

**JUDICIAL REVIEW**

**2022 IEHC 16**

**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**

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**Judgment of Mr Justice Holland, delivered the 19<sup>th</sup> of January 2022**

**INTRODUCTION & DECISION**

1. This judgment addresses the question whether the Applicants’ further prosecution of these judicial review proceedings should be made conditional on their providing an undertaking in damages to the Notice Party.

2. 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 698 student bedspaces on a site at Our Lady’s Grove, Goatstown Road, Dublin 14. That permission was granted pursuant to the Planning and Development (Housing) and Residential Tenancies Act 2016 (“the 2016 Act”) as applicable to Strategic Housing Developments. The Applicants live nearby and consider that the permission would permit significant over-development of the site.

3. This is my second judgment arising out of my hearing of two motions in this case. It should be read with my first judgment, delivered 14 January 2022<sup>1</sup>, in which I declined to stay operation of the Impugned Planning Permission in respect of a limited part of the permitted works.

4. Questions are outstanding as to:

- whether further prosecution of the proceedings should be made conditional on a fortified undertaking in damages by the Applicants.
- whether the Applicants should have a protective costs order.
- the costs of the hearing of the two motions.

5. In accordance with the position taken by Colbeam, the stay remains in place from the point at which the site, once cleared and prepared, is to be handed over to the main construction contractor. Given a present lack of clarity as to when Colbeam will be able to start those works not stayed, (as to which see my first judgment), it is unclear 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.

6. After the hearing of the motions, and more or less contemporaneous with delivery of my first judgment, Humphreys J delivered his judgment on costs protection issues in the **Enniskerry Appliance/Protect East Meath cases**<sup>2</sup>. Inter alia, he decided to refer certain questions on costs protection issues to the Court of Justice of the European Communities. That judgment and those questions appear to me to be likely to bear upon questions as to costs protection arising in this case. Accordingly, I intend to invite the parties to address me on that decision and await their doing so.

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<sup>1</sup> [2022] IEHC 11

<sup>2</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 – Neutral Citation [2022] IEHC 6

7. Some further variables require mention:

- the prospect of its proving necessary or desirable to await the outcome of the reference to the CJEU to be made in the **Enniskerry Appliance/Protect East Meath** cases.
- the prospect of its proving necessary or desirable to make such a reference also in the present case.
- as will be seen, the prospect of a further application by Colbeam for an order making the Applicant's further prosecution of these proceedings conditional on their providing an undertaking in damages.
- Colbeam has issued a motion seeking to identify all persons who have funded the applicants' proceedings with a view to making them liable on undertakings in damages and for costs. It awaits being assigned a hearing date. It seems likely that this motion will take some time and, if such persons are identified, it seems likely they will have a right to be heard, if not at the hearing of the motion at least by way of application to set aside any order made in the motion exposing them to costs.

8. In the circumstances described above, I am conscious of the prospect of delay in these proceedings. Although in my first judgment I have not uncritically accepted its assertions in this regard, I am conscious also of, and in a general sense accept at least to an appreciable degree, the urgency asserted by Colbeam as to completing the development to a deadline in mid-2024 with a view to letting its accommodation to students for the 2024/2025 academic year starting September 2023. It was for that reason that I gave my first judgment on the issue of a stay on works only rather than delay it to await my decision on the costs protection issue. The prospect of a reference to the CJEU as to costs protection issues in the **Enniskerry Appliance/Protect East Meath** cases may perhaps be seen as justifying that course.

9. However, prior to the decision of Humphreys J in the **Enniskerry Appliance/Protect East Meath cases**, I had come to a view that I should, on domestic as opposed to EU law grounds, refuse at least pro tem Colbeam's application for an order making the Applicants' further prosecution of these proceedings conditional on their providing an undertaking in damages.

10. It is in general terms undesirable that multiple judgments should issue on foot of a single hearing, albeit of two motions – not least when there is a prospect of interaction between the various issues involved. However the same impetus of minimising delay and also the desirability of making the parties as aware of my decisions as can be managed as early as can be managed, leads me to issue this judgment addressing only the issue whether I should require an undertaking in damages of the Applicants. It has proved possible to do so because I have been able to decide that issue on the basis essentially of domestic law and without significant reference to costs protection law or to EU law or as to, for example, the quantum of exposure of an undertaking in damages as it may bear on the rule of EU law that certain types of proceedings not be prohibitively expensive to applicants (the "NPE Rule"). Inter alia, I hope this judgment will inform and assist the parties deliberations as to where they consider we should go from here.

## REASONS FOR DECISION

11. As stated, Colbeam seeks to have further prosecution of these proceedings made conditional on the Applicants' providing fortified undertakings in damages. In Colbeam's favour I will consider the question as if no question of costs protection arises.

### **O'Connell v EPA, Broadnet, Coll v Donegal County Council & Seery v An Bord Pleanála**

12. It is important first to observe that in all four cases considered in this section of the judgment the decision to require an undertaking in damages or not was considered a matter of judicial discretion – to be exercised judicially and in accordance with principle. This view is reflected in the word “may” in S.50A(6) PDA 2000 which provides as follows: *“The Court may, as a condition for granting section 50 leave, require the applicant for such leave to give an undertaking as to damages.”*

13. Dunne J refused to require an undertaking in the **Coll**<sup>3</sup> case – thus placing the requirement in the realm of discretion and disproving Colbeam's assertion in written submissions that: *“Where the rights of third parties would be affected by the stay, an undertaking as to damages is invariably required.”* Colbeam cite **O'Connell** for that proposition but it seems to me that O'Connell is merely an example of an undertaking being required – not the exemplar of a principle that it is invariably required. The same is true of the other case Colbeam cite - **R.(Greenpeace) v Inspectorate of Pollution**<sup>4</sup> places the requirement of an undertaking in the realm of judicial discretion. Indeed **Fordham**<sup>5</sup> cites that case for the proposition that whether to require an undertaking is *“essentially a matter for the discretion of the judge”*. In like vein, Colbeam cites Dillon LJ in the Court of Appeal in **Kirklees MBV v Wickes**<sup>6</sup> for the proposition that an undertaking is required regardless of how overwhelmingly strong the plaintiff's case might appear to be. But the decision of Dillon LJ was overturned in the House of Lords which restored the decision of the trial judge - such that the case is in reality an example of the exercise of a discretion not to require an undertaking.

14. While I will consider **O'Connell v EPA**<sup>7</sup> further through the lens of the **Coll**<sup>8</sup> case, the premise on which an undertaking in damages was sought in O'Connell bears noting. The decision impugned was an integrated pollution control licence for a proposed electricity generating plant. In getting leave to seek judicial review Ms O'Connell sought and was granted a stay on the implementation of the impugned licence - such that the proceedings were likely to delay the construction and commissioning of the power station and might result in loss and damage to the notice party developer.

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<sup>3</sup> Coll v Donegal County Council & Gillespie 2007 IEHC 110 High Court Dunne J 23/03/2007 – See further below

<sup>4</sup> [1994] 1 WLR 570

<sup>5</sup> Judicial Review Handbook 6<sup>th</sup> Ed'n 2012, p227

<sup>6</sup> Kirklees Metropolitan Borough Council v Wickes Building Supplies Limited [1993] AC 227

<sup>7</sup> O'Connell v. Environmental Protection Agency [2001] 4 IR 494

<sup>8</sup> See below

15. That situation may be contrasted with the present case in which, in my first judgment, I have refused to stay the impugned planning permission in its operation until the point in Colbeam's Work Programme at which, having cleared the site, it will hand it over to the main contractor. I did so on Colbeam's intimation of its intention to proceed with its development despite the present proceedings and because of the necessity and urgency, from its point of view, of completing the student accommodation development to a demanding and tight Work Programme in time to let it to students for the 2024/2025 academic year. For now, the stay remains in being from that point of handover to the main contractor but it is likely that Colbeam will apply in due course to have that stay lifted also. The matter is further complicated inasmuch as, as yet at least, it remains unclear whether and when Colbeam will be able to start development given it has yet to achieve full compliance with the pre-commencement conditions of the impugned permission. The affidavit of Sadhbh O'Connor sworn for Colbeam envisages starting development on foot of a form of arrangement with the planning authority yet to be made and at some apparent degree of variance with the planning conditions in question and which arrangement, as I have recorded in the first judgment, merits very careful consideration. Given the stay is lifted pro-tem and the lack of clarity as to whether and when Colbeam will be able to start development, it is not clear that the prospect of loss and damage to Colbeam by reason of the proceedings is as it was in O'Connell. One could argue that this should not affect the question whether an undertaking should be required and the Applicant should be left to an argument in due course that the proceedings will not have caused loss to Colbeam for as long as no stay was in place and/or that it was unable to develop for other reasons unconnected with the proceedings. However it seems to me that the absence of a present prospect of loss and damage to Colbeam by reason of the proceedings is a proper consideration in the exercise of my discretion to require an undertaking or not and weighs against my doing so.

16. In **Coll v Donegal County Council**<sup>9</sup> the Notice Party got planning permission to develop a filling station and supermarket. It was a condition of the permission that a public road be realigned. That involved the extinguishment of a public right of way, upon which the Council decided. The Applicant got leave to seek judicial review of that decision and a stay on its operation pending trial. The Notice Party sought an order that the Applicant provide an undertaking as to damages as a condition of further prosecution of the proceedings.

17. Dunne J took the view, on the precedent of the **Broadnet**<sup>10</sup> case, that the essential test was whether to require an undertaking was necessary in the interests of justice. The first question in that regard was whether, in substance, the existence of the proceedings had an effect similar to the effect of an interlocutory injunction in private litigation - that activity which would otherwise be engaged in is put 'on hold' pending final determination of the controversy, with resulting loss and damage. The present case is different as, as I have noted above, the permitted development is not at

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<sup>9</sup> Coll v Donegal County Council & Gillespie 2007 IEHC 110 High Court Dunne J 23/03/2007

<sup>10</sup> Broadnet Ireland Limited v. Office of the Director of Telecommunications Regulation [2000] 3 I.R. 281

present on hold by reason of the proceedings and Colbeam intends to proceed despite the proceedings.

18. Dunne J considered the extent to which private as well as public interests were engaged as relevant to the question whether an undertaking would be required. She noted that in **O’Connell v EPA**<sup>11</sup> Herbert J. had required an undertaking on the basis that the O’Connell family lived 100m from the power plant site and *“the real substance of this Application is the preservation and protection of private property rights which are normally protected by private law remedies and the apparent public law aspects of this challenge are in fact subsidiary though important issues.”* Herbert J. based this view in part on the terms of Ms O’Connell’s objection in the planning process. While he did not set out those terms in his judgment, it seems safe to infer that Ms O’Connell’s objection had stressed fears such as pollution of the environs of her family home, resultant diminution in the enjoyment of that home and, perhaps, its value and perhaps health risk to her family: fears, in other words, analogous to complaints of private nuisance.

19. Dunne J also noted that in **O’Connell v EPA** Herbert J., having considered Broadnet, acknowledged:

*“..... the very real difference between a limited liability company with no assets or capital and Colette O’Connell for whom as a person resident in the State of full age and not under any legal or other disability or incapacity and with some interest in immovable property in the State, an undertaking to pay damages was a very serious matter indeed. The fact that the potential loss to Dungarvan Energy Limited might exceed her ability to make good that loss is no basis for regarding her undertaking as worthless and an abuse of the process of the court. I therefore refuse the application that the undertaking to pay damages which the court requires to be given by Colette O’Connell should be supported in any way whatever by the giving of security or the payment of money into court or otherwise. Counsel informed the court that he had carefully advised Colette O’Connell as to the possible consequences of this undertaking and that he was satisfied that she fully understood them and was prepared to give the undertaking it sought by the court.”*

Dunne J considered this passage of some assistance in weighing the considerations relevant to exercising the discretion whether to require an undertaking.

20. Mr Coll was a “man of straw” whose undertaking as to damages was worthless unless fortified. Again on the authority of **Broadnet**, Dunne J recognised a power to require a fortified undertaking where there are doubts about the plaintiff’s resources: the court has a discretion to require either security or the payment of money into court, or an undertaking, from a more financially secure person or body. Herbert J., in **O’Connell v EPA**<sup>12</sup> had considered that in our system

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<sup>11</sup> O’Connell v. Environmental Protection Agency [2001] 4 IR 494

<sup>12</sup> O’Connell v. Environmental Protection Agency, (Unreported, Herbert J., 5th July, 2001)

of jurisprudence, with a constitutional right of access to the courts, the occasions on which a court might properly require a “fortified” undertaking to pay damages must be very few and, as recorded above, he refused to require fortification.

21. In **Seery**<sup>13</sup> Finnegan P required an undertaking. Again his premise was important: he considered that the grant of leave to seek judicial review had the like effect as an interlocutory injunction as it would be “*commercial folly*” for the developer to embark upon the development envisaged by the impugned planning permission pending the determination of the proceedings. He also referred to **Broadnet**<sup>14</sup> and the premise that activity which would otherwise be engaged in is put ‘on hold’ pending final determination of the controversy, with resulting loss and damage.

22. So, while Colbeam is correct to say that an undertaking may be required even of an applicant for judicial review who has not sought a stay or interlocutory injunction, the premise of doing so is that the mere existence of the proceedings has the de facto effect of a stay or interlocutory injunction. That is clearly not so in the present case. Colbeam, who must be the judge of their own interest, clearly do not consider it commercial folly in their particular situation to proceed with development: at present the proceedings not merely do not include a formal stay - they are not operating in practice as a stay, as the proceedings did in **Seery**. If it is folly, and I do not say it is, it is folly on which Colbeam is intent and which undermines the prospect of damage to Colbeam by reason of the mere existence of the proceedings.

23. Again applying **Broadnet**, Finnegan P in **Seery** considered that if the grant of leave to seek judicial review had the like effect as an interlocutory injunction an undertaking should be required unless the application for judicial review is of such a public nature as would justify the court exercising its discretion in refusing to require the undertaking sought. He noted that:

*“The whole tenor of the applicants’ objection to the proposed development before the planning authority and An Bord Pleanála and on the application for leave before me related to a small portion of the proposed development which would overlook the applicants’ dwelling house. In these circumstances it seems to me that this application does not have the necessary public nature to constitute a countervailing factor such as to justify my exercising my discretion in favour of the applicants and not seeking an undertaking as to damages.”*

24. Returning to **Coll**, and in contrast to **O’Connell** and **Seery**, Dunne J held that the public law nature of the claim was such that the Court should not exercise its discretion to require an undertaking as to damages. She said “*This is a case in which it cannot be said that any private law right of the applicant is engaged. The issue before the court arises only in respect of a public law matter.*” Dunne J does not elaborate on this issue but mentions earlier litigation between the same

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<sup>13</sup> Seery v An Bord Pleanála and Ors [2001] 2 I.L.R.M. 151

<sup>14</sup> Broadnet Ireland Limited v. Office of the Director of Telecommunications Regulation [2000] 3 I.R. 281

parties in which Peart J had given judgment<sup>15</sup>. This reveals that Ms Coll was representative of a local residents association whose objections were grounded mainly in road safety but also in alleged adverse effect on visual amenity.

## Further Cases & Discussion

25. It is not entirely clear to me on the foregoing authorities whether this aspect of the exercise of the discretion relates to public/private rights or rather to public/private interests and motivations. I think both or either and that a broad view of the character of the proceedings is required. Nor is a rigid view mandated: the public character of proceedings is not necessarily overshadowed by the coincidence of some degree of private interest: motives and incentives in proceedings such as these are often mixed and complex, especially when the objections are from local residents. It may also be appropriate to remember that even where motives are private to some degree, the assertion of public rights and interests is part of the project of judicial review identified in **Huddleston v Lancashire County Council**<sup>16</sup> as a partnership between the courts and those who derive their authority from the public law, based on a common aim, namely the maintenance of the highest standards of public administration. That project is engaged once leave to seek judicial review on substantial grounds is granted.

26. **Fordham**<sup>17</sup>, on judicial review generally, cites various cases for the generality of a requirement for an undertaking. But he also cites the planning/environmental case of **R.(Huddleston) v Durham County Council**<sup>18</sup>. Mr Huddleston challenged a development consent to reactivate, without doing EIA which would have provided public consultation, mining in a quarry adjacent his home. The mining company claimed that it would be caused extreme hardship if an interim injunction was granted and that Mr Huddleston was not in a position to offer recompense for any resultant financial loss. A later court described him as “*understandably concerned about the proposed reactivation of the quarry and its effect on his amenity and the value of his property.*”<sup>19</sup> So his private interest was clearly a strong one. Nonetheless, as Fordham notes, an interim injunction was granted without an undertaking as the case involved wider questions of public interest. **Moules**<sup>20</sup> (who does say as of 2011 that the requirement for an undertaking is general, though he criticises it) says the interim injunction was granted in **R.(Huddleston) v Durham** because of the potential harm that would be caused to the claimant and because of the risk of wider irreversible environmental harm. It seems from the digest of the case that the injunction was crafted to limit its effects to the environmental effects other than those personal to the Plaintiff.

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<sup>15</sup> Kathleen Coll v Donegal County Council 2005 IEHC 231

<sup>16</sup> R (Huddleston) v Lancashire County Council, [1986] 2 All ER 941

<sup>17</sup> Judicial Review Handbook 6<sup>th</sup> Ed'n 2012, p227

<sup>18</sup> R (Huddleston) v Durham County Council, [2000] Env LR D20 – 29 July 1999 Kay J

<sup>19</sup> R (Huddleston) v Durham County Council, [1999] Lexis Citation 4167, 13 December 1999 Richards J All England Official Transcripts (1997-2008)

<sup>20</sup> Environmental Judicial Review, Hart Publishing, 2011, p163 fn68



Though considering the issue for a quite different purpose and not as to the question of an undertaking in damages, and while I do not accord it great weight as to the question of an undertaking in damages, it is of interest to note that in a third judgment in **R.(Huddleston) v Durham County Council**<sup>21</sup> Sedley L.J. in the Court of Appeal observed that *“The applicant for judicial review needs to establish no private law right or interest, for example as a potential claimant against Sherburn Stone in nuisance. Mr Huddleston’s entitlement to seek judicial review depends not upon his physical propinquity to the site, though that is no doubt a stimulus, but upon his interest in the legal protection of the environment.”*

27. That the relevance of the public/private characterisation of judicial review proceedings is a matter of degree rather than bright line distinction when it comes to considering whether to require an undertaking in damages seems to me supported by the view expressed, as to EU environmental law, in **Case C-530/11 European Commission v United Kingdom** by Advocate General Kokott. She says that the mere existence of a private interest in the outcome of the case need not preclude a protective costs order. In the same case, the CJEU<sup>22</sup> considered it objectionable that protection was not granted even where only the particular interest of the claimant is involved. For present purposes the point is not that the CJEU did not rule out undertakings even where the NPE rule applies: the point is that distinguishing the public from the private characterisation of proceedings is not based on a bright line distinction excluding protection if the interest is private. As the same Advocate General noted in **Edwards**<sup>23</sup>: *“Legal protection in environmental matters, on the other hand, generally serves not only the individual interests of claimants, but also, or even exclusively, the public.”* And *“.... the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations.”* I am considering the matter from a standpoint of domestic rather than EU law but I do not see that domestic authority requires a different view. There is often, one might say, a symbiosis or co-dependence between the vindication of public and private interests in this area.

28. Colbeam cites Laffoy J in **Dowling**<sup>24</sup> as to the public/private issue. But in that case the predominance of private over public interests was very clear: *“In seeking to injunct the completion of the sale to Canada Life, in essence the plaintiffs are endeavouring to protect their private law interests derived from their shareholding in Holdings, ...”*

29. **O'Connor v Offaly County Council**<sup>25</sup> is a decision on costs protection but is of interest as a challenge to a waste collection permit issued to a waste collector operating from premises adjoining the Applicant’s riding school and equestrian centre. Mr O’Connor complained that the first notice party was bringing waste onto its property, storing it there, and washing down trucks and skips used in the course of the collection activity. He alleged that as a consequence of noise, odours and

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<sup>21</sup> R (Huddleston) v Durham County Council, [2000] Env. L.R. 488

<sup>22</sup> European Commission V United Kingdom Case C-530/11, Judgment of the Court (Second Chamber)

<sup>23</sup> Case C-260/11 *Edwards v. Environment Agency*, (Opinion of Advocate General, 18th October, 2012, ECLI:EU:C:2012:645)

<sup>24</sup> *Dowling v. Minister for Finance* [2013] IEHC 299

<sup>25</sup> [2020] IECA 72

concerns for the health and safety of persons arising from the alleged activities of the first notice party, he was forced to close the horse-riding school he had operated from his property. Clearly, his private interests were acutely engaged in the litigation but his legal complaint was of environmental damage. Mr O'Connor sought a costs protection order under S.s 3, 4 and 7 of the Environment (Miscellaneous Provisions) Act 2011.

30. Baker J in the High Court<sup>26</sup> stressed the reality and substance of the proceedings rather than their form and observed that a claim made for a collateral purpose would not receive costs protection. She instanced proceedings brought, not to secure compliance with a condition within the meaning of s.4(1), but to prevent a neighbouring landowner from building a house (Rowan v. Kerry County Council<sup>27</sup>) and proceedings brought with a view to obtaining payment of monies due (CLM Properties Limited v. Greenstar Holdings Limited<sup>28</sup>). She was satisfied that *“the applicant is not pursuing a merely private or personal agenda and has no collateral or extraneous purpose”* and declared the special costs provisions of the 2011 Act applicable. The issue of collateral purpose does not seem to have been canvassed in the Court of Appeal and for other reasons the appeal was dismissed<sup>29</sup>.

31. **O'Connor** seems to me of present interest because, though not dealing with an undertaking in damages, it addressed an issue to which the presence or absence of a private interest was relevant and facts on which the private interest was acute and can only have been a considerable spur to the applicant. Yet that private interest was not seen as a collateral purpose of the proceedings.

32. Colbeam cite **Harding v Cork County Council**<sup>30</sup> - though on the question of fortification of an undertaking once given. I mention it here only to note that Mr Harding offered an undertaking and so the question whether one should have been required of him was not at issue.

33. None of the foregoing is to doubt the relevance of distinguishing the public and private character of proceedings in exercising a discretion whether or not to require an undertaking. It is to observe merely that the distinction is not either/or and though significant, is a factor amongst others in the overall assessment for purposes of exercise of the discretion. In fairness, Counsel for Colbeam did not argue for more.

34. I would add my view that, taking the foregoing Irish and English authorities compendiously, on balance they seem to me to support a view, consistent also with the views expressed in **Case**

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<sup>26</sup> [2017] IEHC 606

<sup>27</sup> [2012] IEHC 544

<sup>28</sup> [2014] IEHC 288

<sup>29</sup> [2020] IECA 72.

<sup>30</sup> [2006] 1 IR 294

**C-530/11 Commission v UK and Edwards** which I have cited above, that as to the role of citizens in planning and environmental judicial review, to borrow a phrase from judgments in very different areas of law, private interests should not be weighed on “*nice scales*”<sup>31</sup> as altering the character of public law proceedings when considering whether to require an undertaking in damages.

### **Application of Law to Facts**

35. First, all the grounds on which judicial review is sought in these proceedings are public law grounds deemed substantial by the grant of leave to seek judicial review – though that reflects the nature of judicial review. Second, the Applicants do not directly in the proceedings invoke private rights or interests – for example they do not cite nuisance or the like. Indeed, while the Applicants protest the intended removal of trees, Colbeam make the point that tree removal will be primarily from the centre of the site and those adjoining the site boundaries, which provide the greatest amenity value and screening to neighbours, will be retained and the Inspector agreed. The Applicants are two residents of an adjacent housing estate – “The Grove” – and members of the “Grove Residents Group”.

36. As did Herbert J in O’Connell, I should consider the terms of the exhibited objection of the first applicant to the planning application. Overall it considers the proposal for specifically student accommodation misconceived, inter alia as to “*community impact*” and elaborates in detail on these issues. There are also specific objections broadly similar to those made in the proceedings. It suggests that the proposed open space provision is deficient by reference to the 22 homes and 19 Apartments in “The Grove” and 9 apartments in “Errew House”. There is a complaint of loss of green space in the wider Goatstown and Robuck areas. The complaints of excessive density and height are made by reference, inter alia, to the context of an established residential area of mostly 2-story housing and asserts detriment to existing character and residential amenity. The objection asserts that the Grove Estate was “Phase 1” built by another developer and its residents (including the Applicants) expected that developer to build similar housing in Phase 2 on the subject site. But instead that developer sold the site on to Colbeam. Various complaints are made of detriment to the amenities of existing neighbourhoods. The deficiency of parking provision will, it is alleged, be “*a disaster for surrounding neighbours*”. Complaints of visual impact and overshadowing appear to relate primarily to the effect on Robuck Grove House, which, it is said, Colbeam owns. The exhibited objection of the second applicant to the planning application is in very similar terms.

37. The objections of both applicants refer to their objections to an earlier development proposal on grounds of a proposed apartment block being too close to their homes. That permission was quashed on judicial review and that complaint is not repeated in their objections to the present development proposal.

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<sup>31</sup> E.g. *Gregan v Sullivan* [1937] 1 Ir Jur Rep 64 at 65; *Rosbeg Partners v LK Shields* [2016] IECA 161

38. Also exhibited by the Applicants is the objection of a Mr Redmond who launched but withdrew other judicial review proceedings challenging the impugned permission. He lives in another nearby estate, Friarsland, and in terms complains of detrimental effect on his home, by way of overshadowing by a proposed nearby high building with loss of privacy and light. He makes other public interest complaints at some length. Though the precise relationship of the Applicants objections to Mr Redmond's is unclear to me (I suspect it is not precise) their interests clearly coincided generally and their objections may have been co-ordinated.

39. I do not naively imagine that the Applicants' objections are likely to be entirely altruistic or exclusively public-spirited. No doubt they fear, in greater or lesser degree, for their own amenities. But the interests they invoke are those of the local community and neighbourhood – at least as they perceive those interests – and whether or not their proceedings succeed there is no reason on present evidence to doubt that they genuinely invoke those public interests. It is not inevitable to require undertakings of the Applicants merely because they are local residents. Communities, neighbourhoods, residents associations and the like are made up of individuals and at what point their private interests collectively elide into a public interest or interests can be difficult to discern.

40. Indeed Colbeam's written submissions, in my view properly, do not assert that these proceedings lack public character or should be regarded as seeking to protect substantially private interests. At hearing counsel for Colbeam did describe the Applicants as having a private interest as to feared overshadowing of their property by high buildings replacing what is now an open space. I am not sure what evidence there is of this as to the present development proposal as opposed to the earlier one. But as I have said that I accept that they likely fear, in greater or lesser degree, for their own amenities, little turns on that evidential question. Whereas Colbeam's written submissions could have been read as suggesting that an Applicant is absolved of an undertaking only where the case concerns "solely public law issues" counsel for Colbeam, correctly in my view, did not argue that such a private interest automatically implies an undertaking. Rather he cited O'Connell and O'Conner for the proposition that this, as he put it "*goes into the measurement*" – "*is taken into account in the balancing act.*"

41. It does not seem to me that private interests at stake in the present case are, on the evidence before me, discernibly as acute as those of the disappointed tenderer in **Broadnet** or the disappointed shareholders in **Dowling**. Nor do they exceed the private interests at stake for Mr **Huddleston** in his dispute with Durham County Council or for Mr **O'Connor** in his with Offaly County Council. On the facts, the position in this case seems broadly more akin to that in **Coll**, in which an undertaking was not required.

42. The position in this case is also very different to that in **Seery** and in **O'Connell** in that, for now at least, these proceedings do not act as a de jure or de facto stay on Colbeam's works and Colbeam has made clear its intention to press on. So, damage to which such an undertaking might apply does not seem at present in prospect.

## **CONCLUSION**

43. Accordingly, in the exercise of my discretion and on the basis of domestic law, without reference to the NPE rule or to costs protection (save to the limited extent to which I have cited EU Law authority above), I will refuse Colbeam's application that the further prosecution of these proceedings be made conditional on the provision by the Applicants of undertakings in damages. Accordingly I also refuse Colbeam's application that the Applicants be directed to disclose their means to satisfy any liability which could arise on such an undertaking.

44. However, as the de jure or de facto position as to the stay may change over time, I will not preclude a further application by Colbeam in this regard if based on changed circumstances. In that event and if an undertaking were then required, questions of the NPE rule and costs protection, as possibly bearing on the scope and quantum of any undertaking, might require consideration.

45. This judgment is delivered electronically. I direct that the parties correspond with a view to agreeing the terms of the orders to be made on foot of this judgment as to all matters arising thereon - such communications to be completed within fourteen days of electronic delivery of this judgment. Forthwith thereafter the result of such correspondence is to be notified by email from the solicitor for the applicants to the registrar. Thereafter I will give further directions as to how the matter is to be dealt with.

**DAVID HOLLAND**  
**19 January 2022**