

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY
GERALD BOTHWELL FOR JUDICIAL REVIEW**

WEATHERUP J

The application.

[1] A Holstein bull known as Wheeton Lancaster is held in isolation at a farm at Foydra, Maguiresbridge, Co. Fermanagh. The applicant applies for judicial review of a decision of the Department of Agriculture and Rural Development, made on 30 September 2003 under the provisions of the Brucellosis Control Order (NI) 1972, to retest Wheeton Lancaster who has been in contact with a brucellosis herd. It is the applicant's position that in the events that have happened the 1972 Order requires that Wheeton Lancaster be slaughtered as having been in contact with brucellosis and the applicant be paid the market value of Wheeton Lancaster, which the applicant assesses at £650,000. It is the Department's position that the 1972 Order does not compel the Department to proceed with the slaughter of Wheeton Lancaster and that he ought to be retested before his future is determined.

The legislation.

[2] The Brucellosis Control Order (NI) 1972 as amended deals with the control of brucellosis in cattle in Northern Ireland. The Order provides -

“ Official Tests.

5(1) The Department may at any time cause an official test to be made on any herd.

5(2) A herd owner shall, when required to do so by notice in writing from the Department, present for official test all animals in his possession in the categories specified in the said notice. Any owner who withdraws or withholds any such animal from an official test shall be guilty of an offence against the Act.

“Power to slaughter

7(1) The Department shall slaughter or cause to be slaughtered any reactor and may slaughter or cause to be slaughtered any other animal which has been exposed to the possibility of infection with brucellosis by being in contact with any such reactor.

(2) Where a notice has been issued in respect of any animal in accordance with Article 8 and where applicable its market value has been determined in accordance with Article 9, the Department shall have power to cause the said animal to be removed for slaughter, and the owner shall provide all reasonable facilities for the collection and removal of the said animal. Were the owner refuses to do so the Department may seize the said animal or cause it to be seized”.

Issue of notice to owners

8(1) Where the Department is satisfied that an animal should be slaughtered in accordance with this Order, the Department shall issue a notice in writing to the owner or person in charge of the animal that the Department proposes to slaughter the animal and requiring him, pending such slaughter, to detain the animal on the premises specified in the notice and to isolate it from other animals.

(2) The owner of an animal to be slaughtered in accordance with this Order shall when required to do so by the Department, immediately isolate such animal and detain it in isolation until collected on behalf of the Department or until informed otherwise in writing by the Department. No person shall move or permit to be moved from his premises any animal in respect of which a notice has been served by the

Department in accordance with paragraph (1) except under the authority of a permit issued by the Department allowing the removal of the said animal for immediate slaughter in Northern Ireland at an abattoir specified by the Department in the permit”.

[3] Article 9 provides for compensation where the Department causes an animal to be slaughtered in accordance with the Order and in the case of a reactor (being an animal that has given a positive reaction to the test) the maximum payment is £750 and in the case of a contact animal (being an animal in contact with a reactor) the compensation is based on market value (Article 9(1)). Market value is determined by agreement or an independent valuer selected by the owner from a list of at least three valuers submitted by the Department or where the owner refuses to select such a valuer, by a valuer selected by the Department (Article 9(3)). The valuer gives to the Department and the owners a certificate in writing of his valuation and such valuation is stated to be final and binding (paragraph 9(4)).

The background

[4] On 2 April 2003 the Department issued a “Notice of Intended Slaughter” that there had been a reactor to a brucellosis test completed on 1 April 2003 and that it was proposed in accordance with the 1972 Order to slaughter a list of animals that had been exposed to infection of brucellosis by contact with the reactor. The list included Wheeton Lancaster. The value of all the contact animals other than Wheeton Lancaster was agreed with the applicant and those animals were slaughtered. The applicant would not accept the valuation of £7,000 placed on Wheeton Lancaster and on 28 April 2003 the Department gave to the applicant in accordance with Article 9(3)(b) of the 1972 Order a list of the names of three valuers and inviting him to select one as independent valuer. On 2 May 2003 the applicant’s solicitor notified the Department that the applicant would not select one of the three valuers because he did not feel that any of them had the experience and knowledge of Holstein Cattle to place a value on the animal. On 28 May 2003 the Department selected one of the three valuers as it was entitled to do under Article 9(3)(c) of the 1972 Order.

[5] This first valuer attended at the applicant’s farm where the applicant had present a Chris Norton from England who was described as an expert in the valuation of Holstein Cattle. This expert had valued Wheeton Lancaster in the region of £650,000. The first valuer declined to submit a valuation of Wheeton Lancaster. The Department nominated a second valuer. Once again Mr Norton was involved and a meeting with the second valuer took place in July 2003.

[6] On the 30 September 2003 the Department wrote to the applicant enclosing the second valuer's valuation of Wheeton Lancaster in the sum of £6,000. The letter stated that the Department had concluded that the valuation-

“... cannot provide a reasonable basis on which the Department can award compensation in relation to the animal”.

This conclusion of the Department was explained by Counsel not on the basis that the Department considered the valuation to be too high but on the basis that the Department had previously offered a higher sum to the applicant and realised that the valuation could not prove acceptable to the applicant. However, it is the direction then taken by the Department that is at the heart of this judicial review. The letter continued –

“In view of the length of time that has elapsed since the Bull was last tested, the Department now considers it appropriate to carry out a re-evaluation of the animal health situation before deciding on the future steps”.

[7] The applicant wishes Wheeton Lancaster to proceed to slaughter. The remainder of the herd has been slaughtered. Under the 1972 Order a contact animal must be detained and isolated and cannot be moved. The farm cannot be re-stocked except with steers and that is not the enterprise in which the applicant has been engaged. He has now been prevented from farming cattle for over a year. If Wheeton Lancaster tests positive he would be slaughtered and no re-stocking of the farm would be permitted for six months. If the test of Wheeton Lancaster were negative he would have to be isolated for six months and re-tested every three months, but the applicant could commence re-stocking immediately. The critical factor in this process would be a positive re-test, which would constitute Wheeton Lancaster a reactor under the 1972 Order, and the compensation provisions limit the award to £750. On the other hand a negative test would avoid slaughter and the applicant could retain an animal he values at £650,000. The powers of the Department are of critical commercial importance to the applicant.

The powers of the Department.

[8] Article 7(1) of the 1972 Order contains two aspects. First, the Department has a duty to slaughter a reactor animal. Secondly, the Department has a power to slaughter a contact animal, so it must exercise a statutory discretion in the circumstances. In the present case the Department exercised that discretion and proposed the slaughter of Wheeton Lancaster as appears from the notice of 2 April 2003.

[9] Article 8(1) provides for the Department to issue a notice that comprises two features. First, it is a notice that proposes slaughter. Secondly, it requires the owner to detain and isolate the animal. The first sentence of Article 8(2) specifies the duration of detention and isolation of an animal to be slaughtered. In the first place it is to be detained and isolated until collected on behalf of the Department. Alternatively it is to be detained and isolated until the owner is informed otherwise in writing by the Department. Is this alternative limited to the owner being informed of the manner in which the animal will be brought to slaughter “otherwise” than being collected on behalf of the Department (as the applicant contends), or does it extend to the animal being released from detention and isolation “otherwise” than by being required to be slaughtered (as the Department contends)?

[10] The second sentence of Article 8(2) provides that an animal proposed for slaughter shall not be moved from the premises. That is implicit in the duty to detain and isolate on the premises. An exception is made where the Department grants a permit for removal for slaughter. Clearly this is one circumstance where the animal ceases to be detained and isolated “otherwise” than by collection on behalf of the Department. Is the Department’s permit the only circumstance in which the animal may cease to be detained and isolated “otherwise” than by collection on behalf of the Department (as the applicant contends) or are there other circumstances in which the animal may cease to be detained and isolated (as the Department contends)?

[11] The applicant submits that the issue of a notice of a proposal to slaughter under Article 8(1) of the 1972 Order cannot be revoked save by mistake. The applicant accepts the respondent’s example of an error in testing that would indicate that the animal was in fact not a reactor or a contact animal so that under the expression in Article 8(2) “until informed otherwise in writing by the Department” the Department could release the animal from detention and isolation without requiring it to be slaughtered.

[12] However, the applicant submits that other than by way of mistake the exercise of the discretion to slaughter a contact animal under Article 7(1) is an irrevocable decision. Reliance was placed on *Re 56 Denton Road* (1953) Ch 51 and *Rootkin v Kent County Council* (1981) 2All ER227 and an article by Michael Akehurst, “Revocation of Administration Decisions”. The authorities discuss a principle of irrevocability subject to exceptions, including error of fact. In *Re 56 Denton Road* the applicant was entitled to compensation for war damage and the assessment Commission sought to alter a decision as to the basis on which compensation would be paid. It was held that the Commission could not revoke its first decision. In *Rootkin v Kent County Council* it was Council policy to reimburse travelling expenses for children living more than three miles from school. This benefit was granted to the applicant by mistake and was then withdrawn when the mistake was discovered. It was held that the Council was entitled to revoke its first decision. The Court of Appeal based

the decision on the applicant having no right to the payment but only having the benefit of the exercise of a discretion. Akehurst's article questions that finding on the facts of the case. However the article's conclusion is that irrevocability is subject to consent or mistake or public interest or the terms of the statutory scheme that applies. The approach of the authorities and the article would have to be re-fashioned in the light of developments in the principle of legitimate expectation. However, I approach the present case as an issue of statutory interpretation as to whether the legislative scheme admits of a conclusion other than slaughter in the absence of consent or an error of fact once a notice of proposed slaughter is issued under Article 8(1).

[13] The Department relied on Article 7(2) to the effect that it was after the issue of a notice under Article 8 and the determination of market value under Article 9 that "the Department shall have power to cause the said animal to be removed for slaughter." I consider that what Article 7(2) contemplates after notice under Article 8 and determination of market value under Article 9 is the exercise of the Department's power to have the animal "removed" for slaughter. That is not the taking of the decision to slaughter, and does not indicate that the decision of the Department to propose slaughter is not a decision taken until the decision to remove for slaughter.

[14] The Department also relied on Article 5(1) which allows the Department to carry out an official test at any time and, therefore, after a notice proposing slaughter. Whether Article 5 is capable of having that effect depends on the interpretation of the powers in Article 8.

[15] In essence the issue resolves to whether the words in Article 8(2) "or until informed otherwise in writing by the Department" are to be interpreted in the manner contended for by the Department so as to admit of a conclusion other than the slaughter of the animal or are to be interpreted in the manner contended for by the applicant as admitting of no conclusion other than slaughter. It is apparent from Article 8(1) that a decision will already have been taken to slaughter prior to the issue of the notice. Article 8(2) contemplates a further decision as to the circumstances in which the requirement to detain and isolate will be brought to an end. The words quoted do admit of conclusions to the process other than slaughter.

[16] It is common case that if there has been a mistake of fact there can be a conclusion other than slaughter of the animal. However that is an uncertain guide as to the identity of other circumstances in which there might be a conclusion other than slaughter, as mistake may involve the invalidity of the initial decision to slaughter, and thus provide an example of a replacement decision rather than entitlement to make an additional decision.

[17] The applicant emphasises the impact of these procedures on his farming enterprise and the absence of compensation for loss of profits while the farm

cannot be restocked. That is indeed the consequence of an outbreak of brucellosis and the compensation scheme is limited. However those considerations reflect the policy that has been adopted in the overall character of the 1972 Order and do not speak in favour of the applicant's interpretation of the 1972 Order.

[18] These are animal health measures designed to eradicate brucellosis and that purpose would not be advanced by the slaughter of unaffected animals. With contact animals there is no compulsory slaughter. When a decision has been made to slaughter, and given, as I find to be the case, that the wording of Article 8(2) admits of an interpretation that would not result in slaughter, there is no practical or policy reason why there should not be such a conclusion. In the present case the passage of six months occasioned by the disputed valuation of the animal created the opportunity for a re-testing and there is no reason in the wording of the 1972 Order or of practice or policy why there might not be re-testing in such circumstances. Although it is not the reason advanced by the Department it might appear that if a contact animal were of exceptional quality and value the Department should be entitled to reconsider whether slaughter is necessary.

[19] I am satisfied that the 1972 Order permits the Department to require an official test after the issue of a notice proposing slaughter. Where an animal proposed to be slaughtered has been detained and isolated, the first sentence of Article 8(2) requires detention and isolation until the animal is collected on behalf of the Department or until the Department otherwise releases the owner from the duty to detain and isolate, whether by issuing a permit allowing the removal of the animal for slaughter or otherwise releasing the owner from the duty to detain and isolate without requiring slaughter.

[20] Accordingly the application must be dismissed.