

## 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	8 <sup>th</sup> July 2105
Second Named Notice Party/ Respondent to the Appeal	South Dublin County Council
Second Named Notice Party/ Respondent to the Appeal solicitors	Edel M. O'Brien, Acting Law Agent, Law Department, County Hall, Tallaght, Dublin 24 Telephone : (01) 4149060 DX: 242001 Tallaght 3
Name of appellant	Dunnes Stores
Appellant's solicitors	DAC Beachcroft Dublin, Fleming Court, Fleming Place, Dublin 4 Telephone : (01) 2319600 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	South Dublin County Council
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The respondent was served with the application for leave to appeal and notice of appeal on date	23 <sup>rd</sup> June 2015
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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:

Respondent's Representation

Solicitor			
Name of firm	Edel M. O'Brien Acting Law Agent Law Department South Dublin County Council		
Email	lawdepartment@sduublincoco.ie		
Address	Law Department County Hall Tallaght Dublin 24	Telephone no.	01 4149060
		Document Exchange no.	242001 Tallaght 3
Postcode		Ref.	
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)

Counsel			
Name	Niamh Hyland S.C		
Email	Counsel@nhylandsc.ie		
Address	Distillery Building 145/151 Church Street Dublin 7	Telephone no.	01 8172953
		Document Exchange no.	816361b
Postcode			

Counsel			
Name	Cliona Kimber B.L		
Email	clionakimber@eircom.net		
Address	Distillery Building 145/151 Church Street Dublin 7	Telephone no.	01 8175448
		Document Exchange no.	816542
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address
Telephone no.
e-mail address

How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input 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**

**Not Applicable**

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:**

**Not Applicable**

4. Respondent's reasons for opposing leave to appeal

**The Respondent opposes the Application for Leave to Appeal for the following reasons:**

**Summary**

The High Court, in its Judgment of 21 May 2015 refused *inter alia* leave to apply for Judicial Review in respect of the Planning Authority's decision of the 24<sup>th</sup> March 2014 as well as refusing an extension of time; leave to amend; and leave to join the Planning Authority. The Appellant then applied for, and was refused, a Certificate for Leave to Appeal (Judgment of Mr. Justice McGovern dated 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 Planning and Development Act, 2000. ("The PDA Act 2000")

**Applicant may not appeal refusal of a certificate of leave to appeal**

Section 50A(7) provides that

*"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.”*

The Supreme Court has already held on two separate occasions, that there is no right of appeal in law against a refusal of a certificate for leave to appeal, having regard to the provisions of Section 50A(7), in *Irish Asphalt v An Bord Pleanála* [1996] 2 I.R. 179, and *Irish Hardware Association v South Dublin CC* [2001] 2 ILRM 291.

It is not in the interests of justice or finality of litigation to seek to re-litigate a matter which this Court has already twice determined. A decision of a full Supreme Court given in a fully argued case and on a consideration of all of the relevant materials should not be overruled unless there are strong reasons for so doing. No such reasons have been identified here. In this case, the decisions of two separate Supreme Courts would have to be overruled.

In those circumstances, none of the conditions that must exist in order to justify a direct appeal are present here. The decision does not involve a matter of general public importance, it is not necessary in the interests of justice, that there be an appeal to the Supreme Court and there are no exceptional circumstances warranting a direct appeal to the Supreme Court.

#### **No exceptional circumstances warranting a direct appeal to the Supreme Court**

The sole basis for the Applicant seeking a “leapfrog” appeal is that there are two existing Supreme Court decisions that cannot be overruled by the Court of Appeal. However that alone does not constitute exceptional circumstances justifying a direct appeal. As set out above, the case law on appeals against refusal of leave to appeal is well established and an attempt to overturn well established case law does not constitute an exceptional circumstance.

Moreover, in relation to that part of the appeal relating to an extension of time, or indeed the substantive question as to whether or not leave should have been given for the question certified, the Applicant does not proffer any justification at all for a leapfrog appeal and there is no reason why these issues cannot be dealt with before the Court of Appeal.

The Supreme Court has made it clear in its Determinations to date on direct appeals that part of a case only may be granted leave to appeal with the remainder being determined by the Court of Appeal.

The submissions made below are made without prejudice to the above submission.

**There is no matter of general public importance/Not necessary in the interests of Justice**

The Trial Judge refused the Appellant's application for a certificate for leave to appeal on the basis that there was no point of exceptional public importance to be decided and that there was no public interest in allowing such an appeal. Without prejudice to the above submissions on leave to appeal, even if it were possible to appeal a refusal of a certificate of leave, the point of law sought to be appealed must transcend the threshold of public importance to the extent that it can objectively be said to be of exceptional public importance such that there is a public interest in ensuring that it is considered by the Supreme Court. No such issue arises here.

The proposed point of law in question concerns the interpretation and meaning of Section 37 (1) (b) of the PDA Act 2000 in so far as it provides that a decision of An Bord Pleanala on Appeal shall operate to annul a decision of the Planning Authority. Section 37(1) (b) of the PDA Act 2000 is clear and unambiguous and there is no legal basis to go beyond the express provisions of the 2000 Act. There is no point of law of general public importance to be determined by the Supreme Court.

Nor are there any interests of justice considerations that would tend towards this appeal being entertained. South Dublin County Council expressly rejects, without prejudice to the reasons below, any allegation that the decision of South Dublin County Council was tainted by bias and pre-judgment. South Dublin County Council disputes as a matter of fact and law the allegation of interference by its Director of Services, Mr. Frank Nevin, in the submissions to South Dublin County Council by the National Transport Authority as part of the process of considering the application for planning permissions, and will fully dispute all of the allegations of the Applicant in this regard. In a similar fashion, South Dublin County Council disputes as a matter of fact and law the allegation of prejudgment, which the Applicant makes in reliance on a hearsay account in an e-mail of a third party, of a conversation which that third party allegedly had with Colin Ryan, Senior Planner in South Dublin County Council. The e-mail on which the Appellant relies to ground an allegation of prejudgment does not come from South Dublin County Council but was written by a third party. A detailed refutation of the allegations of bias and prejudgment are contained in the Affidavits of Mr. Frank Nevin dated 25<sup>th</sup> May 2015 and Mr. Colin Ryan dated 19<sup>th</sup> May 2015.

Without prejudice to the above, even if a decision had been tainted by bias or prejudgment, the PDA Act 2000 provides a complete and adequate legal mechanism to challenge the

granting of the planning permission at issue.

The statutory mechanism for challenging a decision of An Bord Pleanála is clearly set out in the PDA Act 2000 and provides full rights to the citizen or any other person to litigate and have access to the Courts in relation to an extant decision from which it states that it has suffered prejudice. If a person is dissatisfied with the Planning Authority he can either Judicially Review the decision or appeal to An Bord Pleanála who will look at the matter de novo. Thus the Planning Authority's decision and that of An Bord Pleanála are subject to full legal scrutiny, depending upon which course an applicant takes. Obviously either choice is subject to the applicable time limits. No prejudice is suffered as a result of this operation of law, and there is no point of law of exceptional public importance, no denial of any remedy, no denial of any right to litigate arising out of the operation of section 37 (1) (b) of the PDA Act 2000.

In order to ensure the effective operation of the planning system, it is important that from the time the Board's decision is made the Planning Authority's decision is treated as never having existed and is annulled. In the absence of such operation of law, the position would permit the existence of two potentially conflicting planning decisions at one time. The annulment of the decision of the Planning Authority is therefore expressly provided by the Oireachtas under Section 37 of the PDA Act 2000.

Indeed, in the context of the instant application, the Applicant seeks to annul the decision of An Bord Pleanála. That assumes that the decision must be deemed legally effective and must operate to annul the decision of South Dublin County Council. This is the system prescribed by operation of law on the application of Section 37 (1) (b) of the PDA Act 2000, which provides that, from the time the decision of An Bord Pleanála is made, the Planning Authority's decision is treated as if it never existed and is annulled. As a matter of law therefore the decision of South Dublin County Council ceases to exist and any challenge to the decision of An Bord Pleanála can only be taken on the basis of the existence of that decision as being the sole valid subsisting decision.

In those circumstances, the Trial Judge was correct to refuse leave. Applying the traditional test in respect of leave to appeal, the point of law sought to be certified is not a point of law of exceptional public importance. In the premises, no matter of general public importance is raised by this issue and it is not necessary in the interests of justice that the Supreme Court accept this application.

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

**A. Decision of the High Court (McGovern J) of the 18<sup>th</sup> of June 2015 to refuse an application for a Certificate for leave to appeal.**

As previously submitted above, the Second Named Notice party submits in the first instance that there is no right of appeal in law against a refusal of a Certificate for leave to appeal, having regard to the provisions of Section 50A(7) as determined by the Supreme Court in *Irish Asphalt v An Bord Pleanála* [1996] 2 I.R. 179, and *Irish Hardware Association v South Dublin CC* [2001] 2 ILRM 291.

Without prejudice to the foregoing, the Notice Party submits as follows:

1. In relation to the decision of 18 June 2015 refusing leave to appeal, the Trial Judge was correct in law on the facts of the application before it and the application of the legal principles thereto in concluding that the point in respect of which a Certificate was sought was not a point of law of exceptional public importance and that it was not desirable in the public interest that the decision should be taken to the Supreme Court, as set out in the applicable authorities including *Kenny v An Bord Pleanála (No 2)* (2001) 1 I.R. 704, *FSK v Refugee Appeals Tribunal* [2010] IEHC 136 and *Glancre Teoranta v An Bord Pleanála* [2006] IEHC 250
2. The Trial Judge was correct in law in concluding that since the interpretation and meaning of Section 37 (1) (b) of the PDA Act 2000 was clear and unambiguous and that there was no basis upon which the Court could go beyond the express provisions of the Act, that there was no point of law of exceptional public importance involved in the Appellant's proceedings, and therefore that there was no basis in law for the granting of a certificate of leave to appeal. The Trial Judge correctly applied the law as set out in *O'Keeffe -v- An Bord Pleanála* [1992] 1 IR 39 and *Arklow Holdings Limited -v- An Bord Pleanála* in which the High Court held that no Certificate should be given where the law is clear and unambiguous. The Trial Judge correctly decided the matter on the basis of clear and established legal principle to the fact of his case.
3. The Trial Judge was correct in law in concluding that even in the context of an application to prove in the proceedings herein that the decision of An Bord Pleanála was ultra vires, void and or no legal effect by reason of it allegedly being tainted by alleged bias and pre-judgment of South Dublin County Council that the decision of An Bord Pleanála should nevertheless be deemed to be legally effective and operate to annul the decision of South Dublin County Council, in that this is the result prescribed by operation of law on the application of Section 37 (1) (b) of the PDA

Act 2000, which clearly provides for a position that from the time the decision of An Bord Pleanála is made the Planning Authority's decision is treated as if it never had existed and is annulled. As a matter of law therefore the decision of South Dublin County Council ceases to exist and any challenge to this decision of An Bord Pleanála can only be taken on the basis of the existence of that decision as being a valid existing decision.

4. South Dublin County Council expressly rejects, without prejudice to the above, any allegation that the decision of South Dublin County Council was tainted by bias and pre-judgment. The conclusions of the Trial Judge do not pre-empt any inquiry in to the lawfulness and legal effect of the decision of An Bord Pleanála, as same is the subject of the substantive application of the Appellant, the hearing of which the Appellant now seeks to delay by virtue of this appeal.
5. The Trial Judge was correct in law in refusing the Appellant's contention that if Section 37 (1)(b) was to be given a constitutional interpretation that the fact the decision of the Board that was tainted by alleged bias of the Council would still have the legal effect of annulling the decision of the Council was wrong in law. The statutory mechanism for challenging a decision of An Bord Pleanála is clearly set out, is in existence, and provides full rights to the citizen or any other person to litigate and have access to the Courts in relation to an extant decision from which it states that it has suffered prejudice. The Trial Judge was correct in law therefore in concluding that if a person is dissatisfied with the Planning Authority that he can either judicially review the decision or go to An Bord Pleanála who will look at the matter de novo, thus the Planning Authority's decision and that of An Bord Pleanála are subject to legal scrutiny, both within the appropriate time limits. The Trial Judge was correct in law in concluding that in order to achieve an effective operative of the planning system, that it is important that from the time the Board's decision is made the Planning Authority's decision is treated as never having existed and is annulled, and it is expressly provided by the Oireachtas under Section 37 of the Act. Absent such operation of law, the position would permit the existence of two potentially conflicting planning decisions at one time.
6. The Trial Judge was correct in law in concluding that the law was certain on the application and meaning of Section 37 (1) (b) of the PDA Act 2000 in circumstances where the observations of McKechnie J in *Beades -v- Dublin Corporation and An Bord Pleanála* [2005] IEHC 406, paragraph 70-72, on which the Appellant purports to rely in grounding this appeal



- (i) First, the observations did not arise in relation to the question which arose for consideration by Mr. Justice McKechnie and were therefore obiter,
- (ii) Second, the facts of the case were quite different from the present case,
- (iii) Third, in *Beades* what was sought was a quashing of the Board's refusal to grant permission and not a quashing of the Planning Authority's decision.

The conclusion of the Trial Judge on the meaning of Section 37 (1) (b) of the PDA Act 2000 is correct in law and unambiguous, namely that it provides that the decision of An Bord Pleanála has the legal effect of annulling the decision of the Council. Without prejudice to the above, any argument in relation to constitutional rights of the citizen to litigate or have access to the Courts was not made before the Trial Judge, and has no application to the present case where the Appellant has a clear right and remedy against the decision of An Bord Pleanála and in any event any constitutional rights are not absolute, but must be balanced against the rights of others. It is open to the Appellant to continue with its proceedings to quash the Board's refusal to grant permission and its constitutional rights to litigate and to protect its position are fully preserved by the extant proceedings in their current form. Matters of alleged fraud can be dealt with by way of criminal law. However, matters of fraud, corruption or pecuniary advantage are irrelevant in circumstances where no such allegations been pleaded against the Planning Authority.

**B. Decision of the High Court (McGovern J) 21 May 2015 refusing application to extend time to challenge the decision of South Dublin County Council and join South Dublin County Council as a Respondent.**

The grounds of opposition in respect of the appeal of the decision to refuse an extension of time are as follows:

1. The Trial Judge was correct in law in finding that the circumstances that resulted in the failure to make the application for leave within the relevant time limit of 8 weeks from the decision of South Dublin County Council, as required by the PDA Act 2000, was within the control of the Appellant. The matters of which the Appellant now complains came to its attention following Freedom of Information Requests seeking material surrounding the making of the decision which the Appellant now seeks to resurrect in Order to quash. That is the decision of South Dublin County Council of 24<sup>th</sup> March 2014 to grant planning permission to the First Named Notice Party. That Freedom of Information request was made almost one year later on 24<sup>th</sup> of February

2015 or in the case of the National Transport Authority on the 17<sup>th</sup> of April 2015. The failure to make such an earlier request in relation to a decision with which the Appellant was clearly dissatisfied was entirely within the hands of the Appellant and it could have done so at any time following the making of a decision by South Dublin County Council.

2. The Trial Judge was correct in law in ruling that the failure of the Appellant to make an application for leave within the relevant time limits of 8 weeks was totally due to the actions of the Appellant when the Appellant could have made its enquiry under the Freedom of Information Act at a much earlier time and therefore have obtained the information on which it now makes its claim of bias, which claim is strenuously denied by South Dublin County Council. The decision of South Dublin County Council to grant permission was made on 24<sup>th</sup> of March 2014 and the Appellant was on notice thereof from that date.
3. The Trial Judge fully took into account the fact that the grounds of challenge related to alleged bias in making his decision as to whether there was good reason to extend the time, in that the challenge of alleged bias was fully argued before the Trial Judge by the Appellant and is referred to on the face of the Judgment at paragraph 2 thereof.
4. The Trial Judge was correct in law in finding that South Dublin County Council's decision could not be challenged because of the provisions of Section 37 (1) (b) of the PDA Act 2000 in that the provisions of that section are clear and unambiguous, that the decision made by South Dublin County Council as Planning Authority has been annulled and that there is nothing to judicially review at this stage.
5. The Trial Judge was correct in law in finding that there was no good and sufficient reason to refuse to extend the time in circumstances where the only entitlement of the Applicant to challenge a decision made under the Planning Acts is by virtue of Section 50 of the PDA Act 2000, that section provides that the Court shall not grant Section 50 relief unless it is satisfied that there are substantial grounds for contending the decision or Act concerned is invalid or ought to be quashed. There being no decision which is extant the decision of South Dublin County Council already having been annulled, there is no decision extant which is invalid or ought to be quashed and therefore no jurisdiction of the Court to grant the requested Order.
6. The Trial Judge was correct in law in finding that there was no good or sufficient reason for the Court to extend time and concluded validly on the basis of the legal argument and fact before it that the Appellant had provided no explanation as to why

it delayed from 24<sup>th</sup> of March 2014 until the 24<sup>th</sup> of February 2015 to make its first valid request to South Dublin County Council pursuant to the Freedom of Information Act 2014 or in the case of the National Transport Authority until the 17<sup>th</sup> of April 2015. The Trial Judge arrived at his decision that no explanation had been provided based on the materials before him and the clear failure of the Appellant to make any explanation. The lapse of time was a valid and logical basis for the Trial Judge to conclude that he was not satisfied that circumstances that resulted in the failure to make the application for leave within the time period were outside the control of the Applicant. The lapse of time was clearly within the control of the Applicant in that it could have made the application under the Freedom of Information Act at any time subsequent to the 24<sup>th</sup> of March 2014 the date on which South Dublin County Council made its decision.

7. Without prejudice to the above, the Trial judge was correct in law in deciding that there was no merit or utility in granting an extension of time for leave to bring an application to challenge the decision of South Dublin County Council, in circumstances where the substantive application for leave had already been determined, on foot of an express request by the Appellant for the trial judge to hear a composite application, and therefore the granting of an extension of time to bring an application which had already been substantively determined was a meaningless and futile exercise.

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

**Niamh Hyland S.C.**

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**

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:

This is a matter of some commercial urgency and for that reason was entered in the Commercial Court. The appeals brought by the Appellant have delayed the hearing of the matter before the Commercial Court on two separate occasions, and it is in the interests of all parties that the matter be concluded.

Dated: 8<sup>th</sup> July 2015

Signed: \_\_\_\_\_

Edel M. O'Brien

Acting Law Agent

Solicitor for the Second Named Notice Party/Respondent to the Appeal

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.