

SUPREME COURT

Application for Leave and Notice of Appeal



For Office use

Supreme Court record number of this appeal	
Subject matter for indexing	Planning

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

[Title and record number as per the High Court proceedings]

An Taisce – The National Trust for Ireland		V	McTigue Quarries Limited and Gary McTigue and Caroline McTigue	
High Court Record Nr	2015/302 MCA	Court of Appeal Record Nr		
Date of filing		13 MARCH 2017 4 APRIL 2017		
Name(s) of Applicant(s)/Appellant(s)		McTigue Quarries Limited and Gary McTigue and Caroline McTigue		
Solicitors for Applicant(s)/Appellant(s)		O'Dwyer Solicitors Ballyhaunis County Mayo		
Name of Respondent(s)		An Taisce – The National Trust for Ireland		
Respondent's solicitors		O'Connell & Clarke Solicitors Suite 142 The Capel Building Mary's Abbey Dublin 7		
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?				
<input checked="" type="checkbox"/> Yes		<input type="checkbox"/> No		
If yes, give [Supreme Court] record number(s)				
Supreme Court Record No.S:AP:IE:2017:000012; application for leave.				

Are you applying for an extension of time to apply for leave to appeal?	Yes <input checked="" type="checkbox"/>	No <input type="checkbox"/>
If Yes, please explain why		
<p>Yes. The respondents were unaware that the appellant intended to seek leave of this Court to appeal until served with the Notice of Appeal.</p> <p>The appellant having done so, it would not be in the interests of justice to have the second part of the learned trial judge's decision (on discretion) to be appealed to this court, and the first part (the finding of unauthorised</p>		

development) to remain before the Court of Appeal.

Consideration of discretion under s. 160 does not arise if the first finding is in error, which the purpose of this appeal.

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Mr Justice Barrett
Date of order/ Judgment	Judgment dated 8 November 2016 and Order perfected on 20 December 2016

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	McTigue Quarries Limited and Gary McTigue and Caroline McTigue
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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

Solicitor			
Name of firm	O'Dwyer		
Email	<u>info@odwyersolicitors.ie</u>		
Address	Ballyhaunis County Mayo	Telephone no.	0949630011
		Document	94 001
		Exchange no.	BALLYHAUNIS
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	Paul McGarry SC		
Email	<u>paul@paulmcgarrysc.com</u>		
Address	Distillery Building 145-151 Church Street Dublin 7	Telephone no.	0872473910
		Document	816 586
		Exchange no.	
Postcode			

Counsel			
Name	David Dodd BL		
Email	<u>ddodd@lawlibrary.ie</u>		
Address	Distillery Building 145-151 Church Street Dublin 7	Telephone no.	0879475217
		Document	816 512
		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 Exchange	<input checked="" type="checkbox"/>	E-mail
<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

Respondent's full name	An Taisce – The National Trust for Ireland
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Original status		Plaintiff		Defendant	Is this party being served with this Notice of Application for leave?			
	X	Applicant		Respondent				
		Prosecutor		Notice Party				
		Petitioner			Yes	X	No	

Solicitor			
Name of firm	O'Connell and Clarke		
Email	info@oconnellclarke.ie		
Address	Solicitors	Telephone no.	018722246
	Suite 142	Document	
	The Capel Building	Exchange no.	
	Mary's Abbey	Ref.	
	Dublin 7		
Postcode			

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

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

Counsel			
Name	Conleth Bradley SC		
Email	cbradley@lawlibrary.ie		
Address	158/159 Church Street	Telephone no.	018172803
	Law Library Building	Document	815 201B
	Dublin 7	Exchange no.	
	Postcode	PO Box 4460	

Counsel			
Name	Oisin Collins BL		
Email	oisinrcollins@gmail.com		
Address	Law Library	Telephone no.	0878189868
	Four Courts	Document	816568
	Dublin 7	Exchange no.	
	Postcode		

If the Respondent is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

Has this party agreed to service of documents or communication in these proceedings

by any of the following means?

<input type="checkbox"/>	Document Exchange
<input type="checkbox"/>	Post

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

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

The proceedings arise under section 160 of the Planning and Development Act 2000 as amended. The judgement delivered by the High Court on the 8th of November 2016 addressed whether there was unauthorised development within the meaning of s. 2(1) of the Planning and Development Act 2000, and the High Court held that there was unauthorised development. The court declined to grant reliefs under the discretionary heading applicable in s. 160 proceedings. That part of the written decision of the 8th November, 2016 determining that there was unauthorised development is appealed. The judgement of the 6th of December 2016 on costs and the perfected Order of the 20th of December 2016 awarding the costs of the proceedings in favour of An Tasice is also appealed. The judgement of the 6th of December 2016 is reported at [2016] IEHC 701.

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

- Article 15.2.1. of Bunreacht na hEireann and Article 34.1
- The Planning and Development Act 2000, in particular the provisions in Part XA thereof, as amended
- Environmental (Miscellaneous Provisions) Act 2011

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

The decision sought to be appealed involves a matter of general public importance and there are exceptional circumstances warranting a direct cross-appeal to the Supreme Court.

In that regard the cross-appellant rely on the grounds in the appellants/applicants notice of appeal in Supreme Court Record No.S:AP:IE:2017:000012; application for leave.

The appellant's having sought leave to appeal on the second part of the learned trial judges decision (regarding the discretion to refuse or grant relief under s. 160).

It would not be in the interests of justice to have the second part of the learned trial judge's decision (on discretion) appealed to this court, and the first part (the finding of unauthorised development) remain before the Court of Appeal.

Consideration of discretion under s. 160 does not arise if the first finding is in error, which the subject of the respondent appeal.

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

Grounds of opposition and of the cross-appeal

1. The learned trial judge erred in fact and law in determining the respondents, through their ongoing acts of excavation, are presently engaging in unauthorised development within the meaning of section 2(1) of the Act of the Planning and Development Act 2000, paragraph 11 of the judgement.
2. The learned trial judge erred in fact and law in determining that a substitute consent under s. 216A of the Planning and Development Act 2000 did not allow for continuing or future development of a quarry; such continuing or future development required separate planning permission to be obtained following the issuance of the substitute consent, as held by the learned trial judge at paragraphs 2 and 10 of the judgement.
3. The learned trial judge erred in fact and law in determining that activities at the quarry were either continuing or future development of a quarry, when the activities are not development or future development requiring a separate planning permission.
4. The learned trial judge erred in fact and law in determining that no evaluation or examination of future works (as opposed to remedial or restorative works) has been undertaken, none of the assessments required under s.172 or s.177S and s.177T of the Act of 2000 are recorded as having been undertaken on the works now being carried out, and current and future site-development is not regulated by any conditions, paragraph 11, or at all.
5. The learned trial judge erred in fact and law
 - (i) in awarding costs under s. 3(4) of the Environmental (Miscellaneous Provisions) Act 2011 considering its true meaning and effect, and
 - (ii) by inviting an application by An Taisce to seek its costs under s. 3(4) of the Environmental (Miscellaneous Provisions) Act 2011 and by thereafter awarding costs of the proceedings to an Taisce under the provision suggested by the Court, when An Taisce had issued and moved an application for an order pursuant to s. 7 of the Environmental (Miscellaneous Provisions) Act 2011.
6. The relevant provisions of the Planning Development Act 2000 should be interpreted and applied in accordance with their true meaning and effect, and the learned High Court judge has erred in this regard.
7. The learned trial judge erred in his interpretation of the provisions in Part XA of the Planning and

Development Act 2000.

8. The provisions of Directive 85/337 should be applied in these proceedings and to the enactments of the Oireachtas in accordance with Treaty on the Functioning of the European Union and judgements of the Court of Justice, and not otherwise, and the learned High Court judge has erred in this regard.
9. Under s. 177O of the Planning and Development Act 2000 ("PDA"), a substitute consent is treated as if it were a planning permission and the respondent has permission, therefore, to carry out the development, and the learned High Court judge erred in his interpretation and application of the section.
10. The learned trial judge erred in his interpretation and application of *Commission v Ireland* (Case C-215/06) generally and to s. 177O of the Planning and Development Act 2000.
11. A development that complies with a substitute consent is deemed to be authorised development, and the learned High Court judge has erred in failing to have regard to this.
12. The consent is not retrospective or historical only in the manner determined or at all: section 177O, the wording of condition 1 itself, the other conditions in the substitute consent, the content of the application, the assessment of the Board (and the planning inspector) make this clear, and the learned High Court judge has erred in this regard.

The appellants reserve the right to advance these grounds of appeal by way of legal submissions in due course, if leave be granted.

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:

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

Neutral citation of the judgment appealed against
[2016] IEHC 620; [2016] IEHC 701

References to Law Report in which any relevant judgment is reported

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 out the precise form of order(s) that will be sought from the Court of Appeal if the appeal is successful:

- (i) A declaration that the respondents, through their acts including excavation, have not engaged in development or unauthorised development within the meaning of section 2(1) of the Act of the Planning and Development Act 2000.
- (ii) An Order for the appellant costs of this appeal and of the High Court proceedings.
- (iii) An Order dismissing the An Taisce's appeal
- (iv) Affirm the decision of the High Court not to grant injunctive relief on the grounds, however, that the applicant failed to discharge the onus of proof that there was unauthorized development. Alternatively, affirm the decision of the High Court to exercise its discretion not to grant injunctive relief.

What order are you seeking if successful?

Order being appealed: set aside ☐ vary/substitute ☐

Original order: set aside ☐ restore ☐ vary/substitute ☐

No order was made against the appellant, but the court found the development was unauthorised development (appealed).

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

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

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions? ☐ Yes ☒ No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union? ☐ Yes ☒ No

If Yes, please give details below:

Will you request a priority hearing?

☐

Yes

☐

No

X

If Yes, please give reasons below:

Signed: O'Dwyer

(Solicitor for) the applicant/appellant

O'Dwyer Solicitors

Ballyhaunis, Co. Mayo.

Tel: 094-9630011

Fax: 094-9630575

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.