O. 58, r. 18(1)

SUPREME COURT

Respondent's Notice

Supreme Court record number		**S: AP: IE: 2007:000109**

Dermot McDonnell **High Court record number: 2016 613 J.R.**	**V**	**An Bord Pleanála,** **(Respondent)** **and** **Oweninny Power DAC** **(Notice Party)**

Date of filing	**04 August 2017**
Name of respondent	**An Bord Pleanála**
Respondent's solicitors	**Philip Lee Solicitors** **7/8 Wilton Terrace** **Dublin 2**
Name of appellant	**Dermot McDonnell**
Appellant's solicitors	**Litigant in person**

1. Respondent Details

Respondent's full name	**An Bord Pleanála**

The respondent was served with the application for leave to appeal and notice of appeal on date:
21 July 2017

The respondent intends :

✓	**to oppose the application for an extension of time to apply for leave to appeal**
	not to oppose the application for an extension of time to apply for leave to appeal
✓	**to oppose the application for leave to appeal**
	not to oppose the application for leave to appeal
✓	**to ask the Supreme Court to dismiss the appeal**
	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court
	Other (please specify)

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:	

Details are correct save that no details are provided as to Counsel for the Respondent. The details of the Respondent's Counsel are as follows:

Counsel			
Name	**Emily Egan SC**		
Email	**EEgan@lawlibrary.ie**		
Address	**Distillery Building** **145-151 Church Street** **Dublin 7**	**Telephone no.** **Document Exchange no.**	**01-8172816** **816001**
Postcode			

Counsel			
Name	**Fintan Valentine BL**		
Email	**fintanvalentine@me.com**		
Address	**Distillery Building** **145-151 Church Street** **Dublin 7**	**Telephone no.** **Document Exchange no.**	**01-8175989** **810289**
Postcode			

How would you prefer us to communicate with you?			
	Document Exchange	✓	**E-mail**
	Post		**Other (please specify)**

2. Respondent's reasons for opposing extension of time

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused

The Respondent understands that the Supreme Court will wish to have due regard to the matters outlined by the Appellant to ground his application for an extension of time, including the error made by the Appellant in completing the incorrect form and thus being unable to file his Application for Leave and Notice of Appeal on 7th July 2017 and the expenses involved in appealing.

The Respondent observes, however, that even when he attended on 7th July 2017, the Appellant was already seven days out of time. In circumstances where his original proceedings were out of time, and his appeal concerns a refusal by the High Court to grant him an extension of time pursuant to section 50(8) of the Planning and Development Act 2000, as amended ("the 2000 Act"), it is suggested that his failure to file his Application for Leave and Notice of Appeal within the 28 period of time prescribed for so doing is surprising.

Further, with reference to the test for enlarging time for an appeal as laid down by the Supreme Court in *Eire Continental Trading Co. Ltd. v Clonmel Foods Ltd.* [1955] IR 170, it is submitted that:

(i) There is nothing in the Appellant's Application for Leave and Notice of Appeal to establish when the Appellant formed an intention to appeal, and whether he did so within the relevant period;

(ii) The mistake pointed to by the Appellant—having filled out the incorrect form—does not explain why he first attended the Supreme Court seven days after the relevant time period for the making of an application for leave to appeal had expired;

(iii) For the reasons set out below, the Appellant does not have an arguable ground of appeal, and, in these circumstances, it is not appropriate to grant an extension of time.

Accordingly, the Respondent submits that it is not appropriate to grant an extension of time in this case.

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

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

The information in section 4 of the Application for Leave and Notice of Appeal is broadly correct save that the Respondent wishes to draw the attention of the Supreme Court to a number of additional matters.

The Appellant's proceedings seek to challenge a decision of the Respondent dated 2nd June 2016 to grant planning permission to the Notice Party for a development comprising the construction and operation of a wind farm at Oweninny, Bellacorick, County Mayo. The Appellant filed his Statement of Grounds and Verifying Affidavit in the High Court Central Office on 27th July 2016, within the eight-week period prescribed by section 50(6) of the 2000 Act for the making of an application for leave to apply for judicial review. The Appellant did not, however, move his application for leave in Court until 21st November 2016.

Ultimately, the High Court (Humphreys J.) granted the Appellant leave to apply for judicial review on 12th December 2016. Leave was granted in respect of two grounds only: (i) that the Environmental Impact Statement ("EIS") submitted with the application was inadequate; and (ii) that the Respondent failed to carry out a proper Environmental Impact Assessment ("EIA"). The Court refused leave on two other grounds, including one (ground no. 3) which concerned the amount the Notice Party ought to be required to contribute to the Community Benefit Fund. In effect, ground no. 3 asserted that the Respondent acted unreasonably and/or irrationally in failing to attach a condition to the planning permission requiring the Notice Party to contribute more than €1,000 per MW installed per annum (the Respondent had noted in its Direction that in circumstances where the Notice Party had committed itself in the planning application to a contribution of €1,000 per MW installed per annum to the

Community Benefit Fund, it was unnecessary expressly to require same by condition).

Both the Respondent and the Notice Party put the question of whether the application for leave had been made within time in issue in their opposition papers.

At the trial of the application for judicial review, the High Court (Haughton J.) decided to deal with the issue of delay as a preliminary issue. The learned trial Judge ruled that the application for leave to apply for judicial review was not made within the prescribed eight-week period (*ex tempore* ruling of the 16th May 2017). He then afforded the Appellant an opportunity to apply for an extension of time pursuant to section 50(8) of the 2000 Act and heard evidence from the Appellant in this regard. In an *ex tempore* ruling of 17th May 2017, he declined to grant an extension of time, set aside the grant of leave, refused the reliefs sought in the Statement of Grounds and dismissed the proceedings.

In his *ex tempore* ruling, the learned Trial Judge indicated that he was refusing the application for an extension of time solely by reference to the fact that the Appellant's Statement of Grounds disclosed no arguable case (the last of the factors to be taken into account on an application to extend time as set out in the judgment of the High Court (Clarke J., as he then was), in *Kelly v Leitrim County Council* [2005] 2 I.R. 404). It is from this decision that the Appellant seeks leave to appeal. (The Applicant did apply to the High Court for a certificate of leave to appeal this decision to the Court of Appeal pursuant to section 50A(7) of the 2000 Act and by written judgment of the 31 May 2017, the learned Trial judge refused to grant a certificate.)

The essence of the Appellant's argument in the proceedings was that the Respondent ought not to have accepted the capacity factor of the proposed wind farm as stated by the Notice Party in its application documentation. In effect, the Appellant contended that the Respondent erred in deciding that it could proceed to carry out EIA in respect of the proposed development without seeking further information, or further interrogating the information it had been given, in respect of capacity factor. For the information of the Court, 'capacity factor' was defined by the Respondent's Inspector as the amount of energy that the wind farm is likely to produce as a percentage of the amount "*it could theoretically produce if it was working at maximum output at all times throughout the year*". The Notice Party indicated that the capacity factor was in the range of 33% to 37%. As recorded by the High Court in its *ex tempore* ruling, "*Mr McDonnell asserts that the wind capacity factor in this case is far higher and he estimates 54 to 58%*".

The High Court held that the Appellant did not have an arguable case on the following grounds (set out at pages 26-37 of the *ex tempore* ruling):

- With the exception of climatic factors, and so far as human beings are concerned, possibly noise and shadow flicker, the capacity factor is not relevant to an assessment of any of the aspects of the environment which fall to be considered in the EIS. The Court noted that the Appellant's own Statement of Grounds stated that the capacity factor was *not required to be set out in the EIS.*

- The Appellant was afforded the opportunity to make his case on the alleged understatement of the capacity factor and his submissions in this regard were taken into account by the Inspector and the Respondent.

- The Inspector summarised the Appellant's submissions in his report, noting that *"[i]n general there was no disagreement between parties that wind farm development at this location would be able to capture a reasonable or better wind resource and*

produce a reasonable or better energy output."

- The case law establishes that the adequacy of an EIS is a matter for the decision-maker subject only to review on limited, *O'Keeffe* grounds.

- As expressly recorded in the Respondent's decision, the Respondent completed an EIA and there was no evidence to the contrary before the Court. The Respondent was under no obligation to deal with capacity factor or comparisons with a neighbouring project in its decision. In this context, the Court also made a broader observation that the Appellant misunderstands *"the limited nature and ambit of judicial review in the Irish Courts."*

4. Respondent's reasons for opposing leave to appeal

The Respondent opposes the application for leave to appeal for the following reasons:-

(1) In order to grant leave to appeal in the instant case, the Supreme Court must be satisfied that the decision of the High Court involves *a matter of general public importance*, or that it is, *in the interests of justice, necessary* that there be an appeal to the Supreme Court. The Appellant has not addressed how, he contends, his application meets either of these criteria.

(2) As regards the first limb, in circumstances where the High Court found that the Appellant's application does not disclose an arguable case, a question must arise as to whether that decision can be said to involve a matter of general public importance. In this regard, reference is made, by analogy, to the following principle applicable to an application for leave to appeal under section 50A(7) of the 2000 Act, as laid down by the decision of MacMenamin J. in *Glancré Teoranta v An Bord Pleanála* [2006] IEHC 250:

"4. Where leave is refused in an application for judicial review, *i.e.* in circumstances where substantial grounds have not been established, a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court."

(In making this analogy, the Respondent recognises, however, that the test of a matter of general public importance appears to be a lower threshold than that which applies under section 50A(7) of the 2000 Act – see decision of the Supreme Court in *Grace v An Bord Pleanála* [2017] IESC 10, at para. 3.6).

(3) The arguments which the Appellant seeks to advance are largely specific to the facts of this case.

(4) Moreover, some of the arguments advanced in Section 5 of his Application for Leave and Notice of Appeal are premised on a misunderstanding or misstatement of what the High Court in fact decided. Thus, there has been no finding that the information submitted in relation to capacity factor was "false". The Court did not determine this issue, and the Board did not need to determine it for the purposes of carrying out EIA. Also, the High Court did not decide that capacity factor information was purely "economic in nature". Rather, as noted above, the Court held that with the exception of climatic factors, and so far as human beings are concerned, possibly noise and shadow flicker, the capacity factor is not relevant to an assessment of any of the aspects of the environment which fall to be considered

in the EIA.

(5) Furthermore, the Appellant seeks to ground his application for leave to appeal by reference to new evidence – a decision of the Commissioner for Environmental Information – which he did not put before the High Court. Further or in the alternative, that decision is not, in any event, relevant to the question of whether the Board was required to interrogate further the capacity factor of the proposed wind farm before carrying out EIA.

(6) The contribution to community benefit funds that a separate wind farm developer pays in respect of a separate wind farm is not relevant to the legality of the Respondent's decision in this case. Moreover, this argument actually relates to one the grounds on which the Appellant *was not granted leave* to apply for judicial review in the first place.

(7) The relevance of paragraph 5 of Section 5 of the Appellant's Application for Leave and Notice of Appeal to the question of whether the Supreme Court should grant leave to appeal is not understood.

(8) As regards the second limb, there is nothing in the Application for Leave and Notice of Appeal which establishes that it is *necessary* in the interests of justice that there be an appeal.

5. Respondent's reasons for opposing appeal if leave to appeal is granted

1. The High Court did not find that the capacity factor information was not environmental information. As already noted above, the Court held that with the exception of climatic factors, and so far as human beings are concerned, possibly noise and shadow flicker, the capacity factor is not relevant to an assessment of any of the aspects of the environment which fall to be considered in the EIA.

   Further, the Appellant himself accepted, in his Statement of Grounds, that information as to capacity factor was *not* information relating to the likely environmental effects of the proposed development which required to be included in the EIS.

   Further or in the alternative, the definition of "environmental information" in the Access to Information on the Environment ("AIE") Regulations is not relevant to the question of what information is required for the purposes of carrying out EIA, which is governed by the EIA Directive and set out in national law in Schedule 6 of the Planning and Development Regulations 2001, as amended.

   In the premises of the foregoing, the High Court did not err in law and/or in fact for the reasons alleged in ground of appeal no. 1.

2. With respect to ground of appeal no. 2, the Respondent did consider the likely effects of the proposed development on human beings and the Respondent will rely, in this regard, on the contents of its Direction and Decision and its Inspector's report.

3. With respect to ground no. 3, as noted by the High Court in its judgment refusing a certificate of leave to appeal to the Court of Appeal (delivered on 31st May 2017), the Appellant's "*broadside attack on the planning system is really a generalised attack on the 2000 Act and the regulations made thereunder, and as such is a complaint about the planning policy and legislation that is a matter for*

the Oireachtas." The contention that the High Court's interpretation of the law *"has enormous negative implications"* is denied.

4. There has been no violation of Article 40.1 of the Constitution. For the avoidance of doubt, the Respondent exercises its functions under the planning legislation independently and the fact that the applicant for planning permission in the instant case is State-owned did not lead to a favourable consideration of the application as implied by the Appellant.

5. There has been no violation of Article 45.3.2 of the Constitution.

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

Emily Egan SC
Fintan Valentine BL

6. Additional grounds on which decision should be affirmed

None.

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: Philip Lee
Solicitor for the Respondent
Philip Lee Solicitors
7/8 Wilton Terrace
Dublin 2

Please submit your completed form to:

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

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.