OIFIG AN PHRÍOMH-ATURNAE STÁIT
CHIEF STATE SOLICITOR'S OFFICE

URGENT BY E-MAIL

YOUR REF.: SWP100100

4th April 2014

OUR REF.: JA/2013/02367

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Re: Pat Swords -v- The Minister for Communications, Energy and Natural Resources, Ireland and the Attorney General
High Court Record No. 2013/4122P

Dear Sirs,

We acknowledge receipt of your letter of 28th March 2014, the contents of which are noted.

Your letter addresses the issue of your client's application for a protective costs order. At paragraph 10 of the relief section of your Statement of Claim, a claim is advanced for a protective Costs Order in respect of the Plaintiffs costs "to be made at an interlocutory stage of the proceedings". An entitlement to a protective costs order is asserted at paragraph 57 of the Statement of Claim. In this regard, we assume that you will be issuing a Notice of Motion in early course claiming a protective costs order and you might confirm that you will be proceeding in that manner.

On the topic of protective costs orders in proceedings relating to the environment, we draw your attention to the decision of Mr Justice Michael Peart in the case of Philip D. Browne v. Fingal County Council (2013) IEHC 630, unreported, judgment

delivered on 11th December 2013. In that case the applicant was not legally represented and asked the Court for a "protective costs order". At paragraph 6 of his judgment, Mr Justice Peart described the relief being sought in this regard in terms as follows:

> "The applicant seeks an order from this Court in advance of moving his application for leave that his legal costs will be paid, regardless of the outcome. He needs this assurance before he engages a legal team to act on his behalf. In effect, he is seeking an order that regardless of what his costs may turn out to be, these will be met by Fingal County Council. He believes that if the Aarhus Convention, and the Council Directives in question are to be given proper effect, he is entitled to such an order now. What he is seeking amounts to legal aid, or an indemnity in respect of his own costs regardless of the outcome of the case."

Your letter of 28th March indicates that you intend to seek the same type of order sought by Mr Browne. In refusing to make the order sought in the Browne case, Mr Justice Peart stated at paragraph 16 of his judgment as follows:

> "I am not satisfied that under Aarhus the applicant is entitled to the sort of blanket costs indemnity order he now seeks in advance of bringing his application for leave to seek judicial review. Neither am I satisfied that this Court has jurisdiction under Statute or otherwise to make the order which he is seeking. The jurisdiction to in certain circumstances make a protective costs order, which is identified by Laffoy J. in Village Residents Association Ltd. v. An Bord Pleanala (2000) 4 I.R. 321 and referred to by Kelly J. in Friends of the Curragh Environment Ltd. v. An Bord Pleanala (2006) IEHC 243 is not so wide as to encompass what the applicant seeks herein."

We refer to the Browne case in the context of putting you on notice of the fact that the Defendants will resist any application that is made for a protective costs order. In the view of the Defendants the Plaintiff does not have an entitlement to same.

In the context of discussing your clients claim to a protective costs order, your letter referred to Section 50B of the Planning and Development Act 2000, as amended. In your letter you stated that the Defendants had denied that your client did not stand to benefit from this provision. This assertion is incorrect. There is no such plea in the Defence. The Defendants take the view that, Section 50B of the said Act do apply to the proceedings. In conclusion on this issue, and in the same context, we also refer to the fact that Mr Justice Peart addressed the issue of the application of Section 50B of

the said Act in his judgment in the Browne case. He was satisfied that it did apply (cf. para. 15 of his judgment).

In your letter you comment upon the content of the Defence and assert, by implication that it is excessively detailed. In this regard we respond by pointing out that the Statement of Claim contained considerable detail along with multiple assertions of fact and and law with which the Defendants take issue. The Statement of Claim was settled by Junior Counsel and by two Senior Counsel. It was presumably carefully prepared and contains the case that the Defendants must meet. The Defendants are entitled to defend themselves and the Defence contains its response to the Statement of Claim. The Defence was very carefully drafted and it is not accepted that it is excessive in any way.

In your letter you refer to the core issues to be determined. These are in fact all of the issues in respect of which relief is claimed. The Statement of Claim is a lengthy document and contains many statements, assertions and allegations that are intended to support the Plaintiff's claim in relation to the core issues and with which the Defendants take issue. If the Plaintiff, in order to shorten the proceedings wishes to withdraw some of the statements, assertions and allegations made, this is a matter for him. In those circumstances, it would be necessary to deliver an amended Statement of Claim to which the Defendants would respond with an amended Defence.

In relation to the matter of discovery of documents, the State Respondents cannot foresee any necessity for any motion before the court being required. We note your client intends, in due course, to furnish our clients with a notice for further and better particulars. Should your client need any documents that are relevant and not already exhibited, we request that he identify such documents for our clients' consideration of provision of such documents.

Your letter contained costs estimates. All that we can say in relation to them is that we are surprised and, indeed, shocked at the levels suggested.

Your letter contained time estimates in relation to the proceedings. An estimate of 10 days is given. In the core issue context a 2 day estimate is given. We regard the latter

estimate as not realistic and will make no further comment upon it. In relation to the 10 day estimate we would not agree with same. In our view, if the matter proceeds, the hearing will be considerably longer. At this stage we could not give an estimate. It should be emphasized in this context that in these proceedings the Plaintiff is seeking to challenge the legal basis for major aspects of State policy in the field of renewable energy as well as virtually the entirety of its policy where wind energy is concerned. This is a huge area. In making his case the Plaintiff, in the Statement of Claim, raises many factual and legal issues that are disputed by the Defendants. In our view, a considerable period of hearing time will be required to make the Plaintiffs case on the facts and on the law. The Defendants will require a similarly lengthy period to respond and both sides will have to tender evidence.

Your letter ended with what is described as your client's proposal. In your letter you invite the Defendants to accept that proposal. Please note that the Defendants do not accept the proposal. We will, therefore, await your client motion seeking a protective costs order.

In conclusion, we re-emphasise the fact that the Defendants are of the view that there is no basis, in fact or in law, for the Plaintiff's claim. It is the intention of the Defendants to defend the proceedings fully and on the basis of all pleas, including the preliminary pleas, in the Defence, as filed. With regard to the Delay motion that has been issued we hereby give your client the opportunity to withdraw the proceedings so as to avoid further expense, time and waste of resources for him and for the Defendants. If your client decides to take this course, we would be prepared to accept that no order as to costs incurred to date in the matter should be made. Please let us have your response to this proposal.

Yours faithfully,

EILEEN CREEDON
CHIEF STATE SOLICITOR