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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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IN THE MATTER OF AN APPLICATION BY IAN MARSHALL FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION OF THE NORTHERN IRELAND ENVIRONMENT AGENCY AND THE DEPARTMENT FOR AGRICULTURE AND RURAL DEVELOPMENT AND THE IMPLEMENTATION AND OPERATION OF THE SINGLE FARM PAYMENT

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MAGUIRE J

Introduction

[1] The applicant in this case is Ian Marshall ("the applicant"). Mr Marshall is a farmer. His farm, where he lives, is at 112 Clady, Middletown Road, Mowhan, County Armagh. The applicant seeks to challenge a decision made by the Department of Agriculture and Rural Development ("DARD") in respect of the amount of his single-farm payment for 2012. The effect of the decision of DARD is that the amount of his payment was to be reduced by 55% under the requirements of the Cross-Compliance Rules put in place under European Union law. It is a feature of EU law that payments, such as single-farm payments, can be reduced where there has been a failure on the part of the farmer to act consistently with what are referred to as Statutory Management Requirements ("SMRs").

[2] SMRs apply to a range of situations. The situation with which the Court is concerned relates to SMR 5, Protection of Water against Nitrate Pollution.

[3] The impugned decision was made as a result of alleged instances of pollution emanating from the applicant's farm and affecting a waterway leading to the River Mowhan. In respect of these instances, the applicant has already been convicted of two pollution offences before a criminal court. However, it was not necessary in those criminal proceedings for the Court to determine whether the acts or omissions of the applicant, leading to the pollution, were intentional or whether they were merely negligent. It is this issue which lies at the heart of this judicial review. This is because the Department, as decision maker, has decided that one of the instances of pollution involved an intentional breach of the relevant SMR. In contrast, the other breach was said to be caused negligently only. The effect of holding that one of the breaches fell into the intentional category is that, by reason of this, it attracted a substantially greater financial penalty for the purpose of the operation of the Cross-Compliance scheme which operates in tandem with the grant of single-farm payments to the applicant.

Nitrate Pollution

[4] SMR 5 deals with the issue of nitrate pollution. This is a common form of pollution of the environment and often is the outcome of various types of effluent discharge in the context of agriculture activity. For many years there have been measures in place to protect waters against such pollution from agricultural sources. In Northern Ireland this is provided for in the Nitrates Action Programme Regulations 2010. A central feature in those regulations is the control of "nitrogen fertilizer". This comprises a wide range of substances, which are defined in the regulations, but the principle behind the control of such substances can be relatively easily stated. While the use of such substances as a fertilizer, when carefully applied, may enhance the growth of vegetation and are therefore valuable, where such substances are applied in excess or on unsuitable land or in unsuitable conditions or where they are discharged directly into a waterway, they can cause severe water pollution.

[5] Sources of nitrogen fertilizer are commonplace in the farm environment. Slurry, which is a mixture of excreta, bedding, washings and so on, is produced by or associated with livestock. Silage, likewise, is commonly a feature of animal feed. It, however, produces an effluent in the form of a liquor which emerges from the grass ensiled. When mixed with slurry, it may be spread on land as a fertilizer but it is vital that this is done properly as silage effluent, even in small amounts, is acidic and highly pollutant and would kill grass if spread undiluted. Dirty water, which is a water run off lightly contaminated by manure, urine, effluent, milk and cleansing materials, can also be collected and spread on land but it may also create significant pollution problems.

[6] Such substances in water present a substantial pollution risk as, being organic, they decompose and remove oxygen and this can be toxic to aquatic life. Organic water pollution may take a number of forms: it may produce sewage

fungus; suspended solids; and reduced oxygen availability, as evidenced by tubifex worm colonies.

[7] In addition to the 2010 regulations, the Water (Northern Ireland) Order 1999 contains a variety of criminal offences associated with pollution incidents.

The Contours of the Challenge

[8] In these proceedings the applicant was represented by Mr Hugh Mercer QC and Mr O'Brien BL and the respondent Department was represented by Mr McMillen QC and Mr Sands BL. The Court is grateful to counsel for their helpful oral and written submissions. While the Court has been provided with voluminous documentation relating to the pollution incidents involved in this case, for the purpose of these public law proceedings, it will not be necessary to do more than set the scene generally. As is usual, the Court has reminded itself that it is not its role to seek to revisit the merits of either the applicant's convictions or of the Cross-Compliance proceedings against him. As both senior counsel agreed, the issue for the Court is one of law and it can be tightly defined as whether the decision taken by the Department categorising one of the pollution incidents as intentional was lawfully arrived at.

[9] It is right to say that at the hearing there was a considerable area of agreement achieved in respect of the issue of how the Department ought to approach the facts of the case. As a result, it can be said that there was no serious dispute about:

(i) The existence of pollution emanating from the applicant's farm in the period from 5 December 2011 to 31 January 2012;

(ii) The fact that the pollution engaged the general responsibility of the applicant;

(iii) The fact that for the purpose of the Cross-Compliance regime the onus of proof in respect of showing that the pollution was caused intentionally is on the Department; and

(iv) The fact that the standard of proof for the above purpose was the civil standard of the balance of probability.

The Impugned Decision

[10] The decision which is impugned in these proceedings was taken on behalf of the Department by Mr Lavery, who was at the material time the Head of the Payments Agency which paid to farmers in Northern Ireland single-farm payments. Mr Lavery was supplied with a substantial file of papers provided to him by the Department. The key documents he considered included the Department's original decision (which *inter alia* held that breach 3.5.6 was intentional); the first-stage

review decision (which held the same); and the External Panel's recommendation (which had held that the breach relating to 3.5.6 was negligent only).

The Factual Matrix

[11] The applicant is an experienced dairy farmer. His farm at Mowhan, the Court has been told, is located at the top of a hill. It consists of a dwelling house and farm buildings and yards. From the maps presented to the Court, it can be seen that close to the farm the River Mowhan flows towards Clady Water. A watercourse travels from the area of the farm to the river and enters it at a point of confluence. An aspect of the case concerns a device known as a "diverter" which was in use at the farm. In brief, the function of this device was to determine the onward passage of the contents of an inflow pipe which carried materials from the farm. On one setting, the inflow materials may be diverted to silage effluent storage tanks. But the diverter has also a second setting. If it is used, the materials are diverted to the storm drains and through them *via* the connecting watercourse to the river. It was a key finding made by inspectors on behalf of the NIEA that on 31 January 2012, when they inspected the premises, they found the diverter to be set to the second setting above. Accordingly the contents of the inflow pipe were being discharged into the storm drains and ultimately to the river. From that date onwards the NIEA appeared to have been of the view that, at least in the main, it was the mis-management of the diverter which was responsible for the contents of the inflow pipe being discharged through the storm drains to the river.

[12] The inspection of 31 January 2012 was one of a number of inspections which occurred at the applicant's farm.

[13] The first relevant inspection for present purposes took place on 5 December 2011. This was conducted by NIEA employees, a Mr McGuinness and a Mr Teague. They had gone to the farm as a result of an anonymous report of pollution at the farm. They noted that the gratings in the main farm yard appeared to be receiving contaminated yard runoff which contained animal manure and silage. They were also able to see cracks in the concrete yard through which silage effluent and slurry appeared to be escaping. They also noticed a slurry tank which attracted their attention because it was full to the brim. Throughout the yard there was slurry on the ground. In the course of their inspection, the inspectors noticed a small waterway in a field nearby which appeared to be contaminated.

[14] In the light of these findings, the officers spoke to the applicant and he then walked with them as they pointed out pollution risks. It was explained to the applicant that the waterway was polluted and that the most likely source of the pollution was the farmyard. Accordingly, the applicant was asked to keep his yard clean and to take steps to prevent pollution by monitoring both the gratings in the yard and the waterway. The officers also told the applicant that a breach of the Cross-Compliance regime had taken place and that NIEA officers may return to complete paperwork in relation to that. After the meeting, the officers drove to

where the waterway from the farm met a steep gorge. They noted that at this site there was gross pollution, a heavy fungal growth on the stream bed, and a strong smell of silage effluent from the water. Where the waterway converged with the Mowhan River, a large plume of fungus could be seen extending downstream. This extended for some 50 metres.

[15] A second visit occurred on 6 December 2011 when the same inspectors arrived at the farm but as there was no one about, they did not carry out an inspection.

[16] On 16 December 2011, the two officers returned to the farm. Upon inspection, the waterway appeared grossly polluted. On this occasion, sewage fungus on the bed of the waterway extended for more than a kilometre downstream of the farm. While the Clady Water, upstream of the farm was clean, the inspectors could find no other source of the pollution they were seeing save for the applicant's farm. In these circumstances, Mr McGuinness telephoned the applicant that afternoon and alerted him to the continuing problem emanating from his farm. The applicant was told that there would be a further inspection the following week and was advised to carry out all necessary work to prevent further pollution to the waterway.

[17] A further inspection then occurred on 20 December 2011, involving the same NIEA personnel. On this occasion there was noted to be a marginal visual improvement in the condition of the waterway but it remained polluted. The officials met with the applicant and informed him that pollution was continuing to affect the waterway and that it was going from his farm to the River Mowhan. The applicant was advised of the need to monitor the waterways for sewage fungus and to prevent pollution to the waterways from the farm. Other potential sources of pollution were pointed out to the applicant such as the pooling of effluent in the yard and the seepage from cracks in the yard.

[18] The next visit from NIEA staff was on 13 January 2012. Again the waterway from farm to river was inspected. Heavy fungal growth within the waterway was present. In Mr McGuinness' view, there had been no improvement in the condition of the waterway. The domestic sewage treatment plant of the farm was checked but appeared to be operating satisfactorily. Another small waterway nearby was checked but it also did not appear to be the source of the pollution. As before, there was a meeting between the officers (this time a Mr Hume accompanied Mr McGuinness) and the applicant who was asked if he had been monitoring the waterways since the last visit, as he had been advised to do. He allegedly said in response that "he hadn't looked once". The applicant was told that a tripartite statutory sample from the waterway was going to be taken from the mouth of a concrete pipe downstream of the farm. The applicant was invited to attend. However he was busy with his cattle at the time and declined the invitation. The officers say that during the course of this visit notes were taken in what was described by Mr McGuinness as a PACE notebook. However this notebook later was lost.

[19] Mr McGuinness returned to the farm on 31 January 2012. This time he was accompanied by a Mr Gray and a Mr Gibson (both officers of the NIEA). On this occasion all the officers were agreed that there was heavy pollution to be seen both at the river and in the waterway. The beds of the latter were thick with sewage fungus and the watercourse smelled of silage effluent. The applicant's father was present at the farm and the inspectors spoke to him and explained why they were there. When inspecting the farm yard, it appeared quite dirty with slurry lying over stone-filled ground outside the main front door. At the south-west side of the cattle sheds, the diverter to which reference was made above, was discovered. It appeared to be directing what looked and smelt like silage effluent away from the settling tanks in the sheds rather than to them. The inspectors located a manhole between the farm yard and the waterway leading to the river. Upon inspection the pipes within appeared to be carrying silage effluent towards the waterway. Samples were taken and dye was used to trace the path of the pollution. The path led to the river. Later a part of the sample was provided to one of the applicant's farm employees as the applicant was not himself present. This was so the sample could, if the applicant wished, be the subject of independent analysis.

[20] While later inspections of the farm took place after 31 January 2012, which to a greater or lesser extent disclosed continuing problems with pollution emanating from the farm, it is unnecessary for the purpose of this judgment to describe these as it is clear that the initiation of the Cross-Compliance case against the applicant related strictly to a timeframe of between 5 December 2011 – 31 January 2012, just discussed.

The Initiation of the Cross-Compliance Case

[21] An important document in these proceedings is what is described as an NIEA CC2 Form. This is official form containing information relating to the outcome of an inspection carried out by officers of the NIEA.

[22] The CC2 Form in this case was not completed until 17 October 2012, notwithstanding that it relates to the inspection carried out on 31 January 2012. As has already been described, there was an inspection on that day which in fact lasted for a period of some 2 hours. This was in the nature of a follow-up inspection because of the on-going pollution. The Form referred to incidents of pollution from the farm and specified breaches of the Statutory Management Requirements. The relevant part of these requirements was Chapter 5. The two requirements said to have been breached in the Form were described as 3.5.6 and 3.5.23.

[23] On 17 October 2012, NIEA officials presented the Form to the applicant who declined to sign it because of the possibility of prejudicing possible prosecution proceedings.

[24] An important feature of the Form is Annex 1 to it which details the alleged breaches. It stated as follows:

> "3.5.6 Water pollution in adjacent river first noted in December 2011 and on-going at time of visit, despite being highlighted, latterly on 13.1.12 stat.sample taken. Classed as intentional, off farm, permanent, medium severity.
>
> 3.5.23 Silage effluent/dirty water not being collected causing the pollution above. Classed as negligent, off farm, permanent, medium severity.
>
> Deemed to be 'reasonable excuse' for alleged slurry spreading over the 2011/12 'closed period', hence no breach under 3.5.4".

[25] It is clear that the Form CC2 defines the relevant timeframe in which the alleged pollution breaches occurred as being 5 December 2011 – 31 January 2012. The form in respect of both breaches alleged indicated that the pollution had to be stopped immediately.

[26] Mr Richard Gray for the NIEA signed the CC2 form. He was present during the inspection of 31 January 2012. In his affidavit filed in these proceedings he describes how on that day NIEA staff came across the diverter and how the diverter operated. Later in his affidavit he refers to a further visit by him to the farm on 17 October 2012. The purpose of this visit was to go over the CC2 form with the applicant. He notes that at that stage the waterway was beginning to show signs of recovery, although it was still polluted. In respect of the Cross-Compliance breaches he states:

> " … a Cross-Compliance breach was recorded by NIEA. This could have been recorded on a number of days; 5th or 16th December 2011 or 13th or 31st January 2012. The date of 31 January 2012 was selected as the final date in that particular continuum of pollution, although pollution persisted beyond that date".

At paragraph 40 of his affidavit, he set out the wording of the two Cross-Compliance requirements as follows:

> "Pollution prevention requirement 3.5.6 – has the controller caused or permitted N fertilizer (including dirty water) to directly or indirectly enter a waterway or water contained in underground strata?

> 3.5.23 – are livestock, manure and silage effluent storage facilities not compliant with SSAFO Regulations and/or not managed and/or maintained such seepage or runoff directly or indirectly reaches a waterway or water contained in underground strata?"

He notes that these requirements reflected, respectively, regulations 4 and 11(4) of the Nitrates Action Programme Regulations (Northern Ireland) 2010.

[27] Mr Gray's affidavit went on at paragraph 41 to discuss the breaches. In respect of the breach of 3.5.23, he describes this as being concerned with the diverter's management. In this regard he notes:

> "I considered it reasonable to class as 'negligent' as this diverter was first noted by NIEA on 31 January 2012. It was not possible to know whether it had been operational on earlier dates and, if so, how much it has contributed to on-going pollution. In addition, the circumstances regarding its operation on 31 January were unknown."

[28] Mr Gray then goes on in his affidavit to describe the reasons why he found in connection with 3.5.6 an intentional breach on the part of the applicant. He said as follows:

> "42. European Commission Regulations give limited guidance regarding the assessment and classification of Cross-Compliance breaches by competent control authorities. A UK wide approach has been incorporated into NIEA inspectors' guidance at the time of the 2011/2012 visits. The relevant section regarding intent (at page 3) states as follows: -
>
> > 'Intentional non-compliance for Cross-Compliance has been defined as being the same as its legal meaning within criminal and civil law. Very broadly, an intentional non-compliance would be considered as occurring in cases where the applicant has knowingly breached the relevant measures imposed with an understanding of what he was doing and the likely consequences of his action'
>
> 43. The EC guidance is relatively brief, with that relating to the distinction between 'negligence' and 'intentional' action being especially so. As a result, there

is a degree of judgment on the inspector's part in determining which is applicable.

44. NIEA officers made four visits to the applicant's farm before the inspection of 31 January. On the first visit, he was shown the effluent running into yard gratings on the storm drainage system and the cracks in the yard surface allowing further pollution. He was also taken down to see the pollution in the waterway below his farm. He was advised to monitor the waterway for pollution signs and to address the issues highlighted in his yard in order to ensure that no polluting material was discharged from his premises. This is something that the applicant ought to have been doing in any event. The duty was on the applicant to ensure that his farm business was not a cause of environmental pollution. Farmers are taken to know their own farms and they must take responsibility for them, as all other businesses do. The applicant was not present for a follow-up inspection on 16 December but the pollution was worsening and he was advised by phone to address this. The applicant was present on 20 December, when a marginal improvement to the waterway was noted and the advice of 5 December repeated.

45. Pollution was continuing on 13 January 2012. Connor McGuinness asked the applicant if he had been monitoring the waterway as advised and the applicant replied that he had not looked at the waterway once. This was a significant statement, in that the applicant admitted that he had chosen not to take basic precautions to ensure that pollution from his farm which he knew about, has stopped. William Hume, the specialist agricultural regulation officer, present on that date, evidently took a similar view because he verbally advised the applicant that there would be a Cross-Compliance breach due to nitrates pollution and this might be considered intentional by the officer assessing it.

46. The applicant was an experienced farmer who was articulate and educated. Farmers are well aware of the requirements of the Nitrates Action Programme Regulations, especially with regard to preventing water pollution by farm effluent."

[29] From Mr Gray's affidavit it appears clear that even though the NIEA in its documentation in this case laid considerable emphasis upon the principal cause of the problem being the diverter, Mr Gray did not regard any mismanagement of the diverter (dealt with as a breach of requirement 3.5.23) as intentional but only as negligent. On the contrary, the finding in respect of intentionality relates to the alleged breach of requirement 3.5.6.

[30] While the long delay in the production of the CC2 form of nearly 9 months was deprecated in the later Cross-Compliance breach proceedings, it is only of limited significance for the purpose of these proceedings. It plainly would have been preferable for the applicant to have been provided with written details of each inspection speedily after each, as is the norm provided for in the scheme.

The Department's Decision-making Process

[31] The decision-making process in this case has been lengthy. It has been carried out in accordance with DARD's publication relating to the review of decisions procedure. The original decision was made by the Department as long ago as 2013. But it has been the subject of the quasi appeal procedures referred to the Department's literature as a Stage 1 and a Stage 2 Review.

[32] The Stage 1 Review involves the original decision being reviewed by another departmental official within the relevant branch who has not previously been involved in the case. The process is that it is for the applicant to request such a review and to set out why he considers the Department's decision to be incorrect. The onus is upon the individual to demonstrate this. The official concerned will then provide a decision on the review and send it to the applicant with a copy of his/her report.

[33] The Stage 2 Review involves a much more sophisticated consideration. It can only be sought after the first stage process has been unsuccessfully invoked. There are several elements within the stage 2 process as follows:

- The applicant must make application for the Stage 2 Review.
- A case officer is appointed whose job it is to report about the case to what is described as the External Panel.
- The case officer's report is also provided to the applicant.
- There then ensues a review by the External Panel which can either be conducted with an oral element or wholly in writing.
- Once the External Panel has conducted its review it makes a recommendation which is sent to the head of the DARD paying agency.

- An official within the Department provides a submission to the head of the paying agency about the case and the recommendation.

- Ultimately the head of the paying agency decides whether or not to accept the panel's recommendation which is not binding on him/her.

- The decision of the Head of the Paying Agency is then provided to the applicant and is final.

[34] As already has been noted, both stages of review were used in this case. While at both stages a series of issues were raised by the applicant, it is unnecessary to trace more than what occurred in respect of the issue of intentionality which is the issue with which the Court is concerned.

[35] The Department's original decision was made under the Single Farm Payment Scheme and was dated 13 November 2012. By letter the applicant had been told he was to be penalised for two breaches of the relevant Cross-Compliance Rules. Interestingly, the letter says that these breaches had been found at a farm inspection which started on 31 January 2012. The two breaches related to statutory management requirements 3.5.6 and 3.5.23. As regards the former it was stated to be intentional, off farm, of medium severity and permanent. A penalty of 55% was stipulated. The latter was viewed as negligent, off farm, medium severity and permanent and resulted in a penalty of 3%. However, the letter explained that the two breaches were to be viewed as a single act of non-compliance for the purpose of penalty. It followed that it was the highest penalty which would be imposed, ie the 55% penalty. This would apply to any claims made by the applicant in 2012 under the Single-Farm Payments Scheme.

[36] The applicant's first-stage appeal was initiated on 20 December 2012. Among the grounds put forward by the applicant was that the breach of 3.5.6 was wrongly classified as intentional. In this regard the applicant referred to a guidance document entitled 'Guidance for Cross-Compliance Field Staff for SSRM 1-5 for the 2012 Year'. The applicant quoted from this document various working descriptions of the terms 'negligent', 'non-compliance' and 'intentional non-compliance'. Negligent non-compliance, according to the document, occurred where the applicant had breached an SMR "as a result of failing to take reasonable care, skill and foresight". In contrast, intentional non-compliance occurred in the cases where the applicant "had knowingly breached the relevant measures with an understanding of what he was doing and the likely consequences of his action".

[37] By way of submission the applicant said:

> "I believe that where NIEA has identified pollution in the nearby watercourse and if they can without doubt link this to my farm business as there no other likely sources of the pollution, then I accept that the relevant measure

> was not met by me. But I will not accept that this was intentional. DARD and NIEA have both been unable to determine the source of the pollution in my farmyard. As the agency and DARD have been unable to identify the actual problem (the source) which is causing this pollution, I cannot be blamed for failing to take action and therefore the breach cannot be determined as being intentional".

Later he went on:

> "According to the inspectors' limited detail on the inspection form in relation to the breach it would appear that NIEA (not DARD) has determined the intent on the basis of the pollution on-going from the start of December to end of January at time of inspection. However, it is evident from the detail of the visits during this time, described above, that I did not receive any reports to inform me of any non-compliance at each visit and any remedial action suggested verbally by NIEA was complied with by me immediately. As stated above, during the NIEA visit of 23 December 2011, NIEA had said that the watercourse was 'greatly improved' and raised no concerns and no further remedial action given. I therefore do not accept the NIEA classification of this breach as intentional".

[38] The outcome of the first-stage review was provided on 5 September 2013 and was negative from the applicant's point of view in respect of the issue of intentionality. The review decision indicated that:

> "… NIEA state that given the duration of polluting impact from this farm and the absence of evidence to suggest that measures had been taken to stop it, they consider that there was a disregard to monitoring the waterway, preventing pro-active steps to address any pollution source. The classification of 'intentional' is therefore believed to be the proper one by NIEA".

[39] The reference to the duration of the polluting impact appears to marry with a statement from NIEA that the case concerned "a pollution discharge that impacted over a period of at least 5 months from December 2011 to April 2012". There is also a reference to pollution again being noted in September 2012. These references are somewhat worrying given that the timeframe for the alleged breaches provided in the CC2 document ended on 31 January 2012.

[40] The applicant initiated a second-stage review on 16 October 2013. By this stage he was officially being assisted by a representative of the Ulster Farmers Union. The applicant sought an oral hearing before the External Panel and when that occurred he was represented at the hearing by Mr James O'Brien BL.

[41] The applicant's case in respect of intentionality remained substantively as before. Essentially he claimed that the remedial action he was asked to attend on 5 December 2011, had been attended to by him immediately – on the following day. He also made the point that the impression that he had been given prior to Christmas was that the waterway had greatly improved. On this point there appears to be a factual issue in dispute as to exactly what was said as between the applicant and NIEA officials in this case.

[42] In his submissions to the External Panel there was a greater emphasis placed upon the relevant timeframe referred to in the form CC2.

[43] It is clear that the External Panel was provided with a legal submission on the applicant's behalf which argued that intention could only exist where a result was intended and where it was the purpose of the person to cause that result. If the person did not have this purpose, it was argued, intention could only be established when the result was the virtually certain consequence of the act and the person knew this. It was argued that the height of the case against the applicant was that he omitted to stop the pollution in that it continued despite the carrying out of recommended remedial works.

The Panel's Recommendation

[44] The External Panel having considered the evidence presented to them, recommended that breach 3.5.6 should be re-classified as negligent (instead of intentional). The panel adopted the meaning given to the words 'intentional' and 'negligent' derived from the guidance document for Cross-Compliance field staff already referred to.

[45] In its conclusion the panel stated:

> "The Panel concluded that the lack of remedial action taken by Mr Marshall was partly due to the fact that NIEA failed to provide written confirmation of the non-compliance breaches or of remedial actions required after any of their inspections. Because of this the Panel concluded that Mr Marshall was not fully aware of the seriousness of the problem and failed to take reasonable care or skill and foresight and the breach should be classified as 'negligent'".

The Consideration of the Issue by the Head of the Paying Agency

[46] Mr Lavery at the relevant time was the Senior Finance Director of DARD. He was also the head of the paying agency for the purpose of a second-stage review. It was therefore his decision on the case which has been the final decision. For the purpose of making a decision, Mr Lavery was supplied with extensive documentation relating to the facts of the case and the preceding decision-making processes. Mr Lavery provided a decision on 14 May 2015. This, of course, is the impugned decision in these proceedings.

[47] In terms Mr Lavery said:

> "I have concluded, based on the facts available, that the original decision of 5 September 2013 should not be changed. You will note that the Panel recommended that the Department's original decision should be changed in relation to the intentionality of breach 3.5.6. I have not accepted the Panel recommendation and my reasons can be found at Annex 2".

[48] Annex 2 is therefore a document of some importance in this case as it sets out the decision maker's reasoning. It is a document of some four pages in length, most of which is taken up with the statement of the Department's position – which it is unnecessary to set out in detail but which the court will briefly refer to in rehearsing Mr Mercer's submissions on behalf of the applicant. The heading "Conclusion" introduces Mr Lavery's own personal consideration. The Court will set it out in full. He said:

> "The basic principle behind the Northern Ireland Cross-Compliance policy on liability is that the person who claims the land for direct payment should be responsible for Cross-Compliance breaches unless they can prove they are not responsible. Responsibility for compliance within the SFP Scheme requirements rested with Mr Marshall. In December 2011, WQI [Water Quality Inspectors] reported breaches found at inspection to Mr Marshall. He was informed of the need to take remedial action to prevent pollution and did not meet this requirement. The onus was on Mr Marshall to act on the findings identified.
>
> The breach was classified as intentional, off farm effect and permanent as Mr Marshall did not take the required action to prevent the on-going pollution. According to the intentional penalty framework the correct penalty of 55% has been applied.

> Photographic evidence, samples and witness statements confirm that there is pollution coming from Mr Marshall's farm for which only he is responsible. This has not been denied by Mr Marshall. The timeline provided shows that Mr Marshall was verbally informed of this on a number of occasions throughout December 2011 and January 2012. In September 2012, 9 months from the date of the first inspection, there is evidence that the pollution continues.
>
> The Department considers that the Panel recommendation in relation to the intentionality of breach 3.5.6 should not be accepted. It should not be changed from 'intentional' to 'negligent'.
>
> There is no option to change the permanence of the breach as per the Guidance for Cross-Compliance Field Staff".

[49] Mr Lavery has filed an affidavit in these proceedings. In it, dealing with his decision, he states that the basis for his conclusion was that there was a lack of evidence of attempts by the applicant to take remedial action to prevent or reduce pollution, despite having been advised about it some months previously. Mr Lavery also noted that it was not for the NIEA or the Department to tell the applicant what he should do to stop the pollution. The onus remains squarely on him. At one point Mr Lavery stated that in his view a clear warning that there was serious on-going pollution of a watercourse, coupled with a failure to take steps to address it, amounted to an intentional breach on the part of the applicant which justified a substantial reduction in SFP.

[50] It seems to the Court that it should be careful, when assessing Mr Lavery's reasons for his decision, to give primacy to the reasons which are contained in the decision which he provided to the applicant at the time. Insofar as the language contained in the affidavit on this issue seeks to change or elucidate those reasons, the Court is of the firm view that, given the nature of these judicial review proceedings, it should prefer to concentrate on the contemporaneous reasons.

The Parties Submissions

The Applicant's case

[51] On the applicant's behalf, Mr Mercer indicated that the applicant regretted the incidents of pollution attributable to him for which he has been fined in the related criminal proceedings. The issue, however, in this case was the legality of the decision-maker's decision to regard breach of 3.5.6 as intentional. Mr Mercer

acknowledged that farmers must respect the statutory management requirements to which they are subject. Graduated penalties may apply where there has been a breach of those requirements. The usual deduction in a case of negligent breach was one of 3% but the range was between 1% to 5%. In the case of an intentional breach the range of deduction was much wider but the usual figure was not less than 50%. In the applicant's case for breach of 3.5.6 the deduction had been set at 55%. Counsel was at pains to make clear that the applicant did not dispute that the breaches involved in this case were caused negligently.

[52] In Mr Mercer's analysis, the applicant had responded appropriately to the visits which had been conducted. In particular, he relied on the fact that after the 5 December 2011 visit, the applicant had taken steps to restore the main yard and to ensure that it was properly swept – measures suggested to him by the inspectors. The inspectors at this stage had not referred at all to the diverter and had not discovered the diverter or taken any action in respect of it. Recommendations in respect of the diverter were only made by the inspectors on 31 January 2012 when they first inspected it.

[53] In short, it was contended that the farmer had complied with what he had been asked to do.

[54] In terms of the decision-maker's decision, no issue was taken with Mr Lavery's approach to the meaning of 'intentional' which was based on the Field Staff Guidance which the Court has already set out in this judgment. The question therefore was whether the applicant had knowingly breached the relevant measure with an understanding of what he was doing and the likely consequences of his actions. The standard, in particular, was not what lawyers refer to as "strict liability" where the state of mind of the farmer was left out of the equation. Approached in a proper way, the breach in this case was no more than a lack of reasonable care and there simply was no evidence to support a finding of intentional breach. In particular, there was no evidence that the applicant knew about the mis-setting of the diverter or that he had been notified in advance about this.

[55] In the course of his submissions, Mr Mercer was critical of the language used in the course of the decision-maker's discussion at Annex 2 of his decision. In particular, he drew attention to the following main points:

(a) The language in which the NIEA is recorded as presenting its case to the decision-maker, he argued, was flawed. The NIEA has asserted that the applicant had "deliberately" chosen to discharge silage effluent to the waterway, when there was in fact no evidence of this. Moreover, the NIEA had called in aid the applicant's criminal convictions to support a finding of intentionality. This, Mr Mercer argued, was potentially misleading as there was no dispute between the parties in the judicial review hearing that in fact the convictions did not contain, as a necessary element, a finding of intentional wrong doing on the part of the applicant. The NIEA's comment to

the decision-maker, recorded by him within the Annex, that "the burden of proof for the criminal standard is higher than the balance of probabilities which is what the appeal is based on "compounded this misunderstanding. Notably, the mistaken approach of the NIEA, as recorded by the decision-maker, was at no stage later corrected in his decision.

(b) Likewise, the language in which the Department is recorded as presenting its case, counsel pointed out, was also flawed. Objection was taken, in particular, to the Department saying:

> "Evidence gathered at early inspection identified that it was mismanagement of the diverter system that caused the escape".

In this respect Mr Mercer pointed out that this conveyed the impression that from an early stage the applicant knew that the diverter system had been identified by the inspectors as a source of pollution. This simply was untrue as it was only on 31 January 2012 – the last day of the relevant time window – when this was drawn to the applicant's attention. Next, Mr Mercer referred to the Department's apparent invocation, according to the decision-maker's précis of its submission, of the failure by the applicant to have the sample provided to him independently analysed. Counsel submitted this had simply no relevance to the issue of intention, a point later conceded by Mr McMillen QC on behalf of the Department. The end summary of the Department's position also attracted counsel's criticism. The decision-maker quoted the Department as having submitted that the applicant "did have knowledge of the on-going pollution, the source of the pollution [ie his farm] and the requirements on him to prevent further pollution. [The applicant] has not provided any evidence to the contrary".

In Mr Mercer's submission, this quotation encapsulated the Department's outlook as being concerned with "strict liability" not with the line to be drawn between intentional and negligent action.

(c) Finally, the language used by the decision-maker in that portion of the Annex dealing with his own conclusions was also characterised as evincing error. In this regard, it was submitted that there was evident confusion about the right approach to the issue in hand. There was, for example, no recognition that (as was conceded at the hearing) the onus of proof of intent rested on the Department. Instead, counsel referred the Court to references which at least create doubt as to whether the decision-maker was aware of where the onus lay. The language used by the decision-maker referred to the applicant being "responsible for Cross-Compliance breaches unless [he] can prove [he] [is] not responsible" and "the onus was on [the applicant] to act on the findings identified". Additionally the language in the decision-maker's approach, viewed as a whole, Mr Mercer argued, was the language of strict liability, for

example, the applicant "did not take the required action to prevent on-going pollution"; "there is pollution coming from the [the applicant's] farm for which only he is responsible". Finally, counsel pointed out that the decision-maker at the crux of the decision referred to events in September 2012, long after the expiry of the relevant timeframe which ended on 31 January 2012. To say that "after 9 months from the date of the first inspection, there is evidence that the pollution continues" was to make a statement not relevant to the issue of intention, a point also later conceded by Mr McMillen QC for the Department in these proceedings.

[56] When the Court stands back and considers the case as a whole, Mr Mercer argued, it was an unavoidable conclusion that the decision maker had failed to deal with the matter correctly. A correct approach would have, it was suggested:

(i) Taken into account the fact that the onus of proving intention was on the Department.

(ii) Taken into account that the required standard of proof was the civil standard.

(iii) Taken into account that the case could not be dealt with as one of strict liability.

(iv) Taken into account that there had to be actual proof of 'knowledge' on the part of the farmer.

[57] In fact the farmer had done what was asked of him and there is no evidence that it was any part of his intention to cause pollution. The most that could be said was that he was guilty of a lack of care. In these circumstances, the Court should set aside the decision as it had been based on the absence of evidence of the applicant knowingly and by a precise method intending to bring the pollution about. This was, on proper analysis, a case of the decision maker having misdirected himself.

The Respondent's Case

[58] In the respondent's submissions stress understandably was placed on the importance of the protection of the environment. That importance was brought home to the applicant, Mr McMillen argued, by the inspectors. Counsel submitted that the applicant was placed on notice of the fact that pollution was, in all probability, coming from his farm and was continuing. He was made aware of the pollution in early December 2011 and, despite measures he may have taken on 6 December 2011 to clean up the farmyard, he soon was made aware that the pollution was continuing to occur. The inspectors had stressed the unacceptability of the on-going situation yet the applicant did not appear, after 6 December 2011, actively to take steps to deal with it.

[59] Counsel further argued that the applicant appeared to take the view that the onus was on the inspectors to diagnose the problem and then tell him what to do but in fact the responsibility for the farm and pollution rested with him. His desire to place reliance on the inspector was not a sustainable position. When the inspectors told him that he should be monitoring the pollution they were later met with an indifferent reaction to it. This was exemplified by the applicant's remark when asked about the waterways on 13 January 2012, that he hadn't looked once.

[60] While accepting that the test to be applied by the decision maker was not one of strict liability, Mr McMillen submitted that intention could be established in more than one way. Proof of deliberate action to pollute might not always be available but intention could be inferred where the farmer, knowing that the problem was occurring, took no steps to remedy it. This latter situation encompassed this case. The applicant was told about the problem and the need to rectify it but notwithstanding that the pollution was patent and was there for him to see (and smell) the applicant after 6 December 2011 sat on his hands and took no steps to deal with it. When a farmer took no proper steps to remedy a pollution situation, he can reasonably be viewed as intending that it continues. This was particularly so in the case of a capable man like the applicant in this case.

[61] The attempt on the applicant's part to impose on the inspectors a duty to discover the source of the problem was misplaced. The inspectors were not so obliged to do this and could only give their best view which in some cases may not involve being able to specify the mechanism of the pollution. It was, Mr McMillen commented, the applicant who knows his farm and best knows what is happening on it.

[62] Helpfully, counsel had been able to locate a recent authority of the European Court of Justice in respect of the distinction between negligence and intention in Cross-Compliance cases. This case, Mr McMillen argued, supported his approach as outlined above. The case was Case-396/12 Van der Ham v College van Gedetuteerde Staten Zuid-Holland. It was decided on 27 February 2012.

[63] The key paragraphs in the court's judgment dealing with the issue of intentionality were as follows:

> "27 The referring court, asks, in essence, how to interpret the concept "intentional non-compliance" ...
> …
>
> 32 … In accordance with settled case law, that concept must be given an independent and uniform interpretation, having regard to the usual meaning of those words, the context of those articles and the objective being pursued by the legislation of which they are a part …

…

> 34 Intentional infringement of the rules on Cross-Compliance is based, first, on an objective factor, namely breach of the rules, and, second, on a subjective factor.
>
> 35 In respect of the second factor, the beneficiary of the aid may engage in particular conduct either with the aim of bringing about a situation of non-compliance with the rules of Cross-Compliance, or not seeking such an objective but accepting the possibility that non-compliance may result".

[64] In Mr McMillen's submission the case fitted into the second of the situations set out at paragraph 35 of the ECJ's judgment.

The Court's Assessment

[65] The Court reminds itself of its task. That is to determine the lawfulness of the decision-maker's intentionality finding made in his decision dated 14 May 2015. The Court confesses to finding the decision-making of the decision-maker troubling in multiple aspects.

[66] It is right, however, before looking at those aspects to acknowledge the context in which the decision was made. As discussed earlier, it was a decision made at the end of a substantial process involving lengthy consideration of the matter. While the decision was effectively reversing the view of the panel which had heard the case as part of the stage two review, the Court must acknowledge that the scheme of decision making did not oblige Mr Lavery to follow that recommendation. He could, and did, reach his own conclusion.

[67] It is not disputed that Mr Lavery had to formulate reasons for his decision but these, it is accepted, need not be detailed provided they clearly and coherently set out the decision made and how it was arrived at. Mr Lavery has tried to achieve this but undoubtedly a question arises as to whether he has approached his decision making in a legally appropriate way.

[68] The Court has been persuaded by the arguments of Mr Mercer, for the applicant, that the decision of Mr Lavery in this case is flawed by reason of the cumulative effect of the following:

- Firstly, the Court believes it is likely that Mr Lavery did not appreciate that in respect of the issue he was deciding the onus of proof was on the Department to demonstrate intentionality on the balance of probability. This is demonstrated by the points made by Mr Mercer at paragraph [55] (c) above which the court accepts.

- Secondly, the Court is satisfied that Mr Lavery in all likelihood viewed the matter as one in respect of which the onus of proof was on the applicant to demonstrate that he did not act intentionally.

- Thirdly, the Court from the language used by Mr Lavery has formed the opinion that he may and likely did approach the case in a way which was tantamount to applying a strict liability approach when such an approach, it is common case, was both inappropriate and forbidden.

- Fourthly, the Court finds that Mr Lavery did not rigorously consider and set out in his decision what precise evidence there was for the conclusion he reached on the issue of intentionality. In other words, he failed to set out the respects in which he had concluded that the applicant had knowingly breached the SMR in question. This is probably explicable by reason of the fact that the decision maker saw it as the applicant's role to explain why he should not be viewed as having acted intentionally rather than his own role to define the ways in which the evidence demonstrated that he had so acted. As Mr Lavery applied the Cross Compliance Guidance for Field Staff test, the detail of which is recorded at paragraph [36] above, it seems to the court it was necessary for him to explain how he had become satisfied to the requisite standard that the applicant had intentionally caused the pollution. As for the test which Mr McMillan quoted from paragraph 35 of the ECJ's judgment in Van der Ham, the court considers it highly unlikely that Mr Lavery was aware of or was applying it in the course of his decision making. While it may be that this test could have been used, in fact, there was no reference to it in the decision maker's decision and no sign it was applied. The court does not accept that Mr Lavery was applying this test.

- Fifthly, the Court cannot ignore the fact that there was at least one reference in Mr Lavery's own remarks which relate to a matter which he seems to have regarded as relevant to the issue he was deciding *viz* the intentionality issue, but which, on a proper analysis (as was conceded by Mr McMillen), did not sound on that issue. This was in relation to his comments about the situation at the farm in September 2012. In this respect, there has been a compromise of what should have been a rigorous approach, especially when viewed in the context of the next point.

- Sixthly, the decision-maker has not dis-associated his approach from irrelevant and/or erroneous statements put to him by the NIEA and/or the Department, referred to in the summary of Mr Mercer's arguments set out above. He left such errors uncorrected and in so doing has left the Court with a serious concern that he may have been influenced by them.

- Seventhly, the decision-maker has left the Court uncertain about the weight, if any, he gave to the issue of the diverter. Mr Lavery has made no finding that

the applicant, in fact, knew of the problem in respect of the diverter prior to the inspectors' locating it on the last day before the end of the relevant time window. In these circumstances the Court is left to wonder whether, as is evident in the NIEA's submissions, the decision-maker regarded the mis-management of the diverter as a significant aspect of the alleged intentional breach. If this was the position, a finding of intentionality would, it seems to the Court, abrade with Mr Gray's view that, in respect of the mismanagement of the diverter, the applicant at most was guilty of negligence. Indeed, it was on this basis that the CC2 Form was issued. This matter, it seems to the Court, should have been the subject of direct discussion in the decision.

[69] In view of the Court's concerns above, and taking into account the cumulative effect of the various findings and reservations to which the court has been reference, the Court is satisfied that the decision-maker's decision, on balance, cannot stand.

Remedy

[70] The Court will make a declaration that the decision of the decision maker is unlawful as being the result of material misdirection. If it is necessary for the matter to be re-decided by the respondent, there will need to be a new decision made by the Head of the Paying Agency or his delegate. Mr Lavery should, in the court's opinion, not be the decision maker in respect of any further decision, given the views he has already expressed.

Postscript

[71] After the conclusion of the oral argument in this judicial review the applicant sought leave to add to his evidence by submitting a further affidavit from him dated 19 September 2016. The court is of the view that it can determine this matter without resort to the proposed affidavit and on this basis it sees no reason to grant the leave sought or to deviate from the court's normal practice of expecting the parties to file their evidence in advance of the hearing and not after it is over.