Appendix FF

No. 2

O. 58, r. 18(1)

SUPREME COURT

Respondent's Notice

Supreme Court record number		S:AP:IE:2017:000084

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

Friends of the Irish Environment Limited	V	An Bord Pleanála and others (High Court Record No. 2014 / 43 JR)

Date of filing	20 June 2017
Name of Notice Party	Edenderry Power Limited and Bord na Móna Plc
Notice Party's solicitors	Arthur Cox 10 Earlsfort Terrace Dublin 2 FOA: Deborah Spence
Name of appellant	Friends of the Irish Environment Ltd
Appellant's solicitors	O'Connell & Clarke

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)

Notice Party's full name	Edenderry Power Limited and Bord na Móna Plc

The Notice Party was served with the application for leave to appeal and notice of appeal on date
6 June 2017

The Notice Party intends :	
	to oppose the application for an extension of time to apply for leave to appeal

X	not to oppose the application for an extension of time to apply for leave to appeal

X	to oppose the application for leave to appeal

	not to oppose the application for leave to appeal

X	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 Notice Party's representation are correct and complete on notice of appeal:	

Respondent's Representation

Solicitor			
Name of firm	Arthur Cox		
Email	deborah.spence@arthurcox.com		
Address	Arthur Cox 10 Earlsfort Terrace Dublin 2	Telephone no. Document Exchange no.	(01) 920 1150
Postcode	D02 T380	Ref.	

How would you prefer us to communicate with you?			
	Document Exchange	X	E-mail
	Post		Other (please specify)

Counsel			
Name	Suzanne Murray BL		
Email	SMurray@lawlibrary.ie		
Address	Office 3.25, Distillery Building, 145-151 Church Street, Dublin 7	Telephone no. Document Exchange no.	(01) 817 5672 816657
Postcode			

Counsel			
Name	Rory Mulcahy SC		
Email	rmulcahy@lawlibrary.ie		
Address	The Distillery Building 145 - 151 Church Street Dublin 7	Telephone no. Document Exchange no.	(01) 817 5293 816310
Postcode			

Counsel			
Name	Brian Kennedy SC		
Email	brian@bkennedy.ie		
Address	2 Arran Square	Telephone no.	(01) 872 9488

	Arran Quay Dublin 7	Document Exchange no.	812143
Postcode	D07 K0YT		

If the Respondent is not legally represented please complete the following

Current postal address
Telephone no.
e-mail address

How would you prefer us to communicate with you?			
☐	Document Exchange	☐	E-mail
☐	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: The substantive decision of the High Court (White J.) refusing the Appellant's application for judicial review was delivered on 9 October 2015 and not 14 October 2016 as stated by the Appellant ([2015] IEHC 633).

The decision of the High Court (White J.) refusing the Appellant's application to revisit its substantive judgment was delivered on 14 October 2016 ([2016] IEHC 558).

The *ex tempore* decision of the High Court (White J.) refusing the Appellant's application for a certificate for leave to appeal pursuant to section 50A(7) of the Planning and Development Act 2000, as amended, was delivered on 3 February 2017.. The Notice Party, Edenderry Power Limited ("**EPL**"), did not participate in this application.

The *ex tempore* decision of the High Court (White J.) refusing the Appellant's application for costs of the substantive proceedings; costs of the application to revisit the judgment and the costs of the application for a certificate for leave to appeal was delivered on 6 April 2017. The High Court (White J.) made no order as to costs in respect of the proceedings.

The Appellant seeks leave to appeal the refusal of the substantive judicial review, namely the decision of the High Court (White J.) delivered on 9 October 2015 and also the substantive costs order which was no order as to costs.

4. Respondent's reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the respondent's reasons why:

This is an application for leave to appeal from an Order of the High Court. Pursuant to article 34.5.4° of the Constitution, the Supreme Court has to be satisfied that there are exceptional circumstances warranting a direct appeal to it, and a precondition of the Supreme Court being so satisfied is the presence of either or both of the following factors (i) the decision involves a matter of general public importance, or (ii) in the interests of justice it is necessary that there be an appeal to the Supreme Court. Neither of these criteria is satisfied in this application for leave to appeal.

At section 5, paragraph 1, of the Notice of Appeal, the *Friends* refer to the *An Taisce* proceedings. This is a reference to *An Taisce v An Bord Pleanála and others* (2014/38JR) in which, An Taisce challenged the decision of An Bord Pleanála (the "**Board**") granting planning permission to EPL for the continued use and operation of a previously permitted peat and biomass co-fired power plant at Clonbullogue, Edenderry, Co. Offaly (PL

19.242226) on grounds relating to non-compliance with Directive 2011/92/EU (the "**EIA Directive**"). The *Friends* proceedings (2014/43JR) was a distinct challenge to the same decision of the Board on grounds solely relation to non-compliance with Directive 92/43/EEC (the "**Habitats Directive**"). The *An Taisce* proceedings and the *Friends* proceedings were linked and heard together by the High Court (White J.). *An Taisce's* challenge was successful and the decision of the Board was quashed (**An Taisce v An Bord Pleanála** [2015 IEHC 633]).

EPL maintain that the appeal is moot in circumstances where the decision of the Board which the Appellant seeks to challenge was quashed by the High Court in the *An Taisce* proceedings. The decision of the Board was not remitted back to the Board for it to reconsider and accordingly no new decision was made by the Board in respect of the appeal (Reg. Ref. PL19.242226).

One of the main reasons why the High Court (White J.) refused to grant the Appellant a certificate for leave to appeal was because the proceedings were moot. It is well established that as a general rule the Supreme Court will not hear an appeal that is moot (**Lofinmakin v Minister for Justice** [2013] 4 IR 274).

During the course of the within proceedings, and prior to the proceedings being heard by the High Court, EPL applied to Offaly County Council for a distinct planning permission for the extension of the continued use and operation until the end of 2030 of the previously permitted peat and biomass co-fired plant at Ballykillen, Edenderry, County Offaly. The decision of Offaly County Council to grant planning permission was appealed to the Board (Reg. Ref. PL19.245295). By Order dated the 21 December 2016, the Board, granted planning permission for the proposed development. This decision of the Board was not the subject of any challenge by way of judicial review and the Edenderry Power Plant is now operating under this planning permission.

The granting of leave to appeal to the Supreme Court can serve no purpose in respect of the decision of the Board which was the subject of challenge in the *Friends* proceedings in circumstances where the Board's decision has already been quashed by the High Court in the *An Taisce* proceedings and the decision was not remitted to the Board. Furthermore, the

granting of leave to appeal to the Supreme Court will not and cannot affect the continued operation of the Edenderry Power Plant which is operating under a valid grant of planning permission which was never challenged by way of judicial review. In circumstances where the appeal is moot, there are no exceptional circumstances warranting a direct appeal to the Supreme Court and it cannot be the case that the decision either involves a matter of general public importance or that in the interests of justice it is necessary that there be an appeal to the Supreme Court.

The sole purpose for this application for leave to appeal, is to allow the Appellant overturn the substantive cost order made in the High Court. This is in fact acknowledged by the Appellant at paragraph 5 of its Notice of Appeal wherein it states:
"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 by allowed in order that this be rectified."(emphasis added)

While the Appellant was not granted an order for costs, as is evident from the Order of the High Court, perfected on 2 May 2017, no order for costs was made in respect of the proceedings. There is no authority to support the proposition that an applicant is entitled to their costs under the Aarhus Convention and indeed the Court of Justice of the European Union in **Edwards "Case C-260/11"** has held that "not prohibitively expensive" does not preclude an order for costs being made against an unsuccessful applicant. As such it cannot preclude no order for costs being made against an unsuccessful applicant. Accordingly, this decision does not involve a matter of general public importance nor is necessary in the interests of justice that there be an appeal to the Supreme Court.

At section 5, paragraph 1 of the Notice of Appeal, the Appellant states that it instituted proceedings in respect of environmental impact assessment ("**EIA**") and appropriate assessment ("**AA**"). This is not the case. It is evident from the Statement of Grounds, filed on 22 January 2014, that the Appellant confined its pleas to AA grounds only.

The Appellant at section 5, paragraph 6 of the Notice of Appeal, states that it "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". However, EPL note that the grounding affidavit was sworn by David Healy who describes himself as an "Environmental Consultant".

At section 5, paragraphs 6 and 7, of the Notice of Appeal, the Appellant states that the High Court refused to allow the Appellant rely on an Affidavit of Tony Lowes sworn on 29 June 2015 on behalf of An Taisce in their related proceedings. This affidavit was sworn after the proceedings had been instituted for the purpose of exhibiting the subsequent distinct planning application made by EPL to the Board (referred to above). The Appellant states at paragraph 7 that "*it is unclear why this evidence was ruled inadmissible.*" This is simply not the case. The High Court (White J.) in his *ex tempore* judgment delivered on 3 February 2017 in respect of the application for a certificate for leave to appeal clearly sets out, at pages 16 to 22, why the Affidavit was ruled inadmissible and refers back to the ruling which the Trial Judge gave on this issue during the trial of the action. In essence the High Court refused to admit the Affidavit of Tony Lowe as "*it came from a planning permission which was entered conditionally on the basis that the Court proceedings may be successful and was a completely different application.*" It was not ruled inadmissible on the basis that the evidence was not before the Board, as suggested by the Appellant at section 5, paragraphs 7 and 13, of the Notice of Appeal.

The Appellant at section 5, paragraph 13, of the Notice of Appeal refers to the case of **People Over Wind v An Bord Pleanála** [2015] IEHC 271 and that the question of scientific evidence in habitats case was referred to the Court of Appeal but that it decided the case on other issues. It should be noted that the Supreme Court refused an application for a certificate for leave to appeal in **People Over Wind v An Bord Pleanála** [2016] IESCDET 21 on the basis that the appellant, People Over Wind had not demonstrated compliance with either of the alternative constitutional requirements stipulated in Article 34.5.3°. Furthermore, and as noted above it is not the case that the Affidavit of Tony Lowes was ruled inadmissible on the basis that the information was not before the Board.

With regard to the burden of proof, the High Court (White J.) dealt with it on the basis of well established principles and relied on the judgment in **Harrington v An Bord Pleanála** [2014] IEHC 232 to the effect that "*the applicant carries the burden of proof of establishing the grounds in respect of which leave for judicial review was granted.*" The law with regard to the burden of proof which an applicant bears in planning judicial review cases is well established and it is not in the interests of justice that this issue be the subject of an appeal to the Supreme Court.

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

Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

EPL will oppose the appeal, if leave to appeal is granted, on the following grounds:

The appeal is moot in circumstances where the decision of the Board granting planning permission to EPL for the continued use and operation of a previously permitted peat and biomass co-fired power plant at Clonbullogue, Edenderry, Co. Offaly (PL 19.242226), which the Appellant seeks to challenge was quashed by the High Court in the related proceedings of **An Taisce v An Bord Pleanála** [2015 IEHC 633]. The decision of the Board was not remitted back to the Board for it to reconsider and accordingly no new decision was made by the Board in respect of the appeal (Reg. Ref. PL19.242226). EPL was subsequently granted planning permission by the Board on 21 December 2016 for the extension of the continued use and operation until the end of 2030 of the previously permitted peat and biomass co-fired plant at Ballykillen, Edenderry, County Offaly. This decision of the Board was not the subject of any challenge by way of judicial review and the Edenderry Power Plant is now operating under this planning permission.

The High Court Judge (White J.) did not err in law and / or in fact in finding that the Appellant had failed to discharge the burden of proof in respect of the case that it was making under the Habitats Directive. The High Court correctly applied well established principles regarding the burden of proof in planning judicial review.

The High Court (White J.) accepted in his judgment delivered on 14 October 2016 [2016 IEHC 558] in respect of an application to revisit his judgment that it did not address specifically the issue of screening. However, the High Court (White J.) further stated that this argument was a significant refinement of the legal argument made during the substantive hearing. Furthermore, it is evident from this judgment that the High Court (White J.) in refusing the application for judicial review, that the court was exercising his discretion to refuse the relief sought (paragraph 27 of the judgment).

The High Court (White J.) did not err in law in finding that the affidavit of Tony Lowes sworn on 29 June 2015 was inadmissible. The High Court refused to admit the Affidavit of Tony Lowe as "*it came from a planning permission which was entered conditionally on the basis that the Court proceedings may be successful and was a completely different application.*" It was not ruled inadmissible on the basis that the evidence was not before the Board, as suggested by the Appellant.

The High Court (White J.) did not err in law in finding that the Appellant needed to produce cogent expert evidence of the effects of a development in order to discharge the burden of proof. The High Court (White J.) correctly held that the Appellant did not adduce any primary evidence whatsoever which would allow it discharge the burden of proof.

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

Suzanne Murray BL
Rory Mulcahy SC
Brian Kennedy SC

6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

N/A

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
If Yes, please give reasons below:

The Appellant has not sought a priority hearing.

Signed: Arthur Cox
(Solicitor for) the respondent

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.