

Beef Special Premium Scheme – Beef Special Premium Regulations (NI) 2001, regulation 9(1) – whether duty to retain documents and duty to create a record – duty to maintain beef land register – whether premium payments recoverable – calculation of premium recoverable

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Ref: **GIRC5468**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 24/01/06

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

**IN THE MATTER OF AN APPLICATION BY OLIVER McALEENAN FOR
JUDICIAL REVIEW**

AND

**IN THE MATTER OF A DECISION OF THE DEPARTMENT OF
AGRICULTURE AND RURAL DEVELOPMENT**

GIRVAN J

[1] Between 2002 and 2004 the applicant, who owns and runs a farm near Ballynahinch, County Down, made applications for subsidy payments under the Beef Special Premium Scheme (“the Scheme”). The net amount of premium paid was £22,530.18. In 2004 the Department of Agriculture and Rural Development (“the Department”) subsequently carried out investigations into the payments. In August 2004 the applicant was informed by the Department that it proposed to recover monies paid under the Scheme and to withhold future payments and by letter dated 4 October 2004 the respondent demanded repayment of subsidies amounting to £21,229.88. The Department considered that 53 of the animals for which the applicant had claimed subsidy under the Scheme were ineligible since the applicant had not satisfied the requisite requirements relating to cattle identification, registration, notification and record keeping. The key element in the departmental decision was that the applicant did not have any records relating to his purported sale of animals at marts and he could not say to whom the animals had been sold and when. It considered that the applicant had not been able to produce evidence that the animals were in his possession

for the full retention period necessary to ensure entitlement under the Scheme.

[2] The applicant's case was that he had transported the animals to the marts and filled in a standard movement form (known as a form MC2). He claimed that the animals had not been sold by the mart operators and that the cattle had been returned to him whereupon he had negotiated their sale privately at the mart premises. He did not fill in any further MC2 documentation in relation to the movement of the cattle to the purchaser nor was that information recorded in his herd register. He could provide no information which would identify or help to identify the persons to whom the cattle were sold or when.

[3] Following the departmental decision to recover the subsidy together with interest the applicant requested a review of the decision which was carried out by the Scheme manager in the first instance. The applicant's challenge was rejected, the Department maintaining the view that it was satisfied that the applicant had failed to adhere to the record keeping requirements under Regulation 9 of the Beef Special Premium Regulations (Northern Ireland) 2001 ("the 2001 Regulations"). The decision was subject to further appeal and then thereafter the matter was referred to an independent appeals panel. Having considered the written and oral evidence presented, the panel was satisfied that the appellant had complied with his statutory obligations under regulation 9 of the 2001 Regulations and under Regulation 7(1) of the Cattle Identification (Notification of Births, Deaths and Movements) Regulations (Northern Ireland) 1999 ("the Movement Regulations"). It recommended that the appeal be allowed.

[4] Subsequently, the Department reviewed the recommendation of the independent appeals panel and, having taken legal advice, concluded that on the proper interpretation of Regulation 9 of the 2001 Regulations the Department was entitled to recover and withhold beef special premium under regulation 12 of the 2001 Regulations. It is that decision that the applicant seeks to challenge in this application.

The Beef Special Premium Scheme

[5] The Department introduced the Scheme (which was fully funded by the European Community) pursuant to EC Regulation No. 1254/99. For the year 2003, (which is the year relevant to the current proceedings), to qualify for the subsidy a claimant had to show that he had kept the animals on which the premium was claimed on his holding for a period of two months ("the retention period") beginning on the day after the claim before premium was received by the Department. The Scheme is a headage payment Scheme designed to provide direct support to beef producers. The premium is paid on male animals intended for slaughter. There are two main age groups for

premium. The first age group is 7 to 20 months (and this group includes the bull premium) and the second age group is for steers over the age of 20 months. Thus, steers potentially receive premium twice in their lifetime. In 2003 the rate of payment was £134.84 for bulls and £96.31 for steers. Payments are subject to a national ceiling. If the national ceiling is exceeded the claims are scaled down accordingly. In 2003 the premium was paid in two instalments, an advance of 80% paid after 16 October and the balance paid after 1 April the following year.

[6] The European legislation governing the Scheme and the Northern Ireland legislation providing for the administration and enforcement of the EC Regulations are Council Regulations (EEC) No. 3508/1992 (establishing an integrated administration and control system for certain community aid schemes); Council Regulation No. 1254/1999 (as amended) on the common organisation of the market in beef and veal; Council Regulation (EC) No. 1512/2001 (as amended) amending Regulation 1254-1999 on the common organisation of the market in beef and veal; Commission Regulation No. (EEC) 3887/1992 (as amended) laying down detailed rules for applying the integrated administration and control system for certain community aid Schemes; Commission Regulation No. 2342/1999 (as amended) laying down the detailed rules for the application of Council Regulation (EC) No. 1254/1999 on the common organisation of the market in beef and veal as regards premium Schemes; Commission Regulation (EEC) No. 2419/2001 (as amended) laying down detailed rules for applying the integrated administration and control system for certain community aid Schemes established by Council Regulation (EEC) No. 2508/1992 and domestic legislation in the 2001 Regulations and the Beef Special Premium (Protection of Payments) Regulations (Northern Ireland) 1996 (as amended). Regulation EC number 1760/2000 provides for the system for the identification and registration of bovine animals. The statutory rules which govern cattle identification and registration are the Cattle Identification (Enforcement) Regulations (Northern Ireland) 1998; the Cattle Identification (Number 2) Regulations (Northern Ireland) 1998; the Movement Regulations and the Cattle Passport Regulations (Northern Ireland) 1999. The final year that the Scheme operated was in 2004.

[7] Of particular relevance in the present proceedings are the provisions of Regulations 9, 12 and 14 of the 2001 Regulations. Regulation 9 provides under the heading "Retention of Records" -

"(1) An applicant shall retain for a period of four years from the relevant date any bill, account, receipt, voucher or other record relating to:

- (a) the number of bovine animals kept on his holding during the period of two months following that date, and
- (b) any transaction concerning bovine animals carried out by him on that date and during the period of 12 months following that date."

For the purposes of the Regulation "relevant date" means the date on which his application for Beef Special Premium was received by the Department.

Regulation 12 provides under the heading "Withholding and Recovery of Premium" -

"(1) where at any time during a Scheme year an applicant fails to:

- (a) comply with the requirements in Regulation 9(1);
- (b) complying with the requirements of Article 7(4) of Regulation 1760/2000, the Cattle Identification Enforcement (Regulations) (Northern Ireland) 1998 or the Cattle Identification (Number 2) (Regulations) (Northern Ireland) 1998; or
- (c) in the reasonable opinion of the Department, keep any specified record in a form which is accurate and up to date. The Department may withhold or recover on demand the whole or any part of any Beef Special Premium payable or as the case may be paid to the applicant in respect of the Scheme year."

Regulation 14 makes it an offence (inter-alia) for a person without reasonable excuse to fail to comply with provisions in Regulation 9(1).

[8] The Movement Regulations (relating inter-alia to the movement of cattle) provides in Regulation 7 that:

"(1) Subject to Regulation 9, the notification of movement of cattle in accordance with the second indent of Article 7.1 of the Council Regulations shall be by the keeper either:

- (a) correctly completing a notification document with the date of the movement to which it

- relates and indicating whether the movement was off or onto his holding; or
- (b) where the keeper is a market operator, correctly completing a notification document with the date of the movement to which it relates and whether the movement was into or out of the market, and
 - (c) delivering that document to the Department in accordance with paragraph (2)."

[9] The Cattle Identification (Enforcement) Regulations (Northern Ireland) 1998 requires the keeper of bovine animals to keep a herd register in a form prescribed in the schedule to the Regulations. A person keeping a register must ensure that it includes within 36 hours of the movement of any animal on or off the holding a record of the movement. The eleventh column in the prescribed form specifies that the name and address of premises to which the cattle are moved should be shown.

The parties contentions

[10] In relation to the cattle the subject matter of the departmental claim to recover subsidy it was the applicant's case that he brought the cattle to various cattle marts with a view to selling them there. He completed appropriate MC2 forms for the movement of those animals. However, the cattle were not sold through the sale ring at the marts and the applicant sold the animals to other farmers who then removed the cattle from the mart to wherever they were taking them. The applicant did not seek/or obtain any receipt from the buyers and contended that he did not need to complete any other documentation. It was his case that he was not in breach of Regulation 9 of the 2001 Regulations because that Regulation related to the "retention" of records that existed or were actually created documents. Since the sales were not documented there was no documentation recovered or received that fell to be retained under the retention obligation in Regulation 9. Mr Lavery on behalf of the applicant contended that the applicant had complied with Regulation 9 and with Article 7.3 of EC Regulation 1760-2000. Article 7.3 did not impose any duty to obtain records. A breach of Regulation 9(1) is by virtue of Article 14 of the Regulations a criminal offence and this meant that Regulation 9 had to be given a restricted interpretation and any ambiguity should fall to be interpreted in favour of the applicant. The argument presented by Mr Lavery in this court was effectively accepted by the Independent Appeals Tribunal.

[11] Mr Scoffield on behalf of the Department contended that the Department was entitled under Regulation 12 of the Farms Subsidies (Review of Decisions) Regulations (Northern Ireland) Regulation 2001 to reject the appeal panel's recommendation which it considered was wrong in law. The

Department's entitlement to recover the subsidy arose under Regulation 12 which had its root in Articles 38 and 39 of Regulation 2419-01. While the Department had relied on a breach of Regulation 9(1) it could equally have relied on Regulation 12(1)(b) in that the applicant had failed to correctly notify the herd movements to the Department or note them in the herd register. It could also have relied on Regulation 12(1)(c) in that it was reasonable for the applicant to require the applicant to keep records of the sales transactions. Counsel submitted that the obligation in Regulation 9(1) (which he said must be read in the light of the underlying European legislation) is to keep records and receipts and that carries an obligation to obtain a receipt or make a record when a relevant transaction occurs. A key provision in Article 25 of Commission Regulation 2419/01 namely Article 25(2)(b) in relation to on-the-spot checks includes checks on the correctness of entries in the register and notification to the computerised data base on the bases of samples and supporting documents such as the purchase and sales invoices. The Department's deponent Mr McDowell in his affidavit pointed out that in order for the on the spot checks of documentation to be effective it is necessary for there to be an obligation to produce and retain purchase and sales invoices in respect of bovine which is the subject of an aid application. Council Regulation EC No. 820/1997 and its later replacement Regulation EC No. 1760/2000 on the identification and registration of bovine animals requires the keeper on request to supply the competent authority with all information concerning the origin, identification and, where appropriate, destination of animals which he has owned, kept, transported, marketed and slaughtered. This carries with it the clear implication of a duty to have sufficient records.

[12] Mr Scofield on instructions gave an explanation of the normal sequence of events occurring at a mart, providing an explanation with which Mr Lavery on behalf of the applicant did not take issue. A farmer wishing to sell cattle at a mart bring the cattle to the mart where they are put in a crush. An MC2 form recording the tag numbers of the animals if given to a member of the mart staff who checks the tag numbers against the animals present. A lot number is allocated to the cattle on the back of the MC2 form and also on the animals. A copy of the MC2 form is also given to the departmental vet on site at the mart. Details of the animals are checked with the Department's computerised system (called APHIS). Responsibility for the cattle is then recorded as being with the mart. When the cattle are sold at the mart the buyer goes to the Department representative and gets an MC2 form which enables the buyer to move the animals to his farm. In this way the animals pass into the control of the buyer and are recorded as such. If the animals are not sold at the mart then the mart by its internal documentation authorises the animals to pass out of the mart's responsibility. If, as the applicant says happened, cattle are withdrawn unsold from the ring and are then sold on by the farmer at the scene the buyer should fill in a MC2 form and obtain

authorisation to remove the cattle from the mart premises. The MC2 form which show the destination of the cattle.

Determination

[13] Much of the debate in the correspondence and in the panel hearing focused on the question of the proper interpretation of Regulation 9(1) of the 2001 Regulations. The decision of the Department was purportedly made under Regulation 12 which, as noted by Mr Scoffield, came into play if there had been a failure to comply with paragraph (a), (b) or (c). Reading the three provisions (a), (b) and (c) together the two legal questions for determination by the Department was whether the applicant had failed to comply with one or other or one or more of the provisions of paragraph (a), (b) or (c).

[14] Mr Lavery handed into court as an example of a documentation used in the transportation of cattle to the mart in question an MC2 form which he said the applicant had used and which he said showed that his client was fulfilling his obligations under the various regulations. That example form handed in was a document entitled Certification of Cattle Movement Consignee's (Buyer's) Form and described movement from the applicant's farm to the premises of Rathfriland Co-Operative. (Other marts were additionally used by the applicant. The argument appeared to indicate that similar documents would have been used there.) It does appear, however, that there were two MC2 forms and documents in use, one described as Consignor's (Seller's) Form and the other Consignee's (Buyer's) Form. In the example given into court the seller's form Mr Scoffield on behalf of the Department handed into court another MC2 form. This was the Consignor's Seller's Form. The seller's form describes the relevant cattle movement as being to Rathfriland. Once the cattle were not sold in the mart ring the MC2 buyer's document which appears to have been used by the applicant was positively misleading since Rathfriland Co-Operative was not the buyer. If there had been a sale in the ring Rathfriland Co-Operative would have generated an MC2 movement document showing the actual buyer and the buyer's address. Once the cattle were withdrawn from the sale in the Co-Operative the buyer's forms as provided by the applicant provided incorrect information to the Department.

[15] A failure to "keep" any specified record in a form which was accurate entitles the Department to recover premium paid. For the purposes of the domestic regulations "specified record" includes a record required to be kept under Article 7(1) and (4) of Regulation 1760/2000. This requires the keeping of an up-to-date register which is to be in a format approved by the competent authority. The register duly required by the schedule to the domestic regulations includes a column showing the destination of cattle sold. Whether he received a written receipt of the sale of cattle or not the applicant apparently did not in his register record where the cattle sold outside the mart

ring were moved and, accordingly, the applicant failed to comply with his obligations under Article 7(4) of the Regulation 1760/2000 and the Cattle Identification (Enforcement) Regulations (Northern Ireland) 1998.

[16] Regulation 7(3) of 1760-2000 requires each keeper to supply the competent authority on request all relevant information concerning (inter-alia) the destination of animals transported and marketed. The applicant could not supply this information because he had not kept a record of the transactions noted (at least by reference to the destination) in the register.

[17] Turning now to Regulation 9(1), as we have noted, the underlying policy of the EC legislation and domestic regulations giving effect to the EC legislation is to ensure the keeping of proper records so that the duty to provide the requisite information under Regulation 7 of 1760/2000 can be performed. Simply to read the duty to retain records under Regulation 9 as a duty to retain a record made by the seller himself would leave Regulation 9 as an insufficient incorporation in domestic law of the community duty lying on the farmer to be in a position to provide the information he can be required to provide to the competent authority fulfilling the duty of ensuring that the community obligations are being fulfilled. Regulation 9(1) read in its community law context must point to a duty to record transactions and information, which if not recorded, a farmer could with impartiality say he has forgotten because he has not recorded the information. To read Regulation 9(1) in the manner contended for by the applicant (and by the appeals panel) would undermine the community law policy of the legislation. Properly construed Regulation 9(1) is not ambiguous or unclear and accordingly no question of interpreting any ambiguity in favour of the applicant arises under Regulation 14 (which creates the criminal offence).

[18] Even if I were wrong in that, I am satisfied that the Department would have been fully entitled and bound in law to found its decision on a breach of Regulation 12(1)(b) and (c). This being so, this is a case where the court would have declined to grant relief even if it had come to different interpretation of Regulation 9.

[19] Although not pleaded in the original Order 53 statement the question arose during the hearing of the application whether the Minister in reaching his decision had failed to appreciate that he had a discretion under Regulation 12 whether the Department should demand a recovery of the subsidy and had a discretion in relation to the determination of the quantum of the amount to be recovered. However as Mr Scoffield argued, reading Regulation 12 together with and in the light of Article 38 of Commission Regulation 2419/2001 the determination that there had been irregularities by the applicant had the consequence that the community law obligation was to recover the amount determined to be due. Mr Lavery did not seek to argue that the figures determined by the Department had been erroneously

calculated. In consequence the determination reached by the Department on the issues of recoverability and quantum was valid in law and the applicant's application is accordingly dismissed.