

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 422
[2020 No. 566 JR]

BETWEEN

AN TAISCE - THE NATIONAL TRUST FOR IRELAND

APPLICANT

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

(No. 2)

JUDGMENT of Humphreys J. delivered on Friday the 2nd day of July, 2021

1. In *An Taisce v. An Bord Pleanála (No. 1)* [2021] IEHC 254, [2021] 4 JIC 2003 (Unreported, High Court, 20th April, 2021), I dismissed an application for judicial review of a planning permission for the notice party's proposed cheese manufacturing facility.
2. The applicant now seeks leave to appeal under s. 50A(7) of the Planning and Development Act 2000 and in that regard I have given consideration to the caselaw on leave to appeal, including *Glancreé Teoranta v. An Bord Pleanála* [2006] IEHC 250, [2006] 7 JIC 1302 (Unreported, High Court, MacMenamin J., 13th July, 2006), *Kenny v. An Bord Pleanála (No. 2)* [2001] I.R. 704, *Dublin City Council v. An Bord Pleanála* [2021] IEHC 34, [2021] 1 JIC 2801 (Unreported, High Court, 28th January, 2021), *Dublin Cycling Campaign CLG v. An Bord Pleanála (No. 2)* [2021] IEHC 146, [2021] 2 JIC 2508 (Unreported, High Court, McDonald J., 25th February, 2021) and *Heather Hill Management Company CLG v. An Bord Pleanála* [2019] IEHC 820, [2019] 12 JIC 0502 (Unreported, High Court, Simons J., 5th December, 2019).

Issue 1: scientific certainty

3. The applicant's first proposed point of law of exceptional public importance on which leave to appeal is sought is "[w]hether, in the absence of scientific evidence placed before the Board to contradict the Natura Impact Statement submitted by the developer, the Applicant was precluded from contending that the Board's assessment under Article 6(3) of the Habitats Directive failed to remove all reasonable scientific doubt as to the effects of the proposed development on the protected sites concerned."
4. In raising this point, the applicant has over-interpreted para. 26 of the judgment. That paragraph reads as follows: "In the present case the main consequence of not having pursued the point in the planning process is that there was no scientific evidence put before the board to contradict the Natura Impact Statement. Consequently, it cannot be maintained now that the board acted in a way which left open scientific doubt when there was no such doubt on the materials which it had."
5. That does not mean that no applicant who does not produce its own evidence can challenge a Natura Impact Statement (NIS). It just means that this particular applicant

cannot because there was not otherwise before the board any “materials which it had” that left open scientific doubt. Those materials could include materials put before the board by the developer and by other parties. For the avoidance of doubt, the board is not obliged to accept an NIS simply because it is uncontradicted. The NIS could have inherent flaws on its face, but I didn’t expressly say that at para. 26 of the No. 1 judgment because that was not demonstrated here and, therefore, was not relevant. You can’t cover everything.

6. This concept of looking at the totality of material before the board in any event emerges clearly from para. 29 of the judgment, so the applicant’s point here is unfortunately a mischaracterisation of the judgment.
7. Nor is it correct to say, as the applicant puts it in submissions, that “the Judgment requires all would-be participants in the planning process to identify, commission and fund the necessary scientific evidence identifying deficiencies in the Developer’s NIS”. Rather, the requirement, if an applicant wants to make a point about scientific doubt, is to do any one of three things:
 - (i). bring forward something raising doubt within the process itself;
 - (ii). point to something raising doubt that was brought forward by somebody else; or
 - (iii). establish evidentially in the judicial review that the developer’s material even if uncontradicted would on its face have created doubt in the mind of a reasonable expert.
8. If an applicant fails to do any of those things, it does not really have a valid complaint if its proceedings are dismissed. It is *not* unfair that an applicant is required to point to evidence for its complaints. This is consistent with the decisions of McDonald J. in *Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála* [2019] IEHC 888, [2019] 12 JIC 2017 (Unreported, High Court, 20th December, 2019), at para. 35 and *Dublin Cycling Campaign CLG v. An Bord Pleanála* [2020] IEHC 587, [2020] 11 JIC 1906 (Unreported, High Court, 19th November, 2000), at paras. 137 and 138.
9. There is no conflict with *Kelly v. An Bord Pleanála* [2014] IEHC 400, [2014] 7 JIC 2503 (Unreported, High Court, Finlay Geoghegan J., 25th July, 2014), because that was a case where there *was* scientific doubt on the basis of materials before the board. Consequently, the No. 1 judgment does not, as alleged at para. 12 of the applicant’s submissions here, “switch the burden of proof”. Placing the burden on the applicant (in the sense of a burden to demonstrate the problem, as opposed to proving it by the applicant’s own evidence alone) is placing it in line with existing jurisprudence. That is not a “switch”.

Issue 2: indirect environmental effects

10. The applicant’s second proposed point of law of exceptional public importance is “[w]hether the indirect environmental effects of the project, including those due to the production of milk, are within the scope of the assessment required by Article 2(1) of the

EIA Directive and Section 172(1) of the 2000 Act". Overall I see little need for further appellate clarification of this point given the Supreme Court's judgment in *Fitzpatrick v. An Bord Pleanála* [2019] IESC 23, [2019] 3 I.R. 617, but in fairness to the applicant's submissions, I will try to deal with the point in more detail.

11. The applicant contended that the effects of milk production were indirect effects of the project and should have been assessed in more detail. I disagreed because I thought they were too remote. The applicant contends that the wording of the No. 1 judgment went further than what the board contended. That was slightly surprising because that hadn't been intended. What I had been trying to do was to accept the submission from the board insofar as it agreed that "it hasn't been established that the demand for raw materials for this project will increase production or, if so, by how much ... and therefore you don't have to assess the ... effects" (Day 2 p. 132).
12. That's another way of saying that the production is too remote from the project to require assessment. If that is a complete answer, then there wasn't an obligation to consider the effects of production at a general level, so I really don't think the judgment was meant to go any further than the board's submission.
13. That doesn't mean that production could never be sufficiently proximate as to require assessment – just that that hasn't been demonstrated here, either by reference to the relationship between the production and the project or by reference to expert economic evidence.
14. A relationship whether functional, legal or otherwise between a given project and some other project or activity including, but by no means limited to, a process of project-splitting, can require a broader definition of the "project" for the purposes of both environmental impact assessment and appropriate assessment.
15. There were, however, no such factors demonstrated here, and hence the decision in *An Taisce v. An Bord Pleanála* [2015] IEHC 633, [2015] 10 JIC 0907 (Unreported, High Court, White J., 9th October, 2015), where the power plant the subject of the permission was connected to bogs by a dedicated railway network, thus giving rise to a direct environmental consequence at those bogs, is simply not relevant. Here, the milk production for the factory is to be carried out on around 4,500 unidentified farms located across the east of Ireland which may vary from year to year. While conscious of the *An Taisce v. An Bord Pleanála* decision, I regarded the factual context there as so clearly different as just not to be relevant here and thus as not necessitating discussion. However, I had better make that explicit now in order to assist the applicant.
16. The applicant now contends (in a formulation that isn't hugely familiar from its submission the first time round, but maybe that's my misunderstanding) that, in effect, even if the production is too remote to be part of the project, its effects are still indirect effects of the project. On foot of that submission it accuses the No. 1 judgment of confusing the project and its effects. This is the sort of Jesuitical distinction that lawyers love, but I am

not altogether sure that it makes complete sense. Even assuming *arguendo* that it does, it isn't relevant here because the effects are too remote.

17. Finally, the applicant says the judgment is unclear if it means that the only effects that need assessment are site-specific ones. I agree that if you strip out the context and implied assumptions, the wording could lend itself to that interpretation, but that isn't the case. If the effects concerned are effects of the project, then they *do* require assessment whether they are site-specific or not. The No. 1 judgment should be read as subject to that clarification. But that doesn't help the applicant here because I didn't think the effects were effects of the project. Even if I'm wrong in that, it is an error in the application of the law to the facts, not a point of law in itself.

Issue 3: collateral attack

18. The applicant's third proposed point of exceptional public importance is "[w]hether the Court was correct in its conclusion that the Applicant's proceedings constituted a collateral attack on government policy."
19. That is a mischaracterisation because I did not so conclude, and indeed did not refer to the doctrine of collateral attack at all. So the judgment cannot have been "a dramatic expansion of the collateral attack jurisprudence" (para. 35 of applicant's submissions). In the hope that the situation will be clearer if I explain it more detail, the three-month time limit in O. 84 RSC applies only to challenges to individual decisions, not to challenges to measures of general application such as a statute, statutory instrument or policy document (see *M.R. (Albania) v. Minister for Justice and Equality* [2020] IEHC 402, [2020] 8 JIC 1702 (Unreported, High Court, 17th August, 2020) at para. 54).
20. A measure of general application can be challenged from time to time as issues arise under it and as it is applied to new applicants and situations. Any other approach would severely undermine the rule of law.
21. The doctrine of collateral attack, therefore, has no application to challenges to general measures. It is about collaterally challenging out of time an individual decision to which a time limit *does* apply by later challenging a subsequent individual decision.
22. My comment about the applicant's real grievance being with government policy was firstly intended to be just a statement of fact as I understood it on the basis of the applicant's submission to the board and oral submissions to the court. Those matters did give me the impression that the applicant did not approve of the government policy to increase the national herd, and given their role as a key environmental NGO, there would not be anything surprising or unreasonable about that.
23. Their complaint about that comment now seems to lie in their contention that the negative environmental effects of this specific development are a consequence of the development and not of policy. I did indeed understand that to be their legal argument, but I had also understood them to have a real (in the sense of underlying) objection to

the official policy that was broader than any objection to any individual development. But maybe I misunderstood their position.

24. Secondly, my comment was intended to be a description of what I saw as the real forensic dynamic here, namely that because the legal grounds for challenging any government policy document are relatively scanty compared to those available to challenge an individual planning decision, the applicant is taking advantage of the latter grounds in order to make a point that in effect amounts to contesting the outcomes envisaged by the underlying policy. That is arguably borne out by the fact that the applicant's focus is on the increase in the dairy herd, which is specifically envisaged as a matter of government policy. That was not a criticism. Indeed, I said it was forensically understandable. Worth trying once from an applicant's point of view, but ultimately not a legally valid approach. The applicant can feel free to disagree with my description of the dynamic of the proceedings, but even if that description is wrong, that does not change the legal conclusion.
25. If it reassures the applicant at all, I agree with its point that a great many decisions can be traced back to a policy of one kind or another, and that that fact in no way precludes them being challenged. The fact that a decision is rooted in a policy of whatever vintage does not in itself in any way diminish the scope for impugning that decision. The reference to policy in the judgment cannot be construed as having the radical effects contended for now.

Issue 4: water framework directive

26. The applicant's proposed fourth point of exceptional public importance is "[w]hether in the absence of scientific evidence placed before the Board to contradict conclusions reached by the developer in respect of potential deterioration of the status of water bodies or jeopardising attainment of good status under the Water Framework Directive (2000/60/EC), the Applicant was precluded from contending that the Board's decision was reached contrary to the requirements of that directive as clarified in Case C-461/13, *Weser*".
27. The premise of the question is incorrect because the applicant was not precluded from advancing its contentions. The contentions were rejected for two reasons. One aspect was not pleaded and the remaining points lacked an evidential basis in the materials as a whole, not simply because *the applicant* did not put forward scientific evidence. There is no conflict with *Sweetman v. An Bord Pleanála* [2021] IEHC 16, [2021] 1 JIC 1506 (Unreported, High Court, Hyland J., 15th January, 2021), which was a case that turned on the fact that an impacted waterbody had an unassigned status. That is not relevant because the waterbody here into which the effluent will be discharged *does not* have an unassigned status. Rather it has been assigned a "good" status.
28. Insofar as the applicant then sought to make an argument that some of the water bodies in the River Suir catchment area had an unassigned status, the applicant endeavoured to expand its case by claiming that of the 179 water bodies within the catchment area, 42

had not been assigned a status by the Environmental Protection Agency. That was quite an involved point and not on any view something that was implicit in what was pleaded.

29. The applicant suggested that to find that this complex unpleaded point was not open to it contradicted para. 31 of the No. 1 judgment, where I made a passing reference to “assuming that the board’s pleading objection as to the lack of specifics can be overcome”. However, that was meant to refer to para. 59 of the board’s statement of opposition which states as follows: “Strictly without prejudice to the foregoing preliminary objection, the Applicant has not in any event adequately particularised these grounds as it has not identified what provision of the said Water Framework Directive and/or the Surface Water Regulations 2009 has been breached by the grant of planning permission for the proposed development. This is contrary to the requirements of Order 84, [r.] 20(3) of the Rules of the Superior Courts, and the said grounds cannot therefore properly form a basis for the grant of the relief sought.”
30. I saw that as a complaint regarding the lack of specifics in terms of what was pleaded. By assuming that *that* could be overcome, I was not intending to imply that the applicant was entitled to argue for something that was *not* pleaded (let alone particularised), in particular the complaint about there being unassigned water bodies. Thus, I went on to say at para. 32 that the point about taking the river basin as a whole would have needed to have been articulated on the pleadings in a much more specific way.
31. In the reply at the hearing of the leave to appeal application, the applicant argued that I was not entitled to rule against it on pleading grounds having regard to EU law and in particular, the point discussed in *Eco Advocacy CLG v. An Bord Pleanála* [2021] IEHC 265 (Unreported, High Court, 27th May, 2021). But I think the problem for the applicant in advancing that point now is that it was not a point made at the hearing, so it cannot be a basis for leave to appeal. As the notice party contends, this is an “after the event” thought.
32. The applicant also suggested that a reference under art. 267 TFEU might be necessary in due course. But if leave to appeal is not appropriate, then a reference for the purpose of leave to appeal cannot be appropriate. In any event, given how complex and involved the point is, as noted above, I do not see how even the most extensive EU law own-motion obligation could stretch to require the court to find for the applicant on such a basis.

Conclusion and order

33. Before concluding, I hope I might be forgiven if I attempt to contextualise the need for expedition in cases of this kind. Legislation recognises a need for urgency in a number of situations, including in respect of challenges to planning decisions. But the system does not always deliver that urgency.
34. A point I tried to make in *Naudziunas v. OKR Group* [2020] IEHC 566, [2020] 11 JIC 1711 (Unreported, High Court, 17th November, 2020), at para. 43 is that one should not unduly blame individual litigants for problems that are more properly down to the system

overall. That applies with particular force where an applicant is exercising Aarhus rights, as here. It may be helpful to point out that art. 3(8) of the Aarhus convention renders unlawful, in international and EU law terms, the victimisation of an applicant for availing of rights of environmental participation and challenge. It logically follows that it would be equally unlawful, in such a sense, to counsel, procure or incite such victimisation, or to attempt to do so. In a related vein in domestic law, it may also be helpful to point out that Carney J. said in *McKinley v Minister for Defence* [1997] IEHC 93, [1997] 2 IR 176, in relation to reporting that amounted to public shaming of a litigant, that “[w]hat concerns me, however, is whether the reporting came close to amounting to an unlawful interference with the constitutional right of access to the Courts in that a person of lesser courage than the Plaintiff could well have been intimidated against bringing her case to a plenary hearing ...”. A better alternative in the present kind of context might be that coined by Evelyn Beatrice Hall (as S.G. Tallentyre) to summarise Voltaire: "I disapprove of what you say, but I will defend to the death your right to say it" (*The Friends of Voltaire* (London, Smith, Elder & Co., 1906), pp. 198-199), and to focus instead on how the system can be improved.

35. As suggested above, the problem of delay in this context is primarily systemic in nature. From time to time various ideas are suggested as to how such cases can be speeded up, but experience suggests that some of these ideas (such as leave being applied for on notice) can in practice have the opposite effect to that intended. I hope I can be forgiven for respectfully suggesting that there are some matters which, if given timely consideration, would be likely to reduce the timescale for a disposition of cases of this type:
- (i). Most obviously, the appointment of significantly more judges.
 - (ii). The establishment of the environmental court as a division of the High Court, with sufficient resources.
 - (iii). Consideration of the elimination of the procedure with which we are concerned here, namely the application to the High Court for leave to appeal to the Court of Appeal. Prior to 2014, planning cases and other urgent matters with a restricted right of appeal could only go to two levels at a maximum, the High Court and, if leave to appeal was granted, the Supreme Court. There was no constitutional necessity in 2014 to provide for the High Court certifying a point that would allow an intermediate to appeal to the Court of Appeal. That was a voluntary policy choice made by the Oireachtas. And indeed given that the leave to appeal to the Court of Appeal procedure involves exceptionality, which is a higher test than that for leave to appeal to the Supreme Court, it frequently if not normally follows that a case of exceptional importance will go the distance in any event following that intermediate appeal. So again, one cannot unduly criticise any given litigant for exercising an option that elected representatives have gratuitously provided. There would be no constitutional difficulty in eliminating that option, if thought desirable, and providing that the High Court decision on planning, for example, would be final

unless the Supreme Court itself granted leapfrog leave. My only concern if that were done would be not to create a whole series of further anomalies, in that it would be more consistent to ensure that all categories of cases where there was a pressing need for finality were treated similarly - other examples being deportation or the European arrest warrant. Logic and consistency suggests that if one were to go back to one bite of the appellate cherry for some of these types of cases, it would be worth considering doing so for all. That would restore the pre-2014 situation, namely only one potential appeal, but with the important improvement that follows from the amended constitutional provision, in that it would be the Supreme Court, and not the trial judge, that would be the gatekeeper. For the avoidance of doubt, the fact that there might be grounds for scepticism about the current leave to appeal procedure is not a reason to decline to give this applicant or any applicant the benefit of it. It is perfectly possible and legitimate to operate the law as it stands while asking the question as to whether any given law might be improved or even repealed. One can note in passing that the fact that any decision on such matters is for the other branches of government alone doesn't prevent a court from suggesting consideration of any such reform, insofar as concerns questions of systemic efficiency and legal policy, as here, without getting involved in pure questions of executive or legislative policy. The reason the applicant isn't succeeding here is not because this procedure could be questioned but because the application hasn't met the existing tests for the procedure.

36. Respectfully leaving the last-mentioned matters for any consideration by the appropriate authorities and returning to the present application, for the reasons set out in this judgment, the leave to appeal application is dismissed.