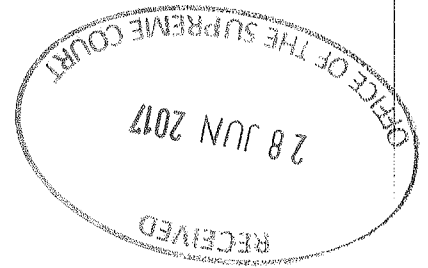


SUPREME COURT

Appendix FF

No. 2

O. 58, r. 18(1)



RESPONDENT'S NOTICE

Supreme Court record number	093-2017
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[Title and record number as per the High Court proceedings]

Pól Ó Grianna, Geraldine Uí Dhúinnín, Aoife Ní Dhúinnín, Cliona Ní Dhúinnín, Bernadette Cotter, Tim O' Connell, Caoimhghín Ó Buachalla, Padraig D. Kelleher, Alan King, Xak Aroo, Simon Swale and Elizabeth Twomey (Applicants)	V	An Bord Pleanála (Respondent) - and - Cork County Council - and - Framore Limited (Notice Parties)
High Court Record No. 2016/643 J.R.		

Date of filing	28 June, 2017
Name of respondent	Framore Limited (Second Named Notice Party)("Notice Party/Respondent")
Respondent's solicitors	PJ O'Driscolls
Name of appellants	Pól Ó Grianna, Geraldine Uí Dhúinnín, Aoife Ní Dhúinnín, Cliona Ní Dhúinnín, Bernadette Cotter, Tim O' Connell, Caoimhghín Ó Buachalla, Padraig D. Kelleher, Alan King, Xak Aroo, Simon Swale, Elizabeth Twomey
Appellant's solicitors	Noonan Linehan Carroll Coffey

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:	Framore Limited (Second Named Notice Party)
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The respondent was served with the application for leave to appeal and notice of appeal on date
15 June 2017

The respondent intends :	
<input 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
<input checked="" type="checkbox"/>	to oppose the application for leave to appeal
<input type="checkbox"/>	not to oppose the application for leave to appeal
<input type="checkbox"/>	to ask the Supreme Court to dismiss the appeal
<input type="checkbox"/>	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
<input type="checkbox"/>	Other (please specify)
In the event that the Supreme Court grants leave to appeal, the Respondent/Notice Party intends to ask the Supreme Court to dismiss the appeal	

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:	<input checked="" type="checkbox"/>
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Respondent's Representation

Solicitor			
Name of firm			
Email			
Address		Telephone no.	
		Document Exchange no.	
		Ref.	
Postcode			
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"/>	Post		Other (please specify)

Counsel	
Name	

Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
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 checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

2. Respondent's reasons for opposing extension of time

<p>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</p> <p>Not Applicable</p>

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

<p>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:</p> <p>In section 4 of the Application for Leave and Notice of Appeal, the Applicants purport to set out the background to the decision in respect of which leave to appeal is sought. In this regard, reference is made to the Substantive Judgment of the High Court (Peart J.) [2014] IEHC 632 in the <i>Ó Grianna (No.1)</i></p>
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proceedings, brought in respect of a previous permission granted in respect of the wind farm project which forms the subject matter of the judgment (i.e., *Ó Grianna (No.1)*) in respect of which leave to appeal is now sought. However, in addition, the High Court (Peart J.) delivered a second judgment on the application for remittal brought in those first set of proceedings. The Applicants omit reference to that Remittal Judgment [2015] IEHC 248. As set out in the Remittal Judgment, the Applicants contended before the High Court in those previous proceedings that the Board could not determine the application, if remitted to it. However, having considered those submissions, Peart J. determined that the matter should be remitted to the Board. In addition, the Applicants failed in their application for leave to appeal against that Remittal Judgment which was refused on the 21st May 2015.

Insofar as the judgment in respect of which leave to appeal is sought on this application, the Applicants have omitted reference to the basis of their argument before the High Court that the development was materially altered. As appears from the judgment of the High Court (McGovern J.) delivered on 18 January 2017, before the High Court the Applicants submitted that the Board acted *ultra vires* and in breach of section 37(1)(b) of the Planning and Development Act of 2000 in granting permission for a development which the applicants assert was substantially different from that contained in the planning application made in May, 2012. The relevant differences asserted by the Applicants were as follows:-

- (i) a new cable trench, approximately 1km in length within the Derragh Wind Farm site to facilitate a grid connection from Cleanrath Wind Farm;
- (ii) relocation of Turbine T1 by 50m from the coordinates identified in the 2012 E.I.S. (and consequential minor alteration to the internal access track and associated underground cable and to the 'red line' site boundary) to ensure that all turbines associated with the proposed development are a minimum distance of 500m from all residences;
- (iii) increase in sub-station handling capacity to 38kV to cater for 38kV connection; and
- (iv) maximum output from wind farm to be 20MW.

These were the issues upon which the Applicants sought to assert that the development was "materially different" from the development which had been the subject of the Board's decision impugned in *Ó Grianna (No.1)*, and not the subsequent inclusion of the grid connection in the description of the development. The purported ground for leave to appeal that the development was "materially altered" is being put forward on a basis which was not advanced before the High Court.

4. Respondent's reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the respondent's reasons why:

1. The Respondent/Notice Party contests the within application for leave to appeal directly to the Supreme Court from the judgment and order of the High Court in circumstances where neither of the requirements of (i) matter of general public importance, or (ii) interests of justice are satisfied.
2. It should be noted that an application was brought by the Applicants for leave to appeal to the Court of Appeal, pursuant to the provisions of subsection 50A(7) of the 2000 Act. However, the learned trial judge correctly decided that the criteria established by the Oireachtas for such leave to appeal to be granted (i.e., that the decision of the High Court involved "a point of law of exceptional public importance and that it is desirable in the public interest that appeal should be taken") were not satisfied in this case. Whilst the tests differ, the Respondent/Notice Party pleads that the questions raised on the instant application for leave to appeal to the Supreme Court, and the facts underpinning them, do not meet the constitutional criteria for leave to appeal.

The decision in respect of which leave to appeal is sought does not involve a matter of general public interest/interests of justice

3. The Applicants have put forward three questions which they say comprise matters of general public importance. However, the questions posed seek to impugn uncertainty, which does not exist, into the application and construction of principles of law that are well-settled. The judgment in respect of which leave to appeal is sought, i.e., *Ó Grianna (No.2)*, arose from the application of the principles set out by the High Court (Peart J.) in both the Substantive and Remittal Judgments in *Ó Grianna (No.1)*. Pursuant to those judgments, the High Court (Peart J.) remitted the matter to the Board with a direction that it reconsider the matter and reach a decision in accordance with the findings of the court. The Board was, consequently, required to assess the cumulative effects of the combined or single project (i.e., the construction of the wind turbines themselves and the connection to the national grid) in determining the remitted appeal. In *Ó Grianna (No.2)*, the High Court held that it was necessary that the cumulative effects of the combined or single project were carried out, and the learned trial judge determined that the Board did what is was required to do in this respect. Thus, any issues of general public interest arose from the establishment of certain principles in the Substantive Judgment in *Ó Grianna (No.1)* and not from the consideration or application of those principles to the facts of the decision made upon the subsequent remittal in the judgment delivered in *Ó Grianna (No.2)*.
4. As regards the first of the purported questions/matters of general public importance, the Respondent/Notice Party pleads that the Rule in *Henderson v. Henderson* is settled law with no uncertainty arising. In addition, the courts have established that this procedural rule applies to planning cases. In this context, it

is equally well-established in the jurisprudence of the European Court of Justice (now Court of Justice of the European Union) that Member States have a discretion in the application for national procedural rules. Finally in this regard, the application of the Rule in *Henderson v. Henderson* in this case is fact-specific and is neither a matter of general public importance (nor is it in the interests of justice) that the Supreme Court should consider the application of these well-established principles to the specific facts of this case.

5. Separately and distinctly, by way of the second purported question/matter of general public importance, the Applicants seek leave to appeal on the issue as to whether the Board has jurisdiction to carry out an EIA of a project where part of that project does not form part of the proposed development in respect of which planning permission is sought. The Notice Party/Respondent pleads that this issue cannot be a matter of general public importance in circumstances where the learned trial judge determined this purported question on the following grounds: (i) it was out of time, and (ii) it offends the Rule in *Henderson v. Henderson* because it could have, and should have, been made in the *Ó Grianna* (No.1) proceedings. It is submitted that, in those circumstances, where the application for substantive judicial review was adjudged on the particular facts of this case to be out of time, it is not a matter of general public interest (or in the interests of justice) to allow an appeal to the Supreme Court on the purported question raised. Furthermore, there has been no engagement with the substance of the EIA actually performed by the Board, and the sole basis of any asserted deficiency is the fact that the assessment was carried out (including an assessment of the cumulative effects of the grid connection and wind turbine development with other plans and projects), otherwise than in the context of an application for planning permission in respect of the grid connection.
6. In their third purported question/matter of general public importance, the Applicants seek leave to raise the issue as to whether, in circumstances where part of the project does not form part of the application for development consent, a competent authority has jurisdiction to carry out an EIA where it does not have power to attach conditions to ensure that mitigation measures are binding. The Applicants appear to contend that this question constitutes a matter of general public importance because the mitigation measures for the grid connection works, as outlined in the revised EIS submitted to the Board, cannot be enforced. However, whilst the assessment of the efficacy of those mitigation measures has been lawfully carried out, it should also be noted that the grid connection works from the Derragh wind farm (which onsite development was the subject matter of the judgment in respect of which leave to appeal is sought) have now been assessed twice – once in the context of the assessment carried out by the Board on the remitted appeal (ref. no. PL04.245082) and for a second time in the context of the EIA carried out by the Board in respect of the application for planning permission in respect of the grid connection works themselves (ref. no. PL04.246742). In those circumstances, there can be no issue of general public importance arising in relation to the purported third question raised by the Applicants, particularly in circumstances where the decision made by the Board to grant permission in respect of the grid connection works (made on 19 May

2017 under ref. no. PL04.246742) attaches a condition requiring the developer to carry out and complete the permitted development (including the grid connection works) in accordance with the plans and particulars lodged with the application, as amended by further plans and particulars submitted, which plans and particulars included an EIS with specific mitigation measures proposed in relation to the grid connection works themselves.

7. Finally in this context, it should be noted that no uncertainty arises, or has arisen subsequently, from the judgment of the High Court in *Ó Grianna (No.2)*, whether in relation to whether it is permissible to carry out an EIA of all elements of a project in circumstances where part of that project is not the subject of the application for development consent.

It is not, in the interests of justice necessary, that there be an appeal to the Supreme Court

8. The Applicants have pleaded that it is in the interests of justice that the three purported questions/points of law arising from the judgment of the High Court (McGovern J.) are resolved. It is submitted that the purported "interests of justice" grounds for leave to appeal are akin to grounds of substantive appeal and do not satisfy the requirements established to satisfy the "interests of justice" criterion.
9. In addition, the Notice Party/Respondent pleads that the interests of justice require a consideration of the clear legislative intention comprised in section 50A(7) of the 2000 Act that a determination of the High Court of an application for judicial review in planning would be final. Of course, whilst this statement of legislative intent must be read in the context of the 33rd Amendment to the Constitution, the constitutional function of the Supreme Court is no longer that of an appeal court designed to correct alleged errors by the trial court. Rather the text of the Constitution makes clear that an appeal to the Supreme Court, directly from the High Court under Article 34.5.4, requires that it be established, *inter alia*, that it is in the interests of justice to allow an appeal to the Supreme Court. It has been established in a number of determinations of the Supreme Court that it will rarely be necessary in the interests of justice to permit an appeal to the Supreme Court simply because it is said that the High Court was in error and that, without more, the interests of justice will not require a further review on appeal to the Supreme Court.
10. The Applicants have sought to rely on arguments made on the remittal application in the previous *Ó Grianna (No.1)* case to assert that it is in the interests of justice require leave to appeal to be granted in respect of the decision of the High Court made in the instant (*Ó Grianna (No.2)*) proceedings. It is pleaded that whether or not a previous set of proceedings brought had a particular impact does not mean that the decision in the present proceedings has, or will have, a similar impact. This would also seem to suggest that the purported interests of justice do not arise out of the decision in respect of which leave to appeal is sought in these proceedings but rather from the history of the previous proceedings.

11. Moreover, it should be noted that this is the fifth occasion on which the Applicants have sought to advance a contention that there must be a single application for development consent in respect of all aspects of a project. The issue was raised: (i) on the remittal hearing in *Ó Grianna (No.1)*, (ii) on the application for leave to appeal in *Ó Grianna (No.1)*, (iii) in the substantive application in *Ó Grianna (No.2)*, (iv) on the application for a certificate for leave to appeal in *Ó Grianna (No.2)*, and (v) on this application for leave to appeal to the Supreme Court. The arguments of the Applicant have on each of the previous four occasions failed to find favour with the courts. It cannot be in the interests of justice to permit a litigant to endlessly seek to agitate the same issue.

There are no exceptional circumstances warranting a direct appeal to the Supreme Court

12. The Applicants contend that exceptional circumstances arise from, *inter alia*, the points of law for which certification was sought from, and refused by, the High Court. In this regard, a number of Supreme Court determinations have confirmed that, if a certificate is refused then a party may seek to persuade the Supreme Court that it is appropriate to grant "leapfrog" leave to appeal. However, that "leapfrog" leave can only relate, if granted, to the substantive or original decision made by the High Court rather than the decision refusing a certificate. Accordingly, it is impermissible for the Applicants to advance purported exceptional circumstances "*having regard to... the points of law for which certification was sought and refused*".

13. Finally in this context, there is no substantiation of the assertion that the Applicants' national and EU law rights to bring these proceedings have been infringed by the substantive judgment in *Ó Grianna (No.2)*. The Applicants' further assert that, in circumstances where a certificate for leave to appeal by the High Court has been refused, an appeal to the Supreme Court is the only remaining remedy. However, the logic underpinning this plea is that, in every case where a certificate for leave to appeal is refused by the High Court, there are "exceptional" circumstances which warrant leave being granted to appeal to the Supreme Court. Such a scenario is not within the constitutional criteria for leave to appeal.

14. It is submitted there is nothing exceptional about the circumstances or facts of this case.

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

Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

1. In response to paragraphs 1 and 2 of Section 6 of the Notice of

Appeal, it is pleaded that there was no error in the High Court determination and no material differences between the planning applications determined by the Board, such as would vitiate the decision of the Board impugned in these proceedings. In *Ó Grianna (No.1)*, the High Court had determined that the grid connection and the wind farm formed a single project and, therefore, it was necessary to assess the cumulative impacts of both elements before permission could be granted for one element. Subsequently, the matter was remitted to the Board to consider the grid connection and, accordingly, details in respect of the grid connection were sought by, furnished to, and considered by, the Board for the purposes of conducting an EIA. The Notice Party/Respondent relies on the provisions of Section 132 of the 2000 Act and the decisions of the Superior Court as the basis upon which the scope of a development considered by the Board can be altered. Moreover, as appears from the judgment of the High Court (McGovern J.) delivered on 18 January 2017, before the High Court the Applicants submitted that the Board acted *ultra vires* and in breach of section 37(1)(b) of the Planning and Development Act of 2000 in granting permission for a development which the applicants assert was substantially different from that contained in the planning application made in May, 2012. The relevant differences asserted by the Applicants were as follows:-

- (i) a new cable trench, approximately 1km in length within the Derragh Wind Farm site to facilitate a grid connection from Cleanrath Wind Farm;
- (ii) relocation of Turbine T1 by 50m from the coordinates identified in the 2012 E.I.S. (and consequential minor alteration to the internal access track and associated underground cable and to the 'red line' site boundary) to ensure that all turbines associated with the proposed development are a minimum distance of 500m from all residences;
- (iii) increase in sub-station handling capacity to 38kV to cater for 38kV connection; and
- (iv) maximum output from wind farm to be 20MW.

These were the issues upon which the Applicants sought to assert that the development was "materially different" from the development which had been the subject of the Board's decision impugned in *Ó Grianna (No.1)*, and not the subsequent inclusion of the grid connection in the description of the development. The purported ground for leave to appeal that the development was "materially altered" is being put forward on a basis which was not advanced before the High Court therefore there is no basis for leave to be granted on this ground.

2. In response to paragraph 2, the applicability of the Rule in *Henderson v. Henderson* is settled law, and it is equally clear that it applies to planning cases. The learned trial judge correctly applied the Rule in *Henderson v. Henderson* to the facts of this case. At no time at the hearing of the action, notwithstanding the Board's written legal submissions raising the Rule in *Henderson v. Henderson*, did the Applicants raise the issue in relation to two additional applicants. Rather, this feature was referred to, for the first time, on behalf of the Applicants in the course of the hearing on the

application for a certificate. In circumstances where this was not an issue raised before the High Court in the course of the hearing it cannot form the legal basis of an appeal to the Supreme Court which, if "leapfrog" leave is granted must relate substantive or original decision rather than the decision refusing a certificate. Moreover, in circumstances where the High Court correctly determined that the assertion that the grid connection development should have been included in the relevant planning application was impermissible as it was out of time in addition to offending the Rule in *Henderson v. Henderson* and, therefore, the reference to two additional litigants does not avail the Applicants.

3. In relation to the grounds of appeal contained paragraphs in 3, 4, and 5 of Section 6, which are advanced solely on the legal basis set out at paragraph 5, the Applicants do not engage with or allege any substantive deficiency in the EIA which was actually carried out by the Board. Rather, the Applicants contend that, as the grid connection works did not form part of the proposed development for which permission was sought, the Board did not carry out an adequate or substantially compliant or lawful EIA in relation to the overall project. In essence, the Applicants contend that the wind turbine development and the connection to the national grid were required to form part of a single application for planning permission. These pleas of the Applicants are made against the backdrop of the Substantive and Remittal Judgments delivered by the High Court (Peart J.) in *Ó Grianna (No.1)*. In his judgments, Peart J. identified the mischief that caused the Board's previous decision to be quashed, namely, the failure to consider the cumulative effects of parts of the project. Accordingly, what was required of the Board upon remittal was to ensure that the cumulative impacts of the proposed wind farm development and the connection to the national grid were assessed before granting permission for the proposed wind farm development.
4. It is clear from the evidence in these proceedings that, after the remittal back to the Board, the documentation which was requested by and submitted to the Board on behalf of the Notice Party enabled the required assessment by the Board of the cumulative impacts of the wind farm and the connection to the national grid. Moreover, the information which was ultimately submitted to the Board has enabled the competent authority to assess the cumulative impacts of that project (including the permitted wind farm development and grid connection) in combination with other plans and projects. However, notwithstanding the clear parameters set in the Substantive and Remittal Judgments in *Ó Grianna (No.1)*, the Applicants now contend that the Board was not only required to assess the environmental impacts of the proposed project, being the windfarm development and the connection to the national grid, but that these elements of the project were required to be part of a single application for planning permission. Thereafter, the Applicants plead that the EIA procedure cannot be divorced from the development consent procedure. In effect, the Applicants contend that, where there is no application for permission for the connection to the national grid, the Board cannot and has not carried out an EIA of the project. However, it does not follow from either

the Substantive or Remittal Judgments in *Ó Grianna (No.1)*, that the two elements of the project were required to form part of a single application for permission. The Applicants are (i) attempting to persuade the Court to construe the EIA Directive in the most onerous manner, (ii) engaging in legal formalism in circumstances where, (iii) they are attempting to strike down the consent granted, notwithstanding the fact that the competent authority has now conducted an effective EIA for this windfarm project in compliance with the EIA Directive. Indeed, both the EIA Directive and Irish legislative provisions clearly envisage a situation whereby there may be different stages of the consent procedure. The European Court of Justice/Court of Justice of the European Union has expressly accepted that a consent procedure may comprise several stages and that the identification, description and assessment of effects may be carried out over more than one stages. In this context, it was determined by the High Court (Peart J.) in *Ó Grianna (No.1)* that, for an EIA to be completed at this stage of the development, it was required to assess the cumulative impacts of the grid connection and the windfarm. After the remittal of the matter, the Board sought and received information relevant to allow that assessment to occur and the assessment, as elucidated by the High Court, was completed. The Notice Party/Respondent pleads that all requirements of the EIA Directive and Irish law have been met.

5. In addition, the Applicants have pleaded, at paragraph 5 of Section 6 of the Notice of Appeal that, as the grid connection did not form part of the proposed development for which permission was sought, the Board could not properly consider the mitigation measures in relation thereto and could not properly carry out an EIA in relation to the project. However, it is clear from the Revised EIS submitted to the Board that a suite of mitigation measures had been described in relation to the proposed windfarm development and the grid connection, to which the developer has committed and the efficacy of which was capable of being assessed by the competent authority. Indeed, both the EIA Directive and Irish legislation requires mitigation measures to be identified and considered: see article 94 of and Schedule 6 to the Planning and Development Regulations 2001, as amended, set out the content of an EIS. In circumstances where the Remittal Judgment in *Ó Grianna (No.1)* required the EIA conducted by the Board to include a cumulative assessment of the proposed wind farm development and the grid connection works, the Notice Party was obliged to include a description of such mitigation measures in relation to the proposed wind farm development and the grid connection works. Moreover, the Board was required to consider mitigation measures in considering the appeal.
6. At paragraph 6 of Section 6 of their Notice of Appeal, the Applicants have also referred to the absence of conditions in relation to the grid connection works. However, the Notice Party pleads that the approach taken by the Notice Party in furnishing information describing mitigation measures in relation to the proposed windfarm development and grid connection works was correct and that the Board correctly considered the mitigation measures contained in the

EIS, including mitigation measures in relation to the grid connection works. Moreover, whilst the assessment of the efficacy of those mitigation measures has been lawfully carried out by the Board, it should also be noted that the grid connection works from the Derragh wind farm (which development was the subject matter of the judgment in respect of which leave to appeal is sought) have now been assessed twice – once in the context of the assessment carried out by the Board on the remitted appeal (ref. no. PL04.245082) and for a second time in the context of the EIA carried out by the Board in respect of the application for planning permission in respect of the grid connection works themselves (ref. no. PL04.246742). In those circumstances, there was and is no gap or *lacuna* in the assessment required under the EIA Directive and Irish law. Moreover, the decision made by the Board to grant permission in respect of the grid connection works on 19 May 2017 (under ref. no. PL04.246742) attaches a condition requiring the developer to carry out and complete the permitted development (including the grid connection works) in accordance with the plans and particulars lodged with the application, as amended by further plans and particulars submitted, which plans and particulars included an EIS with specific mitigation measures proposed in relation to the grid connection works themselves.

7. In all the circumstances as pleaded heretofore, the Applicants have not established any grounds of appeal in respect of any purported inadequacy of the EIA conducted by the Board.

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

Sinéad Kelly B.L.
Jarlath Fitzsimons 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:

The Notice Party/Respondent pleads that there is no requirement or necessity to refer any question to the Court of Justice of the European Union in order to resolve any matter arising in the proceedings. The questions identified by the Applicants do not meet the criteria for referral, as found in Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry for Health* [1982] ECR 3415.

In the event that the Supreme Court grants leave to appeal, the Notice Party/Respondent pleads that the matters which the Applicants have sought to refer to the Court of Justice of the European Union are matters which can be determined by the Supreme Court on any such appeal, as the scope of the application of the principles of EU law is clear from the jurisprudence of the CJEU and the text of the EIA Directive and no reference to the CJEU is necessary.

Will you request a priority hearing? ☒ Yes ☐ No

If Yes, please give reasons below:

The Second Named Notice Party oppose the Appellant's application for leave to appeal to the Supreme Court. However, in the event that the Supreme Court determines that the appeal should be made to the Supreme Court rather than to the Court of Appeal, the Respondent/Notice Parties request a priority hearing of the appeal, for the following reasons:

- (a) The within application was first made On 8 June 2012, to Cork County Council, under register reference number 12/05270 for planning permission for the development. Thereafter, an appeal was made to An Bord Pleanála on 12 July 2013, under register reference number PL04.242223. On 14 November 2013, the Board granted planning permission for the proposed development, subject to 17 no. conditions. Certain of the Applicants in these proceedings brought a challenge by way of judicial review of that decision of An Bord Pleanála, which first set of judicial review proceedings issued on 13 January 2014, the matter was heard in May 2014 and determined by the High Court (Peart J.) by way judgment delivered on 12 December 2014, granting an order of *certiorari* to the Applicants in those proceedings on the basis that the Board had

failed to carry out an assessment in respect of the connection between the proposed wind farm and the national electricity grid. Subsequently, on 16 April 2015, the High Court (Peart J.) decided that the matter should be remitted back to the Board for further assessment.

- (b) The matter was duly remitted back to the Board, which assigned a new reference number (PL 04.245082) to the appeal. The Board thereafter requested invited the Notice Party to submit, *inter alia*, a Revised Environmental Impact Statement to enable the Board to complete an EIA in relation to the overall proposal, including the grid connection. In addition, the Notice Party was requested to submit a revised Habitats Directive screening and, if necessary, a revised Natural Impact Statement, in respect of the overall proposal, including the grid connection. Ultimately, on 15 June 2016, the Board decided to grant planning permission.
- (c) The approximate capital cost of the entire Derragh wind farm project is in the region of €20 million, which amount will include the cost of construction of the wind farm, equipment, connection works, land costs, works to upgrade existing substations required to take the additional power generated by the planned wind farm when connected pursuant to the Connection Agreement with ESB Networks and other associated works. Framore Limited has incurred significant costs to date.
- (d) The overarching commercial imperative is to ensure that the entire project is operational before the end of 2020, in order to enable the project to benefit from the REFIT 2 (Renewable Energy Feed in Target) scheme (operated under the aegis of the Department of Communications, Energy and Natural Resources), which provides a feed-in tariff support scheme that operates by guaranteeing new renewable generators a minimum price for electricity delivered to the grid over a 15-year period. In order to avail of the REFIT 2 scheme, an application must be made to before 31 December 2015, and the project must have been connected to the grid by end of 2017. The connection date has been extended to the end of 2019, however there has been no extension of the 15 year period of feed-in tariff support beyond 2032. Hence, subject to planning permission being granted, the target completion date of the construction of the wind farm development is December 2018
- (e) Whilst the Notice Party/Respondent contests the application for leave to appeal, in the event that leave is granted, the Supreme Court is requested to note that the economic viability of the Derragh Wind Farm project will be significantly impacted upon if the appeal is not determined expeditiously, with commercial uncertainty prevailing in the context of an extant appeal (notwithstanding the dismissal of the proceedings by the High Court and the refusal of a certificate to appeal).

Signed: P. J. O'Driscolls

P.J. O'Driscolls

Solicitor for the Notice Party

41 South Main Street

Bandon

Co. Cork and 179 Church Street, Dublin 7

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.