

**JUDICIAL REVIEW**

[2022] IEHC 61  
**2021/750JR**

**IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT, 2000  
(AS AMENDED)**

**BETWEEN:-**

**WENDY JENNINGS  
AND  
ADRIAN O’CONNOR**

**APPLICANTS**

**AND**

**AN BORD PLEANALA,  
IRELAND  
AND  
THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**

**COLBEAM LIMITED**

**NOTICE PARTY**

**(#3)**

**Judgment of Mr Justice Holland, delivered the 7<sup>th</sup> of February 2022**

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## INTRODUCTION

1. The Applicants seek to have quashed the Board's decision dated 3 June 2021 to grant planning permission ("The Impugned Permission") to the Notice Party, ("Colbeam"), for, essentially, construction of a Strategic Housing Development<sup>1</sup> ("SHD") of 698 student bedspaces on a site at Our Lady's Grove, Goatstown Road, Dublin 14. The Applicants live nearby and consider that the Impugned Permission would permit significant over-development of the site.

2. This is my third judgment in these proceedings and should be read with my two earlier judgments delivered on the 14<sup>th</sup> January 2022 and 19<sup>th</sup> January 2022<sup>2</sup>. In my first judgment I continued a stay which had earlier been imposed on the operation of the Impugned Permission, save that, on Colbeam's application, resisted by the Applicants, I varied it to permit Colbeam to carry out the works identified at lines 1 to 17 of the Colbeam's Programme of Works<sup>3</sup> – essentially site clearance and excavation, tree cutting and demolitions. This represented success for Colbeam, who sought to lift the stay only to that extent. However, it is important to observe that in that judgment I emphasised that lifting the stay, to the extent that I did so, would not render lawful any development otherwise unlawful having regard to questions of timely compliance with pre-commencement planning conditions or building control law and the legal status of development effected prior to such compliance. I also referred to a lack of clarity as to whether and when Colbeam might, for reasons unconnected with the proceedings [i.e. those compliance issues], start development.

3. In my second judgment I declined, pro tem, to make further prosecution of the proceedings conditional on the Applicant's provision of an undertaking in damages.

4. Questions are outstanding as to:

- the costs of the hearing of the motions which resulted in my first two judgments.
- whether the Applicants should have a protective costs order. That motion has been heard but awaits written submissions on the significance, if any of the judgment of Humphreys J on costs protection issues in the **Enniskerry Appliance/Protect East Meath** cases<sup>4</sup>.

Also, a motion stands adjourned in which Colbeam seeks to identify persons associated with the Applicants for the purpose of making them accountable in costs and on an undertaking in damages. None of these issues will be decided in this judgment.

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<sup>1</sup> Within the meaning of the Planning and Development (Housing) and Residential Tenancies Act 2016

<sup>2</sup> [2022] IEHC 16

<sup>3</sup> exhibited at "KB2" to the Affidavit of Kenneth Birrane, sworn on 2 November 2021

<sup>4</sup> Enniskerry Alliance and Enniskerry Demesne Management Company clg V An Bord Pleanála, Ireland and The Attorney General and Cairn Homes Properties Limited [2021 No. 846 JR]; Protect East Meath Limited V An Bord Pleanála, Ireland and The Attorney General and Louth County Council and Hallscotch Venture Limited [2021 No. 770 Jr]; Unreported, High Court, Humphreys J delivered 14 January, 2022 – [2022] IEHC 6

5. The Applicant on 1 February 2022 applied for a stay pending appeal of my order, on foot of my judgment of 14<sup>th</sup> January 2022, as to the stay on the Impugned Permission. This is my judgment on that application.

6. As its application on 1 February 2022 developed, the Applicant in effect seeks a stay pending appeal until the first directions hearing in the Court of Appeal, on terms that it will file its notice of appeal within 10 days of perfection of the order on foot of the judgment of 14<sup>th</sup> January 2022. The parties differ as to when the first directions hearing in the Court of Appeal is likely. Counsel for the Applicant says appeals in SHD judicial reviews are expedited in the Court of Appeal and recites his recent experience of a directions hearing and stay application coming on 10 days after filing the notice of appeal. He says that in **Cork County Council v Minister for Housing**<sup>5</sup> a Notice of Appeal and a Notice of Motion for a Stay issued on 22 December 2021 and came before the Court of Appeal on 14<sup>th</sup> January 2022. By contrast, counsel for Colbeam cites an equivalent period of about 50 days in an appeal from the Commercial Court of a kind ordinarily receiving similar priority in the Court of Appeal.

7. These differences are potentially significant in the particular context of this case for reasons which will be apparent from my two earlier judgments: in effect the stay on the operation of the Impugned Permission is lifted for a relatively brief period to allow the performance of limited and specific works to the point of expected handover of the site to the main contractor. It is unclear as yet when the site will be ready to be handed over to the main construction contractor. It is anticipated that at, or presumably shortly prior to, that point, Colbeam may make a further application to lift the stay on development as it still applies from that point of handover to the main construction contractor. While Colbeam's exhibited Works Programme envisaged works on site commencing on 1 November 2021 and handover was originally scheduled for 10 February 2022, Colbeam has already been delayed in its Works Programme. I have no evidence, or even intimation, of a revised date of expected handover. But I can infer that, if the longer period cited by Colbeam is more accurate, the Applicant would in appreciable degree, as Colbeam argues, get by the stay pending appeal now sought, the stay which it failed to get in the application on which my judgment of 14<sup>th</sup> January 2022 decided. This is in a context in which, while I did not uncritically accept its evidence in this regard, I did broadly accept that it was urgent for Colbeam to commence development on a tight Works Programme to complete development in time to let the student accommodation for the academic year starting September 2024 and that it was likely to suffer significant losses if it missed that milestone.

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<sup>5</sup> See below

## THE LAW ON STAYS PENDING APPEAL

8. I will come in due course to the events since my judgment of 14 December 2021. But it may assist to first set out some of the law as to stays pending appeal.

### The Problem and the Underlying Principle

9. Paraphrasing Clarke J in **Okunade**<sup>6</sup> and as to the grant or refusal of a stay pending appeal, the problem stems from the fact that the court is being asked to put in place a temporary regime pending appeal knowing that the court does not know what the result of the appeal will be. That involves the risk that, when the dust has settled, it will be seen that someone has suffered by the intervention of the court or, equally, by its non-intervention. Recognising that a risk of injustice is inevitable in those circumstances, the underlying principle is that the court should put in place a regime, if needs be nuanced, which minimises the overall risk of injustice. That view is also apparent in the observation of O'Donnell J in **Krikke**<sup>7</sup> that *"there is a clear risk of injustice, whatever course is adopted on the stay application"* and that *"In circumstances where there is an unavoidable risk of injustice on either side, and no simple rule of thumb which can reduce it, the court must necessarily reach a nuanced decision."*

10. Costello J in the Court of Appeal in **Krikke** tellingly acknowledged, in terms applicable to the present case, that in assessing where the least risk of injustice lies there is often *"no truly satisfactory solution"*. That view is also apparent in the observations, in **Krikke**, of O'Malley J that the court should act to minimise the risk of injustice pending appeal *"as best it can"*.

11. Notably, the Supreme Court in **Krikke**<sup>8</sup> considered that *"The ability of the court system to bring matters on for hearing within a reasonably short period is probably the most effective protection against the possibility that serious and unjustified harm might be caused to either party pending that hearing."* and *"The first thing which a court should do is exactly what Costello J. did in the Court of Appeal, which was to seek to fix an early hearing of the appeal, and thus reduce the extent of any injustice to either side that may be caused by a mismatch between the order made on the stay application, and that made on the outcome of the case."* Early trial is the course taken by Simons J as to a first instance hearing in **Friends of the Irish Environment v Roscommon County Council & Ors**<sup>9</sup>. Of course the Court of Appeal would be far better placed than am I to consider question of a stay pending appeal in the context of whatever prospect it may see of an early hearing of the appeal.

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<sup>6</sup> Okunade v. Minister for Justice, Equality and Law Reform [2012] IESC 49 [2012] 3 I.R. 152 per Clarke J.

<sup>7</sup> Krikke v. Barranafaddock Sustainability Electricity Ltd – Costello J, Ex Tempore. Cited in Krikke v. Barranafaddock Sustainability Electricity Ltd [2020] IESC 42

<sup>8</sup> Krikke v. Barranafaddock Sustainability Electricity Ltd [2020] IESC 42

<sup>9</sup> Simons J, Ex Temp. 28 January 2022

## **Cork County Council v Minister for Housing #2<sup>10</sup>, Okunade**

12. In **Cork County Council v Minister for Housing #1<sup>11</sup>** Humphreys J declared invalid and quashed a ministerial direction cancelling a variation of the Cork County Development Plan, thus reactivating the variation. In **Cork County Council v Minister for Housing #2** Humphreys J decided the minister's application for a stay on the order – the effect of which would have been, pending appeal, to prevent application of the variation in the consideration of planning applications.

13. Humphreys J identified **Okunade<sup>12</sup>** as the most pertinent authority and as the first consideration whether the applicant for a stay has established an arguable case. If so, the court considers where the greater (and lesser) risk of injustice would lie on foot of the grant or refusal of the stay, giving appropriate weight to various factors. In a public law action (such as the present) they include:

- the orderly implementation of measures *prima facie* valid,
- any public interest in the orderly operation of the particular scheme in which the measure under challenge was made,
- 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,
- 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 (I would add that in a permission/licence case that translates as the consequences for the applicant and for any public interests which (s)he advances in judicial review of the permission recipient/licensee being enabled to act on the permission/licence under challenge in circumstances where that permission/licence may be found to be unlawful),
- 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,
- 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 – or, to put it another way, its prospects on appeal. Humphreys J considered that factor “*particularly relevant for a post-judgment stay where the court has evaluated the case.*” A fortiori it must be relevant where, as in the present case, the judgment was itself a decision on whether the impugned decision should be stayed.

14. It bears pausing to note three aspects of Okunade:

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<sup>10</sup> *Cork County Council v. Minister for Housing, Local Government and Heritage (No. 2)* [2021] IEHC 708 (Unreported, High Court, 18<sup>th</sup> November, 2021)

<sup>11</sup> *Cork County Council v. Minister for Housing, Local Government and Heritage (No. 1)* [2021] IEHC 683 (Unreported, High Court, 5<sup>th</sup> November, 2021)

<sup>12</sup> *Okunade v. Minister for Justice, Equality and Law Reform* [2012] IESC 49 [2012] 3 I.R. 152 *per* Clarke J.

- First, while it requires an arguable case as a threshold test, it also contemplates that, at the later point of considering the balance of justice, the strength or otherwise of that arguable case may be weighed.
- Second, and as to the orderly implementation of measures *prima facie* valid, Clarke J said that

*“..... significant weight needs to be placed into the balance on the side of permitting measures which are prima facie valid to be carried out in a regular and orderly way<sup>13</sup>. Regulators are entitled to regulate. Lower courts are entitled to decide. .... All due weight needs to be accorded to allowing the systems and processes by which lawful power is to be exercised to operate in an orderly fashion. It seems to me that significant weight needs to be attached to that factor in all cases.”*

The underlined words appear to me important.

- Third, and as recognised by O’Malley J in **Krikke**, Clarke CJ generally saw the possibility of considering the strength of the appeal as arising specifically where the risk of injustice was seen to be evenly balanced. But as will be seen, the position as to stays pending appeal is different.

15. In the particular circumstances of **Cork County Council v Minister for Housing #2** Humphreys J thought the appeal weak and its success unlikely. His conclusion, in nonetheless granting a stay pending appeal, was as follows:

*“18. Having regard to an application of the Okunade test, it seems to me that there isn’t a whole lot that really stands out either way, and ultimately the real argument for a stay is the longshot possibility that a planning application might sneak under the wire before the State manages to progress its appeal. However, given that I see the State case as itself something of a longshot, what all this really comes down to is the possibility that the Court of Appeal, seized with grounds of appeal that I don’t have sight of because they haven’t yet been formulated, might think that there is a case for a stay.*

*19. The logical conclusion is that it would seem proper to preserve the status quo for such strictly limited period as will enable the Court of Appeal to consider that matter if requested to do so. It seems to me that a stay for 28 days and, if an appeal is lodged in that time, for a further period of 28 days, will allow a stay application to be brought in an orderly manner to the Court of Appeal if thought appropriate.”*

16. It is clear, and clear in any event from the manner of Humphreys J’s consideration of these issues on the facts of **Cork County Council v Minister for Housing #2**, that the weight of the factors identified in Okunade, and their weight relative to other factors at play, will vary with circumstance.

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<sup>13</sup> Emphasis added

It is also notable that in that case the prospect of financial loss to a notice party, such as that feared by Colbeam in this case, was not in play.

17. I note in particular that, as to the specific terms of the stay, Humphreys J in **Cork County Council v Minister for Housing #2**, said: *“It seems to me that a stay for 28 days and, if an appeal is lodged in that time, for a further period of 28 days, will allow a stay application to be brought in an orderly manner to the Court of Appeal if thought appropriate.”* And it seems significant that this form of order, which is sought by the Applicant here, was Humphrey J’s reaction to what he saw as the weakness of the appeal in that case.

#### **Krikke**<sup>14</sup>

18. Before considering the case in more detail and as to the public interest considerations at play, and as submitted by Counsel for Colbeam, I should bear particularly in mind the emphasis laid by O’Donnell J in **Krikke** on the importance of recognising 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”* and that as to *“disapplying a measure which is prima facie valid”* the:

*“starting point is, however, the application of a law validly enacted by the body entrusted with that task by the Constitution. Even where the challenged measure is made pursuant to statutory power and is of more limited application, the temporary disapplication of a measure which is ostensibly valid is a serious matter, and the fact that there is no remedy should it transpire that the challenge was not justified is a matter that must be weighed in the balance on any application for an interlocutory injunction or stay pending trial, and perhaps even more so where a stay is sought pending appeal.”*

He also said that *“there is no easy way of repairing the damage to the rule of law caused by the fact that the law has been (wrongly) suspended.”*

19. In **Krikke**, a planning injunction case, the Supreme Court upheld the High Court (Simons J) in its refusal to stay pending appeal an injunction restraining a developer’s operation of an unauthorised wind farm. In so doing the Supreme Court disagreed with the Court of Appeal’s overturning of the High Court. However in the particular and changed circumstances of the case (since the hearing in the High Court) the Supreme Court left the stay in place. Simons J had refused the stay despite finding that the developer had acted in good faith in fitting longer wind turbine blades than the permission allowed. It had engaged proactively with the planning authority and its error was by mistake rather than culpable disregard. Simons J had refused the stay despite also the

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<sup>14</sup> Krikke v. Barranafaddock Sustainability Electricity Ltd [2020] IESC 42 (Supreme Court, O'Donnell J, 17 July 2020) §§11 & 12

prospect of significant financial loss to the developer. The Supreme Court confirmed Okunade as the leading applicable authority.

20. Notably and specific to the application of Okunade to the question of a stay pending appeal, O'Malley J in **Krikke** recorded that in **C.C.**<sup>15</sup>, a decision post-dating Okunade, Clarke J. noted the observations of McCarthy J. in **Redmond v. Ireland**<sup>16</sup> to the effect that appeals had in some cases been seen to have been lodged for tactical reasons, and that there was a heavy responsibility on the legal advisers of a party seeking a stay to assist the court in relation to the reality of the appeal. Clarke J. considered that it was clear, therefore, that the court must form some view of the possible outcome of the appeal.

21. In a passage having some resonance in the present case O'Malley J in **Krikke** said

*“86 In considering the balance of justice, it was of course correct to take account of the potential financial loss to the developer and, further, to take account of the fact that the developer would not be compensated for any loss caused by the High Court order should it be successful in the appeal. However, I consider that the appellants are also correct in their argument that the Court of Appeal ruling does not advert to the principle that developers should not benefit from developments that do not have permission. It must be remembered that s.160 makes no provision for an award of damages, still less for any order aimed at clawing back profits from a development that should not have been carried out. There is a public interest in preventing the accrual of such profits pending an appeal, and this is a matter to be taken into account.”*

22. O'Malley J in **Krikke** also observed that a party seeking a stay pending appeal is not entitled to proceed on the basis that the adverse judgment which is to be appealed carries no weight in the stay application. The fact that a court has, in a reasoned decision, reached a particular conclusion must count for something in the appellate court's considerations.

23. Notably also, O'Malley J in **Krikke** said the following:

*“The orderly operation of the planning code is, in my view, of high public importance. As McKechnie J. emphasised in Murray, the starting point is that, subject to certain exemptions, no development can lawfully be commenced without planning permission. As well as rendering the developer liable to very far-reaching orders under s.160, unauthorised development is a serious breach of the criminal law. The penalties are, McKechnie J. stated, “a significant expression of the high level of public concern there is in regulating orderly and sustainable development”.*

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<sup>15</sup> C.C. v. Minister for Justice and Equality and Ireland [2016] 2 I.R. 680

<sup>16</sup> [1992] 2 I.R. 362



24. O'Malley J stressed that Simons J had structured his order so as to promote positive compliance by the developer with the planning system process, rather than simply penalising it by, for example, ordering the demolition of the turbines. This was relevant to the "balance of justice" debate as, if the Developer got leave from the Board to seek substitute consent for the turbines as built the High Court order might be vacated. The Developer's application for leave to seek substitute consent was seen by the Court of Appeal as supporting the bona fides of the developer, but O'Malley J considered it also relevant to the question whether it was unjust to impose what might have turned out to be only a short-term shutdown pending regularisation.

25. O'Malley J considered that in such circumstances, it was an error by the Court of Appeal "to consider the potential financial loss solely by reference to a worst case scenario relating to the length of time it could take before the Court of Appeal determined the matter, without reference to the possibility that the High Court might vacate its order in a relatively short period of time. It is also relevant that, as it turned out, the Court of Appeal was in a position to fix an early hearing date. The ability of the court system to bring matters on for hearing within a reasonably short period is probably the most effective protection against the possibility that serious and unjustified harm might be caused to either party pending that hearing."

26. O'Donnell J, concurring in Krikke agreed that the Court of Appeal gave too much weight to the financial loss which might have been suffered by the appellant developer pending appeal if its appeal were to succeed. He also agreed that it followed that insufficient weight was given to the public interest in the enforcement of planning law and the law protecting the environment.

### **AIB v FitzGerald<sup>17</sup> & Brompton v McDonald #3<sup>18</sup>**

27. These cases are two recent examples of the exercise of discretion as to the grant or refusal of a stay pending appeal. **AIB v FitzGerald** was a private law case in which Simons J granted a limited stay pending appeal on an order for possession on foot of a mortgage. As to a stay pending appeal, he cited the Supreme Court in **Krikke** as authoritative to the effect that, "the guiding principle must be to do justice between the parties pending the determination of the appeal. It is inevitable that the hearing and determination of an appeal will take some time, and the court should endeavour to put in place arrangements in the interim which best serve the justice of the parties." He found the prospects of the appeal weak and considered it likely to fail and considered accrued delay in the proceedings also relevant. Nonetheless he granted a stay but limited in the first instance to 28 days from perfection of his order and, if by that time Notice of Appeal had been filed, thereafter to the first return date in the appeal.

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<sup>17</sup> Allied Irish Banks PLC v. Fitzgerald [2021] IEHC 231 (High Court (General), Simons J, 26 March 2021)

<sup>18</sup> [2022] IECA 5

28. It is of interest that Simons J's reaction to a perceived weak appeal was, as was Humphreys J's in **Cork County Council v Minister for Housing**, not to refuse a stay pending appeal but to grant a stay limited to the period to the first hearing before the Court of Appeal.

29. Murray J in **Brompton** refused an application for a stay pending appeal to the Supreme Court of the Court of Appeal's refusal to restrain enforcement of two Bulgarian judgments. **Okunade** provided the test, as including two elements: whether the applicant for the stay had identified arguable grounds of appeal, and whether the balance of justice leaned in favour or against the grant of a stay. Murray J found that the applicant for the stay failed both tests.

30. On the threshold test, Murray J observed that *"If the appellant cannot establish arguable grounds of appeal, his application for a suspensory order must fail, and the question of balancing the interests of justice as between the parties does not arise."* Murray J also observed that it was *"less than usual"* for an appellant to fail this test and that a:

*"..... court should not easily conclude that an appellant has failed to establish arguable grounds of appeal for the purposes of an application of this kind. Apart from being properly conscious that it is evaluating its own judgment, the appellant has a right to seek leave from the Supreme Court to appeal decisions of this court and ideally it is that court which, in the course of considering an application for such leave, should determine arguability when the issue arises."*

31. In considering the balance of justice Murray J noted the appellant's arguments that there was no evidence that if he paid on the judgments pending appeal and if the appellant won the appeal, the judgment creditor had assets from which the monies paid might be recovered and that if the judgment creditor executed the judgments pending appeal, the appeal could become moot. He also pointed out that the Supreme Court's likely early determination whether to grant leave to appeal would mean that stay would delay the judgment creditor only briefly if leave was refused and if granted it would imply that the appeals were at least arguable. Murray J considered that normally, these would be weighty considerations in favour of a stay.

32. However, Murray J saw significant countervailing factors as prevailing. First, the grounds of appeal were exceptionally weak. Second, the Bulgarian judgments were prima facie valid – *"an especially significant consideration when the legal starting point is that the courts in this jurisdiction must, in accordance with their obligations under EU law, swiftly and without delay, give effect to orders of the courts of another member state."* The third and fourth factors were particular to the case and legislative context and I need not recite them.

33. Returning to the issue of the appeal being rendered moot, Murray J considered it “*without a doubt, the most substantial point*” but not dispositive when weighed against the countervailing factors set out above and others, again particular case and legislative context.

34. Murray J, in refusing a stay in the particular circumstances of that case made the general observation that:

*“It is uncommon for this court to either refuse a stay on one of its orders pending the seeking of leave to appeal its decision in a case to the Supreme Court or to refuse to continue injunctions granted pending such an application. I think it fair to say that the reality is that in many cases practical concerns around the efficient use of court resources (both of this court and of the Supreme Court) and the fact that applications for leave to appeal can be processed quite quickly, strongly incline to the grant of such stays. However, there are limits to the flexibility the court enjoys to accommodate these pragmatic concerns.”*

#### **EVENTS SINCE JUDGMENT OF 14<sup>th</sup> JANUARY 2022, COLBEAM’S PRESENT CAPACITY & INTENTION TO DEVELOP & THEIR LEGAL SIGNIFICANCE**

35. It bears observing in considering what follows, that the cases<sup>19</sup> are clear – most recently **Doorly v Corrigan**<sup>20</sup> and **Clare County Council v McDonagh**<sup>21</sup> - that the public interest in upholding the integrity of the planning and development system is a strong one – though they also make clear that the relative weight to be given it will vary with circumstance and it may not be decisive in a given case.

36. I did not have before me in hearing the application for a stay pending appeal the subject matter of this judgment, any affidavits or other formal evidence additional to that on which I gave my two earlier judgments. Since the hearing of the application for a stay pending appeal the Applicant has, on foot of liberty granted by me on 1 February 2022, filed 4 further affidavits which I understand, address events since the hearing of the motions on 15 and 16 December last. They were forwarded to me electronically. At hearing on 1 February 2022, in anticipation of their filing, I canvassed the question whether I could have regard to their content in deciding the application of a stay pending appeal – perhaps giving Colbeam also liberty to file affidavit. Counsel for Colbeam objected, pointing out that the Applicants had chosen to move their application for a stay pending appeal in advance of filing those affidavits. As I considered that objection well-founded, not least on grounds of fair procedures and as Colbeam could not be expected to defend an application

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<sup>19</sup> *Ferry v. Caulderbanks* [2021] IECA 345 (Court of Appeal (civil), Power J, 21 December 2021); *Krikke v. Barranafaddock Sustainability Electricity Ltd* [2019] IEHC 825 (High Court (General), Simons J, 6 December 2019); [2020] IESC 42 (Supreme Court, O'Donnell J, O'Malley J, 17 July 2020); *Ferry v. Caulderbanks Trading As D&M Services* [2021] IEHC 97 (High Court (General), O'Regan J, 5 February 2021) and [2021] IECA 345 (Court of Appeal (civil), Power J, 21 December 2021); *Kerry County Council v. McElligott* [2021] IEHC 542, [2021] 7 JIC 3003 (Unreported, High Court, 30th July, 2021), Hyland J.

<sup>20</sup> *Doorly v Corrigan* [2022] IECA 6

<sup>21</sup> Supreme Court, Hogan J, 31 January 2022

grounded on affidavits it had not seen, I have refrained from reading those affidavits prior to finalising this judgment. As I see that the e-mail of 1 February 2022 sent after the hearing of 1 February 2022 covering their provision to the Court suggests that two of the affidavits had been filed on 28 January I should confirm that I was, when hearing that application on 1 February 2022, unaware of any such filing and those affidavits were not opened to me at hearing on 1 February 2022 and I have not had regard to their content in considering the application for a stay pending appeal.

37. I have, in considering the application for a stay pending appeal, had regard to inter partes correspondence<sup>22</sup> sent to me by Colbeam prior to the hearing on 1 February 2022. As here relevant it records:

- The Applicants' assertion by e-mail of 28 January 2022 that Colbeam had performed tree-felling works from shortly before 9am until approximately 11.45 am on Monday 24 January 2022 and enquiry whether, in doing such works, the mitigation measures required by Condition 4 of the Impugned Permission had been complied with. (Condition 4 required mitigation measures set out in an Ecological Impact Assessment which accompanied the planning application and which inter alia related to the prospect of disturbing bats while tree-felling.)
- The Applicants' intimation by that e-mail of 28 January 2022 that they were "considering" appealing my judgment of 14 January 2022 (this had been intimated also at hearing before me on 17 January 2022) and request that Colbeam consent to a stay pending such appeal in terms sought of me on 1 February 2022, failing which consent they intended to apply for a stay pending appeal.
- Colbeam's confirmation e-mail of 31 January 2022 "*that all mitigation measures required by condition four were fully complied with*". This implied admission by Colbeam that the Applicant's assertion of tree-felling works was correct in general if not in detail was confirmed at hearing by Counsel for Colbeam who told me that some of the trees were gone and others were still there and that two of the four trees which had been identified as potential bat roosts had been felled.

I have also had regard to the submissions of counsel as to the facts to the extent that they are not in dispute. While I would have taken the view in any event that the court can act on such correspondence and information, I take comfort in the recent observations of Humphrey J to that effect in **Doorly v Corrigan**<sup>23</sup>.

38. There is no dispute that, whether or not specifically on 24 January 2022, Colbeam recently commenced development on foot of the Impugned Permission by way of felling some of the trees

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<sup>22</sup> Consisting of the following

- John B. O'Connor & Co. (for Colbeam) to F.P. Logue (for the Applicants) 25 January 2022 (enclosing draft order)
- F.P. Logue to John B. O'Connor & Co. 25 January 2022
- John B. O'Connor & Co. to F.P. Logue 26 January 2022
- F.P. Logue to John B. O'Connor & Co. 25 January 2022
- F.P. Logue to John B. O'Connor & Co. 28 January 2022
- John B. O'Connor & Co. to F.P. Logue 31 January 2022

It is apparent from internal references in that correspondence that other correspondence not provided to the court occurred in the period 25 to 31 January 2022.

<sup>23</sup> Doorly v Corrigan [2022] IECA 6 §144

on the site. The question of removal of those trees is the subject matter of dispute in these proceedings on judicial review grounds as to alleged material contravention of a development plan objective for the preservation of those trees, as to their intrinsic value and as to their value as potential bat habitat. I described those controversies in more detail in my judgment of 14<sup>th</sup> December last. Accordingly the Applicants are concerned that if the trees are removed their proceedings will be rendered moot as to certain grounds on which leave to seek judicial review was granted.

39. Counsel for Colbeam explained that tree-felling was started on the footing that the stay on works had expired on delivery of the judgment - such that Colbeam took the view that it need not await perfection of the order on foot of that judgment. At hearing I confessed to surprise that such a view had been taken – not least as the draft order proffered by Colbeam explicitly acknowledged its understanding that the stay continued subject to the variation for which my judgment had allowed. Counsel for Colbeam confirmed to me that the draft order reflected that understanding of the judgment but also asserted that my judgment stated that the stay had lasted only until that judgment. As no relief on foot of that course of action was sought by the Applicants on 1 February 2022, I took the issue no further than to make clear to all parties for the avoidance of doubt that the stay on all works remained in place pending perfection of the order which I intended would occur on my delivering this judgment on the issue of a stay pending appeal. Whether the Applicants intend to seek any such relief on foot of the recently-filed affidavits, I do not know.

40. As a distinct matter arising on foot of that commencement of development by tree-felling, the issue arises whether Colbeam, prior to such commencement, had reached the “pre-commencement” agreements with the Planning Authority required by various conditions of the Impugned Permission.

41. As my first judgment records, the Affidavit of Sadhbh O’Conner sworn 15 December 2021 contemplated development on the basis of a form of arrangement short of formal compliance with the “pre-commencement” requirements of those conditions. I recorded that any such arrangement would merit careful consideration and that the authorities – **Luxor v Wave Point**<sup>24</sup> and **Murtagh Construction v Hannan**<sup>25</sup> - were clear that development started in advance of compliance with such conditions is unauthorised development. I also made clear in my judgment of 14 January 2021 that, prospectively, I was not anxious to precipitously interfere in arrangements designed to overcome genuine practical difficulties. On the other hand, I was equally clear that nothing in that judgment should be taken as, even implicitly, lending imprimatur to such arrangements.

42. Counsel for Colbeam, before me on 1 February 2022, addressed the question whether Colbeam had complied with the conditions of the Impugned Permission requiring written

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<sup>24</sup> Luxor Investments Ltd v. Wave Point Ltd [2018] IEHC 775 (High Court, Burns J, 20 December 2018)

<sup>25</sup> Desmond Murtagh Construction Limited (In Receivership) & ors -v- Hannan & ors [2014] IESC 52

agreements with the planning authority before commencement of development. Counsel for Colbeam was clearly unable to confirm such compliance. I set out below an incomplete, reordered and edited but, I think, fairly illustrative, account of Counsel's arguments in this regard, and as to arrangements of the kind contemplated by Sadhbh O'Conner, taken from the transcript of 1 February 2022:

- *It is a fact that the systems in the local authorities operate in a particular way and have done for a considerable period of time. It is a fact that the planning departments operate in this fashion.*
- *We have engaged, we have engaged with the Council in the manner and fashion that the system has operated.*
- *The local planning authorities were notified of all matters that were happening.*
- *There has been substantial engagement on the conditions, pre-commencement conditions, in which there has been agreement on the bulk thereof, including the bond, which was part of the delay. One of the issues was that Dun Laoghaire didn't indicate the level or amount of the bond.*
- *We have been informed in contact that there is agreement with what we have proposed in relation to the particular aspect of the works that we have before ...*
- *We have submitted and we have engaged with the local authority on the very issues that are pertinent to the level of works to be carried out up to 1 to 17 on the list. There are other issues .....*
- *(the context is a little unclear but seemed to be in contemplation of a S.160 PDA 2000 application) - Because the court will be asked to look at the very same topics; what are you doing and what areas of pre-commencement has not been agreed that have any, any impact on these issues. And none of them do. The construction management plan, nothing to do with these issues. Traffic management control, nothing to do with these issues. They're all to do with matters yet to happen. The drainage systems, nothing to do with these issues.*
- *..... there was a demolition plan in relation to the small building, the prefab, the tower ..... As I understand it, that hasn't been agreed. But then, that hasn't been engaged in.*
- *The trees were the issue. But none of the pre-commencement matters touch upon it, none.*
- *(in response to my question as to the prospect of disorderly implementation of the planning permission) - Well, save insofar as you're looking at it without all of the information before you. So all of the information as required was submitted, much of it in advance of the 17th, much of it already agreed, and what is left outstanding -- And I know this is the unsatisfactory way in which it's being brought before you, and that is entirely not of my doing in the context of the application, but the agreements in relation to matters that are necessary for pre-commencement have in many ways and many aspects advanced. But even if I had advanced none of them, none of the issues that require agreement touch upon what is at issue here.*
- *The Applicant makes no complaint about any of the issues that would have been the subject matter, that are the subject matter of the pre-commencement. It would be entirely different if for example the traffic management plan was at the core of the complaints in relation to the extraction of materials from the site.*

- ..... assume that I get my pre-commencement, as will happen, because it will happen -- It's a timing issue.
- There's an absolute position, an absolutist position, which is that unless all precondition matters, down to whatever it is, even down to the naming of the street is agreed, nothing can happen. That does not happen, ever.
- .... the naming is always a precondition. It never happens.
- (in response to my observation that I thought it not apparent that as a matter of law Colbeam was in a position to commence development) - But that is to presume that, ultimately, the position is such that I can't call in aid how in fact all local authorities operate.
- I say I am implementing that permission in a way that is valid.
- I'm saying what I am doing is lawful in the context of how the local authorities have all operated and how all systems have operated.
- And I'm not asking you to endorse what we're doing. I'll take my chances with the section 160 if Mr. Dodd brings one and I'll take my chances with the Council if they brought one.

43. I emphasise that as the foregoing were counsel's submissions for Colbeam rather than evidence on affidavit and as the matter of a stay pending appeal arose, as happens, in the absence of evidence additional to that which had been before me when giving judgment, it would be wrong of me to hold against Colbeam any account of the facts postdating my judgment of 14 January 2022 other than that apparent from its own correspondence and its counsel's submissions. The legal significance of those facts and any inferences properly to be drawn from them are, of course, a different matter.

44. Despite considerable discussion of the subject of the pre-commencement conditions Counsel for Colbeam, though no doubt very properly on his instructions, did not

- confirm compliance with the pre-commencement conditions of the planning permission by way of the making of the necessary agreements with the planning authority.
- contradict the assertion of Counsel for the Applicants that the pre-commencement condition agreements were not in place.
- take the obvious course of reassuring the court that Colbeam would not recommence development unless and until it was in compliance with the pre-commencement conditions.
- intimate that Colbeam or the planning authority had given the matter the careful, or indeed any, consideration which I had suggested in my judgment.
- suggest that compliance with the pre-commencement conditions was foreseen on any particular timescale.

45. I should add by way of explanation that in his repeated references to the practices of local authorities as to compliance with pre-commencement agreement conditions I understood counsel to refer at least in general terms to the type of arrangement described by Sadhbh O'Connor in her affidavit. Thereby, it is said, Local Authorities facilitate commencement of development prior to compliance with pre-commencement agreement conditions by way of the making of the written agreements required by those conditions. I should add that my clear impression from the foregoing is that Colbeam's interaction with the Council had produced agreement (though not it seems the written agreement required by the conditions) "*pertinent to the level of works to be carried out up to 1 to 17 on the list*" and that even that level of agreement had not yet been reached as to at least some of the agreements required as to works further down the list – in other words the main construction works. Also, it is clear that there is no compliance as yet with the requirement of condition 15 of written agreement before commencement of development of a "*construction waste and demolition management plan*". On its face this seems significant as demolition of the buildings on site is item 12 on the Works Programme, to be commenced at the same time as the tree-felling and completed shortly afterwards and it is an item of work contemplated in my judgment as released from the stay on operation of the impugned permission.

46. I should add by way of further explanation that Counsel's references to S.160 PDA 2000 (the "planning injunction") jurisdiction were in pursuit of his submission that the question whether development by Colbeam in the present circumstances as to compliance/non-compliance with the pre commencement agreement conditions would be unauthorised development was irrelevant to the question whether I should grant a stay pending appeal as it would be relevant in enforcement proceedings if brought against Colbeam.

47. In the foregoing light I advised counsel for Colbeam at hearing of my "*... general impression that (a) there is certainly not in place the full suite of agreements under pre-commencement conditions which is required by the planning permission on its face and (b) that there is (judge's screen frozen) which have not yet been reduced to formal agreement and (c) that your position is that, as to any outstanding issues, none of them affect points 1 to 17 of the programme of works. And I have to say as well that my impression is that that cannot be so as concerns whichever of those points 1 to 17 relate to demolition.*" And later I said to counsel for Colbeam "*I've given you an account of my understanding of what the present position is. If I'm wrong about that, I'd be glad to be corrected by you.*" I was not corrected and the foregoing remains my general impression.

48. It is also my clear inference as a matter of probability on a conspectus of the facts now known to me and of the approach taken by Colbeam at the hearing of 1 February 2022 and in light of Colbeam's commencement of development by way of tree-felling without first having complied with the pre-commencement conditions, that if I refuse the stay pending appeal Colbeam intend to and will recommence development without awaiting compliance with the pre-commencement conditions but rather in reliance on whatever arrangement it considers it has made with the Council



to commence such development despite such non-compliance. To be clear, in my view, such development would be unauthorised development. I respectfully and fully agree with Clarke J in **Murtagh Construction v Hannan**, in a passage I cited in my first judgment but which bears repeating. Clarke J considered that while, from a general perspective, the developer's position might be "reasonable":

*"..... the fact remains that a planning permission is a public law document establishing the rights and obligations not only of developers and local authorities but also of interested members of the public generally. Planning permissions also must be taken to mean what they say. A planning permission which is properly construed as requiring that an agreement on some particular point of detail is to be reached in advance of the commencement of development means just that. The development cannot lawfully be commenced until the relevant agreement is reached. If it is commenced prior to agreement, such a development is unauthorised. I cannot, therefore, agree that, in the absence of an appropriately determined variation of the planning permission, such a requirement can, in some way, be ignored. .... The fact that construction deadlines (again, it would appear, tax driven) might have made it difficult to achieve an appropriate variation in time or to bring proceedings designed to require the council's agreement, does not, in my view, affect the legal position."*

49. The inference which I have drawn, in light of events since my judgment of 14 January 2022, that Colbeam has commenced and intends to and will recommence unauthorised development if no stay pending appeal is granted is an inference which I did not draw in my judgment of 14 January 2022. In that judgment I, in effect, assumed in Colbeam's favour that it would not engage in unauthorised development, not least in view of the terms of my judgment as to the careful consideration required of any arrangement which might be made with the Council as to compliance with pre-commencement conditions.

50. That Colbeam commenced unauthorised development also casts in a new light the inadequacy of disclosure as to its position regarding pre-commencement conditions which I found in my earlier judgment. But in my earlier judgment, with explicitly considerable hesitation, I declined to give significant weight to the issue. Though I do not wish to overemphasise the point, I now consider it to bolster my inference as to Colbeam's present intentions. The inferences which I have now drawn that Colbeam has commenced and intends to and will recommence unauthorised development if no stay pending appeal is granted represents a considerable change of circumstance since that judgment.

51. It also seems to me that if, indeed, the Planning Authority's agreements in principle have been intimated as I assume in Colbeam's favour, it should be possible to finalise such agreements relatively expeditiously. That would enable Colbeam to seek the vacation of a stay pending appeal, though I do not prejudge the outcome of such an application. I may be accused of naivete in this regard as to the reality of Colbeam's capacity to secure expeditious agreement from the Planning

Authority. But if so, and if the correct conclusion, is that finalised agreements are some time off then the prospect of unauthorised development looms even larger.

52. As will have been seen above Counsel for Colbeam sought to impress upon me that the arrangements with the planning authority on which he relies in asserting that Colbeam is “*implementing that permission in a way that is valid*” are the allegedly near-universal practice of planning authorities. A similar argument as to “*industry norms*” was made to Burns J in Luxor. She had, in my view entirely unsurprisingly and correctly, explicitly declined to have regard to such norms. It may be that there are very good practical arguments for such arrangements if the underlying and general reality is that the Board is imposing impractical, unnecessary and/or unrealistic pre-commencement conditions. But the general solution to such a general reality is not to disobey planning conditions: much less to do so generally and in widespread practice. Such a practice does not conduce to the integrity of, and public faith in, the planning system.

53. One possible approach would be to seek to impress the issue on the Board with a view to dissuading it from imposing such conditions in the first place and instead imposing more nuanced, issue-specific or flexible conditions. As it happens, it seems that another approach has been taken: to oblige Planning Authorities to deal with compliance submissions expeditiously. SI 414/2021<sup>26</sup> commenced on 17 December 2021 an amendment of S.34(5) PDA 2000<sup>27</sup>. Its nuances need not be laid out here – essentially it imposes an 8 week time-limit on Planning Authorities to respond to compliance submissions, failing which agreement is deemed to occur in terms of those submissions. Colbeam suggests that the requirement for planning authorities to turn their resources to compliance submissions to which the amendment does apply may result in even greater delays in getting agreement on foot of earlier compliance submissions to which the amendment does not apply. This was mentioned in submissions as background, as was the possibility of a dispute as to any transitional effect of the provision and the detailed operation of the amendment: Colbeam holding out the possibility that the 8-week time-limit might apply in this case. But it was mentioned primarily to illustrate the menace which the amendment of S.34(5) PDA 2000 was designed to address: alleged delay by Local Authorities in finalising pre-commencement agreements and the difficulty which developers found themselves in consequence resulting in developments commencing on foot of practices and arrangements short of pre-commencement agreements.

54. I have not forgotten that on an earlier occasion and again on 1 February 2022 Counsel for Colbeam sought to impress upon me how Burns J in Luxor exercised her discretion as to the grant of a planning injunction under S.160 PDA 2000 as to non-compliance with a condition requiring written agreement of a construction management plan with the planning authority prior to the commencement of development. Despite her finding of unauthorised development, Burns J, it was intimated, satisfied herself with merely requiring the submission of such a plan to the planning

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<sup>26</sup> S.I. No. 714/2021 - Planning and Development (Amendment) Act 2018 (Commencement) Order 2021 - The 17th of December 2021 is appointed to be the day on which subsection (4) of [section 23](#) of the shall come into operation.

<sup>27</sup> By S.23 of the Planning and Development (Amendment) Act 2018

authority. She did not require its agreement or restrain development pending its submission. She did not directly explain this exercise of her discretion in her judgment. But the considerations which lead her to make no order for costs in the case shed some light. She did sympathise with the developer's position but, as it turns out, Burns J did not exercise a discretion in the developers' favour at all: as to substantive relief she did exactly what the applicant in that case asked of her. It is the limited ambition of the applicant which explains her choice of remedy. She:

- Noted that the case law establishes that there can be belated compliance with a pre-commencement condition.
- Considered that, albeit as a result of the proceedings, the Respondent was in compliance with all other conditions of the planning permission
- Found that the Respondent had intended to file such a plan as part of its phased development process and intended to comply with all conditions in the course of the development.
- Noted that the planning authority took no issue with the approach of the Respondent - indeed confirmed that details which the Respondent had submitted related to enabling works only and were in partial compliance with the condition.
- The Applicant had issued private law proceedings in trespass and nuisance in the site clearance and archaeological dig – from which I infer that Burns J inferred a very considerable private motivation in the Applicant – and S.160 was not limit or prohibit such acts.
- Crucially for present purposes, the limited order made by the Court in Luxor was precisely that to which the Applicant had limited its S.160 application. In other words Burns J did not have to, and did not, consider whether a more stringent order was required.

Finally, though Burns J does not mention it in that part of her judgment dealing with costs, it is clear that development had commenced on 5 June 2018 and continued to the date of her judgment on 20 December 2018 with no recent asserted trespass or nuisance. It seems safe to infer that by 20 December 2018 development was well-advanced and that may have weighed against more stringent relief, if not in the mind of Burns J (who, strictly, did not have to consider the issue), at least in that of the applicant in formulating its prayer for relief.

55. There is no doubt that the courts can and do take a nuanced view, in a discretionary context, of unauthorised development. All circumstances are considered and the good faith or genuine error of the developer will often be relevant. But my view Luxor, properly understood, in particular in the context of the limited prayer for relief, which relief was granted, is not authority for a proposition that the courts generally look benignly on unauthorised development. In particular it is not authority that courts generally look prospectively and benignly on intentional unauthorised development.

56. As recorded above, counsel for Colbeam also sought to impress upon me that development on foot of such arrangements in advance of compliance with such conditions is a matter for enforcement – for example via s.160 PDA 2000 – and not relevant to my decision on the question of a stay pending appeal. For good measure he submitted that in enforcement proceedings in the context of arrangements with planning authorities short of compliance with pre-commencement planning conditions, judicial discretion would almost invariably be exercised in favour of the

developer, as exemplified by Luxor. But as I have observed above, Luxor's value as such an exemplar is considerably diminished by the paucity of the Applicant's ambition in that case – the Applicant got exactly the substantive order it sought. And I do not think that, on the particular facts of this case, I should assume the outcome of enforcement proceedings were unauthorised development to resume. In any event, that unauthorised development would be relevant in enforcement proceedings does not of itself imply that the prospect of unauthorised development is irrelevant to the question of a stay pending appeal.

57. So, I take Colbeam's point that I am not exercising an enforcement jurisdiction at present and that if Colbeam engages in unauthorised development it will be for the Applicants, if they wish, or the Planning Authority, to take enforcement action via the statutory means provided. However that does not seem to me to be the end of the matter. As is clear from **Okunade** and **Krikke** and as I have observed in my 1<sup>st</sup> judgment, a significant factor in the exercise of a discretion as to stays in public law cases such as this, and weighing against their grant, is ordinarily the public interest in the orderly implementation of the statutory scheme in question and of the presumptively valid Impugned Decision in question. Colbeam predictably relies on this aspect of the public interest in resisting a stay pending appeal. It weighed considerably with me in my first judgment. But in what Colbeam now intends is not what Clarke J envisaged in *Okunade*: that the permission prima facie valid "be carried out in a regular and orderly way." What is in prospect is not the regular and orderly, but the irregular and disorderly, implementation by way of intentional unauthorised development, of the statutory scheme in question and of the Impugned Permission.

58. The effect of this observation is not that I should now seek to positively enforce, much less pre-emptively enforce, the pre-commencement planning conditions. It is, rather, the negative effect that the public interest in implementation of the Impugned Permission, ordinarily weighty, is rendered far less weighty in the balance of justice.

59. It might seem that taking the prospect of development on foot of such arrangements in advance of compliance with such conditions into account would be contrary to the view I took in my judgment of 14 January 2022 in which I refrained from imposing a stay. However, and as I have indicated, circumstances have changed since then.

- First, that judgment clearly identified, on the authority of **Luxor** and **Murtagh Construction** that development without compliance with such conditions would be unauthorised development.
- Second I stated that any such arrangement other than compliance with such conditions would merit careful consideration.
- Third, I had at that point no sufficient basis for an inference that development without compliance with such conditions – unauthorised development - would in fact proceed. I did not consider that I could at that time infer that Colbeam intended such development. In truth, though I did not say so as I did not need to, I assumed at that time that Colbeam would in fact bring my judgment to the attention of the Planning Authority as part of "*moving heaven and earth*", as it were, to expeditiously secure from the Planning Authority the pre-commencement compliance agreements which it needed to commence development. Counsel for Colbeam did

not on at the hearing of 1 February 2022 intimate any such effort to press the Planning Authority for expedition of the pre-commencement compliance agreements. I do not know whether such an attempt might have succeeded and perhaps I overestimate the weight which might be attributed in some quarters to my judgment of 14 January 2022 on the issue of the stay. But it appears to me relevant that no intimation was made to me of even the attempt.

60. As I have already stated, it appears to me that it is now clearly to be inferred that Colbeam intends as a matter of probability, unless a stay pending appeal is granted, to continue development already commenced and to do so prior to compliance with the pre-commencement conditions. I have already identified considerations underlying that inference. It is based on a conspectus of the evidence and other material proper to my consideration – which I have identified above. That conspectus includes the evidence of Sadhbh O'Connor and the non-disclosure of the issue as to compliance with pre-commencement conditions to which I referred in my earlier judgment, supplemented now by the actual commencement of development in admitted advance of compliance with the pre-commencement conditions and Counsel's seeking to impress on me the alleged near-universal practice of planning authorities of permitting development by an arrangement other than compliance with the pre-commencement conditions and that in enforcement proceedings in such circumstances a discretion would invariably be exercised in a developer's favour.

61. While I have inferred its intention to engage in unauthorised development, I take no view as to and do not prejudge the likely legal status in criminal law of any particular action which may be taken by Colbeam in purported reliance on the Impugned Permission. However I am justified in making the general observation that the Courts, including the Supreme Court, have *"emphasised that unauthorised development is a serious breach of the criminal law and is a matter of high level public concern."*<sup>28</sup> This general observation assists in my attributing weight to the prospect of unauthorised development in this case – or perhaps more accurately, it assists in my assessing the extent to which that consideration deprives the public interest in carrying presumptively valid measures into effect of the weight it would otherwise merit.

62. The Applicant makes the simple point that in considering the balance of justice there can be no injustice to Colbeam in seeing it deprived of the opportunity to engage in unauthorised development. I pressed counsel for Colbeam on this point – his answer was that the issue was relevant only to enforcement proceedings and not to the issue of a stay pending appeal. I have addressed that issue above.

63. In answer to Colbeam's point that the pre-commencement agreement conditions are irrelevant to the works now in question, the Applicant points to Condition 12 requiring a landscape and earthworks plan and condition 15 as to construction and demolition. But counsel says the more

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<sup>28</sup> Krikke v. Barranafaddock Sustainability Electricity Ltd [2020] IESC 42 (Supreme Court, O'Donnell J, O'Malley J, 17 July 2020);

basic point is that irrespective of the relevance or irrelevance of these conditions to works now in question, the permission is clear that no development can be commenced unless all pre-commencement conditions are satisfied.

## OTHER ISSUES

64. Counsel for the Appellants points to **Doorly** for the proposition that tree-felling is development – though as in this case it was work clearly contemplated by the planning permission as part of the permitted development I do not need to further interrogate the proposition.

65. Counsel for the Applicant submits that granting a stay pending appeal is “*fairly routine*”. While Murray J in **Brompton** considered refusal of a stay “*uncommon*” that seems to me to be a comment on the working out in practice of stay applications and in no way absolves the court from careful consideration of the Okunade/Krikke principles. I do not accept that that granting a stay pending appeal is “*fairly routine*” even if granting a stay may be the most common outcome in practice.

66. Counsel for Colbeam argued that the Applicant’s criticism of my taking account, in considering the significance of the prospect of replanting as bearing on the balance of injustice, was wrong given the recent decision of Humphreys J in **Doorly** to direct full remediation of unauthorised deforestation. I take the point but am not clear that it is in appreciable degree decisive of issues now before me.

## Prospect of a Moot

67. Counsel for the Applicant bases his application for a stay pending appeal inter alia on the proposition that failing a stay the applicant will be deprived of the remedy of appeal of my judgment of 14 January 2021 as the underlying factual and legal issues will be rendered moot by Colbeam’s development works pending appeal. In **Brompton**, Murray J considered that, though not dispositive, the prospect of a moot failing a stay pending appeal was “*without a doubt, the most substantial point*” favouring a stay. I am satisfied that if, as I find, Colbeam intends to recommence development if I refuse a stay, the prospect of a moot on some of the grounds on which leave was granted will arise. That was also the case in the circumstances considered in in my judgment of 14 January 2021 save that I did not at that time infer that Colbeam would recommence development without having complied with the pre-commencement conditions. As was the case in **Brompton**, that prospect of a moot was not dispositive in my judgment of 14 January 2021. But the changed circumstances in which I now find that Colbeam does intend to recommence development without having complied with the pre-commencement conditions alters the content in the scales of the balance of justice. Now that the public interest in allowing development on foot of a presumptively valid permission

recedes until compliance with the pre-commencement conditions, the moot looms the larger on the other side of the scales.

### **Stay by the Back Door**

68. While he did not frame it explicitly in terms of a tactical appeal as envisaged by McCarthy J in **Redmond v Ireland**<sup>29</sup> counsel for Colbeam argued in analogous terms that given the short time to the handover of the site to the main contractor, in the context of a likely longer time to an appeal, the Applicants in seeking a stay pending appeal were in effect seeking by the back door and in substance the very relief, in the form of a stay on the Impugned Permission in respect of the works to handover to the main contractor, denied them in my judgment to be appealed and doing so belatedly, given judgment was delivered on 14 January, following alleged “strategic non-activity”. Counsel for Colbeam argued that in most cases a stay pending appeal is only sought because the main argument has been lost. Here, he says, the stay was the main argument. He suggests that in consequence the Applicants must show a “higher level or standard” – of precisely what he was not clear, though he likely was referring to the strength of grounds of appeal. Counsel for Colbeam has, as he gracefully put it, tormented me with recitals from my judgment of 14 January<sup>30</sup>. I see some force in the complaint of delay and more force in the allegation that the Applicants are seeking to get by the back door what they failed to get by the front. But, if it is the argument made, I am not persuaded that the issue imposes a formally higher standard of proof or evidential burden on the Applicants. I do see that issue as weighing in the balance of justice – perhaps not least in light of the observations of O’Donnell J which I record above in the first paragraph of my account of Krikke.

69. Colbeam make another similar argument. As noted above O’Malley J in **Krikke** observed that a party seeking a stay pending appeal is not entitled to proceed on the basis that the adverse judgment which is to be appealed carries no weight in the stay application. The fact that a court has, in a reasoned decision, reached a particular conclusion must count for something in the appellate court’s considerations. Counsel for Colbeam submits, in my view correctly as a general proposition, that this principle must apply a fortiori when the principles applicable to the application for the stay pending appeal overlap at very least considerably with those applied in the adverse judgment which is to be appealed – which was itself a judgment on whether there should be a stay, albeit in that case of a different sort. One can say in shorthand terms that the Okunade/Krikke principles apply to both decisions. But, while a correct general proposition, in my view it does not map neatly as might first seem onto the facts of this case by reason of the changed circumstances since the judgment.

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<sup>29</sup> [1992] 2 I.R. 362

<sup>30</sup> Inter alia paragraphs 95 to 98, 101, 104 146 to which the reader can conveniently have regard at and which I need not repeat here.

## Likely Grounds of Appeal – Arguability & Strength

70. Counsel for the Appellants suggested that my judgment which he proposes to appeal represents a view on my part that the balance of justice was a delicate one. His implication was that it might not take much in the Court of Appeal to tilt it the other way. I do not disagree with counsel to any extent that would make a difference to my present decision.

71. The order which I made as to the stay on the operation of the Impugned Permission, and which the Applicants intend to appeal, was a discretionary order. Appeal courts retain the right to interfere with such orders but are slow to do so save in case of clear error or where the justice of the case so requires<sup>31</sup>. Nonetheless it seems to that, while the judgments in Krikke were not phrased in terms of the appellate court's willingness to interfere in discretionary orders or to reassign the weights to be attributed to the Okunade factors and was framed in phrased of error, the Applicants are correct to point out that the Supreme Court in Krikke in disagreeing with the Court of Appeal displayed at least some willingness to interfere in the exercise of its discretion by the Court of Appeal. Indeed, so too had the Court of Appeal in disagreeing with the High Court.

72. As recorded above, Humphreys J said in **Cork County Council v Minister for Housing #12** that what all this really comes down to (in that case) is the possibility that the Court of Appeal, seized with grounds of appeal that I don't have sight of because they haven't yet been formulated, might think that there is a case for a stay. Neither have I seen grounds of appeal in this case. Counsel for the Appellants formulated some "*on the hoof*" as it were at hearing on the 1<sup>st</sup> of February. Counsel for Colbeam complained that he had had no notice of them but, as I observed, the manner of their formulation might as well represent disadvantage to the Applicants as to Colbeam. In any event I do not consider that any were terribly surprising.

73. As to likely grounds of appeal, Counsel for the Appellants listed the following posited errors:

- Failure to weigh adequately the public interest in preservation of the trees on site having regard to the fact of their protection in the development plan and the Applicants assertion of material contravention of the development plan in that regard,
- Error in going beyond the arguable case test in Okunade by considering the merits of the case,
- Taking into account an irrelevant consideration as to the prospect of replanting in mitigation of tree felling,
- Giving excessive weight to the financial interest of Colbeam. Counsel cited the decision of the Court of Appeal in Krikke by way of example of such error,
- Failure to give any or adequate weight to the prospect that refusal of a stay and resultant works by Colbeam before trial would render moot some of the grounds on which leave to seek judicial review was granted,

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<sup>31</sup> See for example Re Permanent TSB, Dowling v Cook [2022] IECA 21 Binchy J §45



- Failure to give any weight or adequate weight to Colbeam’s non-disclosure of the fact that it had not secured compliance with pre-commencement conditions.

I have to some degree paraphrased Counsel for the Appellants in the list I have set out above and no doubt other posited errors or variations on the foregoing themes will occur to the Applicants by the time a notice of appeal would be settled.

74. Counsel for Colbeam says it’s for the Applicants to show why my exercise of the discretion might come into reconsideration on grounds of error and suggests that my judgment had addressed the exercise of that discretion in a very detailed fashion. Of course, detail does not necessarily imply absence of error. On the facts of this case I cannot resist observing that detail may cause one to miss the wood for the trees. Counsel for Colbeam suggests that the tree-felling in **Doorly** was of greater importance as it was in a wood which formed part of the attendant grounds to a protected structure. But Counsel for the Appellants asserts that I failed to weigh that issue having regard to material contravention of a specific and applicable tree-protection objective in the development plan. I am not persuaded that any difference, as to the relative importance of the trees issue, as between Doorly and this case is such as to materially affect my view on the present application. Counsel for Colbeam asserts that there is nothing in a point as to bats and the trees’ significance for bats – of which, he says there is no evidence. Likewise birds. But in his application for a stay pending appeal Counsel for the Appellants did not mention bats or birds.

75. As Murray J remarked in Brompton, it is *“less than usual”* for an appellant to fail at the arguable appeal threshold and I should be properly conscious for this purpose that I am evaluating criticisms of my own judgment. He observed that a *“..... court should not easily conclude that an appellant has failed to establish arguable grounds of appeal for the purposes of an application of this kind.”* In my view, in this case the Appellants have shown *“arguable grounds of appeal for the purposes of an application of this kind.”*

76. As to the strength of those grounds and so their weight in the balance of justice, I can at least say that I do not feel able to characterise the appeal as weak and its success unlikely - as occurred in both **Cork County Council v Minister for Housing** and **AIB v FitzGerald**. Yet in both a limited stay pending appeal was granted.

## CONCLUSION

77. As so often occurs, this case illustrates the wisdom and perhaps the resignation of the view of Costello and O’Malley JJ recorded above that in these situations there is no really satisfactory solution and the court must *“do the best it can”* to minimise the risk of injustice. At its simplest, and on the one hand, the granting of a stay may in effect deprive Colbeam of the benefit of my judgment in its favour on the issue of a stay of the presumptively valid Impugned Permission and put it at risk

of considerable financial losses as to which it would have little hope of practical recovery. To put that point another way the Applicants may get by a back door a stay they failed to get by the front and I do not find that palatable. Yet there is a right to appeal and refusal of the stay resulting in completion of tree-felling may render moot and deprive the Applicants of not merely their appeal but some of the underlying grounds on which leave to seek judicial review was granted.

78. In my view a significant feature affecting the balance of justice is that, as matters stand the development now intended by Colbeam – indeed already commenced - would be unauthorised development for want of pre-commencement condition agreements and inimical to the integrity of the planning system and code. It would be, not the regular and orderly implementation contemplated by Clarke CJ in *Okunade*, but the irregular and disorderly, implementation by way of intentional unauthorised development, of the statutory scheme in question and of the Impugned Permission. Even the fact that the statutory scheme seeks to ameliorate a housing crisis does not justify unauthorised development – if it did, SHDs would not need planning permission. This, to my mind, emaciates what would otherwise be the substantial weight in the balance of the public interest in seeing a presumptively carried permission carried into effect. Though by no means the only weight in the scales, this emaciation of this public interest inevitably tilts the balance towards a stay pending appeal.

79. As the Supreme Court has said, the primary means of minimising injustice should be an early hearing of the appeal. Of course, given the burdens on the Court of Appeal, that may for very good reasons not be possible. But the Court of Appeal can judge that better than can I – which suggests the limited type of stay pending appeal granted in **Cork County Council v Minister for Housing** and in **AIB v FitzGerald**.

80. I cannot resolve the difference between the parties as to the length of time it will take to get to the hearing of a stay application in the Circuit Court. But Humphreys J's premise in **Cork County Council v Minister for Housing #2** – that a stay for 28 days after Notice of Appeal would "*allow a stay application to be brought in an orderly manner to the Court of Appeal if thought appropriate.*" is at least moderately reassuring. What can be said in the overall scheme of things is that a stay to that date would be relatively short.

81. There remains the question whether a stay pending appeal would in truth put Colbeam at risk of significant financial loss. In respect of the period pending the first directions hearing in the Court of Appeal, it is now apparent, as it was not at the hearing in December 2021, that the avoidance of such losses in respect of some or all of that period depends as a matter of probability on Colbeam's intention to engage in unauthorised development, it does not seem to me that this consideration weights much, if at all, against a stay. In consequence, neither do questions of adequacy of damages or the absence of an undertaking in damages. As counsel for the applicant says, there is no injustice in depriving Colbeam of the opportunity of unauthorised development.

82. Of course, once Colbeam is able to demonstrate full compliance with the pre-commencement planning conditions, a more typical equilibrium would be restored and the question of lifting or varying any stay pending appeal which had been granted might then arise.

83. In the foregoing circumstances I will order a stay pending appeal of the order to be made on foot of my judgment of the 14<sup>th</sup> January for 10 days from the perfection of that order and if Notice of Appeal is filed within that period, such stay to continue until to the first return date in the appeal.

84. As previously intimated, the perfected order on foot of the judgments of 14<sup>th</sup> January, 19<sup>th</sup> January and this judgment will issue shortly. Given that such perfection is desirable in early course, I will not delay it pending argument as to costs of the application for a stay pending appeal but will adjourn that question to be dealt with the various other costs issues to be considered after decision of the pending Protective Costs Order application.

**David Holland**  
**7 February 2022**