarke J. set out the broad approach to the grant of stays in the context of judicial review:

"[104] As to the overall test I am of the view, therefore, that in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply the following considerations:-

(a) The court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;

(b) The court should consider where the greatest risk of injustice would lie. But in doing so the court should:-

(i) Give all appropriate weight to the orderly implementation of measures which are *prima facie* valid;

(ii) Give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and

(iii) Give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;

but also

(iv) Give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.

(c) In addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages.

(d) In addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."

29. The discussion in *Okunade* takes place within the broader and well-established basic framework for injunctive relief as set out in caselaw stemming from *American Cyanamid v. Ethicon Ltd*. [1975] A.C. 396 (an approach followed in *Campus Oil v. Minister for Industry (No. 2)* [1983] I.R. 88, [1984] I.L.R.M. 45), which while variously expressed, involves consideration of three main issues, whether there is an arguable case to an appropriate standard, the adequacy of damages, and the balance of convenience, as well as any other appropriate factors.

30. What *Okunade* particularly adds to this basic mix is a prominent acknowledgement, as a factor to be considered, of the public interest in giving effect to decisions that are *prima facie* valid, and a framing of the balance of "convenience" in a way that clearly brings out that it is not a discretionary and subjective exercise but rather an endeavour to minimise the risk of injustice.

31. As regards prejudice to the beneficiary of or the maker of a decision challenged, it is important to note that the degree of prejudice depends in a substantial way, although this is not the only factor, on when the legality of a decision is first questioned. When a decision is made, it is of course presumed to be lawful and valid from the moment it is adopted, but nonetheless in practical terms it is subject to a zone of provisionality because the right to an effective remedy must in any case allow a reasonable period, however defined, which may vary from legal context to legal context, for that decision to be challenged. Only when the period so defined expires without a challenge does a higher level of prejudice start to accrue to any given decision-maker or beneficiary of a decision. That doesn't of course mean that there can't be at least some prejudice in at least some circumstances if a stay is applied for in the context of a challenge brought within time. Some processes are inherently urgent and the decision-making and judicial procedures need to take that into account along with any other relevant factors.

32. Another issue relevant to balancing the weight of the factors to be considered under *Okunade* is the possibility of damaging (and *a fortiori* irreversible) effects on the environment generally and protected habitats in particular. At least in the latter context, the risk of damage may be inferred as a possibility from any situation where there is a lack of scientific information or a *prima facia* argument that there is such an absence (see *Case C-441/17R European Commission v. Republic of Poland* (Court of Justice of the European Union, 20th November, 2017, ECLI:EU:C: 2017:877) at para. 61):

"Consequently, given the prima facie lack of scientific information excluding beyond all reasonable doubt that the active forest management operations at issue have damaging and irreversible effects on the protected habitats of the Natura 2000 Puszcza Białowieska site referred to in the Commission's action, it must be held that the urgency of the interim measures requested by the Commission has been established."

33. As regards the question of an undertaking as to damages, as a question of pure domestic law a court has a discretion in that regard: see *Jennings v. An Bord Pleanála* [2022] IEHC 16, [2022]

2 JIC 0701 (Unreported, High Court, 7th February, 2022), which dealt with the undertaking as a matter of domestic law only and where Holland J. exercised the discretion not to require such an undertaking without the necessity of considering EU law.

34. The position in European law would seem (on the basis of the consideration that can be given to it at this preliminary stage) to be somewhat stronger having regard in particular to the requirement of access to justice under the EIA and habitats directives and the Aarhus Convention as incorporated into European law (see also *Coll v. Donegal County Council* [2007] IEHC 110, [2008] 1 I.L.R.M. 58, [2007] 3 JIC 2301 *per* Dunne J.). In any event, the first named notice party did not at least at this stage of the proceedings strongly dispute that issue.

Application of the law to the facts

35. As noted above, the basic *Okunade* formula is not especially ground-breaking and is a slightly more elaborate version of well-established previous formulations ultimately driving from *American Cyanamid*.

36. As regards **an arguable case**, sometimes put as a fair question to be tried, that must be read as including a substantial case where that is appropriate including where that is the standard for the grant of leave (although this isn't such a situation). I was satisfied on the basis of what I had as of the date of the decision on the interim stage that this element was satisfied (and indeed I subsequently granted leave as noted below).

37. As regards placing all due weight on the strength or weaknesses of an applicant's case as referred to in *Okunade*, this is something which a court has to approach with a great deal of caution in any case and certainly isn't necessary here. The difficulty with a court going beyond an assessment of an applicant's case as merely arguable (or at most substantial) is that to proceed to an assessment of its strengths and weaknesses can far too easily turn into something which is functionally indistinguishable from giving a provisional view on the ultimate outcome of the case. That is often an unsatisfactory procedure not least from the point of view of justice being seen to be done. For example, suppose the court says that a party's case is just about arguable but fairly weak – one has to ask whether that party would reasonably feel that the court is going to approach the substantive hearing with the necessary openness of mind. Absolute openness of mind is not necessary or even possible because all courts come to all questions with a pre-existing exposure to legal precedents, principles, concepts, philosophies and policies. But somewhere between the impossibility of suggesting that a court should have absolutely no *prima facie* views on the general issues involved in any given case, and the normally dubious procedure whereby a court would comment on the strengths and weaknesses of the case based only on a preliminary examination, lies a zone of reasonableness whereby it might be understood that the court has a broad jurisprudential approach, formed primarily by reference to positive law and decided cases, but remains open to that being challenged or to its application to particular facts being contested. Should judges be neutral? Yes of course, as between persons. But not as between values and ideas. The latter would be a serious misunderstanding of the idea of neutrality.

38. In terms of the **adequacy of damages**, which is related to consequences for the applicants, it is not so much direct consequences to the applicants that are in issue, but an allegation of significant risk to objective environmental interests protected by domestic and European legislation. Damages are unlikely to be an adequate remedy in any case where there is risk of injury to the environment. Relatedly, an undertaking as to damages is not something that I would propose to require either in general in an environmental context without that being specifically asked for and argued for, or more specifically in the present case at the present time having regard to the matters set out in this judgment.

39. As regards the **least risk of injustice**, or the balance of convenience, the fact that the decision was challenged within three months from the date of its publication in *Iris Oifigiúil* and that the first named notice party decided to partially implement the decision while it was still within the zone of provisionality to which I have referred, is relevant. One can reasonably say that while there is undoubtedly going to be financial prejudice to the first named notice party, that is somewhat diluted where there is an element of voluntary acceptance of risk by immediately acting on a public law decision, albeit presumed valid, without waiting to see if it will be challenged.

40. In any event, financial damage to an individual private law actor would normally, and would in this case, have to yield to the objective community and public interest in avoiding the risk of environmental damage which transcends the interests of individual litigants, and which in this case is set out on affidavit by or on behalf of the applicants, in particular in the affidavit of Marie Louise Heffernan, director of Aster Environmental Consultants Ltd.

41. At the same time there are certain factors that lean in favour of the first named notice party. One has to give all appropriate weight to the implementation of a *prima facia* valid public law decision although that has to be reconciled with the fact that the applicants have also established arguable grounds on a *prima facie* basis and in particular in relation to the argument that the condition of the

licence agreement suggests that not all information was before the Minister when the licence was granted.

42. It is also true in favour of the first named notice party that the application for a stay was not sought at the earliest opportunity, that the applicants initiated the proceedings on the last day of the three-month period as running from the date of notification, and that having instituted proceedings they didn't seek to move a stay application until the next list, although that in itself is understandable, especially in the circumstances as outlined above.

43. It also appears that when they sought a stay on the first substantive mention date, that was without clear and specific notice in advance to the opposing parties of an intention to do so on that day, which may possibly have contributed to the State not appearing on that occasion; and that the application for the stay was not made until after the works had already commenced. In a case which concerns a clash of purely private law interests, those factors might have somewhat greater weight, but I don't think that they are totally disqualifying here given the fact that the proceedings engage objective environmental interests going beyond the private law concerns of the applicants. Again for the avoidance of doubt, any assessment of the balance involved can be, and no doubt will be, reconsidered and looked at afresh following full submissions and exchange of affidavits.

44. Issues such as the orderly operation of the public law scheme concerned and factors heightening the risk to the public interest are largely covered by the points already mentioned, although the fact that the project concerned is one of major renewable energy-generating infrastructure is an important factor which no doubt can be considered further when affidavit evidence on behalf of the first named notice party is delivered. But nonetheless, even in the context of green energy projects, there are still objective environmental requirements under the EIA and habitats directives that must be complied with.

45. Overall, an assessment of all relevant factors favours the grant of an interim stay here, with the risk to the environment in particular (even leaving aside other factors favouring the applicants) outweighing such features of the case as tend to militate against a stay, as of the date of the order for interim relief and on the basis of the material before the court at that time.

Terms of any stay

46. I did give consideration to the question of whether the stay could be nuanced in some way or limited to works in the SAC, but having regard to the applicant's expert evidence on affidavit I didn't think that is something that could realistically be done, at least on the basis of the material I had as of the hearing.

47. The first named notice party requested a brief run-off period, and it seemed to me that that was appropriate in this situation, so I allowed the first named notice party a 24-hour period until 16:00 on 9th May, 2023 to wind down the existing works and carry out any health and safety measures, but not to carry out any new steps under the licence. There has to be some balance between absolute principle on the one hand and practicality on the other, given the fact that an application for a stay is being made mid-stream, which means that there must be some possibility in an appropriate case (and this is such a case) of allowing the orderly boxing-off of some specific works which are in hand at the precise time when the application for a stay is sought. The first named notice party had intended to drill seven boreholes during the month of May and as of the hearing was drilling number three, so insofar as that could be wound down within the 24-hour period allowed it seemed to me that that was a reasonable balance between principle and practicality in the circumstances. Perhaps I could be allowed to add that, while there are of course some situations which call for an immediate downing of tools the moment an injunction is granted (for example, when a deportee or extraditee is in a plane on the runway or in a car speeding towards the border), some provision for a winding-down period that does not significantly damage any objective interests also serves the practical function of minimising unnecessary satellite arguments created by brief delays in communicating or actioning any order.

Order

48. For the foregoing reasons, the order made on 8th May, 2023 was that:

(i) there was a stay in terms of relief 3 in the statement of grounds but made under O. 84, r. 26(1) RSC and/or the inherent jurisdiction of the court;

(ii) the first named notice party would have until 16:00 on 9th May, 2023 to wind down existing works and carry out any health and safety measures but not to carry out any new steps under the licence;

(iii) an undertaking as to damages was not required at that stage;

(iv) the applicant was to issue a motion for an interlocutory stay by 16.00 on 9th May, 2023 and to furnish papers in draft form to the opposing parties by 14.00 on that date as well as an order for short service;

(v) the matter was adjourned to Friday 12th May, 2023 at 11.00 to hear the motion to admit the proceedings to the list on notice and the leave application *ex parte* and at

a minimum for mention of the interlocutory stay motion which was to be for hearing if the parties agree that or the court considered that appropriate;

(vi) the applicants were to write to the CSSO immediately to inform them of the order; and

(vii) costs were reserved.

49. I can also record that on 12th May, 2023, after a further listing attended by all parties, additional orders were made as follows:

(i) the proceedings were admitted to the Commercial Planning & Environmental List without objection, costs being reserved and certifying for two counsel;

(ii) time was extended if and insofar as that was legally necessary, without prejudice to any objection that might be made in due course by the opposing parties;

(iii) leave was granted on standard terms, including costs being reserved, and certifying for two counsel, on the basis of a proposed amended statement of grounds to be filed (rectifying paragraph numbers of sub-grounds to make them continuous and particularising to the extent possible the national and EU legal provisions specifically relied on in core ground 9);

(iv) the return date for the substantive notice of motion was fixed for 19th June, 2023; and

(v) the interlocutory stay was fixed for hearing on 23rd May, 2023 with the matter for mention in the meantime on 17th May, 2023.