

Appendix FF

Order 58, rule 15

No. 1

SUPREME COURT

Application for Leave and Notice of Appeal



For Office use

Supreme Court record number of this appeal	
Subject matter for indexing	

Leave is sought to appeal from

The Court of Appeal The High Court

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

FRIENDS OF THE IRISH ENVIRONMENT LIMITED	v	AN BORD PLEANALA IRELAND AND THE ATTORNEY GENERAL -And- EDENDERRY POWER LIMITED BORD NA MONA PLC THE DEPARTMENT OF ARTS HERITAGE AND THE GAELTACHT THE ENVIRONMENTAL PROTECTION AGENCY AND AN TAISCE
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High Court Record Nr | 2014 No 43 JR | Court of Appeal Record Nr |

Date of filing

Name(s) of Applicant(s)/Appellant(s) | FRIENDS OF THE IRISH ENVIRONMENT LIMITED

Solicitors for Applicant(s)/Appellant(s) | O'Connell & Clarke
Solicitors
Suite 142
The Capel Building
Mary's Abbey
Dublin 7

Name of Respondent(s) | AN BORD PLEANALA IRELAND AND THE ATTORNEY GENERAL

Respondent's solicitors | Barry Doyle & Company Solicitors (An Bord Pleanála); Chief State Solicitor (Ireland and the Attorney General);

Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?

Yes No

If yes, give [Supreme Court] record number(s)

Are you applying for an extension of time to apply for leave to appeal? Yes No

If Yes, please explain why

Attended at Supreme Court Office on the 30/5/17 but was after 4-30pm and office was closed. also attended on 31/5/17 & had to make arrangements.

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Michael White
Date of order/ Judgment	6 th April 2017.

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	FRIENDS OF THE IRISH ENVIRONMENT LIMITED
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Original status

<input type="checkbox"/>	Plaintiff
<input checked="" type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner

<input type="checkbox"/>	Defendant
<input type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party

Solicitor			
Name of firm	O'Connell & Clarke Solicitors		
Email	info@oconnellclarke.ie		
Address	Suite 142 The Capel Building Mary's Abbey Dublin 7 County Dublin	Telephone no.	01 872 2246
		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	Oisin Collins BL		
Email	oisinrcollins@gmail.com		
Address	338A The Capel Building Capel Street Dublin 7	Telephone no.	018148858
		Document 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 Bord Pleanála
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Original status	<input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant	Is this party being served with this Notice of Application for leave? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	
	<input type="checkbox"/> Applicant	<input checked="" type="checkbox"/> Respondent		
	<input type="checkbox"/> Prosecutor	<input type="checkbox"/> Notice Party		
	<input type="checkbox"/> Petitioner			

Solicitor			
Name of firm	Barry Doyle & Company Solicitors		
Email	info@doyleandco.com		
Address	Marshalsea Court, 23 Merchants Quay, Dublin 8	Telephone no.	01 6706966
		Document Exchange no.	
		Ref.	Alan Doyle
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)

Senior Counsel			
Name	Nuala Butler SC		
Email	nbutler@lawlibrary.ie		
Address	Law Library	Telephone no.	
		Document Exchange no.	
Postcode			

Junior Counsel			
Name	Fintan Valentine BL		
Email			
Address		Telephone no.	
		Document 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"/> E-mail
<input type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)

Respondent's full name	Ireland and the Attorney General
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Original status	<input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant	Is this party being served with this Notice of Application for leave?			
	<input type="checkbox"/> Applicant	<input checked="" type="checkbox"/> Respondent			Yes	X
	<input type="checkbox"/> Prosecutor	<input type="checkbox"/> Notice Party				
	<input type="checkbox"/> Petitioner					

Solicitor			
Name of firm	Chief State Solicitor		
Email	contact@csso.gov.ie		
Address	Chief State Solicitor's Office Osmond House Little Ship Street Dublin 8	Telephone no.	01 417 61000
		Document Exchange no.	
		Ref.	
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)

Senior Counsel			
Name	Garrett Simons SC		
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Junior Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Notice Party's full name	Edenderry Power Plant
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Original status	<input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant	Is this party being served with this Notice of Application for leave?			
	<input type="checkbox"/> Applicant	<input type="checkbox"/> Respondent			Yes	X
	<input type="checkbox"/> Prosecutor	<input checked="" type="checkbox"/> Notice Party				
	<input type="checkbox"/> Petitioner					

Solicitor	Deborah Spence		
Name of firm	Arthur Cox		
Email			
Address	Eadsfort Terrace Eadsfort Centre Dublin 2.	Telephone no.	
		Document Exchange no.	
		Ref.	
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)

Senior Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Junior Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

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

The applicant seeks leave to appeal the substantive decision to refuse the applicant relief which said judgment was delivered on the 14th of October 2016. The applicant applied to the learned High Court Judge seeking to have the judgment revisited, which application was refused, and subsequently the applicant sought a certificate for leave to appeal to the Court of Appeal, this application was also refused. The applicant applied for its costs and, this was also refused on the 6th of April. Orders in respect of the above were perfected on the 2nd of May 2017.

The applicant seeks leave to appeal the refusal of the substantive judicial review proceedings and also the substantive costs order.

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

The decision sought to be appealed involves a matter of general public importance for the following reasons:

1. It is in the interests of justice that the within appeal be granted leave. The applicant is an ENGO engaged in environmental protection. The applicant was concerned with the permission granted for the continued operation of the Edenderry Power Plant and the associated peat extraction had not been subject to environmental impact assessment (EIA) or appropriate assessment (AA). The applicant instituted proceedings on both of these issues, however, it limited its challenge to the non-compliance with the Habitats Directive. This case was heard with the *An Taisce* case. The applicant argued that the Board did not consider the peat extraction for the purposes of the Habitats Directive. The Board did not conduct either a screening assessment for EIA or AA. This was in breach of the Habitats Directive and Part XAB of the Planning and Development Act 2000.
2. The applicant filed an affidavit of an environmental scientist regarding peat extraction in SAC catchment areas, contending that a screening for AA and, an AA was required, but had not been conducted. The applicant's case and submissions focused the link between the development and the peat extraction, such as would engage the Habitats Directive. It was the applicant's case that once such a link was established, then, automatically, an obligation to carry out a screening assessment of those effects arose. The Board denied such connection.
3. The learned trial Judge determined in the *An Taisce* proceedings that there was a connection between the permitted development and the peat extraction and the development required screening for EIA, the permission was quashed. However, the learned Judge held that the applicant had not established that the development would be likely to have a significant effect on any European Site and had fallen short of the proof required to establish that the respondent ought to have carried out an AA.
4. The learned trial judge did not consider at all, the applicant's case that a screening assessment was required. This issue was not determined. The learned trial judge determined that the applicant had not proven that a Stage 2 AA was required. A Stage 2 AA is only carried out after a positive determination at the Stage 1 screening assessment. Consequently, and before any application for a certificate of leave to appeal, the applicant applied to the learned judge to revisit his earlier judgment and determine this issue. In judgment of the 14th October 2016, the learned judge refused this application. The learned judge did accept in this

judgment that the Court did not address the screening assessment in the substantive judgment (paragraph 21).

5. The applicant submits it was entitled under the Aarhus Convention and national and European law to access to justice in a fair, equitable, timely and not prohibitively expensive manner. The applicant at relief 7 of its statement of grounds sought a declaration that a screening for AA ought to have been carried out. This issue was not determined by the Court. The applicant has been refused relief, and has been refused costs. This is unfair, inequitable and costly for the applicant. It is in the interests of justice that the within appeal be allowed in order that this be rectified.

6. The applicant filed an affidavit contending a significant effect would arise from peat extraction in the catchment of the River Nore and River Barrow SACs. This was uncontroverted. This issue was a matter for the Board. The Board needed to address this issue however it did not. This was wrong as a matter of law. It was not for the applicant to establish what the outcome of screening assessment might have been had it been undertaken. The exact areas and method of peat extraction, and/or any mitigation measures were nowhere described in the application. It was not possible for the applicant to lead evidence of the actual effects of the peat extraction. The applicant is not well funded, and obtaining cogent expert evidence about the case that it was making about the Habitats Directive was not physically or financially possible. The notice party made a subsequent application for permission for the same development, including a screening assessment for AA. This was as a result of these proceedings. The screening assessment concluded positively that the extraction of peat would be likely to have significant effects on the European Sites. The applicant filed an affidavit exhibiting this application and screening assessment. This was cogent, expert evidence of the case the applicant was making about the Habitats Directive. However, the learned trial judge held that this evidence was not admissible.

7. It is unclear why this evidence was ruled inadmissible. In the Court's judgment refusing the certificate application, states that it had been ruled inadmissible as it had been prepared after the first grant of permission and, after the commencement of the within proceedings. Either the evidence is relevant or it is not. Furthermore, it is difficult to conceive of what better evidence might be produced by an applicant than a professional screening assessment compiled by the developer itself. Again, it is in the interests of justice, and generally in the public interest that the evidential burden applicable, and how it is to be discharged, ought to be finally resolved by this Honourable Court.

13. The question of scientific evidence in Habitats cases, and what is required has arisen and continues to arise in other cases. The issue was certified by Judge Haughton in the case of *People Over Wind –v- An Bord Pleanala* 2015 IEHC 271, however, the case was decided on other issues by the Court of Appeal. It is respectfully urged that the issue remains a significant problem in cases such as the within where an applicant has been held to be required to discharge a burden of proof, but, cannot do so as either the information required to do so (such as a description of the development) is not available or inadequate, or, the information that needs to be tendered in evidence is inadmissible as it was not before the Board when it made its decision. This leaves applicants in a Catch 22 where they are required to tender evidence but at the same time prevented from doing so.

14. It is submitted that it is of general public importance that these matters are resolved and, it is in the interests of justice, and in particular the applicant's entitlement to access to justice that the within appeal be allowed.

15. Insofar as it may be suggested that the within appeal is moot having regard to the determination in the *An Taisce* case the issues raised herein remain live notwithstanding the said determination. The two cases were heard simultaneously, the result in one case could not have the effect of rendering the other moot such as could deprive the applicant of an entitlement to relief and/or an entitlement to its costs. Such an outcome would be inherently unjust, unfair and leave an applicant for review in such circumstances exposed in terms of its costs.

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

1. the specific ground(s) of appeal and the error(s) of law related to each numbered ground.

i. The learned Court of Appeal Judge made an error of law and/or fact in finding that:

1. That the applicant had failed to discharge the burden of proof in respect of the case that it was making about the Habitats Directive. The applicant had argued that a screening assessment was required, and, this issue was not determined by the learned trial judge. The Court found as a fact that the peat extraction was an effect of the proposed development and accordingly, this needed to be assessed for the purposes of the Habitats Directive as well as EIA.

2. The evidence tendered by Mr. Lowes of the likely significant effects was inadmissible.

3. That the applicant needed to produce cogent expert evidence of the effects of a development (comprising peat extraction) that had not been described in the application for permission or considered at all by An Bord Pleanala.

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

O'Connell & Clarke Solicitors

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

The High Court

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 aside the Order of the High Court made on 2nd May 2017 and perfected on 19th May 2017 dismissing the Applicant's application and allow the appeal.

What order are you seeking if successful?

Order being appealed: set aside vary/substitute

Original order: set aside restore vary/substitute

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:

~~Where the Honorable Court considers it necessary to enable it to give judgment the applicant asks the Court to request the CJEU to give a preliminary ruling pursuant to Article 267 TFEU on the following question:~~

Will you request a priority hearing? Yes No

If Yes, please give reasons below:

Signed: Doife O'Connell
(Solicitor for) the applicant/appellant

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.