Neutral Citation Number: [2009] EWCA Civ 284

Case No: C1/2008/1911

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
LORD JUSTICE STANLEY BURNTON
CO/5636/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

01/04/2009

B e f o r e :

LORD JUSTICE WARD
LORD JUSTICE KEENE
and
LORD JUSTICE LAWRENCE COLLINS

Between:

THE QUEEN on the application of PARTRIDGE FARMS LIMITED	**Respondent/ Claimant**
- and -	
SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS	**Appellant/ Defendant**

Mr Christopher Vajda QC and Mr Jason Coppel (instructed by DEFRA Legal Group) for the Appellant
Mr Hugh Mercer QC and Mr Jeremy Brier (instructed by Clarke Willmott) for the Respondent
Hearing dates: March 16 and 17, 2009

Lord Justice Lawrence Collins:

I Introduction

1. This is an appeal by the Secretary of State for Environment, Food and Rural Affairs from an order of Stanley Burnton LJ sitting in the Administrative Court dated July 14, 2008. The judge made a declaration that the Cattle Compensation (England) Order 2006 (SI 2006/168) ("the Order") breached the principle of equality in European Community law, because in setting compensation for cattle slaughtered on account of cattle tuberculosis (bovine TB) it did not make proper provision for pedigree cattle of especially high value.

2. TB is one of the most serious animal health problems in the United Kingdom today. In areas where the prevalence of the disease is highest, there has been enormous disruption to the farming industry. The question of compensation for cattle slaughtered because of TB is of great importance to farmers.

3. Section 32 of the Animal Health Act 1981 confers power on the Secretary of State to cause to be slaughtered any animal which is affected or suspected of being affected with a disease to which that section is applied, or which has been exposed to the infection of any such disease.

4. By Section 32(3):

   "The Minister shall pay for animals slaughtered under this section compensation of such amount as may be determined in accordance with scales prescribed by order of the Minister made with the Treasury's approval."

5. The Order was made under section 32(3) of the 1981 Act. It makes provision for the payment of compensation in respect of animals slaughtered as a result of the exercise by the Secretary of State of the power under section 32 in relation to brucellosis, TB and enzootic bovine leukosis (EBL): Article 3(1).

6. In principle it makes provision for compensation payable by reference to average market prices of cattle in 47 categories. Compensation is not set on the basis of an animal's real value as a diseased animal which required to be slaughtered (salvage value).

7. Subject to two exceptions, compensation is payable "at the level of the average market price for the bovine category into which that animal falls at the relevant date": Article 3(3). The relevant date in respect of animals slaughtered for TB is the date when a positive or inconclusive skin test is read; or the date on which a clinical sample is taken; or if slaughtered because of contact with an affected or suspected animal, the same date as for that other animal: Article 3(5).

8. The principal means of ascertaining the amount of compensation payable under the Order is known as table valuation. Part 2 of the Order contains a table setting out the 47 categories of cattle. For pedigree cattle, the compensation payable is the average market price during the period of 6 months preceding the relevant date.

9. Schedule 1 provides for compensation to be paid in accordance with a table valuation based on 47 categories which are set out in Schedule 1, Part 2. The schedule is divided by the age of the animal and by male/female; beef/dairy; and non-pedigree/pedigree. The Schedule does not distinguish between particular pedigrees.

10. Part I, paragraph 1 provides for the average market price for non-pedigree cattle to be calculated from data relating to sales prices of animals of that category in the preceding month. Paragraph 2 provides that the average market price for pedigree cattle will be the amount obtained by dividing the sum of the sale prices by the total number of animals of that category for which sale price data (relating to the sale price of animals in that category for the preceding six months) has been collected.

11. The two exceptions to the table valuations are these. First, the compensation payable in respect of a buffalo or bison is to be set at the level of its market value under the Individual Ascertainment of Value (England) Order 2005 (SI 2005/3434): Article 3(2). This is of no practical significance since there are no sales data relating to buffalo or bison which could be used to determine a table valuation. Second, where the Secretary of State considers that sales price data for any particular bovine category in any given month are inadequate, or the data are unavailable, the Secretary of State may opt to pay compensation at the level of market value of the animal, as ascertained under the 2005 Order. Under that Order valuation is undertaken (at least in theory) by a valuer appointed jointly by the Secretary of State and the owner.

12. Prior to the Order, compensation arrangements for TB were governed by the Brucellosis and Tuberculosis (England and Wales) Compensation Order 1978 (SI 1978/1483, as amended). In practice owners of cattle had a choice between (a) valuation by a government veterinary officer; and (b) valuation by a professional valuer of the owner's choice (provided that the valuer was on a government-approved list). In some areas the State Veterinary Service adopted a practice of using two valuers to value one animal in order to control excessive valuations. From 2004 valuers were nominated by the State Veterinary Service from a list of approved valuers on a rota basis. In the case of an animal slaughtered for TB the compensation was to be "its market value": Article 3(2A), as inserted by SI 1998/2073.

13. Compensation schemes in respect of diseased animals have generally constituted state aids for the purposes of Article 87 of the EC Treaty. The table valuation system under the Order was notified to the European Commission, which on December 6, 2006 informed the Secretary of State that it had decided to raise no objections to the scheme under the Order (and for the scheme in relation to BSE), because the scheme was in line with Community guidelines for state aid in the agricultural sector.

II Partridge Farms Ltd and high value cattle

14. The claimant, Partridge Farms Ltd, claims that the compensation scheme under the Order, based upon table valuations determined by reference to average market price for certain pre-determined categories of cattle, is contrary to the general principle of equality in Community law. It maintains that the table valuations necessarily mean that farmers whose cattle are substantially better than average will receive substantially less than the individual value of their cattle and the greater the disparity between the value of their cattle and that of the average cattle in a category, the greater the disparity (in terms of percentage of value received) between their compensation and the compensation received by the owner of an average or below average animal.

15. The principal owner of the claimant is David Partridge, who followed his family into farming. The claimant's farm is near Tiverton in Devon. It has nearly 900 head of cattle, of which about 300 are Holstein dairy cows, 300 are followers (young stock) and 300 are beef cattle.

16. The claimant's case throughout has been that its herd is of significantly higher quality than the average, and that this is reflected in the market value of its cows. The top producing Holstein produces about 80 litres of milk a day, much more than twice the national average.

17. The evidence for the claimant was that there are pedigree herds in England which have a significantly higher value than average cows of that pedigree. High value dairy herds in England are centred in the regions which had higher levels of grass growth, namely the western half of the country, including Devon, Somerset, Dorset, Gloucestershire, Cheshire and Lancashire. This was also where the rainfall was higher and where there was a relatively high and local human population to consume the milk produced, coupled with the necessary processing plants. The factors which contribute to their higher value include breeding, genetics, age, lactation, capacity, classification and general appearance. Herds which had been kept closed, that is without animals being purchased into the herd with the exception of bulls, would usually also have a higher herd health status and therefore a higher value, as the risk of disease being introduced was diminished.

18. The claimant's farm is in one of the areas of the country which has a chronic TB problem. Mr Partridge's evidence in June 2006 was that the claimant had been formed about 3½ years before, and that the farm had had an on-going problem with TB for about 4 years, i.e. throughout the time since the claimant was formed.

19. About 110 animals had been removed from the herd for slaughter between 2002 and 2006. In February 2006 a TB test was carried out. It identified 9 reactors (i.e. cattle which give a positive reaction to a skin test for TB – although this does not necessarily mean that the animal is infected), a bull and 8 Holstein cows, and they were removed for slaughter in March 2006.

20. The bull was individually valued at £25,000. Before their removal, the cows and heifers were separately valued by two valuers, Derek Biss of Greenslade Taylor Hunt and David Jones, an auctioneer based in Monmouthshire. Their valuations of the individual animals, on the basis of the market price for healthy animals, were these: Mr Biss's average value was £3,156, and Mr Jones's £2,900. The compensation payable under the Order was just over £1,000 per animal, approximately one third of the average individually assessed market value.

21. There was also evidence in support of the claimant's case from Eileen Persey, an organic farmer. In December 2006, 28 pedigree organic Holstein Friesians failed a TB test: a bull and 27 cows. They were slaughtered. She received compensation of £8,400 in respect of the bull, based on its individual valuation. The cows were the subject of table valuations under the Order, most at £890 and the remainder at £1,067. Ms Persey obtained independent individual valuations of these animals. They ranged from £700 to £10,000, and the discrepancy in respect of the highest value animal was some 1000 per cent.

22. An expert report from Professor George Yarrow and Tim Keyworth dated December 1, 2006, submitted in support of the claimant's case, analysed actual sale prices of female dairy pedigree cows 3 and more years old between March and June 2005, i.e. before the date of the Order. 11 per cent of cattle realised prices more than 50 per cent higher than the average price, and 6 per cent were more than double the average price. The highest price paid for a cow was £17,000, the lowest £210 and the average about £1,000. Under the Order, therefore, the owner of the first cow would receive one-seventeenth of its healthy market value, whereas the owner of the second cow would receive about 5 times its healthy market value.

III Background to the Order

23. In March 2003, the Public Accounts Committee of the House of Commons published its report on the 2001 outbreak of foot and mouth disease, and identified the potential for overvaluation if the farmers were allowed to select and appoint the valuers, who were remunerated by reference to a percentage of their valuations. But the Committee recorded that the Department for Environment, Food and Rural Affairs ("Defra") had said that there was no evidence of over-valuation on a systematic basis, and as having found that in most cases valuations were well supported by such matters as sale documents for similar stock and histories of the stock concerned. The Committee recommended that Defra should not allow potential recipients of compensation to select and appoint the valuers.

24. On July 31, 2003, the Auditor General for Wales presented to the National Assembly for Wales a report on "Compensating Farmers for Bovine Tuberculosis in Wales". The Auditor General estimated that in 2002 compensation was at least 50 per cent higher than underlying market prices for both commercial and pedigree animals. The report set out a number of matters that led to overvaluations of animals slaughtered for the purposes of disease control or prevention. Those matters included the fact that valuers were chosen by farmers to act on their behalf, often because they bought and sold healthy animals through the valuer's market. Farmers might take their regular business elsewhere if they were dissatisfied by the valuation. That and a number of other factors could lead to inflationary "valuation creep" compared with underlying market values and add to the pressure on those valuing animals. There were inflationary pressures inherent in the valuation arrangements which had led to the development of a secondary market for animals affected by TB.

25. In October 2003, Defra published a consultation paper entitled "Proposals to rationalise compensation for notifiable animal disease control". It proposed a scheme involving 10 table valuation cattle categories. It recognised that these categories would not be appropriate for certain high value animals, and proposed that there should be different arrangements for higher value cattle. One of the proposals was that animals worth significantly more than the current average market value for an animal in their category could be pre-valued and registered with Defra, and in such cases the compensation payable would be equivalent to the pre-valuation figure. The

Partial Regulatory Impact Assessment stated that there was a clear need to address over-valuations.

26. But it also addressed the issue of high value cattle. Under the heading "Issues of equity and fairness" it stated:

"The changes in compensation policy will, for the most part, impact on those livestock keepers who own high value animals, as they will need to pay valuers. Any change of policy in this area is likely to impact to a greater extent on the dairy sector. Generally speaking, there is a higher proportion of higher value herds in the dairy sector than in any other livestock sector, but every sector has a number of higher value breeding stock and pedigree breeds. However, it is important to bear in mind that compensation will continue to be paid at a fair rate, reflecting as closely as possible market prices, whichever disease an animal is affected by. Any rationalised approach will be fairer than the existing approaches."

27. It said that the option of fixed values with an option to carry out pre-valuations would have the advantage that a "fair rate of compensation is paid for animals that are of high value." It rejected the option of determining "the real commercial value of the animals by no longer ignoring the diseased condition of the majority of them." That would reduce the average compensation per animal to about £175 instead of £1150, and reduce the tax burden by some £22 million. That option was rejected because of the likely impact on the livestock farming industry.

28. In October 2004, Defra published a further consultation document. The valuation categories were increased to 29, including categories specifically for pedigree animals, but without a pre-valuation option. The Partial Regulatory Impact Assessment described the benefits of the table valuation option as including these: it would avoid inconsistent approaches to valuations and inequitable compensation payments; it would provide greater assurance for taxpayers that public money was being used prudently; and compensation payments would more accurately reflect market values, and reduce the risk of over-valuations.

29. But it recognised:

"… Inevitably, when calculating a compensation payment based on average prices achieved for similar types of animal, some animals may (under the new system) be over-valued and some under-valued. Though the net effect, it is expected, will be compensation payments that more accurately reflect 'real market prices.' "

30. In November 2004 Defra confirmed in a briefing paper that it was still considering a pre-valuation system for high value animals, but said that devising a robust and practical pre-valuation system was not straightforward.

31. In 2005, in response to the October 2004 consultation, an internal government working group increased the number of table valuation categories to 47.

32. Following the consultation process Defra published a Final Regulatory Impact Assessment in November 2005 in relation to the four diseases including TB, to which I shall revert in the final section of this judgment. In summary, the assessment repeated that the options were (1) to continue with the existing valuation system; (2) to have table values for all cattle categories, including pedigrees, with compensation rates for commercial and pedigree cattle to be published monthly; (3) to determine market value more strictly by taking into account the fact that the majority of animals were diseased, while the remainder had been affected by disease.

33. Option (1) was not viable because the evidence for overcompensation (for TB) was extensive. Option (2) would ensure that compensation more accurately reflected market values, and significantly reduce the risk of overvaluations, which would benefit the taxpayer. Option (3) would more accurately reflect market values, and reduce levels of compensation, but the social

costs would be unsupportable. Option (2) was therefore recommended because it would tackle the problem of over-compensation and enhance disease control efforts.

34. The Explanatory Memorandum to the Order said that the Order was designed to deal with overcompensation, particularly for bovine TB, which placed an unfair burden on taxpayers and might provide a disincentive for some cattle owners to implement robust bio-security controls; to reduce bureaucracy and increase transparency by simplification of the compensation regime through a table valuation system; and to facilitate the speedier removal of diseased animals.

IV The judgment below

35. The judge delivered a comprehensive and careful judgment and found for the claimant. It is not possible to do it full justice by a summary. The judge found that the Order was in breach of the principle of equality. The claimant had established discrimination, because the Order did not provide for the payment of anything like a reasonable approximation of the true healthy market value of its pedigree cows. It was therefore for the Secretary of State to establish objective justification, and no objective justification for the differential treatment had been established satisfying the requirement of proportionality.

36. The judge's reasoning was as follows. The principle of equality was one of the fundamental principles of Community law: Joined Cases 201 and 202/85 *Klensch v Secrétaire d'Etat* [1986] ECR 3477. The principle required that similar situations should not be treated differently unless differentiation was objectively justified. The greater the differential treatment established, the greater was the burden on the State to justify it.

37. The question was not whether Defra was required to pay healthy market value to all farmers. The claimant complained that the Order resulted in payment to some farmers of healthy market value, to some of more than that value, and to it and to others considerably less than healthy market value.

38. Articles 3(2) and 3(7) of the Order showed that the underlying principle of the Order was compensation based on healthy market value. Table valuations under the Order were assumed to be a reasonably fair and efficient means of determining a reasonable healthy market value. There was no other explanation for the provisions of Article 3(2) and (7), or for the division of animals into categories, or indeed for the consultation documents. The case of the Secretary of State on objective justification supported that conclusion, in contending that the Order "produces a valuation for the vast majority of cattle which is a reasonable approximation of their true market value if healthy".

39. The position might have been different if the Order had provided for the payment of salvage value; but it did not. Conversely, it would have been different if the Order had provided for compensation for consequential losses suffered by farmers whose animals were diagnosed as suffering from TB. It did not; hence such losses were irrelevant to the issues.

40. In assessing the question of objective justification, it was not for the Court to devise an alternative scheme or modification to the Order. There might be more than one view, and probably many, as to which animals should be considered high value, and how much higher than the average is high value. It was not for the court to seek to define what was a high value animal. If, however, the court was satisfied that there could be no sensible practicable alternative to the present Order, the Secretary of State would have established objective justification.

41. The judge accepted that (1) table valuation addressed a serious problem of over-compensation by removing the subjectivity inherent in individual valuation; (2) it contained "bright line" rules which were simple, clear and easy to administer; (3) it contributed to biosecurity by enabling cattle to be removed very quickly after they were diagnosed; (4) the principles on which the system is based were well-established, and tried and tested in many jurisdictions; (5) it produced

a valuation for the vast majority of cattle which was a reasonable approximation of their true market value if healthy. But those factors did not of themselves justify the application of the Order to high value animals. Table valuation gave the owner of average or less than average animals the benefit of the value of high value animals sold on the market during the relevant period.

42. It was irrelevant that there was no legal obligation on the Secretary of State to pay compensation on the basis of individual market value when healthy; and that the true value of the animals concerned was actually very low, on account of their diseased status, and much lower than their table valuation.

43. If only very small numbers of animals were affected by under-compensation, the administrative costs and difficulties of dealing with them separately must be correspondingly small. On the other hand, for some farmers, high value animals formed all or a large proportion of their herd, so that in the event of an infection the impact of the provisions of the Order on them was great.

44. The judge did not accept that the determination whether an animal was worth significantly more than the average was wholly subjective. Matters such as pedigree, milk yield and fertility were objectively ascertainable, as were market data. If valuation were entirely subjective, valuers could not arrive at relatively close valuations, such as those of Messrs Biss and Jones, and owners of pedigree cattle or high yielding dairy cattle would not be willing to sell them on the market. What might be more difficult was the decision where to draw the line between animals that were to be valued by a table valuation and animals that were to be valued otherwise. But difficulties in deciding where to draw the line did not mean that a line could not be drawn. The Secretary of State had not satisfied the judge that reasonably reliable means of fairly compensating farmers with high value cattle at reasonable expense was impossible or impractical to achieve. The difference between levels of compensation paid in Wales and in Northern Ireland indicated that valuations by directly employed valuers were to be preferred to those by independent valuers chosen by the farmer.

45. He was not satisfied that there were effective and practicable measures that could be taken to prevent (as distinguished from removing the risk of) the infection of valuable animals. The suggestion by the Secretary of State that the farmers could fill the valuation gap by insurance confirmed that there was differential treatment, but in any event the judge did not accept that insurance was generally available, at least not in TB hot spots. But if, as the Secretary of State contended, insurance was available for the capital value of animals, it was likely that the insurer had a means acceptable to it of determining with reasonable reliability and at reasonable cost the healthy market value of infected animals.

V The appeal

A The Secretary of State's arguments

46. The principal points made by Mr Christopher Vajda QC on behalf of the Secretary of State are these. It is far from clear how a scheme could be devised to comply with the judgment. Wherever a line would be drawn it was likely to lead to further legal challenge from owners of cattle whose individual healthy market value fell just below the line.

47. The correct analysis is that "high value" and "low value" animals are not different cases because the true value of any bovine animal once it has been identified as affected with TB is the salvage value of its carcass. The claimant's case, that its cattle were "high value" and therefore different cases, as compared to "low value" cattle, could only be maintained if there were some legal obligation upon the Secretary of State which required him to value cattle according to their individual market value when healthy. It was common ground that there was no such obligation.

48. The Order does not proceed on the basis of compensation according to individual healthy market value but, save in exceptional cases, is expressly tied to "average market price" and not to "market value": Articles 2 and 3.

49. When ruling on justification, the judge failed to consider whether the scheme was manifestly inappropriate, and wrongly treated the judicial review as if it were an appeal on the merits against the Order. He failed to allow the Secretary of State the appropriate margin of appreciation when drawing up legislation to address a complex social and economic problem.

50. Any inequality of treatment brought about by the Order was objectively justified as a legitimate and proportionate response to shortcomings in the previous compensation system, and struck an appropriate balance between a number of competing policy objectives. The decision as to which system of compensation should be adopted involved a complex judgment weighing different and incommensurable policy objectives.

51. The table valuation system simplifies the compensation regime, reducing bureaucracy and administrative cost and increasing transparency. The speed and certainty of the table valuation system means that animals can be removed quickly once they have been diagnosed with TB and without having to wait for an individual valuation to take place.

52. The judge wrongly rejected the Secretary of State's assessment that the payment of compensation which was above the individual healthy market value of certain animals would not have the effect of discouraging bio-security amongst the owners of such animals. The judge wrongly dismissed the Secretary of State's reliance upon the fact that measures can be taken to protect valuable animals. Even in the small proportion of cases where there would be, on the claimant's case, substantial under-compensation, it is open to farmers to take steps to reduce still further the small risk of being adversely affected by the Order. So also the judge, in response to the Secretary of State's submission that farmers could obtain insurance, took an approach more suited to an appeal on the merits than a review of a legislative measure.

53. The judge wrongly advocated a range of alternative options which had been rejected, for good reason, by the Secretary of State. As to the suggestion that the Secretary of State should recruit a team of valuers to be directly employed by him, as is the current practice in Northern Ireland, the evidence was that this option had been rejected because it would take a long time to set up, would be expensive to operate and because the system was not considered satisfactory in Northern Ireland and plans were being drawn up to move to table valuations. The judge should not have substituted his own view on this policy issue.

54. There was no satisfactory basis for determining which animals should be treated as of "high value" and subject to special arrangements.

B The claimant's arguments

55. For the claimant Mr Hugh Mercer QC supports the judge's judgment with particular emphasis on these points. No issue of law arises. The judge applied a stringent test ("manifestly unequal") favourable to the Secretary of State in finding that there had been enormous inequality.

56. The judge correctly found that the underlying principle of the Order was compensation based on healthy market value. Had the Secretary of State chosen to pay all animals' salvage value then the situation might be different. Whether all the animals have a salvage value is irrelevant. What is relevant is that the animals are treated manifestly unequally under the Order. That is why the judge rightly held that the claimant established discrimination as regards high value cows.

57. The judge was right to hold that the payment of individual valuations where sales data were inadequate confirms a concern to pay out healthy market value. The Order pays most farmers a reasonable approximation of healthy market value but leaves farmers of high value animals with

huge discrepancies between the healthy market value of their animals and the amount by which they are compensated.

VI Discussion and conclusions

58. The principle of equality is one of the fundamental principles of Community law. It is common ground that the Order must comply with that principle. There is a minor difference between the parties on the precise relationship between the Order and EU law. The judge (adopting the claimant's approach) said that the Order was made pursuant to Council Directives 77/391/EEC of May 17, 1977 and 78/52/EC of December 13, 1977. The Secretary of State does not accept that the order was made pursuant to the Directives, but does accept that EU principles apply because the compensation scheme under the Order is an integral part of TB-control measures in England which are required by the Directives.

59. Article 3 of Council Directive 77/391/EEC deals with bovine TB and imposes an obligation on Member States to draw up plans for accelerating the eradication of bovine TB in their national territories, and which enable affected herds to be classified as "officially TB-free" in accordance with (in particular) Directive 64/432/EEC. Chapter 2 of Council Directive 77/391/EEC permits Member States to apply for EU funding in respect of their eradication programmes (Articles 7-8). But the United Kingdom has not in fact done so for some years and did not do so for 2006, which is the relevant year for the purposes of this claim.

60. Council Directive 78/52/EC established Community criteria for the accelerated eradication of brucellosis, tuberculosis and EBL. It also lays down requirements which must be satisfied by Member States' eradication programmes if these are to qualify for Community funding under Chapter 2 of the 1977 Directive. One of the requirements (Article 3(2)) is: "Compensation for animals slaughtered on the instructions of the official veterinarian must be so adjusted that breeders are appropriately compensated." This is not an EC obligation to pay compensation at an appropriate level, but a requirement which must be satisfied if the Member State concerned wishes to claim an EC contribution towards its costs.

Principle of equality and objective justification

61. The principle of equality is the subject of many decisions of the European Court. Many of those decisions confirm that Article 40(3) of the EEC Treaty, which provided that the common organisation of agricultural markets "shall exclude any discrimination between producers or consumers within the Community" and which is reproduced in Article 34(2) of the EC Treaty, is declaratory of a general principle of Community law. All of the leading cases are concerned with the legality of Community measures, rather than national measures implementing, or taken in the context of, Community measures, but there is no reason to suppose that the principle should be applied differently in the case of national measures.

62. In an early decision, Joined Cases 117/76 and 16/77 *Ruckdeschel v Hauptzollamt Hamburg-St. Annen* [1977] ECR 1753, it was said (at 1769):

> "… the prohibition of discrimination laid down in [Article 40(3) of the EEC Treaty] is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law.
>
> This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified."

63. This formula has been repeated in many subsequent decisions, notably in Joined Cases 103 and 145/77 *Royal Scholten-Honig (Holdings) Limited v Intervention Board for Agricultural Produce* [1978] ECR 2037, at 2072. In Joined Cases 201 and 202/85 *Klensch v Secrétaire d'Etat* [1986] ECR 3477, the European Court said:

"8 Under Article 40(3) of the EEC Treaty the common organization of the agricultural markets to be established in the context of the common agricultural policy must 'exclude any discrimination between producers or consumers within the Community'. That provision covers all measures relating to the common organization of agricultural markets, irrespective of the authority which lays them down. Consequently, it is also binding on the Member States when they are implementing the said common organization of the markets.

9 That finding is borne out by a consistent line of cases (judgments of 19 October 1977 in Joined Cases 117/76 and 16/77 *Ruckdeschel & Co. and Hanse Lagerhaus Stroh & Co. v Hauptzollamt Hamburg-St. Annen* [1977] ECR 1753, and in Joined Cases 124/76 and 20/77 *SA Moulins et Huileries de Pont-à-Mousson v ONIC* [1977] ECR 1795), in which the court held that the prohibition of discrimination laid down in Article 40(3) of the EEC Treaty is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law. That principle requires that similar situations shall not be treated differently unless differentiation is objectively justified.

10 Consequently, where Community rules leave Member States to choose between various methods of implementation, the Member States must comply with the principle stated in Article 40(3). That principle applies, for instance, where several options are open to the Member States …

11 It follows that in such circumstances a Member State may not choose an option whose implementation in its territory would be liable to create, directly or indirectly, discrimination between the producers concerned, within the meaning of Article 40(3) of the Treaty, having regard to the specific conditions on its market and, in particular, to the structure of the agricultural activities carried out in its territory."

64. There are two questions, although in some cases they are not always distinguished. The first is whether there is discrimination or inequality, and the second is whether, if so, the inequality is objectively justified. On the latter question, administrative convenience cannot justify manifestly unequal treatment: Joined Cases 103 and 145/77 *Royal Scholten-Honig (Holdings) Limited v Intervention Board for Agricultural Produce* [1978] ECR 2037.

65. The principle applies to prohibit indirect discrimination, i.e. where an apparently general rule has discriminatory effects because the persons affected by the rule are not in the same position. This is of course a very familiar problem in anti-discrimination law, both at the national level, and also in Community law, and European human rights law, particularly, for example, in employment law: see e.g. Case C-147/03 *Commission v Austria* [2005] ECR I-5969 and the many cases in Luxembourg discussed by the Strasbourg court in *DH and Others v Czech Republic* [2007] ECHR 922.

66. It does not follow, however, that what would otherwise be legislation of general application must be tailored to meet every difference between the persons it affects. From the days of the European Coal and Steel Community the European Court recognised that it was impossible to take account of every difference which may exist in the organisation of economic units subject to the action of Community authorities: Joined Cases 17 and 20/61 *Klockner v High Authority* [1962] ECR 325 at 340. The fact that one particular group is affected to a greater extent than another by a legislative measure does not necessarily mean that the measure is disproportionate or discriminatory inasmuch as it seeks a comprehensive solution to a problem of general public importance. As Jacobs A-G said in Joined Cases C-13-16/92 *Driessen* [1993] ECR I-4751, at [61]:

"… the principle of equality cannot preclude the legislator from adopting a criterion of general application – indeed that is inherent in the nature of legislation. It may affect different persons in different ways, but beyond certain limits any attempt to tailor legislation to different circumstances is likely only to lead to new claims of unequal treatment."

67. Thus in Case 179/84 *Bozzetti v Invernizzi* [1985] ECR 2301 the European Court rejected a discrimination challenge to a levy imposed on milk producers in the following terms:

> "30 … When the Council introduced the levy and fixed the rules for its application, it selected from the various possibilities open to it the one which seemed most appropriate for the aim pursued, that aim being to exert direct, albeit moderate, pressure on the price paid to milk producers in order to make them aware of the link between production and outlets for milk products …
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> …
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> 32 The aim of Regulation No 1079/77, which is clearly indicated inter alia in the first two recitals in its preamble, is to solve the problem of the imbalance on the market in milk within the framework of the common organization of the market by means of a concerted effort by all Community producers in equal measure, regardless of the quality of their products and the use to which they are put, that is to say regardless of whether milk is used for direct consumption or for the production of butter, milk powder, cheese or other processed products. It is also irrelevant whether such products are to be marketed within the Common Market or exported.
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> 33 … [I]t is wholly compatible with Article 40(3) of the Treaty, which provides that any common price policy in the framework of the market organization 'shall be based on common criteria and uniform methods of calculation', for the co-responsibility levy to be determined on the basis of the central unit of value in the common organization of the market, namely the target price, which is fixed by reference to a standard type of milk accepted as typical of community production.
>
> 34 The fact that the introduction of the co-responsibility levy under the common organization of the market may affect producers in different ways, depending upon the particular nature of their production or on local conditions, cannot be regarded as discrimination prohibited by Article 40(3) of the Treaty if the levy is determined on the basis of objective rules, formulated to meet the needs of the general common organization of the market, for all the products concerned by it."

68. In Case C-311/90 *Hierl v Hauptzollamt Regensburg* [1992] ECR I-2061 it was argued that the temporary withdrawal of a uniform proportion of milk quota from all producers replaced a heavier burden on small holdings than on large holdings, which operated on an industrial scale and were able to compensate for withdrawal either by reducing purchases or by intensifying other production. The Court rejected that argument on the ground that withdrawal was determined on the basis of objective criteria formulated to meet the needs of the general common organisation of the market.

69. Another example is Case C-56/99 *Gascogne Limousin Viandes SA v Ofival* [2000] ECR I-3079, BAILII: [2000] EUECJ C-56/99, in which the European Court held that the early-marketing premium scheme for calves was lawful even though it caused French producers losses because to be eligible for premium they had to produce carcases of a weight which did not accord with normal marketing on the French market. Applying *Bozzetti*, the Court held that the scheme was valid because it was determined on the basis of objective rules formulated to meet the needs of the general common organisation of the market: at [44].

70. So also in Case C-535/03 *Unitymark and North Sea Fishermen's Organisation* [2006] ECR I-2689 the question was whether general limitations on the fishing of cod imposed by a Council Regulation were discriminatory because (it was said) they had a disproportionate effect on vessels with open gear beam trawls, which caught much less cod than vessels equipped with chain mat beam trawls. The Court said:

"*Infringement of the principles of non-discrimination and proportionality*

53 The principle of non-discrimination and the principle of proportionality which, in this instance, is closely linked to it are general principles of Community law and, in the field of agriculture, including fisheries, are embodied in the second subparagraph of Article 34(2) EC.

….

63 Furthermore, the fact that one particular group is affected to a greater extent than another by a legislative measure does not necessarily mean that the measure is disproportionate or discriminatory inasmuch as it seeks a comprehensive solution to a problem of general public importance.

…

76 It is apparent from the foregoing considerations that the contested measures were not manifestly inappropriate."

Application of the principles

71. The claimant's case in its grounds of application for judicial review (as amended) was that the application of the table valuation system "treats the producers of high and low quality cattle in an identical way when in fact the two situations are different and such treatment is not objectively justified which is contrary to the Community law principle of non-discrimination and/or contrary to Article 34(2) EC" (para 3(1)); and that (para 31)

"In this case the different situations are undertakings breeding higher quality animals and undertakings breeding lower quality animals. All such producers receive the same compensation for animals slaughtered on grounds of TB. No difference is made between the animals on grounds of quality and a range of other relevant factors."

72. Although the judge found for the claimant, his reasoning was more complex. The judge does not seem to have accepted the simple proposition that there was discrimination because no special provision was made for farmers with high value cattle. What he found was that there was discrimination in not making special provision for those farmers in an Order which set out to provide compensation based on healthy market value.

73. His reasoning went in these stages: (1) the effect of the Order was that it resulted in payment to some farmers of healthy market value, to some of more than that value, and to the claimant and to others considerably less than healthy market value; (2) Articles 3(2) (buffalo and bison) and 3(7) (lack of availability of sales data) showed that the underlying principle of the Order was compensation based on healthy market value; (3) that was supported by the Secretary of State's case on objective justification, when he contended that the Order "produces a valuation for the vast majority of cattle which is a reasonable approximation of their true market value if healthy"; (4) the claimant had established discrimination, because in the case of its pedigree cows, the Order did not provide for the payment of anything like a reasonable approximation of their true healthy market value; (5) the position might have been different if the Order had provided for the payment of salvage value, or if the Order had provided for compensation for consequential losses suffered by farmers whose animals were diagnosed as suffering from TB, but it did neither.

74. I am not convinced that this is really a finding of discrimination at all. It is really a finding that the Order was disproportionate, or *Wednesbury* unreasonable. But I will proceed on the basis that it is a finding of discrimination.

75. In my judgment there was no discrimination. The farmers to whom compensation was payable were farmers whose cattle had been slaughtered because the cattle had been identified as being

affected with TB. I accept the Secretary of State's submission that the true value of any animal once it has tested positive for TB is the salvage value of its carcass. That is of course a very low value. It appears to be in the region of £235 on average. The true value of the claimant's cattle was not materially different from any other cattle which had been diagnosed with TB.

76. What the Order was doing was to provide for compensation to farmers at figures in excess of salvage value, with the compensation based on table values. The relevant classes to whom the relevant parts of the Order applied were owners of pedigree cattle which had been slaughtered.

77. Defra's Final Regulatory Impact Assessment in November 2005 rejected compensation based on the true value of cattle affected by disease. That option would more accurately reflect market values, and reduce levels of compensation, but it was rejected because the social costs would be largely unsupportable.

78. Instead the recommendation was of the table valuation proposal. The farmers were treated equally. All owners of pedigree cattle received sums in excess of the salvage value of the cattle. It is true that as a result of the table valuation scheme some farmers, such as the claimant, suffered greater losses from TB than others. But that was not the result of discrimination against them.

79. This is a case which falls squarely within the principles of Community law to which I have referred. As the European Court has emphasised, the principle of equality does not preclude legislation of general application from affecting different persons in different ways provided it is determined on the basis of objective criteria formulated to meet the relevant objective. The fact that one particular group is affected to a greater extent than another by a legislative measure does not necessarily mean that the measure is disproportionate or discriminatory if it seeks a comprehensive solution to a problem of general public importance.

80. Nor do I consider that this conclusion is affected by the fact that in two cases the Order provides for payment of "market value," which is defined in Article 2 to mean the price which might reasonably have been obtained for it at the time of valuation from a purchaser in the open market if the animal was not an affected animal or suspected of being infected. The two cases are (1) buffalo or bison (which, as I have said, are not found in England) under Article 3(2), and (2) where the Secretary of State considers that the relevant sales price data for table valuation are inadequate or unavailable: Article 3(7). There is nothing in these provisions to justify the proposition that the underlying principle of the Order is healthy market value. Even if it were the underlying principle, that would not mean that by failing to make special provision for the owners of cattle which had previously been (but were no longer) of high value the Order was discriminatory. The whole purpose of the Order was to depart so far as possible from individual valuation.

81. Nor does it assist the claimant that the Secretary of State had said, in support of the case on objective justification, that the Order "produces a valuation for the vast majority of cattle which is a reasonable approximation of their true market value if healthy." I accept the Secretary of State's submission that all that was being said was that that was the effect of the Order in practice.

82. That there is no discrimination is reinforced by the difficulty in determining what are "high value" cattle for this purpose if that had been relevant. This is an issue which falls between the issues of discrimination and objective justification. The Secretary of State's position was that it would be difficult to arrive at a widely acceptable system of identifying animals which could be classified as "high value" and to make a judgment of where to draw the line. There would always be a high degree of subjectivity involved and potentially there would be large numbers of aggrieved cattle owners with animals which fell just below the high value water mark. That would produce pressure for "valuation-creep". The claimant's evidence was that there was an objective means of identifying and valuing high value animals. Mr Robert Sheasby, a chartered

surveyor employed by the NFU, stated that it was possible to link the definition of high value to either or both of type classification and National Milk Records information. The Secretary of State said that that information was confined to the dairy industry and did not cover beef cattle, and it would not be acceptable to introduce system changes which would not be equally applicable to the dairy and beef sector. The point made by Professor Yarrow and Mr Keyworth that high value animals are identified by market participants does not meet the point that there is no satisfactory definition which would not lead to further dispute and claims of discrimination.

83. My conclusion on the main point makes it unnecessary to consider the question of objective justification, but I will deal with it briefly. It seems to me that the judge did not give sufficient weight to the Final Regulatory Impact Assessment published by Defra in November 2005, to which I have already referred. The object of the proposal was described as being to: "1) Simplify valuation arrangements for cattle by introducing a table valuation system based on price data collected continuously from a wide range of sources. 2) Ensure that compensation payments will more accurately reflect market value and address the problems of inconsistent compensation levels, which have arisen under existing systems."

84. The assessment said (as had the previous assessment) that the options were (1) to continue with the existing valuation system; (2) to have table values for all cattle categories, including pedigrees, with compensation rates for commercial and pedigree cattle to be published monthly; (3) to determine market value more strictly by taking into account the fact that the majority of animals were diseased, while the remainder had been affected by disease.

85. Option (1) was not viable because the evidence for overcompensation (for TB) was extensive. Keeping the existing scheme would perpetuate existing inequities and inconsistencies, continue delays caused by individual on-farm valuations, and allow the problem of over-valuation to continue, which would also act as a disincentive to the introduction of robust bio-security controls.

86. The assessment said that option (2) (table valuations) would ensure that compensation more accurately reflected market values, and significantly reduce the risk of overvaluations. That would benefit the taxpayer. The figures indicated a high degree of over-valuation by valuers for the purposes of compensation. There would be substantial savings to the taxpayer, of around £9 million a year, as a result of ending the excessive compensation paid under the existing system and its replacement by valuations based on sale prices. For exceptionally valuable animals, the onus would fall on farmers to insure animals privately (where possible), if they felt that the table valuations would not provide adequate compensation. It was also expected that more farmers will pay greater attention to the available bio-security measures.

87. Finally, option (3) (compensation based on diseased status of animals) would more accurately reflect market values, and reduce levels of compensation. The average salvage value of an animal with bovine TB was about £235, which compared with average compensation paid of £2,103 per pedigree animal. Option (3) would result in a taxpayer saving of around £23 million per annum. As I have said, this option was rejected because the social costs would, in the current climate of increasing disease prevalence, be largely unsupportable. It would be very unpopular and would significantly damage affected farm businesses, and the residual effects of a severely damaged farming industry through salvage value compensation might prove a false economy in the long run.

88. The conclusion was recommendation of the table valuation proposal which "should tackle, robustly, the problem of over-compensation (for TB)" and enhance disease control efforts. The costs and benefits of the option were significant, but "even with the inevitable upwards adjustment of market prices (post table valuation)" significant reductions in the amount spent on compensation for the four diseases (the three diseases covered by the Order, and also BSE), and in particular TB, should be expected.

89. It seems to me that these were compelling points which would have provided objective justification for any discrimination. It may be that some of the points might have been debatable, such as the availability of insurance, but it is not the function of the court to act as an appellate tribunal from ministerial decisions. The measures taken were neither inappropriate nor (if the formula in *Unitymark* is adopted) "manifestly inappropriate." It was held by the judge, and it is common ground on this appeal, that like Community institutions, Member States have a broad margin of appreciation in terms of objective justification. I am satisfied that the Order would have been well within that margin and that it would have been objectively justified in all the circumstances of this case.

90. I would therefore allow the appeal.

Lord Justice Keene:

91. I agree.

Lord Justice Ward:

92. I also agree.