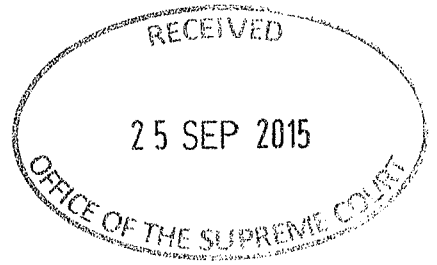


09

Appendix FF

Order 58, rule 15



No. 1

SUPREME COURT

Application for Leave and Notice of Appeal

For Office use

Supreme Court record number of this appeal	
Subject matter for indexing	

Leave is sought to appeal from	
<input type="checkbox"/> The Court of Appeal	<input checked="" type="checkbox"/> The High Court

**THE HIGH COURT
COMMERCIAL**

TAILED
REMOVED
30

[2014 No. 647 J.R.]
[2014 No. 170 COM]

**IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT,
AS AMENDED**

BETWEEN

JOHN CALLAGHAN

APPLICANT/APPELLANT

-AND-

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS/RESPONDENTS

-AND-

**ELEMENT POWER IRELAND LIMITED,
ELEMENT POWER IRELAND
AND
NORTH MEATH WIND FARM LIMITED**

NOTICE PARTIES/RESPONDENTS

John Callaghan		V	An Bord Pleanála, Ireland and the Attorney General	
High Court Record Nr	2014 No. 647 J.R./ 2014 No. 170 COM	Court of Appeal Record Nr		
Date of filing		25 th September 2015		
Name(s) of		John Callaghan		

Applicant(s)/Appellant(s)			
Solicitors for Applicant(s)/Appellant(s)		O'Connell & Clarke Solicitors	
Name of Respondent(s)			
Name of Respondent(s)		An Bord Pleanála, Ireland, the Attorney General	
Respondent's solicitors		Barry Doyle and Company (An Bord Pleanála); Chief State Solicitor (Ireland, the Attorney General)	
Name of Notice Parties			
Name of Notice Parties		Element Power Ireland Limited, Element Power Ireland and North Meath Wind Farm Limited	
Notice Parties' solicitors		Matheson	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?			
Yes		No	
		X	
If yes, give [Supreme Court] record number(s)			

Are you applying for an extension of time to apply for leave to appeal?		Yes	X	No
If Yes, please explain why				

1. Decision that it is sought to appeal

Name(s) of Judge(s)	The Honourable Ms. Justice Caroline Costello
Date of order/ Judgment	Judgment was delivered on the 11 th June 2015 and, in respect of the application in the High Court for leave to appeal, the 24 th July 2015; the High Court Order was made on the 30 th July 2015 and perfected on the 28 th August 2015 (Attested Copy of Perfected Order enclosed)

2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	John Callaghan
-----------------------	----------------

Original status

	Plaintiff
X	Applicant
	Prosecutor
	Petitioner

	Defendant
	Respondent
	Notice Party

Solicitor			
Name of firm	O'Connell and Clarke, Solicitors		
Email	info@oconnellclarke.ie		
Address	Suite 142, The Capel Building, Capel Street, Dublin 7	Telephone no.	01- 8722246
		Document Exchange no.	N/A

Postcode		Ref.	CAL001.0001
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How would you prefer us to communicate with you?

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

Counsel			
Name	Tim O'Sullivan B.L.		
Email	tosullivan@lawlibrary.ie		
Address	Distillery Building, 145-151 Church Street. Dublin 7.	Telephone no.	01-817 7464
		Document Exchange no.	816603
Postcode			

Counsel			
Name	Conleth Bradley S.C.		
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name	Michael Cush S.C.		
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name	John Rogers S.C.		
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Applicant / Appellant is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document	<input type="checkbox"/>	E-mail: info@oconnellclarke.ie
<input type="checkbox"/>	Exchange	<input type="checkbox"/>	
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

First Respondent's full name	An Bord Pleanála
------------------------------	------------------

Original status

<input type="checkbox"/>	Plaintiff
<input type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner

<input type="checkbox"/>	Defendant
<input checked="" type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party
<input type="checkbox"/>	

Solicitor			
Name of firm	Barry Doyle and Company, Solicitors		
Email	info@doyleandco.com		
Address	Marshalsea Court, 23 Merchants Quay, Dublin 8	Telephone no.	01-6706966
		Document Exchange no.	1081 (Four Courts)
		Ref.	AD
Postcode			

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)

Counsel			
Name	Brian Foley B.L.		
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name	Emily Egan S.C.		
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Second and Third Respondents' full name	Ireland and The Attorney General
---	----------------------------------

Original status

<input type="checkbox"/>	Plaintiff
<input type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner

<input type="checkbox"/>	Defendant
<input type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party
<input type="checkbox"/>	

Solicitor			
Name of firm	Chief State Solicitor's Office		
Email	Eoghan_McKenna@csso.gov.ie		
Address	Chief State Solicitors, Osmond House, Little Ship Street, Dublin 8	Telephone no.	01- 4176100
		Document Exchange no.	186
		Ref.	EMK/2014/05341
Postcode			

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)

Counsel			
Name	Michael Wall B.L.		
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name	Rory Mulcahy S.C.		
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel	
Name	Garrett Simons S.C.

Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Fourth, Fifth and Sixth named Respondent's full name:	Element Power Ireland Limited, Element Power Ireland and North Meath Wind Farm Limited
---	--

Original status

<input type="checkbox"/>	Plaintiff
<input type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner

<input type="checkbox"/>	Defendant
<input type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party
<input type="checkbox"/>	

Solicitor			
Name of firm	Matheson		
Email	Nicola.Dunleavy@matheson.com		
Address	70 Sir John Rogerson's Quay, Dublin 2	Telephone no.	01- 2322000
		Document Exchange no.	2 Dublin
		Ref.	NDU/EIMO/663976/6
Postcode			

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)

Counsel			
Name	Niall Handy B.L.		
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name	Jarlath Fitzsimons S.C.		
Email			
Address		Telephone no.	
		Document	

		Exchange no.	
Postcode			

Counsel			
Name	Declan McGrath S.C.		
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

4. Information about the decision that it is sought to appeal

Please set out below:

Whether it is sought to appeal from (a) the entire decision or (b) a part or parts of the decision and if (b) the specific part or parts of the decision concerned.

(b). That part of the decision whereby the “telescoped hearing” of the Applicant’s application for leave to apply for judicial review and the Applicant’s substantive judicial review was refused.

(a) A concise statement of the facts found by the trial court (in chronological sequence) relevant to the issue(s) identified in Section 5 below and on which you rely (include where relevant if certain facts are contested).

The neutral citation of the judgment appealed against is [2015] IEHC 357. In that judgment the Costello J. found (see paras. 1 to 13, 40, 62, 73, 75):

1. The applicant seeks leave to judicially review the decision of the first named respondent, An Bord Pleanála (“the Board”), made on 11th September, 2014, to notify the notice parties that in its opinion the proposed wind farm development at Emlagh, Co. Meath, falls within the scope of s.37A(2)(a) and (b) of the Planning and Development Act 2000, as inserted by s.3 of the Planning and Development (Strategic Infrastructure) Act 2006 (“the Principal Act, as amended”), and is Strategic Infrastructure Development (“SID”) with the result that the application for planning permission for the development is to be submitted to the Board.
2. In addition, the applicant seeks a number of declaratory orders relating to the procedures which were adopted by the Board which it is alleged failed to accord with requirements of fair procedures and of Directive 2011/92/EU (“the [EIA] Directive”)¹. In particular, the applicant contends that the procedure was commenced and completed in a manner that excluded any involvement of the public, including by the applicant, and given the nature of the issues that were determined, the manner in which the decision was made amounted to a contravention of the Directive. It is also separately contended that the provisions of the Directive have not properly been transposed into Irish law.
3. Element Power Ireland Ltd. (“EPI”) proposes to develop a wind farm at Emlagh, Co. Meath. The proposed wind farm will consist of 46 turbines spread over an area of 15km by 10km in three clusters at Farragara, Castletownmoor and Isealchríocha at a

¹ The Environmental Impact Assessment Directive 85/337/EEC and its three amendments have been codified by Directive 2011/92/EU.

height of approximately 167m.

4. By letter received by the Board on 30th May, 2014, EPI initiated the pre-application consultation procedure prescribed under s.37B of the Principal Act, as amended, in relation to the proposed Emlagh wind farm project in Co. Meath.
5. Following the conclusion of the pre-application consultations entered into between EPI and the Board, the Inspector prepared a report dated 1st September, 2014. The Inspector was of the opinion that the development was of strategic economic or social importance to the State or the region given the scale of the proposed development in terms of megawatt output, that the development would be one of the most significant energy projects to be developed in the region and would make a significant impact in terms of meeting the State's renewable energy targets.
6. Accordingly he considered that the proposed development came within the scope of s.37A(2)(a) of the Principal Act, as amended.
7. Given the scale of the proposed development, the Inspector considered that the proposed development would be consistent with the objectives of the Renewable Energy Strategy 2012-2020 published in June, 2012. The Inspector was satisfied that the proposed development met the conditions in s.37A(2)(b) in terms of contributing to the achievement of the objectives of the National Spatial Strategy or Regional Planning Guidelines.
8. At its meeting on 11th September, 2014, the Board issued a Board Direction:-
"At a meeting held on 11th September 2014, the Board considered the report of the Inspector and the documents and submissions on file. The Board determined that the proposed development **would comprise strategic infrastructure development**, generally in accordance with the Inspector's recommendation and conclusions. The Board was satisfied that there was no potential for transboundary impacts to occur in relation to the proposed development, having regard to its nature, scale and location in relation to Northern Ireland. The list of recommended bodies for consultation is noted."
9. Accordingly by notices dated 12th September, 2014, the Board served notice that it was:-
"...of the opinion that the proposed development falls within the scope of paragraphs 37A(2)(a) and (b) of the Act. Accordingly, the Board has decided that the proposed development would be strategic infrastructure within the meaning of section 37A of the Planning and Development Act, 2000, as amended."
10. Pursuant to that notice, the Board directed that any application for permission for the proposed development must therefore be made directly to the Board under s.37E rather than the Local Planning Authority (as is the usual course in planning matters).
11. The decision that is impugned by the applicant in these proceedings is the Board's decision that the proposed Emlagh wind farm development is SID within the meaning of s.37A of the Principal Act, as amended.
12. Prior to reaching its decision the Board is obliged to have consultations with the prospective applicant in relation to the proposed development. As part of that consultation process, the Board may give advice to the prospective applicant regarding the proposed application in relation to what considerations, related to proper planning and sustainable development or the environment may, in the opinion of the Board, have a bearing on its decision in relation to the application for planning permission. Thus the Board engages very closely with the prospective applicant in relation to these issues (see para 40).
13. The Board must form an opinion based on limited information provided solely by the

prospective applicant (see para. 62).

14. The decision of the Board pursuant to s.37B has procedural effects. If it reaches a decision that the proposed development does not fall within the SID criterion then the Board serves a notice in writing on the prospective applicant stating this opinion and the subsequent application for planning permission is made to the appropriate planning authority. If, on the other hand, the Board forms the opinion that the matter falls within one or more of subparas. (a) to (c) of s.37A(2) then the notice served by the Board requires the prospective developer to submit the application for planning permission directly to the Board. In the latter case, there are resulting procedural differences from the planning application that is first considered by a planning authority. Most significantly, there is no appeal to the Board. There are different provisions in relation to material contravention of the development plan; different requirements in relation to notice of the proposed development; the nature and extent of the plans and documents the applicant for planning permission is required to lodge are different; and the Board is entitled to consult with the applicant to a greater extent and to modify the plans (see para. 73).
15. As a matter of fact the statutory scheme requires that the prospective applicant for planning permission has detailed consultations and possibly receives advice from the Board during the pre-application procedure when the public are not involved (see para. 75).

(b) In the case where it is sought to appeal in criminal proceedings please provide a concise statement of the facts that are not in dispute

N/A.

The relevant orders and findings made in the High Court and/or in the Court of Appeal

The relevant orders made in the High Court: “telescoped hearing” of the Applicant’s application for leave to apply for judicial review and the Applicant’s substantive judicial review refused in respect of the leave application; application by the applicant for a preliminary ruling pursuant to Article 267 of TFEU declined. Neutral citation of the judgment appealed against: [2015] IEHC 357.

5. Reasons why the Supreme Court should grant leave to appeal

In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)—

Please list (as 1, 2, 3, etc) concisely the reasons in law why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court

N/A

In the case of an application for leave to appeal to which Article 34.5.4° of the Constitution applies (i.e. where it is sought to appeal to the Supreme Court from the High Court)—

Please list (as 1, 2, 3, etc) concisely the reasons in law:

- i. why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court

The neutral citation of the judgment in which the Applicant was granted a certificate of leave to appeal in the High Court pursuant to section 50A(7) of the Principle Act is [2015] IEHC 493. In that judgment the Costello J. found:

1. The applicant seeks a certificate on three points of law which he says are of exceptional public importance in the following terms:-

“Is the statutory scheme contained in the Planning and Development (Strategic Infrastructure) Act 2006, when construed in the light of Sections 50(2) and 143 of the Planning and Development Act 2000 such that:-

(a) It is necessary to read into the scheme a right for interested members of the public to be heard prior to An Bord Pleanála reaching an opinion pursuant to Section 37A of the Planning and Development Act 2000,

(b) It precludes or effectively precludes An Bord Pleanála, when reaching its decision whether to grant or refuse permission, from reaching a decision on the question of whether the proposed development would be of strategic, economic or social importance to the State and/or would contribute substantially to the fulfilment of any of the objectives of the National Spatial Strategy or any regional planning guidelines for the time being in force different to that reached when forming its opinion pursuant to Section 37A(2) of the Planning and Development Act 2000,

(c) It fails to properly transpose Directive 2011/92 into Irish law by failing to ensure that there is effective public participation in the decision-making process at a time when all options were still open to the decision maker.”

(see para. 1)

2. I accept that [each of the points] raised by the applicant is of importance and that they each transcend the individual case. They apply to any application for planning permission which could be designated strategic infrastructure under the Act of 2006. This means that the points automatically affect all strategic infrastructure development within the State which by definition will be large scale and of importance to the State or a region of the State (see para. 5).
3. It is common case that this is the first case to challenge the procedures introduced by s.37A of the Act of 2000, as amended (see para. 12).
4. The strategic infrastructure designation legislation has not been the subject of judicial scrutiny. The interface between a novel point on this legislation with the evolving law of fair procedures and how it is to be applied to this legislation is open to debate

(see para. 23).

5. If the applicant has a right to participate in the pre-application procedures under s.37A, which right is not afforded to him in the present statutory scheme, in my opinion that is a matter of exceptional public importance and it is desirable in the public interest that an appeal be taken in respect of this question. Therefore a certificate for leave to appeal should be granted. In my judgment this is so even taking into account the contribution the proposed development, if carried out, would make to the State's renewable energy targets and the risk that the project might fail entirely on commercial grounds by reason of the delay inherent in an appeal against my judgment (see para. 24).
6. I was not satisfied that the argument advanced met the threshold of substantial grounds for the reasons outlined in my judgment. My conclusion was predicated on my assessment of the nature of the decision made by the Board when giving its opinion under s.37B(4). Starting from that assessment, I rejected the applicant's argument that his right to fair procedures was triggered and on that basis I concluded that he had not established substantial grounds that he was entitled to participate in the pre-application procedure. However, I acknowledge that logically if a court accepted the applicant's characterisation of the nature of the decision of the Board under s.37B(4) (which I rejected) it could well reach the conclusion that he was entitled to fair procedures in respect of that stage of the process. In my opinion the law in this area is uncertain and as the whole point of affording an appeal is to overturn a decision where the High Court has been in error, I believe that it is desirable in the public interest that there be an appeal on this point, given that it is a point of exceptional public importance (see para. 26).
7. I am satisfied that in point (a) the applicant has raised a point of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Court of Appeal or the Supreme Court. I certify that the applicant may appeal the judgment of 11th June, 2015, as follows:-

Is the statutory scheme contained in the Planning and Development (Strategic Infrastructure) Act 2006, when construed in the light of Sections 50(2) and 143 of the Planning and Development Act 2000 such that it is necessary to read into the scheme a right for interested members of the public to be heard prior to An Bord Pleanála reaching an opinion pursuant to Section 37A of the Planning and Development Act 2000.

(see para. 28)

ii. why there are exceptional circumstances warranting a direct appeal to the Supreme Court

1. In *Dunnes Stores v An Bord Pleanála* [2015] IEHC 387 McGovern J., at para. 2, considered the implications of a certificate of leave to appeal being granted pursuant to s. 50A(7) of the Planning and Development Act 2000 (as amended), as in the instant case. He expressed the view that "*it is likely that in cases certified for appeal on the grounds that they involve a point of law of exceptional public importance and that the appeal is desirable in the public interest that such matters would go straight to the Supreme Court. This would involve an application to the Supreme Court having regard to Article 34.5.4 of the Constitution.*" (see para. 2).
2. By order dated 24th November, 2014, McGovern J. entered these proceedings into the Commercial List of the High Court.
3. The proposed development, if carried out, is likely to contribute significantly to the State's renewable energy targets (see para. 9 of [2015] IEHC 493) and the Board's view, expressed in the decision under challenge in the within proceedings, is that the proposed development is national economic and social importance for *inter alia* that

very reason. The Notice Party has said that for a project this scale to be completed on time in order to meet Ireland's 2020 renewable energy targets, the proposed development must have a final planning decision and other permits in place before the end of 2015 and that the overarching commercial imperative is to ensure that the entire project is operational before the end of 2017 in order to enable the project benefit from the REFIT 2 Scheme which guarantees a minimum price for the electricity delivered. Therefore, the Notice Party says, it is critical that these proceedings are determined expeditiously as any delay has the potential to bring the project beyond the REFIT 2 deadline which would undermine the commercial viability of the project. (See paragraphs 20 to 24 of Kevin O'Donovan's Affidavit, sworn on 18th November 2014, grounding the Notice Parties' application to have proceedings entered into the commercial court.)

4. In those circumstances, when making the order granting the Applicant a Certificate of Leave to Appeal, Costello J. indicated that the Applicant/Appellant try to expedite the appeal.
5. Costello J. has already determined that the Applicant has raised a point of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Court of Appeal or the Supreme Court (see para. 28 of [2015] IEHC 493).
6. A direct appeal to the Supreme Court would avoid the delay that would result in the event that an application for leave to appeal to the Supreme Court was made and/or granted after an appeal to the Court of Appeal.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

Please list (as 1, 2, 3, etc) concisely:

(a) the specific ground(s) of appeal and the error(s) of law related to each numbered ground:

1. The learned Judge made an error of law and/or fact in rejecting the applicant's central submission that the designation of the proposed application as SID (*i.e.* strategic infrastructure development) predetermines the outcome or any part of the outcome of either the EIA or the application for planning permission (see paragraph 65 of judgment appealed against).
2. The learned Judge made an error of law and/or fact in finding that the Board's opinion on SID designation is not determinative of the planning decision, that the earlier exercise does not lead to impermissible prejudgment and that the Board remains free to exercise its discretion in relation to all matters at the end of the process (see paragraph 65 of judgment appealed against).
3. The learned Judge made an error of law and/or fact in finding that, in reaching an opinion pursuant to Section 37A(2) of the Planning and Development Act 2000 as amended, it cannot be said that the Board has prejudged the issue of whether proposed development is of strategic economic or social importance and definitively concluded that the proposed development is of strategic economic or social importance and that it must make its concluded decision on the basis of the fuller information which will be available to it when it comes to make the consent decision (see paragraph 66 of judgment appealed against).

4. The learned Judge made an error of law and/or fact in rejecting the argument that, as a matter of law, the Board cannot revisit its opinion that the proposed development would, if carried out, fall within one of the categories set out in s.37A(2) (see paragraph 67 of judgment appealed against).
5. The learned Judge made an error of law and/or fact in finding that the Board's opinion that the proposed development would, if carried out, fall within one of the categories set out in s.37A(2) is not a concluded decision - within the meaning of s. 50(2) of the Planning and Development Act 2000 as amended (see paragraph 67 of judgment appealed against).
6. The learned Judge made an error of law and/or fact in finding that in deciding whether or not to grant or refuse planning permission or to grant planning permission subject to modifications pursuant to s.37G, the Board would not in any way be questioning the validity of its opinion that the proposed development would, if carried out, fall within one of the categories set out in s.37A(2) – in circumstances where the Board reaches a different decision in relation to the social and/or economic aspects of the proposed development (see paragraph 68 of judgment appealed against).
7. The learned Judge made an error of law and/or fact in finding that, as a matter of law, the Board is entitled – when deciding whether or not to grant or refuse planning permission or to grant planning permission subject to modifications pursuant to s.37G - to look again at the material that was submitted by the applicant for planning permission at the pre-application stage in conjunction with all the additional information then available to the Board to reach a different decision in relation to the social and/or economic aspects of the proposed development (see paragraph 69 of judgment appealed against).
8. The learned Judge made an error of law and/or fact in finding that it is not necessary – as a matter of fair procedures - that the applicant be entitled to be heard at the pre-application stage set out in s.37B (see paragraph 70 of judgment appealed against).
9. The learned Judge made an error of law and/or fact in finding that the pre-application decision is not legally a predetermination of anything to be decided by the Board pursuant to s.37G (see paragraph 70 of judgment appealed against).
10. In light of the above, the learned Judge made an error of law and/or fact in finding that the Board's decision on its opinion that the proposed development would, if carried out, fall within one of the categories set out in s.37A(2) does not trigger the right to be heard as contended for by the applicant (see paragraph 72 of judgment appealed against).
11. The learned Judge made an error of law and/or fact in finding that the procedural effects of the decision – that the proposed development would, if carried out, fall within one of the categories set out in s.37A(2) - on the subsequent decision making process in respect of the planning decision and the EIA do not trigger the applicant's and/or the public's right to fair procedures (see paragraph 74 of judgment appealed against).
12. The learned Judge made an error of law and/or fact in finding that the Board's decision - that the proposed development would, if carried out, fall within one of the categories set out in s.37A(2) - is not determinative of the socio-economic aspects of the application for planning permission and the decision it has to make

pursuant to s.37G (see paragraph 78 of judgment appealed against).

13. The learned Judge made an error of law and/or fact in not accepting that it necessarily follows from the Board's opinion that the proposed development would, if carried out, fall within one of the categories set out in s.37A(2), either as a matter of fact or perception, that the Board predetermines the issue as to whether or not the proposed development is of strategic economic or social importance in the State before the application for planning permission is submitted and that, therefore, the SID designation does not trigger a right to fair procedures (see paragraphs 75, 78 and 79 of judgment appealed against).
14. The learned Judge made an error of law and/or fact in finding that the procedure established in the Planning and Development (Strategic Infrastructure) Act 2006 ensures that at the time the public may participate in the development consent process all options and solutions remain possible and that the public may effectively influence the outcome of the decision-making process and that there is no predetermination of any part of the planning application and that the Board is not legally precluded from reaching a different conclusion on the material submitted by the applicant for planning permission in the pre-application stage in the light of the further information which will be available to the Board once the EIA procedure and all the other submissions and observations are made available to it (see paragraph 81 of judgment appealed against).
15. The learned Judge made an error of law and/or fact in finding that the public is able effectively to influence the outcome of the decision – on the planning application – and can participate early and effectively in the process when all options and solutions remain possible (see paragraph 81 of judgment appealed against).
16. The learned Judge made an error of law and/or fact in finding that the Board may revisit its opinion that the proposed development would, if carried out, fall within one of the categories set out in s.37A(2), in relation to the socio-economic aspects of an EIA when conducting the EIA pursuant to ss. 37D-G of the 2000 Act and that it follows that there is no obligation on the Board at the pre-application stage to comply fully with the requirements of the EIA Directive in relation to the conduct of an EIA and that therefore this is not a ground for saying that the EIA Directive has not properly been transposed into national law (see paragraph 82 of judgment appealed against).
17. The learned Judge made an error of law and/or fact in finding that the public participation provisions of the EIA Directive were not triggered until the formal application for development consent was submitted in October, 2014, notwithstanding the fact that there were statutory pre-application consultations with the prospective applicant and that it follows that the public participation provisions of the EIA Directive do not apply to the pre-application procedure, even where that procedure involves extensive consultation with and the giving of advice to the developer on the content and lodging of the application for consent (see paragraph 84 of judgment appealed against) and the Board forming an opinion that the proposed development would, if carried out, fall within one of the categories set out in s.37A(2) in respect of *inter alia* the strategic economic or social importance to the State or the region in which the proposed development would be situate.
18. The learned Judge made an error of law and/or fact in finding that the

applicant had not established substantial grounds for quashing the decision of the Board of 11th September, 2014, and/or for a declaration that the decision is invalid and/or that he has not made out his case that there are substantial grounds for declaring that the Directive has not been transposed properly into Irish law.

19. The learned Judge made an error of law and/or fact in refusing the applicant leave to seek judicial review.

(b) the legal principles related to each numbered ground and confirmation as to how that/those legal principle(s) apply to the facts or to the relevant inference(s) drawn therefrom:

1. The Board cannot come to a different conclusion in respect of its determination that the proposed development would, if carried out, fall within one of the categories set out in s.37A(2) - *i.e.* on whether or not the proposed development is strategic infrastructure development ('SID') - when carrying out its subsequent EIA or making its decision on the planning application as that would amount to an impermissible collateral challenge to that determination contrary to s. 50 of the 2000 Act (see *Killross Properties Ltv v Electricity Supply Board and Eirgrid Plc.* (unreported, Hedigan J, 28th August 2014); *Ampitheatre Ireland Ltd v HSS Developments* [2009] IEHC 464) and/or would be contrary to the true meaning and effect of the statutory scheme regulating such SID, *i.e.* sections 37A-37J of the 2000 Act.
2. The applicant is entitled to fair procedures in relation to the Board's determination that the proposed development would, if carried out, fall within one of the categories set out in s.37A(2) - *i.e.* on whether or not the proposed development is SID - and relies on the Supreme Court decision in *Dellway Investments Ltd. v. NAMA* [2011] 4 I.R. 1 in this regard. The applicant has a right to be heard in relation to the Board's determination on whether or not the proposed development is SID as his interests were such that his right to fair procedures was triggered. The applicant lives within 5km of the proposed development; he is a qualified engineer and he has studied wind farm technology; he is the primary care-giver of an autistic child who will be gravely disturbed by the proposed giant turbines and he himself is very sensitive to noise. The matters considered by the Board in the course of its determination that the proposed development would, if carried out, fall within one of the categories set out in s.37A(2) are matters that fall to be considered as part of the EIA process and the Board's decision on the planning application in which the applicant, and members of the public in general, have a right to participate.
3. In addition, the Board's decision that the proposed development would, if carried out, fall within one of the categories set out in s.37A(2) had procedural effects of considerable significance. For example, it determined, for the purposes of EIA, who the competent authority will be and under which procedure the EIA will be carried out. In respect of the planning application, the notice requirements were less onerous; the nature and extent of the plans and documents lodged by the prospective applicant can be the subject matter of discussion and agreement between the applicant and the Board; the Board is authorised by s.37G(3)(a)(ii) to make modifications to the proposed development and to grant permission in respect of the proposed development as so modified; there is no appeal as the application is to the Board in the first instance; the Board may give advice and guidance in respect of the application for permission to the applicant; the Board has a wider power to grant permission that is in material contravention of the development plan than does a planning authority. These procedural effects are

such as to entitle the applicant to fair procedures and to afford him a right to be heard in relation to the decision as to whether or not the application should be designated SID.

4. In circumstances where the Board's decision that the proposed development would, if carried out, fall within one of the categories set out in s.37A(2) is such that the applicant has a right to be heard, then the Board must adopt procedures to meet his entitlement (see *The State (Irish Pharmaceutical Union) v. Employment Appeals Tribunal* [1987] I.L.R.M. 36).
5. As a matter of fact or perception there is an appearance of predetermination in respect of some of the matters which the Board must consider in deciding whether or not to grant the permission sought and in carrying out its EIA. In this regard the applicant relies upon the decision of the Supreme Court in *Tomlinson v. Criminal Injuries Compensation Tribunal* [2006] 4 I.R. 321.
6. Article 6(4) of the EIA Directive requires "*The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.*" The public must be able to effectively influence the outcome of the decision-making process (see **C-416/10 Krizan**).
7. In forming its opinion that the proposed development would, if carried out, fall within one of the categories set out in s.37A(2) the Board made final determinations in respect of certain matters that are required to be assessed part of the EIA process but did this without any input from the public as required by the EIA Directive. It determined certain effects of the proposed development on certain factors, e.g. human beings, that are required to be assessed part of the EIA process. A determination that the proposed development is of strategic economic or social importance to the State is of particular significance since the Board must specifically have regard to "*the national interest and any effect the performance of the Board's functions may have on issues of strategic economic or social importance to the State a development would be of social or economic importance to the State*" pursuant to s. 143(b) of the 2000 Act when it comes to make its decision on the proposed development which, in the language of EIA, is the development consent. In addition, the Board's decision that the proposed development would, if carried out, fall within one of the categories set out in s.37A(2) determines, for the purposes of EIA, who the competent authority will be and under which procedure the EIA will be carried out. These determinations are also subject to the EIA process.

(c) the specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely:

1. Planning and Development Act 2000 (as amended) ss. 37A-37J.
2. Planning and Development Act 2000 (as amended) s. 50.
3. Planning and Development Act 2000 (as amended) s. 143.
4. Planning and Development Act 2000 (as amended) s. 146B.

5. Planning and Development Regulations 2001 (as amended), Parts 4 and 18.

(d) the issue(s) of law before the Court appealed from to the extent that they are relevant to the issue(s) on appeal:

“Is the statutory scheme contained in the Planning and Development (Strategic Infrastructure) Act 2006, when construed in the light of Sections 50(2) and 143 of the Planning and Development Act 2000 such that it is necessary to read into the scheme a right for interested members of the public to be heard prior to An Bord Pleanála reaching an opinion pursuant to Section 37A of the Planning and Development Act 2000.”

The above point of law having been certified by the learned High Court Judge it being a point of law of exceptional public importance and in the public interest that an appeal should be taken.

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person: Tim O’Sullivan BL

7. Other relevant information

Neutral citation of the judgment appealed against *e.g.* Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

The neutral citation of the judgment appealed against is [2015] IEHC 357

References to Law Report in which any relevant judgment is reported

N/A.

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

Set aside that part of the Order of the High Court made on the 30th July 2015 and perfected on the 28th August 2015 refusing the “telescoped hearing” of the Applicant’s application for leave to apply for judicial review and the Applicant’s substantive judicial review in respect of the leave application and grant the leave sought to seek judicial, the relief sought in the Applicant’s substantive judicial review and an order for costs in favour of the Applicant/Appellant.

What order are you seeking if successful?

Order being appealed:

set aside

vary/substitute

Original order:

set aside

restore

vary/substitute

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

N/A

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention

N/A

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:

Where this Honourable Court considers it necessary to enable it to give judgment, the applicant asks the Court to request the CJEU to give a preliminary ruling pursuant to Article 267 TFEU on the following questions (also raised before the High Court):-

(i) Are the provisions of Article 6(2) of the EIA Directive to be interpreted as meaning an environmental impact assessment cannot commence until there has been a request for development consent?

(ii) are the provisions of Article 6(2), 6(3), 6(4) and 7(1) of the EIA Directive to be interpreted as meaning that the environmental impact assessment has commenced and the public concerned should be informed and/or consulted where a body, which is a competent authority for the purposes of the EIA Directive, in a process mandated by domestic law, makes a determination in respect of a proposed development which has the effect of giving to that competent authority jurisdiction to determine development consent and where, during the said process, the said body assesses and makes determinations in respect of whether the project is likely to have significant effects on the environment in another Member State and assesses and makes determinations in respect of matters which are required as part of an environmental impact assessment and which must, as a matter of domestic law, be considered when making its decision on development consent?"

Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

When making the order granting the Applicant a Certificate of Leave to Appeal, Costello J. indicated that the Applicant/Appellant try to expedite the appeal.

Signed: 

(Solicitor for) the applicant/appellant

Please submit your completed form to:

The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.