Neutral Citation Number: [2016] IEHC 336

THE HIGH COURT

ORIGINATING NOTICE OF MOTION

[2013 No. 350 S.P.]

IN THE MATTER OF SECTION 11 OF THE AGRICULTURE APPEALS ACT 2001

BETWEEN

MICHAEL O'CONNOR

APPELLANT

AND

MINISTER FOR AGRICULTURE, FOOD AND THE MARINE AND

JIM BYRNE AND MIRIAM CADWELL

RESPONDENTS

JUDGMENT delivered by Mr. Justice Michael White on the 2nd day of June, 2016

1. This is a statutory appeal pursuant to the provisions of s. 11 of the Agricultural Appeals Act 2001.

2. This is an Act to provide for the appointment of appeals officers to review, on appeal, decisions of officers of the Minister for Agriculture, Food and Rural Development in relation to certain schemes.

3. One of the schemes under the remit of the Act is the single payment scheme governed by EU Council Regulation 73/2009 of 19th January, 2009. The SPS is an administrative scheme, part of the common agricultural policy which rewards farmers who farm to minimum standards. While it is an EU scheme, its implementation falls to the Member State and the Member State is answerable to the EU pursuant to Article 258 of the Treaty.

4. The action was commenced incorrectly by special summons on 18th July, 2013. On 12th January, 2015, this Court made orders amending the special summons so that it complied with the requirements for an originating notice of motion under O. 84C of the Rules of the Superior Courts and a further order pursuant to O. 84C, r. 25(b) on consent was made extending the time for bringing the statutory appeal.

5. The appellant wishes to challenge two decisions. The first decision being that of the second respondent of 20th April, 2012, furnished to the appellant in writing. The second respondent was at the relevant time a designated appeals officer pursuant to the Act.

6. The second decision was that of the third respondent who at the relevant time was a director of the Agricultural Appeals Office who was requested by letter and submissions of 24th September, 2002, to review the decision of the appeals officer of 20th April, 2012.

7. The appellant is incorrect procedurally to have challenged both decisions. The third respondent did not revise the decision of the appeals officer and accordingly the appropriate challenge the court will consider is the decision of 20th April, 2002, by the second respondent.

History of Application for Payment under the EU Single Payment Scheme

8. The appellant is a substantial farmer who farms at Nenagh, Co. Tipperary. In addition to lands held in his own name, he had rented a commonage from Mr. P.J. Ryan, a farmer of Kiltyrone, Capparoe, Nenagh, Co. Tipperary. This parcel of land which had the official designation number of V13714061 under the scheme was owned in the following shares: 11/14 by Mr. Ryan; 1/14 Mogul of Ireland (a mining company); Mr. Spillane 1/14; and Raymond O'Brien, 1/14.

9. The appellant rented a 4/14 share in the parcel of commonage from Mr Ryan.

10. The appellant prepared a written application for payment under the 2010 EU Single Payment Scheme, & Disadvantaged Area Scheme, on 17th May, 2010.

11. The appellant made two amendments to his application, the first on 27th May, 2010, and the second on 31st May, 2010. The parcel of commonage was included in his amended application of 31st May, 2010 and is designated as follows: town land Shallee – land parcel No. 13714061; share of commonage claimed 4/14, total digitised area 162.11, area of parcel that is declared for payment 46.00, designated as rented.

12. The total area declared by the appellant for financial assistance under the scheme was 220 hectares.

13. The application form contained the following declaration:-

> "I hereby declare that all the details contained in this application are true, accurate and complete to the best of my knowledge. I confirm that I am aware of the conditions attaching to the schemes for which application is made, as set out in the 2010 Help Sheet/Terms and Conditions and agree to comply fully with these requirements. I confirm that all the land declared in this application will be at my disposal on 31st May, 2010, and I accept that I will be responsible for any breach in cross compliance with regard to that land up to 31st December, 2010. I accept that lands I declare as being available on 31st May, 2010, must be maintained as agricultural land (or afforestation planted in 2010) for 2010 calendar year and undertake to inform the Department of any change in the status of that land. I further agree that the details supplied on this application, whether written or submitted online, along with any supporting documentation, may be made available to any other Department or Agency for the purpose of cross-compliance controls. I understand the Department of Agricultural, Fisheries and Food is subject to the provisions of the Freedom of Information Act (FOI)."

14. Certain of the lands, the subject of the appellant's application were inspected by officers of the first respondent without prior notice on 3rd August, 2010, and 13th August, 2010. On 16th September, 2010, further inspection was conducted on the lands, the subject matter of the application and in addition, the officers conducted a cross-compliance control test on the appellant's cattle herd. There was some notice of this inspection as the appellant accepts that he received a call to his mobile phone number on the morning of 16th September, 2010, and when he received the message he met the officers of the first respondent on the afternoon of 16th September, 2010. It is unclear if the inspections of 20th and 21st September, 2010 were unannounced or by appointment, but the court believes they refer only to inspections on cross-compliance issues with the cattle herd.

15. There is no evidence on affidavit about the interchange between the appellant and the first respondent's inspectors, John Vaughan and Gerard Byrne on 16th September, 2010 or 21st September, 2010. While John Vaughan was present at the oral hearing before the appeals officer on 23rd February, 2012, it is not clear if he gave sworn evidence to the appeals officer or if his evidence was summarised by Mr. Con O'Brien who set out the case of the first respondent before the appeals officer.

16. In any event, there is no dispute that the first written notification to the appellant was by a notice of non-compliance of 21st September, 2010. This notice brought to the attention of the appellant, that animal tags were missing and also that there may be a reduction in the areas allowed for certain plots in the SPS application and in reference to the commonage, the notice stated:

> "Commonage may be rejected from earlier inspection.
>
> Referring to possible sanctions the notice stated "penalties may apply to SPS and DAS".
>
> An ER96 Declaration in respect of bovines temporarily tagged dated 10th October 2010 signed by John Vaughan District Superintendant, was furnished to the appellant.
>
> A remedial action notice was served on the appellant dated 12th October 2010 in respect of the cross compliance inspections of 16th September, 20th September and 21st September, referring specifically to the following "animals with one tag, heifer and cow in Gortshane also tag no's 33197870776, 331197890704, 331245720939. Shellee. Please refer to the notice of non-compliance (NF) issued to you by the inspecting officer for further details of the non-compliance."
>
> You have the option to remedy this breach within three calendar months of the date of inspection i.e. by the 21/12/ 10, otherwise a sanction will be applied for such non-compliance."

17. The appellant addressed this notice in a letter sent to Mr John Vaughan on the 5th December 2010.

18. On the SPS entitlements, a formal decision was issued to the appellant on 18th November, 2010. The decision referred to an inspection carried out on the lands on 16th September, 2010, in relation to the Single Payment Scheme and the Disadvantaged Area Scheme.

Under the heading of Single Payment Scheme, the formal decision stated

> "Total Area Declared =220.17 Ha, Total Area Found at Inspection =160.57 Ha. As per chapter 17 of the terms and conditions, no reduction will be imposed if the number of entitlements is less than the Area Found. Otherwise, the Area Found is compared to the Area Claimed, or the Number of Entitlements if lower, and the difference is used to calculate the level of reduction. Terms and conditions contravened: as per chapter 4 of the 2010 Terms and Conditions. Inadequate deductions were made in some parcels For parcel numbers V14512024, V14512025, V14515002, V14612002, V14612006, V1374028, V13715002, V13715003, V13715008, and V13715030. For Boundary corrections, House site, Groves, Old yard area, Scrub areas, Bog and scrub areas with no access, Farm roads, Rock area, Pond, Headland scrub, House site and wood land area.
>
> The following land parcel V13714061 is being rejected in its entirety. The Department's findings on this parcel are as follows: Commonage inspection Dates 03/08/2010 and 13/08/2010, and part of full inspection on 16/09/2010. There was no evidence of any farming activity on this land prior to our two initial visits of the Commonage in 2010, or in any of the preceding years as the vegetation is overgrown. It is not possible to control the vegetation by mechanical means due to the type of terrain and you did not maintain any livestock on the land therefore, the land was not maintained by an agricultural activity or under GAEC. There were six adult animals found grazing on the Commonage at the ground inspection on 16/09/2010. These animals were only put in a few days prior to this visit. They were hanging around the Exit point trying to get out of the Commonage as the vegetation was completely overgrown and not very palatable for Livestock. I also noted that a new water trough had been recently purchased and installed for water supply for the animals with a reservoir tank nearby. It seemed that the Commonage water was not safe for drinking purposes. List of parcels giving individual findings enclosed for your information."
>
> This form was signed by John Vaughan, District Superintendent. The letter stated "I enclose for your information a copy of the control report." The form attached to the letter was stated to be form SAIRW 2010 and set out the parcels of land under the original application and the relevant deductions.

19. The next formal decision communicated in writing was following the on the spot inspection for cross compliance in respect of animal identification and registration, and was dated 29/11/10. The documentation attached with that notice was a Single Application Inspection Report known as SAIRS 10 and a Detail Report Sheet. The appellant was notified that the overall cross compliance result was a 5% sanction.

20. The effect of the formal decision following the ground inspection was that the total SPS payment for 2010 was rejected as the exclusion of the commonage area, the smaller adjustments to the other parcels of land meant that the appellant had exceeded the threshold allowance of 20% for lands claimed that he was not entitled to claim. It would be fair to state that the exclusion of the commonage area had very serious repercussions for the appellant which included the non-payment of subsidy to which he would have been legally entitled but for his inclusion of the commonage in his original application.

History of the Review and Appeals Procedure

21. The appellant instructed his solicitor to seek a review of both the decisions on exclusion of the Single Payment Scheme for the inclusion of inappropriate parcels of land and also the sanction of 5% in respect of the cross compliance test carried out on the cattle herd and detailed submissions were sent to Con O'Brien, District Inspector, of the first respondent on 11th January, 2011.

22. A substantial portion of the submissions was a complaint about the manner of the inspections of the appellant's landholding. It was alleged that these inspections were carried out contrary to the Farmer's Charter and Action Plan 2009 to 2011. The conclusion to the submission noted as follows:-

> "My client is faced with the possibility of losing his SFP and DAS payment for 2010 amounting to approx €147,000. As a matter of first principle on the basis of breach of natural justice, I must object to the automatic imposition of a totally disproportionately high penalty without my client being provided with sufficient information and evidence concerning the case against him and without being given an opportunity to contest it prior to its imposition."

23. The submission also contained a detailed rebuttal of the finding of the Department Inspector on the suitability of the commonage for inclusion in the original application.

24. The submission also challenged the ground for imposing the 5% cross compliance sanction. While noting that the inspections of 3rd August and 13th August, 2010 were unannounced which was permissible, the submission noted that the appellant was not provided with any card setting out the details regarding the notice for inspections nor was he given an opportunity to postpone elements of the inspection.

25. The outcome of a review of the decision following the findings of the compliance inspection was communicated to the appellant on 16th May, 2011, in a letter from Con O'Brien, District Inspector.

26. The review rejected the submissions made by the appellant on land eligibility and found that the inspectors had acted properly in excluding the commonage lands, parcel V13714061.

27. The exclusion of small parcels of land on other holdings of the appellant in direct ownership by him, was also subject to complaint but has not been the focus of the statutory appeal.

28. In response to the detailed submissions as to the manner of the inspections carried out, the review stated:-

> "In your request for a Review it is stated that you take issue with the manner in which the inspections took place particularly the unannounced nature. I wish to point out to you that there is provision in Commission Regulation EC No. 1122/2009 to carry out unannounced inspections where giving advance notice may jeopardise the purpose of an inspection. Map Area cases are generally inspected unannounced and I consider it to have been the correct course of action in this case."

29. The review went on to state:-

> "The sanction of a nil SPS payment for 2010 is as a result of an area over- declaration by you of over 35%. This sanction was not imposed automatically. An NF (Notice form) issued to you in September 21st 2010, the final day of the inspection, outlining the outcome of the inspection giving you an opportunity to submit any documentation requested and to bring any information on the inspection to the Department's attention in writing within fourteen days and advising you that a written decision on the result of the inspection would be sent to you. This decision was conveyed to you in a letter (and as detailed in the accompanying form SAIRW 2010) issued to you by John Vaughan, District Superintendent dated November 18th, 2010. Having examined your file I am fully satisfied that the decision to reject land parcel V13714061 in full and reject the areas in the other land parcels for inadequate deductions made as fully justified."

30. The first respondent on review decided to impose an additional penalty when the review stated:-

> "Furthermore, Article 29 of Council Regulation 1782/2003 (outlined in Chapter 38 of the Schemes, Terms and Conditions) states that "without prejudice to any specific provisions in individual support schemes, no payment shall be made in favour of beneficiaries for whom it is established that they artificially created the conditions required for obtaining such payments with a view to obtain an advantage contrary to the objectives of that support scheme."
> "The land parcel rejected in full (V1371406) did not make any contribution to the provision of grazing or fodder crops for your animals in 2010. I consider that you did not farm these lands in 2010 and that you artificially enlarged your holding by including these rented lands (Map Acres) on your 2010 application for the sole purpose of drawing down entitlements which you would not otherwise be entitled to and I consider this to be artificially creating the conditions. As a consequence of the area over- declaration in this land parcel being greater than 20% and deemed to have been made intentionally, an administrative fine amounting to the value of the Single Payment on the number of hectares over-declared should also have been applied as part of the original decision. The administrative fine is now being applied and will be offset against any payment due to you made during the course of the three calendar years following the year in which the determination was made."

The court notes that in conducting this review Mr O'Brien did not give any opportunity to the Appellant to address him on the

imposition of a substantial extra administrative penalty, before that penalty was imposed.

31. On 8th August 2011 the appellant furnished grounds of appeal. In addition to the grounds of appeal furnished the appellant requested that the original submissions for the review be included in the grounds of appeal. Further points were raised on land eligibility and cross compliance.

32. Additional written evidence was submitted to the appeals officer being a statutory declaration of P.J. Ryan sworn on 29th July 2011, statutory declaration of his spouse Margaret Ryan sworn on 29th July 2011 and a statutory declaration of Raymond O'Brien a farmer who farmed a 1/14th partial of the commonage sworn on 29th July, 2011.

33. An oral appeal was granted and heard on 23rd February, 2012. The appellant presented further supplemental legal submissions to the appeals officer and following the conclusion of the appeal, the appeals officer agreed to accept further legal submissions. The appellant submitted supplemental legal submissions no. 2 and the first respondent submitted legal submissions from John Kinsella Legal Services Division on 12th March, 2012.

34. The appeals officer communicated his decision in writing on 20th April, 2012. The appellant appealed this decision to the director of Agricultural Appeals pursuant to s. 10(2) of Agricultural Appeals Act seeking a revision of the decision of the Appeals Officer of 20th April, 2012. This appeal was dated 24th September 2012 and was accompanied by further submissions.

35. The decision was reviewed by the third respondent on 29th May 2013. The court has already decided it is not appropriate to consider this decision.

36. Section 11 of the Act states:-

> "Any person dissatisfied with –
>
> (a) the decision of an appeals officer, or
>
> (b) the revised decision of the Director,
>
> may appeal that decision or revised decision, as the case may be, to the High Court on any question of law."

37. The current appeal challenges the appeals officer's decision on the following grounds which are set out in paras. 20, 21, 22, 23, of the originating notice of motion Para 20 states under the heading decision

38. He decided as follows:-

> "The matter for decision here is whether the Department imposed the correct penalties following the 2010 inspection of your farm. While I have noted the legal issues raised by you and responded to by the Department, I would point out the function of the AAO is to decide on the decisions made by the Department following an inspection of your holding."

and thereby made errors of law as follows

> (i) He failed to make any decision on the legal issues in the Appeal in regard to the farm inspections which were the subject of legal submissions by both the Appellant and the First Named Respondent and which were acknowledged by both parties to the Appeal and by the Second Named Respondent as being legal issues arising in the Appeal.
>
> (ii) He decided that legal issues regarding inspections carried out by the servants or agents of the First named Respondents were outside his remit.
>
> (iii) He erred as to his function as an Appeals Officer under the Agricultural Appeals Act.
>
> (iv)He denied the Appellant his right of appeal pursuant to the Agricultural Appeals Act 2001.
>
> (v) He failed to apply the Agricultural Appeals Act.
>
> (vi) He failed to fully allow the appeal on the basis that the decision under appeal was based on inspections carried out by the First Named Appellants servants or agents in breach of the Council Regulation and the Commission Regulations, the Terms and Conditions and the Farmer's Charter and Action Plan 2009-2011 published by the First Named Respondent.
>
> (vii) He failed to comply with para. 14 of the Agricultural Appeals Tribunal Regulations.

Paragraph 21 states:-

Under the heading "Land Eligibility, commonage Parcel V13714061 and Area found at Inspection he decided as follows:-

> "I note that the first time your stock was placed on parcel V13714061 was on 15th August 2010, 2 days after the second commonage inspection. I find that you did not adhere to the 31 May rule for land availability and conducted no agricultural activity on the land parcel prior to the Department inspecting the land in August 2010"
>
> and thereby made errors of law as follows
>
> (viii) he misconstrued the 31 May Rule for Land Eligibility as contained at chapter 5 of the Terms and Conditions in regard to parcel V1371461 in that he found that it required the Appellant to have his own stock on the land on that

date.

(ix) He determined the eligibility of parcel V1371461 for SPS solely on the basis of the Terms and Conditions and without regard to the Council Regulation and the Commission Regulations.

39. Para 22 states:-

Under the heading Identification and Registration of Animals Inspection which concerned the cross compliance breach and the Remedial Action Notice issued to the Appellant as aforesaid, the Second Named Respondent decided as follows:-

> "the fact that a RAN issued incorrectly to you as admitted by the Department does not lessen the cross compliance breaches found at the inspection. I find that the sanction applied by the Department should stand".

And thereby made the following error of law

> (x) He found that the Plaintiff was not entitled to rely on his compliance with the Remedial Action Notice that was issued to him by the First Named Respondent's servants or agents.
>
> In the premises, the Second Named Respondent erred in law in that
>
> (xi) He failed to fully grant the appeal.

40. The appellant argues that it was not appropriate for the second and third respondents to swear affidavits in these proceedings. That is not correct, however, the court in considering that evidence cannot go beyond the written determination of 20th April, 2002 and if there are matters in the subsequent affidavits of the second and third respondents which go beyond the contents of that written determination, those should not and cannot be considered by the court.

41. The respondent has submitted:-

> (i) That the issue of eligibility was decided correctly.
>
> (ii) The breach of Regulations re control report did not prejudice the applicant as these were technical breaches only.
>
> (iii) Inspections can be unannounced pursuant to the Regulations.
>
> (iv) The appeals officer did pay attention to the legal submissions and did not have to comprehensively deal with those submissions in the decision.
>
> (v) The appeals officer made certain findings of fact which cannot be the subject of a statutory appeal.
>
> (vi) The decision of the appeals officer in respect of the Remedial Action Notice was a finding of fact and was not reviewable.

Relevant provisions of Council Regulation(EC) 73/2009

42. Article 1 thereof establishes:-

> "(a) common rules on direct payments;
>
> (b) an income support scheme for farmers (hereinafter referred to as the single payment scheme".

43. Title 1 of the Council Regulation (that is Articles 1-3) is entitled "Scope and Definitions", Title 2 (Articles 4 to 32) is entitled "General provisions on direct payments" Title III (Articles 33 to 72) is entitled "Single Payment Scheme", Title VII (Articles 137 -149) is entitled "Implementing, Transitional and Final Provisions".

44. Some relevant general definitions set out at Article 2 in Title 1 are as follows:-

> "(a) '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, as defined in Article 299 of the Treaty and who exercises an agricultural activity;
>
> (b) 'holding' means all the production units managed by a farmer situated within the territory of the same Member State;
>
> (c) 'agricultural activity' means 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;
>
> …
>
> (h) 'agricultural area' means any area taken up by arable land, permanent pasture or permanent crops."

45. Title II Chapter I is entitled cross-compliance and Article 4 lists the main requirement expected of farmers receiving direct payments which are that the farmer "respect the statutory management requirements listed in Annex II and the good agricultural and environmental condition referred to in Article 6." Annex II to the Council Regulation contains the Statutory Management requirements which comprise a list of Articles of various Directives and Regulations, the list is grouped under Points A, B and C. A lists legislation relating to the Environment. B lists legislation in relation to public, animal and plant health and C lists legislation in relation to Animal Welfare.

46. Article 6 is entitled "good agricultural and environmental condition" and provides at sub-article (1) as follows:-

"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 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 practises and farm structures. Member States shall not define minimum requirements which are not foreseen in that framework"

47. Annex III to the Council Regulation contains a list of agricultural and environmental issues which may arise starting with "soil erosion" and sets out compulsory and optional standards in respect of those issues. Article 6(1) states that the standards shall be optional except where listed in the third column of Annex iii.

"(a) a Member State had defined for such a standard, a minimum requirement for the good agricultural and environmental condition before 1 January 2009 and/or

(b) national rules addressing the standard are applied in the Member State".

48. Title II, Chapter 4 of the Council Regulation provides for an integrated administration and control system which per Article 14 applies to the support schemes listed at Annex 1 to the Council Regulation and SPS is listed in Annex I. Articles 20 provides for Member States to carry out administrative controls supplemented by on the spot checks to verify eligibility for aid and to designate an authority responsible for controlling the controls and checks provided for in Chapter 4. Article 21 provides for reductions and exclusion in the event of non-compliance with eligibility rules. Article 22 provides for controls on cross-compliance and Article 23 provides for the reduction or exclusion of payments in the event of non-compliance with cross compliance rules. Article 29 (in Chapter 4) provides that:-

"Save as otherwise provided for in this Regulations, payments under support schemes listed in Annex 1 shall be made in full to the beneficiaries."

49. Article 34(1) of the Council Regulation provides that:-

"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".

50. Article 34(2) gives the following definition of an eligible hectare:-

"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; and

(b) any area which gave a right to payments under the single payment scheme or the single area payment scheme in 2008 and which:

(i) no longer complies with the definition of 'eligible' as a result of the implementation of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy; or

(ii) for the duration of the relevant commitment of the individual farmer, is afforested pursuant to Article 31 of Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) or to Article 43 of Regulation (EC) No 1698/2005 or under a national scheme the conditions of which comply with Article 43(1), (2) and (3) of that Regulation; or

(iii) for the duration of the relevant commitment of the individual farmer, is set aside pursuant to Articles 22, 23 and 24 of Regulation (EC) No 1257/1999 or to Article 39 of Regulation (EC) No 1698/2005.

The Commission, in accordance with the procedure referred to in Article 141(2), shall lay down detailed rules on the use of eligible hectares for non-agricultural activities.

Except in the case of force majeure or exceptional circumstances, hectares shall comply with the eligibility condition throughout the calendar year."

51. Article 35 of the Council Regulation (also in Title III Chapter I) is entitled "Declaration of eligible hectares" and sub-article (1) thereof provides as follows:-

"1. The farmer shall declare the parcels corresponding to the eligible hectares accompanying any payment entitlement. Except in the case of force majure or exceptional circumstances, fixed in that Member State for amending the aid application".

Those parcels shall be at the farmer's disposal on a date to be fixed by the Member State which shall be no later than the date.

52. Article 142 of the Council Regulation is entitled "Implementing Rules" and provides as follows:-

"In accordance with the procedure referred to in Article 141(2) detailed rules shall be adopted for the implementation of this Regulation. They shall include in particular:

..(c) detailed rules for the granting of aid provided for in this Regulation, including eligibility conditions, dates of application and payment and control provisions as well as for checking and establishing entitlement to the aids including

any necessary exchange of date with the Member States and for the establishment of the overrun of the base areas or maximum guaranteed areas as well as detailed rules concerning the determination of the retention period, the withdrawal and reallocation of unused premium rights established under Sections 10 and 11 of Chapter 1 of Title IV;...

(n) rules on the administrative controls, on the on-the-spot checks and on the checks by remote sensing;...

(o) rules on the application of reductions and exclusions from payments in the event of non-compliance with the obligations referred to in Articles 4 and 22 including cases of reductions and exclusions."

Relevant provisions of Commission Regulation 1122/2009

53. The Commission Regulation (that is 1122/2009) before the recitals sets out its legal basis and specifically refers to inter alia Articles 142(c), (n) and (o) of the Council Regulation.

54. Recitals 31, 32, 41 and 43 to the Commission Regulation provide as follow.

"(31) Compliance with the provisions on the aid schemes managed under the integrated system should be effectively monitored. To this end, and to have a harmonised level of monitoring in all Member States, it is necessary to set out in detail the criteria and technical procedures for carrying out administrative controls and on-the-spot checks in respect both of the eligibility criteria established for the aid schemes and the cross-compliance obligations. It is essential for the monitoring that the on-the-spot checks can be carried out. Applications should therefore be rejected if a farmer would prevent those checks from taking place.

(32) Announcement of on-the-spot checks for eligibility or cross-compliance should only be allowed when this would not jeopardise the checks, and in any case appropriate time limits should be established. Furthermore, where specific sector rules for acts or standards under cross-compliance provide for on-the-spot checks to be un-announced, these rules should be respected.

(41) In order for the on-the-spot check to be effective it is important for the staff carrying out the checks to be informed of the reason for the selection for the on-the-spot check. The Member States should keep records of such information.

(42) To enable the national authorities as well as any competent Community authority to follow up on-the-spot checks carried out, the details of the checks should be recorded in a control report. The farmer or a representative should be given the opportunity to sign the report. However, in the case of on-the-spot checks by means of remote sensing the Member States should be allowed to provide for this right only in cases where the check reveals irregularities. Irrespective of the kind of on-the-spot check carried out, the farmer should receive a copy of the report if irregularities are found.

(73) Rules for the setting-up of detailed and specific control reports for cross-compliance have to be established. The specialised controllers in the field should indicate any findings and also the degree of seriousness of such findings in order to enable the paying agency to fix the related reductions or, as the case may be, to decide on exclusions from receiving direct payments.

(74) The farmers should be informed about any possible noncompliance determined following an on-the-spot check. It is appropriate to provide for a certain time limit within which the farmers should receive this information. However, exceeding such time limit should not entitle the farmers concerned to avoid the consequences that the determined non-compliance would otherwise trigger."

55. The Articles of the Commission Regulation are divided between three parts. Part 1 is entitled "General Provision" and comprises Articles 1 to 4, Part II is entitled "The Integrated Administration and Control System" and comprises Articles 5 to 85 and Part III is entitled "Final Provisions" and comprises Articles 86 and 87.

56. Title III of Part II is entitled "Controls". Title III comprises Articles 26 to 54 and the said Articles are divided between 3 Chapters.

57. Chapter I (comprising Articles 26 and 27) is entitled "common rules".

58. Chapter II (comprising Articles 28 to 45) is entitled "Controls with regard to Eligibility Criteria" and is further divided into 2 Sections which are themselves divided into subsections. Section I (comprising Articles 28 to 29) of Chapter II is entitled "Administrative Controls" and Section II is entitled "On-the-spot checks" and is sub-divided into 4 sub-sections. Sub-section 1 (Articles 30 to 32) is entitled "Control Rate", Sub-Section II (Articles 33 to 40) is entitled "On-the-spot checks of the single application with regard to area-related aid schemes" and Sub-section III (Articles 41 to 45) is entitled "Timing of On-the Spot Checks" and Subsection IV (Article 46) is entitled "On the spot checks of specific reports").

59. Part II Title III Chapter III of the Commission Regulation (which comprises Articles 47-54) is entitled "Controls relating to cross-compliance" and is divided into 3 Sections. Section I (Articles 47 and 48) is entitled "Common Provisions", Section II (comprising Article 49) is entitled "Administrative Controls" and Section III (comprising Articles 50 to 54) is entitled "On –the-spot checks".

60. Articles 31,32 and 34 provide as follows:

"Article 31

Selection of the control sample

1. Control samples for on-the-spot checks under this Regulation shall be selected by the competent authority on the basis of a risk analysis and representativeness of the aid applications submitted.

To provide the element of representativeness, the Member States shall select randomly between 20 % and 25 % of the minimum number of farmers to be subject to on-the-spot checks as provided for in Article 30(1) and (2).

However, if the number of farmers to be subject to on-the-spot checks exceeds the minimum number of farmers to be

subject to on-the-spot checks as provided for in Article 30(1) and (2), the percentage of randomly selected farmers in the additional sample should not exceed 25 %.

2. The effectiveness of the risk analysis shall be assessed and updated on an annual basis:-

(a) by establishing the relevance of each risk factor;

(b) by comparing the results of the risk based and randomly selected sample referred to in the second subparagraph of paragraph 1;

(c) by taking into account the specific situation in the Member State.

3. The competent authority shall keep records of the reasons for the selection of each farmer for an on-the-spot check. The inspector carrying out the on-the-spot check shall be informed accordingly prior to the commencement of the on-the-spot check.

4. A partial selection of the control sample may, where appropriate, be made before the end of the application period in question, on the basis of available information. The provisional sample shall be completed when all relevant applications are available.

Article 32

Control report

1. Every on-the-spot check under this Section shall be the subject of a control report which makes it possible to review the details of the checks carried out. The report shall indicate in particular:

(a) the aid schemes and applications checked;

(b) the persons present;

(c) the agricultural parcels checked, the agricultural parcels measured including, where applicable, the result of the measurements per measured agricultural parcel and the measuring methods used;

(d) the number and type of animals found and, where applicable, the ear tag numbers, entries in the register and in the computerised databases for bovine and/or ovine/caprine animals and any supporting documents checked, the results of the checks and, where applicable, particular observations in respect of individual animals and/or their identification code;

(e) whether notice was given to the farmer of the visit and, if so, the period of advance notification;

(f) indications of any specific control measures to be carried out in the context of individual aid schemes;

(g) indication of any further control measures carried out.

2. The farmer shall be given the opportunity to sign the report to attest his presence at the check and to add observations. Where irregularities are found the farmer shall receive a copy of the control report.

Where the on-the-spot check is carried out by means of remote sensing in accordance with Article 35, the Member States may decide not to give the farmer or his representative the opportunity to sign the control report if no irregularities are revealed during the check by remote-sensing. If irregularities are revealed as a consequence of such checks the opportunity to sign the report shall be given before the competent authority draws its conclusions from the findings with regard to any resulting reductions or exclusions.

Article 54

Control report

1. Every on-the-spot check under this Chapter, regardless whether the farmer in question was selected for the on-the-spot check in accordance with Article 51 or as a follow-up of non-compliances brought to the attention of the competent control authority in any other way, shall be the subject of a control report to be established by the competent control authority.

The report shall be divided into the following parts:

(a) a general part containing, in particular, the following information:
(i) the farmer selected for the on-the-spot check;

(ii) the persons present;

(iii) whether notice of the visit was given to the farmer and, if so, the period of advance notification;

(b) a part reflecting separately the checks carried out in respect of each of the acts and standards and containing, in particular, the following information:

(i) the requirements and standards subject to the on-the spot check;

(ii) the nature and extent of checks carried out;

(iii) the findings;

(iv) the acts and standards in relation to which non-compliances are found;

(c) an evaluation part giving an assessment of the import c) an evaluation part giving an assessment of the importance of the non-compliance in respect of each act and/or standard on the basis of the criteria 'severity', 'extent', 'permanence' and 'repetition' in accordance with Article 24(1) of Regulation (EC) No 73/2009 with an indication of any factors that should lead to an increase or decrease of the reduction to be applied.

Where provisions relating to the requirement or standard in question leave a margin not to further pursue the noncompliance found, the report shall make a corresponding indication. The same shall apply in the case where a Member State grants a period for the compliance with newly introduced Community standards as referred to in Article 26(1) of Regulation (EC) No 1698/2005 or a period for the compliance of young farmers with the existing Community standards referred to in that Article.

2. The farmer shall be informed of any determined noncompliance within three months after the date of the on-the-spot check.

Unless the farmer has taken immediate remedial action putting an end to the non-compliance found in the sense of Article 24(2) of Regulation (EC) No 73/2009, the farmer shall be informed that remedial action shall be taken pursuant to that provision within the time limit set in the first subparagraph.

Where a Member State makes use of the possibility not to apply a reduction or exclusion as provided for in Article 23(2) of Regulation (EC) No 73/2009, the farmer concerned shall be informed, at the latest within one month after it is decided not to apply the reduction or exclusion of the payment, that remedial action shall be taken.

3. Without prejudice to any particular provisions contained in the legislation applicable to the requirements and standards, the control report shall be finalised within one month of the on-the-spot check. However, that period may be extended to three months under duly justified circumstances, in particular if chemical or physical analysis so requires.

Where the competent control authority is not the paying agency, the report shall be sent to the paying agency or the coordinating authority within a month of its finalisation."

Department of Agriculture, Fisheries and Food Helpsheet/ Terms & Conditions for the 2010 EU Single Payment Scheme (SPS)

61. The document made clear it was an aid to applicants, and that the Regulations were the definitive basis for administration of the scheme.

62. The document explained "Land that is eligible for SPS payments", and "the 31 May rule for land availability."

63. On the subject of controls and inspections the document stated:-

"In submitting an SPS application, applicants agree to permit officials or agents of the Department to carry out on- farm inspections, with or without prior notice at any reasonable time and without prejudice to public liability. When notified of an on-farm inspection, the applicant should arrange to be present for the inspection or have a representative nominated in his or her position to assist the inspecting officer. Every on the spot (ground) inspection will be the subject of a report and the applicant or his/her representative will be given an opportunity to sign the report indicating his/her presence at the inspection to add his/her observations if he/she wishes. Signing this document does not imply that the applicant or his/her agent accepts the inspection findings. Applicants are reminded that no payments shall be made in favour of 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. Applicants have a number of appeal options available should he/she wish to avail of them."

Farmers Charter and Action Plan 2009 – 2011

64. Under the heading Notification Procedures the Charter states.

65. For unannounced inspections, prior to the commencement of inspection, the Department of Agriculture will provide the farmer with a card setting out the details regarding the notice for inspection as outlined above and providing the farmer with the opportunity to postpone elements of the inspection for 48 hours or 14 days as appropriate. The format of the notification will be kept under review and changes may be agreed through consultation between the Department and the farm organisations. Inspectors on arrival will introduce themselves, present identification and state the purpose of the visit. The inspector will explain the notification and inspection procedure and satisfy himself/herself that the applicant or his/her representative understands it. If the applicant cannot be present, he/she can be represented by his/her choice. When no one is present when an inspector arrives unannounced he/she will return again. If there is no-one present at the second visit, the inspector will ring the applicant and inform him/her that he/she has been selected for inspection and that the inspection will be carried out on the food hygiene, feed and welfare checks there and then. The inspector will offer the option to the applicant to complete the remaining elements of inspection within 48 hours or immediately if that is the wish of the applicant. Where no contact can be made, the inspector will proceed with the unannounced elements taking due regard of all health and safety issues and leave a note indicating the nature of the call together with contact details and confirming that a return visit will be made within 48 hours to complete the inspection. If an inspector has been unduly delayed at a previous inspection, the applicant will be contacted by phone as soon as possible and not later than 1 hour of the appointed time for the inspection and if the inspection cannot be carried out that day, an alternative arrangement will be made, usually in agreement with the applicant.

The Scope of the Appeal to the High Court

66. The Respondents have very helpfully set out in their legal submission principles which govern statutory appeals:-

> **"**Where an appeal lies in respect of a question of law, it follows that the appellant must demonstrate that there is such a question before any relief can be granted. In *O'Leary v Minister for Transport, Energy and Communications*[1998]1.I.R 558 the appellant, a communications assistant employed at Dublin Airport, contended that she was entitled, under the Anti-Discrimination (Pay) Act, 1974, to the same pay as two radio operators also employed at the airport. Following an investigation, her claim was rejected by an equality officer and, on appeal, by the Labour Court and then the High Court. As the facts, in respect of which there had been ample evidence, justified the conclusion that she was not engaged in 'like work' as required by the Act, her appeal to the Supreme Court was dismissed."
>
> "It is submitted that the Court should also give weight to the specialised knowledge of the deciding body. While a court must not lose sight of its unique role in determining the legality of a public decision, there are sound reasons for the exercise of restraint in the application of the review principles. Dyzenhaus, 'Judicial Review and Democracy' in Taggart ed, *The Province of Administrative Law* (Oxford, 1997), argues that the correct approach may be described as 'deference as respect' which entails 'not submission but a respectful attention to the reasons offered or which could be offered in support of a decision.
>
> In overruling a specialist body there is the practical danger that the Court may end up being responsible for decisions which they are not, by training or experience, qualified to make. Specialist bodies are established by legislation often because their members will have particular knowledge of their fields of activity. That knowledge may not necessarily be imparted to or rest in a judge dealing with a review application."

67. In *Mara (Inspector of Taxes) v- Hummingbird Ltd* [1982] 2 ILRM 421on the role of the Court in respect of Appeals Kenny J said at page 426:-

> "A case stated consists in part of findings on questions of primary fact … These findings on primary facts should not be set aside by the courts unless there was no evidence whatever to support them. The commissioner then goes on in the case stated to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the court should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the commissioner. If the conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable commissioner could draw …. [T]he answer to … [a]… question … nearly always depends on the importance which the judge or commissioner attaches to some facts. He will have evidence some of which supports [a] conclusion … and he will have some which points to the opposite conclusion. These are essentially matters of degree and his conclusions should not be disturbed (even if the court does not agree with them, for we are not retrying the case) unless they are such that a reasonable commissioner could not draw them or they are based on a mistaken view of the law."

68. As these words make clear, a distinction is drawn between primary facts and inferences or conclusions drawn from those facts. Findings of primary fact are pre-eminently a matter for the tribunal, and the superior court will not intervene unless it can be shown that there was no evidence to support them. A more sceptical attitude may, on the other hand, be adopted in respect of inferences or conclusions. They may be set aside where it is shown that they are unreasonable or based on a wrong view of the law.

69. In *Sunday Newspapers Ltd v. Kinsella and Bradley*, [2007] IEHC 324 Smyth J. summarised the law thus:-

> "The decision of the Supreme Court in *Bates v- Medel Bakery Ltd* [1993] I.R. 359 in the context of an appeal from the Employment Appeals Tribunal under the Redundancy Payments Act, 1967 and of the High Court in Ashford Castle Ltd. V-Services Industrial Professional Technical Union [2006]/ ELR 201 in the context of an appeal from the Labour Court under the Industrial Relations (Amendment) Act 2001 point to the desirability of the court expressly confining itself in its enquiries in an appeal on a point of law. These cases and *C & D Food Ltd. v. Cunnion* [1997] I.I.R, 147 and *O'Leary v. Minister for Transport* [1998] I.I.R, 558 and *Costal Line Container Terminal Ltd. v. Siptu* [2000] I.I.R 549 make it clear that it is not open to the High Court in its appellate function in the context of a determination on a point of law to seek to try anew or take into account facts put before the Court (in whatever procedural guise) which were not before the expert tribunal."

70. In *Orange Communications Limited v. Director of Telecommunications Regulation and Another (No. 2),* [2002] 4 I.R. 159 at184, Keane C.J. quoted with approval a passage from the judgment of the Canadian Supreme Court in *Director of Investigation and Research v Southan Inc* in the following terms:-

> *"(an) appeal from a decision of an expert tribunal is not exactly like an appeal from a decision of a trial court. Presumably if Parliament entrusts a certain matter to a tribunal and not (initially) to the courts, it is because the tribunal enjoys some advantage that the judges do not. For that reason alone review of the decision of a tribunal should often be of a standard more deferential than correctness …I conclude that the … standard should be whether the decision of the tribunal is unreasonable. ---- An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it."*

The Findings In Respect Of Land Eligibility

71. Eligibility is primarily a matter of fact for determination by the decision maker. The application of commonage rules are primarily a matter for the decision maker, in particular, a specialist appeals tribunal. The appellant has made detailed submissions in respect of eligibility. It is submitted that the appeals officer misconstrued the 31st May rule for land availability and that this is a legal issue.

72. Having considered the detailed submissions of the parties, I am satisfied that the appellant is asking the Court to carry out a merits based review of the question as to whether there was substantial justification for a decision that no agricultural activity had

been carried out on the land. Again, the appeals officer determination has to be considered in full. There was ample factual evidence before the court to determine the eligibility of the excluded parcel of land. The appeals officer did not misconstrue the law on the substantive issue as to whether the lands were being used for agricultural purposes within the meaning of Council Directive 73/2009.

Legal Matters referred to generally in submissions, but not specifically covered such as Fair Procedures

73. The importance of fair procedures varies with the administrative decision being taken. If one is being excluded from benefit and the effect of the decision is to exclude that benefit without further penalty the opportunity to be given to the applicant to challenge the decision before it is made is limited otherwise day to day administration would become overly bureaucratic and time consuming. However if in addition to the exclusion of the benefit some further penalty is to be applied, which includes the withholding of benefits to which the applicant is legitimately entitled there is an onus on the decision maker to careful comply with whatever regulations are in place and to give whatever opportunity is afforded to the applicant to make the case, why such a sanction should not be imposed. This procedure is different from a review or appeal once a decision is made.

74. The opportunity of an applicant to rebut findings of fact made in an administrative decision must vary in different situations. In this applicant's case a substantial sanction was imposed namely the loss of all payments due to him in 2010 from SPS when it was established that he was qualified for payment for 167 hectares.

75. Unfortunately, neither written legal submissions or oral submissions of the parties addressed the issue of *audi alteram partem* in administrative law. The allegation by the appellant that there was a failure to comply with legal requirements and the charter is essentially an argument that he was not given the opportunity to make observations and rebut the allegations in respect of the addition of the commonage to his application which has had such serious consequences for the overall application.

76. In a useful summary of the law Hogan and Morgan in *Administrative Law* 2nd edition Chapter 9 at p439 states,

> "It is trite law that tribunals and administrative agencies are not required to follow the same strict rules of evidence in procedure as a court of law. Thus, for instance, Henchy J. observed in *Kiely v. Minister for Social Welfare (No. 2)* [1977] I.R. 267 and 281:-
>
> > "Tribunals exercising quasi-judicial functions are frequently allowed to act informally to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore court room procedures, and the like."

As might be expected from the inexact, pragmatic nature of constitutional justice, the same standard does not apply in all areas for "domestic and administrative tribunals take many forms and determine many different kinds of issues and no hard and fast rules can be laid down……" At one end of the scale, Costello J. stated:-

> "The courts must not interfere officiously in the affairs of private associations such as trade unions and must only do so in clear cases to prevent or remedy some manifest injustice. And when considering what procedures can properly be regarded as fair, it must consider procedures which would be appropriate to the type of organisation or association which is to adopt them and the nature and scope of the decision to which they relate."

And at the other end of the scale in *Flanagan v. University College Dublin* [1988] I.R. 724, in which a disciplinary committee was punishing a student for plagiarism, the High Court set a particularly stringent standard:-

> "The present case is one in which the effect of an adverse decision would have far-reaching consequences for the applicant. Clearly, the charge of plagiarism is a charge of cheating and as such the most serious academic breach of discipline possible. It is also criminal in its nature. In my view, the procedures must approach those of a court hearing."

The *audi alteram partem* rule embraces two types of obligation (although as there is a substantial overlap and as nothing turns on a distinction, it is not observed rigorously in the following account). First, the person to be affected by the decision must be alerted to it and given details of it. Secondly, he must be allowed appropriate facilities to make the best possible case and reply."

Alleged failure to comply with the Commission Regulation 1122/2009 and failure to give notice in respect of inspection of parcel of land on 3rd and 13th August 2010

77. The formal decision of 18th November, 2010, refers to the enclosure of a control report. The document enclosed with the written decision was a copy of form SAIRW 10. It did not contain any of the matters set out in Article 32 of Regulation 1122/2009. The documents furnished to the appellant in respect of the SPS inspection, could not be described as a control report, even if the court considered it appropriate to combine documents. The written decision of the 18th November 2010 was not a control report.

78. I have considered the detailed written submissions of the respondents on the issue of notice and the articles relating to control reports. While Article 31, 32 and 54 of Commission Regulation 1122/2009 are primarily for the purposes of ensuring that the member state complies with the Regulations and to ensure the scheme is being run properly, there are important sections in the Articles which places responsibility on the authority to address issues of irregularities with the farmer before conclusions are drawn.

79. The first respondent's officers contravened Article 32 (2) of the regulations The farmer was not given an opportunity to sign any report in respect of the unannounced inspections of the 3rd and 13th August in respect of the commonage and findings made by the inspectors. A notice of the 21st September 2010 relied on by the first respondent and by the inspector when the matter was reviewed was not sufficient to comply with the Regulations. The detailed matter set out in the subsequent decision issued on 18th November 2010 was not set out in the notice of 21st September 2010. No written reports were prepared in respect of the unannounced inspections of the 3rd and 13th August and put to the Appellant for his observations.

80. It should be stressed that unannounced inspections are perfectly permissible and an essential element of the monitoring process. That is not the issue here. The issue is should the appellant have been given an opportunity to rebut the findings of the inspectors arising from the inspections on the commonage on 3rd and 13th August, and revisit on 16th September, before the first respondent concluded that an automatic penalty applied because the application exceeded the 20% rule of disqualified land.

81. While the Terms and Conditions and Farmers Charter are guidelines only and do not have the force of law or bind the court, they

do demonstrate that the officers of the first respondent had very little regard for fair procedures as these guidelines in respect of the SPS inspection were ignored completely. This lack of respect for fair procedures was extended to the review, when another penalty was imposed without any opportunity given to the appellant to make submissions in advance of imposition of an extra penalty.

Alleged failure to comply with the Commission Regulation 1122/2009 in respect of the cross compliance check on the cattle herd, and the effect of the Remedial Action Notice

82. The formal decision sent to the appellant on 29th November 2010 by the first respondent enclosed, a single application inspection report summary. There were other documents furnished to the appellant. The Notice Form of 21st September 2010 disclosed substantial information about the cross check of the herd and the irregularities found. Form ER96 of 10th October 2010 specified the temporarily tagged animals. The Remedial Action Notice of 12th October 2010 also furnished information to the appellant.

83. The appellant has argued that subsequent to the inspections of 16th, 20th and 21st September, when a remedial action notice was served on him, once he complied with this notice, it was inappropriate to impose a sanction.

84. At the appeal hearing The first respondent stated that the remedial action notice had been served in error and did not preclude the imposition of a sanction, as the breaches of the appellant in maintaining the cattle herd were not minor The appellant relies on the doctrine of legitimate expectation.

85. The procedure adopted by the officers of the first respondent in respect of the cross compliance inspection was different to its approach in respect of the inspection for SPS. The appellant was present on the afternoon of 16th September, 2010 and did have the opportunity of making observations on the inspection. The relevant notice served on the appellant, in respect of the cross compliance check was detailed, and the appellant could not have been in any doubt, about the irregularities alleged. While the notices were not described as control reports they contained all the information required by Article 32(1)(d) of Regulation 1122/2009.

86. I cannot see how the doctrine of legitimate inspection would arise in this context. Irregularities were found in the appellants cattle herd. He had every opportunity to address this issue with the Inspectors on the 16th September. The issue of the RAN did not preclude the First Respondent from dealing with more serious infringements provided the sanction was legal.

87. The Appeals Officer who is a specialist with detailed knowledge of the regulations considered that the sanction imposed was appropriate.

The consideration by the Appeals Officer of the Legal Issues

88. The Respondent has opened to the Court extracts from a judgment of Kearns P of 5th June 2015, *Earagail Eisc Teoranta v. Doherty and Ors* [2015] IEHC 347.

89. The relevant extract commences at p 25 of the judgment.

> "Having found that the Tribunal was entitled to adjudicate on the matter, the Court must next consider whether or not the decision arrived at is tainted by any error of law. In doing so, the Court is required to have regard to the doctrine of curial deference when considering appeals from the decisions of expert administrative Tribunals and quasi-judicial bodies as set out by Hamilton C.J. in *Henry Denny & Sons*. This Court must confine itself to a consideration of a point of law only and may only interfere with a finding of fact when it is entirely unsustainable based on the information before the Tribunal. However, as was made clear in *National University of Ireland Cork v. Ahern and Others* [2005] 2 IR 577, the process by which certain findings of fact were made is often a question of law. McCracken J. stated at paragraph 9:–
>
> > *'…matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As a statement of principle, this is certainly correct. However, this is not to say that the High Court or this court cannot examine the basis upon which the Labour Court found certain facts. The relevance, or indeed admissibility, of the matters relied on by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered by account by it in determining the facts, is clearly a question of law and can be considered on an appeal under [the relevant section]'."*

Similarly, in *Dunnes Stores v. Doyle* [2014] 25 E.L.R. 184 Birmingham J. held as follows:–

> *"Identifying the contractual entitlement of an employee of course involves legal determinations. Where such legal determinations are made by a tribunal then there is the option of having the conclusions reviewed in the High Court through the appeal on a point of law route. When that occurs, and the High Court is asked to consider whether the Tribunal correctly applied the law, there is no scope for the doctrine of curial deference."*

I have carefully considered the submissions of both sides and am satisfied that there is a manifest error of law in the Tribunal's interpretation of section 5 of the 1991 Act. The determination of the Tribunal clearly indicates the Tribunal's view that, pursuant to s.5(1)(c) of the 1991 Act, the written consent of the employees was required before the appellant company could bring about any changes to salary levels. However, these exceptions listed at (a), (b), and (c) of section 5(1) are clearly not to be taken conjunctively. The word 'or' is expressly used in the provision and it is clear that each sub-section concerns separate instances which might give rise to an exception to the rule that an employer shall not make a deduction from the wages of an employee. Sub-section (b) states that deductions are allowable where they are authorised by virtue of an employee's contract of employment, which is something the Tribunal should have considered independently of sub-section (c). However, in treating sections (a)-(c) as conjunctive the Tribunal erred in law.

The Court is also satisfied that the Tribunal failed to provide adequate reasons for a number of other findings. The Court accepts that previous decisions of the Court have established that the duty to give reasons does not require extensive analysis of every aspect of a complaint and indeed, as held in *Faulkner*, the 'gist' of the basis for a decision is sufficient. However, in the present case I am satisfied that the brief determination of the Tribunal is wholly inadequate to meet even this low threshold. It is not clear how the Tribunal arrived at the determinations it did and there is not as much as a fleeting reference to vital matters such as the 'reduction or deduction' argument or why section 8.2 of the company handbook is not applicable. The determination states that '*the appellant did*

not advance its own case for a deduction as it opted not to fully engage with the respondents as to the reported serious financial situation it was facing at the relevant time.' There is no engagement whatsoever, however minimal, with the detailed submissions of the appellant in relation to its financial circumstances at the time and no consideration of the circumstances relied upon by the appellant for introducing the pay cut.

The Tribunal was also required to interpret the provisions of the contract of employment and terms and conditions as set out in the handbook. However, aside from briefly stating that section 8.2 was not applicable in light of section 5(1)(b), which, as is apparent from the second paragraph of the determination, the Tribunal erroneously read alongside section 5(1)(c), there is no engagement with the provisions of the handbook. Counsel on behalf of the respondents submits that section 8.2 is not relevant in any event and that section 2.1 of the handbook, entitled 'Payment Rules and Procedures', contains the relevant terms and conditions. I am satisfied that section 2.1 relates only to the procedures and protocols surrounding payment to employees. The deductions in pay referred to in that section do not include a reduction in overall salary, but rather they simply relate to items such as canteen charges, overcharges due to administrative errors, overpayments, loan repayments, and other incidental charges. Submissions relating to the relevant sections of the handbook were made to the Tribunal but there is no finding in relation to them. In this regard, I am satisfied that the Tribunal erred in failing to apply well established principles of construction to the provisions of the handbook and by failing to give reasons for its finding in relation to it. Both sides were in dispute on this point and the decision of the Tribunal fails to indicate which submission was preferred and why.

In relation to the decision of the Tribunal not to exercise its discretion in relation to the payment of compensation in favour of the appellant, the Court accepts that this is a matter for the Tribunal based on the facts of each case. As an expert body with considerable experience in this area, the Tribunal is well placed to make this decision. However, once again, apart from simply stating "*in all of the circumstances of this case*", the decision of the Tribunal is so devoid of explanation as to leave the parties affected by it with no understanding as to how it was arrived at."

Conclusion on Appeal Officers determination.

90. In it's determination of 20th April 2012, questions of law on notice should have been addressed by the appeals officer. The issue of notice and alleged breaches of the regulations were the most substantial legal issues before him, and were the subject of written legal submissions to him This involved the interpretation of the regulations and having regard to the terms and conditions document, the farmer's charter and principles of natural justice which the appeals officer had to have regard to and which were implied implicitly but also set out in s. 14(1) of statutory instrument 193/2002, the Appeals Regulations, which states, " 14(1) The decision of an appeals officer shall have regard to the principles of natural justice and comply with any relevant legislation and terms, conditions and guidelines of the Minister governing or relating to the scheme in question."

91. The detailed legal submissions made to the appeals officer on the issue of interpretation of any relevant legislation on terms, conditions and guidelines of the Minister governing or relating to the scheme in question, should have been addressed. The appeals officer in his written determination did not address this issue which was raised specifically with him by way of legal submission.

92. I accept the submission on behalf of the respondents that the written determination should be considered as a whole and that the specific extract relied on by the appellant to allege that the appeals officer did not address the legal issues is unfair to him, however, he did not, in his written determination, specifically address the legal issues which were the subject of both oral and written submissions to him. As evidenced in the extract of the judgment of Kearns P. of 5th June, 2015, *Earagail Eisc Teoranta v. Doherty & Ors*, that was his responsibility.

Discretion of the Court as to Remedy

93. The Court is faced with the situation that the inspection that led to the imposition of the SPS penalty was procedurally flawed, and the legalities of this were not dealt with on review or on appeal. The Respondents have submitted that procedural flaws should not lead to the exclusion of substantive evidence that the appellant was not entitled to include the commonage in his SPS application, and thus if his appeal was upheld, he would be getting a payment he was not entitled to which would not be in the public interest.

94. Having decided question of laws that the first respondent erred in applying EU regulations, and that the Appeals Officer erred in law when delivering his written determination, what remedy is open to the court. It could remit the matter to the Appeals Officer, but as the substantial finding of the court is that the procedure followed in respect of the investigation of improper parcels of land being included in the application was flawed that would be pointless.

95. Another important matter is applying a remedy in the public interest. The court has found serious procedural flaws but is conscious that there was considerable evidence that the appellant should not have included parcel V13714061 in his application.

96. I am satisfied that this court even when deciding the case pursuant to the jurisdiction of statutory appeal, can provide a judicial remedy to meet the justice of the case.

97. The appellant should be entitled to payment of the subsidy on the extent of the lands which qualified for payment, which I believe to be 167 hectares for 2010, but should not be paid any sum for the commonage. He is liable for the 5% sanction imposed on the cross compliance check.

98. The court will keep and open mind at present on any claim for damages or interest, to allow the parties to make submissions on that matter and also on costs