

Neutral Citation No: [2009] NIQB 18

Ref: **WEA7412**

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

Delivered: **25/02/2009**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

McAlinden and Henity's Applications [2009] NIQB 18

APPLICATIONS FOR JUDICIAL REVIEW BY

(1) SEAN McALINDEN

(2) HUGH HENNITY

WEATHERUP J

Single Farm Payments.

[1] These two applications are for judicial review of the decisions of the Department of Agriculture and Rural Development that in the completion of application forms for Single Farm Payments (SFP) the applicants did not make "obvious errors" under Article 19 of Regulation EC 796/2004. As a result the applications could not be adjusted to include common land held by the applicants in the Mourne mountains. Ms Hyland appeared for the first applicant, Dr McGleenan for the second applicant and Mr Wolfe for the Department.

[2] Further to the Common Agricultural Policy Reform Agreement reached by EU Ministers in Luxembourg in June 2003, Regulation EC 1782/2003 established common rules for direct farm support schemes. As a result SFP were introduced in Northern Ireland on 1 January 2005. SFP directed payments at farm holdings rather than farm production. Regulation EC 796/2004 laid down detailed rules for the implementation of the integrated administration and control system provided for in Regulation EC 1782/2003.

[3] In the Mourne mountains of County Down 'Mourne Mountain West Trust' is responsible for 1,905 hectares of common land. The Department has operated an Integrated Administration and Control System (IACS) since 1993

and the trustees had submitted to the Department the names of graziers and the allocation afforded to them by their right to graze in common. This allocation was expressed in sheep numbers which the Department converted into a notional area of common land. The Department recorded such areas on its mapping system.

[4] ICAS provides for the identification of agricultural parcels and Regulation EC 796/2004, at article 8.2, provides that where an area is used in common, the competent authorities shall notionally allocate it between the individual farmers in proportion to their use or right of use. With the introduction of SFP in 2005 the Department requested the trustees to provide the names of graziers and the areas allocated by the trustees for each grazier. The names and addresses of 67 graziers were notified to the Department, including the first applicant who was allocated 69.11 hectares and the second applicant who was allocated 64.34 hectares. In April 2005 the Department wrote to the applicants giving the field survey number for the common land and confirming their allocations of common land and added "Could you please if you wish, use this farm survey number and area in support of your 2005 Single Farm Payment and LFACA." A claim for LFACA refers to the Less Favoured Area Compensatory Allowance.

[5] In making applications for SFP, farmers were required to declare all fields in their holdings and to identify those fields that were owned, leased, held in conacre or were common land. In respect of all fields in the holding the farmer would specify whether a claim was to be made for SFP and/or LFACA. The issues that emerged in relation to the 2005 applications for SFP by farmers holding lands in conacre was considered recently in Carson's Application [2008] NIQB 87.

[6] The farmer who applied under the SFP scheme had to establish 'entitlements'. The number of entitlements allocated to a farmer was equal to the number of eligible hectares the farmer elected to enter into the SFP scheme in 2005. Establishing entitlements in 2005 fixed the level of the farmer's allocated entitlement in future years. Having established his entitlements the farmer also had to activate the entitlements by using them to claim payment of SFP. A farmer might elect to establish his entitlements in 2005 but, by reason of his circumstances, not activate those entitlements in 2005, in which case he would not receive payment.

[7] The Department's guidance document issued to applicants, at Part 6 on "Land Matters" at section 2 stated the position as follows -

"What land must be declared on the 2005 single application form?"

You will be required to declare all the land on your holding in your 2005 single application field data sheet. You must include all land you own, lease or take in conacre, including any common land you have a right to graze. If you do not declare all your land (under declaration) or you declare more than you have (over declaration) this may result in a penalty being applied to your SFP.

From the land on your holdings, you will have to identify the area (fields) on which you wish to establish your entitlements. You do not have to establish entitlements on all the land that you have on your holding, but if you choose not to, then you will not be maximising the total payment of SFP that you could otherwise receive. It is important that you identify each field on which you are establishing your entitlements.”

[8] An application form was provided to farmers. A farm survey sheet also had to be completed. Across a number of columns an applicant would identify each of the fields in the holding, whether the field was owned or held in conacre or was leased, the field area and then, under column I the area of the field for which entitlements were to be established and under column J the area of the field for which entitlements were to be activated. By completing the areas in columns I and J the farmer made the claim for SFP in respect of that field. Under column K the farmer completed the field area to claim for LFACA in respect of that field.

[9] The Department’s guidance at Part 8 on ICAS 2005 Single Applications, section 13, states that if the farmer wanted to use a field to establish entitlements it was necessary to enter the area of the field in column I. Further, the guidance stated that for every field area entered in Column I the farmer had to decide whether to activate the entitlement in 2005 by entering the area in column J. A note in bold stated that if the farmer did not activate an area he would not receive SFP in respect of that area.

The McAlinden lands.

[10] The first applicant is a tenant grazier and trustee of the Mourne Mountain West Trust and was allocated a parcel of 69.11 hectares of common land in 2005. He submitted an application form on 10 May 2005 in respect of a holding of 27 fields. 19 fields were owned and claims were made for SFP and LFACA. 7 fields were held in conacre and no claim was made for SFA as the fields were ineligible, although 2 of the fields were subject to a claim for

LFACA. The final field (identified as field 26) was the applicant's 69.11 hectares of mountain land where no areas were stated in columns I or J and thus no claim was made for SFA, although a claim was made for LFACA in column K.

[11] Accordingly on 31 March 2006 the applicant received a final entitlement statement from the Department showing entitlement to SFP in respect of 22.95 hectares, with no entitlement to SFP being declared in respect of the 69.11 acres of common land. It is the applicant's case that the failure to claim SFP in respect of the 69.11 hectares of mountain land was a mistake, amounting to an 'obvious error', which under the legislation would entitle the applicant to make an adjustment of the application form to include the additional field of common land.

[12] The applicant appealed the entitlement statement and on 5 February 2007 the stage one appeal recommended that the appeal be rejected. In the notice of decision reference was made to the Department's guidance at Part 8 section 13 where explanatory examples indicate the need to complete the relevant columns to activate the SFP. In addition the appeal decision notes that the applicant had claimed LFACA and not SFP in respect of certain other fields and accordingly the Department considered the decision not to establish or activate the common land to be "a business decision taken by the appellant and could not therefore be judged to be an 'obvious error' as claimed by the appellant."

[13] The applicant lodged a stage two appeal before an Independent Panel which recommended that the appeal should not be upheld. By letter dated 27 February 2008 the Department accepted the Independent Panel's recommendation, referred to the Panel findings, including reference to the unique circumstances of land ownership and use with respect to the Mourne mountains; referred to the three categories of land holdings included in the application; noted the conacre holding of 7 fields which was not established or activated; noted the Mourne Mountain West trustees' field which was described as leased and not established or activated; stated the acceptance by the Panel that the reason for not claiming, as had been intended, was as the applicant claimed a mistake; concluded that the Panel was satisfied that it was the applicant's intention to establish and to activate the claim in respect of the mountain land but "it felt it would be unreasonable to impute your intention to do so from the substance of the form as submitted."

The Hennity lands.

[14] The second applicant is a hill farmer involved in grazing cattle and sheep in the Mourne west area for over 50 years and a trustee of the common grazing area known as "Mourne Mountains West". The applicant was allocated 64.34 hectares of the Mourne West common land.

[15] The applicant made an application for SFP on 10 May 2005. His holding comprised land that was owned, land held in conacre and the common land. In respect of the land that was owned that applicant claimed SFP and LFACA. In respect of some conacre land a claim was made for SFP and IFACA, in respect of some conacre land no claim was made for SFA or LFACA and in respect of some conacre land a claim was made only for LFACA. In respect of the common land (described as field 1) columns I and J were not completed so no claim was made for SFA, although a claim was made for LFACA. Again it is the second applicant's case that the failure to claim SFP in respect of the 64.34 hectares of common land was a mistake that amounted to an 'obvious error' and an adjustment ought to be made to include the common land.

[16] The applicant received assistance in the completion of the application form from Michael McCullough, an official in the Department. The affidavits disclosed a dispute between the applicant and Mr McCullough as to which parts of the field survey sheets had been completed by each of them. In essence the applicant contended that it was Mr McCullough who had completed the relevant parts of the sheets in relation to the common land and that the applicant had signed the form without noticing that columns I and J in respect of the common land had not been completed. On the other hand Mr McCullough contended that he had not completed the relevant parts of the form and indeed had advised the applicant to complete the columns that provided for payment of SFP in respect of the common land.

[17] On 17 May 2006 the second applicant received a final payment entitlement statement indicating entitlement to SFP in respect of 29.67 hectares, with no entitlement to SFP being declared in respect of the 64.34 hectares of common land. The applicant appealed and on 26 July 2006 the stage one appeal recommended rejection. The notice of decision referred to the explanatory examples in Part 8 of the guidance which confirmed the need to complete the relevant columns to activate payment for SFP. The decision concluded that as the applicant had claimed LFACA in respect of other fields but did not establish or activate those fields for SFP that the Department considered the decision not to establish or activate the common land was "...a business decision taken by the appellant and not an obvious error as claimed by the appellant."

[18] The applicant then proceeded to a stage two appeal to the Independent Panel which on 17 September 2007 recommended that the applicant's appeal should be upheld. However by letter dated 14 February 2008 the Department refused to accept the recommendation of the Independent Panel and rejected the applicant's appeal. The Department's letter referred to the findings of the Panel that the applicant had notified the Department of grazing rights on 64.34 hectares of common land which had been acknowledged by the Department on 13 April 2005; that the applicant had claimed LFACA on the common land; that

these matters were “.... sufficiently obvious to put anyone checking the form on notice that it was likely that a clerical error had been made on completing the form and this would have merited further investigation.” Reference was made to the Department’s contention that the failure to claim SFP could be regarded as a business decision but the Panel stated that it did not feel that any business would wittingly make a decision which resulted in a loss of entitlement and subsequent loss of income to the business. Accordingly the Panel concluded that the failure to claim SFP was an obvious error.

[19] The Department referred to the applicant having applied for LFACA on 6 fields including the common land but not having claimed SFP; that there was nothing in the field data sheet that would have led the Department to believe that an error had been made; claiming LFACA only on the common land was stated to be consistent with how the applicant had completed other parts of the field data sheet; the onus was on the applicant to ensure his intentions were clear in the completion of the application form; it would be unreasonable for a person checking the form to confirm the applicant’s intention; the non activation of the common land for SFP could not be treated as an obvious error.

Grounds for Judicial Review

[20] The first applicant’s grounds for judicial review may be summarised as follows –

1. The decision was unlawful in that the Department erred in respect of the definition of obvious error and as a result refused to exercise their discretion in allowing the aid application to be adjusted.
2. The Department failed to have regard to the Commission’s guidance on the concept of obvious error and to have regard to its own guidance on the review and appeal of decisions and on obvious error.
3. The Department failed to process the form promptly thus preventing the form being amended under Article 15(2) and Article 21(2) of EC 796/2004 and failed to carry out administrative checks in accordance with Article 23 of EC 1782/2003 and Article 24 of EC 796/2004.
4. The Department erred in the decision on the stage one appeal; the case officer’s report was factually inaccurate; the decision was unreasonable and irrational and the Department failed to give adequate reasons.

The second applicant's grounds for judicial review may be summarised as follows -

1. The Department's decision to reject the findings of the Independent Panel was irrational.
2. The Department fettered the discretion in the determination of obvious error by applying the concept in a systematic manner without considering the facts of the individual case; the Department adopted too high a threshold for the concept of obvious error by rigidly applying a general rule where an obvious error had to be detected in the application form.
3. The Department had acted in a procedurally unfair manner by not having regard to -
 - a. the applicant being assisted in the completion of the application form by the Department's case officer and acting in detrimental reliance upon advice; and
 - b. the trustees intention to activate all of the 1,905 hectares of common land; and
 - c. failing to conduct appropriate administrative checks that would have exposed the obvious nature of the error in the application form.

[21] The main issue on these applications concerns the scope of the meaning of 'obvious error' and consideration of that issue will address most of the grounds formulated by the applicants. However there are two other short matters to be dealt with before considering the meaning of 'obvious error', namely the effect of the administrative checks carried out by the Department and the alleged intention of the trustees to activate entitlements for common land.

Administrative Checks by the Department.

[22] The applicants' grounds for judicial review rely on certain provisions in the EC Regulations other than that dealing with 'obvious error'. Article 23 of EC 1782/2003 contains provision for administrative checks and on-the-spot checks which include verification of eligible areas and corresponding payment entitlements. Article 24 of EC 796/2004 permits the cross checks to extend to

the detection of irregularities in a number of specified respects and provides that indications of irregularities shall be followed up by other procedures. Article 15 of EC 796/2004 permitted the farmer to make amendments to the SFP application up to 31 May and late amendments were to attract a penalty for a period before amendments are not permitted. The applicants seek to establish a responsibility on the part of the Department to complete the checks and identify errors so as to enable the applicants to make amendments. This is not the object of the legislative scheme. Responsibility rests with applicants to establish errors and if obvious errors are established the appropriate adjustments may be made at any time.

Intention of the Trustees.

[23] The second applicant contends that it was the trustees' intention to activate all of the 1,905 hectares of common land and the Department should have had regard to that intention. I have not been satisfied that the trustees conveyed any such intention to the Department. The trustees informed the Department of the allocations of common land. The Department informed the farmers of the allocations of common land and that they could use the allocation to claim SFP and LFACA if they wished.

Obvious Error.

[24] Article 19 of Regulation EC 796/2004 bears the title "Adjustments of obvious errors" and provides that -

"Without prejudice to Articles 11 to 18, an aid application may be adjusted at any time after its submission, in cases of obvious errors recognised by the competent authority."

[25] The European Commission issued a working document on the concept of obvious error for the purposes of Article 12 of EC 2419/2001 in relation to aid applications in the animal premium and crop sectors. The Commission advice was adopted by the Department in a Business Rule. The guidance provides that as a general rule an obvious error has to be detected from the information given in the application documents. In addition, where Member States carry out cross checks with standing databases which compliment or are an integral part of the aid application procedure, such errors may emerge. The examples offered of such obvious errors are of two types, namely errors of a purely clerical nature, such as boxes not filled in or information lacking, and errors detected as a result of a coherence check indicating contradictory information, such as arithmetical mistakes or inconsistencies. Further, errors may be detected as a result of cross checks with independent databases, though

these may not be considered automatically or systematically as obvious errors. An independent database is presumably one that is not maintained by the Department and may be a Land Register. Examples of relevant errors relate to the Folio number or the number of a neighbouring parcel. It is noteworthy that the Commission guidance states that "... one cannot exclude the possibility of an error being obvious, even if the source of the information used to detect the error does not come from the farmer himself."

[26] More generally the guidance emphasises that the concept of obvious error depends on the overall facts and circumstances of each individual case, so there should be an examination of each and every case individually. Further the competent authority has to be convinced that the error is genuine, that is that the farmer acted in good faith and there should be no possibility that fraud or dishonesty would be involved.

[27] The guidance does not proceed on the basis that the entries in the application paperwork, coupled with reference to databases, should be the sole basis for reaching a determination on whether an entry constituted an obvious error. The Department's guidance at paragraph 6 states that, where an obvious error has been detected through administrative checks, an applicant should be notified in writing that a 'possible error' had been detected and the applicant should be provided with an opportunity to make a correction, with the onus being on the applicant to establish that there had been an error. Such letters should specify that responses had to be received within 14 days and that the failure to respond would result in the Department processing the application on the basis of the information contained in the original application. That such inquiries should be undertaken is evident from the requirements to look at the overall facts and circumstances of each case and to be satisfied that there is no possibility of fraud or dishonesty. Such inquiries by the Department must be intended to inform the Department's determination as to whether the matter is indeed a genuine error and whether it should be treated as obvious.

[28] The scheme of the legislation is to provide that mistakes in the making of an application are to be treated as the responsibility of the applicant and that exceptions are made not merely on the basis of a genuine mistake but only when the mistakes should be "obvious" to the national authority, in this case the Department. The Commission guidance as adopted by the Department states the general rule that such errors should be regarded as obvious when there is a clerical error or an inconsistency in the application paperwork or between the application paperwork and the databases. However it is recognised that there may be obvious errors where the information used to detect the error does not come from the farmer.

[29] In processing an application the first stage is for the Department to consider whether there is an entry in the application paperwork that is an error, and it must be shown to be a genuine error, in that the entry does not reflect the

intention of the applicant. The second stage, if it is satisfied that it is a genuine error, is for the Department to consider whether the error is obvious. The Oxford English Dictionary definitions of 'obvious' include 'clearly perceptible' or 'indubitable', in that it cannot be doubted. These definitions contain two shades of meaning in that the first links the obvious to that which is clearly apparent and the second links the obvious to that which is clearly proved.

(i) Were the entries in the application paperwork genuine errors?

[30] The first stage of the process is establishing that the application contains an error that is genuine in that it does not represent the intention of the applicant. Has each of the applicants made a genuine error in completing the applications for SFP in that they each intended to claim SFP for their allocation of common land? When the issue of an error is raised, by whatever means, the Department would examine the issue to determine, first of all, if there had been a genuine error. If the appeal process were to be invoked the inquiries would be made by the Department at the first stage and by the Independent Panel at the second stage. I am satisfied in the case of each of the applicants that the Independent Panels decided that the failure to claim SFP in respect of the common land was a genuine error.

[31] In respect of the first applicant the Department's letter of decision of 27 February 2008 states the Panel finding that the reason for not claiming SFP was a mistake and the letter repeats that the Panel was satisfied that it was the applicant's intention to establish and activate the claim in respect of the common land. Of course the Panel concluded that it was not an 'obvious' error. The Department's decision letter does not state that it shared the Panel's view that the applicant made an error but the letter does state the Department's conclusion that the matter could not be classed as an 'obvious error'.

[32] In respect of the second applicant it is apparent that the Independent Panel must have considered that the matter was an error as they recommended that it be treated as an obvious error. Again the Department's decision letter does not state if it shared the Panel's view that the applicant's entry was an error but the letter does state the department's conclusion, contrary to that of the Panel, that it was not an 'obvious error'. Accordingly, in respect of the second applicant, it is not proposed to determine on affidavit the factual dispute between the second applicant and Mr McCullough as to the circumstances in which the application form was completed but to proceed on the basis of the conclusion of the Independent Panel that the failure to claim SFP was a mistake.

[33] The Department took the view that the applicants had not claimed SFP in respect of the common lands for "business reasons" and this was the approach of the decision makers at the stage one appeal. However it was not

an approach that was accepted by either Independent Panel, because in each case they were satisfied that the failure to claim SFP had been a mistake. For present purposes I proceed on the basis of the findings of the Independent Panels that there were genuine errors made by the applicants.

(ii) If there were genuine errors, should they be treated as 'obvious errors'?

[34] The second stage in the process is establishing that any genuine error is 'obvious'. The issue that emerges concerns the manner in which it might be established that a genuine error in the application paperwork should be treated as an obvious error. Clearly the source of such information will include the application paperwork, either by itself or in combination with the databases.

[35] However the guidance recognises that an obvious error may arise where the source of the information that leads to the possible error being identified lies in material that does not emanate from the farmer. Further it is apparent that inquiries may be made to establish if there has been an obvious error. Such inquiries may arise if the Department has noted a possible error in the paperwork or if the Department has information that indicates that an entry in the paperwork is a possible error or if the farmer has given notice of an error. The cross checking of the application paperwork and the databases, together with information within the knowledge of the Department, may point to a discrepancy that should be followed up with a 'possible error' letter to the farmer? The Department will have knowledge of practices in the farming community, will have specialist knowledge in relation to agriculture and the local farming community and will have information about the history of the land and claims for grants. All of this may serve to inform the Department's assessment of the issue as to whether there has been an obvious error. For example if the Department had knowledge of circumstances in relation to certain farmers or certain parcels of land that would indicate that the absence of a claim for SFP in an application was a mistake, this may point up a discrepancy that would initiate the possible error correspondence with the farmer? In such instances the error would still lie in the application paperwork, may not be obvious from a review of the application paperwork alone, or from a comparison with the databases, but may become obvious when further information emerges from within the Department or further inquiries made by or on behalf of the Department.

[36] The Department would not be asked to guess at the intentions of farmers in completing the application paperwork. However there may be circumstances where the Department's knowledge of all the circumstances would raise the prospect that the entry would be a mistake, such as where there would be no reason for a farmer failing to make a claim in respect of some of the holding. Certainly if the Department has information that indicated that the application paperwork involved a fraud it is to be expected that the Department would

rely on that information. Equally if the Department had information that indicated that the application paperwork involved an obvious error it is to be expected that the Department would rely on that information. That the conclusion cannot be reached by an examination that extended only to the paperwork and the databases should not preclude the finding of obvious error if that conclusion was warranted by all the information available from the inquiries undertaken.

[37] Instances of this nature appear in the equivalent Scottish guidance. At Annex D paragraph 13, in referring to contradictions, correctable examples include instances where an area is omitted from the form in error, such as where the pre-printed area is not claimed but is necessary to establishments. It is stated that this "... may be eligible but acceptance as an obvious error would very much depend on the circumstances." A further example concerns overdeclaration and the information that may be taken into account includes "previous history".

[38] An obvious error is capable of being established in cases such as the present if, upon inquiry by the Department, there did not appear to be any explanation for an entry other than that it was a mistake. The Independent Panel hearing the second applicant's appeal took this approach when it stated that, as there would be financial loss to the applicant, there was no business reason for the failure to claim SFP for the common lands. Whether the Independent Panel was correct to conclude that there was no business reason for the failure to claim SFP is a different matter.

[39] The Department's decision letter in the second applicant's appeal, in rejecting the Panel's recommendation, stated that there was nothing in the application paperwork that would have led the Department to believe that the applicant had made an error. As indicated above, the totality of the information relating to an obvious error need not lie exclusively in the paperwork or the databases. As a general rule the source of information will be the paperwork and the databases but information from other inquiries cannot be excluded. Each case must be considered on its own facts. If the Department were to be satisfied that a genuine error had been made in not claiming SFP for part of a holding and if there was no reason for the failure to make the claim, the circumstances would be capable of giving rise to a finding of obvious error. Whether that was indeed the case would depend on a consideration of all the circumstances.

[40] The "business reasons" for not claiming SFP, as referred to by the Department, appear to involve what has been described as "stacking". Joseph Kerr, Deputy Principal of the Grants and Subsidies Policy Branch in the Department, explains the concept of stacking. Payment entitlements for SFP are based first of all on a reference amount, which is a combination of an historic reference amount, a diary premium amount and a national reserve

award and secondly on an area amount, which in Northern Ireland was calculated at €78.33 per eligible hectare declared for use in the SFP scheme. The value of entitlements was calculated by dividing the reference amount for a farm business by the number of eligible hectares declared on the application form and adding the area amount for each resulting entitlement. Mr Kerr states that some farmers preferred to stack their reference amounts on to owned land only, thus providing a higher value entitlement which was marketable as a trading commodity. Some farmers preferred not to use land which may not be available to them in future years, for example conacre land may not be used as there could be no guarantee that it would be available for future years. Thus Mr Kerr states that for common land allocations a farmer may have preferred to forego entitlements, as in many cases common land notional areas were allocated annually and could be reduced year on year. So if the area was reduced or was not available the following year the farmer would hold entitlements on which he could not claim payment as he would have less land than the number of entitlements.

[41] The applicants contend that they were not engaged in stacking. Angus Cuthbert of the Ulster Farmers Union referred to the reasons that an active farmer might resort to stacking. The effect of not establishing an entitlement to SFP in respect of some of the land in a holding would be to reduce the number of entitlements and increase the value of each entitlement. Accordingly the reasons for stacking arose where a farmer was uncertain as to whether he would maintain his landholding in future years. Examples offered by Mr Cuthbert related to the absence of security of tenure, proposals to use part of the land for building or to sell part the land for development or by letting in the event of retirement, all instances of a future reduction in the landholding. The view of the UFU was stated to be that there had been a limited degree of stacking in 2005, other than in relation to lands held in conacre. While the Department raised the issue of “business reasons” for not claiming SFP before the Independent Panels it is not clear that the issue of stacking was examined because, in relation to the second applicant, the Independent Panel stated that a business would not wittingly make a decision that resulted in a loss of entitlements and subsequent loss of income to the business. In the affidavits before the Court the business case for stacking was outlined by the Department and contested by the applicants, a matter that was not before the Independent Panels.

[42] The Department does not contend that there was stacking in the present cases but merely that there may be business reasons in any case for a farmer not to make a claim for SFP in respect of some of his holding and the Department cannot be expected to know the intentions of an applicant who does nor make a claim. Thus the issue is not whether the applicants were stacking but whether the Department should treat a genuine mistake as obvious when there is no other reason for the entry than that it would be a mistake. There may be a cross over between the two stages of the process in

that the reason for an entry may bear on the question of whether there was a genuine error as well as whether a genuine error should be treated as obvious.

[43] The details of the stacking dispute were not before the Independent Panels. If a farmer failed to claim entitlements because of stacking that could not amount to obvious error. However if there was no reason for stacking in the case of common land and no other reason for failing to claim SFP in the case of common land, that would be capable of amounting to an obvious error. The Judicial Review Court generally proceeds by way of affidavit evidence and considers policy, principle and procedure and is not best suited to undertake a fact finding exercise. In the present case there is a specialist tribunal that has been established to undertake such an exercise. Whether farmers holding common land might elect to stack entitlements or might have any other reason for failing to claim SFP is a matter that should be examined by the Independent Panels.

[44] Accordingly it is proposed to refer the two appeals back to the Department and the Independent Panels for reconsideration in the light of this judgment. Under section 21 of the Judicature (Northern Ireland) Act 1971 the Court has power to remit a decision to the deciding authority, with a direction to reconsider it and reach a decision in accordance with the ruling of the Court. The Panels should reconsider the issue of 'obvious error' taking account of the consideration of that concept set out above. The Panels should then issue recommendations to the Department. The Department should reconsider the decisions on the appeals in the light of the recommendations, taking account of the matters that are capable of amounting to 'obvious error' as set out above.

[45] Further the Panels may reopen any issues that arise on the appeals or consider any further issues that they consider to be relevant in the particular appeal. The issue has been raised in these proceedings as to the circumstances in which the first applicant completed the application paperwork and the reconsideration of that appeal may extend to the first stage of the process as to whether there was an error and whether it was genuine.