

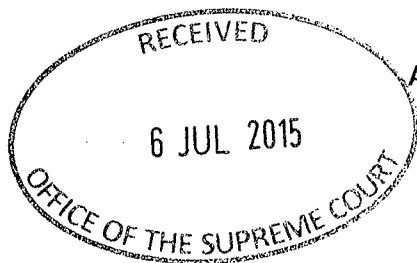
SUPREME COURT  
Respondent's Notice

Supreme Court Record No: 2015/34  
Court of Appeal record number: 2015/322  
High Court Record Number: 2014/685 JR

DUNNES STORES

Applicant/Appellant

-and-



AN BORD PLEANÁLA

Respondent

-and-

INDEGO

First Named Notice Party

-and-

SOUTH DUBLIN COUNTY COUNCIL

Second Named Notice Party

Date of filing: 6 July 2015

Name of Notice Party/  
Respondent to the Appeal: INDEGO

Notice Party's solicitors: A&L GOODBODY

Name of Appellant: DUNNES STORES

Appellant's solicitors: DAC BEACHCROFT DUBLIN

1. Respondent Details

Respondent's full name: Indego

The Respondent was served with the application for leave to appeal  
and notice of appeal on date: 23 June 2015

(i) The Respondent intends to oppose the application for leave to appeal.

(ii) Without prejudice to the above and if the Supreme Court accepts the Appeal, the Respondent will ask the Supreme Court to dismiss the appeal.

Respondent's Representation

**Solicitor**

**Name of firm** A&L Goodbody  
**Email** [afanagan@algoodbody.com](mailto:afanagan@algoodbody.com) : [tcasey@algoodbody.com](mailto:tcasey@algoodbody.com)  
**Address** International Financial Services Centre, North Wall Quay, Dublin 1  
**Telephone No:** 01-6492432 / 016492959  
**DX No:** 29 Dublin  
**Ref:** TCA/AVF 01412847

**How would you prefer us to communicate with you?**

**Email**

**Counsel**

**Name:** Garrett Simons SC  
**Email:** [GSimons@lawlibrary.ie](mailto:GSimons@lawlibrary.ie)  
**Address** The Distillery Building, 145/151 Church Street, Dublin 7  
**Telephone No:** 01-8172983  
**DX No:** 816320

**Counsel**

**Name:** Aoife Carroll BL  
**Email:** [aoifecarroll@gmail.com](mailto:aoifecarroll@gmail.com)  
**Address** The Distillery Building, 145/151 Church Street, Dublin 7  
**Telephone No:** 01-8177621  
**DX No:** 816549

**2. Respondent's reasons for opposing extension of time**

Not Applicable

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

The information is set out in section 4 of the Appellant's Application for Leave and Notice of Appeal.

The Respondent does not dispute the information set out in section 4 of the Appellant's Application for Leave and Notice of Appeal save in that arising from the Judgement of 21 May 2015 and as appears from the Order of McGovern J perfected on 19 June 2015, the Appellant was refused the following reliefs:

- "(i) leave to apply for judicial review as against South Dublin County Council pursuant to section 50A(3) of the Planning and Development Act 2000 (as amended);
- (ii) an extension of time pursuant to the provisions of section 50(8) of the Planning and Development Act 2000 (as amended);
- (iii) leave to join South Dublin County Council as a Respondent to the proceedings, and
- (iv) leave to amend the statement of grounds of 17<sup>th</sup> November 2014."

#### 4. Respondent's reasons for opposing leave to appeal

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

1. The Appellant argues that a decision of the High Court to refuse leave to appeal to the Court of Appeal pursuant to section 50A(7) of the Planning and Development Act 2000 (**the PDA 2000**) can itself be appealed without a certificate for leave to appeal. A similar argument has previously been rejected by the Supreme Court, in the context of the provisions of the Local Government (Planning and Development) Act, 1992, in *Irish Asphalt Ltd. v. An Bord Pleanála* [1996] 2 I.R. 179, and *Irish Hardware Ltd. v. An Bord Pleanála* [2001] 2 I.L.R.M. 291. The Appellant contends that these two judgments were wrongly decided, and invites the Supreme Court to overrule same.
2. In response, it is accepted that the mere fact that an appellant seeks to overrule an earlier judgment will not necessarily result in leave to appeal being refused in every case: if it were otherwise, then the Supreme Court could never exercise its exceptional jurisdiction to overrule an earlier judgment. It is submitted, however, that in determining whether the decision in respect of which leave to appeal is sought involves a matter of general public importance and/or an appeal is necessary in the interests of justice, the Supreme Court is entitled to attach some weight to the underlying merits of the appeal. If, for example, the grounds of appeal were clearly unarguable, then it is difficult to see how the constitutional criteria under article 34.5.4 could be fulfilled.
3. It is submitted that article 34 leave to appeal should be refused in the peculiar circumstances of this case, where not only has the point been decided (*Irish Asphalt*), but the Supreme Court has already revisited the issue, and refused to overrule its earlier judgment (*Irish Hardware*). The law on this issue is settled, and is clear and unambiguous. (The grounds for saying that *Irish Asphalt* and *Irish Hardware* were correctly decided are summarised under the next heading below).
3. In the alternative, it is respectfully submitted that if leave to appeal is to be granted pursuant to article 34.5.4 then same should be confined to what might be described as the *Irish Asphalt / Irish Hardware* issue. More specifically, it is submitted that in circumstances where the Appellant's principal reason for seeking a direct appeal to the Supreme Court is that the Court of Appeal does not have the ability to overrule the judgments in *Irish Asphalt / Irish Hardware*, then this is the only issue which needs to be determined by the Supreme Court on a direct appeal. It is not necessary for the Supreme Court to determine the substance of the underlying appeal. If the Supreme Court were to overrule *Irish Asphalt / Irish Hardware*, then the Court of Appeal could hear and determine the Appellant's appeal against the refusal by

the High Court of a certificate for leave to appeal. The other issues, e.g. the issues of delay, alleged bias or the interpretation of section 37 of the PDA 2000, are not matters which meet the constitutional criteria for a direct appeal.

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

**A. Jurisdictional issue / Section 50A(7) of PDA 2000**

1. It is submitted that the judgments in *Irish Asphalt* and *Irish Hardware* were correctly decided. For the reasons which follow, it is further submitted that the rationale of those judgments applies equally to the almost identically worded provisions of section 50A(7) of the the PDA 2000.
2. The Appellant's analysis of section 50A(7) of the PDA 2000 is erroneous. The opening words of the section ("*The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the Supreme Court in either case [...]*") create an exception to the appellate jurisdiction of what is now the Court of Appeal. This exception is clear and unambiguous, and is allowed for under article 34.4.1° of the Constitution. The balance of the section creates an exception to this exception.
3. It is a well-established principle of statutory interpretation that the Oireachtas must be presumed to have enacted legislation in the knowledge of the legal and judicial history of the wording. The wording of section 50A(7) of the PDA 2000 is similar to that under the Courts of Justice Act 1924, and that earlier legislation has been interpreted as precluding the appellate court from granting the requisite certificate for leave to appeal. The Oireachtas is to be presumed to have known of this interpretation when it enacted the PDA 2000. The legislative intent of section 50A(7) is clear and unambiguous.
4. It is a well-established principle of statutory interpretation that a court may have regard to the purpose or intention of the Oireachtas in enacting the relevant legislation. The purpose or intention underlying the limited right of appeal in planning litigation has been recognised in numerous cases, including, *Irish Asphalt*; *Irish Hardware*; *Glancre Teo v. An Bord Pleanála (No. 2)* [2006] IEHC 250.
5. The Appellant is estopped from raising any objection based on the *nemo iudex in sua causa* principle in circumstances where the Appellant made no objection to the trial judge (McGovern J.) hearing the application for leave to appeal on 3 June 2015. Moreover, the Appellant has not sought to challenge the constitutional validity of the Section 50A(7) of the PDA 2000, nor to put the Attorney General on notice of the proceedings pursuant to Order 60 of the Rules of the Superior Courts.
6. Further or in the alternative, the operation of section 50A(7) of the PDA 2000 does not give rise to any reasonable apprehension of bias/predetermination. A High Court judge has no interest in the outcome of proceedings before him or her, and has no interest in whether a matter is appealed.
7. In the alternative, if the operation of the section does give rise to a reasonable apprehension of bias/predetermination—which is denied—same constitutes a bias of necessity in that the trial judge is the person best placed to rule on whether the determination of the High Court meets the statutory criteria under section 50A(7) of the PDA 2000. To require the matter to be considered by a different High Court judge would be unworkable.

**B. Judgment of 21 May 2015**

**(i) Preliminary Objection**

8. It is respectfully submitted that the Appellant's attempt to isolate the refusal of extension of time, and to appeal this as a discrete issue, is inadmissible.
9. The determination of the High Court of 21 May 2015 is subject to the provisions of section 50A(7) of the the PDA 2000. Section 50A(7) provides as follows:

*"(7) The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the Supreme Court in either case save with leave of the Court which leave shall only be granted where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court."*

10. The High Court, in its judgment of 21 May 2015, refused *inter alia*, leave to apply for judicial review in respect of the Second Named Notice Party's (**the Planning Authority**) decision of 24 March 2014. (The High Court also refused an extension of time; leave to amend; and leave to join the Planning Authority). The Appellant subsequently applied for, and was refused, a certificate for leave to appeal (in the judgment of 18 June 2015). The determination of 21 May 2015 cannot be appealed in circumstances where leave to appeal has been refused pursuant to section 50A(7) of the PDA 2000.
11. If and insofar as the Appellant may seek to rely on the judgments in *AB v. Minister for Justice* [2002] 1 I.R. 296 and/or *A v. Minister for Justice Equality* [2013] IESC 18; [2013] 2 I.L.R.M. 457, it is submitted that those judgments are distinguishable for the following reasons. The Appellant elected to pursue not only an application for an extension of time, but also an application for leave to apply for judicial review. The High Court heard and determined both applications as part of its judgment of 21 May 2015. The High Court thus made a "*determination*" on an "*application for section 50 leave*" within the meaning of section 50A(7) of the PDA 2000. The Appellant subsequently applied for a certificate of leave to appeal pursuant to section 50A(7). The Appellant, having elected to make an omnibus application to the High Court, and having sought leave to appeal in respect of the determination of that application, cannot now seek to disaggregate that application in an attempt to bring an appeal in respect of the refusal of an extension of time as a discrete issue. In particular, the Appellant cannot seek to undermine the order refusing leave to appeal. Put shortly, the Appellant by its conduct has brought itself outside the rationale of the judgments *AB v. Minister for Justice* and/or *A v. Minister for Justice Equality*.
12. Further or in the alternative, any appeal in respect of the refusal of an extension of time is moot and/or cannot provide any practical benefit to the Appellant in circumstances where the High Court has refused leave to apply for judicial review. The High Court has ruled that the Appellant does not have the requisite "*substantial grounds*" for judicial review. Leave to appeal this ruling has been refused by the High Court. In the circumstances, even if the Court of Appeal or the Supreme Court had jurisdiction to entertain an appeal on the application to extend time in the absence of a certificate for appeal—which is denied—an appeal would be of no benefit in that the Appellant is bound by the refusal of leave to apply for judicial review.

**(ii) Judgment of 21 May 2015 correct in law**

13. The High Court was correct in law in finding that the Appellant had failed to establish that there was "*good and sufficient*" reason for extending time, and had failed to establish that the

circumstances that resulted in the failure to make the application for leave to apply within time were "*outside the control*" of the Appellant in accordance with section 50(8) of the PDA 2000.

14. There is an onus on an applicant for judicial review to seek out all relevant material in a timely fashion. Here, the materials which the Appellant ultimately sought to rely upon could have been obtained at a much earlier stage. The Planning Authority's decision to grant planning permission was made on 24 March 2014, yet the Appellant did not make its first valid request pursuant to the Freedom of Information Acts until 24 February 2015. Thereafter there was a further period of delay of some three weeks between receipt of the response to the initial request, and the making of the further requests pursuant to the Freedom of Information Acts. The motion seeking leave to apply, extension of time, leave to amend, and the joinder of the Planning Authority was not issued until 18 May 2015. This delay must be seen in light of the fact that the decisions under challenge are planning decisions for which there is a public interest in having certainty as to their status and finality, and in light of the fact that the within proceedings were entered into the Commercial List of the High Court on 8 December 2014 having regard to the need for urgency in having same determined.
15. The High Court was correct in law in ruling that an order setting aside the first-instance decision of the Planning Authority cannot be made in circumstances where, pursuant to section 37(1)(b) of the PDA 2000, An Bord Pleanála's decision operates to annul the Planning Authority's decision.

#### **D. Judgment of 18 June 2015 correct in law**

16. The High Court was correct in concluding that the Appellant had no entitlement to a certificate pursuant to section 50A(7) of the PDA 2000. The draft point of law advanced by the Appellant does not constitute a point of law of exceptional public importance, nor was it desirable in the public interest that an appeal should be taken to the Court of Appeal.
17. The wording of section 37(1)(b) of the PDA 2000 is clear and unambiguous. There is no uncertainty as to the operation of the section, and a determination of the Court of Appeal is not required in order to clarify the operation of the law.
18. The judgment of the High Court is entirely consistent with the interpretation given to the similarly worded provision under section 26(5)(b) of the Local Government (Planning and Development) Act 1963 by the High Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. The comments in *Beades v. Dublin County Council* [2005] IEHC 406 are obiter dicta, and that case is distinguishable on its facts.
19. It would have been inconsistent for the High Court to grant leave to appeal in circumstances where the Court had ruled that the Appellant had not established "*substantial grounds*" for challenging the Planning Authority's decision.
20. The draft point of law advanced by the Appellant does not transcend the facts of the within case, and does not raise an issue of exceptional public importance such as would resolve other cases. Rather, the issue only arises on the unusual facts of this case where an applicant who has exercised its statutory right of appeal to An Bord Pleanála, and instituted proceedings challenging An Bord Pleanála's decision, and then subsequently seeks to challenge the Planning Authority's decision at first instance.
21. The arguments based on "*fraud*", "*corruption*" or "*pecuniary advantage*" do not arise out of the facts of the present case where no allegation of fraud has been pleaded against the Planning Authority. A point of law may only be properly certified where it arises out of the High Court's determination.

22. Insofar as the Appellant seeks to argue that the application of section 37(1)(b) of the PDA 2000 breaches article 40.3 of the Constitution, no such argument was raised before the High Court. It is denied that any such breach of Article 40.3 of the Constitution arises in circumstances where the PDA 2000 provides for a full de novo hearing before An Bord Pleanála.

**6. Additional grounds on which decision should be affirmed**

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

Not applicable.

**7. Are you asking the Supreme Court to:**

**(i) depart from (or distinguish) one of its own decisions?**

Yes .....

No

If Yes, please give details below:

Not Applicable

**(ii) make a reference to the Court of Justice of the European Union?**

Yes .....

No

If Yes, please give details below:

Not Applicable

(iii) Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

The substantive application for judicial review had been listed for hearing before the Commercial Division of the High Court on 19 May 2015, and 23 June 2015. Both trial dates were vacated in circumstances where the Appellant had brought its various applications, initially before the High Court, and now before the Court of Appeal and the Supreme Court. Indego is anxious to have the substantive application for judicial review relisted for hearing before High Court as soon as possible.

The proceedings were entered into the Commercial List of the High Court by reason of the urgency in having them determined. The delays in the proceedings have consequences for the redevelopment of the Square Shopping Centre and the commencement of the development.

Date:

6 July 2015

Signed:

A&L Goodbody

A&L Goodbody