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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY BARNWELL FARMS LIMITED

KEEGAN J

Introduction

[1] This judicial review application is dated 3 May 2019. It is brought by the applicant against the Department of Agriculture, Environment and Rural Affairs in Northern Ireland ("DAERA" also referred to as "the Department"). It is in relation to a farming subsidy the determination of which is comprised in a decision of 5 February 2019 which rejected the applicant's 2015 single application under the basic payment scheme (BPS). I granted leave on 12 November 2019 on a number of grounds namely:

- (i) Breach of EU law.
- (ii) Breach of policy/legitimate expectation.
- (iii) Irrationality.
- (iv) Failure to state reasons.

[2] The applicant seeks an order of certiorari to quash the impugned decision, a declaration that it is *Wednesbury* unreasonable and an order of mandamus requiring that the decision be retaken. Mr Mercer QC appeared with Ms Fionnuala Connolly BL on behalf of the applicant, Mr Philip McAteer BL appeared for the respondent. I am very grateful to counsel for their oral and written submissions in this case.

Legal context

[3] The background to this case is the reform of the EU Common Agricultural Policy (CAP) which resulted in changes to area based schemes from 2015. The BPS was open to applicants from 2015 onwards by way of lodging a single applicant form (SAF) or by using the on-line service. The BPS replaced the Single Farm Payment Scheme on 1 January 2015. Under the BPS, a set of new payment entitlements were allocated to farmers who applied and who met the eligibility

conditions of the scheme. To claim BPS entitlements the following conditions have to be satisfied:

- (a) The applicant must be eligible to establish three BPS entitlements.
- (b) The applicant must be an active farmer.
- (c) The applicant must have three hectares of eligible land at his/her disposal on 15 May 2015.

[4] This scheme came about by announcement in 2014 by the Department of Agriculture and Regional Development (DARD now the Department of Agriculture, Environment and Rural Affairs - DAERA) who announced that under an EU Regulation this new BPS scheme would be introduced. The relevant regulation is Regulation (EU No. 1307/2013) of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the Common Agricultural Policy and repealing Council Regulation EC No. 637/2008 and Council Regulation EC No. 73/ 2009.

[5] Article 4 of Regulation 1307/ 2013 sets out definitions as follows:

- (1) For the purposes of this regulation, the following definition shall apply:
 - (a) Farmer means a natural or legal person, or a group of natural or legal persons, regardless of the legal status granted to such group and its members by national law, whose holding is situated within the territorial scope of the treaties, as defined in Article 52 TEU in conjunction with Articles 349 and 355 TFEU, and two exercises in agricultural activity.
 - (b) Holding means all units used for agricultural activities and managed by a farmer situated within the territory of the same Member State.
 - (c) Agricultural activity means:
 - (i) Production, rearing or growing of agricultural products, including harvesting, milking, breeding animals, and keeping animals for farming purposes.
 - (ii) Maintaining an agricultural area in a state which makes it suitable for grazing or cultivation without preparatory action going beyond usual agricultural methods and machineries, based on criteria established by Member

States on the basis of a framework established by the commission, or

- (iii) Carrying out a minimum activity, defined by Member States, on agricultural areas naturally kept in a state suitable for grazing or cultivation.

Article 9 reads as follows:

“Active Farmer

(1) No direct payments shall be granted to natural or legal persons, or to groups of natural or legal persons, whose agricultural areas are mainly areas naturally kept in a state suitable for grazing or cultivation and who do not carry out on those areas the minimum activity defined by Member States in accordance with point (b) of Article 4(2).

2. No direct payments shall be granted to natural or legal persons, or to groups of natural or legal persons, who operate airports, railway services, waterworks, real estate services, permanent sport and recreational grounds.

Where appropriate, Member States may, on the basis of objective and non-discriminatory criteria, decide to add to the list in the first subparagraph any other similar non-agricultural businesses or activities, and may subsequently decide to withdraw any such additions.”

[6] Further provisions deal with the Basic Payment Scheme and Single Area Payment Scheme. Article 21 deals with basic payment entitlements. Article 24(2) deals with first allocation of payment entitlements and reads:

“(2) Except in the case of *force majeure* or exceptional circumstances, the number of payment entitlements allocated per farmer in 2015 shall be equal to the number of eligible hectares, which the farmer declares in his aid application in accordance with point (a) of the first subparagraph of Article 72(1) of Regulation (EU) No 1306/2013 for 2015 and which are at his disposal on a date fixed by the Member State. That date shall be no later than the

date fixed in that Member State for amending such an aid application.”

Article 32 deals with activation of payment entitlements:

“(1) Support under the basic payment scheme shall be granted to farmers, by means of declaration in accordance with Article 33(1), upon activation of a payment entitlement per eligible hectare in the Member State where it has been allocated. Activated payment entitlements shall give a right to the annual payment of the amounts fixed therein, without prejudice to the application of financial discipline, of reduction of payments in accordance with Article 11 and of linear reductions in accordance with Article 7, Article 51(2) and point (c) of Article 65(2) of this Regulation, and to the application of Article 63 of Regulation (EU) No 1306/2013.”

Article 33 deals with declaration of eligible hectares.

“For the purposes of the activation of payment entitlements provided for in Article 32(1), the farmer shall declare the parcels corresponding to the eligible hectares accompanying any payment entitlement. Except in the case of *force majeure* or exceptional circumstances, the parcels declared shall be at the farmer's disposal on a date fixed by the Member State, which shall be no later than the date fixed in that Member State for amending the aid application as referred to in Article 72(1) of Regulation (EU) No 1306/2013.”

[7] Regulation EU No. 1307/2013 of the European Parliament and of the Council is supplementary and establishes rules for direct payments to farmers under support schemes within the framework of the Common Agricultural Policy and amending Annex X. I have been referred to Recital 16 in this regulation which reads:

“In line with the case law of the Court of Justice of the European Union, payment entitlement should be allowed to the person enjoying decision-making power, benefits and financial risks in relation to the agricultural activity on the land for which such allocation is requested. It is appropriate to clarify that this principle applies in particular where an eligible

hectare is subject to an application for allocation of payment entitlements by more than one farmer.”

The Guidance

[8] The Department of Agriculture and Rural Development issued a Guidance to Area Based Schemes 2015. This is an important source of information as to how the scheme is administered and so I will refer to it in some detail as follows:

“2.2 Eligibility for the Basic Payment Scheme

Under the Basic Payment Scheme a set of new payment entitlements will be allocated to farms who apply and meet the eligibility conditions of the scheme. To establish and claim the Basic Payment Scheme entitlement you must meet the following three key conditions:

(1) You must be eligible to establish three Basic Payment Scheme entitlements. Most applicants, who submit a 2015 single application form, will have an automatic right to receive an allocation of Basic Payment Scheme entitlements because they activated at least €100 of single farm payment entitlements in 2013. If you do not meet the condition of having activated at least €100 of single farm payment entitlements in 2013 then you will not be eligible to establish entitlements unless you can use one of the following alternatives - apply for an allocation of entitlements from the regional reserve, see page 10 and page 73 for more information; - acquire the right to an allocation of entitlements using a private contract clause, see page 11 for more information. - Establish entitlements by providing verifiable evidence of the production activity that you were undertaking on 15 May 2013 if you have never held single farm payment entitlements previously; see page 11 for more information.

(2) You must be an active farmer. Payment entitlements will only be allocated to the person having decision-making power, benefits and financial risks in relation to the agricultural activity on the land for which an allocation of entitlements is requested. This is referred to as the active farmer requirement and is based on an all agricultural activity carried out

on the land in 2015. See page 12 for more information. Businesses which operate airports, railways services, waterworks, real estate services, permanent sport and recreational grounds, known as the negative lists, will be prohibited from receiving Basic Payment Schemes entitlements and payments unless they meet certain conditions. See page 42 for more information.

(3) You must have three hectares of eligible land at your disposal on 15 May 2015. The minimum eligible area for which the establishment of entitlements can be requested in 2015 and the minimum claim size (number of entitlements that must be activated each year before any payment can be made) will be three hectares. If your holding is below the minimum claim size, you will need to decide whether to continue claiming and if you do, you will need to increase the amount of land you farm in 2015 to meet this requirement. If your holding is on or just above the minimum claim size of three hectares, you may want to consider increasing the amount of land you farm in 2015 as a small reduction in area due to mapping revisions such as field boundary changes or the presence of ineligible area could result in your eligible area falling below three hectares and no entitlements being allocated. The date on which the land has to be at your disposal in order to claim direct payments remains 15 May. It is important that you only establish entitlements on eligible land. You should not claim on fields where there is a doubt about its eligibility. If we later find that entitlements have been established on ineligible areas, your entitlements may be confiscated which could result in a substantial reduction in your basic payment scheme, greening and young farmers payment in future years. Go to page 16 for more information on land eligibility.

Paragraph 2.4 active farmer requirements

To the allocated entitlements in 2015 under the Basic Payments Scheme you must be able to demonstrate that you enjoy the decision-making power, benefits and financial risks in relation to the agricultural activity on each parcel of land for which an allocation of entitlements is requested. This assessment is based

on all agricultural activity carried out on the land parcel throughout 2015. All three elements - decision-making power, benefits and financial risks - must be fulfilled by you.

2.4.1 Land let under conacre and other land tenure arrangements.

For the purpose of allocating Basic Payment Scheme entitlements, the nature of the land tenure arrangement is irrelevant (subject to the claimant having the land at his disposal on 15 May 2015). The key issue is the agricultural activity taking place on the land and what is happening in practice, and in particular, who enjoys the decision-making powers, benefits and the financial risk of that agricultural activity. The active farmer requirements are of particular relevance for land let under conacre arrangements. If you are the landowner and you let your land out in conacre, it will generally be the case that it is your conacre tenant who carries out the main agricultural activity on the conacre land and enjoys the decision-making power, benefits and financial risks in relation to this agricultural activity. Therefore, the tenant will be able to establish Basic Payment Scheme entitlements and claim payments in 2015 on the land not due as a landowner. If you consider that there are exceptional circumstances which lead you to believe that you can meet the active farmer requirement, even though the land is let out, then it will be up to you as a landowner to demonstrate how you meet the active farmer requirements.

2.4.2 Selling grass/silage

You must be able to demonstrate clearly that you enjoy the decision-making power, benefits and financial risks in relation to the agricultural activity being carried out on the land over the course of the year. This will be much easier to demonstrate if the agricultural activities on the land throughout the year have been carried out by you alone, or by your employee or an independent contractor engaged by you, and the farmer who eventually purchased the

silage has no involvement in its production or storage. Two examples are given as follows:

Example 1 - The landowner himself purchases and applies all the inputs required to grow the grass crop. The landowner engages a contractor to harvest the grass as round baled silage when it is ready and the bales are then stored on the landowner property. After advertising the silage for sale, the landowner sells the round bales to a number of other farmers at the best available market price. No other farming activities have taken place on the land over the course of the year. In this scenario, the landowner would be able to make a strong case that he should be allocated Basic Payment Scheme entitlements because he took all of the management decisions, obtained the benefits from the agricultural activity, carried the financial risks in relation to that activity and there was no other activity on that land over the course of the year.

Example 2 - The landowner agrees that a farmer who has taken the land in conacre in previous years should take the grass from the field this year. The farmer arranges for delivery of the inputs and applies the inputs required to grow the grass. The farmer subsequently harvests the grass and places it in his silo when ready. The landowner pays for the inputs and pays the farmer for harvesting costs. The farmer pays for the grass and the overall financial outcome is similar to conacre rent. This scenario would appear to have the same practical and financial impact as conacre. The decision-making powers, benefits and the financial risks of the agricultural activity appear to reside primarily with the farmer and not the landowner. Therefore, it would be very difficult for the landowner to demonstrate to the Department that all three of these requirements have clearly been met by him in respect of this activity and hence, very unlikely that the landowner would be allocated Basic Payment Scheme entitlements.

2.4.8 Provision of evidence

The Department will carefully assess each application received to consider whether the active farmer requirements have been met. The assessment of

whether an applicant meets the active farmer requirements will be based on individual circumstances. No decisions will be taken in advance of applications being submitted and no blanket exclusions will apply. Where there is any doubt as to whether the active farmer requirements have been met, further evidence will be requested. The outcome in each case will depend on the evidence submitted which demonstrates what is happening in practice and not just what may be recorded in writing. The onus is on you as applicant to be able to prove that you are eligible to be allocated Basic Payment Scheme entitlements in relation to the land declared on your application. If you are unable to provide satisfactory evidence when asked to show that you meet the scheme requirements, then your application may be rejected and no entitlements allocated. The following are examples of evidence that may be required:-

Accounts for the farming business prepared by qualified accountant - receipts relating to output and inputs - bank statements showing income/expenditure relating to receipts - contract rearing agreements - share farming agreements - evidence demonstrating that your agricultural activity has a different practical and financial outcome compared to renting land and conacre - an explanation of your farming activities, your personal involvement in these and how this can be reconciled with any other documentary evidence relating to the farm business. Additional evidence may also be required. It is important that you can demonstrate that you meet the active farmer requirements on all land being declared to establish and activate entitlements in 2015. Attempting to establish Basic Payment Scheme entitlements and land on which you carry out no agriculture activity or where the activity is carried out under the control of another farmer is not allowed, even if you are clearly farming other areas of land which you declare. If crops are being grown on the land, you may need to be able to demonstrate that you are growing and harvesting the crops. Therefore you should retain all evidence that would allow you to do so. If you are asked to provide evidence, it is important that you do so within any

deadline specified by the Department, otherwise your application may be rejected.”

The Impugned Decision

[9] This is contained in a letter of 5 February 2019. In this letter, the decision-maker, Mr Doherty, states that he has decided not to accept the Panel recommendation and that the reasons are in Annex 2. He states that this means the original decision will not be changed and so the 2015 basic payment application has been unsuccessful. Annex 1 sets out the Panel findings which are first in time. These I set out *verbatim* as follows.

“The Panel Findings

The Panel heard from Robert Calvert (nephew of late Michael Gerard Calvert) and Gillian Cheatley (Ulster Farmers’ Union). Robert Calvert submitted a time line to the background of this case (Annex 1) and indicated that he is now running the farm on behalf of Barnwell Farms and his aunt, Vie Calvert. They have amalgamated the herds from Barnwell with Robert Calvert’s own herd with the intention of restocking the beef enterprise in 2018 to run along with the current cereal enterprises. Robert Calvert said that his uncle had been passionate about environmental issues on his farm and had won a UK award (Nature of Farming) for conservation on an active farm. The change in enterprise from beef farming to cultivating grass, cereals and silage in 2014 was solely as a result of his uncle’s health issues (prolapsed discs in back). In 2014 Michael Calvert was diagnosed with colon and liver cancer. He passed away in 2017.

Robert Calvert said that the farm was always actively farmed and that the change in enterprise in 2014 did not change this. Gillian Cheatley noted that Barnwell Farms took all the risk in relation to growing grass and cereals and worked closely with AFBI in using recognised techniques including grass plate meter. She said it was up to the customer as to whether they took the grass on a fresh weight basis. Robert Calvert said that it had not been necessary to advertise to sell the grass as they had no difficulty in finding customers locally. Indeed, they had more farmers asking to buy grass than they could supply. Gillian

Cheatley said that perhaps the operation was unconventional in terms of farming methods in 2014 and 2015, but this does not mean that it was not active farming. And was necessitated by circumstances beyond their control.

Robert Calvert said that his uncle had not gone down the route of letting his land in conacre as he was passionate about conservation of his land and it was very important to him to keep control of this. As evidence of this he had purchased a Kubota All-Terrain vehicle to spot spray in an environmentally friendly fashion. When questioned about sale of fertiliser in the Barnwell accounts they assume the accountant has included the sale of a fertiliser spreader with other items. Robert Calvert submitted an invoice for same (Annex 2).

The Panel notes that, in several places in the technical assessment and other papers too, the management of cattle owned by other farmers which grazed on Michael Calvert's land. The Department has referred to the risks of this belonging to the owner of the animals and this indeed is correct. However, this is a separate enterprise and should not be applied to consideration of the enterprise of Barnwell Farms. Mr Calvert's risk related to the cultivation, harvesting of grass, silage and cereals in that these were his only products.

Therefore, the Department's assessment of the decision making power, benefits and financial risks in Mr Calvert's case should relate only to the cultivation of grass, silage and cereals. The Panel accepts the explanation and evidence provided by the applicant. The Panel recommends that the Department's decision in this case should be changed as the Panel is satisfied that there is sufficient evidence that Barnwell Farms is an active farm."

The Reasons for the decision provided on 5 February 2019

[10] Annex 2 is entitled "The Department's Position". The reasons given for departing from the Panel decision are as follows. Again, I set these out in full and *verbatim*:

“To establish and claim basic payment scheme entitlements, an applicant is required to meet a number of key conditions, one of which being that an applicant must be an active farmer. Payment entitlements can only be allocated to the person enjoying the decision making power, benefits and financial risks in relation to the agricultural activity on the land for which an allocation of entitlements is requested. This is referred to as the active farmer requirement and is based on all agricultural activity carried out on the land in 2015. An applicant to the 2015 Basic Payments Scheme must be able to demonstrate to the Department’s satisfaction that they have the decision making power, benefits and financial risks in relation to the agricultural activity carried out on all the land for which an allocation of entitlements is sought.

Mr M Calvert on behalf of Barnwell Farms submitted a Single Application Form (SAF) on 7 May 2015 seeking to establish payment entitlements on 72.9 ha of land under the 2015 Basic Payment Scheme. Prior to making a final decision on the application, the Department felt more evidence was required to support this claim. Mr M Calvert submitted an AFE1 checklist and additional evidence on 29 July 2015, which was reviewed by technical staff, including an assessment panel. Mr M Calvert was also invited to attend a panel interview on 29 February 2016.

However, the Department concluded that Mr M Calvert/Barnwell Farms did not meet the active farmer requirement. While the information and evidence presented by Mr M Calvert did show that some agricultural activity was being undertaken, the extent of this agricultural activity was not commensurate with all the land declared on the 2015 application.

Mr M Calvert submitted an application for a Stage 1 review on 26 April 2016 citing lengthy grounds for review, summarising the farming operations at Barnwell Farms and explaining why, in his opinion, the Department’s original decision, and the findings of the interview panel were incorrect. Mr M Calvert

also submitted further information and evidence on 12 September 2016.

The case was reviewed and reassessed by a technical assessor, who sought advice from DAERA Policy. As part of the Stage 1 review, the Department wrote to Mr M Calvert/Barnwell Farms on 15 November 2016 requesting further evidence. Within this letter, the Department highlighted and requested the specific information required to progress the Stage 1 review. The additional information and evidence submitted by Mr M Calvert in response to the request was extensively reviewed and assessed by technical and policy staff within the Department. It was again concluded that the decision should not be changed. The Department also had concerns over methods used for estimating yield, measuring tonnage and pricing the grass sold.

In preparing the Stage 2 case report, Mr M Calvert's case was again extensively reviewed and assessed by technical and policy staff, taking into consideration all information and evidence previously submitted by Mr M Calvert/Barnwell Farms. However, the Department's decision to find Barnwell Farms not active remained unchanged. The Stage 2 technical assessor concluded that while there was a certain level of activity carried out, the evidence supplied was not sufficient to demonstrate that Mr M Calvert/Barnwell Farms was responsible for the majority of decisions/risks in 2015. Stage 2 recommended that the original decision remain unchanged.

Mr Robert Calvert represented the late Mr M Calvert at the Panel hearing on 29 August 2018 along with Gillian Cheatley (UFU). The Panel recommended that the original decision should be changed as they were satisfied that there was sufficient evidence to show that Barnwell Farms met the active farmer criteria and all the land claimed.

The findings and recommendations of the Panel were presented to a Principal Agricultural Inspector for consideration prior to a final recommendation being made to the DAERA Head of Paying Agency. On the

basis of advice from policy regarding the acceptability of the method used to estimate the yields of grass; and that no weight dockets had been supplied for the grass sold, the Principal Agricultural Inspector remains of the opinion this business does not meet the active farmer requirement.

Taking into account the comments of the Principal Inspector and the numerous technical assessments of Barnwell Farms, it is still the Department's view that it has not been satisfactorily shown that Barnwell Farms took all decisions, and bore all risks and benefits in relation to producing and selling of grass. Therefore, I have not accepted the Panel's recommendation the original decision will not be changed."

From the foregoing the various stages in the process are made clear. Counsel have also taken me to the documents at each stage. Suffice to say I have examined these although I do not recite each and every part of them for the purposes of this ruling.

Evidence of the Applicant

[11] This is comprised in affidavits filed by Mr Robert Calvert who currently manages the farm activities of Barnwell Farms. The affidavits are dated 3 May 2019, 3 February 2020 and 15 February 2020. The applicant also relied on an affidavit of a solicitor Ms Andrea McCann of 3 May 2019 and 5 February 2019. There is further affidavit evidence from Ms Gillian Cheatley who is relied upon by the applicant as an expert and who has filed an affidavit dated 20 May 2019. I have considered all of this evidence.

[12] In the first affidavit of 3 May 2019 Mr Calvert explains that he is a farmer and that he assists with the business in conjunction with Viola Calvert the director of Barnwell Farms Limited. Mr Michael Calvert was director from 2005 until his death on 17 July 2017. Mr Robert Calvert is a nephew responsible for the day to day running of the farm.

[13] The affidavit explains the chronology of decision making as follows. On 7 May 2015 the applicant lodged a single application under the Basic Payment Scheme with the Department. By letter dated 13 May 2015 the Department acknowledge receipt of the single application. The late Mr Michael Calvert set out written representations comprised in a letter of 29 July 2015 with supporting documentation. In that he submitted that the farm clearly retained decision-making power, benefits and financial risks in relation to the farming enterprise namely the cultivation and selling of grass. By letter dated 23 March 2016 the application was rejected on the basis that the Department was not satisfied that the applicant met the

active farmer requirements. Mr Calvert then explains that the applicant lodged a Stage 1 review which was received by the Department on 27 April 2016. In it the applicant asserted that it met all of the criteria on this land and accompanying documentation was provided. The Department requested further information by way of a letter dated 15 November 2016 and this was replied to by way of correspondence of 28 November 2016. The decision after this Stage 1 review was that the Department advised that the original decision was correct.

[14] The applicant then lodged a Stage 2 review and a request was made again for active farmer status to be accepted. This form was received on 10 April 2017. Further documentation was provided. By letters dated 26 June 2018 and 10 July 2018 the Department set out advice on the independent Stage 2 panel hearing which forms part of the process. Mr Calvert passed away on 14 July 2017.

[15] A hearing took place before the Independent Panel on 29 August 2018. The panel was composed of a Mr Ronnie Pedlow and a Mr John King. Mr Robert Calvert also attended the appeal hearing with Ms Gillian Cheatley from the Ulster Farmers Union. Ms Cheatley had prepared and lodged a report to the panel in which she supported the applicant's case. A case report was prepared by the Department dated 7 June 2018. It stated as a Stage 2 recommendation that:

“The Department has reviewed this case and recommends that the original decision should not be changed. Barnwell Farms has not satisfied the Department that they meet the 2015 requirement for active farmer.”

[16] The Independent Panel recommended that the Department's decision should be changed as the panel was satisfied that there was sufficient evidence that Barnwell Farms is an active farm. The panel noted from the technical assessment and other papers that there were cattle owned by other farmers which grazed on Mr Michael Calvert's farm but determined that the risk of this belonged to the owner of the animals. The panel stated that this was a separate enterprise and should not be applied to consideration of the activity of Barnwell Farms in the harvesting of grass, silage and cereals. The Independent Panel decided that Mr Calvert's risk related to that enterprise as those were his only products.

[17] The Independent Panel therefore concluded that the Department's assessment of the decision-making power, benefits and financial risks in Mr Calvert's case should relate only to the cultivation of grass, silage and cereals. By letter dated 5 February 2019 the Department's decision was made and communicated to the applicant namely that the Department did not accept the panel's recommendation and decided that the original refusal of the applicant's basic payment application should be maintained.

[18] In his affidavit Mr Calvert also sets out concerns about the impugned decision. He states the estimated loss to the farm of the impugned decision falls into two categories:

- (a) The actual amount of the single farm payment during the year 2015 until now which is approximately £66,000.
- (b) The effect of the non-payment of the single farm payment on the development and future planning of the farm.

Mr Calvert states that new ventures which were being decided on had to be put on hold as cash might now not be available to see them through due to the effect of the impugned decision.

[19] A number of additional points are raised against the Department's case which was contained in the pre-action protocol response which I summarise as follows:

- (a) Mr Calvert disputes the issue of information not being provided. He points out that on 14 December 2016 Mr Michael Calvert was unable to speak due to the devastating effect of his cancer and that this was obvious.
- (b) He refers to the fact that grass documents were not made a requirement as evidence of grass yield estimate.
- (c) He refers to the fact that the Department's solicitor sets out the findings of a technical assessor who had not previously been involved in the case.
- (d) He refers to the extraordinary length of time taken for the global assessment of the single application under the BPS meant that Mr Michael Calvert could no longer actively defend his position or claim exceptional circumstances due to his health as no decision was taken until long after his death.
- (e) He says in 2015 local farmers who were purchasing grass undertook to cut/lift the grass themselves. This was due to Mr Calvert's on-going medical treatment and the possibility that the grass might not be harvested at the appropriate time.
- (f) He states that no importance has been attached to the applicant's desire to farm the land in such a way that there would be minimal use of pesticides, minimal disturbance of wildlife, no pollution of waterways. He makes the point that in a conacre system the control of such things may be eroded.

- (g) He makes the point that the appeal process has caused significant stress to Mr Calvert who was ill.

[20] The affidavit of Ms Gillian Cheatley is dated 20 May 2019. She explains that she is a senior technical officer at the Ulster Farmers Union and has represented farmers for the purpose of external second stage review appeals since 2009. She refers to the fact that she took part in the Independent Panel hearing. At paragraph 10 of this affidavit Ms Cheatley references the Independent Panel hearing as follows:

“The core issue for the hearing before the independent panel was whether the applicant satisfied the active farmer criteria. The independent panel recommended that the proposed respondent’s decision should be changed and the panel was satisfied that there was sufficient evidence that Barnwell Farms is an active farm. It accepted the explanation in evidence provided by the applicant. The panel noted in several places in the technical assessment and other papers too, the management of cattle owned by other farmers which grazed on Mr Michael Calvert’s land. The panel agreed with the proposed respondent’s assessment that the risk of this belongs to the owner of the animals but stated that this was a separate enterprise and should not be applied to consideration of enterprise of Barnwell Farms. Mr Calvert’s risk related to the cultivation, harvesting of grass, silage and cereals in that these were his only products. The panel therefore concluded that the proposed respondent’s assessment of the decision-making power, benefits and financial risks in Mr Calvert’s case should relate only to the cultivation of grass, silage and cereals.”

[21] In paragraph 14 of her affidavit Ms Cheatley offers her opinion that the decision made on 5 February 2019 was wrong. She also makes three additional points which I summarise as follows. Firstly, she refers to the fact that the impugned decision cites that the method used to estimate yields of grass in the absence of weight dockets was unacceptable. She refers to the fact that Mr Calvert had taken on the laborious task of measuring grass on a weekly basis and with the use of CAFRE (College of Agriculture, Food and Rural Enterprise research figures), had developed a spreadsheet to calculate the dry matter/HA/day (hectares per day to tonnes per acre per week for each individual yield). The Independent Panel agreed that Mr Calvert had produced sufficient evidence to meet the definition of an active farmer although the means by which he actively farmed was complex. He did meet all the criteria by bearing all risks having all decision-making powers and benefits in relation to producing and selling of grass crop. Ms Cheatley also highlights the fact

that in the impugned decision, the respondent did not state the reasons for the conclusions and specifically why it disagreed with an important finding by the Independent Panel which was clearly relevant to the active farm test.

[22] In his second affidavit of 4 February 2020 Mr Calvert also refers to some additional matters. In particular he refers to the issue of weight docketts and avers that weight docketts were not required as a means of estimating yield. He points out that there is in fact no reference to any requirement of weight docketts in the guide to area based schemes 2015. He states at paragraph 6 that:

“Farmers regularly sell and purchase fields of crops through a visual assessment. The purchasing farmer will walk through the crop and then offer a price with both buyer and seller coming to an agreeable price. The purchasing farmer will then harvest the crop and transport it to their farm.”

In this regard he submits some anecdotal evidence in relation to two of the largest contractors in Northern Ireland. At paragraphs 7 and 8 of this affidavit Mr Calvert also avers that weighing loads of silage is not a regular practice. He states that he was advised on making his own enquiries that silage harvesters that have a yield in dry matter estimator have only been available since 2018 and cost £25,000. He states in his affidavit that results are poor and it must be calibrated several times per day with different field and weather conditions. However, he points out that the contractors questioned whether these would be used. At paragraph 10 of his affidavit he also points out that advice was taken from AFBI/CAFRE in relation to weekly grass growth rates. He states that he spoke to a person who he believes was a Dr Debbie McConnell, a senior scientist and diary research project leader at AFBI's agricultural branch. He states that the respondent's averment in the affidavit evidence that weekly grass growth rate figures to individual fields was not convincing appears to contradict the published advice on the respondent's own website from April 2015 which positively encouraged farmers to make use of the weekly grass check information provided by AFBI and CAFRE to match predicted grass growth. He also refers to the use of a grass plate metre and at paragraph 13 states that his understanding is that a grass plate metre is one of the most accurate methods of estimating the yield of grass in a field and it does not require any weight docketts.

Evidence of the respondent

[23] The evidence of the respondent is contained in an affidavit from Mr Brian Doherty, Deputy Secretary with responsibility for central services and contingency planning and head of paying agency in DAERA. This is dated 16 January 2020. In this affidavit Mr Doherty explains the scheme background and eligibility requirements by reference to the guidance and the regulations. He also refers to the technical assessment which took place in this case and states as follows:

“Following an applicant’s submission of the AFE1 and supporting evidence the responses were assessed by the Department on a case by case basis. Each application was subject to comprehensive and detailed technical assessment by a departmental grade 3 technical assessment officer and a 2015 active farmer application assessment form was completed.”

[24] He then refers to the review process in detail. He highlights the process of consideration and determination of the applicant’s application. He states that it is clear that the respondent and the applicant had a process of exchange of information and interviews. In particular at paragraph 56 of his affidavit Mr Doherty refers to an interview of the applicant which concluded that the applicant was actively farming part of the land claimed in the 2015 SAF, through the keeping of two horses and the production of silage/haylage and hay for sale. He points out that the applicant argued that grass was produced in other areas of the farm and was sold on a fresh weight basis, calculated by using grass growth figures published by CAFRE and AFBI, and that this grass was sold to several local farmers. The applicant indicated that he fertilised his land and then sold the grass for silage or grazing to these local farmers. The applicant claimed he offered a contract grass cutting service, but two of his grass customers undertook the grass harvesting themselves, while another customer carried out a zero grazing activity on the land after cutting it for round bale silage. Mr Calvert claimed a fourth customer paid for two cuts of silage, applied further fertilizer himself and subsequently grazed the aftermath. The applicant checked the cattle while they were on the land. Mr Doherty stresses that the applicant did not provide any contracts with these customers to support his claims.

[25] At paragraph 58 of this affidavit Mr Doherty states:

“The technical interview panel noted that the activities carried out by the local farmers on the applicant’s land, were very similar to a conacre arrangement. They acknowledged that the applicant bore some risk in his enterprise and carried some financial risk, however it was not evident that the applicant was farming all the land over the whole year nor that he enjoyed the agricultural production benefits or decision-making powers on all of the land claimed on his 2015 SAF. The panel therefore concluded that the applicant did not meet the criteria of an active farmer.”

[26] Mr Doherty then refers to the Stage 1 and Stage 2 review process and the decision of the Independent Panel. At paragraph 77 he deals with his decision and

his conclusions. He states that following the panel's finding the Department gave advice and the principal technical assessor did not agree with the panel's view and concluded that: "DAERA still consider this business to be inactive based on the information supplied by policy regarding estimating yields of grass. No weight dockets have been supplied for grass sold". Mr Doherty points out that subsequently, departmental officials provided him with a cautionary submission on 30 January 2019 for his consideration and to assist him in reaching his decision. This contained three annexes. He then sets out his decision. At paragraph 81 he states that "in taking my decision I was content that this applicant met the first two key conditions to establish entitlements. However, the Department identified that further evidence was required to ascertain that the applicant met the active farmer requirements for all the land for which it was seeking to establish entitlements". He refers to the guidance and states that an applicant must be able to demonstrate, using evidence that they meet the Department's active farmer requirements. He states in his affidavit that despite having been provided with six opportunities to do so as set out above this applicant has failed to satisfy the Department that they were actively farming all the land for which they had claimed.

[27] Mr Doherty also deals with the issue of weight dockets as follows. At paragraph 84 of his affidavit Mr Doherty states that the policy has been addressed. He states that the Department asked for weight dockets from grass sellers as it considered that to be the only reliable way of measuring yield of fresh grass sold per-field. He states that the Department did consider the evidence the applicant provided and was prepared to consider any other evidence provided by the applicant. Mr Doherty avers that DAERA was simply not aware of an alternative acceptable method of measuring grass harvested from a field to date. He states that the application of AFBI/CAFRE weekly grass grow rate figures to individual fields was not convincing given the wide variation yield that could be expected due to soil conditions, management and weather which are not uniform from field to field nor from year to year. He states that had other evidence been provided it would have been considered as well notwithstanding the failure to provide weight dockets. He concludes by stating that each case is considered on the basis of the evidence actively provided.

[28] Replying to the amended Order 53 Mr Doherty states in his affidavit that the Department has not designated any land which it considers is naturally kept in a state suitable for grazing or cultivation as it is not aware of any such land in Northern Ireland. Consequently, Article 9(1) of Regulation 1307/2013 has no effect in Northern Ireland and neither does Article 10(2) of Regulation 639/2014 as it clarifies the application of Article 9(1) of the Regulation 1307/2013.

The Arguments

[29] Mr Mercer QC in his focussed written and oral submissions essentially made the following points:

- (i) There is a breach of EU law because in Article 41 c i of the Regulation which applies there is no quantitative test. A corollary to this point is Mr Mercer's submission that when EU law is at issue there is an obligation for reasons to be clear. He cited various decisions in relation to this. Mr Mercer also argued that the respondent had erred in confusing the concept of active farmer with managed by a farmer and he cited the case of *Landkreis Bad Dürkheim 2010 ECR-1 09763* in relation to this. Alternatively, under this heading Mr Mercer argued that the Department had improperly applied the regulation in relation to the financial risk test and therefore improperly applied EU law by way of modifying EU law which is impermissible.
- (ii) Mr Mercer argued that the decision was irrational for failing to engage with the position of the Independent Panel and also in relation to applying a rigid requirement for weight dockets.
- (iii) In relation to breach of policy/legitimate expectation Mr Mercer contended that this was made out in that the Department required weight dockets as the only reliable way of measuring yield of grass whereas this stipulation is not found in policy and a decision maker should follow policy unless there is good reason not to. He cited the case of *Lumba v Secretary of State for the Home Department 2012 UKSC 12* in relation to this submission.
- (iv) Finally, Mr Mercer argued that the respondent failed to provide adequate reasons as to why the Panel recommendation was not followed and how the applicant failed the eligibility test.

[30] In response, Mr McAteer made the following points with commendable economy:

- (i) As to reasons, he relied on the fact that there was a long interactive process in this case which the applicant engaged in. He made the point that the applicant is an informed observer and reader of the decision. He also said that the final decision letter had to be read in the light of all of the documents in this case relying on authorities such as the case of *Knox's Application 2019 NIQB 34*. Mr McAteer argued that the court should be vigilant and guard against excessive legalism and avoid a hyper critical approach. Overall, he maintained that the reasons given in this case were adequate.
- (ii) Mr McAteer also argued that the policy was properly applied. He made the point that evidence is required of yield in this area as the policy says. Mr McAteer highlighted the fact that the Department was effectively saying that weight dockets would fill the evidential gap. The application was not rejected simply because of a failure to provide weight dockets, rather the evidence as a whole was not satisfactory.

- (iii) Mr McAteer contended that the decision could not possibly be unreasonable or irrational in the *Wednesbury* sense as the decision maker considered all relevant material and issues of weight were for him and should not form part of the court's analysis.
- (iv) As regards EU law, Mr McAteer pointed out the Department did not rely on Article 9 to refuse the application, rather this case is about the application of the Regulation which requires a farmer to be exercising an agricultural activity on the land concerned.

Consideration

[31] At the outset it is important to restate the fact that this is a supervisory court, not a court of merit. I am concerned only with the legality of the decision-making process not the substance of the decision. The context of this case is also important, involving as it does the application of EU law to an application for a farm payment in relation to 72.9 hectares of land. The background is plain to see from the papers. Mr Calvert seems to have started out as a beef farmer until around 2013 when he sustained a back injury which meant he had to sell his beef herd to other farmers for finishing. He clearly had to change direction and so he began to look to grass production on the farm. It appears that Mr Calvert did undertake some conacre until about 2014 when he decided to wind up that enterprise to concentrate on grass and cereal production. That formed the basis of the BSP application.

[32] In the papers the applicant's farming method is variously described as "unique" and "unconventional." I note that there is also some reference to the techniques used being environmentally friendly. In broad terms the applicant allowed farmers on some of his land to graze cattle and benefit from the grass at source rather than bail it up and sell it to them. The customer (represented by the cattle) came to the field rather than the product (grass and silage) going to the customer (farmer of the cattle). Within this unusual framework, the application made by the applicant was clearly going to present some challenges. The question is whether any unlawfulness attaches to the ultimate decision on the basis of the four arguments raised by Mr Mercer. I have decided each point as follows.

[33] First, as regards alleged breach of EU law I think that this is overstating the matter. Only Article 4 applies, not Article 9; that much is clear. Article 4 requires consideration of active farming and whether risk is assumed. I do not consider that the Department can be said to have breached EU law. This case is not about that at all when broken down. It is actually about the application of EU law.

[34] In my view, there are really two core points at issue in this case – whether the Department applied too stringent a test regarding the weight docket and whether the Independent Panel's point in relation to financial risk can bring this type of operation within the definition of active farmer and therefore within the scheme.

[35] As regards the weight docket's argument I think Mr McAteer is right to say that weight docket's were simply suggested to plug the evidential gap. There is no absolute requirement in the Guidance but there is an expectation that evidence should be provided. In the Guidance at 2.4.8 this issue of provision of evidence is specifically dealt with. It clearly states that "Where there is any doubt as to whether the active farmer requirements have been met, further evidence will be requested. The outcome in each case will depend on the evidence submitted which demonstrates what is happening in practice and not just what may be recorded in writing. The onus is on you as applicant to be able to prove that you are eligible to be allocated Basic Payment Scheme entitlements in relation to the land declared on your application. If you are unable to provide satisfactory evidence when asked to show that you meet the scheme requirements, then your application may be rejected and no entitlements allocated." The decision maker clearly has a wide discretion in relation to evidentiary proof. It follows that the claim based on breach of policy/legitimate expectation fails to gain any traction.

[36] That leaves the claims made under the headings of irrationality and reasons which are interrelated. First I will look at the claim that the decision maker has erred in how the Independent Panel findings were dealt with. In looking at this issue I bear in mind that this was an Independent Panel with technical expertise. It had the benefit of Ms Cheatley's written report and evidence which came from a position of experience and expertise and supported the applicant. Against that the technical assessment is sparse and simply rejects the application with a reference to policy.

[37] The reference to policy is significant because an overarching issue in any scheme such as this is to ensure that it is not abused. In this regard I have considered the additional materials in the recent affidavits dealing with EU criticism of Single Farmer Payment schemes in Northern Ireland. This documentation emanates from a previous audit of the Single Payment Scheme in 2006 which pointed out that "the Northern Ireland authorities granted entitlements to land owners that have never received direct support payments in the past". Clearly, the issue was with land owners who had leased out land to another farmer. The position in Northern Ireland is perhaps, quite distinct in terms of the use of conacre within the farming community. However, it is striking in this case that there is no suggestion that the other farmers were claiming on the land in question. In other words, there is no suggestion that there has been an abuse of this scheme.

[38] The question is whether when the other farmers graze on the land that offends the scheme. In real terms, this may be because such an arrangement resembles conacre to too great a degree. The guidance highlights the issue at paragraph 2.4.2 when dealing with the selling of grass/silage. Specifically example 2 raises the problem. With this in mind, I have examined the decision to determine whether the reasons are adequate and whether it is irrational. I bear in mind the authorities presented by Mr McAteer in this area particularly the case of *Heffron's Application* 2017 NIQB 25 which he has highlighted. I do not for one moment suggest that reasons need to be complex or discursive but they need to be informative and

substantive to allow a proper assessment to be made. There is no general duty to give reasons at common law (see *Re McCallion's Application* 2005 NICA 21). However, reasons are important to allow an individual to determine whether all his arguments have been taken into account and if not it allows an individual to decide whether or not a challenge is viable. Also, this case involves the application of EU law and as the case of *UNECTEF v Heylens* 1987 ECR 4097 states, the general principles of EU law require that reasons be given so that affected individuals can determine whether there are grounds for challenging the interference with their rights.

[39] In this case the issue is not the failure to give any reasons but the fact that the reasons given do not engage with the core issues raised by the applicant and determined by the Independent Panel. The one paragraph identified by Mr McAteer does not rectify the problem. I agree that the reasons letter must be looked at in the round, but again I cannot see that there is adequate consideration of the points raised. Specifically I cannot discern that the decision takes into account the view of the Independent Panel that the beef grazing enterprise is a separate enterprise. Also, no clear reasons are given for departing from the Independent Panel consideration which was informed by expert evidence. The basic problem I have is that the decision-making correspondence does not engage with the core issues in any meaningful sense. That means that the point whether this type of operation can come within the scheme is effectively unaddressed. There is a particular obligation to provide proper reasons under EU law. However, more fundamentally, there is an obligation to explain why the Independent Panel analysis is not followed. A proper analysis would provide clarity and certainty as to whether this type of farming enterprise may qualify.

[40] Then there is the issue of evidentiary proof. I have read the substantial explanatory documents provided in relation to the application and also the queries raised by the Department which focussed on the lack of vouching documentation for grass yield and the apparent discrepancy between the fertiliser used and the amount of land claimed for. These queries were answered but not to the satisfaction of the Department. I have already said that a decision maker must have a large measure of discretion in relation to determination of issues such as this (yield). If this were the only argument I do not think that the applicant would succeed. However, it is allied with the issue of departure from the Independent Panel recommendation. The Independent Panel considered the applicant's evidence sufficient because it accepted that there are other methods of assessing yield in the context of this type of farming. This may or may not be correct however the decision maker also fails to engage with this issue in any meaningful way.

Conclusion

[41] In light of the foregoing I accept the applicant's argument made as regards reasons. This inadequacy also infects the rationality of the decision as I cannot be sure that the core issues have been properly addressed. These are both valid grounds

for quashing this decision however pursuant to Order 53 rule 9(4) I consider that the proper course is to remit the matter to the decision maker with a direction to reconsider it and reach a decision in accordance with the ruling of the court. Obviously, the revised reasoning will inform the rationality of the ultimate decision. I will hear from the parties in relation to the issue of costs.