

**IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT IN WALES
His Honour Judge Jarman QC
[2009] EWHC 2946 (Admin)**

Royal Courts of Justice
Strand, London, WC2A 2LL

06/10/2010

Before :

**THE MASTER OF THE ROLLS
LORD JUSTICE PILL
and
LORD JUSTICE RICHARDS**

Between:

**The Queen (on the application of TA Gwillim
and Sons)**

Claimant/ Respondent

- and -

The Welsh Ministers

Defendants/Appellants

**Clive Lewis QC (instructed by The Treasury Solicitor) for the Appellants
Hugh Mercer QC (instructed by John Collins & Partners LLP) for the Respondent
Hearing date : 20 July 2010**

Lord Justice Richards :

1. Council Regulation (EC) No. 1782/2003 of 29 September 2003 (“the Regulation”) marked a change in the system of financial support for farmers under the common agricultural policy. It established a single payment scheme under which payment entitlements were calculated by reference, *inter alia*, to reference amounts granted to a farmer under previous support schemes in the reference period 2000-2002. By way of derogation from the normal rule, Article 40 (headed “Hardship cases”) contained provisions for the substitution of a different period in the case of a farmer “whose production was adversely affected during the reference period by a case of force majeure or exceptional circumstances”; and those provisions were also expressed to apply *mutatis mutandis* to farmers who, during the reference period, “were under agri-environmental commitments” pursuant to EC regulations.
2. The claimant is a farming partnership consisting of Mr Austin Gwillim and his two sons. The home farm, of some 116 hectares, is near Talgarth in Powys. In October 1999 the claimant entered into a lease of some 451 hectares of additional land near Llanwrtyd Wells. Its case was

that it took on the additional land in order to expand production but that its plans were frustrated by restrictions and uncertainties arising out of agri-environmental commitments affecting the land, which led in the end to a decision not to renew the lease in October 2003; and on that basis it requested, pursuant to the hardship provisions of Article 40, that the period 1997-1999 be used in substitution for the reference period 2000-2002 in the calculation of the reference amounts. A lengthy process of dialogue and dispute culminated in a decision dated 2 September 2008 by which the Welsh Ministers refused the request.

3. The claimant challenged that decision by way of judicial review. The claim was determined in its favour by His Honour Judge Jarman QC, sitting in the Administrative Court in Wales. The Welsh Ministers, as defendants to the judicial review proceedings, now appeal against the judge's order, with permission granted by the judge himself. We heard the appeal at the Cardiff Civil Justice Centre.
4. We are greatly assisted by the judge's full and careful judgment, upon which I will draw for a summary of the relevant facts and to which reference can be made if fuller detail is required. The judgment has also helped to dispose of some procedural issues and to crystallise the argument on the substantive issues pursued on the appeal.
5. The central issue in the appeal concerns the reference in Article 40 to a farmer whose "production was adversely affected" during the reference period by reason of agri-environmental commitments. The defendants contend that an adverse effect on production, within the meaning of Article 40, can arise only if there was a *dip or reduction* in production. The claimant's case, upheld by the judge, is that production can also be adversely affected, within the meaning of the article, where agri-environmental commitments *prevented or restricted an increase in* production.

The Regulation

6. The introduction of the single payment scheme was the main feature of the Regulation. Several of the recitals in the preamble relate to the scheme, but the one on which particular weight was placed in argument is recital (24):

“(24) Enhancing the competitiveness of Community agriculture and promoting food quality and environment standards necessarily entail a drop in institutional prices for agricultural products and an increase in the costs 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 the actual amounts paid to farmers unchanged*, it will significantly increase the effectiveness of the income aid. It is, therefore, appropriate to make the single farm payment conditional upon cross-compliance with environmental, food safety, animal health and welfare, as well as the maintenance of the farm in good agricultural and environmental condition” (emphasis added).
7. Article 2 contains a number of definitions: in particular, “holding” is defined as “all the production units managed by a farmer within the territory of the same Member State”; and “agricultural activity” is defined as “the production, rearing or growing of agricultural products, including harvesting, milking, breeding animals and keeping animals for farming purposes, or maintaining the land in good agricultural and environmental condition”.
8. Title III relates specifically to the single payment scheme. Chapter 1, headed “General provisions”, includes a provision in Article 36(1) that 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).
9. Chapter 2 is headed “Establishment of the amount”. Its material provisions are these:

“Article 37

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.

...

Article 38

Reference period

The reference period shall comprise the calendar years 2000, 2001 and 2002.

...

Article 40

Hardship cases

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

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

...

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

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

10. Chapter 3 is headed “Payment entitlements”. Section 1 is relevant here. It concerns payment entitlements based on area. The basic rule, established by Article 43(1), is that “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”.
11. The use of payment entitlements for the purpose of obtaining actual subsidy is governed primarily by Article 44(1), whereby “any payment entitlement accompanied by an eligible hectare shall give right to the payment of the amount fixed by the payment entitlement”. “Eligible hectare” is defined by Article 44(2) as “any agricultural area of the holding taken up by arable land and permanent pasture”, with certain exceptions. By Article 44(3), the area in question must be at the farmer’s disposal for a minimum period of 10 months 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.

12. In broad terms, therefore, the *quantum* of a payment entitlement depends on (i) the reference amount calculated in accordance with Article 37(1) (subject to the hardship provisions of Article 40) and (ii) the number of hectares in the farmer's holding during the reference period; whereas the extent to which a payment entitlement can be *used* depends on the number of hectares in the holding at or about the time of the application for participation in the single payment scheme.
13. There are circumstances in which a farmer whose holding has decreased in land area since the reference period can be allocated additional payment entitlements from a national reserve created pursuant to Article 42 of the Regulation: see Article 7 of Commission Regulation (EC) No 795/2004. This does not apply, however, where the land area of the holding is less than 50 per cent of that in the reference period.

A fuller summary of the facts

14. I have referred already to the lease entered into by the claimant in October 1999 in respect of some 451 hectares of additional land. The landlords were Dr and Mrs Ellis. The land consisted of two lots. At the commencement of the tenancy Lot 1 was subject to an agri-environmental agreement, known as an Environmentally Sensitive Area ("ESA") agreement, which the landlords had entered into under Council Regulation (EC) No 1257/1999 and which restricted the number of ewes and lambs that could be kept on the land. The agreement was administered at the material time by the Countryside Council for Wales ("the CCW") and subsequently fell under the All Wales Agri-Environment Scheme (or "Tir Gofal"). At the commencement of the tenancy no such agreement applied to Lot 2.

15. The judge described as follows how the claimant intended to use the additional land and the reasons why that intention was not fulfilled:

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

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

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

20. On 7 April 2000 officials of the CCW agreed at a site meeting with Dr Ellis where the winter feeding sites on the additional land were to be placed. That severely restricted the grazing use

which could be made of the land. In the event a revised and more restrictive agreement as part of the Tir Gofal Scheme was entered into on 14 November 2001.

21. Further farm business tenancies for grazing Lots 1 and 2 were entered into by Dr and Mrs Ellis and the claimant at a rent of £10,000 per annum respectively for periods of 12 months on 1 October 2001 and on 1 October 2002. Thereafter the claimant decided that it could not continue to justify paying rent at this level having regard to the restrictions under the Tir Gofal Scheme and an offer of reduced rent was rejected. Accordingly the claimant's last tenancy came to an end on 31 September 2003."

16. The problem that arose for the claimant under the Regulation can be explained in this way:

i) The number of sheep qualifying for payments under previous support schemes (and therefore forming the basis of calculation of the reference amount under the normal rules for the single payment scheme) was the same in 2000 as in 1999, and the number of cattle was only slightly higher in 2000. Overall numbers were substantially lower in 2001 and 2002 than in 1999. Throughout the period 2000-2002 the numbers were much lower than had been intended when the additional land was leased.

ii) Because of the lease, however, the land area used for the calculation of payment entitlements under the single payment scheme was much larger in the 2000-2002 reference period than it had been in 1999 and earlier years. Thus, the quantum of each payment entitlement per hectare, based on the 2000-2002 reference period, was much lower than if it were based on the size of the holding in the period 1997-1999.

iii) By the time of introduction of the single payment scheme the claimant had given up the additional land. This meant that, if payment entitlements were calculated on the basis of the reference period 2000-2002, the claimant was unable to use a substantial proportion of the payment entitlements and would receive under the single payment scheme much less than it had been receiving under earlier support schemes. If, on the other hand, payment entitlements were calculated on the basis of the period 1997-1999, the additional land would fall out of the calculations and the claimant would receive under the single payment scheme broadly the same as it had been receiving under earlier support schemes.

iv) All this explains why the claimant sought to rely on the hardship provisions of Article 40 so as to have the period 1997-1999 substituted for the reference period 2000-2002.

17. It is unnecessary for me to set out the lengthy history of consideration of the claimant's request. Suffice it to say that by the time of the challenged decision of 2 September 2008 the defendants had indicated a willingness to leave the years 2001 and 2002 out of account, on the separate ground that sheep production had been adversely affected in those years by foot and mouth disease, and to base the calculations on the year 2000 alone. That, however, was of little help to the claimant. The defendants maintained their refusal to accept the claimant's case that the period 1997-1999 should be substituted for the entirety of the 2000-2002 reference period on the ground of agri-environmental commitments.

18. It became apparent from a meeting on 17 July 2008, though it was not spelled out in the subsequent decision letter, that the defendants' approach to the issue of agri-environmental commitments was based in particular on the view that production could be adversely affected within the meaning of Article 40(1) of the Regulation only if there was a *dip* in production, and that the only dip in production had been when sheep numbers fell in 2001. The claimant's problem was considered to lie in the land area of the holding in the reference period, which did not provide a basis for relief under the hardship provisions. These points led to the identification of the substantive legal issues at the heart of the claim for judicial review and the judgment below.

The judgment below

19. The first substantive issue considered by the judge was the claimant's submission that, in a case where a farmer was subject to agri-environmental commitments during the reference period, Article 40(5) applies on its proper interpretation irrespective of whether the farmer's production was adversely affected by those commitments. The judge rejected that submission, for reasons given at paras 55-58 of his judgment. The submission is pursued before us by way of a respondent's notice but it was addressed by counsel very much as a secondary issue and I need say nothing further about it at this stage.
20. The second substantive issue considered by the judge was the claimant's alternative submission that the defendants were wrong to interpret the phrase "production was adversely affected" as requiring a dip in production. The judge referred to the approach demonstrated at the meeting of 17 July 2008, which in his view was likely to have informed or heavily influenced the decision letter. He continued:

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

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

The meaning of "production was adversely affected"

21. For the defendants, Mr Clive Lewis QC submitted that the judge was wrong to find that regard must be had to land area and not just to the number of animals for the purpose of determining whether production was adversely affected within the meaning of Article 40(1). A farmer seeking the benefit of the derogation must establish an adverse effect on "production". "Production" means that which is produced, as distinct from the land on which it is produced. The distinction is supported within the Regulation by, for example, the definition of "agricultural activity" in Article 2, which refers on the one hand to "the production, rearing or growing of agricultural products ..." and on the other hand to "maintaining the land in good ... condition" (see [7] above). In the context of a claim under the Regulation for benefits in respect of livestock, to establish an adverse effect on production it is necessary to demonstrate an adverse effect on the number of animals that were eligible for subsidy under the support schemes in force during the reference period, that is to say a dip or reduction in the number of eligible animals. That also reflects the policy underlying the Regulation. In this case there was no adverse effect in the year 2000, since the number of eligible animals remained the same or was subject to a slight increase.
22. Mr Lewis sought to derive further support for this interpretation from the structure of Title III of the Regulation. Article 40 comes within Chapter 2, relating to the establishment of the reference amount. It provides a derogation from the normal rule in Article 37 whereby the reference amount is calculated on the basis of payments granted under earlier support schemes, which were themselves based on numbers of eligible animals. It is not concerned with land area, which comes into play only in Chapter 3, in relation to the calculation and use of payment entitlements. The judge was therefore wrong, submitted Mr Lewis, to hold that regard must be had to land area in the context of Article 40.

23. The claimant's true problem, according to Mr Lewis, is not that production was adversely affected in 2000 but that the claimant ceased to lease the additional land in 2003 and therefore did not have sufficient eligible hectares to activate all its payment entitlements under the single payment scheme. Thus the lower subsidy under the scheme reflects the later reduction in land area as compared with 2000, not an adverse effect on production in 2000. Such a situation is covered by Article 7 of Regulation 795/2004 (see [13] above) rather than by the hardship provisions of Article 40; but the claimant did not qualify for additional payment entitlements under Regulation 795/2004 because its holding had reduced in land area by more than 50 per cent.
24. In my judgment, it is unhelpful and potentially misleading to say that regard must be had to land area when determining whether "production was adversely affected" by force majeure, exceptional circumstances or agri-environmental commitments. I agree with Mr Lewis that "production" in the context of the claimant refers to the number of animals eligible for subsidy. I disagree, however, with his submission that in order to demonstrate that production was adversely affected by a relevant factor it is necessary to establish a dip or reduction in the number of eligible animals. In my view an adverse effect on production can equally well be demonstrated by establishing that an increase in production was prevented or restricted by a relevant factor. That seems to me to accord not only with the wording of the provision but also with the overall scheme and underlying policy, to all of which regard must be had in interpreting a provision of this kind (see e.g. Case C-292/00, *Davidoff & Cie v Gofkid Ltd* [2003] ECR I-389, at para 24 of the judgment of the Court).
25. As to the wording, little elaboration is needed. The expression "production was adversely affected" is a broad one. On their ordinary and natural meaning, the words used are apt to cover any situation where production was lower than it would otherwise have been in the reference period, including a case where a planned or expected increase in production could not be implemented as well as a case where production was reduced. Thus, for example, there is no difference of principle between the case of a farmer whose production is halved by an event of force majeure or by agri-environmental commitments and the case of a farmer who is prevented by force majeure or agri-environmental commitments from doubling his production. In each case it is perfectly natural to say that his production has been adversely affected by the force majeure or the agri-environmental commitments. The defendants' approach, by contrast, requires the implication of a substantial limitation which is not to be found in the words of the Regulation: it introduces a comparison between production in a reference year and production in the preceding year, and holds that an adverse effect can arise only where production has gone down from one year to the next.
26. I do not accept Mr Lewis's submission that the defendants' approach derives support from the structure of Title III of the Regulation. In my view nothing turns on the fact that Article 40 forms part of Chapter 2, concerning the calculation of the reference amount, whereas land area comes into Chapter 3 as a separate element in the calculation of payment entitlements. The level of production will itself depend on how much land is available for use and how that land can be used. Agri-environmental commitments provide a prime illustration of that: they are liable to have an adverse effect on production for the very reason that they restrict the amount of land available for use or the use that can be made of the land, for example by requiring stock to be excluded from parts of the land or by setting limits on permitted stocking densities. Nor does it make any difference in principle whether a farmer enters into agri-environmental commitments in respect of his existing land or acquires additional land which is or becomes subject to such commitments. In each case the commitments may cause the farmer's production to be lower than it would otherwise have been; and if that occurs it is perfectly natural in each case to say that production has been adversely affected by the commitments.
27. I also think that the judge was right to rely as he did on recital (24) to the Regulation. Having referred to the introduction of a system of "decoupled" income support to complete the shift from production support to producer support in pursuit of the aims described, the recital goes on to

state that “decoupling will leave the actual amounts paid to farmers unchanged”. It was obviously not intended to guarantee that the amounts received by a farmer under the new system would be precisely the same as under previous support schemes, and the new system introduced a number of specific conditions of its own; but it was equally plainly envisaged that there would at the outset be a broad equivalence between payments under the old system and the new. Yet the defendants’ approach to the hardship provisions would leave the claimant with far less than he received under the previous support schemes. The claimant’s interpretation, by contrast, would lead to broadly the same level of payments as under the previous support schemes and is in line with the policy revealed by the recital.

28. Mr Mercer QC drew our attention to two cases on the Regulation: the judgment of the Court of Justice in Case C-170/08, *H.J. Nijemeisland v Minister van Landbouw, Natuur en Voedselkwaliteit* (11 June 2009) and the opinion of the Advocate General in Case C-152/09, *André Grootes v Amt für Landwirtschaft Parchim* (8 July 2010, judgment of the Court still pending). *Nijemeisland* relates to the calculation of the reference amount where a producer had suffered loss of one year’s premium by way of a penalty under the scheme in force during the reference period. *Grootes* relates to the applicability of Article 40(5) in circumstances where there had been a change of use from arable land to pastureland on the basis of participation in an agri-environmental measure. Although neither case is directly in point, one feature of the reasoning in both of them has some bearing on the present issue, namely the stress placed on the principle of legal certainty under EU law.
29. Thus, in *Nijemeisland* the Court said that an interpretation whereby the premium that would have been payable but for the penalty was taken into account in the calculation of the reference amount was consistent with the principle of legal certainty:

“In the main proceedings, Mr Nijemeisland accepted, without challenge and without admission of guilt, the penalty concerning the loss of the premium for one calendar year, imposed in accordance with the rules in force at the time. At that time, it was impossible for him to foresee that his decision might have consequences on future direct payments under rules adopted in 2003. Before the entry into force of Regulation No 1782/2003, the applicant could not foresee that his exclusion from receiving the premium would play a role in regard to the amount of the single payment and could therefore cause financial consequences unfavourable to him for several years.”
30. The Advocate General in *Grootes* cited that passage in accepting (at paras 28-37 of his opinion) that the objective underlying Article 40(5) is to give farmers protection of their legitimate expectations and legal certainty; and he also observed that the aim of Article 40(5) is “to ensure that farmers who have participated in environmental measures during the reference period concerned do not find themselves penalised for having done so” (footnote 15).
31. The same considerations provide a degree of support for the claimant’s interpretation of the expression “production was adversely affected” in Article 40(1), in that such an interpretation ensures that the claimant is not penalised under the single payment scheme for having leased land subject to agri-environmental commitments during the reference period when the possible financial consequences of such a step under the scheme could not be foreseen.
32. One of the concerns expressed by Mr Lewis related to a different aspect of certainty. He submitted that, whereas reductions in numbers of eligible livestock are readily quantifiable, it would introduce an unacceptable element of uncertainty into the system if account had to be taken of increases forgone. In my view, however, there is no force in that point. In order to engage the derogation in a case where the adverse effect is said to lie in the prevention or restriction of an increase in production, a farmer will simply need to show that production during the reference period was lower than it would otherwise have been. There may be a *de minimis* issue, but precise quantification of the increase foregone is not required. If the derogation applies, the farmer is then entitled to have the reference amount calculated on the basis of years which

were not so affected. That will provide a known and precise basis for the calculation. If all relevant years are affected, recourse must be had to the alternative approach laid down in the second sub-paragraph of Article 40(5), which may involve a greater degree of judgment but still provides a sufficiently certain basis for the calculation.

33. It will be apparent from the above that I also reject Mr Lewis's submission that the claimant's true problem is that it had ceased to lease the additional land by the time of the single payment scheme and could not therefore activate its payment entitlements in full. In my judgment, the true problem lies in the fact that production was adversely affected during the reference period by reason of the agri-environmental commitments affecting the additional land, so that the calculation of the reference amount and thus of the claimant's payment entitlements on the basis of the reference period produces unfairness and hardship. That is why it is entirely appropriate to apply the derogation under Article 40, leading here to the substitution of the period 1997-1999 for the purpose of the calculations.
34. For those various reasons I agree with the judge's conclusion on the issue raised by the defendants' appeal.
35. Mr Lewis sought to advance an argument, the true import of which became apparent only in the course of his reply, that any effect on the claimant's production arose not from the agri-environmental commitments affecting the additional land but from mere business uncertainty, which in his submission was not enough to bring the claimant within Article 40(1). Mr Mercer objected to the point being raised before us. In my judgment that objection was well founded. Subject to the legal issue discussed above, the question whether production was adversely affected by reason of agri-environmental commitments is a question of fact. As I read the judgment below, in particular at paras 18-20 (quoted at [15] above), the judge found as a fact that there existed the necessary causal link (arising out of a mix of actual restrictions and uncertainty about future restrictions) between the agri-environmental commitments and the claimant's production. Indeed, it would not otherwise have been necessary for him to determine whether, to use the language of his conclusion on the issue of law, Article 40(1) was "capable of including a farmer who plans to increase his flock ... during the reference period but who being under agri-environmental commitments finds that it is not viable to put that plan into effect" (para 65 of the judgment, quoted at [20] above). The grounds of appeal contain no hint of challenge to the factual part of the judgment, nor does Mr Lewis's written skeleton argument. It was simply too late to raise the point for the first time at the hearing of the appeal.

Other matters

36. It follows that no decision is needed on the claimant's alternative contention, raised by the respondent's notice, that a farmer who was subject to agri-environmental commitments during the reference period is entitled to have a different period used for the calculation of the reference amount without meeting the requirement that production was adversely affected. In the circumstances I do not intend to set out the parties' arguments, but it is fair to say that I found nothing in Mr Mercer's submissions to cast doubt on the correctness of the judge's conclusion on the issue.
37. I should mention finally that both counsel raised for our consideration the question of a reference under Article 267 TFEU to the Court of Justice as to the correct interpretation of the disputed provisions of Article 40 of the Regulation. Each side took the position that its favoured interpretation was clearly correct but that the court should make a reference if it were otherwise minded to adopt the other side's interpretation. For my part, I have formed a clear view about the interpretation of the expression "production was adversely affected" in Article 40(1), and the conclusion I have reached on that issue means that the issue raised by the respondent's notice does not arise for decision. On neither issue, therefore, do I consider a reference to be necessary or appropriate.

Conclusion

38. I would dismiss the appeal.

39. The judge quashed the defendants' decision of 2 September 2008 and the defendants will now have to take a fresh decision on the claimant's application that the period 1997-1998 be substituted for the 2000-2002 reference period. Given the attempt to argue before us that any adverse effect on the claimant's production was the result of business uncertainty rather than agri-environmental commitments affecting the additional land (see [34] above), I think it right to emphasise that it is not open to the defendants to go behind the judge's finding of fact on that issue when taking a fresh decision.

Lord Justice Pill :

40. I agree.

Lord Neuberger, MR :

41. I also agree.