



**AN CHÚIRT UACHTARACH
THE SUPREME COURT**

S:AP:IE:2021:000091

**O'Donnell CJ.
Dunne J.
Hogan J.**

Between/

AN TAISCE - NATIONAL TRUST FOR IRELAND

Appellant

-AND -

**AN BORD PLEANÁLA, THE MINISTER FOR COMMUNICATIONS,
CLIMATE ACTION AND THE ENVIRONMENT, IRELAND AND
THE ATTORNEY GENERAL**

Respondents

-AND-

KILKENNY CHEESE LIMITED (FORMERLY JHOK LIMITED)(NO.2)

Notice Party

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 21st December 2021

Introduction

1. This is now the second interlocutory judgment which this Court has been called upon to deliver in respect of judicial review proceedings raising issues of far-reaching importance concerning the scope and reach of our environmental law. In the first judgment delivered

on the 7th December 2021 the Court was required to clarify the scope of its earlier Determination giving leave to appeal to this Court pursuant to Article 34.5.4 of the Constitution: see *An Taisce – The National Trust of Ireland v. An Bord Pleanála & ors (No.1)* [2021] IESC 79. In this judgment the Court is now required to consider whether the Attorney General should be permitted to be joined as a party to this appeal in his capacity as guardian of the public interest. At the conclusion of the hearing on the 13th December 2021 this Court decided that the Attorney General should be permitted to be a party to this appeal subject to the condition that he must abide his own costs. The purpose of this judgment is, accordingly, to give reasons for that decision.

2. Before proceeding to examine this question, it is necessary first to set out in summary the background to these proceedings. In these judicial review proceedings the appellant seeks to quash a decision of An Bord Pleanála dated the 30th June 2020 to grant planning permission in respect of an application made by the developer notice party to construct a cheese factory at Slieverue, Co. Kilkenny. The developer is a joint venture between Glanbia and a Dutch company, Royal-a-Ware.
3. In the High Court Humphreys J delivered a written judgment on the 20th April 2021 dismissing the application for judicial review: [2021] IEHC 254. By a subsequent decision delivered on the 2nd July 2021 Humphreys J refused leave to appeal to the Court of Appeal: see [2021] IEHC 422. By a determination dated the 23rd September 2021 this Court granted leave for a direct appeal to this Court pursuant to Article 34.5.4 of the Constitution: see [2021] IESCDET 109.
4. According to the non-technical summary of the environmental impact assessment report prepared in respect of this development, the proposed cheese plant will require 450 million litres of milk each year, of which approximately 20% is already in circulation. The remaining milk will be sourced from Glanbia's own milk suppliers. This consists principally of some 4,500 farms, largely based in Kilkenny, Tipperary and Waterford and some other surrounding counties. Some 75% of these farms have rivers or streams or other water-courses running through them or are immediately adjacent to them. Of these farms only some 57% have nutrient management programmes designed to mitigate water quality deterioration. A significant portion of the milk supply for the plant is already available but is currently supplied to other processors.
5. At the heart of the appellant's judicial review proceedings lies the contention that the Board did not properly take into account the downstream consequences of the operation of the

proposed cheese factory. Specifically, it is contended that there was no adequate environmental impact assessment of the 450 million litres of milk necessary to supply the factory. It is further said that such supply will have consequences for Ireland's greenhouse obligations in that, for example, the supply of milk at these quantities will have consequences for methane and nitrate emissions. The appellant accordingly maintains that the Board was under an obligation under Article 2(1) of the Environmental Impact Assessment Directive (Directive 2011/92/EU as amended) ("the EIA Directive") to assess these wider (if indirect) environmental impacts due to the demand for milk likely to be created by the project.

6. The appellant adopted a similar argument in respect of Article 6(3) of the Habitats Directive (Directive 92/43/EEC as amended) insofar as these indirect impacts may affect a Natura 2000 site. But it also argued that the Board's inspector erred in screening out certain interests, particularly Atlantic salt meadows, in any assessment. (Atlantic salt meadows are communities of salt tolerant small plants which congregate in tidal estuaries and rivers). It also contended that the Board had failed to have regard to the impact of treated effluent.
7. A slightly different point is made in respect of the Water Framework Directive (Directive 2006/60/EC): it is said that the Board was precluded from granting permission in circumstances where this will lead to an increased discharge of pollutants into the River Suir and where it is said that that waterbody has not achieved what is termed "good" status for the purposes of Article 28 of the Surface Water Regulations (SI No. 272 of 2009).
8. In his judgment in the High Court Humphreys J rejected the appellant's central argument regarding the off-site environmental impact of the proposed milk production, saying (at para. 46):

"The basic reason is that effects of raw material production where such production is sufficiently removed from the project as not to be capable of assessment in site-specific terms are not to be considered part of the project for the purposes of the EIA or AA. Such effects need to be considered on a more programmatic basis and hence lie outside the direct purview of grounds from challenging an individual planning decision."

9. In the first judgment clarifying the scope of the appeal, I concluded that An Taisce should in essence be permitted to rely on all the grounds of appeal which they advanced. In the immediate aftermath of that judgment, the Attorney General issued a motion seeking to be joined as a party to the proceedings in his capacity as guardian of the public interest. Neither the Board nor the notice party objected to this application. It was, however, resisted by the appellant, An Taisce, on the following grounds.

- 10.** First, it was said that the Attorney had delayed making the application until the scope of the appeal was clarified, thus putting in jeopardy the scheduled hearing date of the 12th January 2022 in respect of the main appeal. Second, it was contended that no constitutional issue or issue of EU law had been identified which neither the Board or the developer notice party could adequately address. Third, An Taisce contended that the Attorney’s application was not in fact in the public interest. In this respect it was submitted that the public interest was firmly in ensuring the highest standards of environment protection rather permitting a large scale industrial development which, it was said, would jeopardise Ireland’s capacity to meet her greenhouse gas and climate change obligations, in particular in light of the off-site impacts caused by the necessity to source very large quantities of milk.
- 11.** I propose now to examine each of these arguments in turn. Before doing so it is, however, first necessary to say something about the fact that the Attorney had previously been dismissed from the proceedings. The appellant had at one stage contended that the State had not properly transposed the provisions of Directive (EU) 2016/2284 on the reduction of national emissions of certain atmospheric pollutants (“the NEC Directive”) and had sought a declaration to this effect. The appellant subsequently decided not to pursue this aspect of the challenge with the result that on the 1st March 2021 Ireland qua the Attorney General was dismissed by consent from the proceedings.
- 12.** To my mind, however, the fact that the Attorney General was previously a party to the proceedings is of no particular relevance so far as the present application is concerned. The Attorney General was originally sued qua respondent by reason of a specific contention that the NEC Directive had not been properly transposed into domestic law. Quite clearly, Ireland qua juristic entity is the appropriate respondent to such a claim since it is the entity which bears ultimate responsibility for the proper application of EU law within the State. But the State’s power or entitlement to defend itself in such circumstances is one, which by virtue of Article 49.2 of the Constitution, is exercisable “only by or on the authority of the Government”: see *Byrne v. Ireland* [1972] IR 241 at 249, per Walsh J. The judge then continued:

“In all such cases, it is our view that the correct procedure would be to sue the State and join the Attorney General in order to effect service on the Attorney General for both parties. In effect the Attorney General would be joined in a representative capacity as the law officer of the State designated by the Constitution. If the claim should succeed, judgment would be against the State and not as against the Attorney General.”

13. In effect, therefore, as this passage from the judgment of Walsh J in *Byrne* makes clear, the Attorney General is also joined in a representative capacity in such instances since his task is, qua legal adviser of the Government, to give effect to a decision of the Government that the State should defend the proceedings. All of this simply means that Ireland and the Attorney General were the appropriate respondents in the context of the original (and now abandoned) non-transposition claim with respect to the NEC Directive.
14. The present application is, however, quite different and is brought by the Attorney General in a different capacity, namely, in his separate and distinct role qua guardian of the public interest. The fact that the Attorney General may (or may not) have been a party at an earlier stage of the proceedings has no bearing on the merits of this application and still less does it prejudice the right of the Attorney General to make the present application. We can now turn to consider the merits of this particular application.

Whether there has been undue delay in making the application

15. The first specific objection made by An Taisce was that the Attorney General delayed unduly in making the application. Pointing to the fact that the hearing is scheduled for 12th January 2021, counsel for An Taisce, Mr. Kenny, makes the point that the present application was brought only in the immediate aftermath of the delivery by me of the judgment in *An Taisce (No.1)* on the 7th December 2021 and that the addition of a further party to these proceedings at this late stage is unduly burdensome on what is in essence an under-resourced non-governmental organisation.
16. I am not unmindful of these considerations. Yet it is, after all, An Taisce's appeal and if the Attorney General is joined, there can, I think, be few enough surprises in what he is going to say. Indeed, in her affidavit grounding the application dated the 8th December 2021, the State solicitor, Ms. Barbara Slattery, clearly outlined the case which the Attorney General would wish to make if he were joined to the proceedings.
17. The Attorney General has, moreover, agreed to abide his own costs and the other parties have, in a spirit of commendable fairness, agreed to assist An Taisce in the task of assembling the book of authorities. As counsel for the Attorney, Ms Murray SC, reminded the Court, the Attorney General had at all stages reserved his position regarding the joinder application and this has been made pellucidly clear to all the parties at various stages during the case management process. It may be that the final decision to seek to intervene was made only after the first judgment of this Court was delivered on the 7th December 2021 and then only when it was clear that this Court had in fact sanctioned a broad view of the

scope of the appeal. One way or the other, however, it is clear that the Attorney General then moved with some dispatch.

18. In these circumstances, I would reject the contention that the application was made too late. It is agreed that these proceedings are both important and urgent and it behoves the parties to ensure that there is no delay in the further processing of this appeal.

Whether the Attorney General has identified any point of constitutional law or EU law

19. The second objection is that the Attorney has not identified any constitutional or EU point of any importance with which the existing parties (namely, the Board and the developer) cannot already deal. While this might be so, the short answer is that there does not have to be any such point so identified. It is sufficient for this purpose that the Attorney General can point to the existence of a matter of public interest which can in itself justify an application to be joined. As Denham J observed in *TDI Metro Ltd. v. Delap (No.1)* [2000] IESC 53, [2000] 4 IR 337 at 345:

“The Attorney General does not have a right entitling him to intervene in or to be joined to proceedings. The Attorney General has a right to apply to the court and it is for the court to determine. In many cases the public interest will be clear and the order in favour of the application of the Attorney General will follow. If there is a doubt as to the public interest as submitted by the Attorney General, the court, in exercising its discretion, should lean toward the application of the Attorney General enabling him or her to be joined in the proceedings.”

20. In *TDI Metro* the underlying issue concerned the right of a local authority to prosecute indicatable offences. As Denham J remarked, the public interest in that case was “clear”. Much the same can be said of the other instances where the Attorney General intervened as guardian of the public interest. The Attorney General was, for example, permitted to intervene in this Court in *Brady v. Cavan County Council* [1999] 4 IR 99 since that case concerned the extent of the obligation imposed on public authorities to repair the public highway. More recently in *Re JJ* [2021] IESC 1 – a tragic case concerning the continued treatment of a severely injured young boy who was a ward of court – the Attorney General appeared in this Court at our suggestion in order to advance an argument on behalf of the public interest.
21. While the factual background to these (and other) examples is both varied and different, there is nevertheless one unifying theme, namely, that the case in question has an importance for the general public which transcends the particular – one might even say narrow

– interests of the parties. If it does, then, to adopt the words of Denham J in *TDI Metro*, the case will, at least generally speaking, be taken to present a matter of public interest and the order in favour of allowing the Attorney General to participate will usually follow.

22. What, then, is the situation here? This appeal presents issues of potentially far-reaching importance concerning the application of environmental law standards. If An Taisce's arguments are correct, this would have major implications for the planning process in general and large scale industrial developments in particular. In those circumstances it is clear that as the present appeal has implications which transcend the private interests of the parties to this litigation, so that the public interest is plainly engaged.

Whether the Attorney General's intervention would in fact be in the public interest

23. The final argument is that the Attorney General is not in fact acting in the public interest in seeking to be joined as a party to the appeal. In this context Mr. Kenny maintained that the Attorney's intervention was designed simply to ensure that the planning process operated smoothly for large scale developers, whereas on his argument the true protection of the public interest lay in ensuring that Ireland's climate change targets were met and that the full environmental costs associated with developments of this kind were known in advance by means of an expanded environmental impact assessment which measured what might be termed the off-site impacts of a major industrial project.
24. There are, I think, several responses to this. First, the question of whether a development of this kind should proceed is a matter on which, as befits public discourse in a free and a democratic society, there are doubtless a range of views. Some may think that a development of this kind is likely to generate secure employment while simultaneously providing an outlet for enhanced milk production for farming communities residing in the general South Leinster/East Munster region and such persons would welcome it on that basis. Others may think that the inevitable consequences of all of this is greatly enhanced milk production, thus leading (it is said) to greater methane and other greenhouse gas emissions which in turn would seriously compromise our climate change commitments.
25. The courts cannot, however, comfortably address these questions or pronounce on their correctness, since they are inevitably the stuff of intense political debate and, in the absence of appropriate legal standards to guide the court, are, as such, beyond the judicial capacity to resolve.
26. Secondly, this particular objection tends to overlook the true character of the public interest role of the Attorney General. As I have already indicated, the Attorney's right to apply to

intervene in cases of this kind applies to those category of cases where he forms the view that the case in question presents important questions of law which transcend the private interests of the parties. While the Attorney General acts independently of the Government in these matters, he is nonetheless well placed by virtue of the office he holds to draw the Court's attention to the wider dimensions of the case at hand. These might, for example, include a range of matters such as the implications for diplomatic relations with another state or the State's obligations under international law or under EU law. In another type of case the Attorney may wish to offer a view regarding the proper interpretation of a particular constitutional provision or submit, for example, that a particular line of judicial authority is contrary to principle or is unworkable in practice.

27. These examples merely highlight what is understood by the public interest in this particular sense. The fact that the Attorney General seeks to intervene on this basis does not, of course, mean that his arguments to this effect will necessarily be shared by the Court or that the Court will be persuaded of their particular legal merits. Where the Court makes an order permitting the joinder of the Attorney General to an appeal on this basis, it is simply because the case is one which presents issues which transcend the interests of the parties. It is in that sense – and really only in that sense – that the public interest is engaged. This is plainly the case here as this case is one which obviously transcends the interests of the other parties to the appeal: after all, if there is one thing on which all the parties are agreed, it is practical importance of this case for environmental law generally.

Conclusion

28. In these circumstances, I would accordingly grant an order pursuant to the provisions of Order 58, r. 3(2) permitting the joinder of the Attorney General to this appeal on condition that he abide his own costs.