



Cúirt Uachtarach na hÉireann Supreme Court of Ireland

An Taisce – National Trust for Ireland v. An Bord Pleanála & Ors (No 3)

On appeal from: [2021] IEHC 254

The Supreme Court has today dismissed the appeal brought by An Taisce against the refusal by the High Court to quash a decision of the Respondent to grant planning permission for a cheese factory.

Composition of the Court

O'Donnell CJ, Dunne, Charleton, Woulfe, Hogan JJ

Background to the Appeal

In these judicial review proceedings An Taisce sought to appeal the decision of the High Court to refuse to quash a decision of the Board dated the 30th June 2020 to grant planning permission in respect of an application 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.

The central issue in this appeal is whether the Board was under an obligation to assess – whether for the purposes of an environmental impact assessment under the EIA Directive or an appropriate assessment under the Habitats Directive – the upstream consequences of the operation of the proposed cheese factory and, specifically, the milk that is necessary to supply the factory. A further issue raised by the appellant concerned the extent of the Board's obligation under the Water Framework Directive to assess the environmental impact of the discharge of pollutants on adjoining rivers.

The High Court (Humphreys J) dismissed the application for judicial review. By a subsequent decision the High Court refused leave to appeal to the Court of Appeal. The Supreme Court granted leave for a direct appeal to this Court pursuant to Article 34.5.4 of the Constitution.

This Court has already delivered two judgments in respect of these proceedings. The first concerned a significant disagreement between the parties as to the scope of the leave to appeal granted by this Court in its Determination: see *An Taisce v. An Bord Pleanála (No.1)* [2021] IESC 79. The second judgment concerned whether the Attorney General should be permitted to be joined as a party to this appeal in his capacity as guardian of the public interest: see *An Taisce v. An Bord Pleanála (No.2)* [2021] IESC 83.

Judgment

The Supreme Court held that the upstream consequences of the proposed cheese factory were not indirect significant effects liable to be assessed under EIA Directive or the Habitats Directive. The Supreme Court also dismissed the appellant's challenge under the Water Framework Directive.

Reasons for the Judgment

In the only judgment in this appeal Hogan J first addresses An Taisce's objection based on alleged non-compliance with the EIA Directive, which requires direct and indirect significant environmental effects of a project to be assessed. At the heart of this objection is the contention that the Board was required to assess the effect of the proposed factory on milk supply as a significant indirect effect that fell within the ambit of Article 3(1) of the EIA Directive.

On this issue Hogan J turns first to consider the evidence before the Board and the findings/conclusions of the Inspector. In particular he highlights the conclusion of the Inspector (which must be taken to have been adopted by the Board) that the proposed factory would not in and of itself create a demand for milk, since the milk supplied to the factory would be sourced using existing supplies and a projected increase in productivity. While accepting this on its face, Hogan J notes that it is not quite the same thing as saying the proposed factory will not have an effect on demand for milk. Hogan J explains **[at 77]** that: "the

existence of the factory is likely to reinforce and strengthen the overall demand for milk if only in the particular sense that in its absence the *demand* for milk generally would be reduced” (emphasis added). Hogan J concludes **[at 77]** that “at some elevated macro-economic level one may therefore say there is some link between the factory’s requirements for milk and the milk supply.”

Having established the effect on milk supply that the proposed factory might have, Hogan J next considers the test that should be applied to determine an indirect significant effect for the purposes of Article 3(1) of the EIA Directive. Hogan J considers two possible interpretations of the words of Article 3(1), one which gives the words an open-ended meaning, and a second (adopted by Holgate J in *R.(Finch) v. Surrey County Council* [2020] EWHC 3566) which requires indirect effects to be those which the development itself has on the environment. Subject to one important caveat, Hogan J considers **[at 104-105]** the second interpretation to be better suited to the particular circumstances of this case, ruling out the open-ended interpretation on the basis that it would in principle lead to almost no limits to the range of possible inquiry required by the EIA Directive and “lead to the imposition of an impossibly onerous and unworkable obligation on developers preparing an [environmental impact assessment report].” Hogan J observed **[at 102]** that this meant that “matters such as the construction of the plant or emissions from the plant etc. must be identified and assessed, but, generally speaking, not matters such as environmental impacts of the inputs (*e.g.*, milk production) or outputs of the factory (*e.g.*, the environmental consequence of the plastic wrapping of the cheese).” He acknowledges, however, **[at 102]** that there may well “be special and unusual cases where the causal connection between certain off-site activities and the operation and construction of the project itself is demonstrably strong and unbreakable. In those special and particular cases the significant indirect environmental effects of these off-site activities would fall to be identified and assessed.”

The final question to be determined on this issue was whether the effect on milk supply constituted an indirect significant effect of a project within the meaning of Article 3(1) as just interpreted. Hogan J held that because any effect on the general milk supply in the State by reason of the establishment of the cheese factory “remains entirely elusive, contingent and speculative”, the effect cannot be the sort of significant indirect effect which Article 3(1) of the EIA Directive must be taken necessarily to contemplate. Hogan J concluded **[at 107]** on this point by noting that, as important as the EIA Directive undoubtedly is, “it was ultimately designed to assist in identifying and assessing the direct and indirect significant environmental effects of a specific project, including (post-2014) the climate change effects of such a project. Yet the proper scope of the EIA Directive should not be artificially expanded beyond this remit and, in particular, it should not, so to speak, be conscripted into the general fight against climate change by being made to do the work of other legislative measures such as the [Climate Action and Low Carbon (Development)(Amendment) Act 2021].”

The second issue addressed by the Court was whether, for similar reasons to those advanced in respect of the EIA Directive, the Board was required to assess the potential impact of the proposed factory on various Natura sites. In the first instance Hogan J adopted the general test articulated by the Court of Justice in *Sweetman* (Case C-258/11, EU:C: 2013: 220). Having noted the two sites that could potentially be effected by the proposed factory which had been identified by the Board, Hogan J held that the Board had discharged its legal obligations in respect of these sites: the Board had conducted a proper screening in accordance with Article 6(3) of the Habitats Directive and had in turn fairly concluded that the proposed factory would not adversely impact Atlantic salt meadows and that no assessment of the effects of the milk supply production was required.

The final issue addressed by the Court was whether the Board was precluded by Article 4(1) of the Water Framework Directive from granting planning permission for the proposed factory. Hogan J considered this issue on the merits notwithstanding the contention that it was never pleaded and fell outside the scope of the proceedings. Hogan J dismissed the challenge on the basis that the status of the lower River Suir (where discharges from the proposed factory would enter) had achieved a “good status” for the purposes of Article 28 of the Surface Water Regulations 2009 and therefore there was no impediment to the Board granting permission by reference to Article 4(1)(a) of the WFD in light of the Court of Justice decision in *Weser* (Case C-461/13, EU:C: 2015: 433). Hogan J further rejects the argument that the effect on water-courses from individual farms supplying milk to the factory preclude the Board from granting permission since these farms fell outside the “project” of the proposed factory.

The Court determined that it was unnecessary to make an Article 267 TFEU reference to the CJEU in this case. Hogan J held that this case does not involve an acute point of interpretation, but that **[at 156]** it

“really shades into issues of fact and the application of established principles of EU law.” Hogan J noted, however, that had this case raised two possible conflicting *a priori* interpretations, the resolution of which would have assisted any determination of the outcome of the appeal, then a reference would have been appropriate.

Note

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Case history

13th and 14th January 2022

[\[2021\] IESC 83](#)

[\[2021\] IESC 79](#)

[\[2021\] IESCDET 109](#)

[\[2021\] IEHC 254](#)

Oral submissions made before the Court

Judgment of the Supreme Court on a preliminary matter

Judgment of the Supreme Court on a preliminary matter

Supreme Court Determination granting leave to appeal

Judgment of the High Court (**judgment which was the subject of the appeal to the Supreme Court**)