

THE HIGH COURT

[2020] IEHC 591

[Record No. 2018/3928 P.]

BETWEEN

RAYMOND BYRNE AND LORNA MOORHEAD

PLAINTIFFS

AND

**ABO WIND IRELAND LIMITED, ABO WIND OMS IRELAND LIMITED AND
WEXWIND LIMITED**

DEFENDANTS

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 20th day of November, 2020

1. This matter concerns an application by notice of motion of 5th December, 2019 for discovery of certain categories of documents and/or electronically stored information held by the defendants as set out in the notice of motion. I will refer to the text of the categories sought below.
2. The proceedings were issued by the plaintiffs on 3rd May, 2018, and a statement of claim was delivered on 22nd May, 2018. The plaintiffs are a married couple with two children who reside at Corragh, Bunclody, Co. Wexford. The first and second named defendants are operators of a wind turbine installation known as Gibbet Hill Wind Farm at lands located in various locations in the area of Bunclody, Co. Wexford. The third named defendant is the owner of this wind turbine installation.
3. The plaintiffs' residence lies approximately 1,050m from the nearest of the wind turbines operating at the windfarm. The turbine development work was carried out in 2012 and in early 2013, with the turbines commencing operation in May/June 2013.
4. The plaintiffs seek various reliefs in respect of what they allege are installation noise, vibration and shadow flicker caused or permitted by the defendants to be emitted from the wind turbines, which the plaintiffs say interfere with their reasonable use and enjoyment of their home, lands and premises. It is alleged that the noise, vibration and shadow flicker are of such chronicity and severity that the plaintiffs' reasonable use and enjoyment of their home, lands, and premises have been "*wrongfully interrupted, prevented and destroyed*" [para. 5 statement of claim].
5. The plaintiffs claim a variety of injunctive and declaratory reliefs which seek to prevent the defendants from operating the wind farm in a manner which the plaintiffs say constitutes a nuisance. They seek an order or orders pursuant to s.160 of the Planning and Development Act 2000 (as amended), and seek damages for nuisance, negligence, breach of duty, breach of statutory duty and breach of constitutional rights. The plaintiffs also seek aggravated damages arising from what they claim is the defendants' failure and refusal to have regard to the warnings of the appropriate lawful authorities and to expert opinions provided to the defendants demonstrating that the noise and other emissions constitute a nuisance to the plaintiffs.
6. After an exchange of particulars, a defence was delivered on behalf of the defendants on 11th January, 2019. The defendants deny that they have wrongly caused or permitted

the effects alleged by the plaintiffs, or that, if any such noise, vibration and/or shadow flicker is caused, it intrudes upon or into the plaintiffs' home, lands or premises as alleged or at all.

7. The defendants specifically plead that the windfarm has been constructed and operated in compliance with planning permission granted by Wexford County Council, and that allegations that aspects of that permission have not been complied with relate in fact to the validity of the decision to grant permission, which was not challenged by the plaintiffs within the period of time prescribed by Statute, and is therefore not justiciable at the suit of the plaintiffs in these proceedings. The defendants further say that an issue relating to service of an enforcement notice by the planning authority also "*is not justiciable at the suit of the plaintiffs in these proceedings*", although it emerged during the hearing that there is in fact no enforcement notice extant at the present time.
8. The question of the engagement by the plaintiffs with Wexford County Council and with the defendants is also a matter of some controversy between the parties. In particular, the defendants specifically deny that they have ignored the results of "*the RPS Report*", an expert report commissioned by Wexford County Council in relation to a number of windfarm developments in County Wexford, or other noise reports. The defendants in this regard say that they "*have engaged with the planning authority, commissioned additional reports and offered critical analyses of the RPS report, including but not limited to the fact that the analysis of operational noise levels from the Gibbet Hill windfarm development presented in the RPS report 'does not appear to follow good practice methodology' for these assessments*" [para. 20(e) Defence].
9. I was informed at the hearing that no Reply was served by the plaintiff, and the pleadings are regarded as being closed.

The reliefs sought

10. There are four categories of documents sought in the notice of motion, and they are as follows: -

"(1) *All SCADA data, in unprocessed form, at one minute and ten minute intervals, for each of the six turbines individually of the Gibbet Hill Wind Farm, since they commenced operation, to include*

- a. *Wind speed, m/s (min/avg/peak);*
- b. *Power, kW (min/avg/peak);*
- c. *Rotation, 1/min (min/avg/peak);*
- d. *Act Position;*
- e. *Kilowatt hour;*
- f. *Blade pitch;*

g. Generator torque,

with confirmation as to whether

(i) the time is logged as GMT or Summer Time;

(ii) the time stamp relates to the start or end of each period;

and with time stamps for any shut down periods for any of the turbines since the commencement of their operation.

(2) All unprocessed data gathered on behalf of the Defendants, or in the possession, power, or procurement of the Defendants, or any of them, in the context of measurement or assessment of noise and vibration from Gibbet Hill Wind Farm, in advance of or since its commencement of operation including to but not limited to data gathered by Hayes McKenzie Partnership Limited in connection with the preparation of reports entitled Gibbet Hill Windfarm Compliance with Planning Conditions on Noise dated the 4th December 2013 and the 21st October 2014, (as well as the addendum to the report of the 4th December 2013 dated the 8th April 2014), or otherwise, to include:

a. audio recordings, together with details of the recording quality of such audio recordings;

b. time stamps for recording periods, with confirmation as to whether the time is logged as GMT or Summer Time, and whether the time stamp relates to the start or end of each period;

c. details of monitoring/ recording locations, including make and model of each item of recording equipment, and microphone height at each location;

d. any meteorological mast data associated with the Gibbet Hill Wind Farm.

e. any Lidar data associated with the Gibbet Hill Wind Farm.

(3) All documents and electronic records relating to the Defendants' engagement with the Plaintiffs as alleged at paragraph 16 of the Defence, to include

a. documents and records relating to the assessment and investigation of the Plaintiffs' complaints regarding noise, vibration, and shadow flicker;

b. documents and records relating to the commissioning of independent consultants to carry out investigations and provide reports;

c. the data gathered by those consultants; and

d. the reports generated in respect of the findings of those consultants.

- (4) *All documents and electronic records relating to the Defendants' engagement with the Planning Authority, and relating to the Defendants' assessment of the RPS reports, to include*
- a. *correspondence between the Defendants and the Planning Authority arising in connection with the (non-) compliance of Gibbet Hill Wind Farm with its grant of planning permission;*
 - b. *correspondence between the Defendants and the Planning Authority arising in connection with noise, vibration or shadow flicker nuisance from Gibbet Hill Wind Farm;*
 - c. *documents and records relating to the assessment of the RPS report by or on behalf of the Defendants;*
 - d. *documents and records arising in the context of the enforcement measures taken by the Planning Authority;*
 - e. *documents and records relating to the commissioning of independent consultants to carry out investigations and provide reports;*
 - f. *the data gathered by those consultants; and*
 - g. *the reports generated in respect of the findings of those consultants."*

11. By letter of 27th February, 2019, the plaintiffs' solicitors sought voluntary discovery in respect of these four categories of documents, and in the usual way, reasons were given as to why each of these categories was relevant and necessary for the fair disposal of the case. By letter of 20th March, 2019, the defendants' solicitors refused on behalf of the defendants to make discovery in accordance with this request, and set out the grounds for their refusal in relation to each of the categories. Further correspondence between the respective solicitors did not produce any agreement in relation to the categories, which in turn led to the issue of the present motion.
12. Counsel for the plaintiff referred to the statement of claim, and in particular to the particulars of engagement by the plaintiffs with Wexford County Council and with the defendants set out at para.10 of the statement of claim. The plaintiffs had in fact written to Wexford County Council to express their concerns after the grant of planning permission for the windfarm as early as March 2012. The particulars refer in some detail to the dealings of the plaintiffs with the defendants and Wexford County Council, and refer to noise monitoring which was carried out by the Council at the plaintiffs' residence in July 2013, August 2013 and between November 2013 and February 2014. A report was produced by a Mr. Brendan Cooney of Wexford County Council of 7th May, 2014 following the gathering of data during this latter period of monitoring.
13. The defendants conducted noise monitoring which was carried out by Hayes McKenzie Partnership Limited ("Hayes McKenzie") between August and October 2013, and that

company submitted a report to the County Council in or about December 2013. There was an addendum to this report in April 2014, and a further report of October 2014. The plaintiffs took issue with the findings of the Hayes McKenzie study and sought further information.

14. Ultimately, the County Council commissioned RPS Group Limited ("RPS") to carry out noise monitoring surveys to investigate the impact of noise from a number of windfarms near Bunclody including Gibbet Hill. RPS carried out monitoring between June and December 2016 and issued a report on 26th June, 2017. There were certain communications between the plaintiffs and Wexford County Council, and the plaintiffs say that a warning letter was issued to the first named defendant in October 2017 in respect of "*possible noncompliance*" at the Gibbet Hill windfarm. An enforcement notice was subsequently served by the County Council on the defendants or on one or more of them on 29th November, 2017 "*instructing them to submit proposals within four weeks to reduce the noise impact*" [per the particulars in the statement of claim]. Ultimately, the plaintiffs were dissatisfied with what they perceived as slow progress in the enforcement process, and decided to take the initiative by issuing the present proceedings.
15. On 9th May, 2018, a report issued from MAS Environmental Limited ('MAS'), which was appointed by the plaintiffs' solicitor to assess complaints of noise nuisance in relation to Gibbet Hill windfarm. MAS concluded at para. 10.15 of its report as follows: -

"Summary. The noise generated by the Gibbet Hill Wind Farm contains many intrusive characteristics and manifests in a way that causes significant disturbance. This finding is supported by assessment against factors likely to contribute to a noise nuisance such as frequency and duration of impact, time of day of impact etc. It is also supported when considering various other factors that add to any noise annoyance. Levels and characteristics also exceed limits advised or set in a number of internationally recognised guidance documents. The empirical evidence strongly corroborates the complaint made of nuisance arising from the operation of the windfarm and indicates this is a serious case exceeding any boundary of acceptability by a substantial margin."

16. It is no part of the function of this Court at this stage of the proceedings to express any view, however tentative, as to the respective merits of the tests carried out or the reports submitted by the various experts mentioned above. However, it is very clear that resolution at the trial of the action of the issues between the parties will depend to a large extent on the expert evidence adduced by the plaintiffs and the defendants. It is in this context that the plaintiff seeks the categories in the present motion, and in particular categories one and two.
17. Mr. Thomas O'Dwyer of the defendants' solicitors swore on 24th February 2020 a replying affidavit to the grounding affidavit of 4th December, 2019 of Mr. Philip Coffey on behalf of the plaintiffs. Mr. O'Dwyer set out at length the defendants' reasons for refusing the categories. In relation to category one which seeks all SCADA [Supervisory Control and Data Acquisition] data in relation to the six turbines of Gibbet Hill windfarm, Mr. O'Dwyer

suggested that, to the extent that the plaintiffs required discovery of this category to determine the operating circumstances giving rise to noise nuisance at their home, this was “tantamount to an admission by the Plaintiffs that they do not possess sufficient evidence on which to base their claim in nuisance against the Defendants...the ‘operating circumstances at the windfarm’ giving rise to the alleged nuisance are not relevant to the matters as issue between the parties and it is not necessary for the Plaintiffs to elucidate same in order to prove their case...” [Paragraph 8]. Mr. O’Dwyer’s point was that the plaintiffs have stated that they have identified that noise nuisance exists, and that it is being caused by Gibbet Hill, and that data which would assist in understanding how the noise from the windfarm was generated was simply not relevant to the matters at issue in the case.

18. As regards category two, which sought discovery of data “in the context of measurement or assessment of noise and vibration from Gibbet Hill Wind Farm” including a range of specified data including audio recordings, time stamps for recording periods, details of monitoring/recording locations, meteorological mast data and any Lidar data, it was argued on behalf of the defendants that it was clear that the plaintiffs did not require this data in order to assist them in proving their case, and that the data sought extended far beyond what was necessary to determine noise emissions. It was suggested once again that it was for the plaintiffs to prove that nuisance exists.
19. As regards category three, in which documents in relation to the defendants’ engagement with the plaintiffs was sought, the defendants’ position was that this was something that would be within the knowledge of the plaintiffs and as such as not necessary or appropriate to be discovered.
20. Category four dealt with documents relating to the defendants’ engagement with the planning authority, and specified various documents in that regard. Once again, the position of the defendants as set out in Mr. O’Dwyer’s affidavit was that such documents were not necessary for the fair disposal of the trial, and that many of the documents were publicly available from the planning authority in any event.
21. There was further exchange of affidavits between the plaintiffs and the defendants as to the appropriateness of the categories. I do not propose to recite the various arguments here, although I have taken full cognisance of all of the arguments made in the affidavits, and all of the exhibits referred to in those affidavits, as well as the oral submissions of counsel at the hearing.

Categories one and two

22. The first category concerns what counsel for the plaintiffs called the “raw data” produced by each of the six turbines which includes information in relation to matters set out in the notice of motion such as wind speed, power, rotation, act position, kilowatt hour, blade pitch and generator torque.
23. Counsel laid some emphasis on the respects in which it is alleged that this sort of information will add to the understanding of the quality of the noise generated by the

wind turbines. He referred to in particular to a letter from Mr. Philip Coffey of the plaintiffs' solicitors of 12th November, 2019 to the defendants' solicitors in which, addressing the issue of how and why the data at category one is relevant, he commented as follows: -

"Wind turbines in operation cause noises of various types. A very significant noise type is 'aerodynamic noise', the noise which is produced by the turbine blades moving through the air. The level of this type of noise depends, among other things, on how fast the blades are moving through the air. This is called 'rotational speed' which is typically expressed in rotations per minute (RPM). The level of aerodynamic noise also depends on how much of the blades surface is exposed to the oncoming air, which is principally determined by the blade pitch setting angle. The rotational speed and the blade pitch setting angle are controlled by the wind turbine operator, and adjustments to these and other controls, as well as other data, are recorded in the SCADA (Supervisory Control and Data Acquisition) system for each turbine. Increasing rotational speed and increasing blade surface exposure will cause a greater disturbance of a larger amount of air. In general, therefore, the faster the turbine blades turn the greater the level of noise emitted, and the greater the amount of blade surface which is exposed to the wind, the greater the level of noise emitted".

24. The plaintiffs submitted that this data was required *"in order to understand the circumstances in which the noise is generated"*. It was submitted by the plaintiffs that the data would assist the plaintiffs in making their case, and that the plaintiffs were perfectly entitled to require production of records from the defendants in this regard. The data was described as *"essential bits of knowledge which an expert must have"*. It was submitted also that the data might allow the experts to assist the court more precisely as to the cause of noise emitted, and in particular how any adverse effects of the noise might be mitigated into the future.
25. Similar logic applied to category two. It was submitted on behalf of the plaintiffs that their acousticians would only be able to provide limited comment on the noise monitoring reports commissioned by the defendants without the data sought, and that *"meaningful engagement between the acousticians for the respective parties, and proper assessment of their reports, would depend on access to the data upon which those reports are based. Denial of such access could only limit the potential for mutual understanding between the respective experts, would compromise the potential quality of the expert involvement in the case, and would thereby contribute to an inefficient use of court time"* [Letter of 12 November, 2019, Exhibited in the Grounding Affidavit].
26. The established case law in relation to discovery, as most recently seen in the decision of the Supreme Court in *Tobin v. The Minister for Defence* [2019] IESC 57, makes it clear that the dominant considerations in determining an application for discovery are that the documents sought are both relevant and necessary for the fair disposal of the case or to save costs. In response to a question from the court, counsel for the defendants fairly

conceded that the documents and data set out in categories one and two are relevant to the issues in the proceedings. However, it was submitted that they are not necessary for the fair disposal of the case, given that the plaintiffs have clearly assembled their own evidence and put forward their case on that basis.

27. It may be true that, if I were to refuse the documentation and data set out in categories one and two, the plaintiffs could still proceed with their case on the basis of their own report by MAS and perhaps the RPS Report or other expert evidence. However, the issue which I have to decide is whether the evidence sought is necessary for the fair disposal of the case. In this case, the defendants are in possession of the source data relating to the operation of the turbines themselves, which it would seem is the most important source of information in relation to the manner in which the turbines generate noise, vibration or shadow flicker, if indeed they do. Going into the trial, as things stand, that information would be available to the defendants but not to the plaintiffs. In an action in which the respective experts' evidence will be crucial to the determination of the issues, it seems to me essential for a proper understanding of those issues that the original source data is made available to the plaintiffs. In such circumstances, the experts on both sides would be proceeding from the same information base, which should assist in promoting agreement between the experts, and identifying areas of disagreement between them, which in turn will promote the efficiency of any ultimate trial.
28. I am also mindful of the need to encourage cooperation between experts as embodied in various provisions of O.63C of the Rules of the Superior Courts relating to the conduct of Chancery and non-jury actions. While I can only order discovery according to the well-established jurisprudence of this court, I would certainly of my own motion encourage expert witnesses to convene and agree as much as possible, and it seems to me that one of the best ways to promote this is to ensure that the experts on both sides have the best information available to them.
29. I note that no argument has been seriously advanced by the defendants that the provision of a very considerable amount of data as sought by the plaintiffs would be unduly burdensome or costly. There is no suggestion by the defendants that the information is commercially sensitive. Discovery of the documentation in these categories would not be disproportionate to the benefit to be gained from their discovery, nor are there more efficient methods of disclosure which could be pursued.
30. In all the circumstances, I am satisfied that I should order discovery of the documents and data set out in categories one and two.

Categories three and four

31. There was an issue disclosed in the affidavits in relation to enforcement notices issued by Wexford County Council and whether or not the defendants were entitled to withhold documentation in categories three and four by virtue of a privilege against self-incrimination. However, it was confirmed at the hearing that there is no extant enforcement notice issued by Wexford County Council against the defendants, and that aspect therefore does not have to be considered.

32. Category three relates to documents relating to the defendants' engagement with the plaintiffs, and in particular documents and records relating to the defendants' assessment and investigation of the plaintiffs' complaints, and the commissioning by the defendants of independent consultants to carry out investigations and provide reports.
33. While the affidavits concentrate on the privilege against self-incrimination issue which has now disappeared, the defendants make the case in relation to category three that "*...the Defendants' engagement with the Plaintiffs is something that would also be within the knowledge of the Plaintiffs and as such, it is not necessary, nor is it appropriate to be discovered*" [para. 19, affidavit of Thomas O'Dwyer, 24th February, 2020]. The point is also made that the reports which the defendants refer to at para. 16 of their defence "*were compiled on the basis of and in direct connection with an Enforcement Notice that was issued by Wexford County Council on 29th November, 2017 which is fully referenced within para. 18 of the Defendants' Defence*" [para. 20 affidavit of Thomas O'Dwyer, 24th February, 2020].
34. It is certainly the case that the defendants' engagement with the plaintiffs is within the knowledge of the plaintiffs. However, an issue in the proceedings is how the defendants responded to the complaints made by the plaintiffs. In the particulars set out at para. 10 of the statement of claim, the plaintiffs plead as follows: -
- "...the Plaintiffs have now been enduring nuisance at their family home for nearly five years. The Defendants have ignored the results of the RPS report and other noise reports including those of their own experts and the Plaintiffs will rely on these factors to support a claim for aggravated damages".*
35. The plaintiffs go on to claim as follows in the reliefs of the statement of claim:-
- "(g) Aggravated damages, claimed by reason of the Defendants' failure and refusal to have regard to the warnings of the appropriate lawful authorities and to the expert opinions provided to the Defendants demonstrating that the noise and other emissions from the windfarm constitute a nuisance for the Plaintiffs;..."*
36. It follows that the level and quality of the defendants' engagement with the plaintiffs is a serious issue in the case, and while many details of that engagement may be known to the plaintiffs, it seems to me that documents and records relating to the matters set out in category three are relevant and necessary to the fair disposal of the case. In this regard, I particularly note that a request to the plaintiffs' solicitor to the Planning Enforcement Department of Wexford County Council by letter of 3rd September, 2020 requesting "*a copy of the reports prepared by Irwin Carr and Hoare Lea*" [on behalf of the defendants] was refused on the basis that the consent of the first named defendant would be required prior to the release of those reports to the plaintiffs.
37. It may be that a claim of privilege would attach to some of the documentation sought. However, I am satisfied to make an order in the terms of category three of the documentation.

38. As regards category four, the documents and records are sought in relation to *"the defendants' engagement with the planning authority, and relating to the defendants' assessment of the RPS Report..."*. Various items of correspondence and documentation are specified in this regard.
39. It is clear from the sub-categories set out in category four that these documents are sought with a view to assessing the defendants' response to the various interactions with the planning authority, and in particular the RPS Report which was commissioned by the County Council. Once again, I consider that all of this is relevant to the extent to which the defendants reacted to the complaints of the plaintiffs and enforcement actions taken by the County Council, and are relevant to the issues and necessary for their fair disposal at trial.

Conclusion

40. In all the circumstances, I propose to accede to the motion in its entirety. I am aware that there may be some sub-categories in category one which the parties have agreed do not have application in the present circumstances. The parties may wish to agree an appropriate wording for an order, and to discuss the period required for discovery, and the supply of the name of a deponent. I would also require to be addressed on the question of costs.
41. As this judgment is being delivered electronically, I will give the parties 14 days within which to agree the above matters, or if they cannot be agreed, to forward brief written submissions identifying the areas of disagreement and to set out their respective positions.