

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

Royal Courts of Justice
Strand, London, WC2A 2LL

04/11/2013

B e f o r e :

THE HONOURABLE MR JUSTICE SALES

Between:

**The Queen on the application of
Imogen Bickford-Smith**

Claimant

- and -

**The Secretary of State for Environment, Food
and Rural Affairs**

Defendant

**Mr David Wolfe QC (instructed by Patrick J Taylor, Solicitor) for the Claimant
Ms Sarah Ford (instructed by Treasury Solicitor) for the Defendant**

Hearing date: 16/10/13

Mr Justice Sales :

Introduction and overview of the claim

1. This is the judgement in the “rolled up” hearing of an application for permission to apply for judicial review (with substantive hearing if permission is granted) of a decision of the Rural Payments Agency (“the RPA”), acting on behalf of the Secretary of State for Environment, Food and Rural Affairs (“the Secretary of State”), determining the Claimant’s rights to a subsidy payment under the EU’s Single Payment Scheme for farmers (“the SPS”) for 2012. The decision of the RPA which is under challenge is contained in a Claim Statement dated 3 December 2012

issued by the RPA in relation to the Claimant's application for a payment in respect of agricultural activity carried on by her in the New Forest in 2012.

2. It is, I think, helpful at this early stage in the judgement to give an overview of the claim and to explain shortly why I consider that it fails, so that the reader has this basic outline in mind when then being taken through the rather dense EU legislation which governs the operation of the SPS.
3. The Claimant owns certain farmland in the New Forest on which she carries on agricultural activities. She also enjoys certain rights of common in relation to common land in the New Forest which give her the right, upon payment of a standard fee to the Verderers of the New Forest (the authorities who supervise the exercise of rights of common on that land), to graze animals there. Her complaint is that, while the RPA granted her claim to subsidy payments in relation to her farmland, it refused an additional claim she made for payment of subsidy in relation to her rights of common.
4. Subsidy payments under the SPS are based on entitlements denominated in relation to the hectares of land on which agricultural activity is carried on by a farmer. In relation to rights to use common land in the New Forest, at the commencement of the SPS in 2005 the Secretary of State made an allocation of entitlements to claim subsidy denominated in hectares (as for ordinary farmland owned by a farmer) by reference to a formula designating so many notional hectares of land per relevant animal (or livestock unit) the farmer was entitled to put out to graze in the New Forest at that time. The arrangements put in place for allocation of entitlements in relation to rights of common in the New Forest were specific to that region, reflecting its own particular circumstances.
5. In order to receive a subsidy payment in any year, a farmer has to have an *entitlement* to payment (denominated in so many hectares) in that year and has to *activate* that entitlement. The farmer can activate a hectare's worth of entitlement by declaring to the RPA that they are carrying on "agricultural activity" on a hectare of farmland or by relevant exercise of rights in relation to a notional hectare in relation to New Forest common land. I will refer to entitlement rights as "entitlement hectares" and to the extent of activation of those rights as "usage hectares".
6. Entitlement hectares were allocated to farmers in a once-and-for-all distribution of entitlement rights at the commencement of the SPS in 2005. Once distributed, entitlements became a form of property which is distinct from the underlying farmland or farming rights from which they originally derived. A farmer may sell entitlement hectares to another farmer, without selling the land or rights from which they originally derived. The purchasing farmer may activate the entitlement hectares so purchased, so as to claim subsidy payments, by declaring land on which he is carrying on agricultural activity elsewhere; i.e. the usage hectares used to activate entitlement hectares do not have to relate to the same land. Thus it is possible for a farmer who farms, say, three hectares of land in Devon to purchase three entitlement hectares allocated in relation to New Forest farmland or rights of common and to activate those New Forest entitlement hectares by declaring to the RPA the usage hectares on which she carries on her activity in the current year in Devon. There is an active market in entitlement hectares.
7. As explained below, the notion of "agricultural activity" used for the purposes of the EU's SPS regime is a wide one. It covers both active use of farmland for production of crops or animals and also the maintenance of land in "good agricultural and environmental condition" without putting it to productive use. Thus usage hectares which are declared in order to activate entitlement hectares may be land which is employed for production of food or which is simply being maintained to appropriate "good agricultural and environmental condition" standards.
8. Entitlement hectares may be lost by a farmer (i.e. those entitlements to claim subsidy under the RPA, if activated for a year of claim, may be lost) if they are not activated for a period of two years. The entitlement hectares so lost are deemed to be added to a National Reserve of

entitlement hectares which, according to the SPS regime as established by EU legislation, may then be distributed by the national authorities to other farmers in certain situations.

9. When the Claimant made her claim for subsidy under the SPS for 2012, she owned entitlement hectares equivalent to the area of the farmland owned and used by her in the New Forest, which she activated by declaring that farmland as the relevant usage hectares (i.e. as land on which she carried on agricultural activity) in that year. In that way, she fully used up the entitlement hectares which she owned. Although she also declared her rights of common, those rights were determined not to increase her claim for subsidy because she owned no further entitlement hectares which the notional usage hectares represented by her rights of common could be used to activate.
10. The RPA therefore decided that the Claimant's use of rights of common in 2012 could not give rise to payment of subsidy. The RPA pointed out that the Claimant had no available entitlement hectares to use in combination with her notional usage hectares with reference to her rights of common, and that if she wished to use the exercise of her rights of common as usage hectares to activate entitlement hectares she would need to purchase entitlement hectares in the market.
11. There are two central complaints which form the basis for the Claimant's claim. First, as part of the criteria adopted to determine the way in which entitlement hectares should be allocated at the outset of the SPS in 2005 to farmers with rights of common in respect of common land in the New Forest, the Secretary of State took into account the actual use which farmers had in fact made of their rights of common in 2004/2005, as evidenced by receipts issued by the Verderers of the New Forest for the fees for animals set to graze by them on the common land for that year. The Claimant did not make use of her rights of common in that year and as a result was allocated no entitlement hectares in respect of those rights. However, she now does make use of her rights of common by setting animals to graze on common land, paying the Verderers of the New Forest an annual fee to do so; while (she says) some other farmers in the New Forest who were allocated notional entitlement hectares in 2005 reflecting their actual use of their rights of common in 2004/2005 now no longer make active use of those rights of common, yet still enjoy the benefit of those entitlement hectares which were allocated to them in 2005 in respect of their rights of common. The Claimant submits that this involves an impermissible change of approach by the Secretary of State and the RPA: having used a criterion of actual use of rights of common to allocate hectare entitlements in 2005, she says that the Secretary of State and the RPA should as a matter of consistency apply a criterion of actual use of rights of common in later years to determine the subsidy to be paid under the SPS for those years. The Claimant says that, following this approach, she should be paid subsidy under the SPS for her actual use in 2012 of her rights of common.
12. In short summary, the difficulty for the Claimant in relation to this complaint is that it improperly elides the criteria adopted to determine the initial allocation of entitlement hectares when the SPS commenced in 2005 and the rules according to which the Secretary of State and RPA are obliged to operate the SPS once it was established, which are governed by the relevant EU legislation. Under the EU legislation, the initial allocation of entitlement hectares for farmland and rights of common was a once-and-for-all exercise; once entitlement hectares were allocated to farmers at the beginning of the SPS, there was no provision in the legislation which allowed redistribution of those entitlement hectares as the scheme progressed to reflect actual use being made of the land or rights to which they originally related. The relevant mechanism prescribed by the EU legislation to allow for changes in actual use of entitlement hectares for the purposes of claiming subsidy is a market mechanism, whereby farmers may buy and sell entitlement hectares.
13. There simply is no requirement or permission under the EU legislation which governs the operation of the SPS that entitlement hectares originally allocated in respect of rights of common in the New Forest should be re-distributed in subsequent years to reflect the actual use made by farmers of such rights in subsequent years. Such re-distribution would be plainly unlawful and contrary to cardinal features of the SPS as laid down in the EU legislation. There is no

requirement that the Secretary of State should use the criteria he adopted (within the discretion allowed to him under the relevant provision of the EU legislation) for one purpose, i.e. to decide how entitlement hectares should initially be allocated to farmers in respect of rights of common in the New Forest, for a completely different purpose (namely, to operate the SPS, once the initial allocation of entitlement hectares had been made, in accordance with the rules laid down by the EU legislation, in relation to which the Secretary of State has no relevant discretion conferred upon him). On the contrary, it would be unlawful for him to do so.

14. The Claimant's case was presented in a confusing and confused manner. Once the operation of the SPS and the EU legislation is understood, I consider that the Claimant has failed to show even that she has an arguable case that the RPA has acted unlawfully on the basis of this complaint.
15. Secondly, the Claimant says that there are some farmers in the New Forest who hold entitlement hectares allocated to them at the outset of the SPS in respect of their rights of common who ought not to be treated by the RPA as activating those entitlement hectares each year, with the result that they should in fact be treated as having lost those entitlement hectares under the two year non-use rule. Those entitlement hectares should have become part of the National Reserve of hectare entitlements for which the SPS provides, and the Claimant argues they should then have been allocated to farmers in the New Forest such as herself who are making active use of their rights of common by putting animals out to graze on common land.
16. The Claimant says that, by contrast with herself in 2012, some farmers in the New Forest with entitlement hectares allocated to them in 2005 in respect of their rights of common are not in fact doing anything in relation to the common land. Rather, she says, "All the work to keep it in good condition (maintaining trees etc) is undertaken by the Forestry Commission or the National Trust." She says that it is not open to the RPA to argue that doing nothing in relation to the common land counts as "agricultural activity" in the sense of maintaining the land in "good agricultural and environmental condition" (so that the notional entitlement hectares in respect of rights of common can be regarded as activated for the purposes of a claim for subsidy, on the footing that they can be treated as notional usage hectares in respect of such rights in a particular year of claim), because that would be "entirely inconsistent with the approach the RPA took in 2005 (namely measuring use only by looking at the numbers of animals grazed by a farmer in 2004-2005)."
17. As I have indicated above, this contention of unlawful inconsistency of approach proceeds upon a mistaken and impermissible elision of the criteria chosen by the Secretary of State in his discretion (as allowed under EU law) to determine the initial allocation of entitlement hectares and the rules he and the RPA are required to follow in operating the SPS thereafter. Nonetheless, it remains to be examined whether the RPA is correct in allowing those with notional entitlement hectares in relation to rights of common in the New Forest to treat the non-exercise of those rights by the farmers concerned (i.e. by not setting animals to graze on common land, as they are entitled to do) as "agricultural activity", in the sense of contributing to maintaining the common land in "good agricultural and environmental condition"; and hence in allowing them to treat their entitlement hectares in respect of their rights of common as activated by such non-exercise of those rights of common for the purpose of claiming subsidy.
18. In my view, the RPA is entitled to treat the non-exercise of rights of common as contributing to the maintenance of common land in "good agricultural and environmental condition" and hence as "agricultural activity" for the purposes of activating the notional hectare entitlements in respect of such rights and giving rise to payments of subsidy. If excessive use were made by farmers of grazing rights of common, that could jeopardise the "good agricultural and environmental condition" of the common land to which they relate. Accordingly, I consider that the decision of a farmer not to exercise his rights of common by putting animals out to graze on common land operates as a contribution to avoidance of over-grazing of that land and has a sufficient link to the maintenance of that land in "good agricultural and environmental condition" as to justify the characterisation of that decision as "agricultural activity" for the purposes of the

SPS. Thus the Claimant's argument that there is a group of farmers in the New Forest who ought to have lost their notional entitlement hectares through non-use, so allowing the possible re-allocation of those entitlement hectares to her, fails.

19. Still more damaging for the Claimant's claim, in my opinion, is the fact that even if notional entitlement hectares in the New Forest were lost by farmers and assigned to the National Reserve, she cannot establish any good claim to have entitlement hectares in the National Reserve allocated to herself. Under the EU legislation governing the SPS, the national authorities (the Secretary of State and the RPA) have limited authority to allocate entitlement hectares in the National Reserve to farmers. They may only do so in relation to special defined categories of case. In my judgement, the Claimant wholly fails to show that she falls within any of the categories of case in relation to which such allocation out of the National Reserve is authorised.
20. Therefore, there is no basis on which it is open to her to contend that she should have been paid SPS subsidy for 2012 in relation to her exercise of rights of common in that year. She in fact had no entitlement hectares which could be activated by her exercise of such rights so as to give rise to a claim to subsidy; and there was no legal basis on which she could lawfully have been allocated any additional entitlement hectares to treat as activated in that way. Once this second complaint of the Claimant is properly analysed and understood, I again consider that the Claimant has failed to show even that she has an arguable case that the RPA has acted unlawfully on the basis of it.
21. The Claimant made other criticisms of the way in which the RPA has operated the SPS in the New Forest, but none of them were relied upon to support her claim to quash the Claim Statement dated 3 December 2012 and it is not necessary or appropriate to consider them in this judgement.
22. Usually, the reason for ordering a "rolled up" hearing is to preserve the ability of a Defendant in a judicial review claim to argue that the claim is out of time in relation to a complaint which is otherwise arguable and suitable for permission. In this case, although part of the Claimant's argument involves reference back to the basis on which farmers in the New Forest were allocated entitlement hectares when the SPS was established in 2005, she has made it clear in the course of the proceedings, and Mr Wolfe QC for the Claimant confirmed at the hearing, that she does not seek to challenge the lawfulness of what was done when initial entitlement hectares were allocated to herself and other farmers in 2005. Her claim to challenge the Claim Statement dated 3 December 2012 was in time, and the RPA has no good delay argument in relation to that. The argument about the merits took a full day in court. Nonetheless, although it took time to have the legislation and the Claimant's complaints explained, my conclusion in the end is that the Claimant has no good arguable claim against the RPA. I therefore refuse permission for judicial review and on that basis dismiss the claim.

The SPS regime

23. The following account of the SPS regime draws on the helpful detailed explanation in Ms Ford's skeleton argument for the RPA, for which I am grateful.
24. The SPS is the main Common Agricultural Policy aid scheme in England. It was established in order to implement the Secretary of State's obligations under Council Regulation (EC) No 1782/2003 of 29 September 2003 ("Regulation 1782/2003"), now superseded by Council Regulation (EC) No 73/2009 of 19 January 2009 ("Regulation 73/2009"). The SPS combined various existing support mechanisms into a single scheme of direct payments to farmers.
25. Detailed rules for the implementation of the SPS were laid down in Commission Regulation (EC) No 796/2004 of 24 April 2004 ("Regulation 796/2004"), now superseded by Commission Regulation 1122/2009 of 30 November 2009 ("Regulation 1122/2009").

Decoupled income support

26. A central premise of the SPS is that support for farmers should no longer be linked to the farmer's scale of production. This is explained in Recital 24 to Regulation 1782/2003 in the following terms:

“Enhancing the competitiveness of Community agriculture and promoting food quality and environmental standards necessarily entail a drop in institutional prices for agricultural products and an increase in the cost of production for agricultural holdings in the Community. To achieve those aims and promote more market-oriented 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 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 health and welfare, as well as *the maintenance of the farm in good agricultural and environmental condition*.” (emphasis added)
27. The SPS is therefore a system of “decoupled income support,” i.e. support which is “decoupled” from the farmer's levels of production. This means that farmers are not given an artificial incentive to increase production (and hence grazing activity) merely in order to collect increased farming subsidies.
28. Instead of linking the payment of subsidies to the farmer's levels of production, payment is made conditional on compliance with other obligations, including the maintenance of the land in “good agricultural and environmental condition”.
29. The concept of ‘farmer’ is defined in Article 2(a) of Regulation 1782/2003 as follows:

“ ‘farmer’ means a natural or legal person, or a group of natural or legal persons, whatever legal status is granted to the group and its members by national law, whose holding is situated within Community territory ... and who exercises an agricultural activity, ...”
30. The definition of ‘agricultural activity’ in Article 2(c) of Regulation 1782/2003 refers not only to production, but also to the maintenance of the land in good agricultural and environmental condition:

“ ‘agricultural activity’ means the production, rearing or growing of agricultural products including harvesting, milking breeding animals and keeping animals for farming purposes, or *maintaining land in good agricultural and environmental condition* as established under Article 5.” (emphasis added)
31. Article 3(1) made receipt of payments conditional, *inter alia*, on maintaining the land in good agricultural and environmental condition:

“1. A farmer receiving direct payments shall respect the statutory management requirements referred to in Annex III, according the timetable fixed in that Annex, and *the good agricultural and environmental condition* established under Article 5.” (emphasis added)
32. “Good agricultural and environmental condition” was defined in Article 5:

“Good agricultural and environmental condition

 1. Member States shall ensure that all agricultural land, especially land which is no longer used for production purposes, is maintained in good agricultural and environmental condition. Member States shall define, at national or regional level, minimum requirements for good agricultural and environmental condition on the basis of the framework set up in

Annex IV, taking into account the specific characteristics of the areas concerned, including soil and climatic condition, existing farming systems, land use, crop rotation, farming practices, and farm structures. This is without prejudice to the standards governing good agricultural practices as applied in the context of Council Regulation (EC) No 1257/1999 and to agri-environment measures applied above the reference level of good environmental practices.”

33. Hence the SPS contemplates that agricultural land will not necessarily be used for production, but if not so used it must be maintained in good agricultural and environmental condition in order to justify claims for subsidy payments.

The historic element of the SPS scheme

34. Article 33 (Eligibility) of Regulation 1782/2003 explained that farmers will have access to the SPS if, *inter alia*, they received payment under one or more of the previous schemes during the reference period:

“Eligibility

1. Farmers shall have access to the single payment scheme if:
 - (a) they have been granted a payment in the reference period referred to in Article 38 under at least one of the support schemes referred to in Annex VI, or
 - (b) they have received the holding or part of the holding, by way of actual or anticipated inheritance, by a farmer who met the conditions referred to in point (a), or
 - (c) they have received a payment entitlement from the national reserve or by transfer.”
35. Article 38 states that the reference period shall comprise the calendar years 2000, 2001 and 2002.
36. Article 34 (Application) explained that payment entitlements would be allocated on a once-and-for-all basis in the first year of application of the SPS:

“Application

1. *The first year of application of the single payment scheme*, the competent authority of the Member State shall send an application form to the farmers referred to in Article 33(1)(a) indicating:
 - (a) the amount referred to in Chapter 2 (hereinafter referred to as the ‘reference amount’);
 - (b) the number of hectares referred to in Article 43;
 - (c) the number and value of payment entitlements as defined in Chapter 3.
2. Farmers shall apply to the single payment scheme by a date, to be fixed by Member States, but not later than 15 May.

However, the Commission, in accordance with the procedure referred to in Article 144(2), may allow the date of 15 May to be postponed in certain zones where exceptional climatic conditions render the normal dates inapplicable.

3. Except in case of force majeure and exceptional circumstances within the meaning of Article 40(4), *no entitlements shall be allocated to farmers referred to in Article 33(1)(a)*

and (b) and to those who receive payment entitlements from the national reserve, if they do not apply to the single payment scheme by 15 May of the first year of application of the single payment scheme.

The amounts corresponding to those entitlements not allocated shall revert to the national reserve referred to in Article 42 and shall be available for reallocation by a date to be fixed by the Member State but not later than 15 August of the first year of application of the single payment scheme.” (emphasis added)

37. Article 43 (Determination of the payment entitlements) explained how the value of a payment entitlement was to be calculated for the purposes of the historical element of the SPS:

“Determination of the payment entitlements

1. Without prejudice to Article 48, a farmer shall receive a payment entitlement per hectare which 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 listed in Annex VI.

The total number of payment entitlements shall be equal to the above mentioned average number of hectares.

...

2. The number of hectares referred to in paragraph 1 shall further include:

...

(b) all forage area in the reference period.

3. For the purpose of paragraph 2(b) of this Article, ‘forage area’ shall mean the area of the holding that was available throughout the calendar year, in accordance with Article 5 of Commission Regulation (EC) No 2419/2001 (1), for rearing animals including areas in shared use and areas which were subject to mixed cultivation.

...

4. The payment entitlements per hectare shall not be modified save as otherwise provided.”

38. The reference amount to which reference is made in Article 43(1) is calculated according to Article 37 (Calculation of the reference amount) as follows:

“Calculation of the reference amount

1. The reference amount shall be the three-year average of the total amounts of payments, which a farmer was granted under the support schemes referred to in Annex VI, calculated and adjusted according to Annex VII, in each calendar year of the reference period referred to in Article 38.”

39. Hence, payment entitlements (what I have called entitlement hectares) are to be allocated on a once-and-for-all basis in the first year of the SPS scheme and, in the case of a purely historical model, their value fixed by reference to the payments which had been received under previous schemes.
40. This is the usual means by which payments are ‘decoupled’ from levels of production. Instead of being adjusted and re-allocated every year on the basis of production levels, payment entitlements are allocated once only in the first year of the SPS, with their value being derived

from the amounts paid historically. Thereafter, even if production levels fluctuate, the value of payment entitlements in a purely historical model will not vary.

41. Following initial allocation, Article 46 provided that payment entitlements could be transferred. In practice, a market has been established for trading in entitlements.

The requirement to declare eligible hectares

42. Although payments have been decoupled from actual production, it was nevertheless necessary to ensure that payments were only made to farmers engaged in agricultural activity, and were not made to persons who acquired payment entitlements on the open market but were not actually farmers. This is evident from Recital 30 to Regulation 1782/2003:

“The overall amount to which a farm is entitled should be split into parts (payment entitlements) and linked to a certain number of eligible hectares to be defined, in order to facilitate transfer of the premium rights. *To avoid speculative transfers leading to the accumulation of payment entitlements without a corresponding agricultural basis, in granting aid, it is appropriate to provide for a link between entitlements and a certain number of eligible hectares*, as well as the possibility of limiting the transfer of entitlements within a region. Specific provisions should be laid down for aid not directly linked to an area taking into account the peculiar situation of sheep and goat rearing.” (emphasis added)

43. Article 36 (Payment) set out the link between payment entitlements and eligible hectares:

“Payment

1. Aid under the single payment scheme shall be paid in respect of payment entitlements as defined in Chapter 3, accompanied by an equal number of eligible hectares as defined in Article 44(2).”
44. In order to claim payment under the SPS, the farmer had to show a corresponding eligible hectare (what I have called a usage hectare) for each payment entitlement. Article 44 (Use of payment entitlements) provided as follows:

“Use of payment entitlements

1. Any payment entitlement accompanied by an eligible hectare shall give right to the payment of the amount fixed by the payment entitlement.
2. ‘Eligible hectare’ shall mean any agricultural area of the holding taken up by arable land and permanent pasture except areas under permanent crops, forests or used for non agricultural activities.
3. The farmer shall *declare* the parcels corresponding to the eligible hectare accompanying any payment entitlement. Except in case of force majeure or exceptional circumstances, these parcels shall be at the farmer’s disposal for a period of at least 10-months, starting from a date to be fixed by the Member State, but not earlier than 1 September of the calendar year preceding the year of lodging the application for participation in the single payment scheme.
4. Member States may, in duly justified circumstances, authorise the farmer to modify his declaration on condition that he respects the number of hectares corresponding to his payment entitlements and the conditions for granting the single payment for the area concerned.” (emphasis added)

45. Hence, in order to be entitled to payment, the farmer must make a declaration that she holds eligible hectares which correspond to her payment entitlements. The definition of ‘eligible hectare’ in Article 44(2) is not linked to actual production. Rather, it encompasses land taken up by either arable land or permanent pasture without reference to actual production or usage.

The flat rate element of the SPS scheme

46. Article 58 of Regulation 1782/2003 gave Member States a discretion to apply the SPS on a regional rather than national basis. Article 58(1) provides:

“1. A Member State may decide, by August 2004 at the latest, to apply the single payment scheme provided for in Chapters 1 to 4 at regional level under the conditions laid down in this Section.”

47. Article 59 then permitted Member States to divide available payments within a region between all farmers in the region concerned, irrespective of whether those farmers were entitled to a historical payment under previous scheme years. It provides:

“Regionalisation of the single payment scheme

1. In duly justified cases and according to objective criteria the Member State may divide the total amount of the regional ceiling established under Article 58 *or part of it* between all farmers whose holdings are located in the region concerned, *including those who did not meet the eligibility criterion referred to in Article 33.*
2. In the case of division of the total amount of the regional ceiling, *farmers shall receive entitlements, whose unit value is calculated by dividing the regional ceiling established under Article 58 by the number of eligible hectares*, within the meaning of Article 44(1), established at regional level.
3. In case of *partial division* of the total amount of the regional ceiling, farmers shall receive entitlements whose unit value is calculated by dividing the corresponding part of the regional ceiling established under Article 58 by the number of eligible hectares, within the meaning of Article 44(2), established at regional level.

...

4. The number of entitlements per farmer shall be equal to the number of hectares he declares in accordance with Article 44(2) the *first year of application of the single payment scheme*, except in the case of force majeure or exceptional circumstances within the meaning of Article 40(4).” (emphasis supplied)
48. As is evident from Article 59(2), if Member States choose to exercise their discretion to implement the SPS scheme on a regional basis, then payment entitlements will have a ‘flat rate’ value which is calculated by dividing the total aid available by the number of eligible hectares in the region. Again, it should be noted that the ‘flat rate’ value of the payment entitlements does not vary according to production levels.
49. Article 59(3) makes clear that Member States may choose to adopt a hybrid solution, whereby part of the value of the payment entitlement is derived from a ‘flat rate’ per eligible hectare and part is derived from the historical element of subsidy schemes which preceded the SPS.
50. Article 59(4) emphasises that the payment entitlements under the ‘flat rate’ element are to be allocated on a once-and-for-all basis in the first year of application of the single payment scheme in the same way as for the historical element.

51. Article 63(3) permits a Member State to make a gradual transition between payment entitlements whose value is determined solely by reference to the historical element and payment entitlements whose value is determined by a 'flat rate' element. It provides:

“3. By way of derogation from Articles 43(4) and 49(3), Member States may also decide, by 1 August 2004 at the latest, and acting in compliance with the general principle of Community law, that entitlements established under this section shall be subject to progressive modifications according to pre-established steps and objective criteria.”

The National Reserve

52. Article 42 of Regulation 1782/2003 provided for the establishment of a National Reserve as follows:

“National reserve

1. Member States shall, after any possible reduction under Article 41(2), proceed to a linear percentage reduction of the reference amounts in order to constitute a national reserve. This reduction shall not be higher than 3 %.
2. The national reserve shall further include the difference between the ceiling referred to in Annex VIII and the sum of the reference amounts to be granted to farmers under the single payment scheme, before the reduction referred to in paragraph 1 second sentence.
3. *Member States may use the national reserve to grant, in priority, reference amounts to farmers who commence their agricultural activity after 31 December 2002, or in 2002 but without receiving any direct payment in that year, according to objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions.*
4. *Member States shall use the national reserve for the purpose of establishing, according to objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions, reference amounts for farmers finding themselves in a special situation, to be defined by the Commission in accordance with the procedure referred to in Article 144(2).*
5. *Member States may use the national reserve for the purpose of establishing, according to objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions, reference amounts for farmers in areas subject to restructuring and/or development programs relating to one or the other form of public intervention in order to avoid abandoning of land and/or in order to compensate specific disadvantages for farmers in those areas.*
6. In application of paragraphs 3 to 5 Member States may increase the unit value, within the limit of the regional average of the value of entitlements, and/or the number of entitlements allocated to farmers.
7. Member States shall proceed to linear reductions of the entitlements in case their national reserve is not sufficient to cover the cases referred to in paragraphs 3 and 4.
8. Except in case of transfer by actual or anticipated inheritance and by way of derogation from Article 46, the entitlements established using the national reserve shall not be transferred for a period of five years starting from their allocation.

By way of derogation from Article 45(1), any entitlement which has not been used during each year of the five year period shall revert immediately to the national reserve.

9. By way of derogation from Articles 33 and 43, in case of sale or lease for six or more years of the holding or part of it or premium rights in the reference period or not later than 29 September 2003, part of the entitlements to be allocated to the seller or the lessor may revert to the national reserve under conditions to be defined by the Commission, in accordance with the procedure referred to in Article 144(2).” (emphasis added)
53. Article 144(2) to which reference is made in Article 42(4) provides: “Where reference is made to this paragraph, Articles 4 and 7 of Decision 1999/468/EC shall apply.” Articles 4 and 7 of Council Decision 1999/468/EEC of 28 June 2009 laying down procedures for the exercise of implementing powers conferred on the Commission make provision for the Commission to be assisted by a management committee and for the rules of procedure of that committee. The Commission has set out what constitutes a ‘special situation’ in Articles 18-23(a) of Commission Regulation 795/2004. It includes dairy farmers, transfer of leased land, investments, lease and purchase of leased land, reconversion of production and administrative acts and court rulings.

Regulation 73/2009

54. Regulation 1782/2003 was replaced by Regulation 73/2009. Further references to the ‘decoupling’ of direct support appear in, *inter alia*, Recitals 2, 27, 31, 33 and 40 of Regulation 73/2009.
55. Regulation 73/2009 does not contain any equivalent of Articles such as Article 34 (Application) of Regulation 1782/2003, which set out the process for applying for payment entitlements in the first year of the SPS, or Article 43 (Determination of payment entitlements), which set out the means by which the value of payment entitlements would be calculated. This is because payment entitlements (i.e. what I have called entitlement hectares) were allocated in accordance with the once-and-for-all process set out in Regulation 1782/2003.
56. Article 33 of Regulation 73/2009 (Payment entitlements) now provides that farmers are entitled to support under the SPS if they either hold payment entitlements from Regulation 1782/2003 or subsequently obtain them through transfer or from the national reserve. It provides in relevant part as follows:

“Payment entitlements

1. Support under the single payment scheme shall be available to farmers if they:
 - (a) hold payment entitlements which they have obtained in accordance with Regulation (EC) No 1782/2003;
 - (b) obtain payment entitlements under this Regulation:
 - (i) by transfer;
 - (ii) from the national reserve;
 - (iii) pursuant to Annex IX;
 - (iv) pursuant to Article 47(2), Article 59, the third subparagraph of Article 64(2), Article 65 and Article 68(4)(c).
2. For the purpose of Article 47(2), Article 57(6), Article 64(2) and Article 65, a farmer is considered to be holding payment entitlements where payment entitlements have been allocated or definitively transferred to him. ...”

57. Article 34 (Activation of payment entitlements per eligible hectare) makes provision for the activation of payment entitlements held by a farmer. It provides:

“Activation of payment entitlements per eligible hectare

1. Support under the single payment scheme shall be granted to farmers upon activation of a payment entitlement per eligible hectare. Activated payment entitlements shall give a right to the payment of the amounts fixed therein.
 2. For the purposes of this Title, ‘eligible hectare’ shall mean:
 - (a) any agricultural area of the holding, and any area planted with short rotation coppice (CN code ex 0602 90 41) that is used for an agricultural activity or, where the area is used as well for non-agricultural activities, predominantly used for agricultural activities; ...”
58. The definition of ‘eligible hectare’ is linked to ‘agricultural activity’, which, as in Regulation 1782/2003, encompasses both production and the maintenance of land in good agricultural and environmental condition. It therefore remains the case that payments are not conditional on actual production levels.
59. The definition of ‘farmer’ in Article 2(a) of Regulation 73/2009 is, as in Regulation 1782/2003, tied to persons who exercise ‘an agricultural activity’.
60. As was the case with Regulation 1782/2003, Article 43 provides for the possibility of transfer of payment entitlements (i.e. entitlement hectares).
61. Article 41 of Regulation 73/2009 provides in respect of the national reserve as follows:

“National reserve

1. Each Member State shall operate a national reserve that incorporates the difference between:
 - (a) the national ceilings determined in Annex VIII to this Regulation; and
 - (b) the total value of all allocated payment entitlements and the ceilings fixed in accordance with Article 51(2) and Article 69(3) of this Regulation, or, for 2009, the ceilings fixed in accordance with Article 64(2) of Regulation (EC) No 1782/2003.
2. *Member States may use the national reserve to allocate, as a matter of priority, in accordance with objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions, payment entitlements to farmers who commence their agricultural activity.*
3. *Member States not applying Article 68(1)(c) may use the national reserve for the purpose of establishing, in accordance with objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions, payment entitlements for farmers in areas subject to restructuring and/or development programmes relating to one or other form of public intervention in order to ensure against land being abandoned and/or to compensate farmers for specific disadvantages in those areas.*
4. *Member States shall use the national reserve for the purpose of allocating, in accordance with objective criteria and in such a way as to ensure equal treatment between farmers and to avoid market and competition distortions, payment entitlements to farmers placed in a*

special situation, to be defined by the Commission in accordance with the procedure referred to in Article 141(2).

5. When applying this Article, Member States may increase the unit value and/or the number of payment entitlements allocated to farmers.” (emphasis added)
62. Article 141(2) to which reference is made in Article 41(4) provides: “Where reference is made to this paragraph, Articles 4 and 7 of Decision 1999/468/EC shall apply.” Articles 4 and 7 of Decision 1999/468/EEC have been explained above. The Commission has set out what constitutes a ‘special situation’ in Articles 19-23 of Commission Regulation 1120/2009 (which supersedes Commission Regulation 795/2004, referred to above). Again, it includes dairy farmers, transfer of leased land, investments, lease and purchase of leased land, reconversion of production and administrative acts and court rulings.
63. Article 17 of Regulation 1120/2009, which is in Section 2 of the Regulation entitled “Allocation of payment entitlements from the national reserve”, provides in relevant part as follows:

“Establishment of payment entitlements

1. Where a Member State makes use of the options provided for in Article 41(2) and (3) of Regulation (EC) No 73/2009, farmers may receive, in accordance with the conditions laid down in this Section and in accordance with the objective criteria laid down by the Member State concerned, payment entitlements from the national reserve.
2. When a farmer who does not own any payment entitlement applies for payment entitlements from the national reserve, he may receive a number of payment entitlements not higher than the number of hectares he holds (owned or leased) at that time.
3. When a farmer who own payment entitlements applies for payment entitlements from the national reserve, he may receive a number of payment entitlements not higher than the number of hectares he holds for which he does not own any payment entitlement.

The unit value of each payment entitlement he already owns may be increased. ...”

64. Article 42 of Regulation 73/2009 provides for loss of entitlement hectares which are not activated by a farmer for a period of two years, as follows:

“Unused payment entitlements

Any payment entitlement which has not been activated in accordance with Article 34 for a period of two years shall be added to the national reserve, except in the case of *force majeure* or exceptional circumstances. However, for 2009, payment entitlements not activated for the two-year period 2007-2008 shall not be added to the national reserve if they were activated in 2006 and, for 2010, payment entitlements not activated for the two-year period 2008-2009 shall not be added to the national reserve if they were activated in 2007.”

The allocation of entitlement hectares in respect of common land

65. The regulatory scheme makes specific provision for the manner in which land which is owned in common shall be allocated as between the farmers who have rights over that land. It accords Member States a discretion to choose whether to allocate such land by reference to actual use or rights of use.
66. Article 8 of Regulation 796/2004 (General principles in respect of agricultural parcels) provided in relevant part as follows:

“General principles in respect of agricultural parcels

...

2. With regard to forage area:

- (a) where a forage area is used in common, the competent authorities shall notionally allocate it between the individual farmers in proportion to their use or right of use of it; ...”

67. Similarly, Article 34 of Regulation 1122/2009 (Determination of areas) provides in relevant part as follows:

“Determination of areas

...

5. Where an area is used in common, the competent authorities shall notionally allocate it between the individual farmers in proportion to their use or right of use of it. ...”

Implementation of the SPS in England

68. In accordance with the legal framework set out above, the SPS was implemented in England as follows.

Once-and-for-all allocation of payment entitlements

69. As contemplated by Regulation 1782/2003, entitlements were allocated to farmers in a one-off exercise conducted in 2005. For each hectare of eligible land declared on the SPS application form for that year, the applicant received an entitlement to claim payment under the SPS (i.e. what I have called an entitlement hectare) which could then be activated each subsequent year. The one-off nature of the allocation was made clear in a Press Release dated 21 March 2005 (“the Press Release”) which stated:

“Applicants to the Scheme must make an application for entitlements, otherwise they could lose it for good.”

70. In the section headed ‘Notes to Editors’ the Press Release stated that: “Entitlements must be established in 2005, there will not be a second chance.”

The value of payment entitlements

71. England adopted a dynamic hybrid system for the initial allocation of entitlement hectares, whereby the value of payment entitlements comprised a historical element and a flat rate element. In order to manage the transition between historical and flat rate payments, it was provided that the historical element would gradually decrease and the flat rate element would gradually increase. This was explained in the Press Release as follows:

“The Single Payment Scheme is a new Scheme that came into operation from 1 January 2005. It breaks the link between farm subsidies and production and replaces ten farm subsidies. It is an area based scheme (one eligible hectare = one entitlement) and Ministers recognised that adapting to the system would take some time. A transitional period will therefore operate between 2005 and 2012. Entitlements must be established in 2005, there will not be a second chance. A farmer who claimed subsidies in the years 2000, 2001 and 2002 will be eligible to receive a historic element of payment along with a flat rate payment. The historic element decreases as the flat rate element increases, year by year, so each farmer’s subsidy payment under

the Single Payment Scheme will reflect that farmer's individual circumstances. The full flat rate payment of around £200-220 per entitlement (before deduction) becomes payable in 2012 in respect of eligible English land, outside the upland Seriously Disadvantaged Area."

The SPS and the New Forest

72. Consideration was given to the best way to allocate entitlement hectares in respect of rights in common exercisable in the New Forest and adjoining commons. As set out above, pursuant to Article 8 of Regulation 796/2004, later superseded by Article 34(5) of Regulation 1122/2009, where a forage area is used in common, it must be allocated for the purposes of the SPS between individual farmers in proportion to either their use or right of use of it.
73. On most commons, the rights to graze were quantified and fixed under the Commons Registration Act 1965. Ministers decided notionally to allocate the area of these commons on the basis of the number of each farming commoner's rights to graze the common. However, the 1965 Act did not apply to the New Forest, so the grazing rights had never been quantified, and it was necessary to identify a different system of notional allocation of entitlement hectares.
74. The chosen method was explained in the Press Release as follows:

"The method for allocating a notional area of the New Forest common under the Single Payment Scheme has been agreed. Defra ministers have decided that the fairest and simplest way is to allocate one eligible hectare of common land for each livestock unit grazed in the Forest in the 12 month period immediately preceding the date of this announcement (1 adult cow = 1 Livestock Unit; 1 pony = 0.6 Livestock Unit)."
75. Before commoners are entitled to exercise the rights of common in the New Forest, they are required by virtue of byelaws to pay a marking fee per animal to the Verderers of the New Forest. For the purposes of the initial allocation of entitlement hectares, grazing levels were deemed to be determined by the number of marking fees that had been paid for the reference period.
76. In 2007 a correction was made to the allocation of notional entitlement hectares in relation to the New Forest. Whereas previously 1 Livestock Unit was assumed to correspond to one eligible hectare of common land, the correction reduced the nominal livestock density of the New Forest, meaning that each Livestock Unit was deemed to correspond to three eligible hectares of common land. Additional entitlements were allocated to those who had received entitlements in 2005 and payments already made were recalculated and additional payments made.
77. The SPS Guidance for the years 2006 to 2011/12 stipulated that a marking fee receipt (i.e. receipt for payment of the fee required to allow an animal to graze on common land) must be provided to support an applicant's New Forest claim. It stated as follows:

"If you are claiming New Forest common rights, you must supply a photocopy of valid marking fee receipt(s) to support your claim. A valid receipt is one that is signed by an agister [an official of the Verderers of the New Forest]. The receipt should show that marking fees have been paid for a period that includes 15 May."
78. In fact, this did not reflect the RPA's actual practice. It had been agreed between the RPA, the Verderers of the New Forest and those responsible for the New Forest's Natural England Environmental Stewardship scheme that after entitlements had been established, marking fee receipts would not normally be required for subsequent scheme years. The SPS Guidance was amended in early 2012 in the SPS 2012 Supplement. The Single Payment Scheme Handbook for England 2011 and 2012, as revised in a supplement issued for 2012, now states:

"If you are using New Forest common rights to support your application and you are increasing your rights or have new rights, you must give us a copy of a valid marking fee receipt. A valid

receipt is one that has been signed by an agister. The receipt should show that marking fees have been paid for a period up to and including the current year's application deadline. If your application has not changed from previous years and the previous receipt covers 15 May 2012 you do not need to provide a further marking fee receipt."

79. The effect of this practice statement is that there is a mechanism for a farmer to be treated as acquiring new notional usage hectares in relation to rights of common in the New Forest, by using the rights of common available to her by paying the fees necessary to set animals to graze on the common in any year. The new notional usage hectares so acquired can be used to activate entitlement hectares a farmer might own (whether derived from land or rights in the New Forest or elsewhere, and whether owned by the farmer since the inception of the SPS in 2005 or acquired in the market after that date), and hence used as part of an application for subsidy. Once a farmer provides evidence of the existence of common rights by means of a receipt for fees for use of those rights in any year, the RPA does not require to see further evidence that the farmer continues to have those rights in subsequent years. It will assume that that is the case. If the farmer loses those rights (e.g. by disposing of them or abandoning them), the rights will not be at the farmer's disposal thereafter and so may not be counted as notional usage hectares for the purposes of claims for subsidy payments after that time. The RPA did not put in any evidence on the application, so it was unclear whether other means of proving the existence of rights of common might be accepted. However, it is not necessary for the purposes of this judgement to examine that question.
80. The Claimant made particular reference to two documents. She referred to the minutes of a meeting of the Advisory Group for the New Forest Countryside Stewardship Scheme on 25 September 2006, in which it was recorded:

"Continued qualification of commoners for Single [Farm] Payment Scheme. DEFRA has confirmed that claims by commoners who registered their entitlement for the Single Payment Scheme in 2004, are not dependent on the number of animals they turn out, as they will continue to be entitled to the allocation they claimed in the first year of the Scheme. However, this is subject to claimants continuing to qualify as 'farmers'."

81. When read in the context of the SPS regime, there is nothing untoward in this statement. It accurately referred to the fact that notional entitlement hectares in respect of rights of common in the New Forest had been allocated on a once-and-for-all basis at the commencement of the SPS and that those entitlement hectares could be activated without animals actually being put out to graze in subsequent years (this was on the basis, not set out in the minutes themselves, that non-exercise of rights of common could still count as 'agricultural activity' in the wide sense given to that term in Regulation 1782/2003: see para. [30] above). The statement accurately recorded that in order to claim subsidy in respect of any notional entitlement hectares owned by them, claimants would have to continue to qualify as 'farmers' for the purposes of the Regulation, that is, as persons exercising an 'agricultural activity'.
82. The Claimant also referred to a letter dated 19 April 2006 written on behalf of the Secretary of State to a representative of the Verderers of the New Forest to explain the operation of the SPS in relation to rights of common in the New Forest. The letter stated as follows:

"Single payment scheme and the New Forest

Thank you for your letter of 2 March 2006 in response to my letter of the 2 October 2005 in which you request clarification on the future eligibility of commoners for the Single Payment Scheme (SPS) for 2006 onwards.

I can confirm such eligibility is not dependant on the number of animals that commoners depasture each year. However, they will be required to meet the other conditions of the SPS where they are relevant including being a farmer (for the purposes of the scheme),

maintaining land in good agricultural and environmental condition and having sufficient land at their disposal (including via common rights) for a 10 month period each scheme year to support the number of SPS entitlements [they] hold and wish to claim on in a particular scheme year.

Given that it is not possible to calculate a notional area of common land in the New Forest at the disposal of any individual farmer, every commoner will be considered to have the New Forest at his disposal up to the number of entitlements he claims in relation to the common, regardless of the number of animals he grazes on it. However, we will need to reconsider this approach if the total number of entitlements claimed exceeds the total eligible area of the common.

The establishment of SPS entitlements in 2005 was an “one-off” process (with a few exceptions primarily related to the National Reserve) and the number of entitlements an individual farmer allocated to an individual will not change unless that individual elects to trade entitlements with another farmer, revert back to the National Reserve through non-use or it is found that they were incorrectly allocated.

You also recently raised with me your concerns about the wording of the 2006 SPS scheme handbook issued by the Rural Payments Agency (RPA) in relation to the New Forest. I can confirm that while it is necessary for the claimant to satisfy the RPA that they qualify as a ‘farmer’ under the SPS and that one method of doing this is providing evidence that they have paid marking fees, it is not the only method.

However, I would also draw your attention to paragraph B12 of the 2006 scheme handbook which states that if an individual claimant is unable to prove that they qualify as a farmer they will not qualify under the SPS.

I can also confirm that the RPA have been asked to inform their staff not to automatically reject any New Forest claims where the number of entitlements being activated differs from the number of Livestock Units being grazed.”

83. I consider that this letter is consistent with the legislative scheme applicable in relation to claims for subsidy, as explained above, by reference to both entitlement hectares and usage hectares which arise in relation to rights of common in the New Forest. It does not provide any support for the Claimant’s claim that she should be entitled to be paid additional subsidy.
84. The Claimant had no good claim for subsidy in relation to her use of rights of common in the New Forest in 2012 because she had no spare entitlement hectares which she could treat as activated by such use. In accordance with its Guidance, set out above, the RPA would have been prepared to accept the receipt which the Claimant provided to show she had paid fees to graze animals on the common land in 2012 as evidence that she had notional usage hectares in respect of those rights; but the Claimant could not use those usage hectares to claim subsidy because she had no spare entitlement hectares.

The Claimant’s application for payment entitlements

85. On 10 May 2005 the RPA received an application from the Claimant for entitlements under the SPS in respect of rights of common in the New Forest and adjacent commons. However, the Verderers of the New Forest confirmed that the Claimant did not pay any marking fees during the reference period in 2004/2005 and therefore could not lawfully have depastured any animals during that period. She was not therefore eligible to any entitlement hectares in respect of her rights of common and none were allocated to her. As noted above, the Claimant does not contend that there was anything unlawful about this.

86. In subsequent years, the Claimant did not receive payments in respect of the common land, since she did not hold entitlement hectares in support of her claim. It remained open to the Claimant to acquire entitlement hectares on the open market, but she has not done so.

The Claimant's SPS claim in 2012

87. The Claimant made an application for SPS in the scheme year 2012 dated 12 May 2012. In her covering letter dated 14 May 2012 the Claimant provided evidence in support of her rights of common and stated, "My common land SPS entitlements are still the subject of a dispute." She attached a letter from her solicitors dated 14 May 2012 which alleged that the allocation of entitlements based on actual grazing activity in the year 2004/2005 did not comply with the requirements of Article 8(2)(a) of Regulation 796/2004, which required allocation to farmers where a forage area is used in common "in proportion to their use or right of use of it." This was a confusing and confused claim, which proceeded upon a misapprehension about the way in which the SPS system works.
88. The RPA responded by letter dated 6 September 2012. It pointed out that the policy for allocation of New Forest commons was agreed in late 2004. Since the Claimant did not graze any animals in 2004, she did not establish any entitlements (what I have called entitlement hectares) and was not entitled to payment. The letter added that in future years, if the Claimant wished to claim SPS subsidy payments in relation to her New Forest rights of common, she would need to purchase entitlements (what I have called entitlement hectares).

The Claim Statement dated 3 December 2012

89. In the Claim Statement dated 3 December 2012, the RPA determined the Claimant's entitlement under the SPS 2012. In the absence of any entitlement hectares in respect of the Claimant's New Forest rights of common, the determination did not include any payment in respect of them.

The Claimant's grounds of challenge

90. The Claimant's grounds of challenge evolved over time and were not always clearly formulated. At various times the RPA thought that she was seeking to challenge the lawfulness of the non-allocation of entitlement hectares to her at the inception of the SPS in 2005. However, by the time of the hearing it was made clear that she was not seeking to mount such a challenge (I observe that it would have been well out of time had she sought to do so). Therefore, the case proceeded on the footing that the RPA properly allocated entitlement hectares in respect of New Forest rights of common on a once-and-for-all basis in 2005 as contemplated by Regulation 1782/2003. It did so by reference to the criterion of usage, which is one of the two criteria expressly permitted by virtue of Article 8 of Regulation 796/2004 and Article 34(5) of Regulation 1122/2009.
91. Instead, the two complaints on which the Claimant focused by the time of the hearing have been described in the Introduction, above. Once the SPS legislation is properly understood, I do not consider that either of them amounts to an arguable claim.

Alleged anomalies

92. The Claimant seeks to argue that the one-off allocation of entitlement hectares at the start of the SPS in 2005 gives rise to anomalies, in that people who grazed animals on New Forest common land in 2004/2005 were allocated notional entitlement hectares and still receive subsidy payments, even if they do not now continue to graze animals on that land, whereas people like the Claimant who did not graze any animals in the New Forest in 2004/2005 but who do so now do not receive subsidy payments.

93. I agree with the RPA's submission that the Claimant's criticism is unfounded. The fact that people who do not graze animals in the New Forest nevertheless receive payments is a consequence of the aim of the SPS to decouple payments from production. As explained above, a farmer will be entitled to payments whether she is engaged in production or merely keeps her land in good agricultural and environmental condition. Consequently, a farmer who has New Forest rights in common, having established her right to allocation of entitlement hectares in respect of such rights in 2005, is entitled to claim subsidy payments which are decoupled from the extent to which she now grazes animals on the common. If this were not the case, and the right to activate notional entitlement hectares in respect of New Forest rights of common in order to claim subsidy payments depended on actually putting animals out to graze on the common land in the year of claim, it would give rise to damaging incentives for farmers to overgraze the New Forest in order to obtain subsidy payments.
94. Where, however, a farmer ceases to have New Forest rights in common, for example because she has sold the farmland to which the rights in common attach, she will no longer be eligible to receive payments in respect of any notional entitlement hectares derived from such rights in common. This is because the notional entitlement hectares attributable to those rights in common will no longer be at her disposal, and she will not be able to declare eligible hectares (what I have called usage hectares) to activate those notional entitlement hectares. In those circumstances, the farmer can either sell her entitlement hectares or they will be unused and eventually revert to the National Reserve.
95. On the other hand, in relation to those who did not graze animals in 2004/2005 but do so now, they can establish a right to payment of subsidy by acquiring entitlement hectares (which are transferable) in the open market, and then activate them by using their eligible hectares (usage hectares), evidenced by the production of marking fee receipts for the year in question or previous years.
96. The anomalies on which the Claimant seeks to base her claim are not anomalies at all. They are the plainly intended effect of the principle of decoupling which is at the heart of the SPS regime.
97. I would add that, on the evidence available to the court, it was not established that any farmer with notional entitlement hectares referable to New Forest rights of common has failed properly to activate those entitlements by declaring usage hectares in relation to them in any year. As explained above, such a farmer could activate those entitlements by declaring usage hectares in relation to such rights of common without putting animals out to graze on the common land. Such a farmer could also activate them by declaring usage hectares elsewhere against them. Given the valuable nature of entitlement hectares, it is very likely that farmers who have them have been taking care to activate them properly over time in order to claim subsidy payments under the SPS and ensure they are not lost through non-use.
98. Accordingly, I consider that the Claimant's suggestion that entitlement hectares should have been stripped from other farmers in the New Forest, with a view to allocating them to her, fails.

The National Reserve

99. The Claimant seeks to argue that she is entitled to an allocation of payment entitlements (entitlement hectares) from the National Reserve. Both Article 42(3) to (5) of Regulation 1782/2003 and Article 41(2) to (4) of Regulation 73/2009 provide that Member States may use the National Reserve to allocate entitlement hectares in three circumstances. These are:
- i) To farmers who commence their agricultural activity;
 - ii) To farmers finding themselves in a 'special situation' as defined by the Commission pursuant to a particular procedure; and

- iii) To farmers in areas subject to restructuring and/or development programs relating to one or other form of public intervention in order to ensure against land being abandoned and/or to compensate farmers for specific disadvantages in those areas.
100. The Claimant falls within none of the three categories of case in which the United Kingdom national authorities have power under the EU legislation to allocate new entitlement hectares from the National Reserve. The Secretary of State and the RPA therefore have no power to allocate any additional entitlement hectares to her.
101. The only basis on which the Claimant sought to argue that there was a power (and, according to her argument, a duty) to allocate new entitlement hectares to her was that she fell within the first of these categories, and qualified as a farmer who had just commenced her agricultural activity: see Article 41(2) of Regulation 73/2009, set out above. However, it is common ground that she started a suckler herd of British White cattle in 1994. In the light of this, it is clear in my view that, on proper interpretation of the relevant provisions of the EU legislation, she did not fall within this category. There is no arguable basis on which she does so.
102. The Claimant seeks to contend that she is a farmer who commenced her activity of *grazing on the New Forest common land* after 2005. However, the definition of ‘farmer’ in Article 2(a) of Regulation 73/2009 includes a natural person whose holding is situated within Community territory, while ‘agricultural activity’ in Article 2(c) includes the breeding of animals and keeping animals for farming purposes. It is clear that the Claimant was already a farmer engaged in agricultural activity prior to 2004/5, and it makes no difference that the activity in question took place on other, private land. There is no basis for drawing a distinction between activity which takes place on New Forest common land and activity which took place elsewhere.
103. Article 41(2) of Regulation 73/2009 only applies in relation to “farmers who commence their agricultural activity”, that is to say, become farmers (as defined) for the first time. It does not apply in relation to farmers who commence one particular form of agricultural activity for the first time, even though they have been farmers carrying on (other) agricultural activity throughout a period well before that. The SPS regime draws no distinctions between different *forms* of agricultural activity. Entitlement hectares, usage hectares and the process of activation of the former by declaration of the latter are all defined by, and proceed by reference to, the general concept of “agricultural activity”, and not by breaking that concept down into different forms of activity. The interpretation proposed by Mr Wolfe for the Claimant would be completely at odds with the scheme of the SPS as laid down in the EU legislation.
104. Article 17 of Regulation 1120/2009, on which Mr Wolfe particularly relied, does not support the interpretation of the main legislative provisions governing the operation of the National Reserve for which he contends. It does not show that the concept of “farmers who commence their agricultural activity” operates by reference to separate *activities*, activity by activity. If anything, I consider that it is yet another provision of the legislation that shows that this was not the intention, since it refers in paragraphs (2) and (3) simply to “a farmer” and “the hectares he owns” at the time he applies for allocation of new entitlement hectares to him out of the National Reserve, without drawing any distinction based on the different particular activities a farmer might carry on.

Conclusion

105. For the reasons set out above, I consider that the Claimant’s claims are not arguable. I therefore refuse permission and dismiss the claims.
106. Although the Claimant raised with the Court the possibility that a reference might be made to the Court of Justice of the European Union, in my view there is no good basis for making such a reference. The interpretation of the relevant provisions of EU legislation is clear and there is no reason to refer the matter to Luxembourg in order to determine the claim.