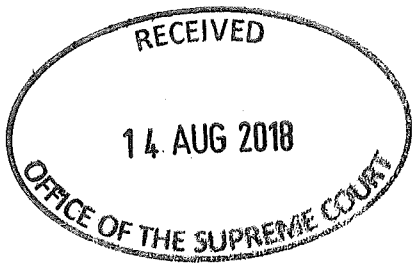
O. 58, r. 18(1)



SUPREME COURT

Respondent's Notice

Supreme Court record number		**S:AP:IE:2018:000114**

Claire O'Brien and Patrick O'Brien **Applicants** **High Court record number: 2017 336 JR**	**V**	**An Bord Pleanála** **Respondent** **Leonard Draper** **Notice Party**

Date of filing	**14 August 2018**
Name of notice party	**Leonard Draper**
Notice party's solicitors	**Arthur Cox Solicitors** **Ten Earlsfort Terrace** **Dublin 2**
Name of appellants	**Claire O'Brien and Patrick O'Brien**
Appellant's solicitors	**Noonan Linehan Carroll Coffey Solicitors**

1. Notice Party Details

Notice party's full name	Leonard Draper

The notice party was served with the application for leave to appeal and notice of appeal on:
1 August 2018

The notice party 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 notice party'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 notice party's representation are correct and complete on notice of appeal:	✓

2. Notice party's reasons for opposing extension of time

If applicable, set out concisely here the notice party'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 notice party 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 Notice Party does not dispute anything contained in Section 4 of the Appellants' Application for Leave and Notice of Appeal, which sets out information about the judgment of the High Court (Costello J.) refusing their application for judicial review ([2017] IEHC 773). However, the Notice Party wishes to highlight four further aspects of the said judgment which are relevant to the application for leave to appeal.

First, it is worth noting the contents of paragraph 20 of the Judgment, in which the High Court records that "*Counsel for the applicants emphasised that it was not alleged that there must be a point by point rebuttal of every point made in the submissions and observations from the public concerned.*" As discussed further in Section 4 below, this was repeated on behalf of the Appellants in the context of their application to the High Court for leave to appeal to the Court of Appeal pursuant to section 50A(7) of the Planning and Development Act, 2000 ("the PDA 2000").

Second, the High Court held that it was clear that the Respondent, An Bord Pleanála ("the Board"), did consider the Appellants' submissions to the Board on the planning appeal and, in particular, the report of Mr. Bowdler in respect of the effects of the operation of the three wind turbines in terms of noise ("the Bowdler Report"). In this respect, the Notice Party relies in particular on paragraphs 32 and 33 of the High Court's judgment.

Third, the High Court also found, on the basis of the Inspector's thematic treatment of the relevant issues arising as part of the environmental impact assessment ("EIA") of the operation of the wind turbines, that "*the applicants, as informed and intelligent observers, could have been left in no doubt as to what the issues were in relation to the noise impacts and could be*

in no doubt as to the view formed on the issues by the Inspector and the Board" (paragraph 84).

Fourth, as is clear from the terms of paragraphs 44 and 45 of the High Court's judgment as cited in Section 4 of the Application for Leave and Notice of Appeal, what the High Court in fact concluded was that there was no requirement for an examination, analysis and evaluation—with consequent written conclusions—of each and every individual submission made (as opposed to an examination, analysis and evaluation of the environmental effects of the proposed development). It *did not conclude* that there was no requirement for consideration or examination of the *substance* of the information contained in submissions made by members of the public concerned. Indeed, at paragraph 31, the High Court noted that "*[c]onsideration of the submissions or observations is part of the process whereby the Board examines, analyses and evaluates the potential effects of the proposed development upon the environment.*"

For the sake of completeness, the Notice Party also relies on the findings of the High Court set out in its refusing the application for leave to appeal under section 50A(7) of the PDA 2000, dated 27th June 2018 and bearing citation [2018] IEHC 389. This will be referred to further in section 4 below.

4. Notice Party's reasons for opposing leave to appeal

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

(1) The constitutional threshold requires that the Supreme Court must be satisfied that (i) 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. It must also be satisfied that (ii) there are *exceptional circumstances warranting a direct appeal* from the High Court to the Supreme Court.

(2) As regards the first part of the first limb, it may be of assistance to contrast the wording with that in respect of the first limb of the test under section 50A(7): the decision must involve a "*matter*"—as opposed to a "*point of law*"—of "*general*"—as opposed to "*exceptional*"—public importance. With respect to the latter point of difference, the Notice Party recognises that the Supreme Court has previously observed that this 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. However, as the Court observed in that case:

> "*[.] it seems to us that this Court would benefit, in considering whether to grant leapfrog leave, from the views of the High Court judge who heard the case as to whether important issues are raised. While it will always remain the situation that this Court must reach its own independent view on whether the constitutional threshold is met, nonetheless the analysis of a trial judge on the importance of the issues which were raised in the proceedings would be of assistance.*" (Para. 3.8).
>
> These observations are particularly apposite in the present case where the application for leave to appeal to the Supreme Court is advanced on the basis of precisely the same, single proposed point of law as that advanced by the Appellants in their application to the High Court under section 50A(7).

The Notice Party relies, in particular, on the views of the learned Trial Judge as set out at paragraphs 18-22 of her Judgment on the application for leave to appeal ([2018] IEHC 389) in which she concludes that the point raised is "*not one which transcends the individual facts and parties*".

(3) In Section 5 of their Application for Leave and Notice of Appeal, the Appellants contend that for the 'public concerned' to participate meaningfully in the decision-making process for projects requiring EIA, the Board "*must examine, analyse and evaluate the substance of the information submitted by the public concerned relating to the direct and indirect effects of the proposed development on the environment.*"

(4) There is in fact very little dispute as to the legal obligation on the Board as regards the carrying out of EIA. As is clear from the terms of the EIA Directive and the decision of the CJEU in Case C-50/09, *Commission v Ireland,* the assessment of the likely direct and indirect effects of a project on the environment "*involves an examination of the substance of the information gathered*"; which occurs as part of "*an investigation and an analysis [undertaken by the competent authority] to reach as complete an assessment as possible of the direct and indirect effects of the project concerned*" (see paragraphs 39 and 40 of Case C-50/09). There was no dispute in the present case but that the Board was required to examine the *substance* of the information submitted to it by the Appellants, including the Bowdler Report. Moreover, as noted in the previous Section, the High Court found that it did so. Insofar as the Appellants seek to suggest that the High Court concluded otherwise, or concluded that there was no requirement to examine the substance of the information submitted, this is simply incorrect.

(5) The Appellants seek to go further in saying that the Board must 'examine, analyse and evaluate' the information submitted by them (as opposed to the environmental effects), notwithstanding that a requirement in these terms does not arise from the text of the EIA Directive or the Judgment of the CJEU in Case C-50/09 (or any other Judgment to which the Appellants can point). Leaving to one side for a moment the legal source of such a requirement, the argument begs the question as to how this differs from—or, to put it another way, what it adds to—the acknowledged requirement to *examine* the *substance* of the information submitted. The Appellants disavow any attempt to require the Board to give reasons for not accepting a particular submission, but have not explained precisely what it is, therefore, that they are contending for. In this regard, the Notice Party relies on paragraphs 19 and 22 of the High Court's Judgment refusing the Appellants leave to appeal under section 50A(7):

"*19. In debating the Article 3 assessment obligation, counsel for the applicants was asked to identify which information received from the public concerned he said required to be subjected to examination, analysis and evaluation, in circumstances where he accepted that the Board was not required to set out a point by point refutation of every point raised. He was unable to give a clear exposition of what was required, other than to rely upon the requirement that the substance of the information gathered be examined. He suggested that the submissions could be dealt with by issues raised rather than by individual submissions.*

[...]

22. The difficulty the applicants had in identifying the information which they said must be subjected to an examination, analysis and evaluation, while accepting that there is no obligation to deal with each point individually, underscores that this is

very much a facts specific appeal. As a matter of fact, all of the information validly submitted was considered by the Inspector and the Board. It was not necessary to rebut each individual point. In Commission v Ireland, the CJEU said the obligation is to assess the direct and indirect effects of the project on the environment "in an appropriate manner, in light of each individual case" and this requires that the substance of the information be examined. This is not a prescriptive test but a qualitative one. It recognises that the assessment of the substance of the information is not to be equated to the assessment of individual submissions or observations. I conclude that the issue raised is not a point which transcends the individual facts and parties. It is not therefore a point of exceptional public importance."

(6) Ultimately, therefore, notwithstanding express statements to the contrary, this application for leave to appeal appears to revolve around an argument that, on the particular facts of this case, the Board ought to have given more expansive reasons for not accepting an aspect of the submission made on behalf of the Appellants. Two observations are warranted in response. First, the issues which the Appellants wish to advance in an appeal are thus entirely fact-specific. Second, to the extent that it could be said to arise, the general issue of the reasoning obligation in EIA case thas been considered by the Supreme Court very recently in its comprehensive decision in *Connelly v An Bord Pleanála* [2018] IESC 31, and this issue does not, therefore, either as a matter of general public importance or in the interests of justice, warrant the grant of leave to appeal in this case.

(7) Furthermore, insofar as the Appellants suggest in Section 4 of their Application for Leave and Notice of Appeal that the EIA carried out by the Board was somehow "*limited to the information furnished by the developer*", this is incorrect and simply does not arise from the facts of the present case. As the High Court clearly found, the Board carried out its EIA in respect of the three turbines on the basis of *all* of the information submitted to it; the High Court's judgment and consideration of the issues in the application for judicial review likewise made no distinction as regards the obligations on the Board vis-à-vis the information submitted by the developer on the one hand and that submitted by the public concerned on the other. In this respect, reliance is placed on paragraph 18 of the High Court's Judgment refusing the Appellants leave to appeal under section 50A(7):

"*18. In order to advance his proposed ground of appeal, the point must arise out of the judgment. The argument is based on an allegation that as a matter of fact there was an unlawful distinction in the assessment conducted by the Board of the information submitted by the applicants, on the one hand, and the developer on the other and a failure to examine the substance of the information gathered. The judgment does not hold that the Board is not required to assess the substance of the information submitted by the public concerned. Therefore, this point does not arise from the judgment. Nor does it suggest that the Board should- or may - make a distinction in its assessment of the information provided by the applicant for planning permission and that submitted by the public concerned. In the judgment, I found that the Inspector and the Board considered the information validly provided, as they were required, and then went on to outline how the Inspector and the Board assessed the direct and indirect noise impact of the development on the environment, the Article 3 obligation. It seems to me that there was no finding of fact that there was any distinction between the assessment of the information provided by the developer and the applicants by either the Inspector or the Board, but merely an inference by the applicants that this was so because there was no express reference to the submissions and criticisms of Mr Bowdler of the information provided by the developer. From this inference, it was then inferred*

that the court in effect endorsed a difference in treatment of information provided by the developer and the public concerned which was not authorised by law. But this was not so. Simply put, the point does not arise from the judgment as a matter of fact or of legal conclusion."

(8) In the premises of the foregoing, the Notice Party contends that the Appellants have established neither that the decision of the High Court involves a matter of general public importance nor that it is necessary in the interests of justice that there be an appeal.

(9) As regards the second, 'exceptional circumstances' limb, the Notice Party acknowledges that the Supreme Court has indicated that the refusal of a certificate of leave to appeal under section 50A(7) may, at least in some cases, provide the appropriate exceptional circumstances justifying a 'leapfrog' appeal to the Supreme Court (see *Grace v An Bord Pleanála* [2016] IESCDET 28). However, it is equally clear that this is by no means a definitive or blanket rule (see *Wansboro v DPP* [2017] IESCDET 115) and the issue remains to be considered in each case on its individual merits. On the particular facts of the present case, and in particular having regard to the matters recited at paragraphs 4 to 8 above, it is submitted that the exceptional circumstances required for a direct appeal to the Supreme Court have not been established.

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

1. The High Court did not err in determining that the Board had carried out a lawful EIA. The EIA conducted by the Board met the requirements of the EIA Directive, including as interpreted by the CJEU in Case C-50/09, *Commission v Ireland.*

2. The High Court did not err in determining that the Board is not, pursuant to the EIA Directive, under an obligation to examine, analyse and evaluate each submission or observation validly made to the Board. Rather, the Board is obliged to identify and assess the likely direct and indirect effects of the project on the environment, and as part of that, must examine the *substance* of information submitted to it. This it did in the present case. It is fully accepted that the Board's EIA cannot be conducted solely on the basis of information submitted by the developer; the Board must also examine the substance of information submitted by the public concerned. Again, however, this it did in the present case. Moreover, the High Court made no finding to the effect that the Board's EIA may be limited to the information furnished by the developer, as appears to be suggested by the Appellants in their Application for Leave and Notice of Appeal.

3. The High Court did not err in determining that the Board had complied with its obligations under Article 3 of the EIA Directive and/or Section 172 of the PDA 2000 having regard to the manner in which it dealt with the Bowdler Report, as alleged at paragraph 3 of Section 6 of the Appellants' Application for Leave and Notice of Appeal. Without prejudice to the generality of the foregoing, the Board is not required to carry out an examination, analysis and evaluation of individual submissions or opinions; nor is it required expressly to resolve and record its resolution of conflicting scientific opinions. Rather, the Board is required, on the basis of the substance of the information before it and its own knowledge and expertise, to evaluate the likely direct and indirect effects of the

project on the environment. It complied with its obligations in this regard in the present case.
Name of counsel or solicitor who settled the grounds of opposition (if the notice party is legally represented), or name of notice party in person: Fintan Valentine BL Rory Mulcahy SC

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? **If Yes, please give details below:**	☐ **Yes**	✓ **No**
make a reference to the Court of Justice of the European Union? **If Yes, please give details below:**	☐ **Yes**	✓ **No**

Will you request a priority hearing? If Yes, please give reasons below:	☐ Yes	✓ No

Signed: Arthur Cox

Solicitor for the Notice Party
Arthur Cox Solicitors
Ten Earlsfort 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.