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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Tullynaskeagh Farms Ltd's Application [2012] NIQB 92

IN THE MATTER OF APPLICATION BY TULLYNASKEAGH FARMS LIMITED FOR JUDICIAL REVIEW

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TREACY J

Introduction

[1] The applicant, Tullynaskeagh Farms Limited, is a limited company which operates a farming business. The applicant applied for a payment from the National Reserve under the European Union farm subsidy scheme called the Single Farm Payment Scheme which is administered in Northern Ireland by the Department of Agriculture and Rural Development ("the respondent"). This is an application for judicial review of a decision made by the respondent on 14 September 2010 not to make an award in the applicant's favour from the National Reserve. The terms of the impugned decision are set out at para [27] of this judgment.

Background to the Single Farm Payment Scheme

[2] Further to the Common Agricultural Policy Reform Agreement reached by European Union Ministers in Luxembourg in June 2003, Regulation EC 1782/2003 established common rules for direct farm support schemes. As a result the Single Farm Payment scheme, an income support for farmers, was introduced in Northern Ireland on 1 January 2005. In Northern Ireland, this is commonly known as 'Single Farm Payment'. Regulations EC 795/2004 and EC 796/2004 laid down detailed rules for the implementation of the Single Farm Payment provided for in Regulation EC 1782/2003.

[3] The Single Farm Payment replaced various subsidy (direct payments) schemes which were linked to production and, instead, directed payments at farm holdings. The Department of Agriculture and Rural Development, Single Farm Payment 2005, Guidance Booklet on 'CAP Reform - Part 7 – National Reserve' published in March 2005 (the "National Reserve Guidance") describes the basis of the introduction of the Single Farm Payment, as follows:

> "In Northern Ireland, the Single Farm Payment Scheme (SFPS) is being introduced from 2005 on the basis of CAP subsidy activity in the reference period 2000 - 2002 and the area of land declared in the 2005 Single Farm Application Form. The SFP will reflect the average of the 2000 – 2002 CAP livestock and arable schemes claims (Historic Reference Amount)."

[4] Paragraph 7 of Mark McLean's affidavit dated 11 February 2011 also refers to the aim of the reform and to the recognition that some farmers would be in a "special situation":

> "The aim of the reforms was to break the link between production and levels of subsidy obtained (coupling) while leaving the amounts of subsidy paid to farmers largely similar to those received in the (historic) reference period 2000 – 2002. However during the reform discussions, because of the time lag between the reference period and the implementation of the reforms in 2005, it was recognised that there were a number of farmers who were in a special situation whereby their SFP in 2005, if it was based on the reference period, would not be reflective of the nature of their farming business in the period immediately prior to 2005."

[5] Regulation 1782/2003 required Member States to set up a National Reserve for awards to farmers in 'special situations', being where the move to the Single Farm Payment from the multiple subsidy regime resulted in a disadvantage to such farmers. One category of farmer defined as being in a special situation is where the farmer is an 'Investor'. Detailed guidance on what constituted an eligible investment and the objective criteria used to calculate the award from the National Reserve is included in the National Reserve Guidance.

[6] The National Reserve Guidance explains that an applicant under the investor category has two options as to how the award is calculated, the first being the default methodology and the second being the alternative methodology. The Guidance makes it clear that, under the alternative methodology, detailed evidence must be provided in support of the application.

Factual background

The applicant's investment

[7] The applicant's skeleton argument describes the applicant's investment as an increase of the size of the farm by 19.74 hectares and an increase in cattle numbers from 119 on 30 December 2002 to 160 on 13 December 2003. It is also stated that the applicant did not retain the animals in the herd to claim various subsidies but instead sold them as forward stores allowing the subsidies to be claimed by the purchasers.

The 2005 application for an award from the National Reserve

[8] On 1 April 2005 the applicant applied for the Single Farm Payment from the National Reserve under the 'Investor' category only. In section 3 of the application form the applicant indicated it wished its award to be calculated by the alternative investment methodology. At p6 of the application form, the applicant described its investment as the "[p]urchase of an additional 19.74 hectares of eligible land…". Together with the application, the applicant enclosed a letter from his solicitor, James Murland & Company, dated 1 April 2005 confirming the investment took place. The applicant did not enclose a copy of its business plan with the application form and, therefore, was required to provide other evidence that the investment was part of a planned increase in production capacity. In this regard, the applicant provided a letter from his solicitors giving details of continued expansion of the farming business.

[9] The application also requested details of the additional units of CAP subsidy receipts (compared with the reference period 2000 – 2002) which would have been supported by the investment and reasons why they were not reflected in the applicant's 2004 subsidy claims record. The applicant stated:

> "The area claimed under the arable scheme increased from an average of 158.63 hectares to 176.79 hectares in 2004. Livestock payments were £16,252.30 average in the reference years and nil in 2004.
>
> 160 cattle were kept in 2004 but no premium was claimed. Premium value would have been 160 x £150 (including scale back) i.e. £24,000. This was not claimed for sound business reasons."

[10] In respect of evidence as to how the expected increased claims were directly related to the scale of the applicant's investment, the applicant provided an APHIS herd list detailing 160 cattle as of 21 March 2005.

[11] On 20 April 2005 the respondent requested further information in order to assess the application, being evidence as to why the increased production was not reflected in the applicant's 2004 subsidy claims. The letter also stated the applicant would be required to prove that the additional units were directly related to the nature and scale of the applicant's investment.

[12] The applicant replied in correspondence date stamped as received by the respondent on 25 April 2005, as follows:

> "For the winter of 2004 we had a large volume of silage. In order to ensure that this high quality silage was all consumed it was decided not to feed any meal, as this depresses silage intake. Feeding no meal meant that the cattle would not be sold as beef, but as "forward stores". The fact that these animals were available to other farmers, after being sold by us, to claim premium on was reflected in the price we obtained. All our silage was eaten & we were as well off in terms of profit. We were also "testing the waters" for farming without subsidy.
>
> The additional units of land are part of a continued expansion of our farming business. I had assumed this was covered in the letter from James Murland & Co, Solicitors."

[13] The respondent's assessment of the application indicates it was decided the alternative methodology could not be used as no force majeure reasons were given but the default methodology should be used instead. However, the default methodology resulted in a nil award.

[14] In a letter dated 8 September 2005 the respondent informed the applicant its application satisfied the eligibility criteria for the National Reserve under the investor category. However, the respondent stated that as there was no overall increase in the applicant's total subsidy claims when compared to the reference period (2000 – 2002), the applicant would not receive an award from the National Reserve.

Review of the respondent's decision in relation to the 2005 application

[15] On 19 September 2005, the respondent received a Stage One Review of Decision application from the applicant and, following the Stage One decision, it received a Stage Two Review of Decision application on 27 March 2006. At both stages the respondent concluded its decision dated 8 September 2005 was correct as the applicant had not provided a force majeure reason for not claiming subsidy in 2004.

[16] The grounds for the Stage Two Review were "[h]aving obtained articles 42 & 21 of Council Regulations (EC) No 1782/2003 & 795/2004 I cannot find a directive stating that increased subsidy payments are the criteria to be used to allow awards from the national reserve to expanding businesses". The applicant stated that the change sought to the decision made at the Stage One Appeal was "[t]hat the supporting documentation sent to the stage one appeal be considered and accepted as proof that the farm business had expanded with the purchase of additional land even though subsidy claims had not".

[17] The Stage Two Appeal hearing took place before the Independent Panel on 8 August 2006. The Independent Panel recommended the appeal be allowed. In its findings, the Panel stated the following view:

> "The Panel is of the view that the imposition of the requirement of an increase in production to be evidenced by an increase in subsidy payments is at variance with the requirements in Article 42 – 'to ensure equal treatment between farmers and to avoid market and competition distortions'…"

[18] Paragraph 35 of Joseph Kerr's affidavit dated 11 February 2011 explains that the respondent's policy officer considered the Panel's recommendation and concluded advice should be provided to the Minister for Agriculture and Rural Development. Mr Kerr stated the Minister was advised to reject the Panel's recommendation on the grounds the applicant had not provided a force majeure reason and when the default methodology was applied there was no net increase in subsidy when the 2004 scheme year was compared to the reference period. Mr Kerr avers the Minister accepted the respondent's advice and the applicant was informed of the Minister's decision on 6 December 2006. The respondent's letter to the applicant dated 6 December 2006 stated the Minister's decision was made on the following basis:

> "1. The Panel's recommendation is not in line with the agreed UK policy and objective criteria for the Investor category.
>
> 2. He does not accept the Panel's view that the agreed UK policy requirement to have an increase in subsidy payments is at variance with the requirements of Article 42 of Regulation 1782/2003 "to ensure equal treatment between farmers and to avoid market and competition distortions". The prescribed methodologies provide for equal treatment and are objective as required by both

> Article 42 of Regulation 1782/2003 and Article 21 of Regulation 795/2004.
>
> 3. You did not provide a force majeure reason as required under the Alternative Methodology and, when the Default Methodology was employed, there was no net increase in subsidy when 2004 scheme year is compared to the Reference Period."

2009 review of 2005 National Reserve, Investor Category applications which used the Alternative Methodology

[19] On 13 January 2009 the Minister announced she had set up a review of 2005 National Reserve applications where the applicant requested the use of the Investor Alternative Methodology. The Minister explained that the respondent rejected a number of National Reserve Investor Category applications on the basis these had not demonstrated that force majeure/exceptional circumstances affected their ability to claim subsidy in 2004. She continued to explain that as this factor was not specifically mentioned in the respondent's National Reserve guidance booklet, she set up a review of these cases against criteria as described in the booklet.

[20] The respondent set aside its decision of 6 December 2006 in respect of the applicant's application as this had been based on force majeure criterion and on 27 February 2009 conducted a review of the application. In a letter dated 27 February 2009 the respondent informed the applicant of its decision that the applicant would not receive an award and set out detailed reasons for its conclusion that the applicant's national reserve award should be calculated using the applicant's 2003 scheme year subsidy claims on which payment was received and comparing these to corresponding average in the reference period (2000 – 2002).

[21] The respondent found that, as there was no overall increase in the applicant's total subsidy claims when compared to the average in the reference period (2000 to 2002), the applicant would not receive an award from the National Reserve under the Alternative Investor methodology.

[22] The applicant was afforded the opportunity to request a review of the decision using the respondent's Review of Decisions process.

Review of respondent's decision dated 27 February 2009

[23] On 7 April 2009 the respondent received a Stage 1 Review of Decision application from the applicant in respect of its decision dated 27 February 2009. The decision at the Stage One Review was that the respondent's decision not to make an award from the National Reserve Investor Category was correct. Detailed reasoning is set out in the case officer's report but paragraph 47 of Mr Kerr's affidavit dated 11 February 2011 suggests the main point is:

> "As stated in the published guidelines, the onus was on farm businesses to provide evidence that the investment would have delivered subsidy payments in any year, including subsequent years. As stated on the appellant's National Reserve Review decision letter, no evidence of this was provided. The fact that higher subsidy payments may have been achieved if different decisions had been taken is not a valid reason on which to base a National Reserve award. Awards under the Investor category are made according to what has been or would have been achieved under existing plans in place at the time."

[24] The applicant was informed of the Stage One Review decision on 23 July 2009. On 21 August 2009 the respondent received a Stage Two Review of Decision application from the applicant on the same grounds as at the Stage One Review. The Case Officer reviewed the applicant's case and concluded the respondent's decision not to make an award from the National Reserve Investor category was correct for the following reasons:

> "In its application to the National Reserve the Applicant advised that it had purchased an additional 19.74 hectares prior to 2004 and kept 160 animals but no premium was claimed. It requested that the potential 2004 subsidy premium on the 160 animals should be taken into account when calculating an award from the Alternative Investor category. However, an investment in land alone would not have increased its capacity to claim CAP subsidy support. Under the old scheme rules the Applicant would also have had to demonstrate that its investment would have delivered subsidy payments in respect of the 160 animals in any year including subsequent years. An examination of the Departmental records confirmed that the Applicant had not claimed livestock subsidy in 2004. Further investigations revealed that the Applicant depopulated its herd in May 2004 and no animals have been moved into the herd since then.
>
> The Applicant had stated in its application that they had the option of claiming premium on 160 cattle. However, an investigation of the Department's records shows that the Applicant submitted BSP 2nd premium applications in respect of 122 of these

> animals on 30 December 2003. Payment was subsequently made on 114.10 animals. The decision not to claim subsidy on the remaining 38 animals is regarded as a business decision by the farm business, as this would have resulted in the opportunity for the purchaser to claim 2nd premium on these animals and would have been reflected in their increased sale value.
>
> It is not possible to base an award on what may have been achieved if different decisions had been made. Awards under the Investor category are made according to what has been or would have been achieved under the existing plans at the time.
>
> The Review Team accepted that the Applicant made an eligible investment however when reviewing the case it was considered that no evidence has been presented to demonstrate that its investment would have delivered subsidy payments in respect of 160 animals in 2004 or subsequent years. It was therefore concluded that the 2003 scheme year would be more reflective of the level of subsidy which the investment would have achieved.
>
> The claim patterns in 2003, were therefore compared with the average over the reference period 2000 - 2002. However, as there was no overall increase in the total subsidy claims, when compared to the reference period, no award could be made."

[25] The Independent Panel considered the case on 13 January 2010 and found:

> "… Whilst the Panel feels the Department's interpretation is at odds with the spirit of Article 21 of the Commission Regulation 795/2004 and in this particular case the intention (which was intended to reward farmers who made investments in production capacity) the Panel accepts that the guidance in its booklet was clear to all farmers for the Investor Category, including the applicant.
>
> ...[T]he Panel however feels that whilst the Department may have been well intentioned in looking at the applicant's 2003 production year as means of measuring entitlement, the Department

> should, as stated in the booklet clearly on pages 10 and 11, have focused on the 2004 claim year. The Panel is persuaded by the applicant's evidence that in good faith he expanded his farm and overall production in eligible sectors up to and including 2004 and the Panel therefore recommends that the Department look again at the applicant's claim focusing on the 2004 position.
>
> The Panel also recommends that the Department has another look at whether its guidance in the CAP Reform Booklet Part 7 which deals with the measurement of increased capacity in terms of subsidies claimed or the ability to claim subsidy, is in keeping with the intention of the EU legislation to reward increased participation in eligible sectors."

[26] A policy officer considered the Panel's findings and recommendation. The Policy Officer disagreed with the Panel recommendation and recommended advice should be given to the Minister. Full reasons are set out in the policy officer's report.

[27] On 25 May 2010 the respondent recommended to the Minister that there were no grounds for accepting the Panel's recommendation. The Minister accepted the respondent's recommendation and the final decision letter was sent to the applicant on 14 September 2010 indicating the Panel recommendation could not be accepted. The reasons for this were set out in the letter, as follows:

> "Tullynaskeagh Farm Ltd's application and the herd list supplied (160 animals) were reviewed. From the information available and a crosscheck of the herd list with the APHIS and Grants and Subsidies databases the following can be confirmed:
>
> - Tullynaskeagh Farms Ltd purchased an additional 19.74 hectares of land in February 2002 and this was accepted as an eligible investment.
>
> - Tullynaskeagh Farms Ltd stated in the application that 2004 subsidy claims were lower in 2004 than 2003. The Department considers that the 2003 position was more reflective of the subsidy achieved by the investment.
>
> - Tullynaskeagh Farms Ltd state that there was an option to claim subsidy on 160 cattle. The Departments records show that Tullynaskeagh

Farms Ltd submitted BSPS 2nd stage premium applications in respect of 122 of the 160 animals 2003. Payment was subsequently made on 114.10 animals. The Department considers the decision not to claim subsidy on the remaining 38 animals was a business decision. The decision would have resulted in the opportunity for the purchaser of the animals to claim 2nd stage premium and this was reflected (as stated by Tullynaskeagh Farms Ltd) in the increased value to Tullynaskeagh Farms Ltd at the point of sale.

- No evidence was presented by Tullynaskeagh Farms Ltd to demonstrate that the investment would have delivered subsidy payment in respect of 160 animals in the 2004 year or any subsequent year. The fact that higher subsidy payments may have been achieved if Tullynaskeagh Farms Ltd had taken different decisions is not a valid reason on which to base a National Reserve award. Awards are based on what has been or would have been achieved under existing plans in place at the time. The investment plan must be in place by 15 May 2004.

- It was noted that in the 2004 scheme year there was an increase in the area claimed by Tullynaskeagh Farms Ltd under the arable aid scheme when compared to 2003. An examination of Tullynaskeagh Farms Ltd's livestock claims in 2004 reveal a disinvestment in the beef enterprise. Consequently, it would not be appropriate in this case to use a combination of 2004 arable claims and 2003 livestock claims as a measurement of the investment in relation to the calculation of the National Reserve award.

- The Department concluded that Tullynaskeagh Farms Ltd's award should be calculated using the 2003 position compared to the reference period (2000 - 2002). This was more beneficial to Tullynaskeagh Farms Ltd as 2003 is a better reflection of the level of production, in subsidy terms, that can be associated with the purchase of the 19.74 hectares of land (both in arable subsidy and livestock subsidy). As there was no overall increase in the total subsidy compared to the reference years no award could be made using the Alternative Methodology."

[28] The letter proceeds to state the National Reserve Guidance booklet reflects the agreed policy and interpretation reached by all four agricultural administrations (Northern Ireland, Scotland, Wales and England) and the intentions of the National Reserve. The letter then states that the Panel cannot make a recommendation in relation to agreed policy and interpretation of European Union legislation.

[29] Finally, the letter provided that the respondent did consider the 2004 position but this was not beneficial to the applicant and the 2003 position was more reflective of the level of production supported by the purchase of the 19.74 hectares of land.

[30] The decision in the letter dated 14 September 2010 not to make an award in the applicant's favour from the National Reserve is the subject of this judicial review.

The application for judicial review

[31] The applicant's amended Order 53 Statement dated 9 November 2011 seeks, inter alia, a declaration that the decision of the respondent on 14 September 2010 not to grant an award to the applicant from the National Reserve Investor Category is unlawful; an order of certiorari to quash the said decision; an order compelling the respondent to grant the applicant such an award; damages; costs; a declaration the decision to allow the applicant to proceed through the appeals process was unlawful; and an order of certiorari quashing that decision.

[32] The summarised grounds upon which relief is sought are, inter alia:

> "(a) The respondent has failed to properly direct itself as to Article 21 of the Commission Regulation 795/2004;
> (b) The respondent has not complied with its own guidance and policy namely National Reserve Guidance Booklet published March 2005;
> (c) The criteria adopted by the Department are arbitrary and irrational;
> (d) The Department published its guidance in March 2005 at such a time when it was too late for the applicant or any farmer to take such necessary steps to ensure compliance with the criteria adopted;
> (e) The Department has without a rational basis departed from the decision of its own independent expert panel;
> (f) The respondent caused the applicant to prepare, pay for and undergo an appeal process the outcome of which was predetermined;

(g) In providing advice to the Minister who was the decision maker the Department failed to give the applicant an opportunity to consider those advices and make representations thereon prior to the decision being made;
(h) The advices provided to the Minister failed to inform the Minister of the relevant matters listed in full in the Order 53 Statement which the Minister failed to take into proper consideration;
(i) The applicant repeats the matters in paragraph (h) as matters which could have been addressed in representations to the Minister. The applicant ought to have been informed that the respondent was recommending the decision of the Panel not be followed and allowed to address in representations to the decision maker. The Department failed to disclose that material fact to the applicant; and
(j) The respondent failed to disclose to the applicant the advices which it was sending to the Minister. The applicant repeats the said particulars at subparagraph (h) as particulars of prejudice and bias."

Legal context: community legislation

General

[33] As previously mentioned, Regulation 1782/2003 provides for the introduction of the Single Farm Payment. European Commission Regulations (EC) No 795/2004 and 796/2004 provide detailed implementing rules relating to the operation of the Single Payment Scheme in support of the provisions of European Commission Regulation (EC) No 1782/2003.

Regulation EC 1782/2003

[34] Recital 25 provides how the system of Single Farm Payment should operate:

> "(25) Such a system should combine a number of existing direct payments received by a farmer from various schemes in a single payment, determined on the basis of previous entitlements, within a reference period, adjusted to take into account the full implementation of measures introduced in the framework of Agenda 2000 and of the changes to the amounts of aid made by this Regulation."

[35] Article 42 refers to the National Reserve. Article 42(4) provides for purpose of the National Reserve and states it is to be used according to objective criteria:

> "Member States shall use the national reserve for the purpose of establishing, according to objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions, reference amounts for farmers finding themselves in a special situation, to be defined by the Commission in accordance with the procedure referred to in Article 144(2)."

Regulation EC 795/2004

[36] As previously mentioned, Regulation EC 795/2004 provided for a number of categories of farmer defined as being in a special situation where, 'Investor' was one such category of farmer. Recital 17 provides:

> "Farmers who made investments resulting in a potential increase of the amount in direct payments that they should have been granted if the single payment scheme had not been introduced should also benefit from the allocation of entitlements. Specific rules should be provided for the calculation of the payment entitlements…"

[37] In relation to the calculation of the livestock unit, Recital 22 provides:

> "Specific rules should be provided for the calculation of the livestock unit in case of establishment of entitlements subject to special conditions by referring to the existing conversion table provided for in the beef sector."

[38] Article 21 of Regulation EC 795/2004 refers to the Investor category:

> "1. A farmer who made investments in production capacity or purchased land in accordance with the conditions laid down in paragraphs 2 to 6, by 15 May 2004 at the latest, shall receive payment entitlements calculated by dividing a reference amount, established by the Member State, in accordance with objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortion, by a number of

> hectares not higher than the number of hectares he purchased...
>
> 2. Investments shall be provided for in a plan or programme whose implementation has already started by 15 May 2004 at the latest. The plan or programme shall be communicated by the farmer to the competent authority of the Member State.
>
> Where no written plan or programs exists, Member States may take account of other objective proof of the investment…
>
> 3. The increase in the production capacity shall concern only those sectors for which a direct payment listed in Annex VI to Regulation (EC) No 1782/2003 would have been granted in the reference period taking into account the application of the options provided for in Articles 66 to 70 of that Regulation.
>
> The purchase of land shall only concern the purchase of eligible land within the meaning of Article 44 (2) of Regulation (EC) No 1782/2003.
>
> In any case, the part of the increase in production capacity and/or the purchase of land for which the farmer is already entitled to be allocated payment entitlements and/or reference amounts for the reference period shall not be taken into account for the application of this Article…"

The National Reserve Guidance

[39] The National Reserve Guidance is one of a number of guidance booklets relating to the Single Farm Payment Scheme and provides information about how the respondent will administer the National Reserve in Northern Ireland.

[40] The introduction of the National Reserve Guidance refers to the basis of the introduction of the Single Farm Payment as set out above in paragraph 3 and to the requirement for European Union Member States to set up a National Reserve:

> "The European Commission requires all EU Member States to set up a National Reserve. The National Reserve exists to deal with certain situations caused

> by the switch from the multiple subsidy regime of the past to the Single Farm Payment. It is designed to help farmers whose businesses, because of their particular circumstances, would be at a disadvantage in this move to the Single Farm Payment…"

[41] The National Reserve Guidance refers to the eight categories under which an application for an award from the National Reserve may be made. Section 4 of the Guidance describes the first category of 'Investor':

> "As a farmer, you purchased land (or leased land for six years or longer) between 1 January 2000 and 15 May 2004 or made investments in your production capacity between 1 January 2000 and 15 May 2004."

[42] The objective criteria used to assess applications for an award from the National Reserve are set out under section 7 of the National Reserve Guidance. In relation to 'Investor', p4 of the Guidance states:

> "This category applies to farmers who may have purchased land, entered into long-term leases (six years or more) for land or made other investments in their business by 15 May 2004. As a result of this expansion, their subsidy claims may have increased above the levels recorded in the reference period 2000 – 2002. This expansion would not have been reflected in their Historic Reference Amount statements and provision has been made for farmers in these circumstances to receive an award from the National Reserve."

[43] Page 5 of the National Reserve Guidance refers to 'eligibility criteria', as follows:

> "Before arriving at a definitive conclusion in terms of your eligibility for an award from the National Reserve, we will examine both the individual subsidy scheme position and the whole farm subsidy claims position to ensure that there has not been an increase in one sector offset by a reduction in another. *Only a net increase in overall subsidy claimed will result in an award from the Reserve."* [my emphasis]

[44] The National Reserve Guidance refers to the two methods of calculation for the Investor category, i.e., the default methodology and the alternative methodology.

Page 10 of the Guidance, under the heading of 'Alternative approach to investment – alternative methodology', provides:

> "As an Investor, you have the option of choosing to present your own evidence of how an investment in production capacity increased your ability to claim CAP scheme subsidies as an alternative to the Default Methodology described above. This is called the Alternative Methodology. *If you take this option, you must provide detailed evidence of*:
>
> - the nature of your investment;
> - the scale of this investment;
> - *a direct link between the scale of the investment and your increased ability to claim subsidy under the old subsidy scheme rules*; and
> - why your 2004 subsidy claims did not reflect the investment undertaken.
>
> In assessing your evidence, the Department will also examine your claims history to see if you have reduced your claims in other subsidy bearing enterprises that may result in a reduction in the size of any award made from the Reserve."

[45] The National Reserve Guidance then sets out the conditions which apply under the alternative methodology. At page 10 the condition titled, "Eligible Investment" provides:

> "Only those investments or part investments (in the case of a rolling programme) completed by 15 May 2004 are eligible for consideration. They must have increased directly your capacity to claim CAP scheme subsidy support. Investments will be considered on an individual basis."

[46] Finally, page 11 of the National Reserve Guidance refers to 'Calculation of an award using alternative methodology" which provides:

> "The award will be based on the additional units of CAP subsidy claims that you can show will be supported by your investment (and which are not, for some reason, reflected in your 2004 claims record).
>
> NOTE:

> You will be required to provide evidence and an explanation as to why the increased production was not reflected in your 2004 subsidy claims. You will also be required to prove that the additional units are directly related to the nature and scale of your investment."

Common Agricultural Policy Support Schemes (Review of Decisions) Regulations (NI) 2004

[47] Regulation 4 of the above named regulations refers to the establishment of the procedure for review of relevant determinations:

> "4. - (1) The Department may establish such procedure as it thinks appropriate for the review by it or on its behalf of a relevant determination.
>
> (2) The procedures established under paragraph (1) shall-
>
> (a) provide for a review of a relevant determination to be carried out on the application of the person to whom it was directed; and
> (b) provide for the manner of making any such application.
>
> (3) Any such procedure so established may, in particular, provide for consideration of the initial determination by such persons (not exceeding three) as the Department may appoint for that purpose, with a view to their making a report of their conclusions in relation to the initial determination and a recommendation as to the manner in which the matter should be finally determined…"

Department of Agriculture and Rural Development – Single Farm Payment Scheme - Guidance Booklet published June 2009 – Review of Decisions Procedure

[48] This guidance booklet provides information and guidance on the two stages of the review process where stage one is an internal review by the Review of Decisions team and stage two is a review by an external panel. At stage two the applicant has a choice of a written review or an oral review. On receipt of a stage two application, a Case Officer is assigned to the case to review the decision and provide a written report to the Panel for the hearing.

[49] Section 6 of the guidance states:

> "The Panel's recommendation is not binding on the Department and the final decision in relation to your case rests with the Minister and her officials."

50. Section 7 refers to how the external panel operates, as follows:

> "The External Panel is made up of two members, one from a legal background and the other from a farming background. Panel members are appointed by us. Before considering a case, Panel members are required to declare any conflict of interest that may arise…In such situations a Panel member will be excluded from that particular case.
>
> The Panel's role is to consider whether our decision complies with the framework of the relevant European and UK legislation. The Panel has no discretion to operate outside the rules of the scheme. The Panel cannot make recommendations on policy or regulatory interpretation."

Relevant affidavit evidence

Mr Joseph Kerr's affidavit (for the respondent) dated 11 February 2011

[51] Paragraph 20 of Mr Kerr's affidavit dated 11 February 2011, in respect of the review of decisions process, provides:

> "The Panel is not a tribunal…The remit of the Panel is to review subsidy related decisions against the framework of relevant European, UK legislation and agreed UK Policy and to consider whether the Department's decision is consistent within this framework. The Panel must restrict itself to the agreed policy and interpretations. The Panel does not have authority to consider the correctness of agreed policy or interpretation of EU Law. The Panel is asked to reach a conclusion on the facts of the case and make a recommendation to the Minister with responsibility for Agriculture and Rural Development…"

Mr Mark McLean's affidavit dated 11 February 2011

[52] At paragraph 17 of his affidavit, Mr McLean referred to the basis for the decision to require a direct link between the investment and a corresponding increased ability to claim subsidy:

> "However, it was recognised that in some cases, an investment may not have delivered increased subsidy claims in 2004. Therefore, an alternative methodology was offered. It is important to state that the objectives in terms of taking into account disinvestments, not rewarding exaggerated or speculative claims of what an investment might deliver, and basing SFP on the level of direct payments, which the investment would have (but not necessarily by 2004) delivered, remained in place. This was to ensure equal treatment between applications made under either methodology. Hence the guidance made clear that detailed evidence had to be provided of a direct link between the scale of the investment and increased ability to claim subsidy, had the old subsidy scheme rules applied and evidence as to why the applicant's 2004 subsidy claims did not reflect the investment undertaken. In addition, it outlined that the award would be based on the additional units of CAP subsidy claims that would be supported by the investment (and which were not, for some reason, reflected in the 2004 claims record)."

The respondent's pre-action protocol response letter dated 12 November 2010

[53] The basis for the decision to require a direct link between the investment and a corresponding increased ability to claim subsidy was also referred to in the below portion of the respondent's pre-action protocol response letter dated 12 November 2010:

> "Recital 17 clearly makes a direct link between investments and the potential subsidy that could be supported by the investment if the SFP scheme had not been introduced. Article 21(3) of the Commission Regulation (EC) 795/2004 also makes a link between investments and subsidy by limiting the increase in production capacity to only those sectors where a direct payment would have been granted in the reference period. In this respect the Department's guidance is compliant with the requirements and purpose of the Investor situation set out in the

> Regulations as it requires the applicant to demonstrate a direct link between their investment and the potential for direct payments had the SFP scheme not been introduced.
>
> The Department would point out that the National Reserve was established in the context of the introduction of the SFP scheme. SFP was introduced in 2005 but payments for the most part were based on paid claims in the 2000 – 2002 reference period. Because of the time lag, it was possible that farmers may have made investments which would have increased their subsidy claims after 2002 but with the introduction of SFP in 2005 would have seen their subsidy payments revert back to the average 2000 – 2002 level. It was for this purpose that the Investor category was introduced. It was not simply to provide awards to farmers who had made investments."

Applicant's submissions

Respondent's failure to properly direct itself as to Article 21 of Commission regulation (EC) Number 795/2004

[54] The applicant submits the respondent has misdirected itself as to the proper interpretation of Article 21 of the Commission regulation (EC) Number 795/2004 by adopting criteria based purely on subsidy claimed rather than on the capacity to claim subsidy. It is asserted this caused an unfairness to the applicant and failed to "ensure equal treatment between farmers" as required in Article 21 Commission regulation (EC) Number 795/2004.

The respondent has not complied with its own guidance and policy namely the National Reserve Guidance Booklet published March 2005

[55] The applicant refers to the National Reserve Guidance's description of "eligible investment" under the heading of 'Alternative approach to investment – alternative methodology' as set out in paragraph 45 above. It is contended the respondent's own policy clearly provides that capacity to claim subsidy rather than subsidy actually claimed is the defining factor.

The criteria adopted by the respondent are arbitrary and irrational

[56] It is submitted that measurement of increased capacity in terms of subsidies claimed rather than the ability to claim subsidy arbitrarily discriminates against the applicant. The applicant asserts that strict adherence to such criteria is, in the circumstances, irrational.

The respondent published its guidance in March 2005 at such a time when it was too late for the applicant or any farmer to take such necessary steps to ensure compliance with the criteria adopted

[57] The applicant argues that, insofar as the National Reserve Guidance can be interpreted as a policy that measurement of capacity will be by reference to subsidies actually claimed, then the adoption of this policy in March 2005, was too late for any farmer to take such necessary steps to ensure compliance with the criteria adopted. It is argued that guidance ought to have been issued during the subject year to ensure that farmers actually claimed subsidy at the relevant time.

The Department has without a rational basis departed from the decision of its own independent expert panel

[58] The applicant states this ground is self-explanatory and makes no further arguments.

The respondent's failure to provide the applicant a fair hearing before the Minister

[59] It is submitted that the impugned decision which is the subject of this application was taken by the Minister. The applicant argues this is not a case of delegation along the lines of the Carltona doctrine in Carltona.

[60] It is asserted the applicant has not had access to a hearing of the issues before the decision-maker.

[61] The applicant makes the point it was able to make representations before the Independent Panel; the Panel accepted such representations; and the Panel recommended the matter be looked at again by the respondent. However, it was the view of one of the respondent's officials that the Independent Panel's advice should be ignored. The applicant states this view was taken with the benefit of a legal opinion which the respondent has refused to disclose.

[62] The recommendation of the respondent's official was accepted by the Minister. The applicant submits while some of its representations made to the officials and the Independent Panel were passed on to the Minister, it was not given an opportunity to have a hearing or make its own direct representations.

[63] It is also asserted that the advices given to the Minister failed to reveal a number of vital factors which are listed in ground 3(h) of the amended Order 53 Statement dated 9 November 2011.

[64] It is argued the applicant's right to a hearing is enshrined in common law and Article 6 of the European Convention on Human Rights.

[65] In relation to the common law right to a hearing, the applicant refers to paragraph 7.31 of Judicial Review in Northern Ireland by Gordon Anthony and to Lord Bridge in Lloyd v McMahon [1987] AC 625, at 702.

[66] In reliance on paragraphs 7.35 and 7.36 of Judicial Review in Northern Ireland, the applicant submits it is a fundamental principle of common law that an individual who may be adversely affected by a decision is given advance notification of the central issue which the decision maker must address.

[67] The applicant says it was not informed the findings of the panel were going to be rejected or that advice was going to be given to the Minister that the panel's findings be rejected. Further, the applicant states it was not given any of the material given by the respondent to the Minister and it had no opportunity to comment on or make representations on the material.

[68] The applicant contends that the nature of the hearing required by the common law in any case will depend on the context that is set by the individual's right, interest, or expectation, and by the corresponding nature of the decision to be taken. However, in this instance, the applicant argues where the findings of the panel were rejected, a full oral hearing before the ultimate decision maker is the only process which would be fair. The applicant asserts as full a hearing as possible is required to eliminate both the unfairness itself and the appearance of bias.

Respondent's submissions

[69] The respondent's decision to refuse the National Reserve award was based on the fact the applicant failed to demonstrate any increase in production capacity would have resulted in an increase in direct, coupled subsidy payment had SFP not been introduced (paragraphs 69 – 75 of Mr Kerr's affidavit dated 11 February 2011 sets this out in detail).

Grounds 3(a) – (e)

[70] The respondent states the basis for its decision to require a direct link between the investment and a corresponding increased ability to claim subsidy (even where for some reason that increased capacity to claim subsidy is not actually manifested in the 2004 coupled claims actually made) is set out in paragraph 17 of Mr McLean's affidavit dated 11 February 2011 (as set out in paragraph 52 above) and to the portion of the respondent's pre-action protocol response letter dated 12 November 2010 (as set out in paragraph 53 above). It is argued this amounts to the objective criteria as envisaged, but not prescribed, in the grounding European Union legislation as illustrated in Recital 17 of Regulation 795/2004 and that, accordingly, the respondent has properly directed itself as to the content of Article 21 of EC Regulation 795/2004.

[71] The respondent submits the criteria it adopted are not restricted to reflect the pre-SFP subsidies claimed alone. It is asserted the fundamental point is whether a

farmer can actually demonstrate that the investment would have resulted in increased direct subsidy payments outside of the historic reference period years irrespective of the fact that no actual increased payment was made. The respondent contends this does amount to objective criterion and adequately addresses the question of equal treatment between farmers whilst avoiding market/competition distortion.

[72] The respondent refers to the basis of its refusal of the applicant's application for the National Reserve in paragraph 21 of its skeleton argument and submits it did not fall into the error, as alleged by the applicant, of focusing on the extent of the coupled subsidies paid as opposed to the increased capacity to claim.

[73] In reliance on Elbertsenit (Case C-449/08) ECJ it is contended that the European Union legislation is framed in such a fashion as to allow individual Member States a wide margin of appreciation in how National Reserve provisions will operate in each State.

[74] In respect of ground 3(d) in the amended Order 53 Statement which states the respondent's guidance was published too late for the applicant or any farmer to take necessary steps to ensure compliance with the adopted criteria, the respondent makes the point the guidance could not be published before the National Reserve was established in 2004. Further, it is submitted the National Reserve scheme was not designed as an opportunity for a farmer to capitalise and to 'mould' one's farm business to fit this category. Instead, it is asserted, the scheme was designed as a "sweeper" category to address pre-existing unfairness.

The challenge to the review process established under statute

[75] The respondent submits this issue is unconnected to and has no bearing upon the public law challenge to the respondent's decision to refuse the award from the National Reserve and, in any event, is internally flawed.

[76] It is asserted that the applicant made an application under the process of review in place in respect of decisions regarding National Reserve awards; it was not for the respondent to prevent the applicant from doing so; and it would not be appropriate for the respondent to presume the extent of information the applicant may have inputted into the stages of the review process.

[77] The respondent refers to Regulation 4 of the Common Agricultural Policy Support Schemes (Review of Decisions) Regulations (NI) 2004 which established the review process; to the parameters of the stage two external panel review as set out in section 7 of the respondent's guidance in relation to the Review of Decisions Procedure; and to paragraph 20 of Mr Kerr's affidavit dated 11 February 2011 which refers to the remit of the Panel. It is submitted that only the applicant would have been aware of the extent of the case it was in a position to bring to that review and it should have been able to gauge this against the remit of the Panel.

[78] It is contended that, as the applicant does not raise any issue with the review panel itself, no allegation of breach of natural justice can be borne out of the facts of this matter. The respondent, also, asserts that Article 6 ECHR does not have any application to the circumstances pertaining to this application where the mainstay of the challenge is that the respondent has failed to properly apply Article 21 of Regulation 795/2004 and has adopted criteria which are arbitrary and irrational.

[79] The respondent argues the decision which is the subject of this review was not arbitrary or pre-determined. The respondent points out that the applicant does not set out any detail of the basis of its challenge in this regard and simply states it is "self-explanatory". The respondent states the external panel's recommendations were that the respondent look again at the applicant's claim focusing on the 2004 position and that it look again at whether its guidance in the National Reserve Guidance is in keeping with European Union legislation. It is asserted both these recommendations were carefully and fully considered but that this did not result in overturning the outcome of the applicant's application for an award from the National Reserve.

[80] The respondent, in particular, points out that the applicant has not amplified on ground 3(f)(vi) which states the decision to cause the applicant to undergo an appeal was in bad faith.

The advices provided to the Minister were internally flawed and inadequate

[81] It is submitted Mr Kerr's evidence referred to in paragraphs 11 – 23 of his second affidavit dated 2 February 2012 clearly establishes the applicant's contentions in grounds 3 (h)(i), (iii), (iv) and (vii) are based on factual inaccuracy.

[82] In relation to ground 3(h)(ii), it is asserted that Ministerial decision-making cannot effectively and efficiently operate if it is to be expected that the high level decision-maker must complete the entire process without the benefit of advice from others and must instead undertake the entire process him or herself. It is contended that the provision of advice does not unfairly prejudice the outcome. The applicant says Ministers are entitled to obtain advice and to act on it accordingly depending on their consideration of same.

[83] The respondent contends that grounds 3(h)(v) and (vi) had no relevance to the decision facing the Minister and that Departmental officials must be allowed a wide margin of appreciation in deciding what material to include in advices to ensure decision-makers can effectively and efficiently focus on the pertinent issues.

[84] In respect of ground 3(h)(viii), the respondent submits the spread sheet showing hectares and livestock numbers during the reference period were included in Annex D of the submission to the Minister and that this was sufficient.

[85] The respondent asserts ground 3(h)(ix) goes to the substantive issue in this judicial review challenge and that it is difficult to see how the advices that the Minister is entitled to refer to 2003 rather than 2004 trespass into and fall foul of the contention in ground 3(h).

[86] In relation to ground 3(h)(x) and (xi) it is argued the legal advice, the Department Guidelines and the relevant European Union Regulations were considered by the officials providing the advice to the Minister and it was not necessary for the Minister herself to consider same.

No opportunity to consider advice provided to the Minister and to make representations directly to the Minister

[87] The respondent submits that ground 3(g) is a manifestly misconceived argument. In reliance on Bushell v Secretary of State for the Environment [1981] AC 75 and R (Edwards) v Environmental Agency (2006) EWCA Civ 877, is was argued that there is no rule of law establishing a Minister making a decision must give prior notice of the advice she is to receive from her officials in guiding the reaching of an outcome.

[88] The respondent asserts that the Panel recommendation is a 'recommendation' and the respondent makes the actual decision on the payment from the National Reserve. Further, the respondent says that a claimant who is dissatisfied with such a decision can challenge same by judicial review or other legal processes and potentially obtain sight of the advice in that context. It is argued, in the instant case, that as the Department's position on the applicant's entitlement to a payment from the National Reserve had remained consistent throughout the process there was no need or useful purpose in providing the advices to and seeking representations from the applicant post the external Panel stage. In reliance on paragraph 9 of Mr Kerr's second affidavit, it is contended, if the Department's position on the entitlement had changed or its basis for that position had changed or some new, material information had come to light, the respondent would have brought such a development to the applicant's attention and sought specific representations in advance of the matter going for final decision. However, such a situation did not arise in the present application.

[89] The respondent says the applicant has not pointed to a material change in circumstances that would have triggered a need for him to be given further information and an opportunity to make further representations in order to avoid a manifest unfairness.

[90] The respondent contends Article 6 of the ECHR was not engaged in the administrative decision-making process involving the applicant's application for a payment from the National Reserve.

[91] In reliance on Ex parte Doody, the respondent asserts that the requirements for fairness under the common law are flexible, reflecting the circumstances at hand. It is contended the applicable standard of fairness has been met in the present case as the applicant has been provided with all material information and has had the opportunity to make representations on the material issues in question as to whether he should be awarded a payment from the National Reserve. It is submitted, therefore, there was no need for the applicant to be provided with the advice to the Minister in order to comment on same.

[92] The respondent asserts there is no requirement, in law or otherwise, for the extraordinary step of a specific oral hearing before the Minister in the making of this administrative decision. In relation to ground 3(i), the respondent submits it is not correct that the applicant should have been informed of and given the opportunity to make representations on the fact the Department recommended the Panel's recommendation should not be adopted. It is argued this ground is not material to the question of whether the applicant was entitled to a National Reserve payment; the Minister was aware she was provided advice contrary to the recommendation of the Panel; and the applicant has not established the representations he would have made to the Minister if advance notification had been given that the Panel's recommendation was not to be adopted.

[93] The respondent contends the applicant has not provided any evidential basis in relation to ground 3(j)

Discussion

[94] It has been necessary to set out a considerable amount of background to place the legal issues arising in this case in their proper context. In its application to the National Reserve for the Single Farm Payment the applicant referred to its purchase of an additional 19.74 hectares prior to 2004 and that it kept 160 animals. Although no subsidy was claimed in 2004 the applicant requested that the *potential* 2004 subsidy premium on its animals should be taken into account when calculating an award under the Alternative Investor category. But as the Respondent has pointed out an investment in land alone would not have increased its capacity to claim CAP subsidy support. Under the old subsidy rules the applicant was required to show that its investment would have delivered subsidy payment in respect of the 160 animals in any year including subsequent years. No livestock subsidy was claimed by the applicant in 2004.In fact the applicant depopulated its herd in May 2004.The applicant says this was for good business reasons [see paragraphs 9-12 above] which involved selling the cattle not as beef but as "forward stores" where the purchasing farmer was able to claim the premium. The fact that these animals were available to the purchasing farmer to claim premium was reflected in the price obtained by the applicant.

[95] Central to the applicants complaint is the contention that the respondent acted unlawfully by imposing a requirement of an increase in production to be evidenced

by an entitlement to an increase in subsidy payments. If the applicant's arguments were correct it would have consequences which appear anomalous and discordant with the underlying purpose of the scheme as explained above. First, it would mean the applicant as cattle vendor gets an uplift in the price because the purchasing farmer can make a subsidy claim. Thus the value of the subsidy is reflected in part in the higher price obtained. Second, the purchaser can claim the subsidy. Third, the applicant would get an SFP payment calculated based on a capacity he could have realised but has chosen not to do so. In this scenario, two people are effectively making subsidy claims and the applicant gets a double benefit of an increased sale price on the cattle and an SFP based on a wholly theoretical capacity to claim CAP subsidy.

[96] As Mr Kerr explained [set out at para 23 above] in accordance with the published guidance the onus was on farm businesses to provide evidence that the investment *would* have delivered subsidy payments in any year, including subsequent years. Awards under the Investor category are made according to what has or would have been achieved under existing plans in place at the time. This applicant was not able to claim subsidy because of the business decision it made. I believe the fallacy in the applicant's argument is that the scheme was not intended simply to award farmers who had made investments. The aim, as explained at para 4 above, was to recognise the "special position" of some farmers whereby their SFP in 2005, if based on the historic reference period, would not be reflective of their farming business in the period immediately prior to 2005.

[97] The additional land was bought in February 2002 and has been accepted as an eligible investment. The applicant's subsidy claims were lower in 2004 than in 2003 and the respondent considered that the 2003 position was more reflective of the subsidy achieved by the investment. I agree with the respondent that the fact that higher subsidy payments may have been achieved if the applicant had taken different decisions is not a valid reason on which to base a National Reserve award. Moreover the decision is in keeping with the National Reserve Guidance [set out at paragraphs 43-45 above] which makes it clear that only a net increase in overall subsidy claimed or increased ability to claim will result in an award. This applicant founds on the latter but it had by its business decision disabled itself from claiming (albeit they got an increased price on the cattle because the purchasing farmer could claim a CAP subsidy).

[98] I reject the applicant's related argument that there is any inconsistency with the respondents approach and Article 21 of Commission Regulation 795/2004. Recital 17 makes a direct link between the investments and the potential subsidy that could be supported by the investment if the SFP scheme had not been introduced. Article 21(3) also makes the link between investments and subsidies by limiting the increase in production capacity to those sectors where a direct payment would have been granted in the reference period. Accordingly I accept the respondent's submission that the departmental guidance is EU compliant.

[99] As regards the various procedural aspects of the challenge summarised at paragraphs 32 (f) – (j) I consider them devoid of legal merit for the reasons advanced by the respondent and set out above at paragraphs 88 - 93.

[100] By reason of the above the application for judicial review is dismissed.