**Neutral Citation Number: [2009] EWHC 2946 (Admin)**

Case No: CO/11551/2008

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

19th November 2009

B e f o r e :

**His Honour Judge Jarman QC**

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**Between:**

**THE QUEEN**
**On the application of**
**T A Gwillim and Sons**

**Claimant**

**- and –**

**THE WELSH MINISTERS** **Defendants**

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**Hugh Mercer QC (instructed by John Collins & Partners LLP) for the claimant**
**Clive Lewis QC (instructed by Legal Service Department, WAG) for the Defendant**
**Hearing dates: 13 October 2009**

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**His Honour Judge Jarman QC:**

*Introduction*

1. The claimant firm, whose partners are Austin Gwillim and his two sons, carries on the business of breeding cows and ewes from a farm of some 116 hectares at Rhydybont, Talgarth, in Powys (the home farm). By a claim form filed on 28 November 2008 the claimant seeks to challenge what it said to be a decision notified in a letter dated 2 September 2008 to Mr Gwillim by the Department for Rural Affairs and Heritage at the Welsh Assembly Government (WAG). That decision concerns the single farm payment due to the claimant under European Council Regulation (EC) No 1782/2003 (the Regulation). The decision letter refers to a previous decision letter dated 20 March 2006 when the Minister of Environment Planning and Countryside accepted a recommendation of an independent appeal panel (the panel) that the claimant did not come within the hardship provisions of the Regulation. The September 2008 letter indicated that further representations on behalf the claimant had been considered at some length but that no issues had been identified which called into question that recommendation or the acceptance of it.

2. The claimant is left with only about 20% in value of the payments which it received under the former regime for farm payments. It is argued that the defendant has interpreted the hardship provisions of the Regulation too narrowly and has focused on sheep numbers without having

regard to the hectarage over which the production of sheep is made. Whereas the former regime of farm payments had regard only to production, the purpose of the new scheme under the Regulation is to shift from production support to producer support and to make the single farm payment conditional upon compliance with environmental and animal welfare issues as well as the maintenance of the farm in good agricultural and environmental condition. Moreover, the claimant submits that on a contextual and purposive interpretation of the Regulation and in particular the hardship provisions, the transition from one scheme to another should not result in loss to the producer. It is said that in failing so to interpret the Regulation, the defendants have erred in law.

3. The defendants do not dispute that the scheme under the Regulation is intended to bring about that shift, or indeed that the hardship provisions should be interpreted as far as proper to ensure no loss as a result of that shift. In essence what is said is that the loss suffered by the claimant, hard though it is, arises not because of the new scheme but because the claimant in 2003 failed to secure a renewal of a two year farm business tenancy which it entered into in October 1999 of some 451 hectares additional land (the additional land) at Abergwesyn near Llanwrtyd Wells in Powys, consisting of mountain land (Lot 1) and improved pastureland (Lot 2). Moreover it is said that in reality the decision challenged in this case is that of the Minister set out in the March 2006 letter and is accordingly well out of time.

*Permission*

4. The permission application was on 27 February 2009 adjourned to an oral hearing and on 1 May 2009 transferred by Beatson J to the Cardiff Civil Justice Centre. On 16 June 2009 Wyn Williams J ordered that the application for permission should be considered at a rolled up hearing, which in the event came before me. At the hearing, only two of the four original grounds were pursued. For the reasons which appear below, in my judgment each of those grounds are at least arguable and I grant permission to advance them.

5. Both those grounds relate to the proper interpretation of Article 40 of the Regulation which deals with hardship cases. The first ground is that as the claimant was during the relevant period under agri-environmental commitments the hardship provisions apply without the claimant having to show that during that period production was adversely affected. The second ground is in the alternative, that if the claimant is required to show such hardship, the concept of production being adversely affected encompasses more than just a reduction in sheep numbers and is sufficiently wide to include a change in the land area giving rise to production because both land area and the number of animals are relevant to calculate entitlements under the Regulation.

*The scheme*

6. To understand the relevance of the facts in this case it is first convenient to set out the scheme under the Regulation in some detail. I shall refer to it simply as the scheme but it is also known as the Single Payment Scheme or SPS. The Regulation is preceded by a preamble, the twenty fourth recital of which encapsulates the shift which is at the heart of this case:

> "Enhancing the competitiveness of Community agriculture and promoting food quality and environment standards necessarily entail a drop in institutional prices of agricultural products and an increase in the cost of production for agricultural holdings in the Community. To achieve those aims and promote more market-orientated and sustainable agriculture, it is necessary to complete the shift from production support to producer support by introducing a system of decoupled income support for each farm. While decoupling will leave the actual amounts paid to farmers unchanged, it will significantly increase the effectiveness of the income aid. It is, therefore, appropriate to make the single farm payment conditional upon cross-compliance with environmental, food safety, animal welfare, as well as the maintenance of the farm in good agricultural and environmental condition."

7. The claimant maintains that its loss in the value of farm payments under the scheme is due to the decoupling referred to in that recital, and as it was intended that such decoupling should leave the amounts paid to farmers unchanged, the hardship provisions should be interpreted to give effect to that intention. The defendant maintains that it was not such a decoupling which led to that loss.

8. Article 1 of the Regulation sets out its scope and provides that it establishes common rules on direct payments under income support schemes in the framework of the common agricultural policy (CAP) financed by the European Agricultural Guidance and Guarantee Fund and an income support scheme for farmers. 'Farmer' is defined in Article 2 as a person whose holding is situated within Community territory and who exercises an agricultural activity. 'Holding' means all the production units managed by a farmer situated within the territory of the same Member State, and 'agricultural activity' so far as relevant means the production of agricultural products including milking, breeding and keeping animals for farming purposes, 'or maintaining the land in good agricultural and environmental condition as established in Article 5.'

9. That latter article provides that Member States shall ensure that all agricultural land especially that no longer used for production is maintained in good agricultural and environmental condition and shall define minimum requirements for those purposes. The defendants rely upon the distinction there made between land on the one hand and production on the other. The article is expressly without prejudice to standards of agricultural practice set out in Council Regulation (EC) 1257/1999 and to agri-environmental measures applied above the reference level of good agricultural practices.

10. Payment and use of aid under the scheme is dealt with in Articles 36 to 44. It is to be paid in respect of payment entitlements accompanied by an equal number of eligible hectares (Article 36(1)). The payment entitlement is calculated by dividing the reference amount by the three-year average number of all hectares which in the reference period gave right to direct payments (Article 43(1)). Any payment entitlement accompanied by an eligible hectare gives right to the payment of the amount fixed by the payment entitlement. 'Eligible hectare' means any agricultural area of the holding taken up by arable land and permanent pastures, with some exceptions which are not relevant for present purposes (Article 44(2)). The farmer must declare the parcels corresponding to the eligible hectare accompanying any payment entitlement. Except in the case of force majeure or exceptional circumstances, the parcels must be at the farmer's disposal for a period of at least 10 months starting on a date fixed in the UK as 10 May in the calendar year preceding the application for participation in the scheme (Article 44(3)). In the present case that year is 2005.

11. The calculation of the reference amount is dealt with in Articles 37 and 38 and is the average of the total amount of payments which a farmer was granted under the former support schemes for each of the calendar years 2000, 2001 and 2002. In order to receive support under the scheme therefore, three factors are taken into account namely, the average support received under the former regime during 2000 to 2002 which was calculated with reference to animal numbers, the number of hectares at the farmer's disposal during that period, and the number of hectares at the farmers disposal for the 10 month period beginning 10 May 2005.

12. It is clear that support under the scheme is in part based on production, in other words for the purposes of the present case, numbers of sheep kept from 2000 to 2002. The detail of the scheme which would eventually be adopted was not known during that period and so it was necessary to include provision for different periods in the case of exceptional events. It has already been seen that such a provision is made in Article 44 (3) in relation to the 10 month period commencing on 15 May 2005.

13. The hardship provisions which relates to payments made under the former regime during 2000 to 2002 are set out in Article 40 which it is convenient to set out in full:

*Article 40*

**Hardship cases**

1. By way of derogation from Article 37, a farmer whose production was adversely affected during the reference period by a case of force majeure or exceptional circumstances occurring before or during that reference period shall be entitled to request that the reference amount be calculated on the basis of the calendar year or years in the reference period not affected by the case of force majeure or exceptional circumstances.

2. If the whole reference period was affected by the case of force majeure or exceptional circumstances, the Member State shall calculate the reference amount on the basis of the 1997 to 1999 period. In this case, paragraph 1 shall apply mutatis mutandis.

3. A case of force majeure or exceptional circumstances with relevant evidence to the satisfaction of the competent authority, shall be notified by the farmer concerned in writing to the authority within a deadline to be fixed by each Member State.

4. Force majeure or exceptional circumstances shall be recognised by the competent authority in cases such as, for example:

a) the death of the farmer;

b) long-term professional incapacity of the farmer;

c) a severe natural disaster gravely affecting the holding's agricultural land;

d) the accidental destruction of livestock buildings on the holding;

e) an epizootic affecting part or all of the farmer's livestock.

5. Paragraphs 1, 2 and 3 of this Article shall apply, mutatis mutandis, to farmers who, during the reference period, were under agri-environmental commitments according to Regulations (EEC) No 2078/92 and (EC) No 1257/1999.

In the case where the commitments covered both the reference period and the period referred to in paragraph 2 of this Article, Member States shall establish, according to objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions, a reference amount in accordance with detailed rules to be laid down by the Commission in accordance with the procedure referred to in Article 144(2).

*The facts*

14. It is necessary to set out the facts in a little more detail. For the purposes of this challenge they are not in dispute save for one or two relatively minor issues which, in my judgment, do not have a bearing on the determination which I have to make. Accordingly I do not deal with them.

15. The farm business tenancy for grazing which the claimant entered into in 1999 is dated 1st October 1999 and is made with a Dr and Mrs Ellis as landlords. The tenancy was granted until 30 September 2001 and by clause 3 h) required the claimant as tenant to keep an appropriate number of stock on the land and not to carry out any activity which may prejudice the landlords ESA management agreement. That latter prohibition was also contained in clause 3 p).

16. At the commencement date of the tenancy Lot 1 was subject to an agri-environmental agreement, known as an Environmentally Sensitive Area agreement (ESA), which the landowner had entered into under Council Regulation (EC) 1257/1999. In Wales such an agreement was at the material

time administered by the Countryside Council for Wales (CCW), and latterly as part of the Tir Gofal Scheme. Under the original agreement, the number of ewes and lambs was restricted to 1245 in summer and 1013 in winter. As at that date no such agreement applied to Lot 2.

17. The claimant's intention in taking the tenancy was to increase its closed flock partly by keeping more ewe lambs than usual from lambing. It was usual to keep about 200 ewe lambs each year, but the intention at this time was to keep double this amount. By 12 October 1999 the flock of about 804 ewes was moved from the home farm to the additional land together with some 71 head of cattle. It was also part of the plan to buy in 350 ewe lambs to keep at the home farm so that the stocking density on that ground would be reduced.

18. On or about 7 December 1999 officials from the CCW visited the additional land with Dr Ellis when Mr Gwillim was present. A complaint was raised about cattle grazing adjacent to a river and damaging wild orchids. On 10 December 2009 the CCW produced maps showing proposals to modify the ESA agreement applicable to Lot 1 and to include Lot 2. These proposals were the subject of discussion between CCW and Dr and Mrs Ellis in which the claimant was not directly involved.

19. These discussions however resulted in considerable uncertainty on the part of the claimant in late 1999 and early 2000 as to what further restrictions might be agreed in respect of Lot 1 and what restrictions might be agreed in respect of Lot 2. In the middle of January 2000 41 head of cattle were returned to the home farm. In the middle of March 2000 Mr Gwillim had discussions with Dr Ellis concerning stocking levels on the additional land and a week later moved 180 ewes to lamb back at the home farm. It was decided not to return them to the additional land. Due to that uncertainty, it was decided that the claimant could not risk keeping the additional ewe lambs on the additional land or buying in ewe lambs to be kept at the home farm, and these plans were not completed.

20. On 7 April 2000 officials of the CCW agreed at a site meeting with Dr Ellis where the winter feeding sites on the additional land were to be placed. That severely restricted the grazing use which could be made of the land. In the event a revised and more restrictive agreement as part of the Tir Gofal Scheme was entered into on 14 November 2001.

21. Further farm business tenancies for grazing Lots 1 and 2 were entered into by Dr and Mrs Ellis and the claimant at a rent of £10,000 per annum respectively for periods of 12 months on 1 October 2001 and on 1 October 2002. Thereafter the claimant decided it could not continue to justify paying rent at this level having regard to the restrictions under the Tir Gofal Scheme and an offer of reduced rent was rejected. Accordingly the claimant's last tenancy came to an end on 30 September 2003.

22. In July 2004 an official of the Department for the Environment, Planning and Countryside of the National Assembly for Wales (the Department) wrote to the claimant with information for farmers applying for the reference period of the scheme under the Regulation to be amended because of force majeure or exceptional circumstances or agri-environment scheme commitments. This prompted the claimant to reply requesting information as to the payment rates, forage area and animal numbers during the period 1997 to 1999 inclusive. This request was refused on that basis that the only time this information would be needed was if the claimant demonstrated that the whole of the period 2000-2002 was adversely affected by the factors referred to above.

23. In December 2004 a statement was received by the claimant from an official in the Department setting out the provisional number of entitlements allocated under the scheme as 571.85 based on a reference period of 2000 to 2002. Because the claimant no longer had a tenancy of the additional land, it was realised that it would not be possible to take up more than about 117 entitlements without further land. Efforts were made to take a letting of further land but because a number of farmers were in the same position the claimant was unable to find such land at a viable letting rate.

24. The claimant applied to the Department requesting that a reference period of 1997 to 1999 be used because production had been adversely affected by force majeure or exceptional circumstances. A divisional officer replied by letter in February 2005 rejecting that request on the basis, so far as relevant, that the evidence did not suggest that the agri-environmental scheme commitments adversely affected production during the reference period.

25. An appeal procedure against that decision was established under the Single Payment Scheme and Miscellaneous Direct Support Schemes (Appeals) (Wales) Regulations 2004. Guidance issued by WAG in respect of that procedure indicated that the intention was to ensure that farmers have access to an open and transparent appeals procedure. Decisions would be reviewed to ensure that the Department had been objective and officials had applied the EU rules correctly. The process consists of two stages, namely review by a divisional executive officer and then, if further review is requested, by an independent panel. The panel reports its finding to the Minister for Environment, Planning and Countryside who makes the final decision taking the panel's recommendation into account.

26. The claimant invoked this procedure by application received on 8 April 2005 and on 20 June 2005 the divisional executive officer rejected the appeal on the following grounds:

"In order to be eligible under the force majeure or exceptional circumstances criteria set out in [the Regulation] there must be an unforeseeable or exceptional event that adversely affected production before or during the SPS reference period (2000 to 2002) which could not have been avoided with reasonable care and over which the business has no control…Insufficient evidence has been supplied to support the agri-environmental element of the appeal, which must therefore be rejected. SAPS claims did not decrease immediately following tenancy of the ESA land in 1999 and there is no evidence of a decrease as a result of entry into the Tir Gofal scheme."

27. A stage 2 appeal led to a hearing before the panel on 21 October 2005. The panel concluded that the variations in the sheep numbers during the reference period were not as a result of any ESA or Tir Gofal scheme obligations. It noted that other stock eligible for CAP scheme claims increased during the reference period. It is agreed that this refers to cattle. The panel recommended that the appeal be disallowed.

28. During 2005 officials of the Department entered into negotiations with its counterparts in England, Scotland and Northern Ireland which led to policy agreements for the implementation, throughout the UK, of the scheme under the Regulation. The aim of such agreements was to ensure consistency of approach throughout the UK. This was thought necessary because different models were adopted. In Wales, for example, an historic model was adopted, but in England a model comprising historic and area elements was chosen. The agreements were to the effect that in all cases, the calculation made under the scheme would be based on CAP subsidy receipts and land usage during the years 2000 to 2002.

29. By letter dated 20 March 2006 the Minister wrote to the claimant setting out the panel's recommendations and stating that after careful consideration of the facts of the case he had decided to accept those recommendations. The letter noted that the appeal was also initially based on loss of sheep during the outbreak of foot and mouth disease in 2001 but that as requested by the claimant that element of the appeal had not been considered by the panel pending the result of correspondence with the Parliamentary Ombudsman. It was indicated that if the claimant wished the panel to consider that element then its secretariat should be contacted.

30. On 27 March 2006 and again on 21 April 2006 the claimant repeated its request to the Department to be supplied with details of payments made to it and the forage areas to which the payments related during the period 1996 to 2006. These details were supplied by letters dated 19 and 21 April 2006. There then followed a course of correspondence from May through to July 2006 by and on behalf of the claimant on the one hand and by the Minister and officials on the other, during which the claimant asked for the panel to be reconvened. By letter dated 3 July

2006 the Head Rural Payments Wales (RPW) of WAG replied to the claimant's Farmers Union of Wales (FUW) representative apologising for the failure to supply the information requested beforehand but maintaining that the information was not necessary for the stage 2 appeal hearing.

31. On 31 July 2006 the Minister wrote to Mr Gwillim's local Assembly Member accepting that the failure to provide the information was regrettable but reiterating that it would have made no difference to the appeal outcome because the panel recommendation was based on the impact of agri-environmental schemes on production during 2000 to 2002. It was also said that it would be reasonable to expect the claimant to retain such information. The Minister confirmed that he did not intend to ask the panel to reconvene to reconsider the hardship appeal in respect of the Tir Gofal agreement but confirmed that the offer in his March 2006 letter for the panel to meet on the issue of loss of sheep remained open.

32. On 2 October 2006 the claimant lodged a complaint in respect of that response at the office of the Public Services Ombudsman for Wales (PSO), as distinct from the Parliamentary Ombudsman. On 25 April 2007 the PSO sent a draft report to the claimant and to WAG in order that the parties may comment on the content. The draft report concluded that it was now accepted that the requested information should have been supplied in 2004, and recommended that to remedy the perceived unfairness the claimant's appeal should be reheard as a matter of urgency by a fresh panel. The draft recommendation observed that it is for the panel to interpret the term "production" within Article 40 and made no comments on the merits of the case.

33. The following month Rory O'Sullivan, the Head of the Countryside Policy Division (CPD) of the Department, visited Mr Gwillim and his sons. Mr O'Sullivan had been the lead official for WAG in the negotiations with other UK officials in 2005. There were discussions at the meeting but its purpose was not to arrive at any decision. Mr O'Sullivan took away a number of documents, including papers relating to the claimant's business expansion plan and the leasing of the additional land. These were copied and returned. By letter dated 19 September 2007, he replied to the PSO saying that he had had a without prejudice meeting with Mr Gwillim and his two sons but maintained the view that the decisions made on the claimant's appeal "were correct having regard to EU legislation, policy implementation agreed at a UK level and the information available at that time as to the position of the business." The letter continued that in light of the meeting and further information available, Mr O'Sullivan was of the view that the circumstances faced by the claimant were never envisaged by those who drafted the EU legislation, but that it was believed a solution had been found based on a recalculation of land used during 2000 to 2002. A report had been prepared the aim of which was to secure a positive outcome and Mr O'Sullivan expected to be able to respond formally to the claimant in due course.

34. As a result of that letter, the PSO wrote to Mr Gwillim on 24 September 2007 saying that he had taken the decision to discontinue that investigation into the complaint for the present given that "the Assembly is currently taking action to try to secure payment to you." On the same day the PSO wrote to Mr O'Sullivan in similar terms but asking him to note that the investigation might be re-opened if it appeared appropriate to do so.

35. Unfortunately for the claimant the hoped for solution came to nothing and in response to a chasing letter from Mr Gwillim in March 2008, Steve Dickens of the CPD Appeals Unit on behalf of Mr O'Sullivan replied by letter dated 17 March saying that after an in-depth investigation they had not been able to identify a specific legal solution which would enable them to offer an alternative solution. It was said that Mr O'Sullivan had written to the Commission and discussed the matter with EC officials but could do nothing further until a response was received.

36. Mr O'Sullivan again visited Mr Gwillim on 23 May 2008 when the latter's MP and FUW representatives were present. There is a difference in recollection as to precisely what was said at that meeting. Mr O'Sullivan recalls that he indicated that the work to identify a solution had failed. Mr Gwillim and others recall a more optimistic conclusion. In response to a fax message from Mr Gwillim in July 2008 Mr Dickens wrote again on 11 July 2008 saying that for the

scheme reference period calculations the stocking density of the declared land is immaterial; "– only the livestock numbers on which subsidy was paid is relevant." It was pointed out that any additional land bought into the business without a corresponding increase in livestock numbers would have reduced the overall stocking density, regardless of whether it was subject to agri-environmental scheme conditions. Further, the letter continued, the additional land was not subject to a signed Tir Gofal agreement until 6 December 2001.

37. The following week on 17 July 2008 a meeting was held between Mr Gwillim, his MP, a representative of the FUW and the Minister for Rural Affairs and CPD officials including Mr O'Sullivan and Mr Dickens. The meeting lasted one hour and the reason for it, according to a note taken by Mr Dickens of the meeting, included the following "Mr Gwillim is seeking the exclusion of the SPS reference period (2000-2002) from his SPS entitlement calculation and its replacement with 1997-1999 production rota." During the meeting, Mr O'Sullivan indicated it was possible to gain legal agreement to the exclusion of the years 2001 and 2002 but pointed out that unless the year 2000 was excluded as well then there would be no benefit to the claimant. In terms of the impact of agri-environmental schemes, it was agreed at a UK level that if there was an adverse impact on production, then years could be excluded. The only dip in production occurred in 2001 when sheep numbers fell. Mr O'Sullivan said that the underlying principles of the Regulation had been explored and in particular its preamble but the legal view was that the preamble had no force.

38. The meeting concluded with the Minister saying that since the decision in March 2006 officials had conducted a further comprehensive investigation and that a further appeal hearing would be unlikely to lead to a different outcome. The Minister continued that whilst expectations should not be raised, she would request that the matter be reflected upon and that a full report would be prepared by officials and the official view would be communicated in writing in due course.

39. Following the close of the meeting with the Minister and after Mr O'Sullivan had left, another CPD official Julia Richards discussed further options and referred to judicial review, pointing out that there is a time limit and that the claimant would need to take its own legal advice.

40. On 2 September 2008 Mr O'Sullivan again wrote to Mr Gwillim as follows:

> "I am writing in the light of the discussion on 17 July that you and Roger Williams MP held with Elin Jones, the Minister for Rural Affairs, about the position on your Single Payment under the EU Common Agriculture Policy Regime.
>
> For the record, you know that the CAP Appeals process concluded in March 2006 when the then Minister rejected the appeal you had lodged against the decision not to allow the application you had submitted under the Single Payment hardship provisions. Since that time, you have made further representations to the Public Services Ombudsman (PSO) and at Ministerial level within the Welsh Assembly Government.
>
> Within the Welsh Assembly Government, we have considered at some length the representations that you have made. We have identified no issues that call into question the recommendation made by the CAP Appeals Panel that resulted in the Ministerial decision in March 2006 to reject your appeal.
>
> I can understand your disappointment at the content of this letter. All I would wish to add is that there are obligations on the Assembly Government to act strictly within the competencies provided under the relevant legal powers, be they at a European or at a national level."

*The decision challenged*

41. The claimant in its claim form filed on 28 November 2008 says that it is the decision set out in that letter which it wishes to challenge. The defendants contend that the decision which in reality

is challenged is that of the Minister in March 2006. They submit that the decision to complain to the PSO in October 2006 does not justify the failure to bring a challenge to that decision promptly and in any event within 3 months. Secondly and alternatively, they submit that the claimant knew that no other solution was possible by no later than 17 July 2008 when the time limit for judicial review proceedings was brought to Mr Gwillim's attention. If contrary to the primary submission, the search for an alternative solution was a good reason not to have brought the claim before, the claimant should have acted promptly thereafter rather than waiting a further 4 months before filing a claim.

42. For the claimant it is submitted that it was not apparent until the meeting on 17 July 2008 that officials in the CPD in interpreting the Regulation had regard to an agreement at UK level that for production to be adversely affected there had to be shown a dip in production. It was against the background of the draft recommendation of the PSO that steps were taken by officials to investigate the matter further. Whilst there was no formal rehearing, the investigation included an examination whether it was possible to find a solution to resolve the problem. There was a fresh decision which might have proceeded either way, and in the event it was the agreement on interpretation at a UK level which prevented a decision favourable to the claimant. In the alternative, the claimant applied at the hearing to amend the claim so as to challenge the March 2006 decision on the same grounds, and for the court to exercise its discretion to allow such a challenge notwithstanding the passage of time.

43. In my judgment the decision set out in the letter dated 2 September 2008 was a fresh decision after a meeting at ministerial level where the Minister had accepted that her officials had conducted a further comprehensive investigation since the March 2006 decision. She indicated at that meeting that she would request that the matter be reflected upon and that a full report would be prepared by officials and that the official view would be communicated in due course. It was not simply a question of confirming in writing a decision which was made on 17 July 2008. It was clearly contemplated by the Minister that her officials would at her request reflect upon the matter after the meeting and prepare a full report. Albeit coupled with a warning that expectations should not be raised, in my judgment such reflection gave rise to the possibility that a decision favourable to the claimant might yet be made, however unlikely that may have seemed.

44. Those indications were given against the background of the draft recommendation of the PSO that a fresh panel should consider the case. That recommendation was given in respect of a complaint relating to the failure to disclose documentation, but it is clear that the PSO envisaged that the fresh panel would consider how to interpret the term "production." The Minister in the July 2008 meeting indicated that a fresh appeal would be unlikely to come to a different conclusion, which is not surprising given the approach of her officials up to and including that meeting. That in my judgment explains why she indicated she would request her officials to reflect on the matter. She gave no indication that the requested reflection would be in any way limited and there is no evidence that it was.

45. In referring to the appeals process as having concluded in 2006, the 2 September 2008 letter does not in my judgment fully reflect the process which had been underway since then. In my judgment the possibility of a fresh panel hearing pursuant to the draft recommendation of the PSO had not been finally or clearly rejected, or at least not before the July 2008 meeting. The possibility was alluded to in that meeting, albeit with the observation that it would be unlikely to lead to a different outcome.

46. Nevertheless the letter goes on to recognise that the claimant had made further representations, including at ministerial level, and that those representations had been considered at some length. It may well be that the officials had not, during this process, wavered in their view that there was no scope for changing the interpretation which had been placed on the Regulation, but it does not follow in my judgment that a fresh decision was not made. In my view it was, and communicated to the claimant in that letter.

*Delay*

47. If I am wrong about that, I would allow the claimant's application to amend the claim to refer to the March 2006 decision and to pursue the two grounds of challenge in respect of that decision. Save possibly for one difference in reasoning which I refer to below, the grounds in substance apply to that decision as they do in respect of the September 2008 decision.

48. The defendants in opposing that application point out that it is over 3 years since the earlier decision was made, and the claim was filed more than 2 years afterwards. Moreover the claimant did not seek to challenge that by way of review but only by a complaint to the PSO in relation to non-disclosure of information, and then not until October 2006.

49. On the other hand, in my judgment, after the March 2006 decision the claimant promptly renewed its request for information which request was belatedly complied with in April 2006. The claimant also promptly requested a new panel hearing. That was not finally dealt with by the Minister until July 2006. Whether or not the Minister was correct in his observation that the information would have made a difference to the decision, the perceived unfairness understandably loomed large at that time in the minds of Mr Gwillim and his sons. It was that perception which caused the PSO to make the draft recommendation for a reconvened panel hearing. The effect of the decision upon the claimant is not limited to one year of production but continues so long as the scheme is in force as it is at present. A challenge by way of judicial review should normally be seen as a last resort, and I am satisfied that it was not until the letter of 2 September 2008 that it was formally made clear to the claimant that no different decision would be forthcoming. Notwithstanding the long delay I would allow the application. I turn now to consider the two remaining grounds of challenge.

*Ground 1 – whether farmers under agri-environmental commitments need to show that production was adversely affected*

50. The claimant submits that Article 40(5) of the Regulation applies whether or not the farmer's production is adversely affected by agri-environmental commitments. It applies to farmers who during the reference period were under such commitments.

51. A number of reasons are advanced for that submission. It is said that Article 40(1) and 40(5) each describes a different situation which amounts to hardship. The latter was not included in the Regulation as originally drafted but only as finally drafted (compare the drafts in January and September 2003 respectively). Had it been intended to require production to be adversely affected by agri-environmental commitments then an extra sub-paragraph would have been added to Article 40(4), instead of a new paragraph.

52. Moreover it is said that farmers could have been under agri-environmental commitments for many years with the result that no dip in production might be perceived in the reference years but Article 40(5) does not provide for an alternative way to measure such a dip beyond the reference years.

53. The purpose of Article 40(5), the claimant argues, is closely analogous to Article 3a of Regulation No 857/84, which dealt with milk quotas. Article 3a was inserted into that regulation to provide that milk producers who had entered into undertakings to suspend production should be entitled to use a reference period unaffected by the agri-environmental legislation. Where a provision in Community law is open to several interpretations, it should usually be interpreted to ensure that it retains its effectiveness (see Case C-434/97 *Commission v France* [2000] ECR I-1129 paragraph 21 and C-403/1999 *Italian Republic v Commission of the European Communities* [2001] ECR I-6883 at 28).

54. The argument continues that by adding into Article 40(5) a requirement that production is adversely affected, its effectiveness is greatly reduced. It does not take into account that

entitlements are allocated according to the land at the disposal of the farmer as well as to the support received. The words "mutatis mutandis" should not detract from the principles of interpretation of Community law which normally require independent and uniform interpretation throughout the Community and must take into account the context of the provision and the purpose of the relevant legislation (see for example Case 327/82 *Ekro v Produktschap voor Vee en Vlees* [1984] ECR 107 and T-41/89 *Schwedler v European Parliament* [1990] ECR II-79 at 27). Article 40(5) merely refers to the type of request that a farmer may make and not to the conditions on which the farmer was entitled to make the claim.

*Conclusion on Ground 1*

55. I am not persuaded by these submissions. In my judgment Article 40 read as a whole is clear and does not permit the interpretation contended for on behalf of the claimant under this ground. The article as a whole deals with hardship cases and Article 40(1) is by way of derogation from Article 37 so as to allow different calendar years to the normal reference period to be used for calculating entitlements. It requires production to be adversely affected by force majeure or exceptional circumstances during the normal reference period, and examples of such cases are set out in Article 40(4). Cases where farmers are under agri-environmental commitments on the other hand are or may well be different in nature to these examples, and it my judgment it is easy to see why they were not dealt with in that paragraph.

56. The opening words of Article 40(5) that paragraphs 1, 2 and 3 of the Article "shall apply mutatis mutandis" to such cases make it clear in my judgment that it is intended to refer to something more than the type of request which may be made. What is to apply to such cases is the justification for the derogation, namely where production is aversely affected during the reference period.

57. Express recognition that such commitments may endure substantially longer than the reference period is given in the second part of Article 40(5), by providing that where the commitments cover the reference period and the period of 1997 to 1999, Member States shall establish a reference amount in accordance with rules to be laid down by the Commission under the procedure referred to in Article 144(2) in such a way to ensure equal treatment of farmers.

58. Accordingly in my judgment there is no justification for leaving out the phrase "whose production was adversely affected during the reference period" in Article 40(1) when applying it to farmers who during that period were under agri-environmental commitments within the meaning of Article 40(5).

*Ground 2 – the meaning of adverse affect on production*

59. Alternatively the claimant submits that in interpreting the phrase "production was adversely affected" in Article 40(1) as a dip in livestock numbers without having regard to the land area farmed, the defendants have adopted too narrow a meaning. It is said that such an effect cannot be defined as a dip in such numbers measured exclusively by a reduction in support payments. The word reduction is not used in the English or the French version of the Regulation. The paragraph does not provide for any specific year to be compared, by way of derogation, with the reference years of 2000 to 2002 set out in Article 37.

60. It is further said that the result aimed at and the principle supporting the entirety of Article 40 is "the equal treatment between farmers and to avoid market and competition distortions" and that so much is clear from the second paragraph of Article 40(5). The parameters of land area and number of animals are equally important to calculate entitlements under Article 37. To underline that point, reference is made to a Declaration of the Commission on the establishment of a list of cases of farmers in a special situation, which was published on 26 June 2003 as Annex 2 of the Final Presidency Compromise in Agreement with the Commission (DS 223/03). Such a list was established by Article 45 of the Commission proposal. The Declaration indicated that when

implementing Article 45 the Commission will consider farmers who in the reference period or not later than 31 March 2003 entered into a multi-annual lease of a holding; or who made investments or purchased land in order to increase their production.

61. The defendants contend that in the context of claims for CAP support for livestock, the phrase "production was adversely affected" in Article 40(1) means an adverse effect on the number of livestock eligible for subsidy and the CAP subsidies received. They submit that the panel found and the Minister accepted in March 2006 that the variations in sheep numbers were not due to agri-environmental commitments. It thus does not matter that in the meeting on 17 July 2008 it was wrongly stated that the recitals to the regulation had no force, because that finding makes it clear that the panel and the Minister in 2006 did not regard the decoupling referred to in recital as causative of the variation in sheep numbers.

*Conclusion on Ground 2*

62. The difficulty with that latter submission, in my judgment, is that although that appears to have been the reasoning of the panel and the Minister in March 2006, the reasoning which informed the decision letter in September 2008 was somewhat different. In the meantime Mr O'Sullivan had seen papers relating to the claimant's business expansion plan and the leasing of the additional land. At the meeting of 17 July 2008 Mr O'Sullivan when dealing with the impact of agri-environmental commitments referred to the agreement at UK level and that the only dip in production occurred when sheep numbers fell in 2001. He indicated that it was the land area declared in the reference period that was the problem and that any unsupported "amendment" as it was termed would result in disallowance from auditors. His conclusion was that there was no legal way to respond positively to the claimant's situation. When the FUW representative referred to the underlying principles of the legislation, Mr O'Sullivan replied that all of that had been explored, and in particular the preamble to the Regulation which refers to the legislation not being intended to disadvantage farmers, but then went on to say that the legal view is that the preamble has no force.

63. Although his subsequent letter dated 2 September 2008 states that WAG had considered the further representations made and had identified no issues that call into question the recommendation made by the panel that resulted in the Ministerial decision in March 2006, in my judgment it is likely that that consideration was informed or heavily influenced by the approach demonstrated in the meeting of 17 July 2008.

64. In my judgment that approach is too narrow and does not properly take into account the purpose of the Regulation as set out in its preamble, namely to promote more market-orientated and sustainable agriculture by introducing a system of decoupled income support. It is clear in my judgment from the preamble and from Article 40(5) that it was intended that such an introduction would leave the actual amounts paid to farmers unchanged and that they should receive equal treatment.

65. Such a contextual and purposive interpretation in my judgment leads to the conclusion that the phrase "a farmer whose production was adversely affected" within the meaning of Article 40(1) is capable of including a farmer who plans to increase his flock and to lease additional land to do so during the reference period but who being under agri-environmental commitments finds that it is not viable to put that plan into effect or to continue to lease the land. It also leads to the conclusion that regard must be had to the land area and not just to the number of animals.

66. This challenge is concerned with the decision making process rather than the decision itself and consequently, in my judgment, it is not appropriate to express any view as to how the decision should be made on the facts of this case. That is a decision which has been entrusted by Parliament to the Minister. But it follows from the above that the decision set out in the letter dated 2 September 2008 is flawed and should be quashed. The decision should be reconsidered taking into account the matters set out in paragraphs 64 and 65 above.

67. It would be helpful if the parties, by the time this judgment is handed down, can reach an agreement as to how that is best achieved in practice. If needs be I shall give further directions on that point after hearing further submissions.