

Neutral Citation Number: [2022] EWHC 2622 (Admin)

Case No: CO/2228/2020

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 20 October 2022

Before:

HIS HONOUR JUDGE KEYSER KC
SITTING AS A JUDGE OF THE HIGH COURT

Between:

THE KING
on the application of **IMOGEN BICKFORD-SMITH** **Claimant**
- and -
THE SECRETARY OF STATE FOR
ENVIRONMENT, FOOD AND RURAL AFFAIRS **Defendant**

The Claimant as a litigant in person
Tim Johnston (instructed by **The Government Legal Department**) for the **Defendant**

Hearing date: 10 October 2022

Approved Judgment

This judgment was handed down remotely by circulation to the parties or their representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30 a.m. on 20 October 2022.

His Honour Judge Keyser K.C. :

Introduction and Summary

1. This is my judgment upon the claimant's application to vary the order made on 10 August 2021 by HHJ Lambert sitting as a Judge of the High Court.
2. 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.
3. The claimant commenced these proceedings for judicial review in June 2020. In essence, she challenged the lawfulness of the Basic Payment Scheme ("BPS") Policy and Rules for the 2020 Scheme Year ("the 2020 BPS") as they applied to the New Forest. (I shall explain the grounds of the challenge later in this judgment.) On receiving the claim and recognising merit in it, the defendant applied for and obtained a stay of the proceedings for the purpose of carrying out a consultation process with a view to the revision of the Scheme for subsequent years. After that consultation had been completed, the defendant filed an acknowledgement of service and summary grounds of resistance, which conceded that the 2020 BPS was unlawful in one particular respect and that the claimant was entitled to a declaration to that effect.
4. The claimant's application for permission to apply for judicial review was considered on the papers by Judge Lambert on 10 August 2021, when he made an order ("the Order") disposing of the claim. By paragraph 1 he gave permission to apply for judicial review. By paragraph 2 he made a declaration in the terms proposed by the defendant, as follows:

"The 2020 BPS (as a system based on use of the common) was unlawful, as it applied to the New Forest, because it failed to make provision for the payment of subsidies to commoners in relation to their participation in non-productive activities that maintained the common in a state that make [sic] it suitable for grazing or cultivation and therefore coupled the payment of subsidies to agricultural production."

By paragraph 3 Judge Lambert made a costs order in favour of the claimant. He then set out the reasons for making the Order, which were in part as follows:

"An order quashing the 2020 BPS is not appropriate. Prerogative orders, declaratory orders and injunctions are discretionary remedies. The court has a wide discretion whether to grant relief at all and in what form to grant it. The court may refuse to exercise its discretion where the grant of the remedy is unnecessary or where there is no injustice. It would be unjust and unnecessary to set aside an executed scheme where there is no significant or substantial injustice to the claimant. The declaration that the defendant agrees should be made is sufficient remedy in your case. As explained, the Secretary of State could

not shut down and rerun the 2020 BPS. If there should be some degree of injustice this is so slight that it must be tolerated. ...

The application for a mandatory order requiring the Secretary of State to operate a lawful scheme represents a mandatory order for the future which cannot be drafted with sufficient precision. In any event such an order is not required because as the defendant states correctly ‘It can be presumed that a public authority will conscientiously act in accordance with the law, to the best of its abilities’.”

Judge Lambert recorded that, as the Order had been made without a hearing, a party affected by it might apply to have it set aside, varied or stayed. That is what the claimant has done.

5. On this application, the claimant’s main contention is that the declaration in the Order is deficient because it identifies only one of the two ways in which the 2020 BPS was unlawful. It correctly declares that it was unlawful to exclude provision for payments in respect of “non-productive activities” (by which is meant, broadly, activities relating to the maintenance of the land rather than the production of food). But it fails to declare that it was unlawful to make any provision for payments that were coupled to the level of productive activities: the Scheme would (the claimant says) have been unlawful even if the deficiency mentioned in the Order had been remedied. In response, the defendant contends that the claimant has misunderstood the relevant legislation; the declaration in the Order accurately identifies the unlawfulness.
6. The claimant has also contended that she is entitled to some form of mandatory relief requiring the defendant to compensate her for losses arising out of the incorrect operation of the 2020 BPS. She does not, however, contend that the 2020 BPS ought to be quashed. In response, the defendant contends that, even if (which he does not accept) the claimant has suffered any financial disadvantage, she has not sufficiently raised the matter in her claim and her remedy would be to bring Part 7 proceedings.
7. In summary, I accept the defendant’s position on these issues and refuse the application. The declaration in the Order shall stand, subject to minor redrafting suggested by the defendant in the interests of clarity. The precise nature of the issues and the reasons for my conclusions will emerge from what follows. However, I do not consider it necessary either to describe all of the intricacies of the law or to set out the prolonged procedural history of this particular case.
8. I am most grateful to the claimant for the precise, concise and courteous manner in which she advanced her application before me. I am grateful also for the most helpful written and oral submissions of Mr Johnston, counsel for the defendant.

The Basic Payment Scheme

9. The BPS provides income support to farmers by way of agricultural subsidies. It derives from the Common Agricultural Policy of the European Union, Council Regulation EUR 1307/2013 (“the Direct Payments Regulation”) and Commission Implementing Regulation EUR 809/2014 (“the Implementing Regulation”). For the time being, it continues to operate in the United Kingdom by reason of the Direct

Payments to Farmers (Legislative Continuity) Act 2020, although it is being phased out and will in due course be replaced by a new scheme. The BPS is administered on behalf of the defendant by the Rural Payments Agency (“RPA”).

10. The BPS was introduced in 2015. It replaced a similar but not identical EU scheme for farmers’ subsidies, the Single Payment Scheme (“SPS”). The operation of the SPS was considered and explained by Sales J in his judgment in an earlier claim brought by the claimant, *R (Bickford-Smith) v The Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 3371 (Admin)¹ (“the First JR Claim”), as follows:

“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

¹ The text of paragraph 2 of this judgment is “lifted”, with gratitude, from paragraph 3 of Sales J’s judgment in the First JR Claim.

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.”

11. For present purposes, that description of the SPS also broadly applies to the BPS, subject to a qualification, mentioned further below, concerning the nature of the non-productive activities that will qualify for payments.

12. Article 39(2) of the Implementing Regulation, as amended, provides:

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

This form of wording (“in proportion to their use or right of use of it”) was the same as had been used for the corresponding provision for the SPS: see Article 8.2 of Part II of Commission Regulation (EC) No. 795/2004; also the judgment of Sales J at [72].

13. Article 4(1)(c) of the Direct Payments Regulation provides the following definition:

“‘agricultural activity’ means:

(i) production, rearing or growing of agricultural products, including harvesting, milking, breeding animals, and keeping animals for farming purposes,

(ii) maintaining an agricultural area in a state which makes it suitable for grazing or cultivation without preparatory action going beyond usual agricultural methods and machineries, based on criteria established by Member States on the basis of a framework established by the Commission, or

(iii) carrying out a minimum activity, defined by Member States, on agricultural areas naturally kept in a state suitable for grazing or cultivation”.

14. This definition of agricultural activity departs from the definition that applied to the SPS, as set out in Article 2(c) of Council Regulation (EC) No. 1782/2003:

“‘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.”

In the First JR Claim, Sales J held that the mere non-exercise of rights of common was capable of being activity that “maintain[ed] land in good agricultural and environmental condition” for the purposes of Article 2(c):

“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.”

For the defendant, Mr Johnston submits that Sales J’s reasoning does not apply to the new definition in Article 4(1)(c) of the Direct Payments Regulation and that the mere non-exercise of grazing rights is not sufficient to fall within the definition; rather, commoners who are not engaged in what has been referred to as “productive agricultural activity” (that is, under Article 4(1)(c)(i)) are now required to engage in certain activities—the precise nature of which was left to the Member States to specify—to maintain the agricultural area in a state suitable for grazing or cultivation. In my opinion, that submission is correct. The new wording seems naturally designed to require more than mere inactivity, and this is confirmed by recitals (7) and (10) to the Direct Payments Regulation, which show an intention that payments should only be made to farmers who “carry out a certain minimum activity.”

15. Special difficulties arise in applying the BPS to the New Forest, as they had done in respect of the SPS. For all other common land in England, the rights to graze were quantified and fixed in registers established under the Commons Registration Act 1965. That Act, however, did not apply to the New Forest; the commoners’ grazing rights on the New Forest have never been quantified and remain in theory unlimited. Instead, commoners in the New Forest are required to pay to the Verderers a “marking fee” for each animal to be grazed—payments are receipted by the physical marking of the animal—and, although the Verderers’ byelaws give them power to limit the grazing rights of the commoners, they have not done so.
16. The RPA addressed this difficulty for the year 2020 by operating the 2020 BPS by reference to the commoners’ “use” of the common, rather than their “right of use” of it:

cf. Article 39(2) of the Implementing Regulation. It quantified the use solely by reference to the historic marking fees paid by the commoners in respect of their animals. This provided a method of quantifying agricultural activity falling within Article 4(1)(c)(i) of the Direct Payments Regulation (that is, productive agricultural activity). But it had the effect that no account was taken of agricultural activity falling within Article 4(1)(c)(ii) (that is, non-productive agricultural activity). The declaration in the Order reflects the unlawfulness of this failure. The new system introduced by the defendant for 2021 BPS and years following is based on each commoner's "right of use" of the common, using the historic marking fees paid by the commoners as a proxy for those rights. The lawfulness of the new system is not in issue in these proceedings.

This Application

17. The principal issue before me concerned the terms and scope of the declaration that ought to be made. See paragraphs 4 and 5 above.
18. Before me, the claimant contended that the appropriate terms of the declaration would be as follows:

“The 2020 BPS was unlawful, as it applied to the New Forest, because it coupled the payment of all subsidies to marking fees paid per animal. The direct correlation between the subsidy paid and the number of animals produced/identified on marking receipts was contrary to a primary objective of the BPS, that entitlement to the payment of aid should be de-coupled from production.”

The claimant submitted that, although use could lawfully be used as a threshold condition for the payment of subsidies (that is, there must be some usage to qualify for subsidy), it was unlawful to correlate the amount of the payment to the amount of the usage, because it was contrary to a principal objective of the reform of the Common Agricultural Policy that led to both the SPS and the BPS, namely the decoupling of income support from production. She said that such a correlation, in the case of the New Forest where the rights of the commoners are unlimited in respect of the number of animals, created a huge incentive for farmers to increase the number of their animals, leading to overproduction and consequent damage to the environment, the long-term future of sustainable farming in the area, and the health and welfare of stock and wildlife.

19. The defendant accepts that, in order to comply with the Direct Payments Regulation, it was necessary for a scheme based on the use of common land to be decoupled, in the sense that it did not directly tie production to the receipt of subsidies. However, in reliance on Article 39(2) of the Implementing Regulation, which permits the payment of subsidy to individual beneficiaries “in proportion to their use [of the common land]”, he contends that the making of payments to individuals on the basis of how many cattle they turned out is not unlawful, provided that the scheme also makes provision for payments in relation to non-productive use of the common. Therefore, the declaration rightly identifies an unlawful failure to make provision for non-productive use; however, the claimant is wrong to seek a declaration that it is unlawful to make provision on the basis of the extent of productive use (that is, the number of cattle).

20. In my judgment, the defendant's position is the correct one. The BPS, as did the SPS before it, permits the payment of subsidies "in proportion to" use. The claimant's argument rests on the contention that, in so providing, Article 39(2) of the Implementing Regulation, which is a Commission Regulation, is itself unlawful as being contrary to the stated intention of the Council Regulations that it purports to implement to decouple subsidies from production. However, such a conflict between the Commission and the Council is inherently unlikely, not least because the Implementing Regulation repeated what the Commission had previously done in respect of the SPS. Anyway, the decoupling of subsidies from production was achieved by the provision of subsidies for non-productive agricultural activity. The true objection to the 2020 BPS is simply that, by failing to include that provision in respect of non-productive activity, it unlawfully coupled the subsidies to production. Accordingly, I reject the claimant's argument.
21. The defendant has proposed that the terms of the declaration made by Judge Lambert be modified slightly, in the interests of clarity, as follows:

"The 2020 BPS (as a system based on use of the common) was unlawful, as it applied to the New Forest, because it directly coupled payments of subsidies to marking fees paid per animal and so failed to make provision for the payment of subsidies to commoners in relation to their participation in non-productive activities that maintained the common in a state that makes it suitable for grazing or cultivation."

I agree that this proposal improves slightly on the existing terms of the declaration, because it makes clearer the logical connection indicated at present by the word "therefore". It seems to me that clarity might further be improved by substituting in the parenthesis "which was" for "as", because, where the parenthesis immediately precedes the words "was unlawful", the presence of "as" is capable of giving the initial impression that the unlawfulness was related to the basis of the system in use. I invite those acting for the defendant to consider this minor modification before the order is drawn.

22. There is a distinct matter, which does not concern the terms of the declaration. The claimant submits that the defendant ought to be required to recalculate and increase the payments that she received under the 2020 BPS. She has not formulated the relief she seeks with any clarity, despite having been required to do so by directions given by Judge Lambert, and she has not set out the grounds on which she claims to be entitled to the relief. I refuse to vary the Order in this respect for the following reasons.
- 1) The claimant does not seek the quashing of the 2020 BPS and the implementation of a new scheme, and Judge Lambert expressly refused such a remedy, as would I. Therefore the relief now sought is not by way of implementation of a new and lawful scheme but by way of compensation for the previous implementation of an unlawful scheme.
 - 2) No claim for compensation has been pleaded. Indeed, the detailed statement of grounds and facts does not identify any loss or damage on the part of the claimant.

- 3) The defendant does not admit that the claimant has suffered any loss and damage by reason of the operation of the 2020 BPS and the claimant has not sought to particularise or prove such loss, though she did assert at the hearing that she has suffered some identifiable loss.
- 4) If the claimant wishes to pursue a claim for compensation, she is in principle able to do so by a Part 7 claim. As it seems to me (though the point has not been argued), any such claim would have to be one for so-called *Francovich* damages for a failure of the UK to give effect to EU law and would require the claimant to establish that the following three conditions were satisfied, namely (i) that the rule of law infringed was intended to confer rights on individuals, (ii) that the breach was sufficiently serious, and (iii) that there was a direct causal link between the breach of the obligation resting on the UK and the damage sustained by the claimant: see the decision of the CJEU in Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA and Factortame Ltd* [1996] ECR I-1029, at para 51.

Conclusion

23. For the reasons set out above, the claimant's application to vary the order made by Judge Lambert on 10 August 2021 is refused. In the interests of clarity, the terms of the declaration will be modified very slightly as suggested on behalf of the defendant.
24. When this judgment was provided to the parties in draft, I indicated my preliminary view that the costs of and occasioned by the claimant's application ought to follow the event—that is, be paid by the claimant to the defendant—and be subject of a summary assessment on the papers; and I invited representations on costs. Having considered the representations received, I remain of the view previously indicated. The claimant rightly points to the service that she performed in commencing these proceedings and thereby bringing about a necessary correction to the BPS for the years after 2020. However, this had been reflected in the costs award made in the claimant's favour in the Order. The costs of the claimant's subsequent application to vary the Order ought to be borne by the claimant, because the application did not succeed. I shall make an order to that effect, which will require the parties to seek to agree the amount of costs payable. If the parties cannot agree, I shall assess the costs on the papers.