



THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number: [2022] IECA 100

Court of Appeal Record Number: 2022/39

High Court Record Number: 2021/750 JR

**IN THE MATTER OF SECTIONS 50, 50A AND 50B OF THE PLANNING AND
DEVELOPMENT ACT 2000 AND IN THE MATTER OF THE PLANNING AND
DEVELOPMENT (HOUSING) AND RESIDENTIAL TENACIES ACT 2016**

Costello J.

BETWEEN

WENDY JENNINGS AND ADRIAN O'CONNOR

**APPLICANTS/
APPELLANTS**

- AND -

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

**RESPONDENTS/
RESPONDENTS**

- AND -

COLBEAM LIMITED

NOTICE PARTY

JUDGMENT of Ms. Justice Costello delivered on the 27th day of April 2022

1. Colbeam Limited (“the developer”) applied for planning permission of strategic housing development at land situate at Our Lady’s Grove, Goatstown, Dublin 14. An Bord Pleanála granted the developer planning permission (ABP Red 309430-21) in June 2021 to develop 698 student accommodation units on the lands pursuant to the Planning and Development (Housing) and Residential Tenancies Act 2016. The grant of planning permission was subject to the agreement of certain pre-commencement conditions with the planning authority. In July 2021 the applicants applied for leave to seek judicial review to quash the grant of planning permission on twenty grounds. Three grounds in particular are relevant to this application:-

- “(8) The impugned decision is invalid as the proposed development granted permission by the Board is in material contravention of the [County Development Plan] in relation to the protection of trees. The grant of planning permission constituted a grant of permission contrary to a Zoning Objective in breach of s.9(6)(b) of the 2016 Act of the land and/or in the alternative, a grant in material contravention of the CDP that was not made pursuant to s.37(2)(b) of the Planning and Development Act 2000....*
- (10) The impugned decision is invalid because the Board failed to comply with Article 299B(1)(b)(i) of the Planning and Development Act Regulations 2001 (‘the 2001 regulations’) as it was not open to the Board to conclude that the possibility of significant effects on the environment could be excluded at preliminary assessment stage...*
- (12) The impugned decision is invalid in that it contravenes Article 12 of the Habitats Directive and/or Article 299(C)(1) as it failed to apply the correct legal test in respect of bat fauna that are entitled to strict protection, and/or the*

preliminary examination EIA determination was based on inadequate information submitted by the developer contrary to Article 4(4) of the EIA Directive.”

2. Holland J. granted the applicants leave to seek judicial review on 19 October 2021 on an *ex parte* basis and stayed the decision to grant planning permission for the development.
3. The developer issued a motion seeking to vary the stay to allow it to carry out certain preparatory works on the site which involved felling trees and demolishing an existing building on the site. It did so on the basis that it risked very significant financial losses if it was not in a position to offer the accommodation for rent to students for the academic year commencing in September 2024, the details of which are set out in the judgment of the High Court of 14 January 2022. In order to meet this hard deadline, it needed at least to commence the site preparation work if it was not to lose the possibility of meeting this opening date. As the development was of student accommodation, if the units were not available to rent by the start of the academic year, it would lose the income for the entire year as it would not be possible to let the units midway through the year.
4. The applicants opposed the application to vary the stay on the grounds that it would render three of their grounds of challenge moot (those cited above), as the works would clear the relevant trees and building; it would result in irremediable damage to the environment and that it was premature. The latter argument was based on the fact that the developer had not agreed all pre-commencement conditions with the planning authority and therefore was not, according to the applicants, in a position to act on foot of the grant of planning permission.
5. The application was heard by Holland J. over three days on 15, 16 and 17 December 2021 together with an application by the applicants for a declaration that they were entitled to the benefit of special costs rules applicable to certain environmental litigation. The trial

judge delivered a comprehensive and considered judgment on 14 January 2022 on the issue of a variation or partial lifting of the stay on the grant of planning permission. In paras 38-63 he identified the authorities relevant to his consideration of the application. It was not contended that he erred in his identification or analysis of the relevant principles. In particular, it was accepted that the principles identified in *Okunade v. Minister for Justice* [2012] 3 I.R. 152 and *CC v. Minister for Justice* [2016] 2 I.R. 680 set out the relevant applicable principles.

6. The trial judge first held that the applicants had an arguable case.

7. He said that it was “*readily apparent*” that damages would not be an adequate remedy resulting from the works intended if the stay was lifted and likewise if the stay was continued and the applicants failed at trial that damages would not be an adequate remedy to the likely wrong to be suffered by the developer.

8. In light of the flexible approach advocated by the Supreme Court in *Merck Sharp & Dohme v. Clonmel Healthcare* [2019] IESC 65 he then considered where the greater risk of injustice lay in the circumstances. He assessed the potential loss to the developer. He held that in principle it was a relevant consideration (para. 68) and he analysed the arguments and the evidence of both sides in paras. 69-71.

9. He noted that there was likely to be a delay in the case coming to trial and he formed the view at para. 72 that “*assuming [the developer] solves its pre-commencement condition compliance difficulties, Colbeam will likely suffer significant losses by reason of a stay...it is by no means inconceivable that such losses will be in a seven-figure sum.*”

10. At para. 78 he concluded:-

“The evidence on neither side of this balance is satisfactory or even helpful, much less convincing. Doing the best I can on thin evidence gruel, I think it likely that, if Colbeam suffer significant losses the applicants’ undertakings in damages, if given,

would be unlikely to appreciably meet Colbeam's losses and the balance of injustice in this respect tilts in Colbeam's favour and against the grant of a stay."

11. He identified a difficulty in weighting the absence of a "meaningful" undertaking as to damages from the applicants in respects of grounds of challenge to which the not prohibitively expensive rules apply (Grounds 10 and 12 as to bats and birds) and stated:-

"As relates to Grounds 10 and 12 at least it seems to me that it will not be open to impose a requirement of an undertaking in damages involving full exposure to the potential losses which may flow from a stay in this particular case. Given that the whole purpose of the NPR (sic) regime is to facilitate "wide access to justice" and that the CJEU has emphasised the necessity that interim measures must be available to protect alleged EU rights pending trial (including from the risk of the dispute becoming moot) it may seem paradoxical that protection from a requirement of an excessive undertaking in damages could work against an applicant as to the "least risk of injustice" test when considering a stay. But such interim measures are required to prevent "serious and irreparable" harm - see [Dowling v. Minister for Finance [2013] 4 IR 576]. Interestingly, the CJEU in [Commission v. U.K. (Case c:530/11)] held that factors relevant to the assessment whether expense was excessive includes "the importance of what is at stake for the claimant and for the protection of the environment,". It seems therefore that the court can consider the importance of the environmental issues at stake and the question of seriousness and irreparability of the likely environmental harm in seeking to resolve any paradox."

(para. 82)

12. He then proceeded to weigh the environmental considerations against the potential financial loss. He noted that in *Krikke v. Barranafaddock Sustainability Electricity Ltd.* [2020] IESC 42 the Supreme Court held that a Court must consider "the reality of

irreparable harm” and in *Dowling*, in the context of EU law, the harm must be not merely irreparable but also serious.

13. He considered the evidence and the issues in paras. 86-104. He noted that 35 trees will be removed and that the applicants alleged that this would be a material contravention of the Development Plan.¹ He held:-

“94. While the question of material contravention will at trial be a matter of law for the court, the weight, in the balance of injustice in considering a stay, of the more general environmental acceptability of the tree loss is an issue as to which the Board’s expert judgement is entitled to considerable weight; greater weight than the judgement of a judge on that issue,”

14. In that context he considered the evidence of tree loss and replanting in para. 95 and 96.

15. He accepted that there could be difficulties with mitigation by replanting and said:

“I do not suggest that this prospect of mitigation is a complete answer to the Applicants’ concerns. But the prospect of mitigation does deserve appreciable weight in balancing the risks of injustice. So, overall, while the loss of the trees would indeed be irreversible in the strict sense, and I do not accept the Colbeam submission that the intended tree removal is de minimis, its environmental consequences in terms of the intrinsic value of the trees are not so absolute given the prospects of mitigation – not least by the prospect of replacement of at least some of the existing “early mature” oaks by “semi mature” oaks.” (para. 97)

16. The trial judge also considered the implications of tree felling for bats roosts. The trial judge noted that the applicants asserted that four trees for felling are potential bat roosts. He held at para. 98:-

¹ The trial judge refers to the loss of 35 trees though the Arboricultural Report and Board Inspector’s Report each refer to the loss of 34 trees.

“[The applicants] have adduced no expert evidence and the “Bat Expert” for Colbeam has sworn an affidavit strongly disputing the Applicants’ inexpert critique of his work. While only by a ground survey, nonetheless no actual bat roosts were found in those trees and all 4 were considered of “low suitability” for bat roosts. Those trees are to be removed only after more detailed expert examination for bat roosts closer to the time of removal and under bat expert supervision by a soft-fell method designed to allow bats to escape unhurt if present. If bats are found present, work must cease pending application for and decision on the grant of a derogation licence under Article 16 of the Habitats Directive.”

17. He concluded that while the issue of bats was not without some weight as to the question of a stay, he did not see it as determinative, not least because the removal of the stay would not authorise any act or omission which would be illegal by virtue of Article 51 of the Habitats Regulations 2011. He accepted the expert evidence of Mr. Fettes on behalf of the developer and concluded that *“damage is likely to be caused if a stay is refused but I am not persuaded that the reality of such damage is that it is likely, at least after replanting, to be irreparable and serious.”* (para. 105).

18. He then considered the public interest in strategic housing developments in paras. 106-108 and he concluded that *“in Okunade terms”* this was a factor in the public interest in this case.

19. Having considered all of these factors in great detail he reached his decision in paras. 110-113 as follows:-

“ 110. With considerable hesitation I have decided that to give significant weight to Colbeam’s inadequate disclosure of its position as to pre-commencement conditions by granting a stay I might otherwise have refused would be disproportionate in the particular circumstances of this case. That should not be considered to diminish my

deprecation of its failure in this regard. I am moved in particular by the simple fact that unless and until Colbeam's position as to pre-commencement conditions is resolved in accordance with law it will be unable to start development even if I refuse a stay. None of the foregoing is to rule out the possibility of other consequences of Colbeam's inadequate disclosure.

111. For reasons set out above, I find neither side's dire predictions of the consequences of an adverse outcome on the issue of a stay very convincing. On balance, and against the background of a presumptively valid permission, I do not think Colbeam should be put to appreciable risk of large losses by reason of the prospect of tree loss in the context of the mitigation, including replanting, proposed or, if the development does not proceed, the mitigation which can be imposed. I consider that strict protection of bats will be achieved, if bats are found on site, by the other means described above and will not be imperilled if a stay is refused.

*112. I am also significantly moved by the public interest considerations identified in Okunade and the caselaw since. There is a clear public interest that presumptively lawfully permitted development of strategic housing identified by statute as urgently required to address a housing crisis should not be delayed. It is not for the court to second-guess the decision by the Oireachtas to include student accommodation in the category of strategic housing development. Like McDonald J in **Massey** and in **Comerford**, I emphasise that the public interest is not inevitably or invariably a "trump card." Not least, in a particular case, the weight of the countervailing public interest in environmental protection and the avoidance of serious and irrevocable*

environmental damage may well outweigh it. But not so on the facts of this case – at least for the purposes of the limited lifting of the stay now sought.

113. I have not ignored the point that if the trees are removed at least some part of this judicial review will become moot. That weighs in favour of a stay but in my view is not decisive in this case. While in Massey McDonald J noted that the prospect of a moot did not arise and he contemplated the prospect of irreparable environmental harm as telling in favour of a stay, McDonald J's rejection of the submission that said judicial review would be an ineffective remedy without a stay seems relevant. As McDonald J said, "There is nothing automatic about the grant of a stay".

20. In light of this decision Holland J. said that he would vacate the stay on the grant of planning permission only as to those elements of the works programme which preceded the handover of the site to the main construction contractor only, as that was the extent of the variation of the stay sought by the developer.

21. Judgment was delivered electronically on 14 January 2022 and the order was perfected on 9 February 2022. The applicants appealed the decision to partially lift the stay by a notice of appeal dated 18 February 2022 and the appeal was listed in the directions list of the Court of Appeal on 25 March 2022.

22. On the basis that the court had varied the stay granted on 19 October 2021, after delivery of the judgment but before the order was perfected, the developer commenced some of the preparatory works on site and, in particular, commenced tree felling. The applicants objected that the actions were premature as the order had not yet been perfected and the pre-commencement conditions had not all been agreed with the planning authority. On 1 February 2022 the matter was listed to perfect the order but, due to the actions of the developer in the interval, the application morphed into an application for a stay on the

order of the High Court partially lifting the original stay of 19 October 2021 pending the determination of their appeal against the judgment of 14 January 2022. A stay was granted for a period of ten days from the perfection of the order, and if a notice of appeal was filed within that period, the stay would continue until the first returned date of the appeal in the Court of Appeal.

23. The applicants then brought a motion to extend the stay granted by the High Court until the determination of the appeal returnable to 25 March 2022, the date upon which the stay granted by the High Court expired, but it was not possible to hear the application on that date. I adjourned the motion to 1 April 2022 and extended the stay for a week. On 1 April 2022 I heard the motion and I reserved judgment and extended the stay until judgment was delivered.

Developments after 14 January 2022

24. It is necessary to consider developments which occurred after 14 January 2022, which the applicants say are highly relevant to this court's decision on the motion to extend the stay pending the hearing of the appeal.

25. The High Court considered the significance of the fact that not all pre-commencement conditions had been agreed by the developer with the planning authority and whether, in the absence of agreement, the developer was otherwise ready to commence works on foot of the planning permission, in some considerable detail. The trial judge concluded in para. 110 that it would be "*unable to start development*" even if he refused a stay unless and until its "*position as to pre-commencement conditions is resolved in accordance with law*". The developer was of the view that once the judgment was delivered on 14 January 2022, and prior to the perfection of the order on 9 February 2022, that it was permissible to act on foot of the judgment and that it could do so

notwithstanding the fact that it had not yet reached concluded agreements with the planning authority in respect of all pre-commencement conditions.

26. On 1 February 2022 an application for a stay on the order pending appeal was heard by the trial judge. Holland J. reserved judgment and with commendable speed delivered a written judgment (27 pages long) on 7 February 2022. In this subsequent judgment the trial judge identified the law on stays pending appeal and in particular the decisions of the Supreme Court in *Krikke and Redmond v. Ireland*.²

27. He accepted that the applicants had demonstrated arguable grounds of appeal and so proceeded to consider where the balance of justice lay between the parties in light of his judgment of 14 January 2022 and the subsequent developments on site.

28. The trial judge noted that counsel for the developer, Mr Hayden S.C., submitted to the High Court that the developer believed that the stay on works expired on the delivery of his judgment on 14 January 2022 and that it was therefore permitted to proceed with the works of site clearance which it did not believe to be development, and therefore did not have to await the conclusion of all pre-commencement conditions. He further submitted that the pre-commencement issues did not relate to any issues in the proceedings, noting that one of the issues was the numbering of the units and the signage in the development, matters which could only arise at the conclusion of the development. It was submitted that in practice details of this kind were never agreed before commencement of works on site.

At paras. 48 and 50 of his judgment of 7 February 2022 the trial judge held:-

² He also cited the observations of Murray J. in this Court in *Brompton v. McDonald* [2022] IECA 5. However, it is important to note that this judgment relates to stays on an order of the Court of Appeal pending an application for leave to appeal to the Supreme Court, and, if leave is granted, a stay pending the determination of the appeal by the Supreme Court. The procedural differences between an application for a stay pending an appeal to the Court of Appeal, which may readily be heard by the Judge taking the Directions List in the Court of Appeal, compared with a stay pending in determination of an application for leave, where there is no such comparable list in the Supreme Court and no automatic right of appeal, means that the considerations in each case are not precisely the same. The refusal of a stay by the Court of Appeal requires the empanelling a division of the Supreme Court to hear an application for a stay, a special procedure giving rise to some administrative difficulty, whereas the refusal by the High Court of a stay or the grant of a stay to the first Directions List in the Court of Appeal does not give rise to the same difficulty.

“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.

...

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 circumstances since that judgment.” (emphasis added)

29. He indicated that if the developer and the planning authority reach agreement that the developer would be able to seek the vacation of a stay pending an appeal, though he would not pre-judge the outcome of such an application.

30. The trial judge recognised that granting a stay pending an appeal amounted to granting the applicants the outcome which they failed to achieve in the judgment of 14

January 2022. He acknowledged that “*the Applicants may get by a back door a stay they failed to get by the front and I do not find that palatable.*”

31. At paras. 78 and 82 he held:

“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 (sic) 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.

....

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 has been granted might then arise.” (emphasis added)

32. Accordingly, he granted a stay on his order partially lifting the stay of 19 October 2021 until the first listing of the appeal in the directions list of this court.

The applicants’ motion for a stay on the order of the High Court pending appeal

33. Before considering the arguments of the parties on the motion it is appropriate to set out the principles to be applied to an application for a stay on an order of the High Court pending an appeal to this court and, in particular, where the order of the High Court is from an interlocutory order involving the exercise by the trial judge of his discretion.

34. In *Betty Martin Financial Services Limited v. ABS DAC* [2019] IECA 327, Collins J. considered this issue. At paras. 35, 37 and 38 he identified the proper approach of this court on appeal as follows:-

*“35. What is before this Court is, of course, an appeal from the decision of the High Court and, citing *Lawless v Aer Lingus* [2016] IECA 235 and *Ganley v RTE* [2019] IECA 18, the Agent contends that that decision was made in the exercise of the Judge's discretion, based on a correct application of the applicable principles and that the decision was one that was clearly open to him on the evidence and, accordingly, a significant margin of appreciation should be afforded to that decision (para 11 of the Agent's written submissions to this Court). In his oral submissions, Mr McGrath SC refined that position somewhat, accepting (correctly, in my view) that a distinction is to be drawn in this context between the analysis of whether a fair question/serious issue had been established on the one hand and, on the other, the Judge's consideration of adequacy of damages, balance of convenience and delay. In respect of the former, Mr McGrath accepted that if this Court identified an error of principle in the analysis of the Judge, it could properly intervene but as regards the latter, intervention was appropriate only if this Court was satisfied that there is an injustice.*

...

*37. In *Lawless v Aer Lingus* (a discovery appeal), Irvine J (with whose judgment Hogan and Keane JJ agreed), referred to her judgment (for the Court) in *Collins v Minister for Justice, Equality and Law Reform* [2015] IECA 27 (an appeal to this*

Court against the High Court's refusal to dismiss the proceedings on grounds of delay) which comprehensively analysed the authorities before expressing its conclusion in the following terms:

“79. For all of these reasons, therefore, we consider that the true position is that set out by MacMenamin J. in Lismore Homes, namely, that while the Court of Appeal (or, as the case may be, the Supreme Court) will pay great weight to the views of the trial judge, the ultimate decision is one for the appellate court, untrammelled by any a priori rule that would restrict the scope of that appeal by permitting that court to interfere with the decision of the High Court only in those cases where an error of principle was disclosed.”

38. *In Lawless, Irvine J added the following qualification to that statement:*

“23. However, it seems to me that all too often parties who are somewhat dissatisfied by interlocutory orders made in the High Court seek to use this Court as a venue to re-argue their application de novo in the hope of persuading this court to exercise its discretion in a somewhat different fashion from that which was adopted by the High Court judge at the original hearing. That is a practice which I believe is not to be encouraged. In order for this Court to displace the order of the High Court in a discovery matter the appellant should be in a position to establish that a real injustice will be done unless the High Court order is set aside. It should not be sufficient for an appellant simply to establish that there was a better or more suitable order that might have been made by the trial judge in the exercise of their discretion.””

35. Earlier, in *Heffernan v. Hibernia College Unlimited Company* [2020] IECA 121, Murray J., speaking for the court, stated at para. 30:-

“It is also clear that the exercise by the High Court of its discretion in calibrating these various considerations should not be lightly upset by an appellate court: as the Supreme Court has most recently explained in the context of the balancing exercise undertaken by a trial court in making discovery orders ‘it should not be overturned on appeal unless the appellate court is satisfied that the determination of the court below was outside the range of judgment calls which were open to the first instance court’ (Waterford Credit Union v. J&E Davy [2020] IESC 9 at para. 6.3). The exercise of such restraint by an appellate court has been repeatedly stressed in the context of first instance decisions in respect of costs (see Delaney and McGrath “Civil Procedure” 4th Ed. (Dublin, 2018) at paras. 24.777 – 24.285) . However, and at the same time, an appellate court retains jurisdiction to interfere with a costs order where the trial judge has erred in principle, or failed to attach weight to the appropriate factors relevant to the particular decision in hand (Godsil v. Ireland [2015] IESC 103; [2015] 4 IR 535 at para. 69).”

36. As this is an application for a stay pending an appeal, the authorities relevant to such an application are *Okunade*, *CC* and *Krikke*. First the court must be satisfied that there are arguable grounds of appeal. If there are not, that is the end of the matter. The court must be satisfied that the appeal is *bona fide* and not simply tactical. Once it is so satisfied, the court should then proceed to determine how to balance the risk of injustice to either party and to minimise that risk as far as possible by way of an order of the court and/ or (if possible) and early hearing of the appeal.

37. It is important to note that in this case the authorities on a stay pending the hearing were each addressed comprehensively in the High Court’s judgment, as the application before the trial judge was to vary the existing stay pending the hearing of a judicial review. The trial judge set out these authorities in detail and clearly considered all the relevant issues and authorities carefully. He heard the initial application over three days and the

application for a stay pending an appeal on a further day. He was also the judge who gave leave to seek judicial review. In short, he was extremely familiar with all the issues in the case and, as was set out by the Supreme Court in *Krikke*, his judgment is entitled to some weight in those circumstances.

Is there an arguable ground of appeal?

38. The applicants have raised twenty grounds of appeal in their notice of appeal. I am satisfied that these are arguable grounds within the meaning of the jurisprudence and that the appeal is brought *bona fide* and not simply for tactical reasons. The trial judge recognised in his judgment of 7 February 2022 that there are arguable grounds raised in the notice of appeal. I am not prepared to decide this motion on the basis that there is no stateable ground of appeal. In the circumstances, it is not appropriate for me to discuss the grounds further as the merits of the grounds will be decided at the hearing of the appeal.

39. That being so, the court must endeavour to craft an order which establishes the least risk of injustice to the parties, bearing in mind the fact that a stay or the refusal of a stay may result in an injustice to one party if the outcome of the appeal differs to the decision on this motion. As I have previously stated, there is often no truly satisfactory solution to this conundrum.

The risks of injustice

40. The applicants say that the stay should be continued for the following reasons:

- (a) Three grounds of challenge in its judicial review proceedings (cited above) will be rendered moot if the developer is permitted to carry out the limited works permitted by the order of 14 January 2022. It will therefore be denied an effective remedy as guaranteed under the Aarhus Convention and EU law.
- (b) There will be irreparable damage to the environment as a result of the felling of trees.

- (c) The felling of trees will not protect bats which have been found to be present on the site, as required by the Habitats Directive.
- (d) The developer breached the order of the High Court staying the implementation of the grant of planning permission on 19 October 2021 when it proceeded to act on foot of the judgment of 14 January 2022 in advance of the perfection of the order on 9 February 2022.
- (e) The developer carried out unlawful development by acting on foot of the permission in advance of agreeing all pre-commencement conditions with the planning authority.
- (f) The developer's case as to the urgency to develop the site is undermined by (i) the fact that it cannot commence development until pre-commencement conditions have all been agreed with the planning authority and (ii) by the affidavits of Mr. Kenneth Birrane sworn on behalf of the developer to the effect that a delay of weeks or months will result in one year's loss of rental income for the developer in circumstances where it now informs the Court of Appeal that it can make up the time and still complete the development on schedule if the stay is now lifted.
- (g) There is unfairness in only seeking a partial lifting of the stay as once the works envisaged have been completed, if the judicial review proceedings have not concluded, inevitably the developer will bring a further application to vary/lift the stay. In those circumstances, it is seeking an unfair advantage in seeking only a partial lifting of the stay.
- (h) EU law in relation to interim relief favours the granting of a stay.

41. The developer accepts that unless and until all pre-commencement conditions are satisfied it cannot proceed to develop the site. It submits that the essence of the judgment

of 7 February 2022 was to grant a stay on this basis. It says the trial judge did not reverse his decision on 14 January 2022; he put a temporary stay on it. His judgment of 14 January 2022 stands once the pre-commencement conditions are agreed unless this court continues the stay of 7 February 2022.

42. Counsel for the developer submits that the court's task is to balance the justice of the case and he asks rhetorically where has the balance of justice changed since 14 January 2022?

43. Counsel submitted that the trial judge addressed all of the points raised by the applicants in considerable detail and this court should afford him a wide margin of appreciation. The change in circumstances between 14 January 2022 and 7 February 2022 was not the felling of trees as that was permitted by the judgment of 14 January 2022 – it was action in advance of agreement in respect of all pre-commencement conditions. The developer has undertaken that it will not act on foot of the planning permission until all such outstanding pre-commencement conditions have been agreed. As of the date of the hearing of the application all but three had yet to be agreed and the developer was hopeful that agreement could be reached in relation to these matters in the near future.

Discussion

44. In his judgment of 14 January 2022, the trial judge conducted a very thorough, careful and considered analysis of all of the arguments raised by the applicants, including the first three points raised in this motion before me. While I appreciate that this judgment is under appeal, I am not prepared to interfere with his exercise of his discretion in regard to these points on this motion in all the circumstances. He was exercising his discretion and the jurisprudence is clear that this court should be slow to intervene and should only do so if of the opinion that the justice of the case so requires. Holland J. clearly exercised his discretion having considered all the relevant authorities, evidence and arguments and the

order he made was an order within his jurisdiction to make. He was particularly well informed in relation to all matters at issue in these proceedings and it would not be appropriate in light of the principles recently enunciated in *Betty Martin* and *Heffernan* for me to grant a stay on his order on those grounds which he rejected or, as he put it, to grant by the back door what was refused by the front.

45. Furthermore, I agree with his assessment in this case. The test to be applied is whether there will be both irremediable and serious damage (*Dowling*), in this case to the environment, and the court must consider the reality of the harm alleged (*Krikke*). While strictly speaking the felling of even one tree is irremediable, that is not and cannot be the end of the consideration. Both the Board and the trial judge considered the number (34/35) and nature of the trees which would be lost and the number and nature of the trees which are to be replanted (or could be ordered to be replanted if the decision is quashed) and they each concluded that replanting in place of felled trees would avoid serious damage to the environment. In this regard I note the evidence that at least some of the trees are classified as unsafe and/or necessary for removal. I agree with the trial judge both as regards the respect this court should show to the judgment of the Board on an issue within its sphere of expertise (the degree of environmental loss likely to occur) and with the trial judge's own conclusion that the evidence did not establish that the ensuing damage to the environment would be serious.

46. In this regard it is important to note that any bats which may roost on site will be protected by the specific measures to be adopted in felling potential roosts and upon the discovery of any bats present on site. I am not satisfied that in reality there will be both serious and irreparable harm to the environment if the stay sought is refused.

47. In their eighth point (h) the applicants rely upon the requirements of EU law in relation to interim injunctions in cases involving EU environmental law. In written submissions they cite the case *C-121/21R, Czech Republic v. Poland*.

48. At para. 60 the CJEU said:-

“ In addition, the court hearing an application for interim relief must postulate, solely for the purposes of assessing urgency, without this involving it taking any position as regards the merits of the pleas put forward in the main action by the applicant for interim relief, that those pleas might be upheld. The serious and irreparable damage whose likely occurrence must be established is that which would result, where relevant, from a refusal to grant the interim measure sought in the event that the main action was subsequently successful... ” (emphasis added)

49. Thus, on their own case, the threshold test is that of serious and irreparable damage if the interim relief (in this case a stay on lifting the stay) is not granted. For the reasons set out in the judgment of the High Court, with which I agree, and in this judgment, I am not satisfied that the applicants have met this test, as the damage they identify is not, in my judgment, serious, even if it could be described as irreparable.

50. In their sixth argument (f), the applicants ask this court to reject the developer’s evidence as to the alleged urgency of commencing work on site and the losses which it may sustain if it is not in a position to let the units to students for the academic year commencing September 2024. The essence of the argument is that because, on their reading of the affidavits, Mr. Birrane overstated the tightness of the timetable and the lack of flexibility in the modular development the developer has adopted, that it misled the court as to the steps open to the developer to recover lost time. This, they say, fundamentally undermines its case for a partial lifting of the stay. Separately, they submitted no development could lawfully take place until all pre-commencement

conditions have been satisfied and this has yet to occur. Therefore, there was no basis for lifting the stay, even partially, and there could be no prejudice therefore in continuing the stay of 7 February 2022 pending the hearing of the appeal.

51. In relation to this latter point, the developer accepts that it cannot act on foot of the planning permission until all pre-commencement conditions have been satisfied. As of 1 April 2022, it was hopeful that this could be achieved in the near future and may even have been achieved before this judgment has been delivered, or maybe achieved sometime shortly thereafter. In any event, it was anticipated by the trial judge on 14 January 2022 that no development would commence until all pre-commencement conditions had been satisfied yet he still granted a partial lifting of the stay of 19 October 2021 – he did not regard it as a reason to refuse the primary relief sought. Neither do I.

52. The court is concerned with what ought to be the situation once all such pre-commencement conditions have been agreed; it is not necessary to await this agreement for the court to reach its conclusions on whether, once all such conditions have been satisfied, development ought to be stayed or whether a limited degree of development may then proceed.

53. The trial judge weighed the evidence of Mr. Birrane in some detail in this judgment of 14 January 2022 and he was not entirely convinced that the timetable was as tight as Mr. Birrane presented in his affidavit. Holland J. acknowledged that there are normally slippages in development timetables and opportunities to make up lost time, though these are not limitless. This, I think, can be accepted and Mr. Birrane explained in his affidavit of 16 March 2022 that some time may be made up by incurring additional costs and duplicating activities, such as employing two cranes where one originally had been planned. Nonetheless, I must also acknowledge that this judgment is being delivered six weeks after this affidavit was sworn and thus that a further six weeks have been lost from

the schedule. It must be accepted that at a certain point in time it will no longer be feasible to make up this lost time, bearing in mind that originally enabling work had been scheduled to commence on 15 October 2021. I am not satisfied, therefore, on the evidence before me that I can reject the evidence of the developer as to the urgency in this case and thus the serious financial risk which the trial judge found was likely to occur if the partial lifting of the stay sought by the developer were refused and yet the applicants' case ultimately was rejected.

54. Counsel for the applicants, Mr Dodd S.C., argued that there was an unfairness in applying for only a partial lifting of the stay of 19 October 2021 and that this was a further reason for staying the decision of 14 January 2022 pending the determination of the appeal.

55. I cannot see how applying for a lesser relief creates an unfairness in the circumstances of this case. If the relief sought by the applicants in this motion is refused it is possible that three of their grounds for judicial review may become moot. However, had the developer sought to vacate the stay of 19 October 2021, *simpliciter*, and had it succeeded in that application, then this undoubtedly would have had a greater potential for impacting upon and possibly rendering moot further grounds upon which the applicants sought to quash the grant of planning permission. The lesser relief sought by the developer potentially negatively impacts upon the applicants' proceedings to a lesser extent than if a variation of greater scope or vacating of the stay had been sought. How this equates to an unfairness to the applicants is unclear to me. At most, it could be said that after the developer had completed the works permitted by the judgment of 14 January 2022 that it might apply for a further lifting of the stay on the grant of planning permission. This would involve a further application to court where the applicants would be heard, and their arguments might result in a refusal of any further variation of the stay. The only possible unfairness could be the necessity of incurring further legal costs in defence of their

position. This is a matter which could, if necessary, be dealt with by the trial judge by an appropriate order for costs on such a future motion. Therefore, I do not see this hypothetical possible future exposure to legal costs as a basis for granting a stay on the order pending the appeal in this court.

56. Furthermore, even if the developer had sought simply to vacate the stay of 19 October 2021, it is possible that the High Court might have made an order in precisely these terms, possibly with liberty to apply, as such an order arguably would best meet the justice of the situation balancing the interests of both sides. Certainly, I do not see it as being so fundamentally unfair as to warrant a stay on the entire order pending the appeal.

57. The only basis upon which the applicants seek a stay pending the appeal which was not comprehensively argued in December 2021 and decided in January 2022 is the basis upon which the trial judge granted his limited stay in his judgment of 7 February 2022: the premature action of the developer in felling trees in advance of the perfection of the order on 9 February 2022 and, more importantly, in advance of agreeing all pre-commencement conditions with the planning authority. If the pre-commencement conditions had all been agreed with the planning authority before the developer commenced work on site, everything that happened thereafter would have been permitted by the judgment of 14 January 2022. The only reason the trial judge stayed his order was because he regarded what occurred as amounting to unauthorised development because the pre-commencement conditions had not all been satisfied. He was very critical of the actions of the developer in so proceeding and I join in his condemnation of their actions, particularly in light of his clear statement in para. 110 of his judgment of 14 January 2022 which I have cited above.

58. However, I do not believe that it is appropriate to grant a stay pending the hearing of the appeal because the developer purported to act on foot of a planning permission in advance of agreement all pre-commencement conditions and thus engaged in unauthorised

development. That is not the test I am required to apply on a motion of this kind. I am required to assess the risk of the least injustice in all the circumstances. In so doing, the trial judge's exercise of his discretion in relation to the same issue is entitled to respect and I should be slow to intervene unless I believe that the justice of the case so requires.

59. I am not satisfied that the premature action of the developer weighs so heavily that it should not be permitted to carry out any development on foot of the impugned decision pending the determination of the appeal from the judgment of 14 January 2022 even when all the pre-commencement conditions are agreed and thus the development would be permitted and not unauthorised.

60. It is clear from the decision of the trial judge of 7 February 2022 that the basis upon which he was prepared to grant a limited stay on his order on foot of his judgment of 14 January 2022 would no longer apply once all pre-commencement conditions were agreed.

61. The developer, through its counsel, accepts that it cannot take any steps to carry out development on the site unless and until all pre-commencement conditions have been agreed with the planning authority. That being so, the sole question is whether once this occurs, should the stay of 7 February 2022 continue beyond that date pending the determination of the appeal? Put otherwise, is it just and proportionate in the circumstances to deprive the developer of the benefit of the judgment of 14 January 2022 in the circumstances?

62. When agreement is reached between the developer and the planning authority it will be entitled to do what it did. In my judgment such agreement will then recalibrate the balance back in favour of lifting the stay pending the appeal. I do not believe that the stay should be continued on the basis of some notional punishment for the premature actions of the developer carrying out unauthorised development of this kind, by reason of the failure to agree the outstanding pre-commencement conditions. There is no reason to believe that

the developer did not intend to reach agreement on the points with the planning authority. The unauthorised development in this case, to my mind, is very different to development in the absence or in breach of the substantive terms of a grant of planning permission.

63. I note that the trial judge placed no emphasis in his judgment of 7 February 2022 on the fact that the developer acted pursuant to the judgment of 14 January 2022 before an order had been perfected and thus arguably, in breach of the order of 19 October 2021. It was certainly the intention of the judgment of 14 January 2022 to permit the developer to carry out the scheduled works up until handing over of the site to the main construction contractor. The order was not immediately perfected as the trial judge had yet to decide whether further prosecution of the proceedings should be made conditional on a fortified undertaking as to damages by the applicants, whether he should make a protective costs order in favour of the applicants and the costs of the two motions. As the trial judge said in his judgment of 19 January 2021 on the first of these questions, he was conscious of the urgency asserted by the developer as to completing the development to a deadline in mid-2024 with a view to letting its accommodation to students for the academic year starting September 2024 and for that reason he gave his first judgment on the issue of a stay on works only rather than delay it to await his decision on the costs protection issue. It may therefore be inferred that he intended the developer to have the benefit of his judgment of 14 January 2022 as soon as possible *i.e.* as soon as all pre-commencement conditions had been fulfilled, whenever that may be, and it was not to be held up until the order was formally perfected (which would only occur when the costs of the motion had been determined).

64. For this reason, I am satisfied that it would not be appropriate to grant the relief sought by the applicants on this motion on the basis that the actions of the developer

breached the order of 19 October 2021 as no order giving effect to the judgment of 14 January 2022 had been perfected until 9 February 2022.

65. For these reasons I refuse to extend the stay granted by the High Court on 9 February 2022 pending the determination of the appeal pending before this Court which accordingly lapses.

66. The developer will be free to commence works in accordance with the judgment of 14 January 2022 once all pre-commencement conditions have been agreed with the planning authority pending the hearing of the appeal.

Other matters

67. The second relief by the applicants in their Notice of Motion was:

“A Declaration that costs protection applies to Appellant’s (sic) appeal to this Honourable Court either under the special costs rules in section 50B of the Planning and Development Act 2000 (interpreted to the fullest extent possible in a manner that conforms with EU law), sections 3 and 4 of the Environmental (Miscellaneous Provisions) Act 2011 and/or pursuant to the inherent jurisdiction and/or Order 99 of the Rules of the Superior Courts and/or Section 168 of the Legal Services Regulation Act 2015 and/or the court’s duty to interpret national law to the fullest extent possible in a manner that conforms with EU law including Article 9 of the Aarhus Convention and the Charter of Fundamental Rights.”

68. The applicants have applied to the High Court for an order determining that the NPE rules apply (whether in whole or in part) to these proceedings. Holland J. noted that Humphreys J. had delivered his judgment on costs protection issues in the joint cases of *Enniskerry Alliance v. An Bord Pleanála* and *Protect East Meath v. An Bord Pleanála* [2022] IEHC 6 and referred certain questions on costs protection issues to the CJEU. Holland J. felt that the judgment and the questions referred to the CJEU were likely to bear

upon the question as to costs protection arising in these proceedings and he invited the parties to address him on that decision and he has yet to deliver his decision in these proceedings on the applicants' motion pending before him.

69. In the circumstances where an application that the NPE rules apply to the proceedings is pending before the High Court which has seisin of the issue, I decline on a motion pending an appeal before this Court to decide the issue. The matter ought first to be decided by the court of first instance where it has been raised before that court. An appellate court ought not to pre-empt the decision of the lower court in the circumstances. This is not to say that if the issue were raised for the first time in the context of an appeal, that this court could not decide the question, but that is not the situation which pertains here.

70. In addition, counsel for the applicants requested that the motion be heard by a court of three judges rather than one judge, as normally occurs in the directions list of this court, on the basis that if the relief is refused the appeal may become moot. In my judgment, this motion is no different from many other motions for stays on orders of the High Court pending appeal which are regularly heard by a judge sitting alone in the directions list rather than by a panel of three judges. In light of the pressure of work and on dates for the Court of Appeal, I did not deem it appropriate to adjourn this motion for a period of potentially weeks, in order that a date for the hearing of the motion could be found in the court's congested diary when it could, in accordance with normal practice, be heard promptly by a judge sitting alone in the directions list. For this reason, I heard and have determined the motion alone as the judge assigned to the directions list on the date the motion came on for hearing in the usual way. Indeed, no particular reason why this motion, as opposed to the many other motions seeking a stay on orders of the High Court, should be heard by a panel of three judges was advanced. It could lead one to infer that it was an

attempt to gain a tactical advantage by delaying the hearing of the application, predicated on the belief that the existing temporary stay would have to remain in place until a date to hear the motion could be found in the court's calendar. If that were the case it might be open to the court to conclude that the appeal was not being brought *bona fide*, but rather to obtain a tactical advantage by delaying the development for as long as possible. I should add that my sense of unease in this regard would have been greatly increased had the applicants followed through with the position intimated in their written submissions of arguing that this court should refrain from determining this motion until the preliminary reference in *Enniskerry Alliance v. An Bord Pleanala* has been answered by the CJEU (likely to be at the earliest 18 months from now, coincidentally September 2024) and in the meantime to make an order preventing any works on the site, thus utterly precluding any possibility of the development being completed in time for the academic year starting September 2024.

71. Had such a position been adopted it would be difficult to avoid the logical conclusion that the appeal was not being pursued *bona fide* but rather was tactical and thus a stay should be refused without even considering the balance of the risks of injustice to either side.