MILLS & REEVE

briefing

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How much is an orchid worth in SPS payments?

Many lawyers limit their involvement in the single payment scheme to ensuring that the correct provisions are drafted in contracts for sale and farm business tenancies to the transfer of single farm payment entitlements.

However, what if the value of the entitlements awarded simply does not fairly reflect the level of production or the size of the holding? One means of obtaining an increase in single farm payment has been to invoke the "hardship provisions" under article 40 of the Single Payment Scheme Regulation EC 1782/2003 to request that the claim be dealt with under a "reference period" other than the default period of years 2000 to 2002 inclusive.

On the advent of the SPS regime, the amount of single payment subsidy per hectare payable under the new regime was calculated by taking the three-year average (2000 to 2002) of the payments received under the old schemes and dividing it by the three-year average number of hectares for which the farmer was claiming – this took into account the fact that many farmers' holdings varied in size from year to year.

Put simply, if, for whatever reason during the period 2000 to 2003, the farmer was unable to gain the maximum potential subsidy for his land, his new single payment scheme entitlements would have suffered, but for those hardship provisions under article 40. This provides that where a farmer's "production was adversely affected during the reference period by a case of force majeure or exceptional circumstances occurring before or during the reference period", he may request the reference period to be the earlier period of 1997 to 1999 (or another period if this proves also to be inappropriate).

Farmed out

An encouraging development has emerged thanks to *R on the Application of TA Gwillim & Sons v Welsh Ministers* (2010). Here, T A Gwillim & Sons decided in 1999 to expand its farming operation, and took a lease of just over 1,100 acres in October of that year. One part of this land was then subject to an environmentally sensitive area scheme.

Gwillim duly moved some 800 ewes and 71 head of cattle onto the new land, but the animals had not been grazing for two months when the Countryside Council for Wales (which administered the ESA scheme) proposed to extend the ESA to cover the other part of the land as well, on the basis that grazing taking place adjacent to a nearby river was damaging wild orchids.

The new ESA agreement came into force on 14 November 2001 following a period of great uncertainty on the part of Gwillim as to the extent to which he could graze the new land. By this point it had moved most of its livestock off the additional land and back to the original holding.

The size of Gwillim's holding therefore belied the scale of its farming operation in the relevant period 2000 to 2002. Gwillim's single payment entitlements were duly calculated on the basis of the three-year average of payments received in the years 2000 to 2002 divided by the average land area which it farmed. This included the additional land on which it had not been able to graze nearly as much livestock as was planned.

The net result was that Gwillim's single farm payment was substantially lower than the amount of subsidy received under the previous schemes, and would have been more appropriately calculated with reference to the period 1997 to 1999 when the holding was smaller but operated at a much higher grazing density.

Gwillim put forward an application under article 40 of the 2003 regulation, asking for the "reference period" to be the period 1997 to 1999, when its operation was not beset by the difficulties of the expanding ESA scheme. The Welsh ministers rejected the claim on the basis that "production adversely affected" under article 40 meant a dip in production, rather than thwarted plans for increased production. While there had been a slight dip in production in 2001, the ministers did not consider this to be significant enough to allow a change in the reference period.

Giving judgment, Richards LJ confirmed that an adverse effect on production can equally be brought about by the fact that an increase in production was prevented or restricted by a relevant factor (in this case the ESA scheme) and followed recent European case law by adopting a more purposive approach to the regulation rather than adhering to a strict interpretation of it.

Counsel for the ministers tried to argue that the "adverse effect on production" was brought about by mere "business uncertainty", presumably because Gwillim started moving livestock back before the relevant ESA scheme kicked in. This was rejected by the Court of Appeal on the basis that the fact remained that the agri-environmental scheme had caused an adverse effect on Gwilim's production.

This should be encouraging for farmers who have found their operations "undervalued" by the new scheme, and who have been locked in negotiations with authorities that have chosen to take a more Anglo-Saxon (literal) approach to the law.

While authorities are likely now to take a broader view of the hardship provision, it is uncertain as to whether the article 40 provision has survived the 2003 regulation's repeal and the subsequent enactment of its replacement (EC 73/2009). The correlation tables in the new regulation cross-refer the same words in its annex IX to those of the old article 40, but there is a degree of uncertainty as to whether the ambit of the new legislation extends beyond fruit and vegetables, ware potatoes and nurseries to which the new annex purports to apply.

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