

**THE HIGH COURT
(COMMERCIAL)
(JUDICIAL REVIEW)**

RECORD No. 2005/63 JR

BETWEEN

ALBATROS FEEDS LIMITED

APPLICANT

AND
THE MINISTER FOR AGRICULTURE AND FOOD,
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice Kelly delivered the 7th day of March, 2005

Introduction

1. The applicant (Albatros) seeks *certiorari* against the first respondent (the Minister) in respect of certain "instructions" and "seizure and detention notices" issued by her in respect of a quantity of maize gluten which the applicant attempted to import into the State.

The Applicant

2. Albatros is a limited company incorporated in Ireland. It is an importer of grains and animal feedstuffs.
3. On importation, the feedstuffs are sold to third parties who use them for blending into a finished product.

The Events

4. On 6th November, 2004, the m.v. 'Pakrac', carrying a cargo of 30,642 metric tonnes of various products, including corn gluten for delivery to Albatros, arrived at Foynes. The cargo was in five separate holds on the ship. Four products were on board. Two holds were occupied by roquette gluten and the remaining three by soya hulls, corn distillers and CPI gluten respectively. The CPI gluten, which is the only product relevant to these proceedings was stored in hold no. 2. This cargo was being imported from the United States of America.

5. A portion of the cargo, including 1,845.70 metric tonnes of the CPI gluten was discharged at Foynes between the 6th and 9th November, 2004. Hereafter I will refer to this as "the Foynes consignment".

6. Following discharge of the cargo at Foynes the ship transported the remainder of the cargo to Ringaskiddy, Co. Cork. There 4,557.56 metric tonnes were discharged between 10th and 12th November, 2004. This I will refer to as "the Ringaskiddy consignment".

7. Feedstuffs imported into the State are subject to routine sampling and testing by the servants or officers of the Minister.

8. On 18th November, 2004, the applicant was informed by the general manager of the store keeping company in Ringaskiddy that he in turn had been informed by agents of the Minister that certain of the cargo which had been unloaded there contained "spicules" and that accordingly the material in possession of the store keeper was to be impounded. Subsequently a representative of the Minister confirmed by telephone that a sample from the Ringaskiddy consignment contained a number of bone spicules and that on that basis the Foynes consignment was also to be impounded.

9. On the same day, 18th November, 2004, the Minister issued an instruction in writing to Albatros concerning the Ringaskiddy consignment. This instruction was purportedly issued pursuant to the European Communities (Processed Animal Products) Regulations, 2000, (S.I. 486 of 2000) (the Regulations). Insofar as it is relevant the instruction read as follows:-

"A consignment of CPI maize gluten feed imported on the m.v. Pakrac into Ringaskiddy on 12th November, has been sampled by an authorised officer at Moyglare Holdings Limited, Ringaskiddy, Co. Cork. A copy of this sampling report form has been forwarded to you together with notification that a duplicate sample has been left at the premises where the sample was taken.

The sample was found on analysis to contain processed animal protein, which is regarded as a serious breach of the above regulations. I attach a copy of the analysis certificate.

Therefore, in accordance with the powers vested in the Minister you are instructed to:-...

2. Within 24 hours of this notification, issue a written instruction to all affected customers informing them that:

(a) The product must not be sold or used as a feeding stuff or feed ingredient, since it has been found to be in breach of the above regulations, and

(b) In the case of customers who are retailers,

(i) that they initiate a recall of all contaminated materials sold, and

(ii) compile a list of the names and addresses of these customers along with the quantity and dates of delivery.

3. Arrange for the immediate recall of all unused product from customer premises to Moyglare Holdings Limited, Ringaskiddy, Co. Cork, under your responsibility and at your expense."

10. On 18th November, 2004, a number of what are described as "seizure and detention notices" were served by the Minister's officers on the applicant in relation to the Foynes consignment. The notice insofar as it related to CPI gluten was addressed to Albatros in the following term:-

"I, the undersigned, being an authorised officer for the purpose of the regulations listed on the attached schedule, am satisfied that the consignments of feeding stuff designated maize gluten feed, CPI, batch numbers D.,O.,Ms., Store no. 3 and consisting of bulk bags of approximately 1,299 tonnes in weight and held on the premises of Stafford Port Services, Foynes, Co. Limerick, does not comply with the requirements of the regulations marked with an 'X' on the attached schedule.

I hereby give you notice that I am seizing the above mentioned consignment(s) and requiring that it be detained at the above mentioned premises. You are hereby directed to take such steps as are necessary to ensure that this consignment or any part thereof does not continue to be put into circulation/is not put into circulation, and that the consignment or any part thereof is not moved from the above premises other than in accordance with my written permission.

This notice is served on you as the person who appears to be in control of the consignments concerned.

Signed: Maurice Winder, Authorised Officer, date 18/11/04."

11. The schedule attached to this notice contained the titles of 11 different sets of regulations, one of which was marked with an 'X'. The regulations marked with an 'X' were the Regulations.

12. Similar seizure and detention notices were served in relation to the Ringaskiddy consignment over the next number of days.

13. On 25th November, 2004, the Minister issued an instruction in respect of the consignment which had been landed at Foynes, which was identical (save for the detail mentioned below) to the instruction issued on 18th November, 2004, in respect of the consignment landed at Ringaskiddy. It is these instructions and the relevant seizure and detention notices which are sought to be quashed on this application.

14. All of the instructions and the notices which are in suit rely upon the Regulations for their legality. The seizure and detention notices assert that the consignments affected by them do not comply with the requirements of the Regulations but they do not give any specific detail as to how the consignments so fail. The instructions of 18th November, 2004, concerning the Ringaskiddy consignment alleges that a sample of the material was found on analysis to contain processed animal protein. A copy of the analysis certificate was enclosed with that instruction. In fact, what was discovered was the presence of a small number of terrestrial animal bone spicules.

15. The instructions of 25th November, 2004, in respect of the Foynes consignment were (unlike the instructions relating to the Ringaskiddy consignment) based upon the fact that the material analysed had "also been found upon analysis to contain bone of terrestrial animal origin". (My emphasis)

16. Between 18th November, 2004 and 25th November, 2004, Albatros requested the Minister to provide it with details of-

(1) the level of contamination, and

(2) the species type.

17. It also sought permission to have an independent analyst examine the sample. A further request was made on 19th November, 2004, for information regarding the bone identified. Albatros requested that the particles be held securely while a laboratory for DNA testing was identified by it.

18. On 19th November, 2004, Albatros was informed by the Minister that the Foynes consignment had tested negative for bone spicules. On 22nd November, 2004, Albatros was informed that the Foynes consignment was to be re-sampled in a more intensive manner. This retesting was carried out and Albatros was informed that a negative test had been returned. It was further tested on 22nd November, 2004, and no bone spicules were found. On 23rd November, 2004, eleven sets of samples were drawn from the Foynes consignment and sent for sampling. Two samples showed the presence of bone spicules. The first of these samples was tested twice. The first test indicated the presence of one bone spicule while the second indicated the presence of two such spicules. The second sample was also tested twice. The first test indicated the presence of two bone spicules whilst the second test did not indicate the presence of any such material.

The Correspondence

19. On 26th November, 2004, Ms. Maree Gallagher, solicitor for the applicants, wrote to the deputy chief inspector of the Minister's department. Her letter is long but as it sets out in some detail the complaint which is made in these proceedings it is worth reproducing in full. It reads:-

"Dear Mr. Behan,

I am instructed by my client, Albatros Feed Limited (Albatros) to write to you in connection with alleged finding by the Department of Agriculture and Food (the Department) of terrestrial bone spicules in a consignment of corn gluten originating in the U.S. which was imported by Albatros into Ireland on the m.v. Pakrac on 12th November, 2004.

On 18th November, 2004, the Department informed Albatros that a sample of the corn products international (CPI) corn gluten taken by the Department in Cork had 'as far as was discernable under a microscope constituents of animal origin (terrestrial animals) were found in the sample listed below'. Despite repeated requests by Albatros, no further information has been forthcoming from the Department about the results of the sample and no evidence has been produced by the Department that the matter allegedly detected in the sample was processed animal protein as defined in European Communities (Processed Animal Products) Regulations, 2000, S.I. 486 of 2000.

Notwithstanding the lack of evidence that the matter allegedly found was processed animal protein, the Department issued an unlimited product recall on the CPI product which had been distributed from the consignment delivered into Ringaskiddy. Albatros co-operated fully with the Department in this regard despite having serious concerns about the validity of the test results and the Department's undue expedition in ordering such a costly and unnecessary recall in circumstances where there is no evidence that the matter found was processed animal protein.

The Department subsequently also sealed the consignment of CPI which had been delivered by the m.v. Pakrac to

Foynes and tested it for processed animal protein. This consignment tested negative for any animal protein. The Department then requested another test, the results of which were also negative. Despite two negative tests, the Department then insisted on conducting a third test which Albatros is informed allegedly showed the presence of spicules. Following three tests of the product in Foynes the Department on receiving one positive test, yesterday issued a further unlimited product recall. Once again, the Department failed to provide Albatros with any evidence that the matter it alleges it has found is in fact processed animal protein. Despite repeated requests from Albatros, the Department has failed to provide any evidence that the substance allegedly found is processed animal protein.

Albatros and its management has at all times co-operated with the Department in this matter but, despite this willingness to co-operate, the Department has persisted in its inappropriate and extreme interpretation of the 2000 regulations and despite several requests, has failed to provide any meaningful information about the substance allegedly found during testing. Albatros absolutely rejects the finding by the Department that the substance allegedly found is processed animal protein and it can provide documentation which proves that there is no way in which the product in question could have been contaminated with processed animal protein. If the Department can prove conclusively that the product does contain spicules of some form of animal protein, Albatros is adamant that any spicules of animal protein in the product is not in any way processed animal protein as defined in the 2000 regulations and could only be present in the product by virtue of the fact that the product is of agricultural origin and may have been adventitiously 'contaminated' by nature. There is no specific evidence which demonstrates that, for example, spicules of bone belonging to birds or mice pose a risk to human or animal health. In the absence of conclusive DNA testing by the Department which shows that the matter allegedly found is processed animal protein there should be no product recall and no action is required to be taken by the Department as there is no risk health (sic).

Indeed, it is clear that the substance allegedly found is not considered by the Department as creating any risk to the health of humans or otherwise. In that regard, the Examiner (23rd November, 2004) indicates that a spokesman for the Department acknowledged that any danger to human and animal health is 'negligible'. Accordingly, it is clear that the actions taken by you are wholly unwarranted and completely disproportionate. Furthermore, the Department authorised this action without any regard to the rights of Albatros and in an irrational and grossly unreasonable manner thereby causing gross prejudice to Albatros. The future liability of Albatros's business is jeopardised by the Department's reckless actions.

It is clear that the Department is actively targeting imports of animal feedstuffs. In that regard, it is subjecting such imports to more strenuous and stringent testing than native grain feed and other feeding stuffs, such as silage. There is evidence that the Department is not testing feed which is being imported into the Republic through ports in Northern Ireland with the same level of intensity as it tests consignments off loaded in Irish ports. This targeting of imports into Irish ports and inconsistency in testing is prejudicial to my client and constitutes an unjustified quantitative restriction on imports.

We hereby request the Department to provide detailed information of all testing done to date on animal feeding stuffs on farm and stores in Ireland. In addition, specify the date on which any such testing began. In particular we request details of all tests carried out by the Department on silage (and the subsequent results). It is unacceptable to Albatros, and indeed to the entire industry, that the testing by the Department is creating an unlevel playing field and is unfairly and indiscriminately targeting imports of animal feed while virtually ignoring non-imported feeding stuffs.

Albatros strenuously objects to the actions taken by the Department in its handling of this matter. Its actions constitute a breach of natural and constitutional justice and are clearly in excess of E.U. internal market rules which prohibit the feeding of processed animal protein to farmed animals. Furthermore the Department's actions have the effect of creating a technical barrier to trade which cannot, by the Department's own admission, be justified on the grounds of protecting public or animal health (see the Examiner 23rd November, 2004).

Albatros demands that the product recall be cancelled with immediate effect. Without prejudice to the foregoing, any recall be limited in such a way as to be reasonable. Furthermore, we require that the Department indemnifies Albatros for the extensive costs associated with this unnecessary action and that the Department compensates Albatros for all the damage that has been done to the company's reputation by the Department's unjustified action. In the event that we fail to receive a satisfactory response to the foregoing we will advise our client as to all legal remedies available to it.

Yours sincerely,

Maree Gallagher."

20. That letter was not responded to until 21st December, 2004, when the head of the legal services division of the Minister's department wrote to Ms. Gallagher. I will turn to that response in a moment but before doing so should recite certain events that occurred in the meantime.

21. On 28th November, 2004, the managing director of Albatros met with representatives of the Minister in the company of representatives of the shipping company which was also the vendor of the product. Those representatives informed the Minister's agents of the production process engaged in in the United States in respect of both the Ringaskiddy and Foynes consignments. They made the case that it was impossible for processed animal protein to get into the feed stuffs. They contended that if any bone spicules were present in the consignments they were not derived from processed animal protein but instead represented adventitious contamination which had neither health or safety implications. An invitation was extended to the Minister's representatives to attend the production premises in the United States so as to satisfy themselves as to the integrity of the procedures adopted.

22. Albatros arranged that samples of the product would be tested by an E.U. approved laboratory located in Rotterdam. Furthermore, samples of the product, together with photographs of the spicules which had been taken on behalf of the Minister, were furnished to the applicant and sent to a Dr. Bates who is an adjunct professor in the Department of Foods and Nutrition at Kansas State University.

23. In a report dated 19th November, 2004, Dr. Bates concluded inter alia-

"No traces of any animal particles were found. I concluded from the above observations that no rendered particles from any mammals were present in this corn gluten feed sample. No evidence of any animal products was found".

24. A further report was obtained from Dr. Bates dated 3rd December, 2004. In the course of that report Dr. Bates opined as follows:-

(1) The presence of bone fragments in corn gluten feed is unusual in feed mill collected bin samples like the consignments in question, particularly where dedicated barges are provided.

(2) Organic fraction particles such as ground hair, hoof, horn, leg scales etc. are far more numerous than skeletal bone fragments in any rendered by-products meals and are readily found in any product in contact with animal by-products meals. No such organic fraction particles were present in the samples tested. In particular Dr. Bates noted that he had never seen an animal meal contamination problem that did not have a confirming structure in the organic fraction of the contaminated samples.

(3) He noted that an animal or poultry bone fragment without any organic fraction particles of any sort suggests it was not a rendered by-product.

(4) Dr. Bates noted that the most detailed photographs provided were of bird bone fragments. No bones were found in the reserved barge samples and vessel composite from the 'Pakrac' that was examined. Furthermore, there was not found any confirming feather barbule fragments, leg scales, hair or other characteristic organic fraction particles that would indicate the bone fragments in the photographs came from a rendered source.

(5) Dr. Bates concluded from the samples examined and the information provided from the Irish authorities that there was insufficient evidence to conclude the bones found were from a rendered animal by-product source. To the contrary he believed the lack of confirming organic fraction particles indicated strongly that the corn gluten feed materials had not been contaminated with rendered animal by-product meal. Dr. Bates was unable to determine the sources of the traces of bone fragments found but opined that their extremely low frequency, their clean appearance and the lack of confirming particles indicated that they were probably artefacts of processing facilities that had the same common problems world wide with small birds and rodents. These reports were furnished to the Minister on 10th December, 2004.

25. It is to be noted that Dr. Bates swore an affidavit on 7th February, 2005, confirming the various analyses carried out and expressing the view that there was insufficient residue to conclude that processed animal protein was present in the various samples analysed.

26. An initial report from the Rotterdam laboratories indicated the presence of bone fractions. They were then subjected to DNA testing by that laboratory. The DNA testing confirmed that the results were negative for pig, cattle, sheep or goat. It indicated that the most likely source of the bone was pigeon. These results from the Rotterdam laboratory were also notified to the Minister.

27. On 14th December, 2004, the Minister received certificates of analysis from the laboratory engaged by her to test the product. That laboratory is known as LUFA Speyer. Three reports were provided in respect of three samples. In relation to each sample the laboratory nominated by the Minister stated that:-

"The analysis gave no evidence for animal constituents in the tested sample material according to the enclosed examination report."

28. By an email of 14th December, 2004, Albatros indicated that it would hold the Minister liable for all costs and losses associated with the recall which had been directed.

29. On 21st December, 2004, the Minister, through the head of her legal services division responded to Ms. Gallagher's letter of 26th November, 2004. The letter reads:-

"Dear Ms. Gallagher,

I act on behalf of the Minister for Agriculture and Food.

I refer to your letter of 26th November, 2004, relating to the Departments recall of a consignment of maize gluten feed imported by your client, Albatros Feeds Limited from the U.S.A. and off loaded at Foynes and Ringaskiddy ports in mid-November, 2004. The material was found, on analysis, to contain traces of bone of terrestrial animal origin.

I wish, at the outset, to state the context within which this department operates its feeding stuffs controls. Controls on the distribution and use of feed materials and compound feeding stuffs, including sampling and testing for the presence of processed animal proteins, are critical to the success of the Nations effort to contain and eliminate diseases such as BSE from the national herd and as a direct consequence reduce any potential risk to public health. Any failure on the part of the Department to maintain or improve its controls in this regard provides the potential to undermine the current status of this control programme and negate the time, money and effort which various interested parties, not least the tax payer, have committed to this end over recent years with increasingly obvious success.

It follows, therefore that when the Department is informed by the designated testing laboratory that evidence of either terrestrial or fish bone has been identified as being present in a sample feed, taken in accordance with the national legislation, imported into this country it is incumbent on the Department to proceed in accordance with both the obligations placed on it by E.U. and national legislation and its stated policy and practice in such an eventuality.

The analytical method applied by the Department is contained in Commission Directive 2003/126/EC which sets out:-

'The analytical method for the determination of constituents of animal origin for the official control of feeding stuffs'

and

'Is currently the only method validated to control the presence of animal proteins including these proteins treated at 1330C/ 3bar/20 in feeding stuffs.'

All subsequent actions taken by this department, following the notification of the existence of bone spicules are carried out in accordance with the procedures set out in the Department's contingency plan for animal feed and the standard operating procedure for the sampling analysis and follow up of positive results for processed animal proteins in animal feeding stuffs as regulated with the industry.

These procedures provide for, inter alia, product impoundment, product recall and product destruction. The Department is conscious that success in the first two elements of these procedures is critical in minimising the level of potential risk to the food chain should any product containing prohibited material enter it.

The timely impoundment and comprehensive recall, particularly from farms where such products may have found its way for use in animals feed would, in general, lead the Department in conjunction with the F.S.A.I. to judge the risk to the food chain as being negligible.

I can confirm that all of the above factors were considered and applied by the Department in its dealings with the consignment of maize gluten imported by your client.

While the procedures carried out by the Department were those normally applied in such cases, the Department does concede that a sampling frequency greater than normal was employed in this case. This was carried out both in the interests of fairness to your client and in the interest of ensuring food safety. While the laboratory determination was that the bone spicules identified in the consignment were identified as constituents of terrestrial animal origin, the possibility that these constituents could be derived from mammals cannot be excluded.

It is the view of this department that the action taken in this case was proportionate to the probable risk which animal feed stuff contaminated with bone residues of possible mammalian origin poses to the Irish livestock sector and to the social and economic consequences which would ensue from the introduction into the national herd of new BSE infective material.

Referring to your request for information on sampling carried out by this department on feeding stuffs I am enclosing for your information the detailed report prepared for the E.U. Commission on sampling carried out in 2003. The inspection regime operated by the Department in 2004 is similar to that operated in 2003.

Finally you should note that this department will not be cancelling the recall instruction issued to your client and that none of the costs associated with the recall and destruction process will be borne by the Department. Any proceedings issued by your client will be strongly defended by the Department."

30. On 14th January, 2005, Ms. Gallagher wrote to the head of the legal services division of the Minister pointing out that his reply of 21st December, 2004, did not address the issues raised in her letter of 26th November. His letter also failed to address the material, including scientific and DNA analysis which Albatros had forwarded to the Department and which clearly indicated that the corn gluten did not contain mammalian meat and bone meal. Again the Minister was asked to cancel the product recall and it was pointed out that judicial review proceedings would be commenced if an appropriate confirmation was not received by 17th January, 2005. At the request of the Minister at the time for responding to this letter was extended to 20th January.

31. On 20th January, a lengthy reply from the Minister's legal division was forthcoming. Insofar as it is relevant it reads as follows:-

"Heading: Nature of the bone spicules identified in the feed material

.....

In my letter of 21st December, 2004, I indicated that the analytical method applied by the Department for the official control of the presence, identification and/or estimation of the amount of constituents of animal origin in feeding stuffs is that contained in Commission Directive 2003/126/E.C S.I. No. 185 of 2004 has transposed this directive into national legislation.

All Member States are obliged to use this method for official control purposes.

In addition, the microscopic method provided by the directive is currently the only method that is validated by E.U. law to control the presence of animal proteins, including processed animal proteins, in feeding stuffs. It should also be noted that in the judgment of the European Court of Justice (see 286/02 of 1st April, 2004), it was found that community rules relating to this matter must be interpreted so that the presence, even accidental, of low levels of contamination is not permitted in feeding stuffs, (the zero tolerance principle).

It should also be noted that in the same judgment, the E.C.J. ruled that-

'Article 13 of the European Economic Area Agreement of 2nd May, 1992, must be interpreted as meaning that decisions 2000/766 and 2001/9 are not incompatible therewith.'

I respectfully suggest that your client's contention that the actions taken by the Department are 'clearly in excess of E.U. internal market rules' runs counter to the decision of E.C.J. in the case mentioned.

All of the decisions made concerning your client's feed material were based on the fact that the material in question was found to contain constituents of animal origin (terrestrial animal) using the official method of analysis authorised by the E.U. and available to the Department.

Notwithstanding the above, this department has examined the results of analysis, both microscopy and DNA, commissioned by your client at TLR Laboratories in the Netherlands. The Department notes that this analysis confirms that the sample material is positive for 'parts of land animals'. This would appear to be consistent with the earlier microscopic results forwarded to your client by this department. With regard to the DNA analysis, the laboratory reported the result as 'not detectible' for a range of species. This logically must mean (sic) that DNA from those other species was not detected. However, it does not mean that material from those species was not present. For example, this could happen when the amount of DNA present in the sample is below the parameters or limits of detection,

provided for in the specific DNA method applied. It could also be the case that the material has undergone prior heat treatment, which could denature the DNA present in the material (as would be the case for processed animal proteins).

The Department also acknowledges receipt of the report from Albatros which was commissioned by them from Dr. Bates concerning this matter. His opinion concerning the origin of the bone fragments does not alter the fact that the maize gluten feed was found to be positive for bone spicules of terrestrial animal origin using the official method of analysis."

32. The letter then went on to deal with the levels of sampling carried out on imported feeding stuffs and concluded by indicating that the Department was not prepared to cancel the impoundment and recall notice nor would it bear any of the costs associated with the impounding or recall. With the receipt of this letter the battle lines were drawn between the parties and proceedings ensued quickly.

33. The Minister relies on such analyses as showed the presence of constituents of animal origin (terrestrial animal) and the possibility that they were of mammalian origin as the scientific justification for the action taken.

The Proceedings

34. Leave was given to commence these proceedings by Macken J. on 24th January, 2005. Four days later I made an order admitting the case into the commercial list under the provisions of order 63(A) rule 1(g) of the Rules of the Superior Courts having regard inter alia to Albatros's estimate of the costs of the recall to it at approximately €2,300,000.00 and the fact that if the product is to be of merchantable quality as it has a limited life span. I also gave directions for an accelerated exchange of pleadings and an early trial. The case was heard by me on 16th and 17th February, 2005.

35. As part of the preparation for the case the parties produced a list of agreed issues which fall to be determined on the application. It is the answer to these questions that will decide the outcome of this application.

36. It is clear that both the "instructions" and the "seizure and detention" notices issued by the Minister all purport to be issued pursuant to the Regulations. It is therefore necessary to see precisely what those regulations provide.

The Regulations

37. The Regulations were made pursuant to s. 3 of the European Communities Act, 1972, for the purposes of giving effect to Council Decision 200/766/E.C of 4th December, 2000 and the subsequent Commission decision providing for the implementing control measures. They came into operation on 1st January, 2001. They contain a number of definitions which are of importance.

38. They define "animal" as follows:-

"Means an animal belonging to a species normally nourished and kept or consumed by man as well as animals living freely in the wild in cases where they are nourished with feeding stuffs."

39. The term "farmed animal" is defined as follows. It

"Means an animal which is kept, fattened or bred for the production of food."

40. The term "processed animal proteins" is defined as meaning:-

"Meat and bone meal, meat meal, bone meal, blood meal, dried plasma and other blood products, hydrolysed proteins, hoof meal, horn meal, poultry offal meal, feather meal, dry greaves, fish meal, dicalcium phosphate obtained from defatted bones, gelatine, and any other similar products including mixtures, feeding stuffs, feed additives and pre-mixtures, containing these products."

41. Article 3 of the Regulations provides a general prohibition against processed animal proteins being fed to farmed animals.

42. Article 5 prohibits the import and export of processed animal proteins both from and to European Union Member States and from and to third countries unless it is done in accordance with a licence issued by the Minister under Article 7 of the regulations.

43. It is Article 5(4) that is of relevance here. It prohibits a person importing processed animal proteins from a third country unless it is done pursuant to a licence issued by the Minister.

44. Article 6 prohibits a person from having processed animal proteins in their possession or under their control on any land or premises which is used for or in connection with the manufacture of feed stuff or used for or in connection with the holding, handling, keeping or farming of ruminant animals. It also prohibits a person from incorporating processed animal proteins into any feeding stuffs intended for feeding to animals other than ruminants except in accordance with a licence granted by the Minister. The term "ruminant" is defined in the regulations as including cattle, deer, goats and sheep.

45. Article 7 provides for the licences which may be issued by the Minister from time to time.

46. Article 8 permits the Minister to appoint one or more persons to be an authorised officer for the purpose of the regulations. Such a person on appointment must be furnished by the Minister with a certificate of his or her appointment.

47. Article 9 provides that the provisions of the European Communities (Animal Nutrition Inspections) Regulations, 2000 (S.I. No. 4 of 2000) shall apply to inspections undertaken by an authorised officer for the purposes of the regulations.

48. Article 10 of the Regulations provides that any person who contravenes them or obstructs or interferes with an authorised officer in the course of exercising a power conferred on him by the regulations or who fails to comply with a request made by or to answer any question posed by such an officer or who fails to comply with a condition of a licence shall be guilty of an offence. It also provides that any person who has in his possession processed animal proteins for the purpose of putting them into circulation in contravention of a provision of the regulations is to be guilty of an offence. Various other offences are provided for and the penalty for such offences on summary conviction is a fine not exceeding IR£1,500.00 or imprisonment for a term not exceeding six months or to both such fine and imprisonment.

49. It is clear that the Regulations create a prohibition on the feeding, import, export or possession of "processed animal proteins", save in circumstances where such activities are carried out with a licence issued by the Minister. The Regulations create offences in

respect of their contravention and prescribe penalties upon conviction for such offences.

50. I now turn to the issues which the parties to this litigation agree fall to be determined.

The Applicant's Case

51. Albatros's case can be synthesised as follows. The "instructions" and the "seizure and detention" notices (hereinafter I will refer to both as the Instructions) issued by the Minister have had and will continue to have very serious adverse effects upon the business and financial affairs of Albatros. They amount to an attack upon its property rights which are protected both under the Constitution and the European Convention on Human Rights.

52. The Instructions purport to be issued pursuant to statutory powers. Two conditions are necessary in order to render the acts done by the Minister valid. They are:-

(a) the power exercised must be one that is clearly conferred by the authorising statutory provision, and

(b) assuming that that power exists, the preconditions for the exercise of the power must be satisfied.

53. Albatros contends that neither condition has been met.

54. As an alternative, if the Instructions were issued in accordance with the Regulations, the Regulations themselves are invalid or are incompatible with certain provisions of the European Convention on Human Rights. There is also a claim for damages.

55. These latter two elements of Albatros's case do not fall for determination at present.

56. The question of the validity of the Regulations will not arise unless Albatros fails on the first part of its case. Damages will not arise at all in the absence of success by Albatros on some part of its case.

Respondent's Case

57. In brief the respondents contend that there is a sufficient legal basis for the Instructions.

58. They do so by reference not merely to the Regulations but also to a variety of other legal provisions both domestic and European.

59. Insofar as Albatros contend that there was no evidence before the Minister to warrant the steps taken, they contend that that is an attempt on the part of Albatros to have the court review the merits of the Minister's decision. That is not permissible in judicial review proceedings.

The Agreed Issues

Issue 1.1

Were the Instructions lawfully authorised by the provisions of the Regulations, properly construed?

60. The Instructions were issued pursuant to the Regulations. That is apparent on the face of the documents.

61. The Regulations do not in express terms confer any power on the Minister to issue such Instructions. There is nothing in the Regulations to empower the Minister to take these steps, nor indeed to define the circumstances in which such steps might be taken. As I have already pointed out the Regulations create certain prohibitions and render a breach of those prohibitions criminal offences. They also prescribe penalties for such offences.

62. The only provision of the Regulations that could provide a basis for the giving of the Instructions is Article 9. Article 9 does not grant any substantive powers to the Minister but provides that the provisions of the European Communities (Animal Nutrition Inspections) Regulations, 2000, shall apply to inspections undertaken by an authorised officer for the purposes of the Regulations.

63. Unless, therefore, Article 9 of the Regulations is capable of sustaining the action taken by the Minister it follows that they were not authorised under the Regulations.

64. In a moment I will consider Article 9 when I come to deal with Issue 1.3.

65. The answer to Issue 1.1 is that the Instructions were not lawfully authorised by the provisions of the Regulations unless they can be justified under Article 9 thereof. There is no other article of the Regulations which could possibly justify the actions taken by the Minister.

Issue 1.2

Having regard to the fact that, on their face, the Instructions purport to be issued pursuant to the Regulations and that no other statutory authority is referred to in them, are the respondents entitled to contend that the Instructions were properly issued by reference to other statutory provisions?

66. There can be little doubt but that the actions of the Minister in this case had serious consequences for the property rights of Albatros concerning the cargo in question. It is I think axiomatic that an interference of the type in suit must take place on a clear legal footing.

67. Such a material impairment of Albatros's property rights could only be justified by the use by the Minister of a legal power vested in her and its due exercise.

68. Such a legal power must be conferred by a legislative instrument. It could not for example be conferred by what was described in the letter from the head of the Minister's legal services on 21st December, 2004, as a "contingency" plan or "standard operating procedures".

69. The Instructions all demonstrated on their face that the legal basis for them was the Regulations. It was perfectly correct that they should show the jurisdiction under which they were given on the face of the relevant documents. There is a common law requirement for that. It applies not merely in respect of court orders but also orders affecting fundamental rights. So it has been held that deportation orders, extradition orders and compulsory purchase orders must show jurisdiction on their face and where they did not they have been set aside for such failure. (See *Kajli v. Minister for Justice*, Unreported 21st August, 1992; *D.P.P. v. Dunne* [1994] 2 I.R. 537; *State (Holmes) v. Furlong* [1967] I.R. 210 and *Movie News Limited v. Galway County Council*, High Court, 30th March, 1973)

70. The Instructions cannot be criticised for failure to show the jurisdiction under which they were purportedly issued. They did so in unambiguous terms when they cited the Regulations. Having done so however, is it now open to the Minister to seek to sustain the Instructions on a basis other than the Regulations?

71. In my view it is not. Actions of the type in suit affect property rights. They also create the possibility of a criminal liability if disobeyed. They must be soundly based in law and when documents are served giving effect to them they must show the jurisdiction which is being relied upon. Having done so it is not in general open to the decision maker to rely upon a different jurisdictional basis for the action taken. If that were to be permitted there could be little legal certainty in respect of the exercise of any such powers.

72. In the present case it appears to me to be particularly appropriate not to permit the Minister to rely upon powers other than those in the Regulations cited by her. That is so not merely because of the commercial and possible criminal consequences for Albatros but also because no form of appeal is allowed internally or externally from the Instructions. Judicial review is the only remedy available to an aggrieved party. No compensation is available to Albatros in respect of the Instructions. It would in my view be wrong for the court to permit the Minister to change her stance as to the legal basis for the Instructions now.

73. Lest this view be considered too harsh I will admit of the possibility of the Minister being permitted to contend that the Instructions were properly issued by reference to other provisions. If that were to be allowed I am of opinion that there would have to be excusing circumstances which would permit of such a course. I find nothing in the evidence that suggests the presence of such excusing circumstances.

74. I am of the view that the Instructions were required to identify on their face the legal basis for them. That was done by reference to the Regulations. In these circumstances the Minister must stand or fall by reference to the Regulations. Accordingly, I answer "No" to this question.

Issue 1.3

Subject to the resolution of 1.2 above, were the instructions lawfully authorised by;

- **The European Communities (Animal Nutrition Inspections) Regulations, 2000 (S.I. 4 of 2000) and/or,**
- **The European Communities (Animal Nutrition Inspections) Regulations, 2003 (S.I. 238 of 2003).**

75. The European Communities (Animal Nutrition Inspections) Regulations, 2000, (the 2000 Regulations) were revoked with effect from June, 2003. The actions of the Minister in this case occurred in November, 2004. It follows that reliance upon the 2000 Regulations cannot avail the Minister since they were revoked 17 months before she issued the Instructions. The 2000 Regulations were revoked by Article 19 of the European Communities (Animal Nutrition Inspections) Regulations, 2003, (the 2003 Regulations).

76. The 2003 Regulations revoked, re-enacted and replaced the 2000 Regulations.

77. In these circumstances it appears to me that the Minister is correct when she argues that pursuant to the provisions s. 20(2) of the Interpretation Act, 1937, the reference in Article 9 of the Regulations to the provisions of the 2000 Regulations must now be read as a reference to the 2003 Regulations.

78. Section 20(2) of the Interpretation Act provides that wherever a statutory instrument or a portion of a statutory instrument is revoked and re-enacted, with or without modifications, references in any other statutory instrument to the revoked instrument shall be construed as references to the instrument containing the re-enactment.

79. I must therefore consider whether the actions of the Minister which are called into question in these proceedings were authorised by reference to the 2003 Regulations insofar as they are referred to in Article 9 of the Regulations. It is that provision which applies the 2003 Regulations to inspections undertaken for the purposes of the Regulations.

80. There are only two Articles in the 2003 Regulations that could be applicable to the actions taken by the Minister. They are Articles 7 and 11.

81. Article 7, insofar as it is relevant provides:-

"1. Subject to paragraph (2), where a product to which Regulation 6 applies does not comply with a provision listed in the definition of inspections, the Minister shall -

(a) prohibit its entry into or marketing in the State, or

(b) order its re-dispatch out of the community territory, and immediately inform the Commission and other Member States that he has rejected the product and indicate the infringements found."

82. Article 11 reads:-

"1. Subject to paragraph (2), where an inspection is completed while the product is in transit or has reached its destination and non-compliance with the provisions listed in the definition of inspection is established, the Minister may direct that the product is treated in accordance with Regulation 7(2) or direct that the product is returned to the country of origin and the Minister shall inform the competent authority of that country of the details of the consignment.

2. A person receiving a direction under paragraph (1) shall comply with the direction within the specified time and shall be liable for any expenses in so doing."

83. It is to be noted that both of these provisions apply to a product which does not "comply with the provisions listed in the definition of inspections".

The term "inspections" is defined in the 2003 Regulations. It means - "Actions set out in Regulation 4(2) to check compliance with - Council Directive 70/524/E.E.C. of 23rd November, 1970 - Council Directive 1999/29/E.C. of 22nd April, 1999 - Council Directive 96/25/E.C of 29th April, 1996 - Council Directive 79/373/E.E.C of 2nd April, 1979 - Council Directive 82/471/E.E.C. of 30th June, 1982 and Council Directive 93/74/E.E.C. of 13th September, 1993 and cognate word shall be construed accordingly."

84. Article 4 of the 2003 regulations provide that inspections may take place at any stage of *inter alia* importation and it also

prescribes how they shall be conducted. But such inspection can only be carried out to check compliance with the various Council Directives which I have just recited. The actions which are authorised under Articles 7 and 11 likewise can only occur in circumstances where inspections are authorised by reference to the definition of that term.

85. As the Regulations are not mentioned in the definition of inspection in the 2003 Regulations it follows that the 2003 Regulations cannot be relied upon by the Minister as authority for the action taken.

86. For good measure it is to be noted that not merely does the definition of "inspections" not include reference to the Regulations but neither does it include any reference to Council Decision 2000/766/E.C. of 4th December, 2000, which spawned the Regulations.

87. In these circumstances I am of the view that the actions of the Minister were not lawfully authorised by either 2000 Regulations or by the 2003 Regulations. There is one further matter which is contained at para.11 of the Statement of Opposition delivered by the respondents. That paragraph reads:-

"Further, Council and Parliament Regulation 999/2001 Annexe IV, 3. II. E provides that the competent authority, in this case the respondent, shall carry out documentary and physical checks including tests on feeding stuffs throughout the production and distribution chain in accordance with Council Directive 95/53/E.C. (2), to control compliance with its provisions and the provisions of this regulation. Where any presence of prohibited animal proteins is detected, Council Directive 95/53/E.C. shall apply. Council Directive 95/53/E.C. is given effect in Irish Law by S.I. 238 of 2003 and accordingly the Minister had jurisdiction under S.I. 238 of 2003 to issue the instructions referred to above."

88. This argument does not alter the position. The plain fact is that the 2003 Regulations contain their own definition of inspections and its only in circumstances where those inspections were carried out to check compliance with the Council Directives which are set forth in that definition that the entitlement to inspect and to give the directions contemplated in Article 7 of the 2003 Regulations apply.

89. It follows therefore that insofar as the Minister places reliance upon any of the 2003 Regulations she has not done so successfully. This question is answered "No".

Issue 1.4

Subject again to the resolution of issue 1.2 above, if, on their proper construction, none of the statutory instruments referred to in paras. 1.1 and 1.3 confer on the respondents a specific power to detain and dispose of the applicant's product, was the Minister nonetheless entitled to issue the instructions of foot of any or all of the following:-

- **Commission Regulation 1234/2003,**
- **Commission Directive 126/2003,**
- **Council and Parliament Regulations 999/2001 and 1774/2002, and/or,**
- **The decision of the European Court of Justice in case 286/02 *Bellio v. Prefettura de Treviso*?**

90. These questions fall to be answered in the circumstances which are identified at para. 12 of the Statement of Opposition.

91 That paragraph reads:-

*"Even if the applicant is correct in stating that there is no specific power under the statutory instruments referred to above to detain and dispose of the product, then the respondent was still entitled to take the action that it took on foot of mandatory requirements of European law and in particular Commission Regulation 1234/2003, Commission Directive 126/2003 and Council and Parliament Regulations 999/2001 and 1774/2002 and the decision of the European Court of Justice in *Bellio v. Prefettura de Treviso* [2004] E.C.R."*

92. I have already held that there was no power to issue the Instructions in the domestic law relied upon by the Minister i.e. the Regulations and the 2003 Regulations. The Minister has no entitlement to make this case for the reasons given in answering Issue 1.2. However, for the sake of completeness I propose to answer the questions raised in this issue.

93. Commission Regulation 1234/2003 of 10th July, 2003, amends Regulation 999/2001 and Regulation 1326/2001 as regards transmissible spongiform encephalopathies and animal feeding stuffs. It also repeals Decisions 2000/766 E.C. and 2001/9/E.C (see Article 3). Under Annexe 4 it extends the prohibition provided to the feeding *inter alia* to farmed animals of processed animal proteins. It requires the competent authority to carry out documentary and physical checks including tests on feeding stuffs throughout the production and distribution chain in accordance with Council Directive 95/53/E.E.C. to control compliance with its provisions and the provisions of the regulations. Where any presence of prohibited animal protein is detected Council Directive 95/53/E.E.C. is to apply. (See paragraph E of the general implementing conditions).

94. That directive has been transposed into Irish domestic law by the 2003 Regulations. That is clear on their face. I have already concluded that those regulations did not authorise the actions of the Minister so I cannot see how reliance upon Regulation 1234 can be of assistance. It is true that it creates an obligation on the competent authority to carry out certain tasks in accordance with Council Directive 95/53/E.E.C. It was up to the competent authority to transpose that directive into Irish law. It did so by the 2003 Regulations. Insofar as that transposition is concerned it does not authorise the actions of the Minister which are impugned here. I must assume that the obligations which are imposed upon the competent authority have been properly transposed into Irish law and it is not in my view open to the Minister to argue to the contrary.

95. Commission Directive 126/2003 deals with the analytical method for the determination of constituents of animal origin for the official control of feeding stuffs. It requires Member States to bring into force the laws, regulations and administrative provisions necessary to comply with the directive by 1st July, 2004, at the latest.

96. There is nothing in that directive which to my mind could justify the actions of the Minister.

97. I have already dealt with the regulations set forth in the third indent to the question posed in Issue 1.4 in the context of Regulation 1234/2003.

98. Finally, under this heading I have to deal with an argument by reference to the decision of the European Court of Justice in *Bellio* which in my experience is novel. I am unaware of any authority to the effect that a decision of the European Court of Justice could authorise of itself actions on the part of a Minister of the type in suit.

99. *Bellio* dealt with an Article 234 reference from the Treviso district court. The question submitted to the European Court of Justice

arose in proceedings between Bellio and the Prefettura concerning the confiscation of a consignment of fish flower imported from Norway. These questions arose in the context of the agreement on the European economic area.

100. An administrative sanction was imposed pursuant to Italian law. Unlike the present case there does not appear to have been any issue in *Bellio* as to whether that sanction was or was not authorised under the domestic law of the Republic of Italy. On that basis alone the case is distinguishable.

101. Quite apart from that however, I do not read any part of the judgment in *Bellio* as providing authority for the actions of the Minister here. It is a decision given in the context of the agreement on the European economic area and it makes it clear that the contracting parties to that agreement have a discretion as to the level of risk which they consider appropriate. They are entitled to invoke the precautionary principle according to which it is sufficient to show that there is relative scientific uncertainty with regard to the risk in question and that that discretion is open to judicial review. Neither the Regulations nor the 2003 Regulations in this jurisdiction give any indication as to how Ireland has exercised such discretion if it has one.

102. In my view the Minister lacked authority to issue the Instructions. If there is an obligation on Ireland under European law to provide for the issue of such Instructions such obligation (unless it is directly applicable) must be translated into domestic law by an appropriate statutory instrument. In my view it was not done here.

103. The answer to these questions effectively disposes of this application and I need not go further. However, under the heading of Issue 2, ten further questions are posed to the court.

Issue 2

104. I do not propose to answer these ten questions *seriatim* but will express my views in general in relation to the issues which they raise lest this matter goes further. In essence Issue 2 seeks to ascertain whether the presence of processed animal protein as that term is defined in the Regulations in Albatros's product was a precondition to the valid exercise by the Minister of any of the powers conferred on her.

105. In the long letter of 24th November, 2004, from Ms. Gallagher, it is pointed out on many occasions that at no stage did any of the analyses demonstrate the presence of processed animal protein as defined in the Regulations. That position obtains to the present day. Whatever tiny quantities of animal matter were found they were not processed animal protein as defined in the Regulations.

106. It is not open to the court to read into the definition in the Regulations matter which is not contained in it. That it is so regardless of how desirable such a result might appear.

107. In my opinion the presence of processed animal proteins as defined must be demonstrated before the Minister could proceed to exercise any powers which she might have by reference to the Regulations.

108. There was no evidence at any stage of processed animal protein as defined in the Regulations being present. If the Minister did have powers under the Regulations there would have to be some evidence of its presence before action could be taken.

109. In coming to this conclusion the court is not acting as a court of appeal from the Minister but rather is concluding that there was no evidence of the type required under the Regulations which would trigger the Minister's entitlement to act as she did (assuming that she had such powers).

110. I also wish to mention an argument which was made on behalf of the Minister which was in part addressed to Issue 1.4 and to the questions raised in Issue 2.

111. It was argued that there exists in European law and implementing legislation a threefold regime. They were described as the animal protein regime, the animal nutrition inspections regime and what was called the analytical regime.

112. Insofar as the animal protein regime was concerned it was argued that was to be found in Council Decision 2000/76/E.C. which was given effect to in this jurisdiction by the Regulations. It was also to be found in Regulation 999/2001 of the European Parliament and Council and Commission Regulation (E.C.) 1234/2003. It was said that the definition of processed animal protein in point 42 of Annexe 1 of Regulation 1774/2002 is to apply. That definition states that processed animal protein means animal proteins derived entirely from category 3 material (largely slaughtered animals) which had been treated in accordance with Regulation 1774/2002 so as to render them suitable for direct use as a feed material or other use in feeding stuffs. Article 2 of Regulation 1774/2002 in turn defines animals as any vertebrate or invertebrate animal including fish, reptiles or amphibians. As amended it was said that Article 1 of Annexe IV of Regulation 999/2001 extends the prohibition in Article 7 of Regulation 999/2001 to the feeding to farmed animals with the exception of the feeding of carnivorous fur producing animals of processed animal proteins. Article 3.11.E of the Regulations 999/2001 provides that the competent authority shall carry out the documentary and physical checks, including tests on feeding stuffs in accordance with Council Directive 95/53/E.E.C. to control compliance with its provisions and the provisions of Regulation 999/2001. It further provides that where any presence of prohibited animal protein is detected then Council Directive 95/53/E.E.C. shall apply. That Directive is given effect to by the 2003 Regulations. I have already dealt with how the term "inspections" is defined in those Regulations. Inspections are only permitted in accordance with that definition.

113. The inspections regime consists of Directive 95/53/E.C. which of course has been imported into domestic law by the 2000 Regulations and the 2003 Regulations which replaced them.

114. The analytical regime relied upon finds its basis in Commission Directive 2003/126 which has been imported into domestic law by S.I. 185, 2004, the European Communities (Feeding Stuff) (Methods of Sampling and Analysis) Regulations, 2004. The Directive provides that Member States shall provide that where official analysis of feeding stuffs is carried out with a view to officially controlling the presence, identification and/or estimation of the amount of constituents of animal origin in feeding stuffs in the framework of the co-ordinated inspection programme in the field of animal nutrition in accordance with Council Directive 95/53/E.C. (3) "it shall be carried out in accordance with the provisions of the annexe to Directive 2003/126/E.C.". The annexe to the directive sets out the conditions for the microscopic detection, identification or estimation of constituents of animal origin in feeding stuffs.

115. The Minister contends that the analytical method prescribed by this directive has been followed and the product in question contained constituents of animal origin and further found that the possibility that the said constituents were derived from mammals could not be excluded. In these circumstances it is said there was evidence before the Minister of a risk that the consignment contained processed animal proteins possibly of ruminant origin. She was therefore entitled to invoke the precautionary principle and

determine that the product should be recalled and disposed of. Whilst all of this may be very laudable it does not provide an answer to the challenge of Albatros.

116. In my view the presence of processed animal protein as defined in the Regulations was required before the Minister could exercise any of the powers which she purported to exercise.

Referral of Question to the European Court of Justice

117. In the course of the hearing the Minister asked for two questions to be referred to the Court of Justice pursuant to Article 234 of the Treaty. They were:-

1. Is processed animal protein deemed to be present in product for the purposes of the prohibitions in Decision 2000/766/E.E.C. when testing on a sample from that product demonstrates, as far as was discernable using a microscope, the presence of constituents derived from terrestrial animals?
2. Is Commission Directive 2003/126/E.C. to be interpreted as requiring a Member State to accept conclusively, as demonstrating the presence of processed animal protein, the result of a test carried out in accordance with the methods set out in the annexe to that directive where that test leads to a report stating that, as far as was discernable using a microscope, constituents derived from terrestrial animals were found in the submitted sample, irrespective of the results of other tests carried out otherwise than in accordance with those methods?

118. Directive 2003/126 has been implemented by S.I. 185 of 2004 into the domestic law of Ireland.

119. I do not think that it is necessary for me to refer either of these questions to the European Court of Justice. The essential point in this whole case is whether the Minister acted lawfully in issuing the Instructions. The Instructions could only arise in circumstances where she was authorised to issue them by an Irish statutory provision or by a directly applicable European legislative instrument. The only provisions relied upon at the time were the Regulations. In my view they did not authorise the Minister to issue the Instructions. Insofar as there may be obligations on Ireland to have in place a regime of inspection of broader compass than is provided for at present it is a matter for the Minister to see to them.

Conclusion

120. The answers to the agreed questions are:-

Issue 1.1 – No (unless they could be justified under Article 9. They were not).

Issue 1.2 – No.

Issue 1.3 – No.

Issue 1.4 – Not necessary to answer this but in any event 'No'.

Issue 2 – Not necessary to answer this but see the views expressed in the body of the judgment.

121. *Certiorari* is granted to quash the Instructions.