

109/2017 //

Order 58, rule 15



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SUPREME COURT

Application for Leave and Notice of Appeal

For Office use

Supreme Court record number of this appeal	
Subject matter for indexing	

Leave is sought to appeal from	<input type="checkbox"/> The Court of Appeal	<input checked="" type="checkbox"/> The High Court
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[Title and record number as per the High Court proceedings]

	V	
High Court Record Nr	2016 613 JR MCDONNELL VS AN BORD PLEANÁLA	Court of Appeal Record Nr
Date of filing		
Name(s) of Applicant(s)/Appellant(s)	Dermot McDonnell	
Solicitors for Applicant(s)/Appellant(s)	Applicant in person	
Name of Respondent(s)	AN BORD PLEANÁLA, OWENINNY POWER DAC	
Respondent's solicitors	PHILIP LEE FOR AN BORD PLEANÁLA A&L GOODBODY FOR OWENINNY POWER DAC	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	
If yes, give [Supreme Court] record number(s)		

Are you applying for an extension of time to apply for leave to appeal?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
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If Yes, please explain why

I am 18 days late filing this application. I did attend the Supreme Court office on July 7th and intended to file then but I had filled out the wrong form. Saving the money necessary to make this application took time. I live on Job Seekers Allowance of €191 per week. The cost of a single day return trip to the Four Courts by public transport is almost €50 over 25% of my weekly income. During the High Court case, the department of Social Protection cut off my payment as I failed to sign on because I was in the Four Courts. The High Court case completely drained my meagre resources. I had hoped to return to Dublin last week in order to file this application but I suffered an attack of inflammatory arthritis.

1. Decision that it is sought to appeal

Name(s) of Judge(s)	MR. JUSTICE HAUGHTON
Date of order/ Judgment	31 MAY 2017 (PERFECTED 2 JUNE 2017)

2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	Dermot McDonnell – Applicant in person
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Original status

<input type="checkbox"/>	Plaintiff
<input checked="" type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner

<input type="checkbox"/>	Defendant
<input type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party

Solicitor			
Name of firm	N/A		
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode		Ref.	

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	N/A		
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name	N/A		
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Applicant / Appellant is not legally represented please complete the following

Current postal address	41 Rathbawn Drive, Castlebar, County Mayo, F23 R652
e-mail address	<i>dermotmcdonnell@yahoo.co.uk</i>
Telephone no.	087 954 5882

How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	An Bord Pleanála		

Original status	<input type="checkbox"/>	Plaintiff	<input type="checkbox"/>	Defendant	Is this party being served with this Notice of Application for leave?
	<input type="checkbox"/>	Applicant	<input checked="" type="checkbox"/>	Respondent	
	<input type="checkbox"/>	Prosecutor	<input type="checkbox"/>	Notice Party	
	<input type="checkbox"/>	Petitioner	<input type="checkbox"/>		
	Yes	<input checked="" type="checkbox"/>	No		

Solicitor			
Name of firm	PHILIP LEE (MS. RACHEL MINCH)		
Email	RMINCH@PHILIPLEE.IE		
Address	7/8 WILTON TERRACE, DUBLIN 2.	Telephone no.	01 237 3700
		Document Exchange no.	
		Ref.	
Postcode	D02 KC57		

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Respondent's full name Oweninny Power DAC

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Original status	<input type="checkbox"/>	Plaintiff	<input type="checkbox"/>	Defendant	Is this party being served with this Notice of Application for leave?
	<input type="checkbox"/>	Applicant	<input type="checkbox"/>	Respondent	
	<input type="checkbox"/>	Prosecutor	<input checked="" type="checkbox"/>	Notice Party	
	<input type="checkbox"/>	Petitioner	<input type="checkbox"/>		
	Yes	<input checked="" type="checkbox"/>	No		

Solicitor			
Name of firm	A & L GOODBODY (MR. ALAN ROBERTS)		
Email	AROBERTS@ALGOODBODY.COM		
Address	IFSC, NORTH WALL QUAY, DUBLIN 1	Telephone no.	01 649 2000
		Document Exchange no.	
		Ref.	
Postcode	D01 H104		

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address	
------------------------	--

e-mail address	
Telephone no.	

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

4. Information about the decision that it is sought to appeal

1. It is sought to appeal from the following parts of the judgement:

- (a) the refusal to extend time,
- (b) the finding that the application did not disclose arguable grounds for the relief claimed,
- (c) the setting aside of the Order of Mr. Justice Humphries dated 12th of December, 2016, granting me leave to seek judicial review.

I ask that my judicial review proceedings be reinstated and returned to the High Court so that the merits of my case are tried.

- (a) A concise statement of the facts found by the trial court (in chronological sequence) relevant to the issue(s) identified in Section 5 below and on which you rely (include where relevant if certain facts are contested)

The High Court ruled that I required an extension of time as I failed to move my proceedings by ex-parte application to the Court within the 8 week period prescribed under the Planning and Development (Strategic Infrastructure) Act 2006 although I had filed my papers in the Central Office of the High Court within the period allowed.

In deciding whether to grant my application for an extension of time, the Court applied the test set out in KELLY – LEITRIM COUNTY COUNCIL [2005] 2 IR 404 by Clarke J. The final test turned on consideration of the merits of my case, “whether the Applicant had established an arguable case”. The Court held that “There was no obligation on the Board in its decision to deal with the capacity factor or comparisons with the neighbouring project, or the 2003 application. For these reasons, there is simply no arguable claim and hence no sufficient reason to extend time”.

In coming to his view, the Judge considered that the production information (capacity factor) included in the planning application was economic in nature rather than environmental and that An Bord Pleanála did not need to consider that information when it came to do the Environmental Impact Assessment required by law.

- (b) In the case where it is sought to appeal in criminal proceedings please provide a concise statement of the facts that are not in dispute: N/A

The relevant orders and findings made in the High Court and/or in the Court of Appeal

- (a) The application for leave to apply for judicial review was out of time and the application did not disclose arguable grounds for the grant of the relief sought,
- (b) The Court refused to extend time and set aside the Order granting leave to seek Judicial Review and refused the relief sought and dismissed the proceedings,
- (c) The Court made no order as to costs,

(d) In respect of my application for a Certificate for leave to appeal to the Court of Appeal, the Court found that section 50A(7) of the Planning and Development Act did not apply to the finding of the Court that the leave application was made out of time,
(e) the Court found that section 50A(7) of the Planning and Development Act did apply to the determination of the Court refusing an extension of time and refused my application for leave to appeal the Judgement of the Court.

5. Reasons why the Supreme Court should grant leave to appeal

The Decision sought to be appealed involves a matter of general public importance for the following reasons:

1. The issue is whether the State, when acting as a developer of a natural resource, can provide information of a fundamental nature in a planning application made under the Strategic Infrastructure Act that it knows to be false.
2. The High Court decided that the “Capacity Factor” information included by the State in the Oweninny planning application was economic in nature. As a consequence, An Bord Pleanála was not required to consider that information in doing an Environmental Impact Assessment. Capacity factor is a scientific term that describes the energy yield of a wind farm. The State has admitted in affidavit that the amount of energy generated will be one third greater than originally claimed. What was presented to the public was an utterly mediocre wind farm in terms of yield. The State now acknowledges that it will be an exceptional wind farm and vastly more profitable than described in the planning application.
3. The Commissioner for Environmental Information, in his decision in Mr Francis Clauson and ESB Networks Limited (Case CEI/15/0029), found that the electrical output of a wind farm is environmental information. ESB Networks did not appeal the decision and the information sought by Mr. Clauson was provided to him.
4. The ESB signed an agreement with Mayo County Council to pay €2,500 per megawatt of generating capacity to a community benefit fund. The German developer, ABO Wind, of the Sheskin wind farm, adjacent to Oweninny, is obliged, and happy, to pay €10,000 per megawatt in community benefit as required in the Mayo County Development plan. The local community and the people of Mayo have been deprived of many tens of millions of euro over the lifetime of Oweninny. The local community are outraged at this deal done between public authorities in secret last October, without the knowledge of the elected members of the Council or the public.
5. Eirgrid and ESB Networks have been upgrading the high voltage grid from Castlebar to Bellacorick for the past couple of years. The 54 year old wires are being replaced by the latest conducting technology to significantly improve the power carrying capacity of the line. The key driver for the upgrade is the Oweninny wind farm. The project had progressed without

difficulty until recently. Now many landowners, close to the wind farm, have refused the contractors entry onto their lands despite offers of many thousands of euro in compensation, money that was neither offered nor provided to landowners on sections already completed. The upgrade project is now stalled with the high voltage circuit out of commission and the project contractor withdrawn from the area for the time being. Mediation by the Irish Farmers Association has failed to resolve the situation. It seems inevitable that the upgrade of the high voltage line from Bellacorick to Ballina, due to begin soon, will also encounter determined resistance. Plans for protests at the entrance to Oweninny are being made and will undoubtedly attract many local people. Our right to the peaceful enjoyment of our lives has been put at risk by the State for reasons best known to themselves.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

The learned High Court Judge made an error of law and/or of fact in finding that:

1. The capacity factor information included in the planning application was not environmental information and more economic in nature. I submit that rational of the Commissioner for Environmental Information in CEI/15/0029 is correct. He dreasoned as follows:

Article 3(1) of the AIE Regulations defines "environmental information" as "any information in written, visual, aural, electronic or any other material form on-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites . . . and the interaction among these elements,

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment,

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements,...

The third party to this appeal asserted that the information requested is not environmental information under the AIE Regulations. Having had regard to the definition, I first note that

the generation and transmission of electricity by wind farms is an activity under paragraph (c) of the definition, as an activity likely to affect the elements of the environment, particularly in terms of effects on the landscape caused by construction of infrastructure. I considered whether the information requested was on the activity in question. The request refers to details of the electrical output of the wind farm for specified dates. I consider that information on electrical output of the wind farm accurately reflects the true generation capacity of the undertaking, and is information on the activity of power generation. Accordingly, I find that the information requested on electrical output is environmental information under paragraph (c) of the definition.

2. The law requires a planning authority to consider the impacts, direct and indirect, of a proposed development on human beings. Economics is as much a part of the fabric of reality as noise, electromagnetic fields, shadow flicker or gravity. I had to emigrate in the 1980s due to lack of economic opportunities here in Ireland. The boom times of the Celtic tiger resulted in people from all over the world moving here in search of economic opportunities. When the economy crashes, we see a sharp rise in depression, self harm and suicide. It is submitted that even if the electrical output of a wind farm is economic in nature, a planning authority is obliged to consider fundamental information of an economic nature in so far as it impacts human beings. It can not be acceptable for a developer to include an impossibly low figure. This is the information age, not the fake news age, despite what some people may believe.

3. The law as interpreted by the High Court has enormous negative implications. Transparency in natural resource development is dead as is the concept of sustainable development if developers are free to lie about the value of natural resources. The planning system, in so far as natural resources is concerned, is a blackguard's charter. NIMBYs will be forever able to point to planning applications for wind farms and say the law allows developers to lie their heads off about the value of the resource. I submit that no public interest is served in a view of the law that serves powerful vested interests at the expense of the rural community expected to host several dozen of the largest wind turbines ever permissioned.

4. Article 40.1 of the Constitution states "All citizens shall, as human persons, be held equal before the law". The State, in both making the Oweninny application and granting permission for it, violates Article 40.1. There is no equality where a handful of individuals in the pay of the State are given the true information in respect of the value of a natural resource and the public of us are given an impossibly low value in a planning application.

5. Article 45.3.2 states "The State shall endeavour to secure that private enterprise shall be so conducted as to ensure reasonable efficiency in the production and distribution of goods and as to protect the public against unjust exploitation". When the State through the planning process sought the support and consent of the public for the proposed Oweninny wind farm is did so on the basis a well calculated deception. These actions constitute unjust exploitation. The planning application and the grant of permission for it, violates Article 45.3.2.

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:

7. Other relevant information

Neutral citation of the judgment appealed against *e.g.* Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

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References to Law Report in which any relevant judgment is reported

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

Set aside the those parts of the order of Mr Justice Haughton dated 31 May 2017, perfected 2 June 2017.

1. refusing to extend time,
2. the finding that the application did not disclose arguable grounds for the relief claimed,
3. the setting aside of the Order of Mr. Justice Humphries dated 12th of December, 2016, granting leave to seek judicial review.

What order are you seeking if successful?

Order being appealed: set aside vary/substitute

Original order: set aside restore vary/substitute

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions? Yes No

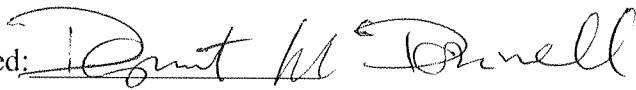
If Yes, please give details below:

make a reference to the Court of Justice of the European Union? Yes No

If Yes, please give details below:

Will you request a priority hearing? Yes No

If Yes, please give reasons below:

Signed: 
(Solicitor for) the applicant/appellant

Please submit your completed form to:

The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.