



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

S:AP:IE:2021:000091

**Dunne J.
Charleton J.
O'Malley J.
Woulfe J.
Hogan J.**

Between/

AN TAISCE - NATIONAL TRUST FOR IRELAND

Appellant

-AND -

**AN BORD PLEANÁLA, THE MINISTER FOR COMMUNICATIONS,
CLIMATE ACTION AND THE ENVIRONMENT, IRELAND AND
THE ATTORNEY GENERAL**

Respondents

-AND-

KILKENNY CHEESE LIMITED (FORMERLY JHOK LIMITED)

Notice Party

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 7th December 2021

Introduction

1. In these judicial review proceedings the appellant seeks to quash a decision of An Bord Pleanála dated the 30th June 2020 to grant planning permission in respect of an application made by the developer notice party to construct a cheese factory at Slieverue, Co. Kilkenny.

The developer is a joint venture between Glanbia and a Dutch company, Royal-a-Ware. As I will explain in a moment, this Court has already granted leave to the appellant to appeal directly to this Court from the High Court pursuant to Article 34.5.4 of the Constitution. This judgment is not, however, concerned with the substance of that appeal. Rather, this Court is at this juncture called upon to determine the scope of that particular appeal and, specifically, to identify the grounds upon which the appellant may rely. But before addressing this question, it is first necessary to explain how the parties came to be in dispute in respect of this very issue.

2. According to the non-technical summary of the environmental impact assessment report prepared in respect of this development, the proposed cheese plant will require 450 million litres of milk each year, of which approximately 20% is already in circulation. The remaining milk will be sourced from Glanbia's own milk suppliers. This consists principally of some 4,500 farms, largely based in Kilkenny, Tipperary and Waterford and some other surrounding counties. Some 75% of these farms have rivers or streams or other watercourses running through them or are immediately adjacent to them. Of these farms only some 57% have nutrient management programmes designed to mitigate water quality deterioration. A significant portion of the milk supply for the plant is already available but is currently supplied to other processors.
3. At the heart of the appellant's judicial review proceedings lies the contention that the Board did not properly take into account the downstream consequences of the operation of the proposed cheese factory. Specifically, it is contended that there was no adequate environmental impact assessment of the 450 million litres of milk necessary to supply the factory. It is further said that such supply will have consequences for Ireland's greenhouse obligations in that, for example, the supply of milk at these quantities will have consequences for methane and nitrate emissions. The appellant accordingly maintains that the Board was under an obligation under Article 2(1) of the Environmental Impact Assessment Directive (Directive 2011/92/EU as amended) ("the EIA Directive") to assess these wider (if indirect) environmental impacts due to the demand for milk likely to be created by the project.
4. The appellant adopted a similar argument in respect of Article 6(3) of the Habitats Directive (Directive 92/43/EEC as amended) insofar as these indirect impacts may affect a Natura 2000 site. But it also argued that the Board's inspector erred in screening out certain interests, particularly Atlantic salt meadows, in any assessment. (Atlantic salt meadows are

communities of salt tolerant small plants which congregate in tidal estuaries and rivers). It also contended that the Board had failed to have regard to the impact of treated effluent.

5. A slightly different point is made in respect of the Water Framework Directive (Directive 2006/60/EC): it is said that the Board was precluded from granting permission in circumstances where this will lead to an increased discharge of pollutants into the River Suir and where it is said that that waterbody has not achieved what is termed “good’ status for the purposes of Article 28 of the Surface Water Regulations (SI No. 272 of 2009).
6. In the High Court Humphreys J delivered a written judgment on the 20th April 2021 dismissing the application for judicial review: [2021] IEHC 254. In the principal judgment Humphreys J rejected the appellant’s central argument regarding the off-site environmental impact of the proposed milk production, saying (at para. 46):

“The basic reason is that effects of raw material production where such production is sufficiently removed from the project as not to be capable of assessment in site-specific terms are not to be considered part of the project for the purposes of the EIA or AA. Such effects need to be considered on a more programmatic basis and hence lie outside the direct purview of grounds from challenging an individual planning decision.”
7. By a subsequent decision delivered on the 2nd July 2021 Humphreys J refused leave to appeal to the Court of Appeal: see [2021] IEHC 422. By a determination dated the 23rd September 2021 this Court granted leave for a direct appeal to this Court pursuant to Article 34.5.4 of the Constitution: see [2021] IESCDET 109.
8. The three parties (An Taisce, the Board and Kilkenny Cheese) duly filed written submissions but it became clear from those submissions that there was a significant disagreement between them regarding the scope of the leave to appeal granted by this Court in that Determination. (The Minister for Communications, Ireland and the Attorney General are reserving their position regarding possible participation in the appeal).
9. At the case management hearing on the 3rd November 2021 I directed An Bord Pleanála to bring the appropriate motion so that the actual scope of the appeal could be determined by this Court at a preliminary hearing.

The Determination granting leave

10. In its Determination granting leave this Court stated (at para. 7):

“...there is no doubt but that a body granting a development consent which potentially impacts on the sort of sensitive site identified in the Habitats Directive is required to be satisfied that all scientific doubt has been removed as to whether there might be adverse

effects on the integrity of the site concerned having regard to all conservation objectives. While that principle is clear there are, in the Court’s view, questions as to how evidence in that regard should be dealt with in a challenge brought to a consent granted.”

11. The Court then continued (at para. 8):

“In those circumstances the Court does not think it appropriate at this stage to attempt to resolve the disputes between the parties concerning the proper characterisation of the test applied by the trial judge. The Court does consider that bringing further clarity as to the proper approach to evidence or argument in relation to scientific matters in judicial review proceedings of this kind is a matter of general public importance which arises in these proceedings. In these circumstances the Court will grant leave to appeal.”

The issue raised by the preliminary motion

12. As I have just indicated this preliminary motion seeks in effect to determine the scope of the appeal and in that regard to ascertain the scope of the leave actually granted in the Determination.

13. In its written submissions to this Court the appellant seeks to rely on the general environmental impacts (including indirect impacts) of the milk production necessary to sustain the proposed factory. It says (at para. 53 *et seq.*) that these effects have not been “identified, described and assessed for the purposes of the EIA Directive.” It further says (at para. 92) that the potential impact of the milk supply “was not assessed at all for the purposes of screening out impacts on the Lower Suir SAC and the River Barrow and River Nore SAC.” The appellant also makes a related point regarding the potential risk posed to the River Suir for the purposes of the Water Framework Directive (Directive 2000/60/EC) (at para. 107 *et seq.*).

14. Both the Board and the developer contend that the appellant has thereby greatly exceeded the scope of the Determination granting leave. While the Board accepts the general principles articulated by Clarke J in *Callaghan v An Bord Pleanála* [2017] IESC 60 and by Irvine J in *Friends of Irish Environment v. An Bord Pleanála* [2019] IESC 53 it maintains that the appellant’s case as reflected in its written submissions stray far beyond the boundaries of that grant of leave, however liberally construed.

15. As the Board stated in its written submissions (at paras. 36 and 37):

“It is clear from the Determination that the only issue in respect of which leave to appeal has been granted related to the consideration, in judicial review proceedings, of

evidence and argument relating to the scientific standard required to be met in the context of a screening for appropriate assessment and/or an appropriate assessment carried out for the purposes of the Habitats Directive. The Determination makes no reference to any other issue identified in the Application for Leave to Appeal nor does it contain any determination that any of those other issues reach the constitutional threshold of being a matter of general public importance. Significantly, it contains no reference to either the EIA Directive or the Water Framework Directive.”

16. The developer makes a similar point. Noting (at para. 27 of its written submissions) that the Determination “makes no reference whatsoever to either the EIA Directive or the Water Framework Directive”, the developer goes on to submit (at para. 28) that the *only* issue on which this Court found that the constitutional threshold had been met was in respect of the following: “Whether in the absence placed before the Board to contradict the Natura Impact Statement submitted by the notice party, the appellant was precluded from contending that the Board’s assessment under Article 6(3) of the Habitats Directive failed to remove all scientific doubt as to the effect of the development.”
17. The dispute, therefore, regarding the scope of the appeal concerns the questions of whether the Determination is broad enough to include arguments based on (i) the indirect effects of off-site milk production and (ii) the Water Framework Directive. Before, however, considering these specific questions it may be convenient to say something regarding the proper interpretation of Determinations granting leave to appeal pursuant to Article 34.5.3 and Article 34.5.4 and the Court’s power to clarify or, if needs be, to modify an earlier Determination.

The proper interpretation of the scope of an appeal pursuant to leave already granted under Article 34.5.3 and Article 34.5.4 of the Constitution

18. Perhaps the first thing which emerges from the two leading decisions to date regarding the scope of the appeal following the grant of leave pursuant to either Article 34.5.3 and Article 34.5.4 of the Constitution is that this Court has eschewed what Irvine J described in *Friends of the Irish Environment* as an “overly technical or narrow” approach to these questions. Clarke J had earlier spoken to the same effect in *Callaghan* when he observed that the “precise boundaries of the arguments which may be properly addressed to the Court should not be regarded as written in stone by reference to the exact language used in the determination of this Court granting leave”

19. Second, save for those cases coming within the category of the interests of justice, the grant of leave pursuant to these constitutional provisions presupposes the existence of issues of general public importance. This in turn implies that this Court must to some extent have regard to wider interests than simply those of the parties: we have, of course, frequently stated that following the coming into force of the 33rd Amendment of the Constitution Act 2013 this Court is no longer merely a court for the correction of legal error. This has a relevance so far as the scope of appeal is concerned for reasons well explained by Clarke J in *Callaghan*: he made the point (at paras. 4.4 and 4.5) that in some circumstances this Court might have to raise issues of statutory interpretation of its own motion:

“When an Irish court is considering the proper interpretation of a statutory measure it may well take into account any constitutional principles which might impact on the proper construction of the legislation concerned. Indeed, it is fair to say that a court might very well be reluctant to disregard such constitutional questions of interpretation even if they were not specifically raised by the parties. A court, and in particular a court of final appeal, is, as a matter of national law, required to give a definitive interpretation of the legislative measure which comes into question in the course of proceedings properly before it. It could not be ruled out, therefore, that a court in such circumstances would be reluctant to give a construction to legislation without having regard to any constitutional issues which might impact on the proper construction of the measure concerned in accordance with *East Donegal* principles. This might well be so where there would be a real risk that the Court would give an incorrect interpretation of the legislation in question if it did not itself raise the constitutional construction issue. It must be recalled that the proper interpretation of legislation is objective and is not dependent, necessarily, on the arguments put forward by the parties. By analogy, it seems to me that it is at least arguable that an Irish court, in order to comply with the principle of conforming interpretation, would be required to have regard, even on its own motion, to provisions of Union law where those provisions might have an impact on the proper interpretation of national measures under consideration.”

20. Clarke J proceeded to make clear that it would not be appropriate for the Court to embark on a consideration of the proper interpretation to be afforded to the overall statutory framework whilst ignoring its obligation to ensure, insofar as possible, that it would be construed in a manner consistent with European Union law:

“The proper interpretation of that statutory framework must be objectively considered, independent of the arguments of the parties, and must have regard both to the principles

of Irish constitutional law and provisions of Union law insofar as those principles and measures may legitimately impact on the proper construction of the statutory framework in question.”

21. The same broadly liberal approach was taken by Irvine J in *Friends of the Irish Environment*. Dealing with the argument as to whether the appellant in that case should have been permitted to raise an argument as to how the provisions of ss. 5 and 250 of the Planning and Development Act 2000 ought to be interpreted in the light of the provisions of Article 291 of the EIA Directive, Irvine J stated (at para. 29 of her judgment):

“The appellant should not be excluded from making an argument as to how those provisions are to be construed in light of Article 2(1) of the EIA Directive even if this results in the applicant being afforded some considerable latitude in light of its failure to pursue such an argument in the course of the High Court proceedings. In so deciding I am mindful of the supremacy of EU law and the risk that if the Court was to take an overly restrictive approach to the scope of the appeal, such a restriction could interfere with its obligation to ensure that the relevant statutory provisions are properly construed against the backdrop of EU law. The Supreme Court, as the final appellate court, could not allow itself be placed in a position where it might incorrectly construe a statute by reason only of the fact that in the court below the applicant had failed to argue the effect of European Union law on that construction.”

22. In the light of the decisions in *Callaghan* and *Friends of the Irish Environment* I consider that the same broadly liberal approach should inform our approach to the construction of the Determination in the present case. It is clear that the question of what I might term as the off-site milk production argument was the central question which had been advanced before the High Court. To date the practice of the Court has been to give reasons for a refusal of leave, including in cases where leave is granted in some respects but not others. The Determination here gives no indication why leave might have been refused in respect of the off-site milk-production issue (such as, for example, that the judgment of the court below simply involved the application of well-established case law). Accordingly, if this argument was to have been rejected as outside the scope of leave, one might have expected that the Determination would have expressly so stated.

23. There is a further consideration here as well. This particular question goes well beyond the issue of the effects of the off-site milk production, raising as it does a fundamental issue going to the very heart of environmental law, namely, the extent to which an environmental

impact assessment has to have regard to what might be termed as the indirect environmental impacts of any proposed development. Here the comments of Irvine J in *Friends of the Irish Environment* have a particular resonance because a restrictive approach to the scope of this appeal could well interfere with our obligation to ensure that the supremacy of EU law is not compromised. It is also in the public interest that this issue of general public importance should, where appropriate, be determined by this Court.

24. All of this suggests that the Determination should be understood as comprising the off-site milk production argument in the manner contended for by the appellant. In any event, over and above its actual words, this Determination has been superseded by this judgment. Whereas a Determination is normally the product of the deliberations of a panel of three judges following an initial assessment of the relevant papers without an oral hearing, this Court has now had the benefit of a very full and focused oral argument following the filing of written submissions addressed specifically to this particular question. Subject only to the constraints imposed by Article 34.5.3 and Article 34.5.4, this Court is to a large extent the master of its own procedures. To that extent, consistent with the general administration of justice and fairness to the parties, we remain free to clarify and even modify a previous Determination following a fuller oral hearing in which the parties have been given an opportunity to address us should it prove necessary to do so. In the special circumstances of the present case, it may be said that this Court has accordingly availed itself of this particular power to clarify the scope of its earlier Determination.

Conclusions re the off-site milk production question

25. In conclusion, therefore, I would propose that, for the reasons just stated, the appellant should be permitted to raise the off-site milk production argument and the general effects of Article 2(1) of the EIA Directive.

Arguments based on the Water Framework Directive

26. There remains the issue of arguments based on the Water Framework Directive. The argument advanced here is similar in character to that specifically advanced in relation to the Habitats Directive, namely, the extent of the Board's obligation in relation to its the treatment of scientific evidence bearing on the potential environmental impact of the discharge of pollutants on the adjoining rivers.
27. Adopting the same broadly liberal attitude to the question of the scope of appeal indicated in *Callaghan* and *Friends of the Irish Environment*, it seems to me that given the broad

similarity of the issue already raised with regard to the Habitats Directive (which all sides agree is within the scope of the Determination) in respect of the treatment of scientific evidence, the appellant should be permitted to raise in this appeal such arguments based on the Water Framework Directive as were properly before the High Court.

- 28.** Finally, for completeness I would add that the grant of express leave in respect of the Water Treatment Directive argument does not debar either the respondent or the notice party from arguing in a full hearing that it was not pleaded or raised in the High Court and, therefore, that it should not be determined by this Court.