Neutral Citation Number: [2023] EWHC 2271 (Admin)

Case No: CO/721/2022

IN THE HIGH COURT OF JUSTICE
KINGS'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 29/09/2023

Before :

MR JUSTICE EYRE

- -

Between :

THE KING **on the application of** **FOLD HILL FOODS LIMITED**	**Claimant**
- and -	
THE FOOD STANDARDS AGENCY	**Defendant**
- and –	
1) LINCOLNSHIRE COUNTY COUNCIL **2) DEPARTMENT FOR ENIVRONMENT, FOOD, AND RURAL AFFAIRS** **3) ANIMAL AND PLANT HEALTH AGENCY**	**Interested Parties**

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- -

Stuart Jessop and Douglas Scott (instructed by **Roythornes Limited**) for the **Claimant**
Nicholas Ostrowski (instructed by **Legal Services, Food Standards Agency**) for the **Defendant**

Hearing dates: 23rd and 24th May 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 29th September 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE EYRE

Mr Justice Eyre :

Introduction.

1. The Claimant is the manufacturer of dry pet food including cat food. In April 2021 the Royal Veterinary College ("the RVC") became aware of an increase in the number of cases of Pancytopenia ("PCP") affecting cats. In response to that outbreak there was, on 15th June 2021, a recall of a number of the brands of cat food produced by the Claimant ("the Recall"). The Recall was accompanied by the issuing of a Product Recall Information Notice ("the PRIN") by the Defendant. Thereafter the Defendant issued a series of public updates ("the Updates") advising cat owners as to the action which they should take in response to the outbreak of PCP and to the recall of the Claimant's products.

2. This claim arises out of the circumstances of the Recall and of the contents of the updates and of subsequent correspondence to the Claimant from the Defendant. Pursuant to orders of HHJJ Tindal and Rawlings the Claimant has permission for seven (out of nine originally advanced) grounds challenging the lawfulness and rationality of the Defendant's actions. The Interested Parties have taken no part in the proceedings.

The Factual Background and the History of the Parties' Dealings in Outline.

3. Although there were significant differences of interpretation and two particular issues on which findings of fact will be necessary the general background and history were not contentious and can be summarised shortly.

4. There are several million pet cats in the United Kingdom (the papers in this case contain various estimates of the number of such cats in a range from 8 to 12 million). The Claimant produces dry cat feed but does not produce wet feed. The Claimant's feed is hypoallergenic in that it is not made using cereals or other grain. In 2021 the brands produced by the Claimant included the AVA and dry Applaws ranges of cat food for Pets at Home; the dry Applaws range for MPM; and the Sainsbury's own-brand hypoallergenic range for Sainsbury's. Before the outbreak hypoallergenic cat food produced by the Claimant was eaten by approximately 100,000 pet cats per annum.

5. PCP is not itself a disease but rather it is a condition which can result from multiple causes. The condition involves the simultaneous development of: a low white blood cell count; a low red blood cell count to which the bone marrow does not respond by producing more red blood cells; and a low platelet count. It is a very rare condition and until the outbreak in 2021 the expectation was that the RVC would come across only one case every five years. The condition has a high mortality rate. In his evidence Ben Mankertz, the Claimant's General Manager, says that of the 565 cats identified as affected by PCP in the outbreak some 350 (61.94%) died. Similarly, the report of 6th July 2021 from the Veterinary Risk Group (to which I will refer further at [18] below) said that there had been a 62% mortality rate in the 515 cases which had been reported to that date. In addition it is to be noted that the RVC told the Defendant that over 95% of affected cats died within a few days of hospital admission[1]. It suffices for present purposes to note that the mortality rate is high and was known to be high at the time of the events with which I am concerned. It is also apparent that many of those affected

[1] I have taken this to be a reference to 95% of the cats which were hospitalised.

cats which did not die made a less than complete recovery and remained in a poor state of health.

6. On 24th May 2021 the RVC drew the Defendant's attention to the increase in the numbers of cats affected by PCP. The RVC said that it had put out a call for information from vets and that at that stage the common factor appeared to be the feed eaten by affected cats. It said that "lots of hypoallergenic foods" had been mentioned "but commonly Applaws, Sainsbury's Hypoallergenic and Nature's Menu products".

7. On 30th May 2021 the RVC informed the Defendant that 46 cases of the death of cats related to PCP had been confirmed. In respect of 10 cats no information about their feed had been obtained. However, in respect of the others a total of 13 different brands had been mentioned. Of the 36 cats whose feed had been stated 18 were said to have eaten Applaws; 10 Sainsbury's hypoallergenic; and 3 AVA. Thus approximately 67% of all the cats and approximately 86% of those whose diet was recorded were said to have eaten cat food produced by the Claimant.

8. By 11th June 2021 96 affected cats had been identified. Dietary information had been obtained in respect of 70 of these and 47% of those 70 were reported as having eaten the Applaws dry feed; 20% Sainsbury's hypoallergenic; and 18.6% AVA. It follows that a total of 85.6% of those cats whose diet was recorded were reported to have eaten food produced by the Claimant.

9. By 15th June 2021 the RVC was reporting that 108 affected cats had been identified. The feed eaten had been reported in 82 instances. More than half of those cats were reported as having eaten more than one brand of feed. Of the 82 cats whose diet was reported 48.8% were said to have eaten Applaws; 18.3% Sainsbury's hypoallergenic; and 17.1% AVA: amounting to 84.2% of those where diet was recorded.

10. Also by 15th June Pets at Home, Sainsbury's, and MPM had withdrawn the three brands produced by the Claimant from their shelves. Pets at Home was commencing a recall of the Claimant's feed while Sainsbury's and MPM were contemplating such a recall.

11. In the period leading up to the Recall there were email exchanges between the Claimant and the Defendant. On 14th June 2021 there was a conversation between Mr Mankertz and Tina Potter, the Defendant's Head of Incidents. The conversation was in the course of a meeting conducted remotely over Microsoft Teams and attended also by other representatives of the Defendant. The terms of the conversation are in dispute. The Claimant says that the effect of the conversation and of the emails from the Defendant was that the Defendant was purporting to require the Claimant to undertake a recall of the three brands. The Defendant disagrees. It says that in that conversation; in its emails to the Claimant; and in a telephone conversation the following day it was advising the Claimant and in particular advising it as to the information available and as to how a recall could best be organised but was not threatening the Claimant nor purporting to direct the Claimant to undertake a recall.

12. The Recall was implemented on 15th June 2021 and it was then that the Defendant issued the PRIN.

13. After the Recall the number of cats found to be affected with PCP continued to rise with further cases being reported. However, the rate at which new cases were being reported

fell over time**.** The most new cases had been reported in week commencing 14th June 2021 when 99 were reported. There was a reduction to 76 reported new cases in week commencing 21st June 2021; to 33 in week commencing 28th June; and to 19 in the following week. Then a total of 40 new cases were reported in the period from 12th July to 23rd August 2021.

14. The Defendant continued to investigate the causes of the PCP outbreak. The investigation included the sampling of the Claimant's products and conducting risk assessments.

15. The Defendant made risk assessments on 2nd, 8th, and 9th July 2021. On 12th July 2021 Professor Chris Elliott who had been engaged on behalf of the Claimant met with Barry Maycock, the Defendant's senior toxicological risk assessor. Following that meeting and subsequent exchanges the Defendant adopted a different approach when undertaking the fourth risk assessment on 17th August 2021 as I will explain below.

16. The risk assessments were based on the results of analysing the level of particular mycotoxins found in cat food produced by the Claimant. Mycotoxins are naturally occurring toxic chemicals. They are produced by various moulds which grow on crops and foodstuffs. They are present widely in food and are most commonly found in cereals and grains and in foodstuffs made from those although they can also be found in potato products. The mycotoxins particularly relevant for current purposes are the Group A Trichothenes, T2 and HT-2.

17. Cats are unable to excrete the T2 and HT-2 mycotoxins. It appears that HT-2 is metabolised to T2 but that T2 cannot be further metabolised or excreted. Cats are recognised as being amongst the most sensitive animal species in relation to those mycotoxins. In addition to T2 and HT-2 the analysis undertaken recorded the levels of diacetoxyscirpenol ("DAS") present in the feed. T2 and HT-2 are recognised as being capable of causing PCP in cats. In 2016 the European Food Standards Agency ("the EFSA") issued a recommendation that the maximum level of these mycotoxins in cat food should be 50µg/kg. There is a dispute between the parties as to whether as a consequence feed in which the level of these mycotoxins did not exceed 50µg/kg was necessarily to be regarded as safe or at least not capable of causing PCP. The Claimant says that the analysis undertaken by the Defendant established that the Applaws and AVA feed contained less than 50µg/kg of T2 and HT-2 and that as a consequence it was irrational and unlawful for the Defendant to fail to differentiate between those ranges and the Sainsbury's hypoallergenic feed in the updates issued after the risk assessments. The Defendant does not accept that it can properly be concluded that there is no risk of feed containing less than 50µg/kg of these mycotoxins causing PCP.

18. The Veterinary Risk Group is a cross-departmental group of veterinary and technical staff whose role is to consider threats and vulnerabilities in respect of animal health and which reports to the Chief Veterinary Officers for England and for the devolved administrations. Its membership appears to be drawn largely from those serving in the Second and Third Interested Parties or in equivalent posts in the devolved administrations. It considered the PCP outbreak at a meeting on 6th July 2021. The group noted that there was a poor understanding of how the mycotoxins interacted with each other. It was noted that T2 and HT-2 have similar effects and that it was possible that their presence together might compound those effects. The group also noted that DAS might, when present, further compound the toxicity of the T2 and HT-2

mycotoxins. The group summarised the position in relation to the cause of the PCP outbreak as being that "the group A mycotoxins are the candidate agents of concern, but [as] yet [there is] no conclusive evidence of causation". The group had earlier noted that "neither the source nor causation is confirmed and there could also have been exposure to chemicals in household products (eg benzene in hand sanitiser) or an unknown biological threat". The group reported to the Chief Veterinary Officers that the threat could be regarded as closed for its purposes and left in the hands of the Defendant. In the record of the discussion and recommendations from that meeting there was reference to the EFSA guideline. However, it was said that the guideline level for individual mycotoxins did "not take account of the compounding effect of multiple toxins, nor cumulative effect in cats due to lack of ability to metabolize and excrete".

19. The Defendant had asked the Claimant to provide details of the ingredients common to the cat food brands of concern. The Claimant had provided that information and potato flakes were identified as being a common ingredient in each of the Sainsbury's hypoallergenic, AVA, and Applaws brands. From 6th July 2021 the Defendant's primary focus was on the potato flakes as being of concern. By 7th July 2021 sampling had found that the T2, HT-2, and DAS mycotoxins were present in a batch of potato flakes which had been provided by one of the Claimant's suppliers and which had been incorporated in the affected brands. The supplier in question was based in Russia. There was some question before me whether it was only one batch of such potato flakes which had been affected. The figures on this were not entirely clear and it was apparent that there may have been some misrecording or misattribution of the batches of potato flakes from which the affected brands had been made. It was, however, clear that at the very least the great majority of those batches of the Claimant's cat food in which mycotoxins had been detected had been made using a particular batch of potato flakes from this supplier.

20. The Defendant issued the Updates on 17th June 2021, 1st July 2021, 16th July 2021, and 26th August 2021. It will be necessary to consider the terms of each of the Updates separately in due course. There were meetings between representatives of the Claimant and of the Defendant on 18th and 20th August 2021. There is a dispute as to what was or was not agreed at the latter meeting. It will be necessary to make a finding of fact as to that question and I will consider this further below.

21. On 3rd September 2021 the Defendant received a further report from the RVC. This was in respect of 563 affected cats. 5% of the cat owners had not been able to recall the brand name. However, 184 cats (32.7% of the 563 entries) were reported as having eaten the Applaws dry feed; 98 (17.4%) Sainsbury's hypoallergenic; a further 16 (2.8%) were recorded as having eaten Sainsbury's cat food without any reference to whether it was hypoallergenic; and 198 (35.2%) AVA. At least one of the three brands produced by the Claimant was mentioned in relation to 469 of the 563 cats.

22. On 1st November 2021 the Claimant's solicitors wrote to the Defendant and received a reply dated 29th November 2021. In part that exchange involved an assertion of differing views as to the appropriateness of the Defendant's earlier actions. That aspect of the exchange is not material other than foreshadowing the arguments before me.

23. For current purposes the relevance of the exchange is that at [20] the solicitors pointed out that Claimant (the letter refers to the Claimant's customers but the intention is to refer to the Claimant) had a "significant stock" of recalled cat food. It was said that the

Claimant did not feel able to sell this in light of the advice which the Defendant had given to cat owners in the 26th August update that the recalled food should not be fed to cats. At [21] – [23] the letter set out testing which had been undertaken on behalf of the Claimant. From this the solicitors drew the conclusion at [24] that "there is no evidence whatsoever to suggest that any of the recalled feed which did not contain [flakes from the batch of potato identified as having contained mycotoxins] is in any way unsafe". Then at [26] and [27] the solicitors requested the Defendant to make a public statement confirming that recalled feed which had not been made from the affected batch of potato flakes was safe. The letter said:

> "26. In light of the above, FHF considers that it is entirely reasonable for the FSA to make a public statement that will both make it possible for FHF's current stock in respect of which there are no food safety concerns to be sold. This should include:
>
> a) all recalled feed which did not contain the Batch of Potato, and which was not even subjected to testing by the FSA; and
>
> b) the feed which was subjected to the rigorous testing, and which was found to be safe.
>
> 27. FHF requests the FSA's cooperation in confirming that the feed identified above is safe and saleable as a matter of urgency. Given the passage of time and the perishable nature of this product, there is a very real risk that this product will become unsaleable, if has not already done so. That will only serve to cause FHF and its customers to suffer yet further unnecessary losses."

24. The Defendant declined to make the public statement sought by the Claimant. The explanation was given thus at [20] (and repeated in very slightly different language at [24]):

> "The FSA has no role in declaring any recalled stock to be "saleable". The suitability of any of the recalled stock (in its current form or otherwise) for placing in the market is a matter for FHF and its enforcement authority, Lincolnshire County Council. Given the uncertainty which persists around mycotoxins in the feed and the cause of pancytopenia, we think it unlikely that either of those parties can be sure that any of the affected feed can be said to be safe within the meaning of feed law."

25. In her witness statement Miss Potter gave a number of reasons why the Defendant believed it could not make the statement sought by the Claimant. In summary they were as follows. First, that the epidemiological data had not changed and there remained a "strong link" between the recalled product and the PCP outbreak. Second, Miss Potter made reference to the fact that the Recall had been followed by "a significant drop off and eventually cessation of PCP cases". Next, that only a small proportion of the recalled product had been tested so that the Defendant could not be confident that the results were representative. This was combined with the point that where a hazard is not spread evenly in a food product a favourable test result did not necessarily indicate that the product was safe. Miss Potter referred to the continuing scientific uncertainty as to the relationship between mycotoxins and PCP. The Defendant did not regard the Claimant as having provided evidence that the recalled product was in fact safe. Then it was said that ultimate enforcement responsibility remained with Lincolnshire CC which had not said that it was satisfied that the recalled feed was safe. Finally, Miss Potter said that the recall notices from the Claimant and the supermarkets remained in the public domain and that it would not have been appropriate for the Defendant to contradict them. Some care is needed in considering these reasons. The last point can

be addressed shortly: I have no doubt that if the Defendant had publicly said that the recalled product was safe to be fed to cats then the retailers would not have maintained their stance. As to the other reasons I will take account of them to the extent that they were implicit in the reasons given in the Defendant's letter of 29th November or inherent in the background. However, to the extent that they amount to additional reasons being put forward after the event and not addressed at the time then they are to be viewed with particular caution. They remain relevant to the rationality of the decision but cannot bear the same weight as the reasons which influenced the Defendant at the time of the decision and which are to be taken as being those set out in the letter of 29th November.

26. The letter of 29th November 2021 led ultimately to the issuing of the claim form on 28th February 2022.

The Grounds of Challenge and the Issues arising therefrom.

27. The Claimant does not concede that the Defendant's actions in relation to the Sainsbury's hypoallergenic range of feed were lawful or rational but it makes no challenge to those actions in this claim. Rather the claim is advanced on the basis that the Defendant's actions in relation to the Applaws and AVA ranges were unlawful and irrational with the alleged irrationality in part deriving from what is said to have been an unjustified failure to distinguish between the three products.

28. Ground 1 arises out of the events of 15th June 2021. It is common ground that Defendant did not have power to require the Claimant either to withdraw or to recall its products. The Claimant says that notwithstanding the absence of any such power the Defendant purported to direct it to recall the feed in question by saying that if the Claimant did not do so voluntarily then the Defendant would compel it to do so. The Claimant says that the Defendant thereby acted unlawfully. The Defendant denies that it required the Claimant to initiate either a withdrawal or a recall of its products. Instead, and as it was entitled and obliged to do, it gave advice in particular as to the way in which a recall could be conducted. Determination of this issue will require a finding of fact as to the terms of the conversations between Ben Mankertz, and Tina Potter on 14th and 15th June 2021.

29. As a subsidiary line of response to this ground the Defendant invokes section 31(2A) of the Senior Courts Act 1981. It says that even if it is found to have required the Recall it is highly likely that the outcome for the Claimant would not have been substantially different even if the Defendant had not done so. In the course of argument the Defendant accepted that it could not establish that Lincolnshire CC, as competent authority, would have required a recall if the Claimant had not undertaken one. However, it maintained the contention that Sainsbury's and MPM would have followed the course taken by Pets at Home and would have effected a recall even if the Claimant had not done so. The Claimant says that this does not assist the Defendant because those businesses only acted in the way they did because the Defendant "wrongly attributed the Claimant's products to the outbreak".

30. Ground 2 puts in issue the rationality of the Defendant's actions on 15th June 2021. As formulated in the Statement of Facts and Grounds the contention was that it was irrational for the Defendant to require the Claimant to undertake a recall. In light of the Defendant's acceptance that it had no power to require a recall that question falls away.

If the Defendant acted unlawfully in requiring a recall then the rationality of that action is irrelevant. However, before me the matter was approached as an alternative which would arise even if the Defendant was found not to have required a recall (in which case ground 1 would fail). The question then became one of whether the Defendant acted rationally in the advice given to the Claimant and in issuing the PRIN of 15th June 2021 in the terms used. The Claimant says that neither the advice nor the language used in the PRIN were justified by the information available at that time. In response the Defendant says that the information known and the context in which matters were being addressed amply warranted the course that was taken.

31. Grounds 3 and 4 are conveniently addressed together and in relation to those of the Updates which were issued by the Defendant on 17th June 2021, 1st July 2021, and 16th July 2021. The Claimant says that in respect of each update the Defendant acted irrationally in that the statements made as to the recalled feed were not warranted by the information known to the Defendant. This was particularly so as the investigations into the PCP outbreak developed; as further scientific investigation was undertaken; and in light of the risk assessments which were made. In addition the Claimant says that as matters progressed it became irrational for the Defendant to fail to distinguish between the recalled products and to treat the Applaws and AVA ranges in the same way as the Sainsbury's hypoallergenic range. Ground 3 puts in issue the rationality of the Defendant's actions in respect of these updates.

32. Ground 4 contends that the Defendant's actions in relation to these updates were unlawful in that there was a twofold failure to comply with article 10 of regulation (EC) 178/2002. The Claimant says that article 10 did not empower the Defendant to issue the updates because there were no reasonable grounds to suspect that food produced by the Claimant may present a risk to animal health. In addition the Claimant contends that the information contained in the updates was inaccurate and did not inform the general public of the risk to the fullest extent possible. This is, the Claimant says, because the updates failed to refer to the possibility that the PCP outbreak was not due or not solely due to consumption of feed produced by the Claimant.

33. The Defendant says that the Updates were in terms which were fully justified in the light of the information available and when seen in context.

34. As I will explain further when addressing this ground, although they are conceptually distinct the issues of rationality and of the Defendant's compliance with its article 10 obligations are closely connected. If it was rational for the Defendant to issue updates in the terms used then there will be little scope for a finding that it was not appropriate to issue them or that compliance with article 10 required different language to be used.

35. Although there are considerations which are common to all the Updates it will be necessary to address each update separately and with reference to the information available at the time it was issued. Although the Claimant's primary case is that the Defendant's actions were irrational and unlawful throughout its case is also put on the basis that even if the Defendant acted rationally in respect of the earlier updates this was not the case in respect of the later ones. In essence the point is that further time for reflection and the obtaining of further information should have caused the Defendant to change its stance and that the advice that cats should not be fed any of the recalled feed became unreasonable even if it had not originally been so.

36. The update of 26th August 2021 is referred to in grounds 3 and 4 but it is the sole focus of ground 5 and is to be considered separately. That update followed the meeting of 20th August 2021. The Claimant says that the terms of the update and the publication of it in those terms were irrational because they involved going back on an agreement reached in the meeting between the representatives of the Claimant and those of the Defendant to sever the link between the recalled feed and the PCP outbreak. In addition it is said that the statement in the update that cat owners should not feed the recalled cat food to their cats was irrational because it was not justified in light of the knowledge which the Defendant then had and because it was contrary to the terms of the rest of the update. The Defendant says that there was no agreement in the terms alleged at the 20th August meeting. In that regard another finding of fact will be required. The Defendant goes on to say that when the update is read as a whole it is neither inconsistent nor contradictory and that the advice that the recalled feed should not be fed to cats was both rational and lawful in light of the facts at that time.

37. Ground 8 takes issue with the Defendant's actions in its letter of 29th November 2021. In that letter the Defendant declined to say that the recalled feed other than that made using potato flakes from the batch known to contain mycotoxins was safe for consumption. The Claimant says that the proper and rational course at that time would have been to give such a confirmation. The Defendant takes issue with this and says that it was not able properly to say that any of the recalled feed was safe and that the view that there was a link between the Claimant's feed and the PCP outbreak remained justified.

38. In ground 9 the Claimant asserts that the Defendant's actions constituted an unlawful interference with the Claimant's peaceful enjoyment of its property and possessions and were as a consequence a breach of the Claimant's rights under Article 1 Protocol 1 of the European Convention of Human Rights. The Claimant says that a declaration would not be just satisfaction for the interference with its rights with the consequence that damages in the sum of £4.468m are payable. It is common ground that this ground is parasitic on the other grounds and that if the Defendant's actions are found to have been lawful and rational then this ground falls away. It was also common ground that the questions of the sufficiency of a declaration as just satisfaction and of the appropriate level of any damages would need to be addressed separately once the question of whether there had been a breach of the Claimant's rights was determined. In addition the Defendant says that even if the other grounds or some of them are established there is no basis for concluding that there has been a breach of the Claimant's rights in circumstances where there has been no destruction or appropriation of the Claimant's property and where any control of the use of the Claimant's property falls within the scope of the wide margin of appreciation to be accorded in such cases.

39. There was an issue between the parties as to whether the precautionary principle set out articles 6 and 7 of regulation 178/2002 applied to the exercise of the Defendant's powers in relation to pet feed. In the course of argument there was a considerable narrowing of the area of dispute on this point. Differences between the parties remained but they can be addressed conveniently and shortly when I address the legislative framework to which I turn now.

The Legislative Framework.

40. Section 7(1) of the Food Standards Act 1999 provides that the Defendant has the function of:

> "7(1) The Agency has the function of—
>
> (a) providing advice and information to the general public (or any section of the public) in respect of matters connected with food safety or other interests of consumers in relation to food;
>
> (b) providing advice, information or assistance in respect of such matters to any person who is not a public authority."

41. Section 9(1) of the Act provides that the Defendant has in relation to matters connected with animal feed stuffs the same general functions as it has under section 7 in relation to matters connected with food safety.

42. Regulation (EC) 178/2002 established the European Food Safety Authority and laid down the general principles of food law together with procedures in respect of food safety. The following provisions of the preamble are of note for current purposes:

> "…
>
> (7) Within the context of food law it is appropriate to include requirements for feed, including its production and use where that feed is intended for food-producing animals. This is without prejudice to the similar requirements which have been applied so far and which will be applied in the future in feed legislation applicable to all animals, including pets.
>
> (8) The Community has chosen a high level of health protection as appropriate in the development of food law, which it applies in a non-discriminatory manner whether food or feed is traded on the internal market or internationally.
>
> …
>
> (12) In order to ensure the safety of food, it is necessary to consider all aspects of the food production chain as a continuum from and including primary production and the production of animal feed up to and including sale or supply of food to the consumer because each element may have a potential impact on food safety.
>
> (13) Experience has shown that for this reason it is necessary to consider the production, manufacture, transport and distribution of feed given to food-producing animals, including the production of animals which may be used as feed on fish farms, since the inadvertent or deliberate contamination of feed, and adulteration or fraudulent or other bad practices in relation to it, may give rise to a direct or indirect impact on food safety.
>
> …
>
> (19) It is recognised that scientific risk assessment alone cannot, in some cases, provide all the information on which a risk management decision should be based, and that other factors relevant to the matter under consideration should legitimately be taken into account including societal, economic, traditional, ethical and environmental factors and the feasibility of controls.
>
> (20) The precautionary principle has been invoked to ensure health protection in the Community, thereby giving rise to barriers to the free

> movement of food or feed. Therefore it is necessary to adopt a uniform basis throughout the Community for the use of this principle.
>
> (21) In those specific circumstances where a risk to life or health exists but scientific uncertainty persists, the precautionary principle provides a mechanism for determining risk management measures or other actions in order to ensure the high level of health protection chosen in the Community.
>
> …"

43. Articles 6 and 7 addressed risk analysis and the precautionary principle thus:

> "**Article 6 Risk analysis**
>
> 1. In order to achieve the general objective of a high level of protection of human health and life, food law shall be based on risk analysis except where this is not appropriate to the circumstances or the nature of the measure.
>
> 2. Risk assessment shall be based on the available scientific evidence and undertaken in an independent, objective and transparent manner.
>
> 3. Risk management shall take into account the results of risk assessment, and other factors legitimate to the matter under consideration and the precautionary principle where the conditions laid down in Article 7(1) are relevant, in order to achieve the general objectives of food law established in Article 5.
>
> **Article 7 Precautionary principle**
>
> 1. In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in Great Britain may be adopted, pending further scientific information for a more comprehensive risk assessment.
>
> 2. Measures adopted on the basis of paragraph 1 shall be proportionate and no more restrictive of trade than is required to achieve the high level of health protection chosen in Great Britain, regard being had to technical and economic feasibility and other factors regarded as legitimate in the matter under consideration. The measures shall be reviewed within a reasonable period of time, depending on the nature of the risk to life or health identified and the type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment."

44. Article 10 imposed an obligation on public authorities to inform the public of risks to health in these terms:

> "**Article 10 Public information**
>
> Where there are reasonable grounds to suspect that a food or feed may present a risk for human or animal health, then, depending on the nature, seriousness and extent of that risk, public authorities shall take appropriate steps to inform the general public of the nature of the risk to health, identifying to the fullest extent possible the food or feed, or type of food or feed, the risk that it may present, and the measures which are taken or about to be taken to prevent, reduce or eliminate that risk."

45. Articles 14 – 20 imposed obligations on Food Business Operators (it is accepted that the Claimant is such an operator) and for current purposes articles 15 and 20 are of particular note.

46. Article 15 stated that:

> "**Article 15 Feed safety requirements**
>
> 1. Feed shall not be placed on the market or fed to any food-producing animal if it is unsafe.
>
> 2. Feed shall be deemed to be unsafe for its intended use if it is considered to:
>
> — have an adverse effect on human or animal health;
>
> — make the food derived from food-producing animals unsafe for human consumption.
>
> 3. Where a feed which has been identified as not satisfying the feed safety requirement is part of a batch, lot or consignment of feed of the same class or description, it shall be presumed that all of the feed in that batch, lot or consignment is so affected, unless following a detailed assessment there is no evidence that the rest of the batch, lot or consignment fails to satisfy the feed safety requirement.
>
> 4. Feed that complies with specific legislation in force in the relevant constituent territory of Great Britain governing feed safety shall be deemed to be safe insofar as the aspects covered by the specific provisions are concerned.
>
> 5. Conformity of a feed with specific provisions applicable to that feed shall not bar the competent authorities from taking appropriate measures to impose restrictions on it being placed on the market or to require its withdrawal from the market where there are reasons to suspect that, despite such conformity, the feed is unsafe."

47. Article 20 provided that:

> "**Article 20 Responsibilities for feed: feed business operators**
>
> 1. If a feed business operator considers or has reason to believe that a feed which it has imported, produced, processed, manufactured or distributed does not satisfy the feed safety requirements, it shall immediately initiate procedures to withdraw the feed in question from the market and inform the competent authorities thereof. In these circumstances or, in the case of Article 15(3), where the batch, lot or consignment does not satisfy the feed safety requirement, that feed shall be destroyed, unless the competent authority is satisfied otherwise. The operator shall effectively and accurately inform users of the feed of the reason for its withdrawal, and if necessary, recall from them products already supplied when other measures are not sufficient to achieve a high level of health protection.
>
> 2. A feed business operator responsible for retail or distribution activities which do not affect the packaging, labelling, safety or integrity of the feed shall, within the limits of its respective activities, initiate procedures to withdraw from the market products not in compliance with the feed-safety requirements and shall participate in contributing to the safety of food by passing on relevant information necessary to trace a feed, cooperating in the action taken by producers, processors, manufacturers and/or the competent authorities.

> 3. A feed business operator shall immediately inform the competent authorities if it considers or has reason to believe that a feed which it placed on the market may not satisfy the feed safety requirements. It shall inform the competent authorities of the action taken to prevent risk arising from the use of that feed and shall not prevent or discourage any person from cooperating, in accordance with national law and legal practice, with the competent authorities, where this may prevent, reduce or eliminate a risk arising from a feed.
>
> 4. Feed business operators shall collaborate with the competent authorities on action taken in order to avoid risks posed by a feed which they supply or have supplied."

48. Regulation 178/2002 originally only applied to food produced for human consumption or to animal feed for food producing animals though as has already been seen the preamble envisaged similar requirements being extended to feed for other animals including pets. This extension was effected by regulation (EC) 767/2009. The following parts of the preamble to that regulation are of note for current purposes.

> "(1) The pursuit of a high level of protection of human and animal health is one of the fundamental objectives of food law, as laid down in Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety. That Regulation also established the farm-to-fork approach designating feed as a sensitive stage at the beginning of the food chain. To ensure a high level of protection of public health is one of the fundamental objectives of this Regulation.
>
> (2) The production of feed is an important end for European agricultural products, given that most of the materials used for the production of feed are agricultural products listed in Annex I to the Treaty. Furthermore, feed is of crucial significance for the 5 million livestock farmers in the Community because it represents the greatest expense.
>
> …
>
> (4) The existing legislation on the circulation and use of feed materials and compound feed, which includes pet food, namely Council Directive 79/373/EEC of 2 April 1979 on the circulation of compound feedingstuffs , Council Directive 93/74/EEC of 13 September 1993 on feedingstuffs intended for particular nutritional purposes (dietetic feed), Council Directive 96/25/EC of 29 April 1996 on the circulation and use of feed materials and Council Directive 82/471/EEC of 30 June 1982 concerning certain products used in animal nutrition (bio-proteins), needs to be updated and replaced by a single regulation. In the interests of clarity, Council Directive 83/228/EEC of 18 April 1983 on the fixing of guidelines for the assessment of certain products used in animal nutrition and Commission Directive 80/511/EEC of 2 May 1980 authorising, in certain cases, the marketing of compound feedingstuffs in unsealed packages or containers should be repealed.
>
> ….

> (7) Given the risk of contamination of the feed and food chain, it is appropriate that this Regulation apply to feed for both food and non-food producing animals, including wild animals.
>
> (8) The responsibilities of the feed business operators laid down in Regulation (EC) No 178/2002 and Regulation (EC) No 183/2005 should apply, *mutatis mutandis*, in respect of feed for non-food producing animals.
>
> …"

49. Article 1 set out the objective of the regulation thus:

> "The objective of this Regulation, in accordance with the general principles laid down in Regulation (EC) No 178/2002, is to harmonise the conditions for the placing on the market and the use of feed, in order to ensure a high level of feed safety and thus a high level of protection of public health, as well as to provide adequate information for users and consumers and to strengthen the effective functioning of the market."

50. Article 2(1) stated that:

> "This Regulation lays down rules on the placing on the market and use of feed for both food-producing and non-food producing animals within Great Britain, including requirements for labelling, packaging and presentation."

51. The definition of non-food producing animals at article 3(2)(d) included pets.

52. Articles 4 and 5 provided as follows:

> "**Article 4 Safety and marketing requirements**
>
> 1. Feed may only be placed on the market and used if:
>
> (a) it is safe; and
>
> (b) it does not have a direct adverse effect on the environment or animal welfare.
>
> The requirements set out in Article 15 of Regulation (EC) No 178/2002 shall apply, *mutatis mutandis*, to feed for non-food producing animals.
>
> 2. In addition to the requirements set out in paragraph 1 of this Article, feed business operators placing feed on the market shall ensure that the feed:
>
> (a) is sound, genuine, unadulterated, fit for its purpose and of merchantable quality; and
>
> (b) is labelled, packaged and presented in accordance with the provisions laid down in this Regulation and other applicable legislation.
>
> The requirements set out in Article 16 of Regulation (EC) No 178/2002 shall apply, *mutatis mutandis*, to feed for non-food producing animals.
>
> 3. Feed shall comply with the technical provisions on impurities and other chemical determinants set out in Annex I to this Regulation.
>
> **Article 5 Responsibilities and obligations of feed businesses**
>
> 1. Feed business operators shall comply, *mutatis mutandis*, with obligations set out in Articles 18 and 20 of Regulation (EC) No 178/2002

> and Article 4(1) of Regulation (EC) No 183/2005 in respect of feed for non-food producing animals.
>
> 2. The person responsible for the labelling of feed shall make available to the competent authorities any information concerning the composition or claimed properties of the feed placed on the market by that person, which allows the accuracy of the information given by the labelling to be verified, including the exact percentages by weight of feed materials used in compound feed.
>
> 3. In the event of any urgency relating to human or animal health or to the environment and without prejudice to the provisions of Directive 2004/48/EC, the competent authority may provide the purchaser with information that is available to it under paragraph 2 of this Article provided that, after having balanced the respective legitimate interests of the manufacturers and the purchasers, it concludes that the provision of such information is justified. If appropriate, the competent authority shall provide such information subject to the signing of a confidentiality clause by the purchaser."

53. By regulation 5 of the Animal Feed (Composition, Marketing and Use) (England) Regulations 2015 the competent authority for the purposes of articles 15 and 18 of regulation 178/2002 is the feed authority for the relevant area or district and for the purposes of article 20 it is the feed authority or the Defendant. It is common ground that Lincolnshire CC is the relevant feed authority and so the sole competent authority for the purposes of article 15.

54. The Claimant's original position had been that regulation 767/2009 had the effect of extending the obligations which regulation 178/2002 imposed on food business operators to feed for non-food producing animals but that it did not otherwise render the latter regulation applicable to pet food. That stance was modified in the course of argument. For the Claimant Mr Jessop accepted that the position was that the regulation 178/2002 provisions applied more generally to pet food such that the obligations which the regulation imposed on public authorities in respect of food for human consumption and for food-producing animals extended to pet food. That acceptance was, however, qualified in respect of the precautionary principle as articulated in articles 6 and 7. The Claimant said that because article 6 was expressly directed at the protection of human life and health the extension of the regulation generally to pet food did not operate in respect of that provision.

55. I do not accept that argument. The Defendant accepted that regulation 767/2009 had the effect of applying the provisions of regulation 178/2003 generally to pet food and that those provisions were to be applied *mutatis mutandis* - that is with the changes to wording and meaning necessary to render the regulation applicable to pet food being made. Regulation 767/2009 did not contain any express exclusion of articles 6 and 7 from the necessary changes nor is there any proper basis for implying such an exclusion. The reference to human health and life in article 6 made sense in the context of the original regulation which was only concerned with food for human consumption or by food-producing animals but there is no reason to exempt it from the changes necessary to make the regulation applicable to food for other animals. The effect of making the necessary changes is that the reference to human health and life in article 6 is to be read as referring also to the health and life of animals. It follows that the precautionary principle applies to pet food just as it did to food for human consumption.

56. Even if my interpretation of the provisions is wrong and the precautionary principle is not applied to pet food by the regulation this does not have any material impact on the approach to be taken. Article 6 says that account is to be taken of the precautionary principle and article 7 provides that precautionary measures "may" be taken. Even in the absence of those provisions it would be open to a public authority acting rationally to take a cautious approach when a question of a potential risk to animal health arose and to take precautionary measures even when there is scientific uncertainty. The question for me is whether in the circumstances with which the Defendant was concerned it was in fact rational for it to take the particular measures which it did. If those steps were rational the fact that the Defendant was not expressly charged by the regulation to take account of the precautionary principle in these circumstances would not render them irrational. Nor would it render them unlawful: the Claimant rightly did not suggest that the non-applicability of articles 6 and 7 would make it unlawful for the Defendant to take a cautious approach or that the Defendant could only lawfully act when there was scientific certainty. Conversely if the Defendant's actions were irrational they would not be saved by a provision in the regulation entitling the Defendant to have regard to the precautionary principle.

Ground 1: Whether the Defendant imposed or threatened to impose the Recall.

57. The parties are agreed that the Defendant had no power to require the Claimant to recall its products. The competent authority with that power was Lincolnshire CC. The parties are also agreed that if the Defendant had purported to direct the Claimant to undertake a recall or had threatened to do so it would have been acting unlawfully. The Claimant contends that this is what the Defendant did by saying that unless the Claimant recalled the relevant feed voluntarily it would be directed to do so. The Defendant denies making such a threat and says that as it was entitled to do it provided advice and encouragement to the Claimant.

58. The Claimant says that the threat to compel a recall was made by Miss Potter in her conversations with Mr Mankertz on 14th and 15th June 2021.

59. In his statement Mr Mankertz deals with the conversation and the subsequent dealings quite shortly. He says:

> "In or around 14/15 June 2021 I was told verbally by Tina Potter, the Head of Incidents at the FSA, words to the effect of `we can show that 80% of affected cats have eaten your feed and that's all we need. If you don't do a voluntary recall then we'll do it for you'. This verbal request was followed up in a series of emails. … If I had failed to do a voluntary recall and instead the FSA had stepped in and done it for us, then that would have been suicide for our company. I was forced to make the decision with a gun to my head. The FSA Head of Incidents was telling me that there was `strong epidemiological evidence' that the pancytopenia was caused by our feed. I have since been advised that the FSA did not in fact have the power to threaten or carry out any recall as they are not the enforcement authority for pet feed, but I did not know this at the time and I was operating on the basis that a forced recall was the alternative to us not recalling the product ourselves. However, any suggestion … that we did this voluntarily is totally false…"

60. Miss Potter gives a markedly different account of the conversation of 14th June 2021 and denies having sought to threaten or compel the Claimant to undertake the Recall. In her statement Miss Potter says that she spoke to Mr Mankertz in a Teams meeting

on 14th June 2021 and in a telephone conversation on 15th June 2021. She denies that in either conversation she directed the Claimant to initiate a recall of the relevant brands of cat food. Miss Potter says that on 14th June 2021 she advised that withdrawal of the brands from sale would be the appropriate course and gave advice about that. Miss Potter refers to the email she sent to Mr Mankertz at 9.04am on 15th June 2021 which I will consider further at [66] below. Mr Mankertz replied saying that the Claimant needed "to understand where you think we need to take this next… are you saying we should be recalling other products too?". Miss Potter says that a telephone conversation followed at the request of Mr Mankertz. She denies that there was any threat to compel a recall if the Claimant did not do so voluntarily and that instead the conversation was mainly about how a recall should be conducted.

61. The Claimant says that the written exchanges are to be read in the light of the threats which it says were made orally on 14th and 15th June and also that the written material gives support to the account of Mr Mankertz.

62. In terms of the written material Mr Jessop drew my attention to internal emails sent by Miss Potter on 14th and 16th June 2021. In the former Miss Potter referred to product being recalled "either on a voluntary basis or on advice from the FSA" and in the latter to the Defendant taking "actions such as recall and withdrawal". Mr Jessop also referred to an email of 9th September 2021 to Public Health England in which the Defendant's Incidents and Resilience Unit summarised the history and said that the Defendant had "encouraged the manufacturer to carry out a voluntary precautionary product recall". The Claimant says that these reveal the Defendant's state of mind which was that it was requiring the Claimant to undertake the Recall and that although the Defendant's later email talked of having encouraged the Claimant the reality was that the encouragement took the form of pressurising the Claimant into undertaking the Recall.

63. In addition there were internal emails in which Miss Potter and her colleagues expressed different views as to the language which should be used to describe the data. Care has to be taken with the interpretation of these because a number were from the start of June 2021 and it is apparent that more information became available over a short period of time. Nonetheless it is also clear that at around the time of the recall Miss Potter was pressing for the use of the term "epidemiological" to describe the evidence available to the Defendant while some of her colleagues expressed reservations about the use of that term. Miss Potter's view prevailed and in her dealings with Mr Mankertz Miss Potter said that there was epidemiological evidence linking the feed produced by the Claimant to the PCP outbreak. The Claimant says that this material shows the Defendant deliberately using stronger language than was justified to describe the grounds for linking the Claimant's products to the PCP outbreak and doing so as a way of increasing the pressure on the Claimant to accede to the Defendant's requirement that it initiate the Recall.

64. For its part the Defendant through Mr Ostrowski points to sundry emails saying that these indicate that Miss Potter's account of what happened is consistent with the contemporaneous material.

65. The email which Miss Potter sent at 9.04am on 15th June 2021 was following up on the meeting of the preceding day and the Defendant says that this shows it seeking information about the steps which the Claimant was proposing to take and offering advice as to the handling of information about the Recall. The Defendant says that the

content and tone of the email are inconsistent with the suggestion that it had required the Claimant to act in this way. Instead it was informing the Claimant of the decision of Pets at Home to initiate a recall; saying that it was likely that the other retailers would take the same decision; asking what the Claimant proposed to do; and advising as to how to implement and publicise a recall.

66. The Defendant points out that it was aware of the limits on its powers and knew that it could not require the Claimant to recall the feed in question. In that regard Mr Ostrowski relied on an email exchange on 11th June 2021 between Miss Potter and Dr Glanemann and Prof Humm of the RVC. The latter had suggested that the Defendant "consider issuing an official consumer product recall for [the] suspected products". Miss Potter had replied explaining that the competent authority for the purposes of a recall was the relevant local authority and that although the Defendant would issue product recall information notices after a recall "to widen the message" it did not itself pursue recalls.

67. Mr Ostrowski said that the language of the internal emails was to be seen in the context of a fast-moving situation in which a lot of exchanges took place and in which a degree of looseness of language was not surprising. It was also said that it was justifiable for Miss Potter to say that there was epidemiological evidence connecting the Claimant's feed to the PCP outbreak. There had not been an analysis by a professional epidemiologist but there was material derived from an analysis of the cases of PCP and of the feed eaten by the affected cats which could properly be regarded as showing a link to the Claimant's products.

68. In addition the Defendant pointed to instances when the Claimant had said that it was undertaking the Recall voluntarily. Thus on 15th June 2021 the Claimant posted on its website a "Food Recall Alert" in which it said "we are voluntarily recalling the dry products we manufacture for the brands detailed in the link below". On 9th August 2021 Mr Mankertz was quoted by ITV News as saying that the Defendant had "chosen to recall" the feed in question. The Claimant engaged its own consultants, Brooks Barn Ltd t/a The Pet Food Consultant, to investigate the mycotoxin test results. A copy of the interim report of those consultants was provided to the Defendant on 30th June 2021. That report was presumably based on instructions given by the Claimant and it referred to the Claimant's "voluntary recall of cat food products". Finally, Mr Ostrowski referred to the email of 21st August 2021 sent by the Claimant's solicitors which talked of "the FSA's involvement in requiring a voluntary recall of certain products" and said that the Defendant "cooperated fully in voluntarily recalling these products as a precaution". In respect of that email it is, however, to be noted that it is said that the Defendant required a voluntary recall and it is more questionable whether this email is inconsistent with the Claimant's current position.

69. My conclusion on ground 1 will require both a finding of fact as to the terms of the conversations of 14th and 15th June 2021 and the interpretation of the contemporaneous correspondence in the light of that finding though the correspondence and the other contemporaneous material will also be relevant to the making of that finding of fact.

70. The parties are agreed that the approach to be taken to the resolution of disputes of primary fact in judicial review proceedings is that summarised by Chamberlain J in *F v Surrey CC* [2023] EWHC 980 (Admin). Having analysed the state of the authorities at [46] – [49] Chamberlain J set out the approach thus at [50]:

> "In my judgment, the correct approach is as follows:
>
> (a) If invited to resolve a dispute of primary fact, the court should consider carefully whether any pleaded ground of challenge really requires resolution of the dispute. In most cases, the answer will be that the resolution of the dispute was for the decision-maker, not the court: the court's supervisory function does not require it to step into the shoes of the decision-maker and therefore does not require it to resolve the issue for itself.
>
> (b) Where the resolution of a dispute of primary fact is necessary, the court usually proceeds on written evidence: see e.g. *Talpada*, [2]. The court will generally do so if - as here – no application to cross-examine has been made before the start of the substantive hearing.
>
> (c) There is no absolute rule that the court must accept in full every part of the statement of a witness who has not been cross-examined, whether the statement is adduced for the claimant or the defendant. The court can reject evidence in a witness statement if it "cannot be correct" (*Safeer*, [16]-[19] and *Singh*, [16]). That might be so if it is contradicted by "undisputed objective evidence… that cannot sensibly be explained away": *S v Airedale*, [18]. But there are also examples of courts rejecting evidence given in witness statements as, on balance, inconsistent with other written evidence: see e.g. *Talpada*, [48].
>
> (d) In some cases, the court may be unable to resolve a conflict of written evidence on a question of primary fact. In that situation, "the court will proceed on the basis that the fact has not been proved": *Talpada*, [2]. This will be to the disadvantage of whichever party asserts the fact. That will generally be the claimant, because in judicial review the claimant generally bears the burden of proving all facts necessary to show that the decision challenged is unlawful. Thus, the principle that the defendant's evidence is to be preferred, save where it "cannot be correct", arises because of the difficulty of satisfying the burden of proof where there is a conflict in written evidence, not because evidence adduced on behalf of a defendant is inherently more likely to be true than that adduced on behalf of a claimant."

71. There is a dispute as to what was said in the conversations between Mr Mankertz and Miss Potter. The Claimant's case that there was unlawful action on the part of the Defendant is dependent in large part on the terms of those conversations. Not only is it the Claimant's case that the unlawful demand was made in the conversations but also that a decision as to the contents of the conversations will provide the context in which the email exchanges are to be interpreted. It follows that it is necessary to resolve the dispute as to what was said on 14th and 15th June 2021.

72. In undertaking that exercise I remind myself that neither Mr Mankertz nor Miss Potter has been cross-examined. Therefore, neither has been tested in that way; neither has had the opportunity to answer points which might be made against his or her account of the conversations in question; and nor has there been any opportunity for the impression formed from my reading of the statements to be changed by observing the responses to oral questioning or by reflecting on any explanation given in such responses. I have to be conscious of the fact that each witness was inevitably recollecting matters from a particular viewpoint. I have regard to the common human capacity and tendency for a witness genuinely but mistakenly to recollect past events as having actually happened in the way in which the witness now and with hindsight believes they would, or indeed should, have happened. That difficulty is compounded in this case by the circumstances in which the meeting and the subsequent discussion took place. The situation was clearly one of difficulty and stress for Mr Mankertz. Miss Potter was dealing with other matters at the same time and both the meeting and the telephone conversation with Mr Mankertz had to be fitted into dealing with those other

matters. The meeting was conducted remotely and the conversation was over the telephone. No minute was taken of either the meeting or the telephone conversation. In those circumstances there is a real risk of misunderstanding and/or misrecollection.

73. For the following reasons I am satisfied that Miss Potter's account of what was said is to be preferred. At the very lowest in the light of these matters the Claimant has failed to establish that Miss Potter told Mr Mankertz that the Claimant's only choice was between a voluntary recall and one required by the Defendant.

74. First, Miss Potter has been able to provide a more detailed and structured account of the dealings. The account of a move from discussion about withdrawal of the products to discussion of a recall is credible and consistent with the surrounding material.

75. Next, there is considerable force in the point that the Defendant was aware of the limit to its powers and aware that it had no authority to compel or require a recall. Shortly before the meeting of 14th June 2021 Miss Potter had explained to the RVC that the Defendant could not require a recall. If she had nonetheless threatened Mr Mankertz in the terms alleged by the Claimant then she would have been bluffing and would have known that she was at risk of having her bluff called. Not only would that have been an unwise and unlikely course but it is also relevant that there was no need for the Defendant to act in that way. Pets at Home had already initiated a recall and MPM and Sainsbury's were considering doing so. It follows that a finding in the Claimant's favour would involve the conclusion that Miss Potter made a threat to do something which she knew she could not do and that she did so when it was unnecessary for her to take such a step. Such action on her part is unlikely.

76. I am satisfied that Mr Ostrowski is right in his submission that for the reasons I have summarised above it was justifiable for the Defendant to say to the Claimant that there was epidemiological evidence linking the outbreak to cat food produced by the Claimant. Again at the lowest the use of this phrase does not indicate a deliberate over-stating of the weight of the evidence so as to increase the pressure on the Claimant.

77. Similarly, no weight can be placed on the language used in some of the Defendant's internal emails which could be read as indicating that the Defendant was requiring a recall. Those were internal emails in a fast moving situation. The position might be different if the internal emails showed a settled belief on the part of the Defendant that it was entitled to require a recall and that it was doing so. However, that was not the position and as already noted the Defendant had made it clear to the RVC that it could not compel a recall.

78. The emails sent by the Defendant and in particular that sent at 9.04am on 15th June 2021 are consistent with the proffering of advice as to how to publicise a recall rather than with directing the Claimant to commence a recall.

79. The Claimant stated publicly that the recall was being undertaken voluntarily and the same appears to have been said by the Claimant to the consultants it engaged. It is perhaps understandable that the Claimant would wish to portray itself in a good light in the public statements though there is no suggestion in Mr Mankertz's witness statement that this was the reason for telling the public that the recall was voluntary. It is harder to understand why the Claimant would have told its consultants that the recall was voluntary if it had been the result of compulsion. The consequence is that the Claimant

is now advancing a reason for the recall which is different from that which it stated publicly at the time and this necessarily detracts from the force of its contentions.

80. Miss Potter says that she got the impression from Mr Mankertz's response to her 15th June 2021 email that he misunderstood the role of the FSA. Such a misunderstanding would not be surprising in circumstances where Mr Mankertz had been confronted with a grave and novel problem at short notice. It cannot, however, change the nature of the Defendant's actions. If the Defendant was in truth providing advice rather than making threats that course would not become an unlawful threat merely because the Claimant wrongly believed the Defendant could compel a recall. In any event such a misunderstanding cannot fully explain the evidence of Mr Mankertz to the effect that he was being told by Miss Potter that if the Claimant did not initiate a recall voluntarily then the Defendant would require it to do so.

81. It follows that the Claimant has failed to establish that Miss Potter made the alleged threat in the Teams meeting or in the subsequent telephone conversation. In the absence of such an oral threat then the email exchanges cannot be read as showing compulsion or the threat of compulsion from the Defendant. The Defendant was entitled to advise and to encourage the Claimant to take a particular course of action but the Claimant has failed to show that the Defendant went beyond that. In my judgement the position was accurately summarised by the reference in the 9th September 2021 email to the Defendant having encouraged a voluntary recall. In reality the Claimant had little choice in the matter but that was because of the correlation between its feed and the deaths of cats suffering from PCP and because of the actions of the supermarkets. The Defendant encouraged but did not compel the Recall nor did it threaten that it would do so if the Claimant did not recall the feed voluntarily. In those circumstances ground 1 fails.

Ground 1: does Section 31(2A) of the Senior Courts Act 1981 come into play?

82. In light of my conclusion on the substance of ground 1 it is no longer necessary for the Defendant to invoke this provision. I can, however, deal with the point very shortly. I am satisfied that it is indeed highly likely that if the Claimant had not initiated a recall then MPM and Sainsbury's would have followed the lead of Pets at Home and done so with the consequence that the outcome would not have been substantially different for the Claimant. MPM and Sainsbury's had already withdrawn the relevant feed from sale and were contemplating a recall. The evidence is also that there was mounting public concern about the matter. The Claimant's answer is to say that these actions were due to the Defendant's wrongful attribution of the PCP outbreak to its feed. I do not accept that characterisation of the position. Representatives of the retailers and of the RVC had attended the 15th June 2021 Teams meeting and at that stage the RVC provided information about the numbers of cats affected and about the reported diet of those cats. I have set out the figures at [9] above. It is almost inconceivable that having received that information from the RVC MPM and Sainsbury's would not themselves have initiated a recall if the Claimant had not done so.

The Context in which the Rationality of the Defendant's Actions is to be considered.

83. Although there were differences of emphasis there was no disagreement of substance as to the approach which I am to take as a matter of law when determining the rationality of the Defendant's actions.

84. In summary the court is to remember that the Defendant was the decision maker and that the task for the court is to assess the rationality and lawfulness of the Defendant's actions and not their merits. The context of any decision is highly relevant to its rationality and as part of that context the court is to have regard to the nature of the decision and of the decision maker. There is to be an additional degree of restraint where the decision results from an assessment of complex technical or scientific matters in respect of which the decision maker will have familiarity, experience, and knowledge markedly greater than that of the judge. This is still more so where the decision turned on assessments of the future consequences of such technical matters. The point has been made in various ways. Thus in *R (Mott) v Environment Agency* [2016] EWCA Civ 564, [2016] 1 WLR 4338 Beatson LJ (with whom Lord Dyson MR and Macfarlane LJ agreed) said at [69] that there it was "common ground that in principle the court should afford a decision-maker an enhanced margin of appreciation in cases … involving scientific, technical, and predictive assessments". At [77] he adopted the approach articulated by May LJ in *R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2008] EWCA Civ 417 that the court must be "careful not to substitute its own inexpert view of the science for a tenable expert opinion" adding that the court "should be very slow to conclude that the expert and experienced decision-maker assigned the task by statute has reached a perverse scientific conclusion". In *R (BACI Bedfordshire Ltd) v Environment Agency* at [99] Lindblom LJ (with whom Henderson and Peter Jackson LJJ agreed) expressed his agreement with the points made by Beatson LJ adding that the court should not "engage in its own exercise of quasi-scientific judgment". Similarly, in *R (Friends of the Earth) v Environment Agency* [2019] EWHC 25 (Admin), [2019] PTSR 1020 at [44] Supperstone J accepted that "a high hurdle" had to be surmounted to establish irrationality "when challenging the decision of the expert regulator in a complex technical field".

85. As Lord Diplock explained in *Secretary of State for Education v Tameside MBC* [1977] AC 1014 at 1065B rationality requires the decision-maker to ask himself the right question and to "take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly". The approach to be taken to the *Tameside* duty of inquiry is now to be found in *R (Balajigari*) v *Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647 at [70] where Underhill LJ delivering the judgment of the court said:

> "The general principles on the *Tameside* duty were summarised by Haddon-Cave J in R *(Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3All ER 261, paras 99—100. In that passage, having referred to the speech of Lord Diplock in *Tameside*, Haddon-Cave J summarised the relevant principles which are to be derived from authorities since *Tameside* itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge *(Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken: see *R (Khatun) v Newham London Borough Council* [2005] QB 37, para 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient. Fifthly, the principle that the decision-maker

> must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

86. The approach I have just set out amounts to the application to a particular kind of decision of two core principles: first, that the court is concerned with a decision's rationality and not its merits and so must be alert to the distinction between those two issues; and, second, that the rationality of a decision is to be assessed having regard to the context of the decision including the nature of the decision and of the decision-maker. However, the exercise of restraint and the granting of a wide margin of appreciation to the decision-maker do not allow the court to avoid addressing the question of rationality. The court must remain open to the possibility that even an expert body is capable of acting irrationally. There can be occasions when such a body has failed to make the enquiries which it should have made. There can be occasions when such a body has failed properly to distinguish between different circumstances and thereby treated in the same way persons or matters between which there is a material difference. Where the body has acted in any of those ways the decision in question cannot stand. Here the Claimant says that the Defendant's actions were not based on a scientific or technical assessment of the material but were instead the consequence of a failure on the part of the Defendant to apply its mind to the material which was available. The result was, the Claimant says, a failure to distinguish between unlike matters and the adoption of the irrational approach of treating the different brands of pet food in the same way.

87. The lawfulness and rationality of the Defendant's actions in issuing the Updates will have to be considered in the light of the circumstances as they were, and in particular the information available, at the time of each of those updates. The information available was different at different times. The Claimant contends that even if the Defendant's initial actions were lawful and rational (which it does not accept they were) then the position changed as the matter developed and as a clearer picture emerged. Nonetheless, there are a number of matters of context which remained relevant throughout, subject to any refinement in the light of developing information.

88. The first of those matters was the gravity of the condition with which the Defendant was concerned. A high proportion of the cats affected by PCP died and of those which did not die many did not make a full recovery. As a consequence prompt action to minimise the number of cats affected was needed. In addition it was appropriate, or at the lowest likely to be rational, for the Defendant to err on the side of caution in the advice which it gave to cat owners. This consideration is connected to that of the purpose of the Updates issued by the Defendant. That purpose was to provide information to cat owners about the cat food which could safely be given to their cats. The Updates were to give practical advice to such persons as to avoiding action which might have fatal consequences for their cats. They are to be considered in the light of that purpose and not as scientific expositions of the kind suitable for publication in an academic journal. Moreover, the Updates were issued in circumstances where cat owners would, at least in some cases, have bought dry feed such as that produced by the Claimant at intervals of some time. Such owners would as a consequence be less

likely to visit the retailers' premises and to see the signs about the Recall displayed there. It followed that there was a risk of cat owners retaining cat food which had been produced by the Claimant and which had been bought before the Recall for some time after the brands in question had been withdrawn from the shelves and after the Recall had been commenced.

89. A significant feature of the context is the contrast between the relatively small proportion of the pet cats in the United Kingdom which ate feed produced by the Claimant and the high proportion of the cats found to be suffering from PCP which were reported to have eaten that feed. At one point in the course of argument Mr Jessop took issue with Mr Ostrowski's characterisation of the Claimant as a niche producer. Nothing turns on the precise description of the Claimant because it is apparent that that only a very small proportion of the pet cats in the United Kingdom ate the feed produced by the Claimant. The figure of 100,000 cats per annum at [4] above was recorded by the Veterinary Risk Group on 6th July 2021 as having been the Claimant's own estimate of the number eating its feed. That is to be contrasted with the total of 8 – 12 million pet cats in the United Kingdom. It is striking that although the cats eating the feed produced by the Claimant formed only a very small proportion of the total UK pet cat population cats which had eaten such feed constituted a large proportion of those which had been affected by PCP. That is a potent factor and is to be seen alongside two further considerations. The first is that PCP is a very rare condition. The second is although cereals and grains are the most common source of mycotoxins the testing found that the T2 and HT-2 mycotoxins were found, along with DAS, in the feed produced by the Claimant which was not made with cereals or grains. The Defendant was, therefore, acting in circumstances where a very rare condition was affecting an unusually large number of cats and where a high proportion of the affected cats had eaten feed produced by the Claimant and in which feed, or rather in a number of samples of which feed, mycotoxins had been found to be present notwithstanding that feed being grain and cereal-free. There is considerable force in the Defendant's contention that these were matters pointing to a connexion between the feed produced by the Claimant and the PCP outbreak. However, the Claimant is right to say that the rarity of PCP is relevant as a factor supporting its criticism of the Defendant's approach. In short it is said that the rarity of PCP is such that if the outbreak was attributable to the feed produced by the Claimant then cats which had not eaten that feed would be unlikely to suffer PCP. The position, however, was that cats which were reported not to have eaten that feed did die of PCP. As will be seen below this is a point on which the Claimant places considerable emphasis.

90. Next, the matters I have summarised at [16] – [18] above formed a significant part of the context. The relevant factors were, in short, the vulnerability of cats to mycotoxins; the recognition of T2 and HT-2 as being capable of causing PCP in cats; the poor understanding of the relation between the mycotoxins; and the concern that the effect of the mycotoxins could be compounded by the presence together of T2 and HT-2 and/or with DAS. To these can be added the fact that the typical interval between the consumption of the mycotoxins and the manifestation of PCP was unknown. In that regard Miss Potter adverted to the possibility that could be highly variable and might be affected by the "age, sex, vulnerability, [and] state of health" of the cat together with other factors including the amount consumed.

91. As I have noted at [13] above although new cases of cats being affected by PCP were reported after the commencement of the Recall the number of new cases fell. This is a significant feature and one to which the Defendant was entitled to have regard. The point can be made very shortly: if the PCP outbreak had a cause which was not related to the feed produced by the Claimant then the Recall would not be likely to have coincided with a reduction in the number of new cases being reported.

92. A further factor is the unreliability of the information provided by cat owners as to the feed eaten by the affected cats. There was some dispute before me as to the extent to which the information provided should be regarded as having been unreliable and as to the extent to which cats were to be regarded as likely to have eaten food other than that provided by their owners. I need not explore those matters in detail. I am satisfied that the unreliability of the information provided went beyond the fact that some cat owners said that they could not remember the name of the food given to their cats. I accept that there will have been other cat owners who, especially when in circumstances of anxiety or distress, misremembered the name of the food being given to their cats or who gave information about the food most recently given to their pets while overlooking food which had been given previously (a point of relevance in circumstances where the typical interval between consumption of affected feed and the onset of PCP was not known). The point was made as follows in the report which The Pet Food Consultant provided to the Claimant albeit in the context of expressing a concern that the publicity about the Recall of the Claimant's products might have caused pet owners who had not fed those products to their cats wrongly to believe that they had done so:

> "It feels insensitive to question the information provided by owners whose cherished pets have died, but speaking from experience, inadequate reporting and misreporting by pet owners are a common phenomenon when it comes to investigating pet food complaints. Many owners do not know or cannot describe which variant of product they are feeding. Whilst the packaging may influence purchasing behaviour in-store, at home product is decanted into bins and packaging discarding."

93. Thus there is a degree of unreliability in the information as to the food eaten by the affected cats. However, that must not be overstated. As a matter of common sense it is to be expected that most cat owners would be able accurately to recall the food given to their pets. Indeed in her witness statement Miss Potter said that the RVC had reported that "many pet owners were positive on the brands their pets ate regularly or tolerated…". This qualification of the unreliability of the information from the cat owners has particular force in the case of the cats which were said to have been given wet feed. The Claimant only produced dry feed. While there is scope for confusion or misremembering as between different brands of dry cat feed there is less scope for a cat owner to report having provided wet feed to his or her cat when in truth the cat has been fed dry cat feed.

94. It follows from the preceding point that notwithstanding the degree of unreliability in the information provided as to feed by the cat owners there were a number of the cats affected by PCP whose owners were reporting that those cats had been given food which had not been produced by the Claimant. Mr Jessop placed considerable emphasis on this point and on the EFSA guideline figure for mycotoxins and I will consider the significance of these factors further below.

95. I have already noted the gravity of the consequences of being affected by PCP for the cats in question and for their owners but the impact of the Recall and of the Updates on the Claimant is also a significant part of the context in which the rationality of the Defendant's actions is to be judged. That impact went beyond merely financial matters and beyond the impact on the Claimant's reputation real though those were. The public linking of feed produced by the Claimant to the PCP outbreak caused public anger and animosity to be directed at the Claimant and its officers and employees with the consequences explained by Mr Mankertz in his second statement. That was a relevant factor. It is one of the considerations which the Claimant says should have caused the Defendant to alter its position as fuller information came to light.

Three Issues relevant to the Rationality Challenges generally.

96. It will be necessary to consider the rationality and lawfulness of each update separately but there are three issues which are of general relevance and which can conveniently be considered at this stage. The first is the relevance to the rationality of the Defendant's actions of the fact that the sampling leading to the risk assessments found levels of T-2 and HT-2 less than the EFSA guideline figure of 50μg/kg and in some instances the presence of those mycotoxins was not detected at all. This is closely related to the second issue namely the nature of the risk assessments and the inferences properly to be drawn from them. Finally, I will address the relevance of the fact that there were cats which died from PCP and whose owners reported that they had not been fed cat food produced by the Claimant. In particular, what is the significance of the fact that cats which were said to have been fed wet feed died? The Claimant says that all are relevant to the rationality of the Defendant's actions and support the assertion that those actions were irrational.

97. The Claimant says that fact that the level of mycotoxins found in the feed was less than the EFSA guideline level should have caused the Defendant to conclude that the feed produced by the Claimant was safe and/or not the cause of the PCP outbreak. In effect it was being said that the guideline should have been regarded as an indication of what was safe and what was not.

98. As to the risk assessments the Claimant says that until the intervention on its behalf by Prof. Elliott the Defendant's approach to the sampling on which the risk assessments were based was flawed. It also says that the results of the sampling should in any event have caused the Defendant to take a different approach and at least to distinguish between different brands of cat food produced by the Claimant. In this regard the Claimant points among other factors to the exercise on 5th July 2021 when five bags of cat feed produced by it and which had been fed to cats which had died of PCP were tested. The Claimant says that this exercise found neither T2 nor HT-2 in two of the bags and mycotoxins at a level below the EFSA guideline in another bag.

99. As I have explained above Prof. Elliott met with Mr Maycock on 12th July 2021. Prof. Elliott was critical of the Defendant's approach to the sampling in two respects. First, he said that because mycotoxins were not distributed evenly in feed there was a possibility that when high levels had been found that was because a hotspot had been encountered. To address this he contended that the samples should have been aggregated before analysis. Second, Prof. Elliot contended that the Defendant should have applied a downwards measurement uncertainty to the results of the analysis before their interpretation. The Defendant did not accept that its earlier approach to sampling

had been inappropriate in the circumstances but agreed to adopt a sampling strategy to be devised by Prof. Elliott thereafter and the fourth risk assessment was based on the results of such sampling. The Defendant did not accept that downwards measurement uncertainty should have been applied to the figures and said that this could have resulted in the levels of mycotoxin being under-estimated.

100. In response to these points the Defendant says that the approach taken to the sampling was appropriate in the circumstances; that the test results and the levels of mycotoxin found were not to be seen in isolation; and that the Claimant's emphasis on the EFSA guideline is misplaced.

101. Mr Maycock and Mark Bond, the Defendant's senior policy adviser for food additives, have given a detailed explanation of the reasoning underlying the approach taken by the Defendant and of its current response to these contentions.

102. In summary the key points in that explanation are as follows.

i) First, it is said that the aim of the risk assessments was "not to conclude on their own whether the cat feeds were definitively the cause or otherwise of the reported cases of PCP … but to assess the risk to cats of eating these feeds, taking into account the background that cases of PCP had been reported".

ii) Next, that the samples and the risk assessments were only part of the picture. The results from the sampling were to be seen in the context of the high proportion of affected cats which were said to have eaten the Claimant's feed and of the decline in new cases after the recall.

iii) Mr Maycock explained the approach he had taken to in estimating the margin of exposure of cats to the mycotoxins. Doubtless other approaches could have been taken but the explanation given for taking that approach is a reasoned and coherent one.

iv) Considerable weight was placed on the high susceptibility of cats to the T2 and HT-2 mycotoxins. The research data had not established a NOAEL – a level at which those mycotoxins could be consumed with no adverse effects. Mr Maycock said that the data "showed us what amount of the T-2 and HT-2 toxin caused severe toxicity and killed cats but it did not tell us what amount of the T-2 and HT-2 toxin was safe for cats to ingest".

v) As had been pointed out at the Veterinary Risk Group meeting on 6th July 2021 (see [18] above) the EFSA guideline was for individual levels of the mycotoxins and did not take account of their combined or cumulative effect. In addition although the literature on the effect of DAS was sparse it was a mycotoxin from the same group as T-2 and HT-2 and the Defendant regarded it as appropriate to have regard to the potential compounding effect of its presence.

vi) It was accepted that mycotoxins could be unevenly distributed in feed and that there could be hotspots. However, the Defendant drew a different conclusion from this fact than the Claimant did. The Defendant said this meant that it could not be confident that its sampling had found the highest levels of mycotoxin present in the feed nor that the mycotoxins were not present in feed where it had

not been detected by the sampling. It also follows that the presence of hotspots could mean that a cat was given feed taken from or containing such a hotspot.

103. The explanation which Mr Maycock and Dr Bond gave was reasoned and detailed. It was supported by the record of the discussion at the Veterinary Risk Group meeting and by the correlation between the high proportion of affected cats reported to have been fed the Claimant's food and by the decline in new cases after the recall. It will remain necessary to consider the rationality and terms of the particular updates in light of the circumstances when they were issued and also whether there should have been a further distinction between the different brands produced by the Claimant. However, the approach taken to the risk assessments and to the EFSA guideline was in light of that explanation and the supporting points well within the range of courses open to the Defendant acting rationally. In particular the Defendant was not required in order to act rationally to conclude that the absence of mycotoxin in a sample of feed or the presence of a mycotoxin at a level of less than 50μg/kg meant that the feed should be regarded as incapable of having caused PCP.

104. Finally, the fact that cats which had not eaten food produced by the Claimant had died was, the Claimant says, significant because it pointed to a factor other than the Claimant's feed being the cause of the outbreak and meant that it was not open to the Defendant to recommend that cats should not eat the Claimant's feed. The Claimant makes two subsidiary points in this regard. First, it says that the fact of cats which had eaten other feed dying is particularly significant given the rarity of PCP. If the outbreak was attributable to the feed produced by the Claimant then no cats other than those which had eaten such feed would have been expected to have been reported to have PCP. The second point is a related one. The Claimant says that it is significant that cats which were reported to have been fed wet feed suffered PCP. The Claimant does not produce wet feed and while it is possible that cat owners might incorrectly report the use of different brands of cat food it was inherently unlikely that an owner would mistakenly report having fed wet feed to that owner's cat when instead the cat had been fed dry feed produced by the Claimant.

105. In response the Defendant relied on the points I have already noted about the unreliability of the information provided by cat owners as to the feed consumed by their pets and as to the limited understanding of the relation between the ingestion of the mycotoxins and the onset of PCP. Miss Potter referred to her experience of dealing with such outbreaks saying "in every single outbreak I have managed it has never been possible to link 100% of cases to the causative agent even where there is a high degree of certainty on the causative agent".

106. There is real force in this point for the Claimant but the points made in response by the Defendant are cogent. In particular the force of this point is substantially undermined by the decline in new cases of PCP after the recall of the Claimant's products. Certainly this point is not the knock out blow which Mr Jessop presented it as being. It does not mean that the only rational response to learning of those reported deaths was for the Defendant to exclude the possibility of a link with the feed produced by the Claimant. Still less does the point of itself mean that it was irrational for the Defendant to continue to warn against feeding the recalled food to cats.

Ground 2: the Rationality of the Defendant's Actions at the time of the Recall.

107. In light of the conclusion I have reached in relation to ground 1 two issues fall to be considered in respect of ground 2. First, the rationality of the advice which was given by the Defendant to the Claimant and, second, the rationality of the Defendant's actions in issuing the PRIN and doing so in the terms used.

108. As to the advice I have already explained my finding that the Defendant did not direct the Claimant to undertake the Recall. Miss Potter said that the focus of the advice was on how to conduct the Recall. I am satisfied that the advice went further than that because it involved telling the Claimant what the other businesses were doing; what was likely to happen; and what the available options were. The Defendant was not directing the Claimant to undertake the Recall but was encouraging that course or at the very least indicating that the Defendant regarded it as appropriate.

109. It is not suggested that there was any deficiency in the advice as to how to undertake the Recall. The question then becomes one of whether it was irrational for the Defendant to indicate that it regarded the Recall as appropriate or to encourage that course. In light of the state of knowledge in relation to the outbreak at that time in mid-June 2021 and the context I have set out above including the measures which the supermarkets were taking it cannot be said that such action on the Defendant's part was irrational. The exchanges with the Claimant were well within the range of courses properly open to the Defendant. It is to be noted that not all of the cat food produced by the Claimant was subject to the Recall. There were brands of cat food produced by the Claimant which had not been linked to the cats suffering from PCP. Those brands were not recalled at any time and nor did the Defendant seek to persuade the Claimant to recall those brands.

110. I turn to the Defendant's action in issuing the PRIN and to the terms of that document.

111. The PRIN was headed with the following in bold and large type:

> "Fold Hill Foods recall several cat food products because of safety concerns"

112. That was followed by the statement that:

> "Fold Hill Foods is taking the precautionary action of recalling several hypoallergenic cat food products because of safety concerns."

113. The PRIN then listed 21 brands of cat food produced by the Claimant.

114. The "Risk Statement" said:

> "There is concern on the safety of the products listed above. There has been an increase in cases of pancytopenia in cats and there is a possible link to the cat food products listed above. Pancytopenia is a very rare condition wherein the number of blood cells (red, white and platelets) rapidly decreases, causing serious illness."

115. Under the heading "Action taken by the company" the PRIN said that the Claimant was recalling the products and made reference with hyperlinks to customer notices which had been displaying at the points of sale.

116. Then under the heading "our advice to consumers" the PRIN said "if you have bought any of the above products you should stop feeding them to your cat". It then made reference to the helplines and contact numbers set up by the retailers of the cat food.

117. Miss Potter directed the issuing of the PRIN at 8.09pm on 15th June 2021. There had been a number of email exchanges throughout that day. At 6.28pm the Claimant had put on its website the Food Recall Alert to which I have referred at [69] above. At 6.44pm Mr Mankertz had sent Miss Potter a draft press statement to be released on behalf of the Claimant. He said that this had been agreed with Sainsbury's, Pets at Home, and MPM and asked for Miss Potter's confirmation that she was "happy with the statement." Miss Potter replied seven minutes later saying that normally the Defendant would have suggested the use of a table as it was easier for consumers to extract the information from that but adding "however, conscious of time, it is fine". Miss Potter asked for confirmation that the draft statement referred to all the products affected and this was confirmed by Mr Mankertz at 7.38pm. Then, at 7.59pm, Miss Potter sent Mr Mankertz a draft of the PRIN asking him to check it and to confirm that he was content with it. Miss Potter said that should would be grateful if this could be done "ASAP" because the Defendant's cut off time for publication (presumably for the day) was in 30 minutes time. It appears that Mr Mankertz did reply almost immediately because Miss Potter's 8.09pm instruction to publish said that the PRIN had been confirmed and cleared by the Claimant.

118. In light of those exchanges the Claimant cannot realistically contend that the Defendant's actions in issuing the PRIN or in doing so in the terms used were irrational. I take account of the intense pressure upon Mr Mankertz in the novel and highly stressful situation with which he had been confronted. Nonetheless in circumstances where the Claimant had already issued a product recall alert on its website; where it had put in hand a press statement; and where Mr Mankertz had been asked to confirm that he was content with the terms of the PRIN and had not protested as to those terms there is no scope for the Claimant now to say that the course of issuing the PRIN in those terms was not properly open to the Defendant. Even if such an argument could be raised the Defendant's actions in this regard were clearly rational in the light of the context set out above and the particular circumstances to which I have just referred.

119. It follows that ground 2 fails.

Grounds 3 and 4: the Rationality and Lawfulness of the Defendant's Actions in respect of the Updates issued in June and July 2021.

120. It will be necessary to consider the rationality and lawfulness of each update separately having regard to the terms of the update in question and the facts known at the time of the update

121. As explained above the Claimant says that the Updates were unlawful having regard to article 10 of regulation 178/2002 as not being justified by that provision and as failing fully to inform the public of the relevant risk.

122. Article 10 sets out a public authority's obligations in objective terms and without reference to the authority's judgment or opinion. Thus where there are "reasonable grounds to suspect" the relevant risk the authority "shall take appropriate steps" and those steps are to identify the relevant food, the risk, and the measures being taken "to the fullest extent possible". The questions of whether there were reasonable grounds; whether the steps were appropriate; and whether the relevant matters were identified to the fullest extent possible are objective questions to be determined by the court.

123. The determination of those objective questions and the assessment of the rationality of the Defendant's actions are logically distinct exercises. It is possible for a public authority to make a decision as to the appropriate steps or as to the information to be provided which is rational but with which the court disagrees and where the court concludes that the steps were not appropriate or that the information was not given to the fullest extent possible. This is because there is a difference between the court's assessment of the rationality of a decision and an assessment of its merits. The court can find that a particular decision or action was rational even if the court would have reached a different decision on the merits or acted in a different way. Where lawfulness depends on objective criteria the conclusion that an authority's decision was rational is not the end of the matter and the court must determine for itself whether the power was lawfully exercised by reference to those criteria.

124. However, although there is a distinction between the lawfulness of the Defendant's actions and their rationality, in the circumstances here that is a distinction which is artificial and which does not advance matters.

125. First, that is because subject to the presence of reasonable grounds, the Defendant had to engage in a single exercise of taking appropriate steps to inform the general public to the fullest extent possible of particular matters. It is important to note that the exercise was that of informing the general public and that it was to be done by way of taking appropriate steps. The purpose of the exercise was partly to enable members of the public to take their own steps to avoid or to minimise the risk but it was also to address both undue concerns and complacency or ignorance. Informing the general public to the fullest extent possible did not require the distribution of an academic analysis setting out the scientific basis for the conclusion that there was a risk and providing the underlying reasoning and qualifications and doubts. Such a distribution (certainly such a distribution by itself) would not be effective and would not amount to the taking of appropriate steps to inform the general public. The information provided had necessarily to be set out in somewhat general and condensed terms. The capacity of the members of the general public to understand technical matters when properly and clearly presented is not to be underestimated. Nonetheless, any exercise of informing the public must operate in the real world and must take account of the differing levels of expertise and of capacity to assimilate technical material together with the differing opportunities which members of the public have to address such material. The distribution of material which could be readily assimilated and understood by a cat owner who was scientifically trained and experienced in the interpretation of statistical analysis would not be effective unless the material could also be readily assimilated and understood by the majority of cat owners who lacked such training and experience.

126. Second, regard is to be had to the nature of the material and to the particular expertise of the Defendant. The assessment of the risk and of the information relating to it involved technical issues of a kind which were within the particular expertise of the Defendant. They are issues of a kind which can be understood by lawyers after suitable explanation. However, the warnings I have noted above highlighting the need for restraint in such circumstances and cautioning against the court engaging in its own quasi-scientific judgment come into play when assessing the presence of the necessary criteria as well as when assessing the rationality of the Defendant's actions.

127. In addition although the questions of whether the steps were appropriate and whether the necessary matters were identified to the fullest extent possible are necessarily to be

determined at trial they are to be determined by reference to the circumstances as they were at the time of the actions and to the state of knowledge at that time.

128. It follows that if I conclude that the Defendant acted rationally in issuing a particular update at a certain time and in particular terms compelling evidence will be needed before I can conclude that nonetheless the steps taken were not appropriate or that the requirement to inform the public to the fullest extent possible required different information to be provided. I will address those questions in respect of each update but will do so briefly.

129. Similarly, it is also conceptually possible for a public authority rationally to believe that there are reasonable grounds to suspect that a certain feed presents a risk to animal health when there are not such reasonable grounds in fact. Making that distinction involves a degree of mental gymnastics and would depend on the court finding that the authority acted rationally in light of the information known to it but that other material meant that reasonable grounds did not in fact exist. In light of the *Tameside* duty for an authority to take reasonable steps to obtain the information necessary to make a rational decision such a finding will only be possible in the rarest of cases. This would only be where the authority was unaware of the other material invalidating the reasonable grounds and the material was such that the authority was not in breach of its *Tameside* duty in failing to discover it. In the circumstances here I am satisfied that this adds nothing to the requirement of rationality**.**

The Update of 17th June 2021

130. The update issued on 17th June 2021 appears at appendix 1. It is to be noted that the update said that the recall had been extended to additional batches of cat food because of "a potential link to an increased incidence of feline pancytopenia"; that it said that this was a voluntary action by the manufacturer; that the link to PCP was said to be "possible" and that there was "no definitive evidence to confirm a link at this stage"; and that cat owners whose pet's usual food was affected by the recall were advised to use an alternative brand.

131. There had been two further developments in the period between the Recall and the issuing of this update.

132. The first was that on 16th June 2021 the Defendant had received a further email from the RVC. This attached the results of an analysis which had been undertaken on behalf of the RVC by academics in the USA. This had confirmed the presence of mycotoxins in the samples tested. However, the samples had been despatched some 3 – 4 weeks earlier and had pooled feed from two different brands (one being Applaws but the other being a brand not produced by the Claimant). The email from the RVC included a comment from a toxicologist at the Animal Plant and Health Agency ("APHA") that the level of mycotoxins found was "not that high" but adding that "I imagine it is feasible that only a low exposure dose is required for this effect".

133. The second development was that on 17th June 2021 MPM told the Defendant that it had decided to extend its recall of Applaws to cover all Applaws produced for MPM by the Claimant. MPM's original recall had been in respect of batches of Applaws produced in the period from December 2020 to April 2021. However, MPM found this was causing difficulty for its customers some of whom were unable to find the batch

codes indicating the date of production or who were worried about food they had bought earlier and still retained. MPM had extended the recall to simplify matters for its customers. In passing it is to be noted that this illustrates the validity of the points mentioned above as to dry pet food being retained by purchasers for a considerable time after purchase and being decanted by cat owners into containers other than the packaging in which it was sold.

134. Miss Potter says that the PRIN was updated to reflect the extended MPM recall and that this update was issued at the same time. The update was issued to explain what was happening and to avoid pet owners mistakenly thinking that it was the result of the situation worsening.

135. The update is wholly unexceptionable whether considered by reference to the rationality of the Defendant's actions or to their lawfulness under article 10. Nothing had happened since the Recall two days earlier which would have warranted the Defendant taking a different view of the risk potentially associated with the food produced by the Claimant nor to warrant giving any different or further information other than to explain what had happened. The recommendation to use a different brand of cat food was implicit in the Recall and added nothing to what had gone before. The Defendant says that it was its standard practice to advise that recalled products should not be consumed or fed to others. This needs hardly to be stated: if there is sufficient cause for concern to warrant the recall of a food product because there is a potential risk to health in consuming it then it necessarily follows that there is sufficient cause for concern to advise those who have the product to cease using the product. It is to be remembered that there was a distinction between a withdrawal of a product when retailers removed it from their shelves and stopped selling it but did not call back sold products and a recall when customers were asked to return products which they had bought.

The Update of 1st July 2021

136. The update of 1st July 2021 is at appendix 2. This explained that the recall was a precautionary action. It said that because cases of PCP were continuing to rise the Defendant wished to spread the message to cat owners who might not have heard of the Recall. It said that "no definitive cause" of the PCP outbreak had yet been identified.

137. The RVC provided further figures on 19th, 22nd, 24th, and 28th June and on 1st July. The percentages of the affected cats which were reported as having eaten feed produced by the Claimant were approximately 79%, 78%, 86%, 73%, and 81% on those occasions. The percentages reported to have eaten Applaws was of the order of 30% throughout those figures. Those reported to have eaten the AVA feed ranged from approximately 28% to approximately 33%. The figures for those reported as having eaten the Sainsbury's hypoallergenic feed were of the order of 18 – 20% throughout.

138. Miss Potter says that there had continued to be intense media interest in the PCP outbreak and that there had been a high number of calls to the Defendant's consumer helpline. The Defendant was concerned by suggestions which were increasingly being made on social media and elsewhere that the cause of the outbreak had been discovered but that the Defendant was not disclosing it. In addition Miss Potter took account of the information from the RVC that new cases of PCP were still being reported (although as will be seen from [13] above at a reducing rate). This caused Miss Potter to believe that

there were cat owners who were unaware of the Recall and who were feeding their cats the food which had been recalled.

139. The principal criticism which is made of this update in addition to the general points being made by the Claimant is that the Defendant was aware that a risk assessment was being undertaken and that the update should have been delayed until after the results of that assessment (which were provided on 2nd July 2021) had been received and considered.

140. I do not accept either the particular criticism in respect of the timing of this update or the application to it of the Claimant's general arguments. Both when regard is had to the need for the Defendant to act rationally and when the requirements of article 10 are considered the decision to issue the update and the terms used were amply justified. The information which had been received from the RVC in the period between 17th June and 1st July was entirely consistent with the earlier information. There was no basis for believing at that stage that the risk assessment would lead to a significant change of view. I have already addressed the risk assessments and will turn below to their relevance to the subsequent updates. If those assessments had shown a markedly different picture from that which was apparent on 1st July 2021 that might have necessitated a fresh update and even conceivably a retraction of the earlier statements but that was not material to the question of this update.

141. Therefore, grounds 3 and 4 fail in respect of the update of 1st July 2021.

The Update of 16th July 2021

142. The update of 16th July 2021 is at appendix 3. It will be seen that it is in shorter terms than the earlier updates. It said that mycotoxins had been found to be present "in a small number of samples of the recalled cat food tested to date". It said that investigations were continuing. The advice to stop feeding the recalled products to cats was repeated and the update contained hyperlinks to the PRIN and to the 1st July 2021 update.

143. There had been a number of developments since the previous update had been issued on 1st July 2021.

144. Further figures had been provided by the RVC on 5th and 7th July. On each occasion approximately 90% of all the cats where the brand of feed was recorded were reported as having eaten one of the affected brands. The figures for 8th July 2021 distinguished between cats which spent time both indoors and outdoors and those which were kept indoors and of the latter approximately 96% were reported to have eaten one of the three brands. The RVC did not provide further spreadsheets with case information after this but they did publish periodically the case numbers and mortality rate. Miss Potter explains that she understood that the RVC had been advised by its lawyers not to continue to provide information in the earlier format.

145. Miss Potter said that although there was a reduction in the rate of new cases there continued to be such cases. In addition the RVC told the Defendant that in at least some of these cases the cats' owners had been unaware of the Recall. This reinforced the Defendant's concern that pet owners who had bought larger bags of feed would not return to the stores selling feed frequently and would be unaware of the Recall.

146. By 16th July 2021 the Defendant had the results of the risk assessment made by Mr Maycock and two colleagues on 2nd July 2021 and updated on 8th and 9th July to take account of the results of further testing.

147. The 2nd July risk assessment was based on the testing of three brands of cat food produced by the Claimant. The T-2, HT-2, and DAS mycotoxins were found in all three brands but only one of the readings for either T-2 or HT-2 was above the EFSA guideline level. The assessment said that it was difficult to draw definitive conclusions because of the limitations to the available toxicological data. However, the assessment did conclude that one brand (AVA Mature Chicken) was "unlikely to pose any significant risks"; that the position was more uncertain in respect of another (Applaws Kitten Chicken) but that "significant cases of PCP and mortalities appear unlikely"; and that there was some concern in respect of the third (AVA Hairball Chicken) and that some mortalities could not be excluded. The assessment did say that the position might change and the concerns might be raised if the levels of T-2 and HT-2 were to be combined and also that the presence of DAS might need to be considered further.

148. The risk assessment was updated by Mr Maycock on 8th July 2021 after the Defendant had received further test results for cat feed produced by the Claimant. The update noted that the results were "very variable". It noted that some of the results showed low levels of the mycotoxins while others showed higher levels than had been found previously. It said that a combined risk assessment for T-2, HT-2, and DAS might be appropriate and that it was likely that an assessment which did not take account of the combined presence of those mycotoxins would lead to an underestimation of the risk.

149. Mr Maycock made a further update on 8th July 2021 to take account of the results of the testing on behalf of the RVC of five samples of feed which had been fed to cats suffering from PCP and of the results provided by the Claimant following the testing of seven samples. Against the background of noting various uncertainties Mr Maycock said that the levels of mycotoxin found in three of the RVC samples and in five of the Claimant's samples did not raise safety concerns but that there were concerns derived from the level of mycotoxins in the other samples.

150. In addition from 6th July 2021 onwards the Defendant was aware of the potential connexion between the outbreak of PCP and the batch of potato flakes imported from Russia which had contained mycotoxins. The Claimant had provided the Defendant with the results of analysis of a sample of the batch of potato flakes in question. These had shown the presence of mycotoxins albeit at less than the EFSA guideline level.

151. The Defendant engaged, together with the Claimant, in an exercise of seeking to identify the batches of cat food which the Claimant had produced using the batch of potato flakes in question and correlating this with those in which high levels of mycotoxins had been found. Dr Bond described this as showing a "stark clustering" of batches which had been produced using those potato flakes and those found to contain mycotoxins. The levels of mycotoxin were lower in the Applaws products than in the AVA or Sainsbury's hypoallergenic brands. Mr Bond says that this was to be expected from the fact that in production of the Applaws products the potato flakes in question had been blended with those from a different supplier.

152. In his statement Dr Bond explained that the difficulties of establishing the link to the affected batch of potato flakes and whether that was the sole cause of the outbreak were

increased by three matters. The first was that some of the consignments of potato flakes had been incorrectly recorded by the Claimant's employees which had initially caused the parties to believe that the affected potato flakes had been supplied by a different supplier. The second was the lack of retained samples of the relevant batch of potato flakes other than a small amount of that product. This meant that no further samples were available either for further testing or to confirm that the results which the Claimant had obtained were representative of the batch as a whole. Finally, neither the Russia-based supplier of the potato flakes nor the Russian regulatory authorities had responded to approaches from the Defendant (as was explained by Miss Potter). Notwithstanding these difficulties Dr Bond took the view that the evidence that the potato flakes was the most likely source of the mycotoxin contamination of the cat food was "quite compelling".

153. I have already noted that before me there was dispute as to whether it was only one batch of potato flakes which had contained mycotoxins. That question was largely a matter of interpretation and may have been the result of a lack of clarity in the recording of batch numbers. However, the fact that nearly two years after the event there was disagreement on this point illustrates the difficulties which there were in establishing the cause of the PCP outbreak.

154. By this time the Claimant had engaged its current solicitors. They made representations on the Claimant's behalf. In particular there were representations about the terms of the update. The Defendant had sent a draft update to the Claimant on 7th July 2021. In this draft reference was made to a possible link between the presence of mycotoxins and the outbreak of PCP; it was to be said that high levels of T-2, HT-2, and DAS had been found in the recalled products; and that the possibility of the potato flakes being the source of the mycotoxins was being investigated.

155. There were then exchanges between the Defendant and the Claimant and the latter's solicitors. These caused the Defendant to modify the draft update and to release the update in the form at appendix 3. It is to be noted that the Claimant did not accept or agree to the update even in its revised form.

156. The Claimant's position at the time was that there was no reason to believe that the feed it had produced was the cause of the PCP outbreak. Its position now is that the Defendant acted irrationally and in breach of its article 10 obligations. It says that the Defendant should either have explained that there was no basis for linking the outbreak to the recalled cat food or distinguished between different brands of the cat food it produced making it clear that no risk was posed by those batches or brands which had not been made using the single batch of potato flakes which had been found to contain mycotoxins.

157. I have already explained why I am satisfied that the approach adopted by the Defendant in respect of the risk assessments and significance of the EFSA guideline was within the range of approaches open to the Defendant acting rationally. In short the assessments were not to be seen in isolation and the fact that a particular sample did not contain mycotoxins above the EFSA guideline level did not require the Defendant to regard the feed in question as being incapable of having caused PCP.

158. It is also relevant to note again that pet owners would often not be in a position to identify whether the cat food they had purchased came from an affected batch of feed

or not. As the consultants engaged by the Claimant explained in the passage quoted at [93] above packaging is frequently discarded when the product is brought home when the cat food will be decanted into other containers and potentially mixed with other cat food already in the container.

159. Did the discovery of mycotoxins in a batch of potato flakes and the linkage of the cases of PCP to feed made from that batch of potato flakes mean that the Defendant should have differentiated between such feed and other feed produced by the Claimant? Should the Defendant have acted to tell consumers that there was no risk from feed not made from that batch and that it was safe for their pets to eat cat food of the recalled brands provided that the feed in question was not made using that batch of potato flakes?

160. I have already set out the context in which those questions are to be addressed. I have particular regard to the purpose of the Recall and of the information which the Defendant gave to the public namely seeking to reduce the chance of cats eating feed which it was believed might be causing the PCP outbreak. In addition I have taken account of the fact that the Defendant was entitled to place considerable weight on the benefits of the message being given to the public being a clear one. In those circumstances it cannot be said that the only rational course was for the Defendant to seek to distinguish between recalled feed containing potato flakes from the affected batch and recalled feed which was not made from that batch and then to tell the public that it was safe for the latter to be fed to cats. The identification of the affected batch of potato flakes was a very significant development but it was not a "game changer" such as to make it irrational for the Defendant to continue its previous approach of advising that the recalled feed should not be fed to cats.

161. It follows that rationality did not require the Defendant to say that there was no link between the recalled feed and the PCP outbreak. Indeed, in light of the correlation between the presence of mycotoxins in feed and the batch of potato flakes used to make the batch of feed I am satisfied that Miss Potter is right to say that the suggestion that a link between the recalled feed and the PCP outbreak should have been ruled out was "indefensible". I am also satisfied that rationality did not require the Defendant to engage in differentiating between different brands of the recalled feed still less between different batches of the same feed and then to modify the advice to the public by tailoring it to such brands or batches. Similarly the Defendant's article 10 obligation did not require it to take either of those steps.

162. Accordingly grounds 3 and 4 fail in respect of the update of 16th July 2021.

The Rationality and Lawfulness of the Update issued on 26th August 2021.

163. The text of this update is at appendix 4. The following points are of note:

i) The full cooperation of the Claimant was stated.

ii) "Extensive testing" was said to have identified higher levels of mycotoxins in some samples of the recalled food.

iii) It stated that "no causative link between [PCP] and the recalled cat food products has been established".

iv) In answer to the question "is it safe for anyone who still has the recalled cat food to feed it to their cats" the advice was given that the recalled food should not be fed to cats.

v) The update explained that the Claimant was working to resume production because no causative link between the recalled food and PCP had been established.

vi) The update concluded by saying that "there is no evidence linking other products to [PCP]".

164. No further figures had been provided from the RVC since the last update.

165. Mr Maycock and a colleague had produced the fourth risk assessment on 17th August 2021. This assessment had been made using the approach to sampling and analysis agreed with Prof. Elliott. In short the samples were combined and homogenised before further sampling and analysis. Two brands were analysed. Particularly high levels of the T-2 and HT-2 mycotoxins were found in the Sainsbury's hypoallergenic salmon samples. There were lower levels in the Applaws Kitten Chicken brand although mycotoxins were found in most of the samples and in a number of them the level of HT-2 was above the EFSA guideline level. In the conclusion regarding the Applaws Kitten Chicken the assessment said that most of the results for T-2 and HT-2 were of "relatively low concern" and although the risk to cats could not be entirely excluded the "risk of PCP would appear to be low". However, the assessment went on to emphasise the limitations of the toxicological data; the need to take account of the presence of DAS; and the likelihood that the presence of several mycotoxins meant that the risks were greater than would have been the case if they had been present alone.

166. There were meetings on 18th and 20th August 2021 involving various members of the Defendant's staff together with a representative of Lincolnshire CC and Mr Mankertz together with Prof Elliott and Hannah Leese of the Claimant's solicitors.

167. The Claimant says that the 26th August 2021 update was irrational and/or non-compliant with the Defendant's obligations under article 10 in two respects. The first is that the Claimant says that it amounted to the Defendant reneging on an agreement which had been reached at the meeting that the link between the feed produced by the Claimant had been severed. The update was, secondly, said to have been internally inconsistent and so irrational in that although it said that no causative link between PCP and the recalled cat feed had been established the Defendant continued to recommend that the recalled cat feed should not be fed to cats.

168. The challenge based on the asserted inconsistency in the update can be addressed shortly. I have already explained my conclusions that the earlier updates were rational and lawful and that the advice that the recalled feed should not be fed to cats was inherent in the recall decision. It is significant that the 26th August update said that the investigation into the cause of the outbreak was continuing and that the cause of the PCP had not been established. The update did not say that there was no link between the recalled feed and the PCP but rather that no causative link had been established. There had been no material change of circumstances since the earlier updates (the fourth risk assessment did not show any markedly different picture). Indeed, the discovery in July of the potential link between one batch of the potato flakes used by the Claimant

and the presence of mycotoxins in the cat food reinforced the grounds for concern about the recalled cat food. In those circumstances there was no inconsistency in the update: it was entirely rational for the Defendant to say both that no causative link had been established and also that the recalled feed should not be used.

169. I turn to the question of whether the Defendant reneged on an agreement which had been made at the meeting on 20th August 2021. It will be necessary to determine whether there was such an agreement. Of course, such an agreement could not require the Defendant to mislead the public in its pronouncements but if there had been such an agreement at a meeting convened to address the situation and to determine the way forward then it would be incumbent on the Defendant to explain why there had been a departure from that position.

170. The meeting was said to have been on a without prejudice basis and the minutes refer to it being undertaken on "non-prejudice format". Both parties have referred to the meeting and it was not without prejudice in such a way as to be privileged. However, the use of those terms does indicate that there was an air of informality.

171. In his statement Mr Mankertz dealt with the meeting briefly saying only that the Defendant had said at the meeting that it wished to "sever the link" between the Claimant and the PCP outbreak.

172. Miss Leese explained that she did not have an attendance note of the meeting but that she recalled "certain aspects of what was discussed with clarity". In particular Miss Leese recalled Miss Potter saying that the Defendant was keen to sever the link between the Claimant and the outbreak. Miss Leese explained that she recalled this distinctly because she and her client had been pressing for such severance. She says that the Defendant accepted that the data from the RVC did not demonstrate a link between the Claimant's feed and the outbreak.

173. Although she did not have an attendance note Miss Leese was able to refer to emails she sent shortly after the meeting and these were in evidence before me. The meeting had begun at 9.30am. At 3.23pm Miss Leese emailed Christopher McGarvey who was the Defendant's head of legal services and who had chaired the meeting. Miss Leese took issue with the terms of a draft update which had been provided to the Claimant. She said that the Defendant had confirmed that the sampling had revealed no link between the Claimant's feed and the PCP and said that "this is the message that the public needs to hear". Miss Leese also said that the position was "now clear" namely that the Claimant was not responsible for the PCP. Mr McGarvey replied providing a revised draft but said that the Defendant was not prepared to go further than what was set out in the draft (which I understand to have been substantially reflected in the update as issued on 26th August 2021). Miss Leese replied in an email which was sent the following day but which I accept was drafted on the evening of the 20th August. In this Miss Leese set out the Claimant's position at length. It is of note that she said that the Defendant was reneging on the position which it had stated at the meeting and on what had been agreed at the meeting. Miss Leese said that the proposed update implied that the Claimant was responsible for the PCP outbreak but that the Defendant was unable to prove it. She said that this was unacceptable and that instead the public should be told that the Claimant's feed did not cause the outbreak.

174. Miss Potter produced the minutes of the meeting. She accepted that Mr McGarvey had talked of "severing" the link between the Claimant's feed and the PCP outbreak and that she had spoken of "breaking" the link. However, she added that Dr Bond had not been supportive of this and that another of the Defendant's team, Josh Hunt, had been reserved on the point. She said "no consensus was reached".

175. Dr Bond said that when his colleagues had talked at the meeting of severing the link between the recalled feed and the outbreak he had said that he could not accept this position. He said that the matter was escalated within the Defendant and that it was agreed that the Defendant could not go as far as to say that there was no link between the Claimant's feed and the PCP. The statement that no causative link had been established was a compromise and was the furthest which Dr Bond believed could be justified.

176. There is no evidence as to the taking of the minutes of the meeting and they were not sent to the Claimant for approval. However, they are detailed and purport to record the substance of the comments of each speaker. I accept that they were substantially contemporaneous and accurate.

177. At the meeting Mr McGarvey and the representative from Lincolnshire CC both confirmed that they were content for the Claimant to re-start production with the former saying that was because it was possible that the issue had been with a single batch of potato flakes.

178. The minutes record extensive discussion about communication. My reading of those accords with Miss Potter's interpretation that although she and Mr McGarvey were open to breaking the link between the Claimant's feed and the PCP Dr Bond was resistant to this and no consensus was reached. It is of note that Dr Bond's resistance was in strong terms and appears to have prompted an angry response from Mr Mankertz to the effect that Dr Bond was "not on the same page as everyone else".

179. The evidence of Miss Leese is powerful as to her understanding of what happened at the meeting. Not only is she a solicitor but the emails she sent shortly after the meeting are consistent with her account. However, she did not take an attendance note and I have already explained that I have accepted that the minutes were contemporaneous and substantially accurate. In fact the difference between the parties' positions as to the meeting is not as great as it appeared to be at one stage. It was common ground that no link had been definitively established but there was difference as to the consequences which followed from that. In large part the differences of recollection are a consequence of the participants in the meeting having recalled it from different viewpoints and having focused on different aspects. I am satisfied that the Claimant's team left the meeting believing that progress had been made but I find that there had not been any settled agreement by the Defendant to say that the Claimant's feed had not caused the outbreak. The minutes record Mr McGarvey ending the meeting by saying that the Defendant was working on the matter at director level; recording that Dr Bond was expressing reservations; and saying that the Defendant needed time to work on the issue. It was apparent that the Defendant's stance was that further work was needed. The Claimant's team were entitled to leave the meeting believing progress had been made that there were grounds for hoping that the further work would result in an update along the lines the Claimant was calling for on the footing that there was some support for such an approach on the part of some on the Defendant's team. However, the

Claimant was not entitled to believe that this had already been agreed by the Defendant and it should have been aware that different views were being expressed. It is understandable that Miss Leese and Mr Mankertz latched onto the comments of Mr McGarvey and Miss Potter but it should have been clear that there was a difference of view when the members of the Defendant's team were seen as a whole. In particular there was no agreement that the public should be told that it had been established that the recalled cat feed had not caused PCP.

180. It is apparent that further thought was given to the terms of the update after the meeting between the Claimant's team and the representatives of the Defendant. Dr Bond has explained that there were further internal discussions at the Defendant. As already noted a draft update was sent to the Claimant's solicitors prompting the reaction from Miss Leese to which I have referred above. In addition the Defendant informed officials at the Department for the Environment, Food, and Rural Affairs and at APHA that no definitive link between the recalled cat food and PCP had been established; that the Claimant was intending to re-start production; and that the Defendant was intending to publish an update in those respects. Gordon Hickman, the head of exotic disease at DEFRA, responded expressing concern. Mr Hickman said that "very clear lines" were needed for cat owners and that although a definitive link may not have been established there was circumstantial evidence linking the cases to a particular batch of feed and that the cases of PCP had "tailed off" after the Recall. Mr Hickman also pointed out that testing was still underway and he said "we need to be careful not to be too definitive until that testing is complete".

181. Underlying the Claimant's challenge to the 26th August 2021 update is the Claimant's focus on the Defendant's acceptance that no definitive or causative link between the recalled cat food and the PCP outbreak had been established. The Claimant seeks to move from that fact to the conclusion that the Defendant should have told the public that there was no link between the recalled cat food and the outbreak. The conclusion does not follow from premise. The fact that a link had not been definitively established did not mean that the only rational course or the only course compliant with the Defendant's article 10 obligations was to tell the public that there was no link and still less that cat owners should have been told that it was safe to feed the recalled cat food to their pets. The absence of evidence definitively proving a link between the feed and the outbreak did not amount to evidence proving that there was in fact no link. The maxim that the absence of evidence is not the same as evidence of absence applies. The approach taken in the update was amply justified by the matters to which I have already referred in particular the uncertainty about the effect of mycotoxins and their relationship to PCP; the presence of mycotoxins in samples of the recalled feed and in the potato flakes from Russia; and the correlation between cats reported to have consumed the relevant feed and those affected by PCP. In addition account had to be taken of the reservations expressed by Dr Bond and by Mr Hickman. In those circumstances it was not open to the Defendant to tell the public there was no link between the feed and the outbreak or that the recalled feed could safely be consumed by cats. Far from it being irrational for the Defendant to fail to inform the public in those terms it would have been inappropriate for the Defendant to have done so.

182. In his oral submissions Mr Jessop said that the Defendant was to be criticised for failing to distinguish between different feed products manufactured by the Claimant. However, at the time of the dealings in August 2021 the Claimant was not pressing for the

Defendant to distinguish between different brands but was instead pressing for a public statement that there was no link between the Claimant's feed and the PCP outbreak. It is to be noted that in her email sent to Mr McGarvey at 3.23pm on 20th August 2021 Miss Leese said that Mr Mankertz had told her that potato flakes had been mentioned in a meeting which had taken place a few minutes before. Miss Leese said that this was "unacceptable" and continued to press for a statement that there was no link between any of the Claimant's products and the outbreak. It follows that the Claimant cannot now criticise the Defendant for failing to distinguish between different brands or batches at this time.

183. The consequence is that the challenge arising out of the update of 26th August 2021 also fails.

Ground 8: the Rationality of the Defendant's Actions in the Letter of 29th November 2021.

184. This ground turns on the question of whether in order to act rationally the Defendant should have agreed to inform the public that recalled feed which had not been made using potato flakes from the batch known to contain mycotoxins was safe and could be fed to pets. Was the only rational course open to the Defendant to make such a statement to the public?

185. The argument that it was not for the Defendant to declare food safe is not an answer to this challenge. The Defendant had issued public statements advising that cat owners should not feed the recalled food to their pets. In light of that if the only rational conclusion was that identifiable parts of the cat food was safe and posed no risk it would not then have been open to the Defendant to say nothing and to leave the updates in the public domain in their unaltered state.

186. The Claimant's argument in support of this ground is in some ways the converse of the contention on which the challenge in ground 5 to the 26th August 2021 update was based. There the Claimant said that because the Defendant accepted that no link between the Claimant's feed and the PCP outbreak had been definitively proven the Defendant should have said publicly that there was no link. In support of this ground the Claimant says instead that the Defendant could be confident that feed not made with the tainted potato flakes was safe. The Claimant's contention is that it was clear that those potato flakes were the cause of the outbreak (thereby accepting that feed made with those flakes was unsafe and had caused the outbreak) and that the testing on its behalf had not found concerning levels of mycotoxins in the other samples taken from feed not made using those potato flakes. The absence of the definitive proof of a link to the potato flakes is here an obstacle to the Claimant's case. The available material pointed strongly to the infected batch of potato flakes as the cause of the outbreak but that had not been definitively established.

187. In those circumstances the Defendant was rationally entitled to take the view that the making of a positive statement that particular parts of the recalled feed were safe was a major step needing materially stronger and more conclusive evidence than that which had been needed to say that there was a risk associated with particular food.

188. I am satisfied that that the Defendant's conclusion was within the range of conclusions open to it acting rationally. There remained a real degree of doubt as to the cause of the outbreak and the Defendant was entitled to say that the position was not sufficiently

clear for it to be able to tell the public that the recalled feed was safe provided that it had not been made using potato flakes from the affected batch.

189. It follows that this ground also fails.

Ground 9: did the Defendant interfere unlawfully with the Claimant's peaceful Enjoyment of its Property and Possessions?

190. This ground can be addressed very shortly. It was parasitic on the other grounds. My conclusion that the Defendant did not compel the Recall but instead encouraged voluntary action on the part of the Claimant means that it cannot be said that the Recall amounted to an unlawful interference with the Claimant's peaceful enjoyment of its property and possessions. I have found that the Defendant did not act unlawfully or irrationally in respect of the various updates and it also follows that those cannot have been such an unlawful interference. Therefore, this ground also fails.

Conclusion.

191. As a consequence the claim is dismissed.

Appendix I: Update - Advice to cat owners following rise in cases of feline pancytopenia

A product recall has now been extended to include additional batches of specific cat food products, due to a potential link to an increased incidence of feline pancytopenia.

This update is not due to the identification of further safety concerns, but is a voluntary action by the manufacturer to make things easier for consumers to understand which products may have been affected.

Since April 2021 there have been over 130 cases of feline pancytopenia, an illness that can often be fatal in cats. Pancytopenia is a very rare condition where the number of blood cells (red, white and platelets) rapidly decrease, causing serious illness.

A government spokesperson said:

> 'Working with the Royal Veterinary College, the Animal Plant and Health Agency and other government departments across all four nations of the UK, local authorities and the pet food supply chain, we are investigating a possible link between specific cat food products and feline pancytopenia. There is no definitive evidence to confirm a link at this stage.
>
> 'No unsafe cat food has been identified but the manufacturer and brand owners affected, based on investigations so far, are taking the precautionary action of recalling and withdrawing cat food products that have been linked to affected cats. 'There is no evidence to suggest this outbreak of feline pancytopenia presents any risk to human health.'

Advice to cat owners

Pancytopenia is a serious, but usually very rare disease. If your cat is unwell and has been fed any of the cat food listed in the product recall, you should seek immediate advice from your vet.

If your cat's usual food is a product affected by the recall, you should use an alternative cat food brand.

If your cat was being fed a product affected by the recall, we advise you follow the advice in the product recall information notice and discuss with your vet what alternative food would be best to switch to for your pet. This will help to avoid your cat becoming ill as a result of ceasing to feed the listed food.

Advice for vets

The Royal Veterinary College has put out a call for information to gather further information on any identified cases and the possible cause of this illness in cats. Find out more details of the recall and all affected products in the latest product recall.

Appendix II: Update from the Food Standards Agency, Food Standards Scotland and Defra following the rise in cases of feline pancytopenia

The Food Standards Agency (FSA), Food Standards Scotland (FSS), Royal Veterinary College (RVC), Department for Environment, Food & Rural Affairs (Defra), the Animal and Plant Health Agency (APHA), local authorities and the pet food supply chain are taking the situation extremely seriously. All potential causes of feline pancytopenia are being investigated.

No unsafe cat food has been identified but the manufacturer and brand owners affected, based on investigations so far, have taken the precautionary action of recalling batches of cat food that have been possibly linked to affected cats.

The FSA has published a product recall notice which details the affected products. Cases of feline pancytopenia are continuing to rise so we want to spread the message to cat owners who may not have heard about the recall.

A series of targeted analytical tests were initially undertaken to look for heavy metals and mycotoxins (including T-2/HT-2) in the recalled cat food, as these toxins are known to be able to cause pancytopenia in cats. Tests were also undertaken to see if some of these toxins or any deficiencies in essential vitamins and minerals could be identified in the bloods of cats with confirmed cases of feline pancytopenia. No definitive cause has yet been identified, although full results are currently pending.

Our joint investigations, by the food business and respective agencies involved, have since broadened to look for a much wider spectrum of toxic substances in the recalled cat foods, individual ingredients and in the blood of affected cats.

Certain viruses are known to cause feline pancytopenia, of which the most common have also been ruled out, but we continue to consider all possible causes.

The RVC is continuing in its role of gathering information about all identified cases through a call for information to vets in an attempt to identify any common denominators which might point to an underlying cause.

With acute cases of this nature, it may be some time until we can definitively identify a common cause. The investigation remains of an utmost priority and should additional products be identified as potentially unsafe further alerts will be issued.

Appendix III: Update from the Food Standards Agency and Food Standards Scotland following the rise in cases of feline pancytopenia

The presence of mycotoxins has been identified in a small number of samples of the recalled cat food tested to date. Mycotoxins are naturally occurring toxins produced by certain moulds.

Mycotoxins are widely found in some types of feed and food and do not, in themselves, indicate they are the cause of feline pancytopenia.

The business, FSA and other regulators continue to investigate including undertaking wider sampling and also broader screening for any possible toxins.

The FSA's product recall notice details all the affected products that were recalled by the business as a precaution on 17 June. We are urging cat owners to check the list of products, stop feeding them to their cats and return them to the store they purchased them from.

Previous advice to cat owners following the rise in cases of feline pancytopenia (01 July 2021).

Appendix IV: Further update from the Food Standards Agency and Food Standards Scotland following the rise in cases of feline pancytopenia

The Food Standards Agency has been working closely with Fold Hill Foods over the course of the investigation into the recalled cat food. The company has co-operated fully.

The results of extensive testing identified higher levels of mycotoxins in some samples of the recalled cat food. This includes specific compounds known as T2 and HT2. These products are no longer on sale.

Mycotoxins are found in some types of feed and food and do not, in themselves, indicate they are the cause of feline pancytopenia. No causative link between pancytopenia and the recalled cat food products has been established.

As a result of these findings, Fold Hill Foods is working with its local authority to take steps to resume production.

Next steps in the investigation

A multi-agency approach will continue to try and identify the causes of the pancytopenia. As new information emerges, we will review our approach on managing any identified risks in animal feed and inform industry so that they can take any action required as a result of our findings.

Details of the original product recall notice were published on 17 June.

Frequently asked questions

We understand how upsetting the past two months have been for cat owners and know how important it is that the cause of the recent feline pancytopenia cases is established.

Our tests and analysis to date have not found a causative link to the pancytopenia cases, but our investigation is ongoing and we will provide an update once we have more information.

Was the pancytopenia outbreak not caused by cat food?

To date testing has not been able to definitively determine a cause, we have not ruled out cat food or any other possible causes either.

Is it safe for anyone who still has the recalled cat food to feed it to their cats?

Cat owners should not feed any recalled cat food to their cats and should continue to follow the advice in our recall notice.

What other possible causes are being investigated?

We continue to work with the Animal and Plant Health Agency (APHA) and the Department for the Environment, Food and Rural Affairs (DEFRA) to identify the possible cause of the pancytopenia. At this stage we are not ruling out any possible cause.

Why is the company being allowed to restart production if it is not known for sure that its cat food is safe?

To date a causative link between the feline pancytopenia and the recalled cat food has not been established, and so the company is working with its local authority, Lincolnshire County Council, to resume production.

Some social media posts have shown the results of mycotoxin tests, suggesting food is unsafe for cats. Why has action not been taken?

We are aware of some social media posts, in which test results have been misinterpreted as showing a danger to cats. The mere presence of mycotoxins in cat food does not necessarily pose a risk to cats. Mycotoxins are naturally occurring substances produced by certain types of moulds (fungi) which can grow on a variety of different crops and feedstuffs.

If mycotoxins are widely found in animal feed, should people be concerned about other brands of cat food?

No. There is no evidence linking any other products to feline pancytopenia.