

**SUPREME COURT****Respondent's Notice**

Supreme Court record number	2017 : 096
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[Title and record number as per the High Court proceedings]

North Kerry Wind Turbine Awareness Group	V	An Bord Pleanala and Kerry County Council, Ireland and the Attorney General and Stacks Mountain Windfarm Limited
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Date of filing	30 June 2017
Name of respondent	Stacks Mountain Windfarm Ltd (Fourth Named Notice Party)
Respondent's solicitors	John Flynn, Solicitor, Lissarda Industrial Estate Lissarda Co. Cork
Name of appellant	North Kerry Wind Turbine Awareness Group
Appellant's solicitors	O'Connell & Clarke Solicitors Suite 142 The Capel Building Mary's Abbey Dublin 7

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	Stacks Mountain Windfarm Ltd (Fourth Named Notice Party)
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The respondent was served with the application for leave to appeal and notice of appeal on date

June 16 2017

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)

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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.	
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			
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

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:

For reasons more fully set out below the fourth named notice party does not accept the Applicant's contention that the decision of McGovern J. in the High Court involves issues that have arisen in a number of recent references to the Court of Justice, and/or, appeals that have been accepted into and/or are pending before the Supreme 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. Furthermore, the Applicant has not identified any exceptional circumstances for admitting this appeal.
2. An application was brought by the Applicant for leave to appeal to the Court of Appeal* pursuant to the provisions of subsection 50A(7) of the 2000 Act. The learned trial judge (McGovern J.) 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, taking into account the facts underpinning them, do not meet the constitutional criteria for leave to appeal.

Matter is of general public importance

3. The obligations under EU law in respect of Environmental Impact Assessment (EIA) and Appropriate Assessment (AA) are well established pursuant to the relevant jurisprudence and these obligations were correctly interpreted and applied by the learned trial judge.

4. It is submitted that the provisions of domestic law in respect of EIA and AA are clear in their transposition and interpretation of the obligations imposed under EU law. These provisions of domestic law were correctly interpreted and applied by the learned trial judge.
5. Insofar as is asserted in the Applicant's Application for Leave and Notice of Appeal that the decision of the High Court involves issues that have arisen in a number of recent references to the Court of Justice and/or appeals that have been accepted into this Honourable Supreme Court and/or are pending before this Honourable Court, this is not accepted. For reasons more fully set out herein, the issues arising in the within proceedings are distinguishable from the aforesaid references to the Court of Justice and appeals accepted.

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

6. The Applicant in Application for Leave and Notice of Appeal have pleaded that it is in the interests of justice that a number of 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. It is submitted that 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.

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

7. It is unclear from the Application for Leave and Notice of Appeal what exceptional circumstances are relied upon to warrant a direct appeal to the Supreme Court. It is submitted no such exceptional circumstances exist or have been identified by the Applicant

Response to the specific points listed by the Applicants in section 5 of the Application for Leave and Notice of Appeal

1. The mere fact that the within proceedings raised issues in relation to the manner of, and recording of EIA and AA conducted by the Respondent, does not mean it is in the interests of justice that the within proceedings are admitted by the Court. Such issues are routinely raised in judicial review proceedings which seek to challenge decisions of the Respondent. It is not accepted that the same or similar issues were raised in the within proceedings as were referred to the CJEU by Humphreys J. in the case of *Holohan v- An Bord Pleanala* Unreported 4th of May 2017. In particular, it is disputed that questions (i),(j) and (k) of the reference to the CJEU are engaged in a similar manner in the present case. The factual context and circumstances in which the AA was undertaken and recorded by the Respondent was materially different and distinguishable for those which pertain in the within proceedings.
2. It is not accepted that similar issues arise in the within proceedings and in the case of *Connelly -v- An Bord Pleanala* 2017 IESC 57 which related to the Respondents conduct and recording of EIA and AA in a very particular factual matrix which

differs from that which pertains in the within proceedings. The High Court in its decision clearly addressed the issues raised in *Connelly* but correctly decided not to apply that decision to the facts of the present case. To the extent that the High Court only dealt with the *Connelly* decision in the context of EIA this reflects the fact that this was the context in which the case was in substance argued before it. The Applicant relied on *Connelly* in the context of argument as to the standard required for recording an EIA by the Respondent. Without prejudice to the foregoing it is not accepted that the *Connelly* decision is of relevance in the context of AA in the manner suggested by the Applicant.

3. Insofar as the Applicant asserts that it objected to the hearing of the within application pending the determination of the *Connelly* appeal this is only partially correct. Paragraph 15 of the Applicant's legal submissions referred to the *Connelly* appeal and alluded to the possibility of an adjournment of the within proceedings pending the determination of the *Connelly* appeal. However, paragraph 16 of the submissions expressly stated "*an adjournment is not necessary*" as the proceedings could be disposed of on the grounds that no AA occurred.
4. At paragraph 16 of its legal submissions the Applicant argued that the within proceedings could be distinguished from *Connelly* and expressly stated "*the issue before the Supreme Court in Connelly is different*" as in that case the Respondent purported to adopt a report of its inspector in the context of conducting and recording an AA. Furthermore, at paragraph 17 of its legal submissions the Applicant states "*The within proceedings are different in this regard. In the within proceedings, the Board's inspector has not carried out any AA Therefore, it is submitted, that the issue in Connelly (namely as to the extent to which reports can be adopted) does not arise on the instant facts, as, there is simply no assessment anywhere conducted that could in fact be adopted.*" It is clear from the judgment of the learned trial judge that he properly concluded that the Respondent had itself in fact properly conducted and recorded an AA and did not adopt an AA conducted by the Inspector. In this respect the within proceedings are clearly distinguishable from the issue that arises in *Connelly* namely the extent to which the Respondent can adopt an inspector's report in conducting and recording an AA.
5. It is not disputed that the issue as to whether and how the connection of a windfarm to the national grid is required to be assessed as part of the overall project in the context of EIA has been considered in a number of cases. However, this consideration has occurred in the context of very different factual circumstances. In *O'Grianna (No. 1)* no grid connection had been identified or included in the planning application. Peart J. held that as a consequence the cumulative impact of the windfarm and the grid could be not assessed in accordance with the requirements of the EIA Directive. In *O'Grianna (No. 2)* the factual circumstances differed materially in that the grid connection, although not part of the planning application, was identified and the court held as a consequence a cumulative assessment of the grid connection and windfarm could and had been conducted. The proceedings in *Daly v Kilronan* related to an entirely separate question as to whether, on the facts, the grid connection works constituted 'exempted development' under the 2000 Act. Accordingly, when these factual differences between the authorities are properly considered there is no divergence in authorities or absence of clarity on the issue as suggested by the Applicant.
6. It is not accepted that the finding of the learned trial judge on the issue of AA in the within proceedings is of considerable public importance. The obligations of the Respondent under EU and domestic law in conducting AA are well established as is the requirement that the AA must be recorded and that it must be certain, and contain complete, precise, definitive findings capable of removing all scientific doubt about

the effects of a development on European Sites. There is a settled line of authorities on these obligations, most notably *Kelly v An Bord Pleanala* [2014] IEHC 400. It is clear from the judgment of the learned trial judge that these requirements and authorities (including *Kelly*) were properly applied and considered by the trial judge. He properly concluded on the facts that an AA had been conducted and recorded by the Respondent. In the circumstances, it is submitted the judgment can in no way be considered to throw the law in respect of the conduct and recording of AA into considerable uncertainty as suggested by the Applicant.

7. The issue of the appropriateness of considering mitigation measures when conducting a screening for AA does not arise in the within proceedings. The Applicant itself argued that AA was required but contended that no such AA had been properly conducted or recorded by the Respondent. However, the learned trial judge properly held that the Board had, as a matter of fact, conducted an AA and clearly recorded same. In these circumstances, the issue of the appropriateness of considering mitigation measures when conducting a screening for AA is simply irrelevant. As a consequence, the outcome of the preliminary reference to the CJEU in *People Over Wind —v- Coillte* is of no relevance to the within proceedings.
8. Whilst it is factually correct that the relevant development plan did change during the course of the appeal the planning authority did not refuse permission on the grounds that the proposed development contravened the development plan. The High Court at paragraph 32 of the Judgment expressly held that the provisions of s.37(2) of the 2000 Act did not apply and it appears the Applicant is not taking issue with this finding. Contrary to what is alleged by the Applicant no issue arises as to what is the appropriate legal approach to be taken by the Board to an appeal in circumstances where the development plan has changed. The provisions of s.37(2)(a) of the 2000 Act are perfectly clear as to extent to which (and in what circumstances) the Board can decide to grant permission in material contravention of a development plan.

*delete where inapplicable

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):

The Respondent refers to the reasons given in section 4 above and also more specifically as follows:

1. The Notice Party pleads that the EIA was properly carried out and recorded by the Board in accordance with the requirements of national and European law and, in particular, in accordance with Section 171(2)(1J) of the Planning and Development Act, 2000 and the relevant jurisprudence relating to same.
2. The Board did carry out a proper EIA and, in particular, carried out a cumulative assessment in respect of the grid connection as part of the overall project.

3. The Board carried out its obligations in relation to appropriate assessment in accordance with law.

4. It is denied that the Board did not record the AA that it had carried out or that the Applicant had no opportunity to consider or review that EIA. It is denied that the Board decided to grant permission in material contravention of the Development Plan in an unlawful manner or in a manner that was other than in accordance with the provisions of Article 28A of the Constitution.

5. The High Court Judge was correct in finding that the Board's decision in respect of the material contravention of the development was lawful.

6. No application for legal aid or financial assistance in bringing the within application was in fact ultimately brought before McGovern J. Whilst the Applicant brought a motion seeking such relief at the hearing of the application for a certificate it was effectively conceded by counsel for the Applicant that there was no basis for the grant of such relief and no such relief was in fact sought.

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

Eamon Galligan S.C
Tom Flynn B.L

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:

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 issues identified by the Applicant in its Application for Leave and Notice of Appeal 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 that the Applicant has 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:

Planning permission for the proposed windfarm development was granted by the Respondent made on the 25th of July 2016 on a planning appeal (Reference number PL 08.244066). The application by way of judicial review to quash the decision of the Respondent was refused in a decision of the High Court of March 9th 2017. An application for a certificate for leave to appeal pursuant to s50A(7) of the 2000 Act was refused by a decision of the High Court of May 2nd 2017.

The Windfarm represents an overall investment of over €46 million on the part of Stacks Mountain Windfarm Limited ("SMWL"). To date, over €1.5 million has been invested in SMWL and the Windfarm in addition to significant human resources and capital. There is a commercial imperative to ensure that the Wind Farm 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). The REFIT 2 scheme 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. It is essential to the commercial viability of the Wind Farm that it avail of REFIT 2. In order to avail of the REFIT 2 scheme, an application must be made on or 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. It was originally envisaged that that the Wind Farm would become commercially operational in late 2017 but construction has been delayed by virtue of the within proceedings. Construction would need to commence as soon as possible to render it feasible that the 2019 connection deadline is met. These considerations were outlined in this Notice Party's Application for Entry to the Commercial Court.

The Notice Party/Respondent contests the application for leave to appeal. However in the event that leave is granted, the Supreme Court is requested to note that the economic viability of the Wind Farm will be jeopardised if the appeal is not determined expeditiously, with commercial uncertainty prevailing in the context of an extant appeal.

Signed: Anne Foley
(Solicitor for) the respondent

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.