O. 58, r. 18(1)

SUPREME COURT

Respondent's Notice

Supreme Court record number		**S:AP:IE:2016:000099**

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

Peter Sweetman and the Swans and the Snails	**V**	**An Bord Pleanála, Ireland and the Attorney General (Respondents) Clare County Council and North Tipperary County Council (Notice Parties)**

Date of filing	Appeal filed 29 July 2016
Name of respondent	An Bord Pleanála
Respondent's solicitors	Barry Doyle & Co, Marshalsea Court, Merchant's Quay, Dublin 8 Telephone: (01) 670 6966 | DX 1081 Four Courts
Name of appellant	Peter Sweetman and the Swans and the Snails
Appellant's solicitors	Harrington & Co (details per Notice of Appeal)

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	*An Bord Pleanála*

The respondent was served with the application for leave to appeal and notice of appeal on date
3 August 2016

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)

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:	✓

How would you prefer us to communicate with you?

	Document Exchange	✓	*info@doyleandco.com*
	Post		*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

n/a

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:

None in dispute.

4. Respondent's reasons for opposing leave to appeal

1. The constitutional threshold of the interests of justice is not met in this case because (a) the law is clear and settled and (b) the case put forward is moot or hypothetical. There are no reasons why it is necessary for the Supreme Court to hear an appeal in this matter and no exceptional circumstances exist to warrant an appeal.

2. First, as the Applicant makes clear, the area of land to which the appeal relates is 0.226ha of alluvial wet woodland. Whilst the smallness of the area does not itself mean the case has no general public importance, when coupled with the fact that the European Commission did not object to the land's non-designation, and the High Court's finding that the site will be regenerated, it is indicative of the limited public importance of the factual issue in this case.

3. Second, the Applicant alleges that the decision has "the potential to create uncertainty" by comparison with the decision of Charleton J in *Sandymount and Merrion Residents Association v An Bord Pleanala ("SAMRA")* [2013] IEHC 542 on the basis that the Court "appeared to suggest" that priority habitats would enjoy greater protection than were afforded to non-priority habitats. In fact, there is no uncertainty, actual or potential. SAMRA was concerned with non-priority habitats; the distinction between priority and non-priority habitats is clear; and the High Court clearly agreed with but distinguished SAMRA on that basis. Similarly, the legal point in Harrington v. Bord Pleanala, [2014] IEHC 232, concerned priority habitats but there was no evidence that any priority habitat was involved. The Court agreed with the judgment but distinguished the case as the lands here did contain a priority habitat type. The present judgment is consistent with both SAMRA and Harrington in law, and the Court clearly explains the distinguishing features. There is, accordingly, no uncertainty or ambiguity. In those circumstances, the reference to BW v. Refugee Tribunal and Ogalas are not relevant.

4. The fact that the law relating to appropriate assessment may still be evolving, as

noted by Haughton J in the *People Over Wind* case [2015] IEHC 393 is irrelevant to the present case which deals with the separate issue of site designation, a distinct area of the Habitats Directive. The concept of "shadow protection" itself is not novel: it is simply a novel name for a concept which emerged in the European Court in Dragaggi (Case C-244/05) and its parameters are clarified already. The CJEU has already considered the issue of what the Applicant terms "shadow protection" on multiple occasions and emphasised that it is the protection that applies to a site by virtue of the fact that it is required to be designated as a special area of conservation (Cases C-117/03 *Draggagi*, C-244/05 *Bund Naturschuz* and C-340/10, *Cyprus*). Sites that are not required to be designated to not engage this protection. This was all accepted by the High Court and, indeed, was clear on the *SAMRA* judgment which was applied.

5. In his final point the Applicant alleges that this Court should grant him a certificate of leave to appeal because there "could be" legal uncertainty if it does not. He does not question the legal test applied by the High Court, or establish any actual uncertainty. In circumstances where this Court is already dealing with an appeal as to whether an appeal lies against the refusal of a certificate (Grace v. Bord Pleanala), it is submitted that, even if there is a right to appeal the refusal of a certificate, there is no basis advanced to upset the decision of the High Court in this case, no matter of general public importance and no public interest consideration.

6. Furthermore, the certificate question as advanced is moot as it asks whether a site which has not been designated as an SAC under Article 6 is entitled to protection, when it is clear that it can: the High Court addressed this by answering the more pertinent question of whether a piece of land which <u>has not even been proposed</u> under Article 4, or queried by the Commission under Article 5, is entitled to protection; and the clear view of the CJEU is that it is not (*Draggagi*, *Bund Naturschuz* and *Cyprus*, op cit). Furthermore, the High Court also found as a fact that there was no question of any serious compromise to the ecological characteristics of the site in question.

7. Insofar as the Applicant's prayer for a reference is relied on to indicate that the constitutional threshold is met, the above is repeated. The law is entirely clear. Neither Charleton nor McDermott JJ saw any need to refer a question to assist in application of the existing CJEU jurisprudence. The Court is not obliged to refer all questions of European law, however well established, to the CJEU, much less to allow an appeal where a lower Court has correctly applied those well established rules.

8. The issue in this case is not of public importance. There is no public importance in continuing to litigate a point which has no bearing on the facts in the case for the reasons set out above. The interests of justice do not favour an appeal in this case nor are there any exceptional circumstances to warrant an appeal to this Court given the issues in this case.

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

1. In refusing the relief sought the High Court Judge made no error. A priority habitat is not automatically entitled to designation or protection. Only sites which the State or Commission have found to be of importance after application of the Article 4 and 5 procedure are so entitled. The law was entirely clear and the 0.226ha of alluvial wet woodland in question is not entitled to what is described as "shadow protection" in this case.

2. The learned trial judge correctly determined that the SAMRA decision was not authority for the proposition that all lands containing a priority habitat type must be protected by refusal of development consent, even if undesignated and regardless of whether they fulfil the other criteria for designation. As he noted, there is a process of designation, and the CJEU has held that sites which are within the selection process but which have not yet been designated are indeed entitled to protection pending their designation as special areas of conservation (and he correctly cited Cases C-117/03 *Draggagi*, C-244/05 *Bund Naturschuz* and C-340/10, *Cyprus*). No such facts arose here, however, and there was no error in how the High Court Judge read or understood the *SAMRA* decision

3. The point being put forward at (3), as now formulated is that, once a site contains a priority habitat type it must be protected; but the Directive is quite clear that what are to be protected are sites of Community importance, and Community importance can only be established by applying the criteria in Annex III. Sites which are not of importance are not entitled to protection. The Applicant contends that there must be a negative decision to exclude sites; but the scheme of the Directive requires a positive decision by the State to propose a site under Article 4, subject to a review by the Commission under Article 5; and the European Court has clearly held that it is only where such a positive conclusion is reached that a right to protection arises..

4. There is no requirement that the list of sites has to be exhaustive and the Applicant misconstrues Case C-67/99 *Commission v Ireland*. Rather than stating that the list of sites must be exhaustive, that case refers to an exhaustive list *"of the sites which, at a national level, have an ecological interest which is relevant from the point of view of the directive's objective of conserving natural habitats and wild fauna and flora."* This is not

a list of all sites containing priority habitats. Rather, it is a list of all sites of Community importance, arrived at by application of the criteria in Annex III.

5. This repeats Ground 4 and the above is referred to. The reference to "all sites identified by Member States which contain priority habitat" in Para.1 of Stage 2 of Annex III of the Directive makes it clear that it is the sites *identified* that are relevant, rather than all sites containing particular habitat types. Those sites are identified by the State based on their representativity, area, conservation and value in light of the Directive's objectives (ie, Annex III, Stage 1). Article 5 makes clear that sites containing priority habitats which the State has omitted may be included if the Commission feels they are essential to achieve the overall objectives of the Directive. Thus, the State may omit sites containing a priority habitat after it has applied the selection criteria, and it is for the Commission to object to the omission if it sees fit. As there is no automatic obligation to designate such sites, logically and necessarily there can be no automatic obligation to protect those that have properly not been designated.

6. No particulars of the alleged error at 6 are given, and the same answer applies as at 5. There is a margin of discretion arising from the fact that the Directive clearly confers a discretion. The State does not have to designate every single site that hosts a particular habitat type, whether priority or otherwise.

7. There was no error as alleged at 7. The provisions of Article 4(2) are designed to facilitate a Member State in circumstances where the Member State has in accordance with Article 4(1), and applying the criteria set out at Annex III (State 1), identified sites containing priority habitats or species which represent more than 5% of its national territory. They do not and cannot be read as obliging a Member State to propose every area of priority habitat within its territory for designation regardless of the extent to which it satisfies the criteria set out in Annex III (Stage 1). The evidence was that the Commission had taken no issue with the State's proposals (para.58 of the judgment). In effect, the Applicant is asking this Court to determine that the Commission was incorrect in *not* taking issue with the State's proposals. This is not a justiciable complaint.

8. There was no error as alleged at paragraph 8. The Commission has power to intervene in any case where an important site has not been designated. Such cases should of course be exceptional. The fact that the Commission has not intervened is, it is submitted, a relevant factor in assessing whether there is any cause for concern about the non-designation. The requirement for on-going surveillance on the part of a Member State does not alter the fact that the Commission in this case is satisfied with the amount of the habitat type proposed for designation by the State.

9. Ground 9 repeats the contention that there is uncertainty or an error in how *SAMRA* was

applied. This is not the case.

10. The learned High Court judge noted, as an aside, that if Article 6 applied, its requirements would be satisfied. It was clear that Article 6 did not apply. Therefore, the Court was not addressing whether those requirements would be satisfied under Article 6(3) or 6(4) (ie, because there would be no adverse effect on the integrity of the site, or because compensatory measures for the adverse effect would be adequate.) Thus, the Court was not concerned with the issues in Briels or Orleans (Cases C-521/12 and C-388/15 respectively) which deal with that distinction. The alleged error simply does not arise. and the case law cited is simply not relevant.

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

Brian Foley BL
Nuala Butler SC
Alan Doyle, solicitor.

6. Additional grounds on which decision should be affirmed

None.

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:

Reference

1. Replying to the Applicant's argument for a reference, there is no need to refer in this case because the law relating to the established facts is entirely clear. Neither Charleton nor McDermott JJ saw any need to refer a question to assist in reaching their clear and direct application of the existing jurisprudence of the CJEU. The Applicant appears to contend that the final Court is obliged to refer all questions of interpretation of any European law concept, however well established. That is entirely incorrect. In this respect, the Applicant does not actually set forth any particular interpretive issue of European law but contends that there is an uncertainty as between the decisions of Charleton and McDermott JJ.

2. In Draggagi (Case C-117/03) the European Court held:

   25. … on a proper construction of Article 4(5) of the Directive, the protective measures prescribed in Article 6(2), (3) and (4) of the Directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the Directive, are on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Article 21 of the Directive.

   26. This does not mean that the Member States are not to protect sites as soon as they propose them, under Article 4(1) of the Directive, as sites eligible for identification as sites of Community importance on the national list transmitted to the Commission.

   27. If those sites are not appropriately protected from that moment, achievement of the objectives seeking the conservation of natural habitats and wild fauna and flora, as set out in particular in the sixth recital in the preamble to the Directive and Article 3(1) thereof, could well be jeopardised. Such a situation would be particularly serious as priority natural habitat types or priority species would be affected, for which, because of the threats to them, early implementation of conservation measures would be appropriate, as recommended in the fifth recital in the preamble to the Directive.

3. The Court's rationale is clear: any site that is established under Articles 4 and 5 to meet the criteria for designation, applying the site selection criteria, must be protected, even before Article 6 applies to it. The Court was there looking at a site that was on the Commission's list of sites of community importance. In Case C-244/05 *Bund Naturschuz* it applied the same rationale to a site that was on the national list only. In Case C-340/10, *Cyprus*, it applied it to a site that the Commission maintained should have been on the national list. The difference in the

present case is that the Applicant wrongly interprets the principle as being that any site that contains a priority habitat must be designated. This is not the case. The site must be one that meets the selection criteria. These involve a measure of discretion for the State subject to review by the Commission. As the High Court tellingly held, there was no evidence that the Commission was dissatisfied with the State's designation process in this case.

4. It is submitted that the law is clear and there is no obligation to refer.

Will you request a priority hearing?		*Yes*	✓	*No*
If Yes, please give reasons below:				

Signed:_____

Barry Doyle and Company
Solicitors for the respondent
23 Merchants Quay
Dublin 8

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.