

CO/8947/2006

Neutral Citation Number: [2007] EWHC 558 (Admin)  
IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
THE ADMINISTRATIVE COURT

Royal Courts of Justice  
Strand  
London WC2A 2LL

Thursday, 22nd February 2007

B E F O R E:

**MR JUSTICE CALVERT SMITH**

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**THE QUEEN ON THE APPLICATION OF FRIENDS OF THE EARTH**  
**(CLAIMANT)**

-v-

**FOOD STANDARDS AGENCY**  
**(DEFENDANT)**

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(Official Shorthand Writers to the Court)  
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**MR DAVID WOLFE** (instructed by Friends of the Earth) appeared on behalf of the  
CLAIMANT

**MS DINAH ROSE QC AND MR BRIAN KENNELLY** (instructed by Messrs DWP  
Solicitors) appeared on behalf of the DEFENDANT

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J U D G M E N T  
(As Approved by the Court)  
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1. MR JUSTICE CALVERT SMITH: This claim for judicial review by way of declaration against the defendant, the Food Standards Agency, is brought by the claimant following the grant of permission on 17th November 2006. The claim concerns the action or, as it is claimed, lack of action by the defendant following Emergency Decisions (ED) of the European Commission in respect of imported American long grain rice (LGR) which was found to be contaminated with a genetically modified organism (GMO) called LLRICE601. The claimant's contention is that, although immediate and sensible steps were taken by the defendant to stop rice coming into the country and to prevent distribution by the mills, which receive imported rice as to some 94 per cent of such imports being distributed, there was a great deal of such imported rice already in circulation or on the market since the problem had in fact been discovered in the US as early as January of 2006. Because rice has a two year sell-by date, there is, it is claimed, an ongoing risk that contaminated stocks may be on supermarket or other shelves or in restaurants, schools, prisons and the like. In particular, the claimant points to the fact that of the members of the European Union the UK took, in the last whole year recorded, 45 per cent of the import of LGR from the US and had by a few months into last year taken some 41 per cent of the total US import.
2. They claim that the defendant has a duty to advise and guide public authorities, to monitor and set standards and, in certain circumstances, to direct local authorities to report on actions they have taken to enforce relevant food legislation. Second, they claim that the defendant rightly assumed a leading role in advising and guiding following the emergency. They say that the defendant sampled at rice mills into which 94 per cent of imported rice is taken but had no plans for sampling the remainder. Indeed, the defendant decided, positively and early on in the process, not to sample from supermarket shelves or to pursue "downstream" rice. These decisions were not taken on properly established evidence. The principle of Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014, and the well-known passage from the speech of Lord Diplock was cited, and indeed accepted, by both parties as a suitable statement of the basic principles which the court should apply:

"... it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider [a reference to Wednesbury]. Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

In short the claimant suggests that in this case the defendant did not.

3. The claimant further submits that the failures which they allege all stem from a wrong premises from which the defendant started, that there is no evidence that this particular GMO is harmful. That, they say, ignores the mandatory nature of the EDs, which I shall refer to in detail later. Even when, they submit, the European Food Standards Agency report was published, which indicated inter alia that this particular GMO was not likely to be a risk to health, the emergency decision remained, and indeed, as far as the court is aware, still remains, in full force. They further submit that the EDs do not permit a pure "risk analysis" approach by Member States. The disbanding of the *ad hoc* group within the defendant after only a few days of operation is a pointer towards the lack of proper attention to the problem. They point to a particular failure, as they allege, of the defendant to issue an Alert Notice or Notices to inform local authorities of the issue and suggest appropriate action. In addition, and without prejudice to their point on Alert Notice or Alert Notices, they allege that the defendant failed to identify to enforcement authorities the codes and description of LGR which have been found to contain contaminated grains; that although the response in respect of the importers of rice was acceptable, its response in respect of food operators was far from perfect and, in particular in respect of local authorities, who are the enforcement authorities in respect of rice already on the market, their action was seriously late and inadequate. They contend that, as part of the failure, the defendant failed to survey the market sufficiently to ensure that their measures were indeed appropriate and further that the defendant failed to keep its own policy under review as it had promised it would.
4. The response of the defendant to the issue of judicial review proceedings at the end of October of 2006, but not before, was to send emails and other communications to local authorities, retailers, other member states and the like, something which it should have done not with a view to judicial review proceedings but in order to carry out its duty according to the emergency decision.
5. To the criticism that the particulars of the claim have altered since the first issue of proceedings, the claimant submits that that is not a function of any lack of clarity, let alone merit, to the claims made but to the fact that time has passed and new evidence and information has become available which has caused those particulars to be adjusted. Finally, they submit in summary that, although as a result of actions taken by the defendant, most of them they would submit triggered by the prodding of the claimant and the threat of judicial review, and, as the result of the passage of time, there is no purpose in attempting to achieve injunctive relief or an order but they submit that the court should declare that the way in which the problem was dealt with from its inception until the end of 2006 was unlawful because it failed to implement the crucial emergency decision.
6. In reply, the defendant contends that Article 3 of the decision did permit the defendant to decide how to carry out its requirements. In particular, they were entitled to take into account the fact that in mid September the European Food Standards Agency issued a statement, which I have already summarised, that there is even now no positive evidence of any risk to health from the GMO in question. They were entitled, they submit, to take into account in assessing their response the effect of any particular measure on the market, the need for member states' responsibilities to be both comprehensive and common and also to take into account the cost of taking one course

or another in framing their response and their advice to relevant parties. They submit that the Article does not require any particular method to be adopted by member states (apart from random sampling and analysis) and they submit, as is the case, that it is conceded that it would have been impossible to verify that every single grain of rice in the country was free from this particular GMO.

7. They submit that, although they were, as they now concede, in error in one piece of advice in early September 2006, they corrected the error and indeed did so well before the lodging of this claim for judicial review in late October. They submit that the ED was directed at the UK as a member of the European Community and not at the defendant. Although they accept that they are an important player and indeed clearly took a leading role at the start of the emergency, they are by no means alone. Food operators have the duty of obeying the law and, if they fail to do so, of suffering criminal sanctions for failure. Local authorities are the enforcement arm. Government departments, in particular the Department of the Environment, Food and Rural Affairs (Defra) and the Department of Health, have a role to play. The defendant has a duty to advise and guide and to help shape policy both in Europe, as the UK representative on the Standing Committee on Food Chain and Animal Health, and in the UK, as the body set up to advise, guide and encourage good practice. They submit that the judicial review as originally framed sought to fix them with responsibility for all aspects of the United Kingdom's response. They submit that their response, within the confines of their role, was in any event, with the exception of the matter I have already referred to, pretty well a text book proportionate and appropriate response which did in fact have the effect of preventing any possibility of new contaminated rice entering the food chain represented by the ports, the rice mills, the major manufacturers and the retailers who are responsible for putting US long grain rice into the public's hands. They submit that the omissions, the six per cent which does not go to rice mills and down the chain, the small shops and other businesses, which were not covered, were not so significant as the claimant contends and were certainly not things which the terms of Article 3 required them to do. They submit that while the exact proportions of US long grain rice in the various sectors were not known at the time of the original decision, the plan of action, which was to start by preventing any further contaminated rice entering the country, followed almost immediately by preventing any contaminated rice held at mills from leaving it, followed by targeting the major retailers and manufacturers and inviting them to carry out sampling exercises so as to ensure that they fulfilled their legal obligations, was sensible and timely. Even if the guidance to local authorities may have been sent out earlier, it was certainly not unlawfully late and contained sufficient to inform those local authorities as to the situation and to remind them of their powers of enforcement.
8. Next, they submit that the *ad hoc* group, which was disbanded after a few days, was not an essential element of the FSA response after its first meetings and that the papers indicate that the defendant continued to perform its functions adequately afterwards. Next, they submit that the response of the defendant within the United Kingdom framework was well within the range of responses of other member states, two of which arguably did more and many of which did much less. (I should say that the court is unaware whether some or all of the member states' agencies who replied to questionnaires had precisely the same role within their country's framework as the

defendant does in the UK framework, in particular as to whether they or any of them have a direct enforcement role.)

9. They submit, as I have mentioned in dealing with the summary of the claimant's submission, that there has been throughout these proceedings a failure to particularise or to remain faithful to previous particulars and that that is a sign that there is no strong basis for the declaration sought. Next, they submit that it is relevant to consider that the European Commission itself has never expressed any concern at the UK's dealing with the problem, let alone the way in which the defendant in particular has done so, and has certainly not taken any proceedings which it would be entitled to do in respect of this emergency and the defendant's response to it. Nor, they point out, has the claimant made any complaint to the Commission. They submit that the process of gathering evidence, which started before the claim was issued, was for the most part simply part of the process of compliance with the ED. Only latterly, when specific reference was made to the impending proceedings, is it clear that the principal motive was these proceedings rather than the general response to the ED. They submit that the court should remember that the process of gathering evidence from other parties must be seen against the context in which the defendant is only one part of the UK's overall response and needed to tap in, as it were, to the other parts of that response in order answer some of the allegations being made against it. Finally, in summary, they submit that the process of reflection which inevitably follows the conclusion of episodes such as this within an agency like the defendant should be sufficient to identify, as is often the case, any mistakes that may have been made and that the agency itself, rather than a court, is the best place for that process to happen.
10. In my judgment, insufficient has been set out by the claimant to justify a remedy by way of declaration. While the defendant concedes that it fell into error early on and that that error did colour their approach to the problem and while, as I shall make clear, I have found that it is arguable that it could and should have acted more quickly and firmly in respect of the local authorities and their part in implementing the directive and that there is little evidence of the "beefing up" that had been requested from the end of August onwards following the decision, I do not find that, separately or together, any such mistakes and failings amounted to an unlawful failure to implement Article 3 of the Emergency Decision. There has, as I have already made clear, been no complaint from the European Commission or by the claimant to it and the reaction of the defendant, and indeed of the UK as member state generally, does not seem on the limited material before me to be out of kilter with responses in Europe and in particular in those member states which import very significant quantities of US long grain rice. Such comments as I shall make may help to inform the process of reflection to which I have referred.
11. The legislative framework against which we have had to consider this claim is extensive. I am greatly indebted to Mr Wolfe for his chronology, which includes a very clear summary of that framework.
12. One part of the framework concerns the relationship between the European Commission and member states on this issue. Since there was no dispute that the Emergency Decision was binding on the UK and that the FSA, the defendant, was

required to play a role in carrying out that binding decision, it is in my judgment unnecessary to do more than refer to the fact that the background to that requirement is to be found in articles 249 and 10 and 230 of the European Community Treaty, together with the passage in the judgment in Wells v Secretary of State for Transport, Local Government and the Regions [2004] ECR I-00723. The passage relied upon is paragraph 64 and 65 of the judgment, which was a preliminary ruling on reference from the Queen's Bench Division in this jurisdiction by the European court. Paragraph 64:

"64. As to that submission, it is clear from settled case-law that under the principle of cooperation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law ... Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned ...

65. Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment [and so on]..."

13. The status and role of the defendant as a constituent part of the UK as member state again, although on the papers it looked as though there was some dispute about it, in the end turned out to be uncontentious, it being accepted in argument before me that on the one side the defendant had an important role to play, albeit there are two other key elements, namely the food operators and the local authorities and the like, who enforce the law, and on the other side, on behalf of the claimant, that clearly there was no monopoly in the role to be played by the defendant.
14. The defendant was created by the Food Standards Act 1999 in the wake, as the court was reminded, of the BSE problem. Its functions are set out at section 6:

"(1) The Agency has the function of-

(a) developing policies (or assisting in the development by any public authority of policies) relating to matters connected with food safety or other interests of consumers in relation to food; and

(b) providing advice, information or assistance in respect of such matters to any public authority."

From section 7:

"(1) The Agency has the function of-

(a) providing advice and information to the general public (or any section of the public) in respect of matters connected with food safety or other interests of consumers in relation to food;

(b) providing advice, information or assistance in respect of such matters to any person who is not a public authority.

(2) The function under subsection (1)(a) shall be carried out (without prejudice to any other relevant objectives) with a view to ensuring that members of the public are kept adequately informed about and advised in respect of matters which the Agency considers significantly affect their capacity to make informed decisions about food."

Section 8 deals with the function of acquiring and reviewing information connected with food safety and other interests of consumers in relation to food. Section 12, upon which the claimant relied:

"(1) The Agency has the function of monitoring the performance of enforcement authorities in enforcing relevant legislation.

(2) That function includes, in particular, setting standards of performance (whether for enforcement authorities generally or for particular authorities) in relation to the enforcement of any relevant legislation."

...

"(4) The Agency may make a report to any other enforcement authority on their performance in enforcing any relevant legislation; and such a report may include guidance as to action which the Agency considers would improve that performance.

(5) The Agency may direct an authority to which such a report has been made-

(a) to arrange for the publication in such manner as may be specified in the direction of, or of specified information relating to, the report; and

(b) within such period as may be so specified to notify the Agency of what action they have taken or propose to take in response to the report."

And section 21, headed "Supplementary powers":

"(1) The Agency has power to do anything which is calculated to facilitate, or is conducive or incidental to, the exercise of its functions.

(2) Without prejudice to the generality of subsection (1), that power includes power-

(a) to carry on educational or training activities;

(b) to give financial or other support to activities carried on by others;

(c) to acquire or dispose of any property or rights;

(d) to institute criminal proceedings in England and Wales and in Northern Ireland."

Section 23 deals with "Consideration of objectives, risks costs and benefits, etc":

"(1) In carrying out its functions the Agency shall pay due regard to the statement of objectives and practices under section 22.

(2) The Agency, in considering whether or not to exercise any power, or the manner in which to exercise any power, shall take into account (among other things)-

(a) the nature and magnitude of any risks to public health, or other risks, which are relevant to the decision (including any uncertainty as to the adequacy or reliability of the available information);

(b) the likely costs and benefits of the exercise or non-exercise of the power or its exercise in any manner which the Agency is considering; and

(c) any relevant advice or information given to it by an advisory committee (whether or not given at the Agency's request).

(3) The duty under subsection (2)-

(a) does not apply to the extent that it is unreasonable or impracticable for it to do so in view of the nature or purpose of the power or in the circumstances of the particular case; and

(b) does not affect the obligation of the Agency to discharge any other duties imposed on it."

15. The defendant has published general objectives, dated October 2000. Paragraphs 14 and 15 deal with the Agency's approach to risk:

"14. We will develop and publish our approach to risk. In essence, we will maintain a policy based on the following principles. We undertake to adopt a consistent approach in all our decisions and actions. We will make decisions and take action that is proportionate to the associated risk. In doing so we will take due account of the nature and magnitude of the risks involved, to the costs and benefits of proposed actions, to the information provided by the relevant independent advisory committees and to any other appropriate sources of expertise. Decisions will be based on sound scientific advice, and we will commission programmes of research and surveillance specifically targeted to addressing our policy aims and objectives.

15. We recognise that there is often uncertainty in the science underlying our decisions and we shall explain these uncertainties and make sure it is clear how we have taken them into account. Where there is a risk of

serious damage to public health, we will adopt a precautionary approach by acting quickly to implement appropriate measures to reduce health risks. Scientific certainty is rarely achieved in practice and we will not allow the absence of certainty to delay proportionate action. Equally, we will not use the absence of scientific certainty as an excuse for taking action other than that needed to protect public health and well being. Such action will be reviewed if new evidence becomes available."

16. Those two paragraphs encapsulate the territory over which these particular proceedings have been fought; the claimant maintaining that the defendant on a number of occasions fell short of one or more of the objectives set out in those paragraphs; the defendant claiming that it did not.
17. An undated document issued by the defendant, headed A Framework for Regulatory Decision Making in the Food Standards Agency, sets out further claims as to the way in which the defendant will approach its decision making:

"6. As a regulator, working with our enforcement partners across the UK, we will consider intervening to protect consumers where the market is not balanced, effective or provide proper levels of food protection, but will only intervene where the benefits justify action and outweigh the risks of inaction.

7. In deciding whether to intervene, we take into account:

- the evidence and extent of harm, or potential harm, to public health or consumer interests, based on the best scientific evidence;
- the prospects of intervention reducing that harm or mitigating the risks, balanced by the prospects of creating new and unintended risks;
- proportionality, taking account of the balance of risks, costs, and benefits to everyone concerned, within our statutory duty to attach the greatest weight to protecting the interests of consumers;
- the risks of inaction – including the risk of loss of consumer confidence in the regulatory system."

18. Finally, the European and domestic measures which apply to the GMOs in this case. The preamble to the General Food Law Regulation EU 178/2002 contains a large number of paragraphs, many of which were cited to me in argument. They, in summary, refer to the need to protect free trade so far as is possible; to have a common approach to the food safety issue across the community; and to the need for the measures adopted by the community and member states to be generally based on risk analysis except when it is not appropriate to the circumstances or nature of the measure. At paragraph 19 of the preamble:

"It is recognised that scientific risk assessment alone cannot, in some cases, provide all the information on which a risk management decision

should be based, and that other factors relevant to the matter under consideration should legitimately be taken into account including societal, economic, traditional, ethical and environmental factors and the feasibility of controls.

And at 21:

"In those specific circumstances where a risk to life or health exists but scientific uncertainty persists, the precautionary principle provides a mechanism for determining risk management measures or other actions in order to ensure the high level of health protection chosen in the community."

19. It deals with the system of rapid alert which was employed on a number of occasions during this particular emergency. The principles of food law are set out at Article 5 and, 6 and Article 7:

"Article 5

General objectives

1. Food law shall pursue one or more of the general objectives of a high level of protection of human life and health and the protection of consumers' interests, including fair practices in food trade, taking account of, where appropriate, the protection of animal health and welfare, plant health and the environment.

2. Food law shall aim to achieve the free movement in the Community of food and feed manufactured or marketed according to the general principles and requirements in this Chapter.

3. Where international standards exist or their completion is imminent, they shall be taken into consideration in the development or adaptation of food law, except where such standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives of food law or where there is a scientific justification, or where they would result in a different level of protection from the one determined as appropriate in the Community."

20. Article 6 applies the principles of risk analysis:

"Article 6

Risk analysis

1. In order to achieve the general objective of a high level of protection of human health and life, food law shall be based on risk analysis except where this is not appropriate to the circumstances or the nature of the measure.

2. Risk assessment shall be based on the available scientific evidence and undertaken in an independent, objective and transparent manner.

3. Risk management shall take into account the results of risk assessment, and in particular, the opinions of the Authority referred to in Article 22, other factors legitimate to the matter under consideration and the precautionary principle where the conditions laid down in Article 7(1) are relevant, in order to achieve the general objectives of food law established in Article 5."

And then Article 7:

"1. In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment.

2. Measures adopted on the basis of paragraph 1 shall be proportionate and no more restrictive of trade than is required to achieve the high level of health protection chosen in the Community, regard being had to technical and economic feasibility and other factors regarded as legitimate in the matter under consideration. The measures shall be reviewed within a reasonable period of time, depending on the nature of the risk to life or health identified and the type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment."

Once again, that article and its effect on this particular emergency have been central to the dispute between the parties.

21. Directive 2001/18/EC, on the deliberate release into the environment of genetically modified organisms, is dated 12th March 2001. It incorporates in its preamble the precautionary principle into its drafting and is concerned, as is obvious from its title, to prevent GMOs deliberately released being placed on the market without having been subjected to satisfactory field testing at the research and development stage in ecosystems which could be effected by its use. There being no dispute about this, one can summarise it by indicating that, within the community, it is illegal deliberately to release onto the market GMOs which have not been subjected to rigorous scientific analysis and certification.
22. Regulation No 1829/2003 of the European Parliament and of the Council, dated 22nd September 2003, on genetically modified food and feed, deals with the same topic. The Regulation is said to be in accordance with the general principles laid down in the previous regulation, 178/2002, to provide the basis for ensuring a high level protection of human life and health and other matters, whilst ensuring the effective functioning in

the internal market. It defines the term "placing on the market", which is relevant to these proceedings, as:

"... the holding of food or feed for the purpose of sale, including offering for sale, or any other form of transfer, whether free of charge or not, and the sale, distribution and other forms of transfer themselves."

It sets out a regime for authorisations and forbids in Article 4(2) the placing on the market of a GMO for food use or food unless covered by such authorisation.

23. It is in that context that the Emergency Decision, promulgated on 23rd August 2006, came to be promulgated. On 18th August, the European Commission was informed by the US authorities that unauthorised LLRICE601 had entered the food chain in the US. On 23rd August the European Commission adopted the first Emergency Decision in this case and issued a press release. I should say that the preamble repeats a great deal of the preambles to previous regulations, including the need for a comprehensive and common approach, allowing "effective action to be taken and avoiding disparities between treatment of the situation by the various member states". It provides specifically that:

"The measures provided for in this Decision must be proportionate and no more restrictive of trade than is required and should therefore cover only products considered likely to be contaminated with LL RICE 601, which according to the information received, are imported from the United States to the Community."

24. Article 2 deals with the conditions for first placing on the market. Section 2 reads:

"In the absence of such an analytical report, the operator established in the Community who is responsible for the first placing on the market of the product shall have the products referred to in Article 1 tested to demonstrate that they do not contain genetically modified rice..."

And the products in Article 1 list a series of particular types of rice with particular code numbers:

"Pending availability of the analytical report, the consignment shall not be placed on the market of the Community."

Article 3:

"Member states shall take appropriate measures, including random sampling and analysis, concerning the products referred to in Article 1 already on the market in order to verify the absence of genetically modified rice LL RICE 601. They shall inform the Commission of positive (unfavourable) results through the Rapid Alert System for food and feed."

Article 4:

"Member States shall take the necessary measures to ensure that the products referred to in Article 1 that are found to contain genetically modified rice LL RICE 601 rice are not placed on the market."

Article 5:

"Member states shall ensure that the costs incurred in the implementation of Articles 2 and 4 are borne by the operators responsible for the first placing on the market."

25. That decision on 23rd August was repeated, it being a provisional decision, by an identical decision on 5th September 2006. It was again repeated, albeit modified and expanded, by a further decision of 6th November 2006. The preamble of the decision of 6th November brought up-to-date the history of the matter in its preamble and set out in an annex the details of the matters, in particular the sampling which needed to be taken. It is accepted by the defendant that it had a role to play in the implementation of those three decisions. Finally, effective from the 9th November, a domestic statutory instrument came into force, entitled the Rice Products (Restriction on First Placing on the Market) (England) Regulations 2006. Similar regulations were made in respect of Wales, Scotland and Northern Ireland. These regulations put into statutory form the requirements of the emergency decision.
26. So that is the framework against which I have been asked to look at the defendant's response. Following the first Emergency Decision on 23rd August, there was a meeting on 24th August between the defendant and representatives of the industry. Among those attending were representatives of the Rice Association and the Department of the Environment, Food and Rural Affairs. At the meeting, the defendant's representative confirmed that the UK is obliged:

"... to carry out our own analysis to verify that products on the market are free from LLRICE601. Surveys will be carried out either through Local Authorities or through one of our own agents.

If the agency conducts its own survey, we will consult on a sampling plan (unless it is treated as an emergency) and will include GAFTA and the Rice Association on the circulation list. Retailers selling parboiled and easy cook will be included in the sampling."
27. The following day, the 25th, the defendant issued a declaration under Regulation 33 of the Official Feed and Food Controls (England) Regulations 2006 stating that the presence of LLRICE601 is likely to constitute a serious risk to public health, that being the formulation in paragraph 1 of Regulation 33 of those regulations. The following day again, 26th August, a huge consignment of rice from the US arrived in Rotterdam and it became clear soon afterwards that tests by the Dutch authorities had revealed the presence of LLRICE601 despite negative reports that had accompanied the consignment from the US and it then became clear that the standards applied by the two, the US and the European Community, are different. They are stricter in Europe. On 30th August, the Commission issued a notification asking member states to carry

out "intensive and targeted controls within the framework of Article 3" on those products placed on the market before entry into force of the decision; a clear steer, the claimant contends, to the member states to look back. On 31st August, the defendant met the Rice Association and for the first time, but the first of many times, a similar statement of policy was made. From the record of the meeting:

"The agency stated that the emphasis of enforcement of the EU emergency measures would be placed on stopping food containing the unauthorised GM material being placed on the market. The purpose of subsequent testing would be to confirm whether the test certification system is working."

28. On the same day, the Commission asked member states at a press conference to "beef up their controls on the market because we cannot rule out that products which are already on the market are indeed contaminated". Again, the same day, 31st August, the first meeting took place of the *ad hoc* incident group. Mr Wolfe, on behalf of the claimant, points out that there is a document of the defendant which describes in general the way in which such *ad hoc* incident groups should be set up and should operate and I have had regard to it. At this first meeting, the decision I have just referred to from the meeting with the Rice Association was confirmed in different wording:

"It was decided not to sample from supermarket shelves because of the massive resource implications in tracing all contaminated end products and the difficulty of obtaining statistically significant sample sizes. This was not considered as proportionate given that the contamination did not have any food safety implications.

Downstream distribution from mills would not be pursued for the same reasons..."

29. Mr Wolfe, in his submissions to me, asked me, as I have done, to stop the clock every so often, to see what was appropriate then, rather than simply looking at the evidence from the vantage point of February 2007 as a whole, and one of the occasions on which I have stopped the clock is 31st August. It is contended by the claimant that, at some stage around this time, the defendant should have issued an alert notice; that it should have commissioned modelling in order to ascertain exactly what the scale of the problem was; that it should have, whether it issued an alert notice or not, issued some kind of advice to local authorities who had the duty of enforcing and, if necessarily, instituting proceedings against those who might have on their shelves contaminated food; and that it should have taken steps in general to investigate the "downstream distribution from mills". At each stage and at the end, cumulatively, of course, I have tried to decide whether a judge, looking at the situation then, would have been in a position to issue some sort of mandatory order that the defendant do one or other of the things that the claimant now contend that they should have done. I have come to the conclusion that, at this early stage, the strategy pursued by the defendant was justified, the emergency was still in its infancy and a great deal needed to be done at the upper level with major players before detailed strategy, no doubt costed, was worked out.

30. Moving on, on 1st September there was a meeting between the defendant and retailers and other food industry persons at which the defendant, as the meeting records, indicated that it would test rice held at mills:

"Dr Baynton confirmed the FSA were not planning to test rice further down the supply chains as this was considered disproportionate. The FSA saw its role as preventing any further GM-containing stocks entering the UK markets. They are therefore looking at further measures to check certification."

31. The Commission wrote to member states on the same day asking them, among other things, according to the Commission Decision 2006/578, "to carry out intensive and targeted controls on rice products already on the market". On 4th September, an internal e-mail within the defendant confirms that:

"... we will only look to carry out tests in mills and won't be seeking to take samples off supermarket shelves for testing given that we consider there is no risk to health. All were pleased with the approach being taken by the FSA."

32. That is the first overt reference that I have referred to in the judgment, but there are many within the papers, to the fact that the FSA, in formulating its response, did take account of what it believed (and a few days later the belief was confirmed) was the current scientific thinking on the dangers of this particular GMO.

33. It was conceded by the claimant that the actual measures taken by the defendant and the other key players within the UK were a matter of discretion. No-one would have thought, for instance, that a call for emergency measures to analyse and destroy, if contaminated, every single grain of rice in the country would on any view have been "appropriate", albeit that some of the early correspondence from the claimant seemed to suggest that that was necessary. Why? Because the situation was a risk of a risk rather than a definite, even if unquantifiable, risk to health. To turn the situation on its head, if the scientific information about LLRICE601 had been that there was a risk, albeit unquantifiable to public health, then the appropriate measures would have had to have been adjusted accordingly. The defendant was entitled to consider the whole of the evidence in pitching their response, in particular the evidence or lack of it of health risk, of the cost of one measure against the cost of another and the consequent risk to the agency's own work in other fields, but also, in my judgment, and in a sense in support of the claimant's case, to other matters outside the narrow terms of the directive itself such as the request to "beef up" the investigation, repeated on a number of occasions by the Commission in various ways, into rice which was already on the market and to pay attention to the fact that, if in the end there did turn out to be a risk to health from this particular GMO, there are more people in this country than in any other member state who will be exposed to it, since more than 40 per cent of the rice from the US comes to this country and that more than a quarter of the long grain rice we in this country consume is imported from the US.

34. All those matters, in my judgment, were matters which the defendant was entitled to consider when framing the level of its response and, of course, returning to the question of health, when, on 15th September, the European Food Safety Authority published its report, that was another factor which in my judgment the defendant could and should take into account in pitching the scale of their response.
35. On 4th September, there was a last meeting of the *ad hoc* group in which it was stated, according to the record of the meeting, that:

"... other [member states] were not sampling processed rice products, however, there was no information on their discussion with retailers. It was agreed that the actions taken by the FSA should harmonise with other member states..."

And on the same day there was a meeting between the defendant and supermarkets, the British Retail Consortium and the Food and Drink Federation, at which, the meeting record records, Dr Baynton advised that:

"... the Agency's view was that, in the absence of safety concerns, widespread withdrawal of foods containing low levels of unauthorised material would be considered disproportionate. In cases where a milled batch of rice tested positive, one option would be for primary products currently on the market to be withdrawn. And before finalising the Agency's position, the FSA sought clarification on what retailers considered were their primary rice products."

Then later:

"... the FSA are legally obliged to issue a food alert, this is the usual route of informing Commissioners and informing Local Authorities..."

Doctor Baynton confirmed that the FSA did not have information on what action other member states were taking."

The statement that the FSA were legally obliged to issue a food alert is agreed on both sides to be inaccurate, although the claimant maintains its complaint that in this case such an alert should have been issued.

36. The alert letter regime and its use are described at chapter 2.2 of the defendant's Code of Practice:

"A 'food alert' is a communication from the Agency to a Food Authority concerning a food hazard or other food incident..."

and it states that action is expected from food authorities if specified in such a food alert and that that action should be undertaken promptly and in accordance with any risk assessment carried out by the Agency, and that if food authorities propose to take alternative action they should agree these with the Agency before implementing them. Where they anticipate difficulty in complying with a request for action, they must

contact the Food Incident Team immediately. So these food alerts are clearly designed to put pressure at the very least upon food authorities to take appropriate action in respect of particular incidents such as this one.

37. A number of documents evidencing one way or another previous, and indeed subsequent, food alerts have been put before me, most recently, and after argument had finished in connection with a particular food incident, the Sudan 1 incident, in which some 350 products which contained Worcestershire sauce as an ingredient had to be withdrawn as the result of the presence within the Worcestershire sauce of Sudan 1, which had been proven to have some, albeit low and unquantifiable, risk of causing cancer.
38. There is nothing in the contemporary written material to indicate whether an alert letter was considered and, if so, why it was rejected. By implication, it is clear that, if it was considered, the passage I have just read from the document of 4th September suggested at that time the writer of that note thought that it was a necessary consequence. After the event, in answer to questions from the claimant, the defendant said this, having dealt with the inaccuracy of the statement about the legal requirement:

"Food alerts are issued to local authorities to inform them of action to take (Food Alerts for Action) or to inform them of product withdrawals or recalls undertaken by food manufacturers or retailers, where they have informed customers of the reason why they have taken this action (Food Alert for Information).

Since there was no action required of local authorities and retailers had withdrawn products for sale but not notified consumers of the reason for the withdrawals, the Agency took the view that it was not necessary to issue Food Alerts.

This decision was not made at any specific time as it is in line with current Agency policy. Decisions on each withdrawal were made on a case by case basis in accordance that policy."

39. As I have said, it is inconceivable to me that, in view of the frequent issue of such notices, some consideration was not given to the issue of a food alert. In hindsight, I believe that the defendant would have been well advised to issue such an alert, in particular in response to the "beefing up" calls to which I have referred over the preceding days. However, the action called for was not in respect of a product like Sudan 1, which carried a risk of cancer, it was in respect of a product which likely had no risk at all and whose removal was necessary principally to secure compliance with the general directive that GMOs should not be available in the EU with a EU safety certificate and sufficient action in my judgment was taken not to have made it unlawful not to issue an alert letter.
40. The further point is made, and in my judgment it has some substance, that such an alert notice or some other document akin to an alert notice, in particular by analogy with the extensive list in the Sudan 1 documents, could have included the particular code

numbers of batches of rice which had been found to be contaminated so that retailers and others could decide whether they wished to run the risk that they had contaminated rice on their shelves and therefore run the risk of prosecution, and local authority personnel on visits to such premises would have known what to look for and, indeed, concerned members of the public could then decide for themselves whether they wished to take the "risk of the risk" which still applies.

41. On 5th September, as I have already mentioned, the second Emergency Decision was promulgated. The same day, there is an internal e-mail to the effect that confirms the record of the meeting of the previous day about responding to retailers and food manufacturers:

"It was agreed that we would not expect action to be taken to remove contaminated product from the food supply chain but our aim was to prevent any more contaminated rice entering the food supply."

42. On 11th September, there was a further meeting of SCofCAH, the Standing Committee of the European body upon which the defendant sits. The record of that meeting, which of course dealt with other matters than LLRICE601, contained a number of important pieces of information. First of all, it was reported that the Federation of European Rice Millers (FIRM) had indicated that it takes "approximately 10 to 12 weeks between the arrival of the products in the stocks of rice mills and its sale to final consumers". Further, the minute records:

"Member states informed the Commission of the steps taken to implement the decision 2006/601/EC. Customs authorities, entry points and operators have been rapidly informed of the provisions of the Decision and are controlling that products covered by its scope are accompanied by a certificate as requested by the Decision."

A little later on:

"The Chair of the meeting took note of the difficulties encountered by Member States to put in place fully operational testing activities, welcomed the actions taken as regards imports, but at the same time reminded all the delegations to do any possible effort to be able to test with a reliable detection method as soon as possible for products already on the market. He reminded MS to continue with an intensive testing as was already communicated earlier in writing to MS."

I should say that in the passage I have omitted it was accepted, as is apparent from documents within these papers, that it took some time for the analysis to be done. Later on, the meeting records:

"On the basis of the knowledge available today, the Standing Committee agreed that, as a matter of priority, it was necessary to ensure that illegal GM long grain rice originating from the USA does not enter the EU market or is not further distributed in the food chain. As a consequence,

it was agreed that, unless operators can demonstrate the absence of LLRICE601, stored bulk consignments of US long grain rice as defined in Article 1 of the Commission Decision 2006/601.EC, which first entered the EU market prior to entry into force of the emergency measures should be subject to official control as foreseen in Article 3 of Decision 2006/601/EC before entering further in the food chain."

43. The minute of that meeting and the passage from which I have quoted make it clear to me that the defendant must at that stage have been aware of the general nature at the very least of the measures taken by other member states to implement the decision.

44. On 15th September, the EFSA statement was promulgated:

"[It was] not possible to conclude on the safety of LLRICE601 itself in accordance with the EFSA guidance for risk assessment. However, on the basis of the available molecular and compositional data and on the toxicological profile of PAT proteins, EFSA considers that the consumption of imported long grain rice containing trace levels of LLRICE601 is not likely to pose an imminent safety concern to humans or animals."

Following this, the FSA included quotations from the statement on its website.

45. Criticism was made in the course of argument by the claimant of the way in which the FSA dealt with this statement. In my judgment, that criticism was unfounded. The statement, as quoted, made it perfectly clear that all the EFSA was saying was that LLRICE601 was not likely to pose an imminent safety concern, which clearly implies the possibility that it might do.

46. On 15th September the claimant sent an initial letter to the defendant before action. Four days later, the programme, which had been foreshadowed by a number of the meetings to which I have referred, of sampling began. On 20th September, a very urgent communication was received from the Commission by the UK and all member states referring to the shipment which had been discovered at Rotterdam:

"This case confirms that intensive and targeted controls on products, which are already on the market, are absolutely necessary."

47. By this time, the ten major supermarket chains had, on the evidence, either done or started to do a comprehensive exercise of trying to identify rice on their particular shelves, these being responsible for the sale to the public of 94 per cent of US long grain rice, and the results of those came out between the middle of September and the beginning of December. So the defendant submitted that those principally responsible for obeying the law, the food operators, this major sample thereof, were in fact, following meetings with the defendant, carrying out the second part of Article 3 of the Decision.

48. It perhaps worth stopping the clock again at this stage. Once again I have looked to see whether in my judgment a judge would have been likely to grant some form of

injunctive relief at that stage to compel different action, in particular in respect of local authorities, a month or nearly a month having passed since the original emergency. Again, in my judgment, albeit there may be criticism that in a perfect world more would have been done more quickly, it is not the case that injunctive relief would have been forthcoming from this court at that stage.

49. On 4th October, the defendant convened a meeting to review the problem. At that meeting it was conceded that the advice to retailers of 5th September was open to misinterpretation and that they would correct the mistake and the following day they purported to do so. In a letter to the stakeholders, they wanted to correct any impression that may have been created by a letter of 5th September that for stores deliberately to keep on their shelves unauthorised and illegal GM food was wrong. Paragraph 5 of the letter:

"It is one of the Agency's General Objectives to make decisions and take action proportionate to the risk to consumers and enforcement bodies are also required to take account of this principle when considering any enforcement action that might be taken in relation to this incident. The Agency wishes to make clear that its support for proportionate enforcement action does not mean that it condones the sale of unauthorised and illegal GM material in food. Retailers and other operators have a clear obligation to ensure that the food they sell complies with the law.

6. The Agency's advice to consumers, that they can continue to eat long grain rice that they have at home, has been reconsidered in the light of EFSA's advice and is unchanged."

Clearly the original stance of the defendant, as it now concedes, was in error insofar as it implied that, because shelves were not going to be raided, so to speak, it was all right to continue to sell GM contaminated food.

50. On 10th October, the claimant sent its second letter before action, in particular, among other things, calling upon the FSA to issue food alerts, or a food alert, in relation to rice held by retailers, caterers and wholesalers. This letter reinforces my conclusion that, albeit there is no written evidence of it, someone within the defendant must have considered whether, even at this stage, a food alert was appropriate. It is another occasion on which, in attempting to perform the exercise Mr Wolfe invited me to, I have stopped the clock. On receipt of the claimant's letter, was the action or inaction of the defendant sufficient to make their overall response to this emergency unlawful? Once again, by this time I have come to the conclusion that the defendant was actively pursuing all the relevant means to enforce this decision. The only piece of the jigsaw that was outstanding, which was finally put in place the following day, was the letter to the Heads of Environmental Services and Chief Port Officers and, later, on 25th October, to the same persons together with the Directors of Trading Standards Departments, explaining the new requirements. In retrospect, the defendant may well consider that, were exactly the same circumstances to occur again, that guidance would be sent out earlier, whether by way of alert letter or other means.

51. On 23rd October, SCofCAH approved amendments to the Emergency Decision, those amendments being supported in principle by the defendant as a member, and two days later the defendant wrote a letter to stakeholders in connection with that amendment. The same day it wrote to alert enforcement authorities generally as to the emergency measures. The letter is a detailed letter. It explains the history of the matter and of other correspondence and points out the powers available to food authorities to deal with products which, they suspect or know, fail to comply with food law and lists the testing requirements applied to particular products by code. The claimant says, with force, that that is all very well but it is two months after the original emergency and is so, or so far, short of compliance with the duty to implement Article 3 that it should call for a declaration. It clearly was later than it should have been but does not in my judgment justify the issue of any kind of declaratory relief.
52. The following day, the claimant issued its application for judicial review. Following that application, the defendant wrote out, either in hard copy or electronically, to retailers, its partner bodies in other member states and to local authorities, sometimes on more than one occasion, asking them for information as to what they had done, in particular with reference to the fact that they were not facing a legal challenge to their own behaviour. That process continued right up to December. On 6th November 2006, as I have already said, the amended Emergency Decision came into force. Of course, it took account of the fact that the EFSA report was now in and other developments since the first decision. The claimant rightly points out the fact that the decision was taken to issue it so that it was obvious that the emergency was not yet over and action was still required. On 9th November, again, as I have said in reciting the legal framework, the statutory instrument, interestingly issued by the Department of Health rather than DEFRA, came into force. It was accompanied, so far as stakeholders were concerned, by a letter from the defendant providing them with an update on those regulations. The letter in the bundle indicates that the agency is writing separately to rice importers and enforcement bodies.
53. Thereafter, the history becomes less important in the sense that Mr Wolfe's criticism of the defendant is principally aimed at its conduct in the months up to the beginning of November. He simply points out that, as I have mentioned, the correspondence in some instances could have gone out much earlier.
54. The final criticism which I refer to relates to the fact that it was only on 8th December that the final report from consultants instructed by the defendant to model the food chain in respect of long grain rice was produced. Far too late, says the claimant, for the defendant to have made a considered decision at some time, considerably earlier than that on its strategy. In fact, the report seemed to confirm the information that the defendant had had, in large part, on the likely progress of rice through the food chain. Clearly there would be exceptions and there were, because in January a representative of the claimant purchased rice from a shop in North London which on analysis turned out to be contaminated; so that not every bag of rice had gone through the food chain in anything like the 10 to 12 weeks upon which the defendant had relied. But in my judgment the defendant has to rely on general information like this in taking what are national policy decisions and it will be for local enforcement authorities, who are likely to know which shops may have products on their shelves for longer than the normal

time, to decide which to visit and which to sample. As I have indicated already, it may well be that the process of reflection will suggest to the defendant that more should have been done, on the matters to which I have referred, earlier than it was. But in my judgment there must be a margin within which an agency such as the defendant has to be allowed to make its own decisions and even, to some extent, its own mistakes without attracting legal sanction. As I have said, I have adopted the stance I was invited to take by the claimant of stopping the clock at various points during this chronology and asking the question whether at that stage judicial review would have gone to order the defendant to do or not do something. On each occasion that I have done so, both individually and taking them altogether, I have found that it would not.

55. MR WOLFE: My Lord, Friends of the Earth obviously welcomes my Lord's comments on the conduct of the FSA and also looks forward to the review my Lord clearly contemplates them undertaking with the comments my Lord has made in that respect. There is, however, one matter at the heart of my Lord's decision which we would seek permission to appeal in relation to, which is in a sense the core legal point. I am sure my Lord knows which one I refer to, which is --
56. MR JUSTICE CALVERT SMITH: The appropriateness.
57. MR WOLFE: Exactly, my Lord's conclusion that they were entitled to take into account their view of safety in determining their level of response. That is obviously central to this matter.
58. MR JUSTICE CALVERT SMITH: I think you will have to take that application elsewhere. The answer seems absolutely clear to me but if you want leave to appeal that decision, take it elsewhere.
59. MS ROSE: My Lord, the only thing I would like to add on behalf of the Agency is that the Agency will very carefully take on board the comments your Lordship has made and the Agency does appreciate the guidance given by the court and that will be a factor in the Agency's review.
60. MR JUSTICE CALVERT SMITH: Thank you. I am sorry I have kept you all so late.