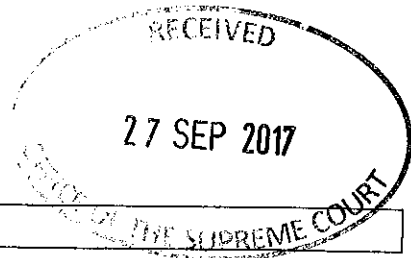


SUPREME COURT

Respondent's Notice



Supreme Court record number	S:AP:IE:2017:000136
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Gerard Fulham	V	An Bord Pleanála, (Respondent) and M & N O'Grady Developments Limited (Notice Party)
High Court record number: 2017 248 J.R. Court of Appeal record number: 2017/32		

Date of filing	27th 8 September 2017
Name of respondent	An Bord Pleanála
Respondent's solicitors	Philip Lee Solicitors 7/8 Wilton Terrace Dublin 2
Name of appellant	Gerard Fulham
Appellant's solicitors	Litigant in person

1. Respondent Details

Respondent's full name	An Bord Pleanála
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The respondent was served with the application for leave to appeal and notice of appeal on date:

13 September 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)

For reasons explained in Sections 4(1) and 5 below, while the Respondent is opposing the

application for leave to appeal, in the event that leave to appeal is granted, it does not intend to participate in the appeal.

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

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)

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

N/A

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 correct insofar as it indicates the Orders made by the High Court and the Court of Appeal. However, it may be of assistance to the Supreme Court to set out some more of the factual background to this application.

The Applicant's application for judicial review sought to quash two decisions of the Respondent, An Bord Pleanála ("the Board") dated 18th January 2017 granting the Notice Party, M & N O'Grady Developments Limited ("the developer"), planning permission for various modifications to a previously permitted development.

The statutory eight-week period for making an application for leave to apply for judicial review of the said decisions (as laid down in section 50(6) of the Planning and Development Act 2000, as amended, "the 2000 Act") expired on 14th March 2017.

On 16th March 2017, the Applicant filed a Statement of Grounds and Verifying Affidavit and also issued a Notice of Motion in the Central Office of the High Court which simply sought "*an order of certiorari quashing*" the said decisions. This relief was being sought in circumstances where an application for *leave* to apply for judicial review had not been made in accordance with the requirements of sections 50(2) and 50A(2) of the 2000 Act, and where leave to apply for judicial review had not been granted by the High Court.

By letter dated 31st March 2017, the Board's Solicitors wrote to the Applicant to point out the procedural infirmities in his motion of 16th March 2017. The improprieties identified in the said letter included that the Applicant had failed to move an application for leave to apply for judicial review as required by section 50 of the 2000 Act, that he had issued a motion simply seeking an Order quashing the relevant decisions of the Board and not seeking leave to apply for judicial review, and that his motion was issued outside the eight-week time period for the making of an application for leave to apply for judicial review as provided in the 2000 Act.

By letter dated 12th April 2017, Mr. Fulham replied stating that "*your ignorance of the law is surprising and amazing*" and that the eight-week time limit had been declared unconstitutional by the Supreme Court in *White v Dublin City Council* [2004] 1 I.R. 545 (which decision related not to section 50 of the 2000 Act, but to earlier legislation which provided for an *absolute* time limit of two months for the initiation of judicial review proceedings in respect of a planning decision, without any provision for a possible extension of that period).

Accordingly, on 3rd May 2017, the Board issued a motion seeking the dismissal and/or striking out of the proceedings on the grounds that same were improperly constituted (by reference to the requirements of section 50 and Order 84 of the Rules of the Superior Courts). This motion came before the High Court (Faherty J.) on 18th May 2017. The developer filed an affidavit in support of the Board's motion.

On 18th May 2017, the High Court struck out the Applicant's judicial review proceedings on the basis that they were improperly constituted, and awarded the Board and the developer their costs.

For the avoidance of doubt, notwithstanding that he had been advised of the procedural infirmities in his application for judicial review by the Board's solicitors on or about 31st March 2017, at no time did the Applicant take steps to remedy those infirmities, such as by applying for leave to apply for judicial review and/or an extension of time for the making of such an application for leave.

On 30th June 2017, the Applicant issued a motion seeking an extension of time for the bringing of an appeal and also filed his intended Notice of Appeal.

It should be noted that the Board had indicated in correspondence to the Applicant dated 26th June 2017 that it was prepared to consent to an extension of time for the filing of his appeal to the Court of Appeal further to a request from the Applicant dated 19 June 2016. The Applicant subsequently stated that he did not receive this letter (although it was signed for), but, in any event, by letter dated 25th July 2017 the Board's solicitors advised the Applicant that the Board would not oppose his application for an extension of the time for the bringing an appeal. This should not be interpreted as a concession that there was any merit in the appeal (for reference, by example, to the third limb of the test laid down in *Eire Continental*

Trading Company Ltd. v Clonmel Foods Ltd. [1955] 1 I.R. 170) (hereinafter “*Eire Continental*”). Rather, the Board adopted a pragmatic approach to avoid the risk of an additional layer of court hearings—and the costs and time associated therewith—in circumstances where the underlying appeal was, in its view, entirely without merit and could be disposed of very expeditiously.

The developer opposed an extension of time for the bringing of an appeal and also brought its own motion seeking an order striking out any appeal on the basis that the Applicant was required to comply with the requirements of section 50A(7) of the 2000 Act (requiring a certificate of leave to appeal from the High Court) and had not done so.

The Court of Appeal heard the Applicant’s motion seeking an extension of time on 10th August 2017. The Board’s solicitor was in attendance, but the Board did not participate in the hearing.

The Court of Appeal refused the Applicant’s application for an extension of time for the bringing of an appeal. In an *ex tempore* judgment for the Court, Irvine J. indicated that only the first limb of the test in *Eire Continental* had been met.

Accordingly, the Court refused the Applicant’s extension of time and awarded the developer the costs of that motion (the Board did not seek costs). It is that decision which is the subject matter of this application for leave to appeal – see section 1 of the Application for Leave and Notice of Appeal.

For the sake of completeness, the Court of Appeal did not hear and determine, and struck out with no order as to costs, the developer’s motion regarding the issue of compliance with section 50A(7) of the 2000 Act. The Court noted that it was unnecessary to proceed to hear and determine this Motion as an extension of time had been refused.

4. Respondent’s reasons for opposing leave to appeal

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

- (1) The Board is conscious that it did not actively participate in the hearing before the Court of Appeal the subject matter of this application for leave to appeal to the Supreme Court. In normal circumstances, it might therefore be anticipated that it would not take a position on the application for leave to appeal to this Court. However, the Board has a general concern to avoid the unnecessary expenditure of resources—both in terms of the Board’s costs and the Court’s and Board’s time—which would be incurred were unmeritorious litigation to be prolonged. It also has a concern that that the Orders sought at section 8 of the Applicant’s Application for Leave and Notice of Appeal suggest that he may seek to broaden out any appeal to include an appeal from the decision of the High Court, notwithstanding that Section 1 unambiguously identifies the decision of the Court of Appeal as being the only decision which he seeks to appeal. In these circumstances, and in the light of its view that this application does not meet the requisite constitutional criteria, the Board is opposing the application for leave to appeal.
- (2) 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.

- (3) In particular, none of the reasons set out in section 5 of the Application for Leave actually relate to the *decision* which he seeks to challenge, the refusal by the Court of Appeal of his application for an extension of time for the bringing of appeal. They instead relate to allegations regarding the underlying planning permissions. It is not proposed to respond to these points (which, in any event, go beyond the parameters of the *evidence* in these proceedings); but the Board's silence in this regard should not be taken as an admission of the correctness or validity of same (including, in particular, the unfounded allegation at paragraph 8 of section 5 to the effect that the Board has somehow "joined forces" with the developer to diminish the rights of the Applicant and/or his neighbours, an allegation which the Board completely rejects).
- (4) As regards the first limb of the test for the grant of leave, the decision of the Court of Appeal clearly does not involve a matter of general public importance. The decision involved a straightforward application of the test as set out in *Eire Continental* which gave rise to no complex or novel issues of law and turned on the circumstances of the individual case.
- (5) As regards the second limb, the interests of justice do not mandate that the Applicant be granted leave to appeal. This is so for a number of reasons.
- First, he was given a very fair hearing by the three members of the Court of Appeal, Ryan P., Irvine J. and Whelan J..
 - Second, he did not identify any mistake which led to his failure to file his Notice of Appeal within time.
 - Third, his delay in filing his appeal is not an isolated incident. The Applicant's High Court proceedings were not only improperly constituted but were also filed outside the eight-week statutory period, and, as noted above, the Applicant took no steps to address the procedural infirmities in his High Court proceedings after those infirmities had been drawn to his attention by the Board's solicitors on or about 31st March 2017. Given the procedural history, it is surprising that greater care was not taken by the Applicant to file his appeal to the Court of Appeal within the time limits laid down in the Rules of the Superior Courts.
 - Fourth, the underlying appeal to the Court of Appeal is without merit. The High Court proceedings were clearly improperly constituted, and having regard to the unambiguous terms of section 50 and 50A of the 2000 Act, the High Court did not err in striking them out. Insofar as the Applicant suggests that he ought to have been given a greater opportunity to mend his hand, it is simply again reiterated that he was advised of the infirmities in his proceedings on or about 31st March 2017 but subsequently took no steps to address them.
 - Finally, the interests of justice do not mandate an appeal having regard to the legislative objectives of expedition and finality underpinning the scheme of sections 50 and 50A of the 2000 Act, as recognised by the Supreme Court in cases such as *KSK Enterprises Ltd. v An Bord Pleanála* [1994] 2 IR 128.

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

As explained above, the Board, for reasons of pragmatism, did not oppose the Applicant's application for an extension of time within which to bring an appeal to the Court of Appeal. As set out above, the Board does not believe that the constitutional criteria for the grant of leave to appeal from the decision of the Court of Appeal to the Supreme Court have been met, and it therefore opposes the application for leave to appeal. However, if leave is granted, consistent with the position adopted before the Court of Appeal and subject to any appeal being confined to the Court of Appeal's decision to refuse the Applicant's application for an extension of time, the Board will not participate in the appeal.

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

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:

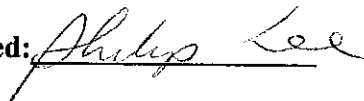
Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

Signed:



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