THE HIGH COURT
COMMERCIAL
JUDICIAL REVIEW
IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED
Record No. 2016/613JR

BETWEEN

DERMOT MCDONNELL

APPLICANT

–AND-
AN BORD PLEANÁLA

RESPONDENT

-AND-
OWENINNY POWER DAC

NOTICE PARTY

Judgment of Mr. Justice Robert Haughton delivered the 31st day of May, 2017.

1. This judgment deals –

(a) with the form of the order that the court should make consequent on its rulings made on 16 May, 2017 and 17 May, 2017, and
(b) with the applicant's application for a certificate of leave to appeal under section 50A(7) of the Planning and Development Act, 2000 (as amended) ("the 2000 Act").

The second question involves preliminary consideration of whether certification is required at all. It should be noted that the applicant has at all stages appeared in person.

2. It is necessary first to summarise the history of the proceedings thus far:

(i) The impugned decision of the respondent to grant approval for a windfarm at Oweninny, Bellacorick, Co. Mayo, is dated 2 June, 2016.
(ii) On 27 July, 2016, just within the 8 week period allowed by s.50(6) for seeking leave for judicial review of the Board's decision, the applicant lodged papers in the Central Office.
(iii) For reasons considered in my earlier rulings the applicant did not make his application for leave until he moved his application *ex parte* before Humphreys J. on 21 November, 2016. The matter was adjourned to enable the applicant to swear a further affidavit to exhibit a copy of the impugned decision, and to deal with delay, both of which were addressed in a second affidavit sworn by the applicant on 12 December, 2016.
(iv) By order dated 12 December, 2016, Humphreys J. granted leave to apply for the reliefs set forth in paragraph D1 of the Statement of Grounds (*certiorari)* on the grounds set forth in E1 and E2, but refused leave in respect of any other relief or on any other grounds viz. grounds E3 and E4.
The said order did not extend time for seeking leave, although the reasons for delay were addressed in the applicant's second affidavit.
(v) By order of McGovern J. dated 19 December, 2016, on the motion of the notice party the proceedings were admitted to the Commercial List for hearing.
(vi) In its Statement of Opposition the respondent raised a preliminary objection that the *ex parte* application for leave was out of time because it was not 'made' within 8 weeks, and pleaded that the applicant had not sought or been granted an extension of time, and that the reasons proffered were not 'good or sufficient' or outside his control within the meaning of s.50(8) of the Act of 2000. Similar objection was taken by the Notice Party in its Statement of Opposition. In the interests of expedition, the notice party chose to pursue these objections at full hearing rather than bring separate motions seeking to set aside the leave order.
(vii) The matter came on for full hearing before me on Tuesday, 16 May 2017. As the respondent and notice party were pursuing their preliminary objections, I considered that the hearing would be best managed by first determining whether the leave application was made on time (see Transcript day 1 pgs.4-6).
(viii) Having heard argument on that issue I delivered my *ex tempore* ruling on 16 May, 2017 (the "first ruling"). This is recorded in the Transcript day 1, pgs. 24-37. In my first ruling I respectfully differ from the approach taken by Humphreys J. that is evident from his decisions in *Burke v. Minister for Justice Equality and Law Reform* [2015] I.E.H.C. 614 and *McCreesh v. An Bord Pleanála* [2016] I.E.H.C. 394 viz. that when the papers in an *ex parte* application are lodged in the Central Office that stops time running. I determined that the *ex parte* application was not "made" for the purposes of section 50A(2) of the 2000 Act until the matter was moved in court. Accordingly, I found that the filing of the *ex parte* leave papers on 27 July, 2016, did not commence the proceedings, and the application was not "made" until the matter was moved before Humphreys J. on 21 November, 2016 (see Transcript day 1 p.37). Having so found I then stated: –
"that brings the court on to the second issue, which is whether it should extend time."

(ix) The court then proceeded to consider the question of extension of time. In addition to the affidavit evidence before the court the applicant was permitted to give oral evidence, on which he was cross examined, and I then heard further oral argument. I also had the benefit of full pleadings and the parties written submissions. In his oral submissions, counsel for the notice party made it clear to the court that a relevant factor that the court should consider in deciding this issue was the merits of the case, and the notice party wished to urge upon the court that no arguable case had been made out. This submission was based on commonly cited *dicta* of Clarke J. in *Kelly v Leitrim County Council* [2005] 2 IR 404 at pgs. 413, 415 and 423. Accordingly, counsel for the notice party contended that the grounds raised by the applicant were not arguable, and the applicant had an opportunity to and did reply to that contention.
(x) Having reserved my decision overnight, I delivered an *ex tempore* judgment on 17 May, 2017 - see Transcript day 2 pgs. 4-37 (the "second ruling"). I considered the application in the context of the non-exhaustive factors (a) – (f) identified by Clarke J. in *Kelly v Leitrim County Council* at pgs. 412 – 413 of his judgment, factor (f) being "the merits of the case". In effect, I found that while I would have been disposed to extend time for seeking leave to seek judicial review on consideration of factors (a) – (e), on consideration of the merits of the case under factor (f) I was led to the conclusion that I should not extend time. At page 26 of the Transcript I state –

> "… I find that the Applicants case on grounds (e)(i) and (ii) is not arguable and is bound to fail for a number of reasons which it is appropriate to set out."

Thereafter I give some six reasons related to the merits of the case that support this conclusion and I end on page 37 by stating –

> "I must, therefore, refuse the application to extend time for pursuing grounds (e) (i) and (ii) and the proceedings must therefore be dismissed."

(xi) As no party sought their costs I determined that there should be 'no order as to costs'.

FORM OF ORDER

3. It is evident from the foregoing that I decided firstly that the *ex parte* application for leave to seek judicial review was not "made" in time. Logically it follows that the order granting leave should be set aside, because it is not apparent on the face of that order that Humphreys J. considered or adjudicated on the question of whether to extend time for making the application. Secondly in the context of deciding whether to extend time I addressed, *inter alia,* the merits of the case and concluded that there was no arguable case. Accordingly, the operative part of the order should read as follows: –

> **THE COURT FINDS AND DETERMINES** that the application for leave to apply for judicial review was not made within the period prescribed in section 50(6) of the Planning and Development Act 2000 and accordingly was made out of time;
> **IT IS ORDERED** that, the court having determined that the within Application does not disclose arguable grounds for the grant of the relief claimed, the court refuses to extend the time having regard to section 50(8) of the Planning and Development Act 2000
>
> **AND IT IS FURTHER ORDERED** that the order of Mr Justice Humphreys made herein on the 12th day of December 2016, to the extent only that it granted leave to the applicant to seek judicial review, be set aside
> **AND IT IS FURTHER ORDERED** that the relief sought by the Applicant as set out in paragraph D(1) of the Statement of Grounds is refused and the Applicant's proceedings be dismissed.
> **And on hearing the said Applicant and Counsel for the Respondent and Counsel for the Notice Party in respect of costs**
> No order as to costs.

CERTIFICATION – IS IT REQUIRED?

4. This question is not straightforward. Counsel for the respondent presented legal authority bearing on the issue, but remained neutral as to whether it is or is not required. Counsel for the notice party argued that certification was required. The applicant did not address this issue, but did address the court and seek certification.
5. Section 50A(7) provides –

> "(7) The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the [Court of Appeal] in either case save with leave of the Court which leave shall only be granted where the Court certifies that it's decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the [Court of Appeal]."

6. In *A. B. v. Minister for Justice, Equality and Law Reform* [2002] 1 I. R. 296 the Supreme Court, in the context of a very similarly worded provision in section 5(3)(a) "The determination of the High Court of an application for leave to apply for judicial review as aforesaid or of an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court." of the Illegal Immigrants Trafficking Act 2000, addressed the question of whether the applicants required leave to appeal to the Supreme Court from orders of the High Court refusing them an extension of time within which to seek judicial review of a deportation order and a refusal of refugee status respectively. At the outset, two points should be noted about

this decision. First, the time limit for seeking judicial review in such cases under s.5(2)(a) of that Act was only 14 days. Secondly, it does not appear from the report that the High Court made any determination of the merits of the cases in refusing to extend time.
It was held by the Supreme Court, in allowing the appeals to be heard, that the issues involved on the application for an extension of time might be substantially different from those involved in the application for leave, and under the express provisions of the Illegal Immigrants Trafficking Act 2000 there was no ouster of the right of appeal from a refusal to extend time. Critically it was held that the refusal of an extension of time by the High Court was not a "determination" of an application for leave within the meaning of s. 5(3)(a).
The starting point for the court's consideration was Article 34.4.3 of the Constitution which (then) provided –

> "The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law."

Since this decision the Twenty Third Amendment to the Constitution has provided for the establishment of the Court of Appeal, and under the new Article 34.4.3 it is now that court that has appellate jurisdiction from all judgments of the High Court.
7. Keane CJ. stated at page 301: –

> "The critical provision is, however, that contained in subs.(3)(a). I do not think that I do any injustice to the argument advanced on behalf of the applicants in saying that it rests essentially on the proposition that the "determination" referred to in that subparagraph is a final judicial conclusion, after an examination of the merits, of either an application for leave to apply for judicial review or the application for judicial review itself. An application for an order extending the period within which the application is to be made, on the other hand, does not necessarily involve any examination of the merits of the application and, accordingly, cannot be regarded as a "determination" of the application. Where the court decides that there is good and sufficient reason for extending the time, it must necessarily proceed to a second and, as was urged, separate or discrete application, i.e. as to whether leave should be granted and it was only the second such adjudication which could be said to be the determination of the application for leave within the meaning of s.5(3)(a)."

8. Geoghegan J., with whose judgment Denham, McGuinness and Fennelly JJ. agreed, stated at p.319:

> "While it is true that this court has recently held in *G.K. v. Minister for Justice* [2002] 1 I.L.R.M. 401, that on an application for extension of time, the court is entitled to have regard to the fact that the merits of the application might be unstateable or, on the other hand, particularly strong, in many instances the issues on the application for extension of time would be quite different from the issues on the application for leave itself. All sorts of issues can arise on the application for the extension of time, such as non-delivery of letters, delay by the applicant's solicitor, difficulties in language communication *etc*. which might not turn out to be relevant on the application for leave.
> In this connection, it is irrelevant in my view whether the application for an extension of time is brought by an independent motion on notice in advance of an application for leave or whether the extension of time is requested in a combined motion on notice seeking the extension of time and then, if granted, leave for judicial review. In either event the issues involved on the application for extension of time may be substantially different from those involved in the application for leave. Under the express terms of the Act the restrictions on the right of appeal to the Supreme Court apply to the application for leave or the application for judicial review and as a matter of ordinary grammar and syntax, I find it difficult to see how it could be argued that there is an ouster of the right of appeal from a refusal to extend time. If the Oireachtas had intended that, it should have said so. Until the extension is granted there is no application for leave in existence. But even if as a matter of grammar and syntax, such an argument could be made, there is certainly not a clear and unambiguous ouster of the right of appeal which is required under the constitutional jurisprudence referred to earlier in this judgment."

9. In agreeing with Geoghegan J, Fennelly J stated at p.324:

> "The fact that the extension of time application is, in principle, distinct, is illustrated by the fact that the court accepted in *The Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360, as Keane C.J. noted that a separate application could be made for an extension within the fourteen day period. This point is further underscored in the judgment of Geoghegan J., where he points to the distinct character of the matters which will need to be considered on such an application for an extension of time. This view gains further support from the remark of Hardiman J. that this "is a special statutory jurisdiction which is in [his] view *sui generis* " (*G.K. v. Minister for Justice* [2002] 1 I.L.R.M. 401 at p. 404). There is a further decisive consideration. As Geoghegan J. also points out, where the respondent objects to an order which is made granting an extension, there is nothing to prevent that party from appealing such an order. Section 5(3)(a) does not apply. The reason is that the order granting the extension of time does not determine whether leave will be granted. Some troublesome anomalies flow from treating the refusal of an extension of time as a determination of an application for leave. Firstly, it is clear, that an order *granting* an extension is not to be treated as amounting to the determination of an application.

> It seems equally clear that an order refusing an extension will be treated as not determining the application for leave, if the extension application is made within the fourteen days. On the other hand, an order refusing leave after the expiry of the time will be treated as determining the application for leave. In my view, that interpretation of the section is both inconsistent and discriminatory. It is not an acceptable approach to the interpretation of a provision claimed to limit the right of an affected person to access to the courts."

10. *A.B.* was followed and applied quite recently by the Supreme Court in *A. v. Minister for Justice and Equality* [2013] IESC 18. The applicant brought a motion seeking leave to seek judicial review of a decision of the Refugee Applications Commissioner somewhat outside the 14 day period. That application was adjourned, and was never in fact heard. During the period of adjournment, the respondent brought an application by notice of motion seeking an order dismissing the proceedings on the grounds that they were frivolous/vexatious or doomed to fail and an abuse of the process. The court considered the grounds, and noted that the applicant had a pending appeal to the refugee appeals tribunal, and acceded to the motion and dismissed the proceedings. The appellant appealed against that judgement and order, and the respondents brought a motion before the Supreme Court seeking to have the appeal dismissed on the basis that the appellant required a certificate of leave to appeal. The court considered that the net point was whether the High Court order dismissing the proceedings was a "determination of the High Court of an application for leave to apply for judicial review as aforesaid". At paragraph 24 of her judgement Denham CJ. states –

> "24. The facts of the case, as set out earlier, that the appellant's application for leave to apply for judicial review was not heard by the High Court. What the High Court heard was the motion brought by the respondent seeking an order that the appellant's proceedings be dismissed on the grounds that they were frivolous, vexatious and/or doomed to failure. Thus, to decide if the decision of the High Court on that motion was a "determination" under s.5(3)(a) requires an analysis of the law and facts."

Denham CJ. then referred to the decision in *A.B.,* quoting with approval from the judgement of Geoghegan J. at page 319, referred to above, where he states that the issues involved in the application for extension of time "may be substantially different from those involved in the application for leave" and where he found "it difficult to see how it could be argued that there is an ouster of the right of appeal from a refusal to extend time". Denham CJ. then stated: –

> "27. I would apply that analysis to this case. The issues involved in a motion to dismiss may be substantially different from those involved in an application for leave to apply for judicial review. I agree and apply the reasoning of Geoghegan J. that the wording of s. 5(3)(a) does not clearly ouster an appeal from such a motion. Further, even if such an argument could be made, there is certainly not a clear and unambiguous ouster of the right of appeal, such clear language being necessary under the constitutional jurisprudence."

11. I was also referred to my own decision in *Sweetman v An Bord Pleanála and others* [2017] IEHC 133, but this does not assist primarily because in that case the jurisprudence outlined above was not raised in argument or considered by the court.
12. In highlighting the above quoted extracts from the decisions in *A.B.* and *A.,* counsel for the notice party argued that the court should distinguish the present case from one in which a decision to refuse an extension of time does not have regard to the merits of the application. Keane CJ. refers to a "determination" as being a judicial determination where there has been an examination of the merits of the case. Geoghegan J. in referring to the judgement of Hardiman J. in *G.K.* acknowledges the entitlement of the court considering an extension of time to have regard to the merits of the case where they are "unstateable", but emphasises that in many instances the issues on an extension application will be quite different. Fennelly J. also emphasises that the extension application does not decide whether or not leave will be granted – that is a further determination that is made if an extension is granted.
13. Thus counsel urged the court to have regard to the fact that in the present case statements of opposition with verifying affidavits were filed, the pleadings were effectively closed, and the matter came on for hearing before this court by way of full trial. Furthermore, all parties filed written submissions dealing with the merits of the applicant's application for judicial review (as well as the issue of delay and extension of time). More particularly counsel urged that in determining the extension of time application, the court, on the invitation of the notice party, had regard to the merits of the application. It did so with the benefit of full pleadings, replying affidavits and the submissions of all parties. Having heard the extension application the court refused an extension of time purely on the basis that on the merits, the application for judicial review was not arguable.
14. I believe these arguments are well made. It is notable that when the Supreme Court delivered its decision in *A.B.* Hardiman J had only recently given his judgment in *G.K.* noting that "…it is not an excessive burden to require the demonstration of an arguable case" where an extension of time is sought. The Supreme Court in *A.B.* did not take issue with that proposition, and it was applied by McGuiness J. in *C.S. v. Minister for Justice* [2004] IESC 44. Some years later the principle achieved prominence in the field of planning judicial review following the decision of Clarke J in *Kelly v Leitrim County Council* - see particularly pages 413-415, which were relied upon in my second ruling. The practice of having regard to the merits of the case in reaching a decision on whether to extend time has grown over time and is now a regular feature in arguments raised by respondents opposing a time extension.
15. There can be no doubt that in this case, on the urging of the notice party, the court expressly had regard to the merits, or lack thereof. Moreover, this happened in the course of argument and the applicant was afforded the opportunity to and did

address the court specifically on the notice party's submissions that the grounds pleaded by the applicant were not arguable. This is evident from the transcripts and is reflected in the order that will now be perfected stating -

> **IT IS ORDERED** that, the court having determined that the within Application does not disclose arguable grounds for the grant of the relief claimed, the court refuses to extend the time having regard to section 50(8) of the Planning and Development Act 2000.

This reflects the true position, namely that this court did not refuse to extend time based on any time considerations, but did so solely on the basis that on fuller consideration of the relevant grounds with the benefit of full pleadings, replying affidavits and submissions, those grounds were not arguable. Indeed, had the grounds been arguable I would have been disposed to have extended time. This is apparent from those parts of my second ruling in which I accepted the applicant's evidence and found that he had, inadvertently, been misled as to when he should 'move' the *ex parte* application, and that he had in all other respects demonstrated good and sufficient reason for extending time by showing circumstances that were effectively beyond his control. The only reason time was not extended was because the two grounds pursued were not arguable.

16. However a distinction must be drawn between my first ruling, that the *ex parte* application was made out of time, and the second ruling refusing to extend time. In respect of the first ruling there was no consideration of the merits of the application. It was a separate and distinct matter that was dealt with effectively in a preliminary module - with narrow facts and focussed argument upon which the basis for challenging the Board's decision had no bearing whatsoever. It was properly described as a preliminary matter. It clearly could not be described as a "determination" of the leave application because it concerned whether or not such an application had been "made" at all within the meaning of s.50(6) of the 2000 Act. *A fortiori* it was not a "determination" of the judicial review. In respect, therefore, of the first ruling it must be concluded that s.50A(7) has no application and the requirement for certification does not apply It is worth noting that the court enquired of the applicant as to whether he wished to raise any point of law as to the correctness or otherwise of the first ruling. He indicated his belief that the jurisprudence cited by counsel for the respondent and notice party "…led me to conclude that your interpretation of the law is probably the correct one, judge." (Transcript Day 3 p.56)..

17. However it does apply to the second ruling, and it is necessary to consider whether the applicant has raised any point law of exceptional public importance in respect of which it is desirable in the public interest that the court should certify for appeal.

POINTS OF LAW FOR CERTIFICATION

18. I note that in advance of this hearing the respondent's solicitors wrote to the applicant advising him of s.50A(7) and furnishing him with a copy of the judgement of McMenamin J. in the *Glancre* case to which I shall refer shortly. The applicant's submissions were largely contained in a written statement which he read out to the court and which appears in the Transcript for day 3 pages 47-55. Unfortunately, the applicant did not formulate any specific points of law in respect of which he sought certification and the court is left with the task of trying to discern possible points of law from his address.

19. In considering these the court applies the test under s.50A(7) that the point of law must be of "exceptional public importance" and separately that it must be desirable in the public interest that an appeal be taken. The court also applies the principles summarised by McMenamin J in *Glancré Teoranta v. An Bord Pleanála* [2006] I.E.H.C. 250: –

> "I am satisfied that a consideration of these authorities demonstrates that the following principles are applicable in the consideration of the issues herein.
> 1. The requirement goes substantially further than that a point of law emerges in or from the case. It must be one of *exceptional importance* being a clear and significant additional requirement.
> 2. The jurisdiction to certify such a case must be exercised sparingly.
> 3. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as to enable the courts to administer that law not only in the instant, but in future such cases.
> 4. Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court (Kenny).
> 5. The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.
> 6. The requirements regarding "exceptional public importance" and "desirable in the public interest" are cumulative requirements which although they may overlap, to some extent require separate consideration by the court (Raiu).
> 7. The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word "exceptional".
> 8. Normal statutory rules of construction apply which mean *inter alia* that "exceptional" must be given its normal meaning.
> 9. "Uncertainty" cannot be "imputed" to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.
> 10. Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a

point to be certified be such that it is likely to resolve other cases."

I would observe that point 4 is particularly relevant. As a matter of logic, it is more difficult for the applicant to persuade the court that there could be any point of law of exceptional public importance arising out of the decision where the grounds raised have already been held not to be arguable.

20. The applicant argues that the court has misunderstood the significant role of "capacity factor" in the context of this particular planning application, its relationship to policy objectives of the State and its description of unit production in the context of wind farms. He says that in this planning application capacity factor replaced "the very detailed windspeed information normally included in wind farm applications", and that there was a deficit of wind speed information. He argues that this is all that he had to work with and that it formed the basis of the "required environmental calculations, for example carbon abatement".

21. This comes back to the applicant's core complaint that the capacity factor was much greater than represented by the developer and that "the price tag" that the developer will pay for this development in terms of community benefit contribution is far too low.

22. In my second ruling I dealt with this by reference to the material before the board which included the EIS, the applicant's submissions on capacity factor and the evidence at the oral hearing, and the Inspectors main report and conclusions which were accepted by the board. As I point out, the case law establishes that the adequacy of an EIS is a matter for the planning authority. That case law at least in relation to planning decisions, does not stand in any state of uncertainty, nor does the applicant suggest or try to identify any uncertainty. This therefore does not give rise to any point of law that the court should certify.

23. In his address the applicant then returns to his complaint that the developer used a 33% capacity factor which he characterised as a "lie" based on 2002 information and "using very dated technology", and suggests that the developer was trying to mislead An Bord Pleanála and court. He expresses the view that "the planning system as it stands is a blaggard's charter" and develops this theme with similarly colourful language in relation to the law. His end point is that this has led to the grant of permission without a community benefit contribution that appropriately compensates the local community. He returns to this theme later in his address when asserting that there should be 'public confidence in the planning system" and that developers should not be "free to tell us whatever comes into their head when it comes to non-environmental or economic information".

24. The applicants broadside attack on the planning system is really a generalised attack on the 2000 Act and regulations made thereunder, and as such is a complaint about the planning policy and legislation that is a matter for the Oireachtas. Moreover, his complaint is so lacking in specificity that it does not give rise to a point of law for certification. Further on in his address the applicant narrows this down to criticism of the court's limited role in a system of judicial review that does not extend to reviewing the content of decisions other than in accordance with the test set out in *O'Keeffe*. As I have already stated the jurisprudence in this regard is well established.

25. Next the applicant argues that "economics are as much part of the human environment as the electromagnetic field, noise, shadow, flicker or gravity for that matter… Thus, it seems to me that when An Bord Pleanála comes to assess the impacts, direct and indirect on human beings, economic factors should be fully considered." The difficulty is that as a matter of fact the board had considered the planning application, submissions, and material within the Inspector's main report, bearing on the issue of the environmental effect on the community, and community benefit contribution to compensate the local community. It must also be presumed that board took into account the Inspector's recommendations based on the wind farm capturing "a reasonable or better wind resource" than 33% capacity factor, and the Inspectors view that a community contribution of €2500 per installed megawatt per annum would be appropriate. The applicants point therefore does not arise as a point of law. It seems to me that his point is really directed at the merits of the decision. As I've already said it also seems to me that his focus on the capacity factor is misplaced insofar as the community benefit contribution is or should be based on actual output measured in terms of megawatts.

26. The applicant has not satisfied me that there are any points of law of exceptional public importance in respect of which I should grant a certificate and accordingly I refuse his application.