THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 254
[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

JUDGMENT of Humphreys J. delivered on Tuesday the 20th day of April, 2021

1. The notice party developer is a joint venture between Glanbia Ireland and a Dutch company, Royal A-Ware. It applied for permission to construct a cheese manufacturing plant and associated works and infrastructure at Belview Science and Technology Park, Gorteens, Slieverue, Co. Kilkenny.

2. According to the non-technical summary of the environmental impact assessment report, 450 million litres of milk per year will be required for the proposed development from 2022 onwards, of which approximately 20% is already in circulation. The milk required will equate to approximately 4.5% of the milk pool projected to be available in Ireland in 2025. The milk will be sourced from Glanbia's own milk suppliers, 4,500 farms in the eastern part of the country. Some 75% of these farms have streams or watercourses running through or adjacent to their lands and only 57% have nutrient management programmes to mitigate water quality deterioration. A significant portion of the milk supply for the plant is already available and being sold to other processers.

3. The applicant, An Taisce – the National Trust for Ireland, is a statutory consultee and made a submission to the planning authority on 23rd October, 2019.

4. Kilkenny County Council decided to grant permission for the development on 14th November, 2019.

5. Following the council's decision, the applicant appealed the permission to the board on 11th December, 2019. A major issue in the appeal was that meeting the State's climate targets requires reducing the national herd of cows and not increasing it and that the dairy industry overall is unsustainable due to the adverse environmental impacts created.

6. The board's inspector made a favourable report on 15th June, 2020 in which she refers to a number of national policies at section 5:

   (i). the National Spatial Strategy 2002 to 2020;

   (ii). the National Planning Framework 2018; and

(iii). "Food Wise 2025" succeeding "Food Harvest 2020" a growth plan for the agri-food sector which involves a significant increase in primary production.

7. She also referred to regional and local plans. Under the heading of Climate Change, at para. 6.2.12 she referred to:

(i). the National Mitigation Plan which was subsequently quashed by the Supreme Court in *Friends of the Irish Environment v. The Government of Ireland* [2020] IESC 49, [2020] 2 I.L.R.M. 233. It can be noted that the inspector also relied on the High Court decision in that case, *Friends of the Irish Environment CLG v. The Government of Ireland* [2019] IEHC 747 (Unreported, High Court, MacGrath J., 19th September, 2019), referenced at para. 8.7.3 of her report which was later reversed on appeal (perhaps I can note here that I held in *Balscadden Road SAA Residents Association Ltd. v. An Bord Pleanála* [2020] IEHC 586, [2020] 11 JIC 2501 (Unreported, High Court, 25th November, 2020), that reliance on materials later quashed was a ground for challenging a decision, but the applicant didn't plead that point here and in fairness it would only have made a difference if the discussion on climate was something the inspector was obliged to engage in in this way, which I address below);

(ii). the National Adaptation Framework 2018;

(iii). the Climate Action and Low Carbon Development Act 2015;

(iv). the Climate Action Plan, which she says at para. 8.7.2 was made under the 2015 Act, but that is not the case - it is a non-statutory plan made without a strategic environmental assessment.

8. While the Climate Action Plan wasn't quoted extensively by the inspector, it's worth recording that it notes that "the accelerating impact of greenhouse gas emissions on climate disruption must be arrested. The window of opportunity to act is fast closing, but Ireland is way off course … [w]e are close to a tipping point where these impacts will sharply worsen. Decarbonisation is now a must if the world is to contain the damage and build resilience in the face of such a profound challenge." It goes on to address the use of a marginal abatement cost curve (MACC) to identify the most cost-effective pathway to reduce emissions in the different economic sectors (see p. 33). At pp. 98 to 99 it is noted that dairy products are "products with a high carbon footprint" and indicates that the State will work to meet food demand while contributing to climate commitments "including avoiding the perverse incentive to off-shore agricultural activity to less carbon-efficient production systems and locations". At p. 105 the plan notes that "[w]hile existing policy measures have increased carbon efficiency to an extent, the expansion of the dairy and dry stock herds has exceeded those gains …".

9. The inspector went on to address indirect effects of the development at para. 8.4.2 The effects on individual farms "would be too remote" as they are distributed over 4,500 dairy

suppliers. National policy is also noted which envisages what the inspector seems to consider to be a modest increase in dairy farming.

10. She states at para. 8.6.3 that the supply of milk to the proposed development will not result in any additional emissions beyond what is currently projected by the government and that the appellant is challenging issues of policy outside the scope of the appeal.

11. She says at para. 8.7.3 that matters involving policy and political choices are for elected representatives.

12. At para. 8.8.1 she implies that the effects of production are too remote and at para. 8.8.2 says that the proposed development will not of itself drive increased milk production the expected increase in production sits within the national policy context and "aligns with national climate change policy".

13. At para. 11.138 she says that "there is an indirect impact" from the development but that this is "expected to decrease by virtue of the production efficiency of the existing dairy herd and implementation of mitigation measures as outlined in the EIAR. Further these emissions are already accounted for and regulated through the National Climate Action Plan as part of dairy sector emissions. The proposed development will not directly or indirectly result in an increase of CO2 emissions proportionate to the required milk input. The impacts arising would be mitigated through compliance with both the Government and Glanbia's sustainability programmes as outlined in the EIAR which I have reviewed and consider reasonable."

14. Under the heading of appropriate assessment, she noted at para. 12.2 that there were six European sites within 15 kilometres but considered that four of them had been screened out due to the lack of pathways (para. 12.3). For the remaining two, the qualifying interests were identified and at paras. 12.10 and 12.11 such qualifying interests that could be affected are identified.

15. At para. 12.30 the inspector says that it is not practicable to assess the potential indirect effects of milk production on all Natura sites, but it can be concluded in general terms that the continued implementation of programmes and mitigation measures will mitigate potential indirect effects.

16. At para. 12.33 she addresses effluent discharge and concludes that the combined future effluent will have the same or lower concentrations of key pollutants and, therefore, there will be no significant cumulative effects on the Lower River Suir SAC water quality.

17. At para. 12.35 she concluded that the development would not adversely affect the integrity of the sites concerned or any other European sites.

18. The board issued a direction to grant permission generally in accordance with the inspector's report and made a formal decision to do so on 30th June, 2020.

19. The statement of grounds was filed on 13th August, 2020 and runs to a modest 87 grounds. The primary relief sought is *certiorari* of the board's decision.

20. Simons J. granted leave on 23rd November, 2020. The matter was later struck out as against the state respondents with no order as to costs, and proceeded before me only as against the board and notice party.

Relevant European law

21. The most relevant EU legislation is as follows:

(i). art. 191 of the Treaty on the Functioning of the European Union which references climate change as an explicit objective of EU environmental policy;

(ii). art. 47 of the Charter of Fundamental Rights of the European Union;

(iii). directive 92/43/EEC, the habitats directive, as amended by directive 2009/147/EC, in particular art. 6(3) requiring an appropriate assessment;

(iv). directive 2000/60/EC, the water framework directive;

(v). directive 2003/35/EC on public participation;

(vi). decision 2005/370/EC adopting the Aarhus Convention;

(vii). directive 2008/105/EC on environmental quality standards in the field of water policy;

(viii). directive 2010/75/EU on industrial emissions;

(ix). directive 2011/92/EU on environmental impact assessment as amended by directive 2014/52/EU, in particular art. 3 requiring assessment and annexes I and II setting out projects requiring assessment; and

(x). directive 2016/2284/EU on national emissions ceilings.

Relevant provisions of international law

22. To complete the background, pertinent international law provisions which are referenced in the materials before the court or in the relevant EU legislation include the following:

(i). the United Nations Framework Convention on Climate Change, done at New York on 9th May, 1992;

(ii). the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("Aarhus Convention"), done at Aarhus on 25th June, 1998; and

(iii). the Paris Agreement on Climate Change following the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change ("the Paris

Agreement"), done at Paris on 12th December, 2015 which is referred to in the inspector's report here at para. 8.7.1.

Relevant provisions of domestic law

23. Pertinent domestic law provisions include the following:

(i). the European Communities (Natural Habitats) Regulations 1997 (S.I. No. 94 of 1997), in particular reg. 32 implementing the habitats directive;

(ii). the Planning and Development Act 2000, in particular part X implementing the EIA directive and part XAB implementing the habitats directive;

(iii). the Planning and Development Regulations 2001 (S.I. No. 600 of 2001), in particular schedule 5 setting out relevant projects;

(iv). the European Communities Environmental Objectives (Surface Waters) Regulations 2009 (S.I. No. 272 of 2009), in particular reg. 28 giving effect to the water framework directive;

(v). the Climate Action and Low Carbon Development Act 2015, referred to by the inspector, s. 15 of which requires public bodies to have regard to mitigating greenhouse emissions, adapting the State to climate change and to the statutory plans under the Act; and

(vi). the European Union (National Emission Ceilings) Regulations 2018 (S.I. No. 232 of 2018)).

Alleged breach of Habitats Directive

24. Leaving aside for the moment the question of the impact of the process of producing the raw materials for this cheese plant, the applicant raised two significant questions under the habitats directive:

(i). firstly, whether the inspector erred in screening out certain interests, particularly Atlantic salt meadows, in the assessment; and

(ii). secondly, the alleged failure to adequately consider the impact of treated effluent.

25. I will assume for the purposes of this argument that the applicant has standing to make these points by way of judicial review not having made them originally, but of course it needs to be emphasised that the fact that one might be able to make a point that one did not make to the decision-maker does not mean that failure to make the point originally has no consequences whatsoever.

26. 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.

27. As regards the alleged failure to record the conclusion of the board on the issue of the habitats directive, as alleged at para. 70 of the statement of grounds, the form of the decision is a matter of national procedural autonomy and the board can be taken to have relied on the inspector's report which in turn relied on the Natura impact statement: see *Connelly v. An Bord Pleanála* [2018] IESC 31, [2018] 2 I.L.R.M. 453.

28. Finally, there is simply no basis to suggest that the screening out of interests in the Natura Impact Statement was improperly based on mitigation in a way that would contravene the principle in Case C-323/17, *People Over Wind v. Coillte Teoranta* (Court of Justice of the European Union, 12th April, 2018, ECLI:EU:C:2018:244). So unfortunately for the applicant there is nothing in this point.

29. As regards the impact of treated effluent, again assuming that the applicant is entitled to make the point, that does not mean that the applicant is entitled to reconfigure the evidence in the judicial review context. The important point here is that the applicant did not present any contradictory scientific evidence and indeed nobody did. In such circumstances it was open to the board to conclude that the pollutants from the effluent discharged will not affect the European sites, even though the applicant is now saying that the board should have assessed volumes rather than just concentrations. There wasn't anything before the board to make the volumes an issue that warranted express consideration or any material supporting the view that they created scientific doubt. (See generally on this issue *Reid v. An Bord Pleanála* [2021] IEHC 230 (Unreported, High Court, 12th April, 2021)).

30. Had there been any such evidence before the board, I wouldn't have considered it a sufficient defence to say that this would be a matter for the EPA, as contended by the board and the developer. While s. 99F(1) of the Environmental Protection Agency Act 1992 has the effect that the board can't impose conditions to control emissions, it can still refuse permission on "environmental grounds" under s. 99F(2). So it must, therefore, fully and properly consider the emissions situation.

Water Framework Directive 2000/60/EC

31. Assuming for the sake of argument that the applicant can raise this point as well, which was not raised before the board, and assuming that the board's pleading objection as to the lack of specifics can be overcome, the nearest the applicant comes to particularising its case under this heading is at para. 77 of the statement of grounds in which it is suggested that "the Board is precluded from granting permission for the plant in circumstances where that grant of permission will introduce additional pollutants into the River in circumstances where that waterbody has not attained "good" status by 22nd December 2015 for the purposes of Regulation 28 of the Surface Water Regulations S.I. 272 of 2009".

32. It does not seem to me that the applicant has overcome the onus of proof in relation to this particular claim. The particular part of the river into which the discharge will take place appears to be designated as "good" and if the applicant wanted to make a point

about taking the river basin as a whole that would need to have been articulated on the pleadings in a much more specific way.

33. The second point made in para. 77 of the statement of grounds is that permission was unlawful "where the granting of permission may cause a deterioration in the status of the waterbody", citing the *Wesser* case, Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland e.V. v. Bundesrepublik Deutschland* (Court of Justice of the European Union, 1st July, 2015, ECLI:EU:C:2015:433). Again, this goes back to the evidence before the board. Assuming *arguendo* that the applicant can make this point, the validity of the board's decision on this particular issue has to be judged by reference to the evidence before it; and there wasn't anything contradicting the developer's analysis of the extent to which the development might cause a deterioration in the status of the water body.

34. The third point made at para. 77 of the statement of grounds is that "in the absence of any assessment of the impacts of either pollutant source it was not possible for the Board to determine whether or not the proposed development would lead to a deterioration in the water body." However, the premise of that complaint is incorrect because there was an analysis of the impacts, which was reasonable given the information the board actually had before it.

National Emissions Ceilings Directive 2016/2284/EU

35. Assuming *arguendo* that the applicant has standing to make a point under directive 2016/2284/EU, that doesn't overcome the obstacle that in Joined Cases C-165/09 to C-167/09 *Stichting Natuur en Milieu and Others v. College van Gedeputeerde Staten van Groningen* (Court of Justice of the European Union, 26th May, 2011, ECLI:EU:C:2011:348), the CJEU held that "that directive is based on a purely programmatic approach under which the Member States enjoy wide flexibility as regards the choice of the policies and measures to be adopted or envisaged", and that "attainment of the objectives set by the directive cannot interfere directly in the procedures for grant of an environmental permit" (para. 75). Hence, this point is going nowhere.

Standing objection

36. A number of interesting points were canvassed in relation to standing having regard in particular to arts. 6 and 9(2) and (3) of the Aarhus Convention, Case C-137/14 *European Commission v. Federal Republic of Germany* (Court of Justice of the European Union, 15th October, 2015, ECLI:EU:C:2015:683), Case C-826/18 LB, *Stichting Varkens in Nood v. College van burgemeester en wethouders van de gemeente Echt-Susteren* (Court of Justice of the European Union, 14th January, 2021, ECLI:EU:C:2021:7), directive 2003/25/EC, Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd* (Court of Justice of the European Union, 15th October, 2009, ECLI:EU:C:2009:631), Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd* (Court of Justice of the European Union, 20th December, 2017, ECLI:EU:C:2017:987), Case C-470/16 *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála* (Court of Justice of the European Union, 15th March, 2018, ECLI:EU:C:2018:185) and some Irish domestic

caselaw, particularly *Highlands Residents Association v. An Bord Pleanála* [2020] IEHC 622 (Unreported, High Court, McDonald J., 2nd December, 2020) and *M28 Steering Group v. An Bord Pleanála* [2019] IEHC 929 (Unreported, High Court, MacGrath J., 20th December, 2019).

37. For the record, if it had been necessary to decide this aspect, I don't think the position is properly *acte clair* and would have leaned towards seeking the assistance of the CJEU on the two questions raised, namely:

    (i). whether art. 9(2) of Aarhus convention, approved by decision 2005/370/EC, and/or art. 47 of the Charter of Fundamental Rights, has the effect of precluding a rule of domestic procedure that a challenge before a judicial body to a domestic decision that is subject to public participation and environmental impact assessment, insofar as it includes grounds relating to other provisions of EU law, cannot be maintained by reason of the failure of the applicant to raise such points before the decision-maker; and

    (ii). whether art. 9(2) and (3) of the Aarhus Convention approved by decision 2005/370/EC, and/or art. 47 of the Charter of Fundamental Rights, has the effect of precluding a rule of domestic procedure that only complaints directed against the same aspects of the contested decision as those which were the subject of observations by the applicant during the administrative procedure are open to challenge before the court, either in general or in the absence of an acceptable explanation.

38. In fact, as the applicant's points where standing was challenged fail anyway, these questions don't arise. Possibly on different pleadings or different facts some of these questions could indeed require decision, in which case they might well be worth referring in such a future hypothetical context.

The key issue - what is the project to be assessed?

39. The main point in the case is the scope of the duty to assess the indirect effects of a project for the purposes of art. 3 of the EIA directive and art. 6(3) of the habitats directive. The present project arises under annex II, para. 7 of the EIA directive and exceeds the threshold for assessment. The EIA directive has a broad purpose and a wide scope and is designed to provide a procedural environmental protection (Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v. Gedeputeerde Staten van Zuid-Holland* (Court of Justice of the European Union, 24th October, 1996, ECLI:EU:C:1996:404), paras. 31 and 39). The purpose of the directive is to contribute to environmental protection (Case C-420/11 *Leth v. Republik Österreich* (Court of Justice of the European Union, 14th March, 2013, ECLI:EU:C:2013:166), paras. 28 and 34). In Case C-142/07, *Ecologistas en Acción-CODA v. Ayuntamiento de Madrid* (Court of Justice of the European Union, 25th July, 2008, ECLI:EU:C:2008:445), the CJEU noted the circumstances in which projects required assessment included those where they were likely to have regard to their interaction with other projects to have significant effects on the environment. Thus, measures such as project-splitting to avoid the EIA process were not a valid means to

avoid the application of the directive. Having said that, there is also authority to the effect that the extent of the "project" for the purposes of the EIA directive includes developments to which it is functionally related, but not aspects that are significantly more remote. That seems to be the sense of the opinion of Advocate General Gulmann in Case C-396/92 *Bund Naturschutz in Bayern e.V. v. Freistaat Bayern* (Court of Justice of the European Union, 9th August, 1994, ECLI:EU:C:1994:307) and there is also national caselaw to this effect: see in particular *Fitzpatrick v. An Bord Pleanála* [2019] IESC 23, [2019] 3 I.R. 617, *Kemper v. An Bord Pleanála* [2020] IEHC 601 (Unreported, High Court, Allen J., 24th November, 2020), *R. (Squire) v. Shropshire Council* [2019] EWCA Civ 888, *R. (Finch) v. Surrey County Council* [2020] EWHC 3566 (Admin).

40. The essential questions of EU law raised by the applicant's arguments could be summarised in a number of ways, including as follows:

(i). is the competent authority relieved from the obligation under art. 2(1) of the EIA directive to assess the environmental effects of a development and/or under art. 6(3) of the habitats directive in assessing impacts on a Natura 2000 site in terms of the production (or increased production) of raw materials (such as natural produce to be processed into food) due to demand for raw materials created by the project, where the supply of such materials is considered by the competent authority as an indirect effect, solely on the ground that the production itself is not part of the matters for which consent is sought, but rather economically connected to it as a consequence of such consent or alternatively that it is not established whether or how much precisely production will increase as a result of the project or where precisely such production will take place; and

(ii). does art. 2(1) of the EIA directive and/or art. 6(3) of the habitats directive have the effect that (insofar as the competent authority is required to assess the impacts of production of raw materials for the purposes of a project) in assessing the environmental effects of a development and/or in assessing the impacts on a Natura 2000 site in terms of possible increased production of raw materials (such as natural produce to be processed into food), the competent authority is entitled to rely on general government policy documents that impliedly accept that the production of raw materials so required for the development contribute significantly to emissions harmful to the environment, but that economic analysis dictates that it is more cost effective to make environmental gains by other measures.

41. But the problem from the applicant's view is that the CJEU has already given guidance on the key distinction, which is that between "programmatic" measures and the "procedures for grant of an environmental permit": Joined Cases C-165/09 to C-167/09 *Stichting Natuur en Milieu and Others v. College van Gedeputeerde Staten van Groningen*.

42. The applicant's real grievance is with government policy. It objects that in the face of the climate emergency, and despite the enormous contribution of agriculture in general and dairy in particular to the rise in emissions, the State is not only not reducing dairy production, but actively increasing it by a significant amount (I amn't sure that the

board's characterisation of the increase as "modest" is necessarily self-evident). The State's answer, conveyed in effect on their behalf by the respondent and notice party, is in essence that environmental targets can be met, but should be met at lowest economic cost. Thus, one can classify potential policy measures on the basis of a curve (the marginal abatement cost curve), ranging from those where the low-carbon option involves costs savings as compared with business-as-usual, ranging to cost-neutral measures, cost efficient measures where there is an economic price tag, but it is less than the cost of carbon credits, and at the top of the curve, cost-prohibitive measures where the cost of reducing a unit of emissions is more than the cost of the equivalent carbon credit. Because dairy is so profitable for Ireland, it lies at the upper end of this curve. In the background is an international perspective which adds the further complication that an over-regulated approach in certain areas may simply create perverse incentives to shift production to less carbon efficient jurisdictions, resulting in more emissions globally for the same amount of production (Climate Action Plan, p. 98). Thus, the issue brings together two key insights that need to be stressed again and again in both legal and, if one dare say so, policy contexts:

(i). Firstly, as put by US economist Thomas Sowell, there are no solutions, only trade-offs (*see McGinley v. The Minister for Justice and Equality* [2017] IEHC 549, [2017] 9 JIC 2801 (Unreported, High Court, 28th September, 2017), para 47 and *North East Pylon Pressure Campaign Ltd. v. An Bord Pleanála* [2016] IEHC 300, [2016] 5 JIC 1215 (Unreported, High Court, 12th May, 2016), para. 97). It is all-too-easy for anybody (even a court) to isolate one fragment of a problem and, on that distortedly superficial premise, present one's proposed rule (or policy) as the solution, sometimes in a form that lends itself to a simplistic 280-character assertion. But a mature and rounded view requires one to look at all of the various trade-offs involved.

(ii). Secondly, the role of incentives is crucial, and the consequences and incentives (whether positively intended or not) created by the rule or policy being introduced need to be factored in before the decision is formulated. There should be no "law of unintended consequences" - an unhelpful formula. What is that law exactly? That people who don't adequately consider the consequences of their decisions are surprised when there are any? The correct "law" is that articulated by Posner J.: "Justice Antonin Scalia's dissent [in *King v. Burwell* 576 U.S. ___ (2015)] can be summed up in four words: *'fiat justitia, ruat coelum*,' which means, roughly, do justice even if doing justice causes the heavens to fall. In other words, sever legal analysis from consequences however great. That is a dangerous approach to law, and to government generally. Legal doctrine should in my view be shaped with careful regard for consequences, especially where doctrine is flexible, as in the case of statutory interpretation" (slate.com, 2015) (see also Mc*Ginley v. Minister for Justice* at para. 24).

43. Admittedly, the policy starting point is not a given - the Government's objective seems to be to meet existing Paris Agreement targets at the lowest economic cost. Reasonable

people could disagree about these objectives, for example by arguing for more ambitious targets, or by objecting to the idea of buying one's way out of trouble through carbon credits. And another school of thought might hold that even if one accepted the premise of the policy argument, there might be an issue with the friction generated in practical implementation. If dairy is the spoonful of sugar for the economy that helps the medicine of low carbon go down, one might have to wrestle with the possibility that the sugar works better when given alongside the medicine rather than in advance. The fact that there might be a medley of views doesn't in itself suggest that the official policy is incorrect. Courts are good at commutative justice but not equipped for questions of distributive justice that such issues raise, because they simply don't have the instruments of policy investigation and analysis at their disposal. In our system, such policy questions despite or maybe because of their critical importance generally have to be left to the electoral process and the political system in the absence of a much more explicit basis for review. Courts can't get involved in deciding which premise is better without some justiciable instrument mandating forensic involvement, which hasn't been established here. To borrow Carl von Clausewitz's aphorism about war (*Vom Kriege*, Berlin, 1832), law impermissibly becomes "politics by other means" ("der Politik mit anderen Mitteln") when it annexes, for inflexible judicial determination, territory that properly belongs to open and democratic policy debate.

44. At the same time, the mere fact that something can be characterised as policy does not give it immunity from judicial scrutiny if in fact there is some justiciable standard. So the reason I am not going to express any view on these matters is not that they are in principle beyond the scope of judicial consideration if some relevant context for review is established, but that they aren't a basis for challenging a particular decision under the planning code. Confronted with unchallenged policy documents and the highly regulated procedure for an individual planning consent, the applicant is trying to use the latter process to indirectly challenge the former. While that is forensically understandable as a tactic for "pushing the boat out", the reason that it isn't legally appropriate is that general, programmatic policies are not capable of being subjected to the same sort of site-specific regulation as planning applications.

45. At the risk of repetition, policy documents as such are not beyond the scope of judicial review, if an applicant can invoke a justiciable standard, whether in the Constitution, EU law, the ECHR (as incorporated), statute law or administrative law, and provided that the court gives appropriate recognition to the constitutional entitlement of the executive and legislature to formulate policy within the law. But challenging the logic of such documents by the side-wind of a planning judicial review doesn't raise the level of scrutiny of programmatic documents to that applying to individual planning decisions.

46. Applying that concept here, I don't think the decision is invalid due to the board's failure to conduct an assessment of the upstream impacts of milk production, even where the board did consider such matters at the broad level, which it wasn't obliged to do. 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 EIA or AA. Such effects need to be considered on a more programmatic basis and hence lie outside the direct purview of grounds for challenging an individual planning decision.

Order

47. The case emphasises a few important themes. To summarise some of the key points:

    (i). An applicant is confined to what is pleaded. The inclusion of a large number of grounds in no way guarantees that the points eventually sought to be made will be covered by a sort of weight-of-numbers effect.

    (ii). Even accepting that the applicant may opt out of making points to the decision-maker in certain circumstances in the environmental field, such opting-out nevertheless has consequences. The decision challenged normally has to be measured primarily against the evidence actually put up before it is made, and if no adverse evidence is given to the decision-maker, the decision itself is unlikely to be invalid on the grounds of failure to consider something. Standing only gets you in the door - it doesn't guarantee you a free buffet lunch when you get there.

    (iii). And finally, many of the obligations of planning law relate only to individual projects. The high standards of scrutiny of particular development consents don't apply to more general issues arising from overall programmes that are not site-specific in the same way.

48. For the reasons set out above, the order will be:

    (i). that the application be dismissed; and

    (ii). that the parties be directed to liaise with the List Registrar to have the matter listed on the next convenient Monday with a view to addressing any consequential matters.