APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2024/60

Neutral Citation Number [2024] IECA 233

Whelan J.

Faherty J.

Allen J.

BETWEEN/

CARLOW FOODS LIMITED

APPLICANT/APPELLANT

- AND –

THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE

RESPONDENT

AND

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Mr. Justice Allen delivered on the 24th day of September, 2024

Introduction

1. This is an appeal by Carlow Foods Limited *("the appellant")* against the judgment and order of the High Court (O'Regan J.) of 6th February, 2024 refusing its application for

orders pursuant to O. 40, r. 1 of the Rules of the Superior Courts directing the attendance for cross-examination of two veterinary inspectors, the deponents of affidavits filed on behalf of the Minister for Agriculture, Food and the Marine *("the Minister")* in opposition to the appellant's judicial review application.

2. The factual and legal background is complicated. What follows is not intended to be an exhaustive analysis of all of the issues in the substantive proceedings but merely as a sufficient summary to facilitate an understanding of the issue in the appeal, the arguments of the parties in relation to that issue, and the reasons for which I have come to the conclusions which I have.

The facts

3. The appellant is the owner and operator of what it describes as a free-range poultry farm and adjoining slaughterhouse and meat production factory at Kilkea, Fenagh, County Carlow. The appellant farms and processes chickens and turkeys. The facility – to use a neutral term – comprises or includes land, chicken rearing houses, and a slaughterhouse and processing building. As I will come to, the legislation is in the main directed to *"holdings"*. Part of the appellant's case relies on the physical separation of the elements of the facility – specifically, the slaughterhouse and the chicken rearing houses – and there appears to be some argument as to whether the *"holding"* comprises the entire facility or can be divided into the constituent elements. For the avoidance of doubt, I express no view on that.

4. On 9th December, 2020 the appellant brought a number of its turkeys from the farm to the adjoining slaughterhouse, where they were slaughtered, processed, and stored for the Christmas market.

5. Later that day, the appellant received a consignment of turkeys from a third-party farmer, a Mr. Murphy in Co. Wicklow. Mr. Murphy's turkeys were not introduced onto the appellant's farm but were brought directly to the slaughterhouse. Before the birds were

slaughtered, one of the attending vets expressed concern in relation to their health and samples were taken for laboratory testing. The samples tested positive for highly pathogenic avian influenza *("HPAI")*.

6. On the same day, the Minister issued notices under regulation 4(1) and regulations 29 and 31 of European Communities (Control of Avian Influenza) Regulations, 2006. The premise of the regulation 4 notice was that the appellant's holding was a *"suspected outbreak holding"* on which *"the presence of avian influenza [had] not been ruled out"*. The regulation 4 notice required – in the vernacular – that the holding be locked down. The premise of the regulation 29 and 31 notice was that avian influenza was suspected in the slaughterhouse and that notice required that *"based the results of a risk assessment"* all birds present in the slaughterhouse should be killed or slaughtered, the carcasses put into isolation, and the slaughterhouse locked down until it had been cleansed and disinfected. On the appellant's case, all of this was duly done and on 11th December, 2020 Mr. Murphy's turkeys were disposed of by the appellant as directed by the Minister.

7. In the meantime, on 10th December, 2020 the Minister had issued seven further notices under the 2006 Regulations including notices which declared that the appellant's holding was a *"suspected outbreak holding"* and specified the measures to be applied; which declared the holding to be a *"contact holding"* and specified the measures to be applied; and set out the disinfection procedures to be followed in the slaughterhouse. In each case, the *"holding"* was identified as *"the holding at Carlow Foods, Kilkea, Fenagh, Carlow."*

8. By letter dated 16th December, 2020 the appellant was informed that the Minister had directed that the entire poultry flock located at its lands and premises at Kilkea, Fenagh, County Carlow was to be killed and disposed of in accordance with Part 6 of the Animal Health and Welfare Act, 2013. That course – it was said – was being taken as, in the opinion of the Minister (reflecting the language used in s. 30 of the Act of 2013):-

"(a) the poultry may be or are suspected of being affected with avian influenza,

(b) the poultry are at risk of being affected with avian influenza,

(c) the poultry may have been or may be in contact with or may have been in contact with or exposed to an animal, an animal product, animal feed or other thing to which paragraph (a) or (b) relates, or

(g) this action is necessary, ancillary or supplementary to prevent the risk or spread of avian influenza."

9. The appellant protested at the proposed depopulation of its farm. Mr. Murphy's turkeys – it said – had gone directly to the slaughterhouse. The slaughterhouse – it was said – was separate to, and at a remove from, the farm. There had been no contact between the appellant's chickens and Mr. Murphy's turkeys. Moreover, it was said – and it is common case – samples from the appellant's chickens taken for testing on 17th December, 2020 were reported negative; as were samples taken from the appellant's turkeys which had been processed on 9th December, 2020. Nevertheless the cull took place on 21st and 22nd December, 2020.

The substantive proceedings

10. By order of the High Court (Meenan J.) made on 8th March, 2021 the appellant was granted leave to apply by way of judicial review for orders of *certiorari* quashing the Minister's decision as communicated to the appellant on 16th December, 2020; the Minister's decision said to have been made on 21st December, 2020 to proceed with the depopulation; and the notices of 10th December, 2020; as well as damages associated with the lockdown of the appellant's holding and the destruction of its flock.

11. The appellant is entitled to statutory compensation for the value of the flock but makes the case – and it can hardly be gainsaid – that the losses it sustained extended far beyond the value of the birds. The appellant was also granted leave, in the alternative to its

claim for damages for the destruction of the flock, to apply for a declaration that the statutory limit or measure of compensation in s. 31(2) of the Animal Health and Welfare Act, 2013 constitutes an unjust attack on its property rights as protected by Articles 40.3. 2º and 43 of the Constitution and is accordingly invalid having regard to the provisions of the Constitution.

12. The substance of the challenge to the Minister's decisions of 16th December, 2020 and 21st December, 2020 is that it was unreasonable and disproportionate to have directed the destruction of the flock before it had been tested and/or unreasonable and irrational that the decision was not reconsidered – and presumably, reversed – in light of the negative test results.

13. Further, the appellant argues that in making his decision under Part 6 of the Act of 2013 to depopulate the appellant's flock on a precautionary basis, the Minister failed to properly carry out his duties under Directive 2005/94/EC, as transposed into domestic law by the 2006 Regulations.

14. The appellant further makes the case that the Minister *[sic.]* failed to properly transpose Directive 2005/94/EC; that the orders failed to have any regard to the distinction in EU law between *"holding"* and *"slaughterhouse"*; and that the impugned decisions are void for want of sufficient reasons: but these are obviously pure legal challenges.

15. The Court is not on this appeal concerned with the merits of any of the grounds, but I cannot help but wonder whether the appellant's further contention that the statutory power conferred by s. 30 of the Act of 2013 to direct the killing of *"an animal"* is limited to the killing of a single animal is its best point.

16. The substance of the appellant's challenge to the notices of 10th December, 2020 is that the power in regulation 12 of the 2006 Regulations to declare a holding to be a *"contact holding"* and to direct measures to be taken is limited to confirmed outbreaks of HPAI.

17. The appellant's notice of motion seeking the substantive relief was issued on 23rd March, 2021 and was initially returnable for 11th May, 2021.

18. The appellant's application was opposed by the Minister on the grounds set out in a twenty page notice of opposition. Insofar as is material for present purposes, the Minister asserted that an epidemiological inquiry – acknowledged to have been required by regulation 12 of the 2006 Regulations – was completed on 10th December, 2020; that a risk assessment was carried out prior to the decision to depopulate the flock; and that the decision to depopulate the flock had been made in line with Council Directive 2005/94/EC. The decision to depopulate was said to have been made considering three main risk criteria: the proximity of the flock to the confirmed cases in the slaughterhouse; the integrated nature of the production site; and the increased risk of further spread if the appellant's birds were infected.

19. The statement of opposition was verified by an affidavit of Ms. Ann Quinn, superintending veterinary inspector, filed on 12th October, 2021. Further affidavits of Ms. June Fanning, senior superintending veterinary officer; Mr. Rob Doyle, veterinary director; Mr. Charles A. Grant, veterinary inspector; and Mr. Martin Hanrahan, veterinary inspector, were filed on behalf of the Minister.

20. Ms. Quinn deposed *inter alia* that a risk assessment had been carried out as per the Regulations and that the decision to depopulate had been taken as a precautionary measure after a full risk assessment had taken place.

The discovery motions

21. By letter dated 6th December, 2021 the appellant, by its solicitors, called upon the Minister to make voluntary discovery of all documents arising from the investigation of the suspected avian 'flu outbreak and the risk assessment and epidemiological inquiry pertaining the appellant's holding between 9th December, 2020 and 16th December, 2020 (both dates inclusive). There was no reply from the Chief State Solicitor and by notice of motion dated

17th February, 2022 the appellant applied to the High Court for an order pursuant to O. 31, r. 12 of the Rules of the Superior Courts directing the Minister to make the discovery which had been sought. The notice of motion also asked for an order pursuant to O. 84, r. 23(2) permitting the appellant to amend its statement of grounds; and an order pursuant to O. 31, rr. 1 and 5 granting leave to the appellant to deliver interrogatories.

22. The discovery motion was grounded on an affidavit of Mr. Greg Ryan, the appellant's solicitor, who deposed – quite correctly – that no risk assessment or epidemiological inquiry had been exhibited by any of the five veterinary officers and – citing *O'Neill v. Governor of Castlerea Prison* [2004] 1 I.R. 298 and *Murtagh v. Kilrane* [2017] IEHC 384 – suggested that the Minister was subject to a duty to disclose to the High Court all materials which were relevant to the impugned decisions. Mr. Ryan also laid the ground for the application for leave to amend and to deliver interrogatories; in respect of which a consent order was eventually made on 12th January, 2023.

23. By letter dated 21st February, 2022 the Chief State Solicitor, on behalf of the Minister, did not contest the necessity in principle for discovery but argued that the appellant's request for discovery was too broad and onerous. The Minister offered instead to make voluntary discovery of the risk assessment and epidemiological inquiry. By letter dated 6th April, 2022 the appellant's solicitor conveyed the appellant's acceptance of the Minister's offer.

24. On 2nd June, 2022 Ms. Fanning swore an affidavit of discovery on behalf of the Minister in which she listed, in the First Schedule, First Part:-

> *"1. Risk Assessment,*
>
> *2. Epidemiological Survey."*

25. In the First Schedule, Second Part, Ms. Fanning deposed that there was *"Nothing to discover"* and in the Second Schedule *"NIL".*

26. The appellant was dissatisfied with the discovery and – having previously set out its concerns in correspondence – by notice of motion issued on 5th January, 2023 moved for an order pursuant to O. 31, r. 20(3) directing the Minister to state by affidavit whether any more documents were or had at any time been in his possession or power or procurement; and if not then in his possession, when he had parted with them and what had become of them. That motion was grounded on a second affidavit of Mr. Ryan.

27. Ms. Fanning's affidavit of discovery and copies of the discovered documents were sent to Mr. Ryan's office by e-mail on 9th June, 2022. The copy of the document described in the schedule to the affidavit of discovery as *"Risk Assessment"* was a soft copy of a Microsoft Word document which was headed *"Risk assessment carried out prior to precautionary depopulation"* and was undated and unsigned. By looking at the Microsoft Word properties, Mr. Ryan was able to establish that the document had been created on 15th March, 2021 and revisited three times thereafter. The author was not identified on the face of the document but the properties showed that it had been created by *"author: june.fanning"* of *"company: Department of Agriculture, Food and Marine."* The copy documents provided which were said to have been the *"Epidemiological Inquiry"* or *"Epidemiological Survey"* were a two page document entitled *"ND/AI Suspect Telephone Report"* and a three page document entitled *"Avian Clinical Disease Report Form."*

28. In support of the application for further and better discovery, Mr. Ryan suggested that there were reasonable grounds for believing that there must be more documents, specifically, a risk assessment document that was created in December, 2020, and something more directly related to the notices of 9th and 10th December, 2020. Mr. Ryan pointed to the (659 page) contingency plan which had been exhibited by Ms. Fanning to her affidavit filed on 12th October, 2021 which, he said, had indicated the type of *"risk assessments"* and

"epidemiological inquiries" that ought to have been carried out and ought to have been discovered.

29. On 9th March, 2023 Ms. Fanning swore what was described as a supplemental affidavit to address, she said, certain issues arising out of her affidavit of discovery.

30. As to epidemiological inquiry, she deposed that:-

> *"7. I say and believe that in respect of the epidemiological inquiry, having reviewed the files and having it confirmed to me, Forms F2 [the Suspect Telephone Report] and F4 [the Avian Clinical Disease Report] were the extent of the epidemiological inquiry carried out before the decision to depopulate was taken. Samples were taken after the decision to depopulate, but the sampling (and the results of the sampling of the applicant's flock) did not form part of the pre-decision inquiry. The sampling with negative results permitted the respondent to allow the earlier repopulation of the applicant's flock. If the results were positive, there would have been a requirement for zones and a longer time without restocking."*

31. As to the risk assessment, she deposed that:-

> *"8. I say and believe that in relation to the risk assessment, I discovered a report of the matters considered before the decision to depopulate was taken. The decision to depopulate is a very serious one and requires assessment of the situation by the relevant team in the National Disease Control Centre in conjunction with the senior veterinary management team. Those discussions themselves are not minuted but the main points are recorded in the Risk Assessment report that is discovered. ...*
>
> *10. I say and believe that the risk assessment document was prepared by your deponent in or around March, 2021. I believe that it is an accurate reflection of the risk assessment carried out prior to depopulation. Your deponent drafted the report having consulted with senior veterinary management to ensure that it is an accurate*

reflection of the assessment carried out. As stated above, there is no formal risk assessment document, and this is why the document discovered post-dates the decision to depopulate.

11. I say and believe that the 'risk assessment' upon which the decisions were subsequently made, was a process resulting in a well-considered, appropriate, decisive, swift course of action as opposed to a document. The assessment of risk occurred during extensive discussions between senior management and officials from the respondent involved in dealing with this particular, unique situation. A risk assessment to restrict the applicant's flock as a high risk contact took place on 9th and 10th December, 2020. Discussions and assessments in relation to the depopulation of Mr. Salter's flock took place between 10th and 16th of December 2020 following confirmation of avian influenza H5N8 in the 3rd party turkey flock at the Carlow Foods' premises. The presence of avian influenza was suspected on the premises on 9th December, 2020 which involved a certain level of risk, and preventative precautions (including a restriction notice) were obliged to be issued in accordance with Council Directive 2005/94. However, when the presence of AI subtype H5N8 was confirmed to be present in the brain of the affected turkeys on 10th December, 2020, the level of risk escalated. This is when discussions and assessments in relation to options concerning the broilers took place."

32. Ms. Fanning went on to recall – as had been set out in the statement of opposition – that the risks which were considered included the proximity of the flock of chickens to the confirmed cases in Mr. Murphy's turkeys in the slaughterhouse; the integrated nature of the production site; and the increased risk of further spread if the appellant's birds were infected; and she reprised what she had said in her initial affidavit as to the circumstances in which the decision to depopulate had been made.

33. If the appellant's solicitors were not necessarily satisfied with the explanation provided by Ms. Fanning, they nevertheless took the view that the motion for further and better discovery could go no further and, by letter dated 14th March, 2023 to the Chief State Solicitor, proposed that the motion be struck out with costs to the appellant. On 22nd May, 2022 a third affidavit of Mr. Ryan was filed in support of the appellant's argument that the motion for further and better discovery was reasonable and necessary and that the Minister should be ordered to pay the costs.

The motion to cross-examine

34. On 15th June, 2023 the appellant's solicitor issued the motion which has given rise to this appeal, seeking orders pursuant to O. 40, r.1 for the attendance for cross-examination by Ms. Fanning in respect of her affidavits of 8th October, 2021 – her first affidavit – 2nd June, 2021 – the affidavit of discovery – and 9th March, 2023 – her supplemental affidavit; and of Ms. Quinn in respect of her affidavit of 11th October, 2021.

35. The motion to cross examine was ground on a fourth affidavit of Mr. Ryan. Mr. Ryan suggested that there was a significant conflict as to the facts on the face of the affidavit evidence.

36. Mr. Ryan identified in regulation 12 of the 2006 Regulations the requirement for a risk assessment and an epidemiological inquiry. The notices served on the appellant – he said – were stated to have been based on the results of an epidemiological inquiry. The Minister's contingency plan – he said – outlines the comprehensive investigative steps required in circumstances of a suspected outbreak of avian influenza: forms, records, lists, diagrams, sampling, pathogenicity testing, and so forth. However – he said – Ms. Fanning had deposed in her affidavit of 9th March, 2023 that the risk assessment carried out in this case was *"a course of action as opposed to a document."*

37. Without getting ahead of myself, all of this was common ground.

38. Mr. Ryan went on to refer to the *"Risk assessment carried out prior to precautionary depopulation"* discovered by Ms. Fanning, which she had later sought to explain; and the averments in Ms. Fanning's first affidavit that the decision to depopulate had been taken after a *"full risk assessment"*. He identified in Ms. Quinn's affidavit an averment which he understood to mean that *"a separate risk assessment"* had been carried out prior to the precautionary depopulation.

39. Again I do not want to get ahead of myself, but it will make my judgment easier to follow if I say at this point that the *"separate risk assessment"* referred to by Ms. Quinn at para. 17 of her affidavit of 11th October, 2021 was plainly the risk assessment on which the decision to depopulate of 16th December, 2020 was based, which was separate to the risk assessment referred to in the immediately preceding paragraph which was carried out on the same day which was directed to the risk of releasing onto the market the appellant's turkeys which had been processed on 9th December, 2020. This was later confirmed by a further affidavit of Ms. Quinn but in my view, it is quite clear from her initial affidavit.

40. Ms. Quinn – said Mr. Ryan – had averred in her first affidavit that the possibility of a negative result had been taken into account in the risk assessment carried out prior to the decision to depopulate; which she had. Ms. Fanning – said Mr. Ryan – had deposed in her supplemental affidavit – which she had – that the *"the document entitled 'Risk assessment carried out prior to precautionary depopulation' was created on 15th March, 2021 to articulate clearly the risk assessment carried out prior to the decision to depopulate."* However, he said, there is no record in the document of the possibility of a negative result having been taken into consideration.

41. Mr. Ryan correctly identified what had been said by Ms. Quinn and what was recorded in the *"risk assessment"* but there is no conflict. Ms. Quinn deposed that the possibility of a negative result had been taken into account and no one has suggested that it

was not. The later created document says what it says. It does not say that the possibility of a negative result was not taken into account. As was pointed out by Ms. Quinn in her affidavit of 24th July, 2023, although the document does not refer to the possibility of negative test results, it does contemplate the possibility of positive test results. The fundamental point is that there is no conflict between Ms. Quinn's evidence and Ms. Fanning's document.

42. At para. 6 of his fourth affidavit Mr. Ryan suggested that what he had identified as the conflicts were conflicts which were required to be resolved if the High Court was to properly adjudicate on four legal grounds.

43. The first legal ground was that the appellant claimed that it was unlawful for the Minister to have made the decision to depopulate in advance of any epidemiological sampling of the flock. The Minister's case – he said – was that a risk assessment had been carried out. Mr. Ryan suggested that the court could not determine the matter without knowing the nature and extent of the risk assessment and epidemiological inquiry, if any, carried out by the Minister at the material time. However, the nature and extent of the risk assessment was clearly set out in the statement of opposition and the affidavits. To be sure, the appellant does not accept that it was a sufficient risk assessment but whether it was or not is a matter of law. It is common case that no epidemiological inquiry was carried out prior to the decision to depopulate. Whether this undermined the validity of the impugned decision is a question of law.

44. The second legal ground is the appellant's claim that when making the initial decision to depopulate and the later decision to proceed with the cull, the Minister failed to have regard to the conclusion of the epidemiological investigation carried out in respect of Mr. Murphy's holding: which was that the most probable source of the infection of Mr. Murphy's turkeys was wild birds. It is common case that Mr. Murphy's turkeys were infected with

avian 'flu. It is not immediately obvious to me how the source of infection of the turkeys might have been material to the assessment of the risk they posed to the appellant's chickens. Rightly or wrongly, I do not understand that the source of infection of the turkeys was in fact taken into consideration in coming to the decision to depopulate the appellant's flock but whether it was or not will be apparent from the statement of opposition and supporting evidence. If it was not, then the issue as to whether the Minister's failure to take into account the source of infection of Mr. Murphy's turkeys went to the validity of the decision to depopulate the appellant's holding is a question of law.

45. The third legal ground identified by Mr. Ryan is the alleged failure of the Minister to properly transpose Directive 2005/94/EC. This is quintessentially a legal argument. It is said that the Minister cannot be in compliance with Article 7(1) without a questionnaire-based investigatory procedure in place. Whether that is so is a matter exclusively for legal submission and not a contested question of fact which would necessitate – or be advanced by – the cross-examination of the veterinary inspectors.

46. The fourth legal ground is that if, as averred by Ms. Fanning in her affidavit of 9th March, 2023 there is no formal risk assessment document, there remains a duty on the Minister to disclose to the High Court all materials in his possession which were relevant to the decision sought to be impugned. Mr. Ryan deposed to his belief that this duty exists regardless of the scope of the terms of discovery agreed between the parties. With all due respect, this goes nowhere. The appellant's motion for further and better discovery was brought as far as the appellant's advisors believed that it could be and there is no suggestion that the Minister has – or that there is reason to believe that he might have – any materials relevant to the impugned decisions and notices which have not been made available to the court. Rather, the argument is that the decisions and notices were invalid because of the absence of what the appellant contends was necessary paperwork.

47. In response to the fourth affidavit of Mr. Ryan, further affidavits of Ms. Quinn and Ms. Fanning were filed on behalf of the Minister but these – with no disrespect – were largely argumentative and directed to showing that there was no contested question of fact.

The High Court judgment

48. The appellant's motion was heard by O'Regan J. on 6th February, 2024 and dealt with in a short *ex tempore* judgment.

49. With characteristic brevity and clarity the judge identified the core issues in the substantive proceedings as twofold; one, whether the Regulations require the various assessments to be in writing and, two, whether what occurred and such enquiries as were caried out complied with the Department of Agriculture, Food and the Marine's contingency plan.

50. The justification offered in support of the motion was the requirement that if a party to litigation was to say that the evidence of his opponent was not credible, it was necessary in the interest of fairness to put that to the witness in cross-examination. The judge referred to the decision of Kelly J. (as he then was) in *Irish Bank Resolution Corporation v. Moran* [2013] IEHC 295 and Collins and O'Reilly's work on *Civil Proceedings against the State* at paras. 6-109 and 6-110.

51. The judge considered that the issues as to whether there was a need for written assessments or would oral assessments do and whether there had been compliance with the contingency plan were issues of law, not of fact. She said that it had not been appropriate for Ms. Fanning to have said – as she had – that the assessment had been made in full compliance with the contingency plan. That, said the judge, was a matter of law. She also found that the appellant, in contending in argument that cross-examination was necessary to allow it to impugn the credibility of the evidence, had sought to enlarge the basis on which cross-examination had been sought.

52. O'Regan J. concluded that neither the contingency plan compliance nor the need for a written as opposed to an oral assessment was a matter of fact but both were matters for legal argument. She found that there was no evidence other than a bare denial of credibility or reliability to suggest that cross-examination was required and refused the application.

The appeal

53. By notice of appeal filed on 4th March, 2024 the appellant appealed against the judgment and order of the High Court on three grounds:-

1. That the judge erred in finding that the appellant had made a bare assertion that the evidence of Ms. Quinn and Ms. Fanning was not credible and in finding that there was no evidence other than a denial of credibility or reliability.
2. That the judge erred in finding that the appellant had enlarged the grounds on which it sought to cross-examine.
3. That the judge failed to err on the side of caution and/or failed to observe the principle of tending towards permitting cross-examination where it was debatable whether the cross-examination sought was necessary or desirable.

54. In support of the first ground, the appellant argued that while the Directive, the Regulations and the Department's contingency plan all dictated a documentary, paper based approach, there had been a manifest failure to place such material in evidence. But this, it seems to me, begs the question. The appellant's case is that the decision-making process must be made or documented in writing. The Minister contests that. Whether it is or is not so is a matter for legal argument.

55. The appellant made the point – and it is not entirely without merit – that the Minister's assertion in response to the motion for discovery that the request was *"far too broad and onerous"* was inconsistent with the absence of relevant documents eventually

produced. However, the scope of the agreed discovery was narrower than the original request and the discovery of the three documents encompassed by the narrower category does not necessarily go to the volume of documentation that might have been captured by the broader category. And in any event, the scope of discovery was water under the bridge.

56. So also was any argument that the title of the *"Risk assessment carried out prior to precautionary depopulation"* document suggested that it had been created in December, 2020. If Ms. Fanning's affidavit of 9th March, 2023 could be said to have contradicted what – absent the Microsoft Word properties – might have been inferred from the written record of the risk assessment, there was no remaining factual issue in relation to the document or the time or circumstances in which it had come into existence.

57. The appellant submits that without cross-examination it will not be in a position to invite the High Court to reject the evidence of Ms. Quinn and Ms. Fanning but in truth the appellant's legal arguments as to the validity of the decision to cull is premised on the accuracy of that evidence, namely, that there was no written assessment. Alternatively, the appellant argues that the decision is invalid for a want of reasons but the adequacy of the reasons for the decision must in principle be determined by reference to the reasons given at the time of the decision.

58. The appellant notes that the judge – perfectly correctly – observed that Ms. Fanning was not competent to aver that the Minister's actions were in full compliance with the contingency plan; which is a matter for the court to decide. However, it goes on to argue that it is entitled to contest by cross-examination the assertion in the pleadings and on affidavit that the Minister conducted the proper risk assessments, epidemiological inquiries, and all investigative procedures required by the Regulations and in accordance with the contingency plan. This is contradictory. The witnesses have said what they did. They are not competent to say that what they did was sufficient to comply with either the contingency plan or the

requirements of the Regulations. It follows that they cannot properly be cross-examined on any of these issues which are matters to be determined by the Court.

59. The appellant's second ground is founded on the judgment of the Supreme Court in *RAS Medical Ltd. v. Royal College of Surgeons in Ireland* [2019] I I.R. 63 which is said to have established *"... that it is incumbent on a party who wants to invite a court to reject sworn affidavit evidence without giving the deponent concerned an opportunity to answer any questions as to why the sworn evidence should not be regarded as credible or reliable."*

60. This is very confused. What Clarke J. (as he then was) said in *RAS Medical Ltd.* – as is set out in the appellant's written submissions – was that:-

> *"[88] Where a party wishes to assert that evidence tendered by an opponent lacks either credibility or reliability, then it is incumbent on that party to cross-examine the witness concerned and put to that witness the basis on which it is said that the witness's evidence should not be accepted at face value. It is an unfair procedure to suggest in argument that a witness's evidence should not be regarded as credible on a particular basis without giving that witness the opportunity to deal with the criticism of the evidence concerned. ..."*

61. Later, at para. 92, Clarke J. said that:-

> *"[92] ... If it is suggested that there are facts which are material to the final determination of the proceedings and in respect of which there is potentially conflicting evidence to be found in such affidavits or documentation, then it is incumbent on the party who bears the onus of proof in establishing the contested facts in its favour to use appropriate procedural measures to ensure that the potentially conflicting evidence is challenged. Where, for example, two individuals have given conflicting affidavit evidence and where it is considered that a resolution of the dispute between those witnesses is necessary to the proper disposition of the*

case, then there has to be cross-examination and the onus in that regard rests on the party on whom the onus of proof lay to establish the contest fact."

62. It needs first to be said that whether – as the judge said – the appellant in argument expanded the basis on which it sought to cross-examine is a red herring, for the simple reason that the judge dealt with the submission.

63. The fundamental premise of the appellant's motion to cross-examine was that the affidavits disclosed conflicts of fact that needed to be resolved to allow the case to be decided. The starting point, then, was whether there was such a conflict. The two witnesses sought to be cross-examined were the Minister's witnesses, and the conflicts which Mr. Ryan sought to identify were not conflicts of fact between the evidence tendered on behalf of the appellant and the evidence tendered on behalf of the Minister but in the main supposed inconsistencies between the evidence of the veterinary inspectors and the requirements of the Regulations and the contingency plan. Mr. Ryan's fourth affidavit said nothing about any challenge to the credibility or reliability of the two veterinary officers. The written submissions filed on behalf of the appellant in the High Court referred to *RAS Medical Ltd.* and Collins and O'Reilly but did not identify how – still less why – it would make the case that their evidence should not be accepted at face value.

64. I think that it is fair to say that the appellant considers that it is unbelievable that the Minister destroyed their flock in the circumstances in which he did. But unbelievable in the sense of being truly extraordinary rather than impossible to believe. There is no challenge to the facts set out in the statement of opposition or the evidence of the veterinary officers who directed the cull. The appellant contends that in view of the requirements – or at least what it believes and submits are the requirements – of the Directive, the Regulations, and the 659 page contingency plan, it is unbelievable that there is no contemporaneous written record of the reasoning behind the decision or the evidence on which it was based. Or, put another

way, the appellant regards it as unbelievable that the destruction of the flock was ordered without any written assessment. But as a matter of objective fact, the flock was destroyed and there was no written assessment. It will be a matter for the court to determine at the substantive hearing whether, as the appellant contends, such was a legal prerequisite. As I have endeavoured to explain, the appellant's legal arguments are largely premised on the absence of any written assessment and so, on the accuracy of the evidence of Ms. Fanning and Ms. Quinn.

65. The appellant does not contest the judge's twofold summary of the core issues in the case: one, whether the Regulations require the assessments to have been in writing, and two, whether what was done satisfied the requirements of the contingency plan. As it is put in the appellant's written submissions on the appeal, what is in issue is the extent to which the Minister carried out proper risk assessments and epidemiological inquiries. The dispute is as to the sufficiency of what was done, rather than what was in fact done.

66. The appellant's third ground of appeal is that the judge erred in failing to err on the side of caution and of failing to tend towards permitting cross-examination where it is debateable whether it was necessary or desirable. This principle, however, is not engaged unless and until the court concludes that it is debateable whether the cross-examination is necessary or desirable. In this case, for the reasons she gave, the judge firmly concluded that there was no conflict of fact. For the reasons I have given, I am satisfied that the judge was correct in this conclusion. It follows that it was not debateable whether cross-examination was necessary or desirable and that there was no need for caution.

67. I would add for the sake of completeness that I do not accept the submission on behalf of the Minister that the starting point for applications for leave to cross-examine in judicial review is that such applications are uncommon. The starting point is whether there is a contested issue of fact on a point which is material to the final determination of the

proceedings. If it is unusual that such issues arise in judicial review proceedings, it does not alter the test or increase the burden on the moving party to establish that the affidavits disclose such an issue.

Conclusion

68. For these reasons I am satisfied that the High Court judge was correct in her analysis and conclusions and that the appeal should be dismissed.

69. The Minister having succeeded entirely on the appeal, I can think of no reason why the appellant should not be ordered to pay the costs of the appeal. However – with the usual warning of the risk that the appellant might thereby add to the burden of a costs order against it – if the appellant wishes to contend for any other costs order, I would allow fourteen days within which to file and serve a short written submission – not to exceed 1,000 words – in which event the Minister will have fourteen days to file and serve a reply, similarly so limited.

70. As this judgment is being delivered electronically Whelan and Faherty JJ. have authorised me to say that they agree with it.