

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

Royal Courts of Justice
Strand, London, WC2A 2LL

12/07/2016

B e f o r e :

THE HON. MR JUSTICE CRANSTON

Between:

**R (on the application of T & S KING (a
partnership))**

Claimant

- and -

**SECRETARY OF STATE FOR
ENVIRONMENT, FOOD AND RURAL
AFFAIRS**

Defendant

**Mr. Daniel Stilitz QC and Mr. Christopher Knight (instructed by Barker Gotelee)
for the Claimants**

**Mr. George Peretz QC (instructed by the Government Legal Department) for the
Defendant**

Hearing date: 27/06/2016

Mr Justice Cranston:

Introduction

1. This judicial review raises a question as to the application of the EU Regulation governing a single payment scheme of support to farmers. In outline under the relevant scheme support for farmers was no longer linked to a farmer's scale of production. There was an initial once-and-for-all allocation of entitlements to payment at the beginning of the scheme in 2007. Once distributed, entitlements became a form of property rights distinct from the underlying farmland or farming rights from which they originally derived. A farmer's entitlement to payment was denominated in so many hectares in any year and he had to activate that entitlement by declaring that he was carrying on agricultural activity on specific agricultural land at a specific point in the year. Farmers could sell entitlement, to other farmers, without selling the land or rights from which they originally derived. There was no provision allowing redistribution of those entitlements as the scheme progressed to reflect actual use being made of the land or rights to which they originally related, the relevant mechanism for changes being the market:

see Sales J in *R (Bickford-Smith) v. Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 3371 (Admin).

2. This is a test case concerning the legality of a form of agreement between farmers which purportedly enabled them to continue to activate their single payment scheme entitlements while farming land where they could not do this. It seems that these agreements were widely used in England. T and S King (“the Kings”) contend that the agreements were lawful and necessary for them during a period of instability. The Secretary of State regards the agreements as an abuse of right under European law. The case turns on the interpretation of a provision of the EU Regulation in force at the time, Council Regulation (EC) No 73/2009. Article 30 of that Regulation reads:

“Without prejudice to any specific provisions in individual support schemes, no payment shall be made to beneficiaries for whom it is established that they artificially created the conditions required for obtaining such payments with a view to obtaining an advantage contrary to the objectives of that support scheme.”

In this case it is common ground that the arrangements were artificial within the terms of Article 30, the issue being whether they were also contrary to the objectives of the scheme.

Background

3. The claimant, T and S King, is a husband and wife farming partnership. The partnership is primarily concerned with finishing cattle, which involves the purchase of beef breeds at around 450kg live weight, then fattening the cattle over a period of approximately six months, either directly from grass in summer or from a diet of conserved feedstuffs in winter, to be sold for slaughter at 650-700kg. The Kings have no other commercial interests or income outside agriculture.
4. The Kings had farmed in Dumfriesshire, but in 1998 they moved to Winghale Priory Farm in Lincolnshire. They owned 345 acres at Winghale Priory Farm and, along with rented land, were eventually farming some 1,000 acres in total. In 2007, they decided to move north to be closer to ageing parents. For financial reasons, and following professional advice, they sold Winghale Priory Farm in 2007 before purchasing a new farm. Between 2007 and 2010 they viewed at least 25 farms, and made formal bids on around a third of these. None were successful. In the meanwhile they continued to farm actively under a series of short term agreements in Lincolnshire and Northumberland, renting buildings for the cattle. Finally, they bought Crossrig Farm in Berwickshire, Scotland, with entry in October 2010. Since then they have continued to farm at Crossrig Farm.
5. At all material times for this claim, the partnership owned 135.99 English entitlement units under the single payment scheme. Between 2008 and 2010 none of these farming arrangements the Kings made included a right to activate the partnership’s English entitlement units under the single payment scheme. Concerned that they might lose these entitlements because they did not have a permanent farming base to activate them, they approached local agents. They were advised that it would be impossible to find sufficient qualifying land within a reasonable distance as a single block. National agents then advised that they should enter a farm business tenancy with Mr and Mrs Wakely over one block of land of 133.99 hectares, extending to one half of Staple Park Farm in Somerset. The Wakelys were tenants of the Crown Estates there. They did not have any single payment scheme entitlements. Apparently they could not afford to buy any.
6. Under the farm business tenancy, the Kings were the tenants of the Wakelys for a period of 10 days from 10 to 20 May 2009. The rent for the period was £15,121.40. The permitted purpose under the agreement was the business of farming for agricultural use and the Kings agreed to

use the holding for that purpose. At the same time as entering the 2009 tenancy, the parties entered separate tenancy agreements on the same terms for the following years, 10-20 May 2010 and 10-20 May 2011.

7. In addition to the tenancy agreement, there was a short contract farming agreement prepared by the national agents under which the Wakelys as contractors were employed by the Kings as employers to undertake contract farm work at Staple Park Farm. Under it, the Wakelys assumed a number of obligations, including:

- “5. The land is maintained by the Contractor in “Good Agricultural and Environmental Condition” and there are no breaches of the Cross-compliance Regulations under the Single Payment Scheme.

6. For the relevant scheme year the Contractor and the Employer shall ensure the land is not entered into any party’s Single Payment Scheme claim, apart from that of the Employer.”

8. The Kings paid agents to ensure that the Wakelys met these obligations over the three years. Both parties commissioned cross-compliance soil protection reviews for each year in 2009-2011. The Secretary of State accepts that the contract farming agreement imposed a contractual obligation on the Wakelys to maintain the land in good agricultural and environmental condition throughout the year, and that they did indeed do so.

9. The Kings activated their English entitlements in reliance on the land at Staple Park Farm in each of the years 2009, 2010 and 2011. Receipts for scheme years 2009 and 2010 were £255,556.90 and £155,404.45 respectively and the amounts were reinvested in the business. Given their move to Scotland in 2011, they agreed to sell their 135.99 English entitlements to BS Pension Fund Trustee Limited at £233 per unit, a total sale price with VAT of £38,022.80. On 8 November 2011 they applied to the Rural Payments Agency to transfer the entitlements. In March 2012 the transfer was disapproved. In letters in May and June 2012, the Agency gave the reason that the arrangements between the partnership and the Wakelys were artificial, on the ground that the 10-day leases had no commercial purpose other than obtaining entitlement payments.

10. Meanwhile in 2011 the Kings had applied to the Scottish Government’s Rural Payments and Inspections Division to activate Scottish entitlements they had bought and their English entitlements in relation to Crossrig Farm. The Division concluded on 25 April 2013 that it was prevented from paying any part of the English entitlements because it was bound by the Agency’s view that those entitlements had not been lawfully activated. However, the Division stated:

“For its part, in [the Rural Payments and Inspections Division]’s experience dealing with some 20,000 claims per year, the arrangements entered into by [T & S] King do not appear improper or unusual and in its view meets the objectives of single farm payment scheme in that they were designed to secure the direct income support that the scheme was created to provide. In short, [T & S] King are an established eligible farmer who declared eligible land and entered into contractual arrangements to ensure that land was kept in [good agricultural and environmental condition], a requirement of the scheme in return for support.”

11. Following the decision of the Agency, the Kings appealed to the Independent Agricultural Appeals Panel. There was a hearing before three members of that body on 19 June 2014. Its recommendation was terse:

“The panel received two conflicting legal opinions of the interpretation of this rule. As the panel members are not legally trained we are obliged to accept the [Rural Payments Agency]’s interpretation of the second limb and in particular their interpretation of ‘obtaining an

advantage contrary to the objectives of that support scheme'. Therefore the Panel recommend rejecting the appeal in favour of [Rural Payments Agency]."

12. The recommendation then went to the Minister. Finally, on 1 April 2015, his reply came from one of his civil servants. Its reasoning was even briefer than the Panel's:

"The Minister considered that the Rural Payments Agency had applied the rules correctly. In making his decision, he considered the governing legislation, the scheme rules, the facts of the appeal and the Panel recommendation."

13. In his witness statement, Mr King explains that the intention of the arrangements with the Wakelys was to ensure that the partnership could continue to activate entitlements which would otherwise have lapsed during a period of uncertainty and insecurity whilst they moved farms. It was a commercial necessity in a difficult market for farmers. The result of the decision was that it treated the entitlements as never having been activated in 2009 and 2010, which meant that they reverted to the English national reserve. That had had a knock-on effect for the 2011 application in Scotland. The partnership had to repay the sale price to the pension fund. The decision also meant that the Agency considered that the partnership had received payments for 2009 and 2010 to which they were not entitled and would have to repay them. Losing the right to the payments would be a major loss to their farming business and would have a colossal impact on the viability of the business.

Legal framework

14. Council Regulation (EC) No 73/2009 of 19 January 2009 established common rules for direct support schemes for farmers under the common agricultural policy and certain support schemes for farmers ("the EU Regulation"). Since 1 January 2015, Regulation (EU) 1306/2013 is a horizontal Regulation applying across a range of Common Agricultural Policy legislation, in particular to basic payment scheme payments under Regulation (EU) 1307/2013. That Regulation governs the basic payment scheme, which is the successor to the single payment scheme.
15. Recital (3) of the EU Regulation recalled that the predecessor instrument, Regulation (EC) No 1782/2003, established the principle that farmers not complying with certain requirements in the areas of public, animal and plant health, environment and animal welfare would be subject to reductions of or exclusion from direct support, and asserted that this cross compliance system formed an integral part of EU support under direct payments and should therefore be maintained. Recital (4) referred to how, in order to avoid agricultural land being abandoned and to ensure that it was maintained in good agricultural and environmental condition, Regulation (EC) No 1782/2003 established a framework within which Member States adopted standards taking account of the specific characteristics of areas concerned, including soil and climatic conditions, which should be maintained. Recital (28) stated:

"The main elements of the single payment scheme should be maintained...Member States should also operate a national reserve that may be used to facilitate the participation of new farmers in the scheme or to take account of specific needs in certain regions. Rules on the transfer and use of payment entitlements should be laid down to prevent speculative transfer and accumulation of payment entitlements without a corresponding agricultural basis."

There are no national rules in the UK as contemplated by this Recital.

16. The scope of the Regulation was identified in Article 1, to establish, inter alia, (a) common rules on direct payments and (b) an income support scheme for farmers, the single payment scheme. Article 2 contained definitions. A "farmer" meant a person or a group "who exercises an agricultural activity". "Agricultural activity" meant:

“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 as established in Article 6.”

17. Article 6, headed “Good agricultural and environmental condition” provided:

“1 ...Member States shall define, at national or regional level, minimum requirements for good agricultural and environmental condition on the basis of the framework established in Annex III, 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. Member States shall not define minimum requirements which are not foreseen in that framework.”

In Case C-333/15, *Planes Bresco* ECLI:EU:C:2016:426, the Court of Justice of the European Union said that “environmental protection, one of the essential objectives of the European Union, must be regarded as forming part of the common agricultural policy ... and, more specifically, ... it forms part of the objectives of the single payment scheme”: at [46]; see also Case C-428/07, *Horvath v. Secretary of State for Environment, Food and Rural Affairs* [2009] ECR I-6355, at [29].

18. The requirements for cross compliance were set out in Chapter I of the EU Regulation. The main requirements, in Article 4, included that a farmer receiving direct payments should respect the statutory management requirements listed in Annex II and the good agricultural and environmental condition referred to in Article 6. Under Article 22 member states were to carry out on-the-spot checks to verify whether a farmer complied with his obligations in Chapter 1.

19. Article 23 of the EU Regulation provided for the reduction of or exclusion from payments in the event of non-compliance with cross compliance rules, namely where the statutory management requirements or good agricultural and environmental condition are not complied with at any time in a given calendar year. That sanction also applied where the non-compliance in question was the result of an act or omission directly attributable to the person to whom or from whom the agricultural land was transferred, transfer meaning any type of transaction whereby the agricultural land ceased to be at the disposal of the transferor. There were other minimum requirements for receiving direct payments set out in Article 28. In particular, Article 28.2 provided:

“2. From 2010, Member States may establish appropriate objective and non-discriminatory criteria to ensure that no direct payments are granted to a natural or legal person:

- (a) whose agricultural activities form only an insignificant part of its overall economic activities; or
- (b) whose principal business or company objects do not consist of exercising an agricultural activity.”

20. Title III of the EU Regulation dealt with the details of the Single Payment Scheme. Article 33, regarding payment entitlements, specified that support under the single payment scheme should be available to farmers if they, inter alia: (a) held payment entitlements which they have obtained in accordance with Regulation (EC) No 1782/2003, and (b) obtained payment entitlements under the Regulation by transfer or from the national reserve. Activation of payment entitlements was addressed in Article 34: support was to be granted per eligible hectare, and “eligible hectare” included:

“(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, as well for non-agricultural activities, predominantly used for agricultural activities...”

21. This meant that a farmer was to declare the parcels corresponding to the eligible hectares accompanying any payment entitlement, but except in the case of *force majeure* or exceptional circumstances, those parcels should be at the farmer’s disposal on a date fixed by the Member State, the so-called snapshot date: Article 35.1. That date in this country is 15 May. In Case C-61/09, *Landkreis Bad Dürkheim* [2010] ECR I-9763, the court said that the “at his disposal” requirement means that the farmer must have “power to manage [the] holding for the purposes of an agricultural activity” or “enjoy a degree of autonomy with regard to that area sufficient for the carrying-out of his agricultural activity”: see at [58] and [62]. There were national ceilings for payments, fixed in accordance with Article 40.

22. Article 42 has been called the “use it or lose it” or “use it, sell or lose it” provision. Entitled “Unused payment entitlements” it provided:

“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...”

Article 43.1 enabled payment entitlements to be transferred by sale with or without land. However, lease arrangements or similar types of transactions were allowed only if the payment entitlements transferred were accompanied by the transfer of an equivalent number of eligible hectares: Article 43.2. The distinction for lease arrangements was to prevent the speculative transactions referred to in Recital (28): see Case C-470/08, *Kornelijs van Dijk v. Gemeente Kampen*, ECLI:EU:C:2010:31.

The Secretary of State’s case

23. For the Secretary of State, Mr Peretz QC contended that the arrangements the Kings entered into was contrary to the objectives of the single payment scheme and thus fell foul of Article 30 of the EU Regulation. In his submission the principal purpose of the Regulation was to provide income support to farmers on land that could be used to activate entitlements, not to support farmers on other land. He gave as an example the farmer having more payment entitlements than could be activated because he sold his agricultural land for development. In such a case, the buyer would have had no interest in acquiring payment entitlements so the farmer would be left with payment entitlements exceeding the amount of agricultural land at his disposal. But it would not be expected that the farmer in that situation would be able to use payment entitlements since the scheme was designed to provide for payment to farmers, not ex-farmers. In Mr Peretz’s submission, Article 43 provided for the sale of entitlements in this type of situation, to farmers who did have eligible hectares to activate them.
24. Mr Peretz submitted that the definition of “agricultural activity”, which payments under the Regulation were designed to support, did not include entering into arrangements such as the ones at issue. Recital (28), contemplating national rules preventing speculative transfer and the accumulation of payment entitlements without a corresponding agricultural basis, was to similar effect. While he accepted that Article 35 of the EU Regulation left open the possibility of payment entitlements being activated by a purely temporary control over agricultural land as at 15 May each year, in his submission the type of arrangements the Kings entered into was contrary to the requirements in Article 35 that the land actually be at their disposal on that snapshot date. The scheme’s purpose was not to support farmers who did not have eligible hectares at their disposal, albeit that they were farmers elsewhere. Moreover, such arrangements would subvert the use it or lose it rule in Article 42 of the EU Regulation, which Mr Peretz characterised as a keystone provision, essential to the long term operation of the

scheme. If a farmer with entitlements could not take advantage of them, Article 42 was designed so that they went into the national reserve for distribution to others.

25. Mr Peretz was also critical of notion that the claimant's arrangements furthered the objective of maintaining land in good agricultural and environmental condition. In reality, he submitted, the arrangements did no more than allow the Kings to avoid having to sell their payment entitlements, as well as being able to continue to receive scheme payments. If the objective of the EU Regulation was to maintain land in good agricultural and environmental condition, that would have been achieved just as well if the payment entitlements had been sold on the market to owners of eligible hectares. Indeed the arrangements were such as to result in payments being made, over a period of years, where during almost all the year those who had the land at their disposal, the Wakelys, were not themselves accountable to the Secretary of State to comply with the condition of maintaining the land in the requisite condition in return for the payments. Instead the Wakelys had no more than an obligation under a contract with those in receipt of the payment, the Kings, to comply with it. That, in Mr Peretz's submission weakened the enforcement mechanism in the Regulation for ensuring that land would be in good agricultural and environmental condition.

Analysis

26. It is common ground that the arrangements the Kings entered with the Wakelys regarding Staple Park Farm were artificial. It is also common ground that because of Article 35 of the EU Regulation there was the possibility of an entitlement under the single payment scheme being activated by temporary control over agricultural land as of the 15 May in any year. As a result of the Farm Business Tenancies the Kings entered into, they obtained temporary control over the Wakelys's land at Staple Park Farm for the 10-day period around 15 May in the years 2009-2011, which enabled them to specify eligible hectares to activate their payment entitlements. As a matter of law the land was at their disposal on the snapshot date.
27. So these arrangements on their face fell within the terms of the EU Regulation. Recital (28) of the EU Regulation contemplated that national authorities might introduce rules to prevent what were termed speculative transfers of entitlements or their accumulation by those essentially non-farmers. No such measures were taken, even if they would have had any impact on the Kings' arrangements. Thus the issue boils down to whether there was enough material to show that the arrangements were caught by Article 30 because they were contrary to the objectives of the scheme: see *Henderson v. Scottish Ministers* [2012] SLCR 92. I do not think they were.
28. The context of the arrangements was that the Kings, having sold their farm for quite legitimate reasons, were making genuine efforts to locate a new one but facing difficulties in doing so. Eventually, they did purchase a new farm, but there was a gap. During the search the Kings were still engaged in full time farming, but not on land which enabled them to activate their entitlements under the single payment scheme. Thus they entered the farm business tenancies with the Wakelys in 2009 for three years, along with the contract farming agreement. This was not the case of Mr Peretz's farmer selling land for development and going out of business, or even worse of non-farmers engaging in speculative transfers or the accumulation of payment entitlements without a corresponding agricultural base, deprecated in Recital (28) of the EU Regulation. Clearly the use it or lose it principle in Article 42 applies to these examples.
29. Under the contract farming agreement between the Kings and the Wakelys it is common ground that the Wakelys were bound to maintain the land in good agricultural and environmental condition throughout the whole of the year. There is no issue that they did not do that in practice, evidenced in part by the soil protection reviews. Maintaining land in good agricultural and environmental condition is one of the objectives of the single payment scheme, recognised amongst other places in Article 4 of the EU Regulation and in the jurisprudence such as Case C-333/15, *Planes Bresco*, ECLI:EU:C:2016:426. It falls within the definition of agricultural

activity in Article 2(c) of the EU Regulation. Consequently the Kings were farmers both in reality and as defined in Article 2(a) of that Regulation. The arrangements were artificial with the object of the Kings retaining and receiving their single farm entitlements but I fail to see how, against the background I have described, they were contrary to this important objective of the single payment scheme.

30. In considering the Secretary of State's objections to the arrangements it is important in my view to note that the issue is whether the arrangements between the Kings and the Wakelys were contrary to this objective, not whether they positively furthered it. One of Mr Peretz's objections was that the legal basis for the ensuring that the Wakelys kept their land in good agricultural and environmental condition lay in their contractual obligations to the Kings. I note at the outset that the Wakelys did not otherwise have any legal obligation to maintain the land they farmed in good agricultural and environmental condition, so that the arrangements had the effect of ensuring as a matter of law that this land was so maintained.
31. And the Kings had an incentive to ensure that the Wakelys lived up to their obligation since, under Article 23 of the EU Regulation, they could be penalised by a reduction in payments if the Wakelys failed to do so. There is no doubt that the mechanisms for ensuring this were weaker than they would have been than if the Kings had been directly farming Staple Park Farm. Nonetheless, I cannot regard the arrangements as being contrary to the objectives of the scheme because the enforcement mechanisms could have been stronger. Mr Peretz's contention that the objectives of the scheme would have been better achieved if the Kings had sold their entitlements fails for similar reasons.
32. At the very least these arrangements were not to the detriment of one of the objectives of the single farm payment scheme. Thus they did not fall within Article 30 of the EU Regulation. The decision of the Secretary of State that they did was consequently in error.

Conclusion

33. I allow this claim for judicial review.