



# SUPREME COURT

## Respondent's Notice

Supreme Court record number	34/2015
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[Title and record number as per the High Court proceedings]

Dunnes Stores	V	An Bord Pleanála (Respondent) Indego (First Named Notice Party) South Dublin County Council (Second Named Notice Party)
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Date of filing	6 July 2015
Name of respondent	An Bord Pleanála
Respondent's solicitors	Barry Doyle & Co, Marshalsea Court, Merchant's Quay, Dublin 8 Telephone: (01) 670 6966   DX 1081 Four Courts
Name of appellant	Dunnes Stores
Appellant's solicitors	DAC Beachcroft Dublin, Fleming Court, Fleming Place, Dublin 4 Telephone: (01) 231 9600   DX: 109012 Fitzwilliam

### 1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

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
23 June 2015

The respondent intends :
<input checked="" type="checkbox"/> to oppose the application for an extension of time to apply for leave to appeal

<input type="checkbox"/> not to oppose the application for an extension of time to apply for leave to appeal
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*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:*

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

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

## 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:*

None in dispute save that so far as the Board is concerned, it is unclear whether the application made by the Appellant to the High Court also involved an application for leave to seek judicial review of South Dublin County Council's decision of 24 March 2014 or whether the Judgment of 21 May 2015 can properly be characterised as refusing an application for leave to seek judicial review of that decision. In this regard, the Board refers to the Appellant's Notice of Motion of 18 May 2015 and the Judgment of 21 May 2015 and in particular paragraphs 1 and 13 of that Judgment.

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

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

- i. This appeal arises from two judgments of McGovern J of 21 May 2015 (which dealt with the substantive application) and of 18 June 2015 (which dealt with the application for a certificate pursuant to s.50A(7) of the Planning and Development Act, 2000 ("the 2000 Act")). On each occasion the Board took a neutral stance (save in respect of costs).
- ii. Whereas it is clear that the substantive application involved an application to amend the pleadings and an application for an extension of time within which to seek leave to apply for judicial review, it is, so far as the Board is concerned, unclear whether the application also involved an application for leave to seek judicial review of South Dublin County Council's decision of 24 March 2014 or that the Judgment of 21 May 2015 can properly be characterised as refusing an application for leave to seek judicial review of that decision.
- iii. In this regard, the Board refers to the Appellant's Notice of Motion of 18 May 2015 and the Judgment of 21 May 2015 and in particular paragraphs 1 and 13 of that Judgment.
- iv. Insofar as the Appellant's application involved an application to extend time to bring judicial review proceedings against South Dublin County Council, the Board's position is that an appeal lies to the Court of Appeal against the refusal of same without a need for certificate (*A.B. v Minister for Justice* [2002] 1 IR 296) and within such appeal the Appellant is entitled to challenge the findings made by the High

Court on the application for an extension of time, including any finding as to the meaning and effect of section 37(1)(b) of the 2000 Act made by the High Court on that application.

- v. Insofar as there was an application to amend the existing grounds before the Court, the Board's position is, again, that an appeal lies to the Court of Appeal in this case against the refusal of same without a need for a certificate.
- vi. Insofar as the High Court' by its Judgment of 21 May 2015 and/or its Order of 18 June made a decision to refuse leave to bring judicial review proceedings against South Dublin County Council, no appeal lies to this Court in respect of that decision, having regard to the provisions of s.50A(7) and to the refusal of the High Court on 18 June 2015 to grant leave to appeal.
- vii. No appeal lies to this Court from the refusal of the High Court to grant leave to appeal having regard to the decisions of the Supreme Court in *Irish Asphalt v An Bord Pleanála* [1996] 2 IR 179 and *Irish Hardware Association v South Dublin County Council* [2001] 2 ILRM 291.

In the above premises:-

- (a) The Appellant appears to be of the view that it was required to seek a certificate in respect of the High Court Judge's determinations on the meaning and effect of section 37(1)(b) of the 2000 Act made by the High Court on that application. The Board's view, as set out above, is that within the appeal against the refusal to extend time to bring judicial review proceedings, the Appellant is entitled to challenge the findings on the meaning and effect of section 37(1)(b) of the 2000 Act. Whereas this was the subject of the certificate application made of the Appellant's own volition, no need for a certificate arose in the facts and context of this case and thus there is no need to appeal this point as the Appellant can, if it chooses, raise issues regarding the High Court Judge's determinations on the meaning and effect of section 37(1)(b) of the 2000 Act within its appeal to the Court of Appeal. There is therefore simply no need – at all – to appeal to this Court and the criteria in Article 34.5.3 are not met.
- (b) Further, or in the alternative, if it were determined that either the High Court Judge did not make a decision to refuse leave to bring judicial review proceedings and/or that it was unnecessary for the High Court Judge to make such a decision (on the basis that an extension of time had been refused) then the only issues that arise on appeal are capable of being dealt with in the Court of Appeal where an Appeal has, in fact, been brought. Again, there is therefore simply no need – at all – to appeal to this Court and

the criteria in Article 34.5.3 are not met.

- (c) Without prejudice to the above, if the Court is of the view that leave to seek judicial review was refused and a certificate was required, the Board submits that no appeal to this Court should be permitted from the refusal of such certificate and will refer to *Director of Public Prosecutions -v- Reddington* [2015] IESCDT 14 in this respect.
- (d) The decision does not involve a matter of general public importance insofar as this point is concerned. The matter is not of general public importance because it has been settled by two prior decisions of this Court. Further, it cannot be said that it is in the interests of justice it is necessary that there be an appeal to the Supreme Court.
- (e) First, as a matter of substance, the issue of an appeal to the Supreme Court from a determination by a High Court Judge that no certificate lay within the meaning of s.50A(7) has been dealt with by the legislature. No appeal lies. Second, insofar as the Appellant wishes to argue that this is not correct, the Supreme Court has *twice* determined in recent times that no appeal lies from such a refusal. Although the legislation has changed due to the introduction of the Planning and Development Act, 2000 the relevant criteria are identical and thus the change in legislative regime has no material effect.
- (f) The Board would submit that the interests of justice are cognizant of the interests of certainty and finality in the planning process – a fact recognised in *Irish Asphalt v An Bord Pleanála* [1996] 2 IR 179 and *Irish Hardware Association v South Dublin County Council* [2001] 2 ILRM 291. It is in the interests of justice and in the public interest that there be certainty in the law regarding the planning process. There is also a clear interest in maintaining the clear legislative intention that for the most part planning cases end in the High Court. It is destructive of this intention that an application for a certificate under s.50A(7) could, itself, be the subject of appeal and thus serve to further add to delays in the planning process when this is clearly the reverse of the legislative intention and is a view that has commended itself to the Supreme Court on two occasions.
- (g) It is further not in the interests of justice that well settled principles of *stare decisis* should be undermined by permitting an Appellant to effectively disregard the respect such principles should command by seeking to re-litigate a matter already settled by two recent Supreme Court decisions.
- (h) Substantively, therefore, the Board submits that this issue is settled and the Appellant has not demonstrated that the criteria for a leap-frog appeal have been met. In order

for it to be *necessary* for there to be an appeal to the Supreme Court where there are *two* prior Supreme Court determinations, the Appellant should, at a minimum, be required to demonstrate what *need* there is to re-visit those authorities. There is no such need. No particular change of circumstances has been identified which could give rise to a need for an appeal in this case.

- (i) The Appellant has failed to address the issue save to point to how it “contends” that the prior decisions were wrongly decided and relies on passages in Kelly, *The Irish Constitution* (Hogan and Whyte Eds)(4<sup>th</sup> Ed) to the effect that these decisions should be over-turned. Those passages, however, do not properly reflect the correct understanding of the *Irish Hardware* decision where the Supreme Court positively and clearly affirmed the *Irish Asphalt* decision but also held independently from that authority that the correct position was that no appeal lay to the Supreme Court from the refusal of the High Court to certify a point of law within the meaning of what is now s.50A(7). This is the settled position and it is in the interests of justice and a matter of public importance that the certainty provided by these two ruling be maintained.

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

- a) Insofar as the Appellant’s application involved an application to extend time to bring judicial review proceedings against South Dublin County Council, the Board’s position on this aspect of the Appellant’s appeal is a neutral one.
- b) Insofar as there was an application to amend the existing grounds before the Court, the Board’s position on this aspect of the Appellant’s appeal is a neutral one.
- c) Insofar as the High Court’ by its Judgment of 21 May 2015 and/or its Order of 18 June made a decision to refuse leave to bring judicial review proceedings against South Dublin County Council, no appeal lies to this Court in respect of that decision, having regard to the provisions of s.50A(7) and to the refusal of the High Court on 18 June 2015 to grant leave to appeal.
- d) No appeal lies to this Court from the refusal of the High Court to grant leave to appeal having regard to the decisions of the Supreme Court in *Irish Asphalt v An Bord Pleanála* [1996] 2 IR 179 and *Irish Hardware Association v South Dublin County Council* [2001] 2 ILRM 291.
- e) In accordance with the above, if leave to appeal is granted the Board intends to limit

its role to making submission herein that the Appellant may not appeal against so much of the High Court's Judgment of 21 May 2015 as refused the Appellant leave to seek judicial review of South Dublin County Council's decision of 24 March 2014 and may not appeal the refusal of the High Court on 18 June 2015 to refuse to certify a point of law within the meaning of s.50A(7) of the Planning and Development Act, 2000. The Board will contend that the Court has no jurisdiction to hear this aspect of 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:

Brian Foley 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: Barry Doyle & Co  
(Solicitor for) the respondent  
Barry Doyle and Company  
23 Merchants Quay  
Dublin 8

**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.