

No. 2

O. 58, r. 18(1)



## SUPREME COURT

Record No:

2019/205

### Respondent's Notice

#### Part I

*The information contained in this part will be published. It is the respondent's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court*

1. **Title of the Proceedings:** *[As in the Court of first instance]*

**FRIENDS OF THE IRISH ENVIRONMENT CLG**

**Appellant**

-v-

**THE GOVERNMENT OF IRELAND, IRELAND & THE ATTORNEY GENERAL**

**Respondents**

2. **Name of Respondent:** **The Government of Ireland, Ireland and the Attorney General**

3. **Application to extend time:** Yes  No

*If an application is being made to extend time for the filing of this Notice, please set out concisely the grounds upon which it is contended time should be extended.*

We presented with a Respondent's Notice on the afternoon of Friday the 6<sup>th</sup> of December (the last day to file on time). Unfortunately our form did not comply with the page limit for the Appendix – grounds of opposition. It has been necessary to re-draft the form to comply with this requirement. We are filing on the next available working day. We apologise for this oversight.

**4. Do you oppose the applicant's application to extend time:**

Yes  No

*If an application by the applicant to extend time is being opposed please set out concisely the grounds on which it is being opposed.*

N/A

**5. Do you oppose the applicant's application for leave to appeal:**

Yes  No

**6. Matter of general public importance:**

*Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is contended, that the matter does not involve a matter of general public importance. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that the matter involves a matter of general public importance. This section should contain no more than 500 words and the word count should appear at the end of the text.*

- 1) The State Respondents do not oppose the Appellant's application for leave to appeal and accepts that the within appeal potentially raises legal issues of general public importance.
- 2) For the avoidance of doubt, the Respondents do not accept the Appellant's characterisation of the National Mitigation Plan ("the Plan") or of its effects as set out at Section 7(5) – (7) of the application for leave.
- 3) The Plan, as described therein, was an initial step to set the country on a pathway to achieve the level of decarbonisation required (see paragraph 100 of judgment of High Court) and, as concluded by the trial judge was "*but one, albeit extremely important, piece of the jigsaw.*" (paragraph 132 of judgment). Further

significant steps have taken place since the hearing in the High Court including the following:

- a. The Climate Action Plan 2019, was published by the Government on 17 June 2019, and gives further effect to the National Mitigation Plan;
- b. The Climate Action Plan commits to the publication of a Climate Action (Amendment) Bill by the first quarter of 2020, to amend the Climate Action and Low Carbon Development Act 2015;
- c. The commitments in the Climate Action Plan 2019, will be incorporated into the National Energy and Climate Plan, which must be finalised and submitted to the European Commission shortly, in accordance with Regulation (EU) 2018/1999 on the Governance of the Energy Union and Climate Action;
- d. As set out in the Climate Action Plan, it is intended that, pursuant to the Climate Action (Amendment) Bill, a proposed Long-Term Climate Strategy (“LTS”) will become the statutory successor to the National Mitigation Plan (“the Plan”). The LTS will be aligned to the period set out by the three five-year carbon budgets, namely, 2021—2035, but also include a longer-term perspective to 2050; and
- e. The fact that the annual Climate Action Plan, the LTS and the National Adaptation Framework will fully inform Ireland’s EU and international reporting requirements under the Paris Agreement and the EU Regulation on the governance of the energy union and climate action (EU2018/1999).

4) Notwithstanding the foregoing, the State Respondents accept that an appeal potentially raises legal issues of general public importance regarding, inter alia,

- a. The justiciability of a measure such as the National Mitigation Plan;
- b. The applicable standard of review when seeking to challenge such a measure on constitutional or the Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) grounds;
- c. The standing of the Appellant to rely on breach of constitutional rights at all and, in particular, in the absence of a challenge to the underlying legislation;
- d. The existence or otherwise of an unenumerated right to an environment consistent with maintaining bodily integrity;
- e. The interpretation of the ECHR by national courts.

For the avoidance of doubt, the State Respondents contend that, save as set out in the additional grounds for opposing the appeal, the learned trial judge correctly and clearly resolved each of the issues in this appeal.

Word count - 500

**7. Interests of Justice:**

*Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is alleged, that the interests of justice do not require an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended, that the interests of justice require an appeal.*

*This section should contain no more than 300 words and the word count should appear at the end of the text.*

- 1) The State Respondents accept that an appeal to the Court of Appeal is unlikely to narrow the issues in dispute. In particular, there are no issues of fact between the parties requiring refinement and/or resolution through appeal to the Court of Appeal.
- 2) It is further noted that the Appellant has, in its Application for Leave, evinced an intention to appeal if unsuccessful in the Court of Appeal.

- 3) Although the NMP the subject of these proceedings will require to be replaced by 2022, pursuant to the Climate Action and Low Carbon Development Act 2015, and sooner, as proposed in the Climate Action Plan, it is submitted that it is in the interests of all parties that the issues in dispute between the parties are resolved in early course.
- 4) For the avoidance of doubt, it is not accepted that any delay in determining the appeal will have the adverse consequences contended for by the Appellant at Section 8(4) of its application for leave.

Word Count – 165 words

**8. Exceptional Circumstances Article 34.5.4.:**

*Where it is sought to apply for leave to appeal direct from a decision of the High Court pursuant to Article 34.5.4, please set out concisely, in numbered paragraphs, the grounds upon which it is contended that there are no exceptional circumstances justifying such an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that there are exceptional circumstances justifying such an appeal.*

*This section should contain no more than 300 words and the word count should appear at the end of the text.*

- 1) In circumstances where the facts are not in dispute and the legal issues between the parties are not likely to be narrowed further in the event of an appeal to the Court of Appeal, the State Respondents accept that this may be an appropriate case for a direct appeal to the Supreme Court.
- 2) Moreover, it is accepted that given the multiplicity and potential significance of the legal issues in dispute, an application to appeal to this Honourable Court from a decision of the Court of Appeal is likely.
- 3) In circumstances where the State Respondents continue to take steps in furtherance of the NMP and otherwise to address the consequences of climate

change, it is submitted that an early final resolution of all issues in dispute between the parties would be of benefit to all parties.

- 4) For the avoidance of doubt, the State Respondents do not accept that, by the National Mitigation Plan, it is pursuing a course of action which infringes fundamental rights as alleged at section 9(4) of the Application for Leave.

Word count – 177 words

**9. Respondent's grounds for opposing an appeal if leave to appeal is granted:**

*Please set out in the Appendix attached hereto the Respondent's grounds of opposition to the Grounds of Appeal set out in the Appellant's Notice of Appeal.*

**10. Cross Application for Leave:**

*If it is intended to make a cross application for leave to appeal please set out here precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance or the interests of justice justifying a cross appeal to the Supreme Court.*

*If it is sought to make a cross application for leave to appeal direct from a decision of the High Court, please also set out precisely and concisely, in numbered paragraphs, the exceptional circumstances upon which it is contended that such a course is necessary. This section should contain no more than 500 words and the word count should appear at the end of the text.*

N/A

Word count -

**11. Additional Grounds on which the decision should be affirmed and Grounds of Cross Appeal**

*Please set out in the Appendix attached hereto any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court and / or the grounds of cross appeal that would be relied upon if leave to appeal were to be granted.*

See appendix

**12. Priority Hearing:**

Yes  No

*If a priority hearing is sought please set out concisely the grounds upon which it is alleged that such a hearing is necessary.*

*This section should contain no more than 100 words and the word count should appear at the end of the text.*

- 1) The State Respondents have no objection to the Appellant's application for a priority hearing.

Word count – 15 words

**13. Reference to CJEU:**

*If it is contended that it is necessary to refer matters to the Court of Justice of the European Union, please identify the matter, and set out the question or questions which it is alleged it is necessary to refer.*

*This section should contain no more than 100 words and the word count should appear at the end of the text.*

N/A

Word count:

**Part II**

*The information contained in this part will not be published.*

**14. Respondent's Representatives:**

*If not provided in the application for leave to appeal please identify the solicitor and counsel for the respondent, with contact details for the solicitor dealing with the matter including an email address for the solicitor and lead counsel or in the case of a respondent in person please provide contact details including telephone and email.*

There has been no change, save that Niamh Byland SC (as she then was) no longer acts of the State in this matter.

**15. Legal Aid:**

*In the case of an application by the DPP from an order in a criminal trial please confirm that a Legal Aid (Supreme Court) certificate has been granted by the Court below and please provide a copy of same.*

Signed:


  
\_\_\_\_\_  
(Solicitor for) the Respondent

Chief State Solicitor's Office,  
Osmond House,  
Little Ship Street,  
Dublin 8

Date:

9/12/2019  
9<sup>th</sup> December 2019

To be served on:

  
\_\_\_\_\_  
(Solicitor for) the Applicant  
O'Connell and Clarke Solicitors,  
Capel Building,  
Dublin 7

Please file your completed Notice in:

The Office of the Registrar of the Supreme Court  
The Four Courts  
Inns Quay  
Dublin 7



## Appendix

### Grounds of Opposition (and Cross Appeal)

1. **Title of the Proceedings:** Friends of the Irish Environment CLG v Government of Ireland and Ors

2. **Respondent's grounds for opposing an appeal if leave to appeal is granted:**

*Please list concisely in numbered paragraphs, the Respondent's ground(s) of opposition to the grounds of appeal set out in the Appellant's Notice of Appeal.*

1. It is denied that, as pleaded at Ground 1 of the Notice of Appeal, fundamental rights, and in particular the Appellant's fundamental rights, under the Constitution and/or the European Convention on Human Rights ("Convention") were engaged by the making of the Plan. It is further denied that the Learned Trial Judge held that fundamental rights were engaged by the making of the Plan and/or it is denied that the Learned Trial Judge held that there is a constitutional right to an environment consistent with human dignity.
2. In the foregoing circumstances, the Learned Trial Judge, while considering whether fundamental rights were breached by the making of the Plan applied the correct standard of review.
3. For the avoidance of doubt, the State Respondents do not concede that the Plan involves a decision to postpone reduction of carbon emissions. Ireland's response to climate change has been, is and will be formulated and implemented as part of the response of the European Union ("EU").
4. It is denied that, as pleaded at Ground 2, the Learned Trial Judge was wrong to conclude that the Appellant was not entitled to raise fundamental rights grounds of objection to the adoption of the Plan in circumstances where the Learned Trial Judge had concluded that the Plan was *intra vires* the Act and the Appellant had not challenged the constitutionality of the Act.
5. The Learned Trial Judge was correct not to "follow" the decision of the Dutch Court of Appeal in *Urgenda*", contrary to the plea at Ground 3.
6. It is denied that, as pleaded at Ground 4, that the ECtHR has not addressed the issue. The ECtHR has concluded that there is no duty "*to provide general protection of the environment as such*".
7. Accordingly, it is denied that the Learned Trial Judge was wrong to apply the principles set out in *McD v L* on the bases alleged or at all. Insofar as necessary, it is further denied that the principles set out in *McD v L* (and applied consistently thereafter by the High Court) are incorrect.
8. The plea at Ground 5 is denied. It is pleaded that the Learned Trial Judge was correct, and acted consistently with the jurisprudence of the ECtHR, by affording the State Respondents a wide discretion when determining whether the Plan infringed fundamental rights. It is consistent with the ECHR for a national court to take cognisance of the nature of the decision under review and

to vary the scope of discretion and/or standard of review afforded to decision makers depending on the nature of the rights alleged to be infringed and the nature of the State and/or public interest asserted. This is particularly the case where, as here, positive obligations are at issue.

9. It is denied, as alleged at Ground 6, that the Learned Trial Judge failed “to examine in any detail the alleged violation of Convention rights as required under s.3 ECHR Act.” The Learned Trial Judge examined at length and in detail the factual and legal basis upon which the Appellant brought its claim.
10. It is pleaded that if (which is denied) fundamental rights, and, in particular, the Appellant’s fundamental rights are engaged by the making of the Plan, the Plan is a proportionate interference with the same having regard to, *inter alia*, the scope and nature of the Plan, the extent of the measures set out in the Plan, the complex policy context in which the Plan is formulated, the cost of reducing emissions precipitously, and the wide discretion afforded to the State Respondents in this area.
11. It is denied that, as alleged at Ground 7, constitutional rights and, in particular, the Appellant’s fundamental rights were engaged by the making of the Plan.
12. Further, it is further denied that the Learned Trial Judge held that constitutional rights were engaged by the making of the Plan and it is denied that the Learned Trial Judge held that the Appellant enjoys a constitutional right to the environment consistent with human dignity.
13. The Learned Trial Judge correctly determined that any interference with constitutional rights (which interference is denied) was proportionate and the pleas set out in response to Ground 6 are repeated.
14. It is denied that, as pleaded at Ground 8 the Learned Trial Judge divorced consideration of the discretion afforded to the Respondent from the question of fundamental rights as alleged.
15. It is denied that, as pleaded at Ground 9, the Learned Trial Judge held that the Plan is an inadequate response to climate change and/or “does not propose to do enough quickly enough”. The factual premise of the Appellant’s complaint is not well-founded. The learned judge was correct to conclude that the Plan was *intra vires* the Act and that the Appellant had not challenged the Act itself and were therefore restricted in the pleas it could advance.
16. It is denied that, as pleaded at Ground 10, the Learned Trial Judge concluded that the Respondent had met its obligation to have regard to EU and international law obligations in considering the Plan for approval by virtue of simply referring to those obligations.
17. It is denied that the Learned Trial Judge did not address the Appellant’s specific, separate point re *Tristor*. It is denied that the Plan flies in the face of the matters to which it was required to have regard.

**3. Additional grounds on which the decision should be affirmed:**

*Please set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court.*

1. With respect to Ground 11 in the Appellant’s Notice for Leave to Appeal—the State Respondents accept that the proceedings, as of the date of this Respondent’s Notice, are not moot. However, the State Respondents reserve the right to plead that the proceedings are moot in the event that the intended replacement of the National Mitigation Plan the subject of these proceedings occurs prior to the determination of these proceedings, having regard, in particular to the matters set out at paragraph 3 of section 6 above.
2. The Learned Trial Judge erred by concluding that the Appellant, as a body corporate, had standing (§131) to advance its claim that the Plan breached the constitutional rights to life, bodily integrity, and a right to an environment consistent with human dignity (the existence of which right is denied).
3. Arising from the foregoing, the Learned Trial Judge erred in concluding, insofar as it is contended by the Appellant that he did so, which is denied, that there is an unenumerated constitutional right to an environment consistent with human dignity;
4. The Learned Trial Judge erred by failing to consider and/or by implicitly holding that the Appellant, as a body corporate, had standing to advance its ECHR claims.
5. Insofar as necessary, the Learned Trial Judge erred in not concluding that the Plan was non-justiciable or non-justiciable on the grounds advanced by the Appellant. The policy adopted by the State Respondents to reduce carbon emissions over the five-year period of a particular Plan is a non-justiciable issue.

**4. Cross Appeal**

*Please set out in numbered paragraphs the Grounds of Cross Appeal relied upon if leave to cross appeal were to be granted.*

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**5. Order(s) sought**

**Please set out in numbered paragraphs the order(s) sought if the Cross Appeal were to be successful.**

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