



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 10

Record No. 2016/334

**Finlay Geoghegan J.
Peart J.
Hogan J.**

BETWEEN/

MUIRÍS O'DONOGHUE

APPLICANT /

APPELLANT

- AND -

SOUTH KERRY DEVELOPMENT PARTNERSHIP LIMITED

RESPONDENT/

RESPONDENT

- AND -

DEPARTMENT OF THE ENVIRONMENT, COMMUNITY AND LOCAL GOVERNMENT

NOTICE PARTY

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 23rd day of January 2018

1. This is an appeal brought by the applicant, Mr. O'Donoghue, against the decision of the High Court (Barrett J.) delivered on the 26th May 2015. In that judgment Barrett J. refused to quash the decision of the respondent body, South Kerry Development Partnership Ltd. ("SKDP"), in June 2013 merely to allocate the sum of €20,000 from what are known as LEADER funds to a farm tourism project with which he was heavily involved. The Minister for the Environment, Community and Local Government (which has a key role in the general supervision and administration of the LEADER project) was a notice party to these proceedings, but ultimately took no role in the appeal before this Court.

2. The applicant is a farmer from Feighmaan West, Valentia Island, Co. Kerry. Together with his wife they have developed a major tourist attraction at Geokaun Mountain and the Fogher Cliffs, the highest point on Valentia Island. This is, in essence, a mountain park which can be accessed by either road or by foot. Either way the summit offers breathtaking views, including views of the Skelligs, Dingle and the Basket Islands.

3. This project has been developed by the O'Donoghues as a farm tourism project with considerable success since it was first opened in 2006. This has required not inconsiderable investment: thus, for example, a ticket station, viewing deck and a 1,500 metre looped path have all been constructed. There has also been landscaping and other works. The present proceedings commenced in August 2013 and at that time Mr. O'Donoghue maintained that he had already invested some €182,000 of his own money into the venture, along with some €71,000 of further funding from the LEADER scheme on two earlier occasions. The LEADER scheme is a joint Irish-EU funded rural development scheme.

4. The LEADER scheme had previously operated on four separate occasions, namely, from 1991 to 1995 (LEADER 1) and from 1997 to 2001 (LEADER 2). The 3rd LEADER programme was operated from 2002 to 2006 in conjunction with the State-run National Regional Development Programme. Mr. O'Donoghue had secured some €38,125 of funding under this programme. The Rural Development (LEADER) Programme then operated from 2009 to 2013. Some €32,709 had been awarded to Mr. O'Donoghue under the auspices of this programme prior to 2013.

5. It is the manner in which Mr. O'Donoghue's application for funding for further LEADER funding in respect of certain drainage and tarring works at the Geokaun Mountain site was considered and determined which has given rise to the present application for judicial review. Responsibility for the allocation of LEADER funds is vested in some fifty or so development companies, of which SKDP is one. In early 2013 the Minister for Community, Rural and Gaeltacht Affairs informed the development companies that the funds available for the LEADER scheme would be reduced from €400m. to some €370m. At the same time the Minister directed that there should be an embargo on allocations and payments under the scheme pending the completion of an audit. The embargo had the effect of preventing the Board from deciding on allocation of funds to projects which had been forwarded to it by the Advisory Council. It did not, however, have the effect of preventing the Council from considering and evaluating applications and from forwarding recommendations to the Board. It was envisaged, however, that the embargo would be lifted at some stage, so SKDP continued to receive applications in respect of the 2013 funding round and its Advisory Council continued to evaluate and recommend projects to the Board.

The LEADER scheme and its Rules

6. As one might expect, the disbursement of large sums of both Government and EU funding is subject to a comprehensive set of rules. In the first place Council Regulation (EC) No. 1698/2005 ("the 2005 Regulation") governs support for rural development by the European Agriculture Fund for Rural Development. Title VI of the 2005 Regulation deals with management, control and information. Article 74(2) of the 2005 Regulation requires each Member State to designate

"for each rural development programme, the following authorities:

(a) the Managing Authority, which may be either a public or private body acting at national or regional level, or the Member State itself when it carries out the task, to be in charge of the management of the programme concerned."

7. It is not disputed but that SKDP is a "managing authority" in this sense, even though it is a company limited by guarantee. Article 75 of the 2005 Regulation then provides that:

"1. The Managing Authority shall be responsible for managing and implementing the programme in an efficient, effective and correct way, and in particular for:
(a) ensuring the operations are selected for funding in accordance with the criteria applicable to the rural development programme...."

8. Article 76 of the 2005 Regulation requires Member States to provide information on and to publicise rural development programmes of this kind. Article 77 provides for the establishment of Monitoring Committees whose task is described by Article 78(a) in the following terms:

"The Monitoring Committee shall satisfy itself as to the effectiveness of the implementation of the rural development programme. To that end, the Monitoring Committee:

(a) shall be consulted, within four months of the decision approving the programme, on the selection criteria for financed operations. The selection criteria shall be revised according to programme needs...."

9. The Department of the Environment, Community and Local Government is the Monitoring Committee of the LEADER Programme so far as this State is concerned.

10. It is clear from these provisions (and other similar provisions in the 2005 Regulation) that managing authorities (such as SKDP) are not simply dispensing private monies as if they were, for example, purely private charitable foundations. It is rather the case that the managing authorities are required to make payments of public money towards local rural development projects by reference to stated criteria and in a transparent fashion and that, although a limited company, insofar as it is dispensing LEADER funds, the SKDP is in fact governed by public law.

11. In addition, a set of Operating Rules had been prepared by the Minister which were designed to complement the rural development plan programme for Ireland between 2007 and 2013. These Operating Rules are departmental rules which "set out the general basis upon which each Local Action Group deliver the 2017-2013 LEADER programme". SKDP is a Local Action Group for the purpose of the Operating Rules.

12. The Operating Rules are detailed and only a summary of some of the relevant provisions can be supplied here. Article 7 of the Operating Rules requires each Local Action Group ("LAG") to have "good control procedures" and to maintain "its own comprehensive procedures manual showing financial, administrative and management control systems and procedures". Article 8.1 requires that a decision on the application "must not be postponed indefinitely or delayed having regard to the possibility of funds becoming exhausted or the ending of the Programme". Article 8.2 provides for an appeals mechanism "about the manner in which applications for grant aid are processed". Article 8.2 further states that it is in each LAG's "own interest to operate a system for processing applications which is scrupulously impartial and consistent". Rule 35 provides that the Rules can be amended from time to time at the discretion of the Department, but they cannot, of course, be amended by an individual LAG.

13. The Operating Rules further provide that before payment out can be made the following is necessary:

"The Evaluation Committee's assessment and recommendation to the Board:

The Evaluation Committee should clearly indicate the criteria used by the LAG to establish the amount and rate of aid offered....The file will need to show clear evidence that the application has been checked for eligibility and suitability for the South Kerry Rural Development Plan....It will clearly outline the economic justification for supporting a project and include evidence that the LAG made appropriate comparisons with similar projects, organisations or activities before making its decision."

14. Article 5.2 of the Operating Rules is, perhaps, the most important provision. It provides:

"The Board of the LAG is the decision-making authority in relation to all Programme related activities and all decisions must be formally recoded in the minutes of Board meetings. Each LAG Board will be required to establish an Evaluation Committee to look at applications for grant assistance. All Board decisions shall be made in conformity with Commission Guidelines, EU regulations, national legislation, the Programme, the LAG's legal agreement with the Department, the Operating Rules and the LAG's business plan. Any decisions at variance with the recommendations of the Evaluation Committee and the reasons for doing so, should be clearly documented in the Board minutes.

Signed Board minutes must be retained on a dedicated file within the LAG and a signed and dated extract placed on the relevant project file."

15. Article 8.1 further provides that LAGs "shall adopt an arrangement under which all formal recommendations for LEADER assistance shall be submitted by the Evaluation Committee to the Board for decision (including refusal of aid) within 3 months of the date of receipt. Accordingly, while the Operating Rules clearly envisaged that the Board could depart from the recommendation of the Evaluation Committee, it was not free to introduce a new criterion which had not previously been considered by the Committee. Had it been intended that the Board should have had this freedom, the Rules would doubtless have expressly so provided.

16. The Rules further provide at Article 11 under a heading of "Eligibility of Projects":

". . . The LAG should focus on the networking of local partnerships and the implementation of co-operation projects should be emphasised, encourage and facilitated. There is also a major emphasis on economic activity and enterprise including diversification into non-agricultural activities, the creation of new and the expansion of existing enterprises, job creation and sustaining of existing jobs as well as the generation of additional and alternative incomes in rural areas. Support is also provided for the encouragement of tourism activities and for the maintenance, restoration and upgrading of the cultural heritage

- Aid will take the form of support under the following measures:
 - Diversification into non-agricultural activities
 - Support for business creation and development
 - Encouragement of tourism activities
 - Basic services for the economy and rural population
 - Village renewal and development
 - Conservation and upgrading of the rural heritage
 - Training
 - Skills acquisition and animation for the preparation and implementation of a local development strategy.” (emphasis supplied)

17. The Operating Rules also provided for an appeal process. Article 8(2) envisaged that a disappointed applicant might seek a review of the decision from SKPD in the first instance about the manner in which the applications for grant aid have been processed.

18. If this appeal was unsuccessful, then the applicant could appeal within a further month to a regional inspector who was a Departmental official. Rule 23.4.1 of the Operating Rules provide that:

“The Regional Inspector will only review the decision of the LAG in respect of the:

- the process and procedures followed by the LAG in coming to the original decision and in performing the review and
- the LAG’s interpretation of the relevant national/EU regulatory requirements.”

19. Acting in conjunction with the Minister, the SKDP developed its own Procedures Manual. The Manual relates, however, only to the SKDP and is obviously subsidiary to the Operating Rules.

The sequence of events from May 2013 to June 2013

20. As I have already indicated, the events giving rise to the litigation may be said to have started on the 29th January 2013 when the Department announced a cut in the budget allocation and placed an embargo on LAGs such as SKDP allocating funds to projects.

21. This embargo did not mean, however, that the Advisory Council (*i.e.*, the equivalent of the Evaluation Committee described in the Operating Rules) of the SKDP could not continue to evaluate projects and on the 13th February 2013 the Council recommended funding for several projects. Mr. O’Donoghue submitted his application on 8th March 2013 and some two weeks later on the 20th March, the Council made a positive recommendation in respect of this application as well as several other projects.

22. By May 2013 the SKDP’s Advisory Council had received 119 applications for funding, albeit that one application was later withdrawn. All of the remaining applications received favourable recommendations. In the case of the Geokaun Mountain tourist facility, the Advisory Council had recommended at its March meeting that:

“The project meets the objectives of Rural Development Measure 311 for Diversification into Non-Agricultural Activities and supports the use of fixed-farm assets for non-agricultural activity. The project is wholly in line with SKDP’s Corporate Plan...

Outcome 2b: to support the development of new and existing enterprises in South Kerry;

Outcome 3c: to support the development of niche tourism products in South Kerry...”

23. By this stage, however, the SKDP had been told by the Minister that the embargo had been lifted, albeit that the available funding was now reduced. On the 29th May 2013 the SKDP wrote to all applicants to inform it had suffered a 20% cut in its funding with the result that it would not have sufficient grant aid for all the projects which had already been evaluated to date in 2013.

24. The Board of the SKDP was informed of the extent of the shortfall at its meeting on the 28th May 2013. The minutes of that meeting record the CEO and company secretary, Mr. Spillane, as stating that this shortfall meant that “a system of ranking projects for approval would need to be put in place” and it was agreed that ranking criteria would be adopted at the next meeting. It is important to stress – since it forms a key aspect of the applicant’s complaint – that the Board had previously adopted a chronological system of dealing with applicants, so that this was, in essence, as Barrett J. had put it, a “first recommended, first funded” method of dealing with applications.

25. The key decisions in respect of which complaint is made in these proceedings were made by the Board of SKDP on the 4th June 2013 and 25th June 2013 respectively. Mr. O’Donoghue’s application for funding had been submitted on the 8th March 2013. It envisaged that the surfacing and drainage works would make the mountain road more accessible for groups such as elderly, the disabled and families with young children. The total cost of the proposed expenditure was just under €199,000, of which just under €50,000 came from Mr. O’Donoghue’s own funds. The total grant aid from LEADER funds thus sought in respect of the project was approximately €149,000. This amount had been recommended by Advisory Council.

26. The SKDP’s board of directors met on the 4th June 2013 to consider the various recommendations which had been made by the Advisory Council. The board minutes record the following decisions:

“As the amount of grant aid sought...[by] project applicants far exceeded the project grant funding available the following criteria...[were] agreed in prioritising/ not prioritising projects for the available grant aid:

- Whether the promoter had received grant funding previously under the current [LEADER]...Programme and the funding currently sought is for a project that represents an expansion, enhancement or continuation of this

previously funded grant aided activity. These projects would not be prioritised for funding. Priority would be given to promoters who had not received...[LEADER] grant aid under the current programme or where the activity for which funding was currently sought represented new project activity.

- Geography: Extent to which an area had not benefitted from grant aid under the current...[LEADER] programme.
- Enterprise Project: Priority would be given to new enterprises looking to start up.
- Feasibility studies would be prioritised for funding: Analysis & Development project would be given greater priority than feasibility studies.
- Job creation potential: Projects with the greatest job potential would be prioritised for funding.
- Festivals: Priority would be given to festivals seeking RDP grant support for the first time. 50% of total project costs would be awarded to festivals seeking RDP grant aid support for the second time and 25% of the total project costs would be awarded to festivals seeking RDP grant aid support for the third time.
- Projects that require planning and that had not been applied as at the date of the board meeting would not be funded due to the revised Departmental time frame - which requires all commitments to be made by 31st August [2013]..."

27. The Board then went on to approve 69 projects in the sum of €1.256m. Another project costing €500,000 received preliminary approval. In total, therefore, 28 projects were rejected, but 18 projects were deferred (including the applicant's application) to the next meeting. While the Board faced an unenviable choice in that the promoters of many worthwhile projects were inevitably going to be disappointed, the Board decided, as will be seen from the minutes, to give priority to the funding of new projects and projects which had not previously received grant aid and had, moreover, introduced a new ranking criterion for this purpose. It also decided not to prioritise projects which had already received grant funding under the current Leader. The practical effect of the decision to postpone consideration of the 18 applications was that they were, in effect, excluded from funding, since all the available funds had been distributed at that meeting.

28. It is this decision which has given rise to the applicant's objection in the present proceedings. He maintains that in so doing the Board wrongfully imposed this new criterion (*i.e.*, priority funding for new projects) which was applied for purposes of one single meeting and which unilaterally departed from previous practice.

29. As it happens, the sum of €500,000 became available for distribution at the second meeting on the 25th June 2013. This was an unexpected development which had come about by reason of the fact that a project which had previously been provisionally approved at the 4th June meeting and which had been provisionally allocated this sum was no longer going ahead. It is agreed that on this occasion the criteria which had been agreed and applied at the 4th June meeting were *not* then applied at the second meeting. As Mr. Spillane, the Chief Executive Officer of SKDP, explained in his affidavit of the 2nd December 2014, Mr. O'Donoghue's project was then considered "on its merits without reference to the [4th June] criteria". At the second meeting the sum of €20,000 was then approved for drainage works at the Geokaun mountain site. To this extent, therefore, Barrett J. was in error when he recorded in his judgment that the 4th June criteria were also applied at the second meeting on the 25th June 2013.

30. It appears that Mr. O'Donoghue learnt of these developments informally from irregular disclosures which had been made by some members of the Board who had been present at the 4th June meeting because the SKDP was receiving correspondence from Mr. O'Donoghue's solicitors complaining about the decision-making process as early as the 17th June 2013. At all events Mr. O'Donoghue received a letter on the 2nd July 2013 advising him of the fact that he had been allocated €20,000 in funding and further informing him of his right of internal appeal if he were disappointed with the decision.

31. On 2nd August 2013 an application was made *ex parte* for leave to apply for judicial review to the High Court (Gilligan J.). Leave was granted on a number of grounds, chief among them the arguments that the Board had departed from the Operating Rules and had taken into account new evaluation criteria which had never previously been published.

The decision of the High Court

32. In a comprehensive judgment Barrett J. rejected the argument that the SKDP had departed from the Operating Procedures by agreeing or applying the additional criteria agreed at the meeting of the 4th June 2013. Nor could he agree that it was procedurally unfair to change the criteria by which an application might be assessed after the application had been submitted and during the assessment process. As Barrett J. observed:

"....there were €4.1m. worth of approved projects and but €1.5m. of available funding: some means had to be found of resolving fairly the shortfall presenting and by 4th June 2013, the board of directors, having not yet met as a board to consider the Evaluation Committee recommendations, and as a preliminary measure, agreed that it considered a rational and reasonable set of criteria to be applied, given the cut in funding presenting. Those criteria may not have served Mr. O'Donoghue's interests, but the board was tasked with doing fairness to all, and sought to do so."

33. Barrett J. also found that the applicant should have exhausted the right of appeal envisaged by Article 23.4.1 of the Operating Rules. In other words, even though he found against the applicant on the merits of the legal claim, Barrett J. would also have found against him on discretionary grounds by reason of his failure to exhaust his appellate remedies. Barrett J. also rejected the argument that the applicant could invoke the doctrine of legitimate expectations for this purpose. Even if could be said that the hitherto observed practice of granting funding by reference to the chronological order of applications served to create a legitimate expectation that this order would be followed automatically so far as this funding round was concerned, the judge pointed to decisions such as *Curran v. Minister for Education and Science* [2009] 4 I.R. 300 as authority for the proposition that changed economic conditions justified a departure from that previous practice. As Barrett J. noted:

"...it is simply not possible to pay €4.1m. of requested funding from €1.5m. of (significantly reduced) funding. In such a situation...the previous way of allocating funding gave way to the prioritisation criteria that the board adopted, was entitled to adopt, to which it was entitled to have regard, and in the adoption and application of which it was not, *inter alia*, in breach of any Procedures or Rules."

34. I propose now to consider each of these issues in turn.

Was the Board entitled to adopt and apply new criteria at its meeting on the 4th June 2013?

35. The key question presented on this appeal is whether, having regard in particular to the Operating Rules and the Rules of Procedure it was permissible for SKDP in effect to introduce new criteria governing the disbursement of funds at the meeting of the 4th June 2013 by introducing a new ranking system once the extent of the funding shortfall had been realised. I stress this because, generally speaking, the courts have no role in reviewing the manner in which public funds have been dispersed. Even in times of plenty, there are almost infinite demands on the public purse, not all of which can be satisfied. These problems are even more acute in times of austerity.

36. Judgments about these matters form the core of contemporary political debate and it is the two other branches of government who alone are democratically accountable in respect of these matters. By contrast, as the judicial branch lacks both the expertise and the necessary democratic accountability to make such judgments in respect of public spending, applications for judicial review in respect of such public spending decisions are exceptional and must normally be confined to issues arising from the procedures which the decision-maker followed in cases of this kind: see, *e.g.*, the judgment of Clarke J. in *Greencore Group plc v. Government of Ireland* [2007] IEHC 211.

37. Such is the case here, because the courts have no role in choosing as between what appears to have been the many worthy applications for the disbursement of these scarce LEADER funds. To repeat, therefore, if the applicant is to succeed, it can only be because of the procedures followed by SKDP at the meeting of the 4th June 2013 and, in particular, the adoption of the new criterion on that date which was applied on that single occasion.

38. The real question is whether SKDP were entitled to alter unilaterally the criteria which it had previously published (Article 11 of the Operating Rules) and by reference to which the funding round was to operate. In effect, therefore, the issue is whether the SKDP were entitled to alter what amounted to eligibility criteria which had been previously prescribed.

39. The leading authority in a case of this kind remains that of the Supreme Court in *Latchford and Sons Ltd. v. Minister for Industry and Commerce* [1950] I.R. 33. In that case the Minister had promulgated a scheme for the payment of a bonus to certain bread suppliers. The Minister refused, however, to sanction payment to the plaintiff on the ground that it had recently been convicted of an offence in connection with the sale of bread. The scheme did not, however, provide that bread wholesalers such as the plaintiff could be denied a bonus payment on this ground.

40. The Supreme Court held that in these circumstances the Minister had no power to withhold this bonus payment. As Murnaghan J. explained ([1950] I.R. 33, 42):

"After having made and published the conditions on which payment of subsidy would be made, the Minister can alter these conditions from time to time or withdraw them: but, until altered or withdrawn, the conditions apply, and persons who have complied with the published conditions are entitled to claim that they have qualified for payment of subsidy. Inasmuch as the conditions published....to not include a condition which in any way empowered the Minister for Supplies to withhold recommendation for the subsidy on the ground [of the bread conviction] there was nothing to justify the action of the Minister for Supplies."

41. There are, of course, differences between the present case and *Latchford*. The latter case did not involve a competitive funding round with each applicant being evaluated by reference to specific criteria. But the underlying principle which nonetheless emerges from *Latchford* is that elementary fairness and good administration requires in a context of this kind that the criteria should not be unilaterally changed in the middle of the adjudicative process.

42. This underscored by a consideration of the relevant EU legislation and the detailed EU and national rules and procedures. As I have already pointed out, Article 75(1)(a) of the 2005 Regulation requires bodies such as the SKDP to ensure that the LEADER programme is operated "in an efficient, effective and correct way", and, in particular, to ensure that applicants "are selected for funding in accordance with the criteria applicable to the rural development programme....".

43. It is likewise plain from the Operating Rules that it was necessary first that the Evaluation Committee (or Advisory Council) "should clearly indicate the criteria used by the LAG to establish the amount and rate of aid offered...". While Article 5(2) of the Operating Rules makes clear that the Board is not, of course, bound by the recommendations of the Committee, it is nonetheless implicit that the Board cannot make decisions by reference to criteria different to those previously employed by the Evaluation Committee to evaluate applications, since if that were so an essential safeguard in the entire process which was designed to ensure consistency and correctness in the application of these public funds could be set at naught.

44. In effect, therefore, the entire system of the allocation of LEADER funds therefore presupposes that the criteria to be used for *each funding round* should be consistent and not be variable *throughout the process*. Article 11 of the Operating Rules furthermore directs the approach of LAGs to determining eligibility of projects which includes a "major emphasis on . . . the creation of new and expansion of existing enterprises". This, of course, is not to suggest that the criteria can never be changed, since this is clearly envisaged by Article 78(a) of the 2005 Regulation and Article 35 of the Operating Rules. Amendment, however, appears to be a matter for the Minister or Department under those provisions. Be that as it may it is, however, correct to say that the criteria cannot be changed by a LAG as between the date of evaluation by the Advisory Committee and the decision of the Board itself, something which is necessarily implicit in the structure of both Article 5(2) and Article 8(1) of the Operating Rules.

45. The real difficulty here is that neither the Operating Rules or the Procedures Manual provided for the special situation which obtained in 2013, namely, where the Evaluation Committee evaluates the applications by reference to the pre-existing criteria but where the Board is then faced with an acute difficulty by reason of external developments (*i.e.*, a sharp reduction in its funding) with the consequence that it is required to adopt new criteria. It is, in essence, this lacuna in the Operating Rules and Procedures Manual that has given rise to the present difficulties. That lacuna, however, does not of itself permit the Board, after evaluation had taken place, to adopt differing criteria from those published in the Operating Rules.

46. For all of these reasons, therefore, I have concluded that the Board acted *ultra vires* the terms of the Operating Rules by adopting new criteria which were different to those which had been employed by the Advisory Committee and of which this applicant had no notice. In particular, the effect of the adoption of the new criteria was to all intents and purposes to exclude the applicant from eligibility for funding when the primary allocations were being made by SKDP on the 4th June 2013. In that respect, therefore, I differ from the conclusions on this point reached by Barrett J..

47. I reach this conclusion with some reluctance given the very difficult choices which the board of the SKDP were required to make on the 4th June 2013. Short, however, of aborting the process and promulgating new criteria by reference to which the Advisory

Council could then deliberate on the various applications, the Board was nevertheless bound to adhere to the existing criteria which had been applied by the Advisory Council. I recognise that adherence to the existing criteria might well have resulted in significantly reduced payments to the eligible applicants given the acute funding shortfall and for that reason alone might well have been regarded as an unattractive option.

48. It is nevertheless important that the procedural safeguards regarding the adoption and application of eligibility criteria envisaged by Article 75(1)(a) of the 2005 Regulations and Article 5(2) and Article 11 of the Operating Rules are adhered to. In these circumstances, while fully recognising that the Board was faced with difficult choices in these circumstances, I nonetheless feel constrained to hold that it acted *ultra vires* in the manner which I have indicated. It is, however, important to stress that there has been no suggestion that the Board acted otherwise than *bona fide*.

Is the applicant entitled to succeed in respect of a legitimate expectations claim?

49. So far as the applicant's legitimate expectations argument is concerned, I have already noted that Barrett J. found against this claim by reason of the changed circumstances and the emergence of the funding shortfall. In the prior years of this LEADER programme it appears that funding was made available as the projects were approved and decisions were then taken by the Board at meetings generally held within two weeks of each meeting of the Advisory Council which made the recommendations. It was, however, the ministerial embargo which precluded the Board from making decisions, but, as we have already seen, did not prevent either applications being made or their evaluation by the Advisory Council coupled with the funding shortfall, which created the situation that the Board was faced with in May 2013.,

50. So far as the legitimate expectations arguments advanced by the applicant is concerned, even if it could be said that the previous practice of granting funding by reference to the chronological order of applications received served to create a legitimate expectation that this order would be followed automatically so far as this funding round was concerned, regard must be had to the special circumstances with which the Board was confronted. As Barrett J. observed, it is clear from the decision of Dunne J. in *Curran* that the potential enforceability of any legitimate expectation may be defeated by changed economic circumstances. This was certainly the case here where the funding shortfall was acute and where the need to prioritise and rank the applications seemed manifest. I accordingly consider that Barrett J. was correct to reject any argument based on legitimate expectation in the light of these changed circumstances.

51. In any event, for my part, I would go somewhat further and also find against the applicant on the basis that it could not be said that the previous practice of SKPD amounted to a representation such as might form the basis of a legitimate expectation. Generally speaking, a practice – even if it is established and inveterate – cannot amount to an implied promise or representation such as might ground a legitimate expectation.

52. An example here is supplied by the judgment of Barr J. in *Egan v. Minister for Defence* (High Court, 24 November 1988). In that case the applicant claimed that there was a long standing practice within the Defence Forces to the effect that the Minister would always permit officers with more than five years standing to take early retirement. When the Minister refused the request of an Aer Corps officer to retire early, Barr J. held that no legitimate expectation was engaged because there was no implied promise or representation from the Minister:

"Such a practice, however firmly entrenched it may have been in the life of the permanent Defence Forces, it did not amount to an implied promise or representation (as envisaged by Finlay C.J. in *Webb v. Ireland*) made by the Minister to the officer corps that permission to retire would be granted to each and every case."

53. The same can, I think, be said here. Even if it could be said that the prior practice of the SKPD to decide applications by reference to chronological order was well established and inveterate, this in itself did not give rise to a legitimate expectation because – just as in *Egan* – that practice did not in itself amount to an implied promise or a representation to an applicant. This is not a case such as *Gutrani v. Minister for Justice* [1993] 2 I.R. 427 where the Minister had committed himself to following a particular approach in respect of all asylum cases and where clearly a representation or implied promise had arisen.

54. In these circumstances, I find myself obliged to conclude that as the previous practice of SKPD did not amount to an implied promise or representation that applications would always be determined by chronological order, no question of any legitimate expectation can properly arise in the applicant's favour.

Whether the applicant should have exercised the right of appeal

55. In the High Court, Barrett J. found against the applicant on the ground that he ought to have exercised the rights of appeal conferred by the Article 8(2) of the Operating Rules. While I accept that, generally speaking, an applicant should, where possible exhaust appellate remedies where they are available, I nonetheless find myself coming to the opposite conclusion on this question so far as the 4th June meeting is concerned.

56. Article 23.1 of the Operating Rules provides that a right of appeal "exists in respect of all grant decisions by the LAG" and Article 23.3 similarly provides that a promoter may appeal a decision of the LAG. But on the 4th June 2013 no "grant decision" was taken on Mr. O'Donoghue's application, as it was deferred on that date. The decision to introduce new criteria was not, moreover, a "grant decision". There could, accordingly, be no appeal of that decision and, he was not, in any event, notified of that decision. Accordingly, insofar as the challenge to the decisions of the 4th June is concerned I would not refuse an application for judicial review by reason of a failure to appeal those decisions by the applicant.

57. The situation is otherwise so far as the decision of the 25th June 2013 to allocate only €20,000 to the applicant is concerned. The applicant was aware of that decision which was a "grant decision" of an LAG within the meaning Article 23.3 of the Operating Rules, but he did not seek to avail of the right of appeal or review in respect of that decision. This was a perfectly satisfactory remedy which was available to the applicant in the circumstances.

58. It is unnecessary here to examine the wealth of case-law on the topic of the exhaustion of remedies, not all of it perhaps completely consistent. It is, perhaps, sufficient to say that the courts will generally "lean towards requiring" applicants to exhaust their appellate remedies and, absent special and particular circumstances, will normally insist upon this: see *Tomlinson v. Criminal Injuries Compensation Tribunal* [2005] 1 I.L.R.M. 394, 400, *per* Denham J.

59. Given that the applicant had a perfectly satisfactory appellate remedy available to him in respect of the decision of the 25th June 2013 (in contrast to the position with regard to the decisions of the 4th June 2013). I would exercise my discretion to refuse to grant relief by way of judicial review by reason of his failure to exhaust it.

To what relief is the applicant entitled?

60. There remains the question of the relief to which the applicant is entitled in relation to the decisions of the 4th June. I think it clear that in the light of my reasoning that the applicant is entitled to a declaration that the board of the SKDP was not entitled to adopt new criteria at its meeting on the 4th June 2013. I would not, however, be prepared to grant the applicant any further relief by reason of the potential prejudice to third parties who are not before the Court and by reason of the failure of the applicant to exhaust his appellate remedies so far as the decision of the 25th June 2013 is concerned.

61. It must be recalled that Article 8.1 of the Operating Rules envisaged that decisions on applications for funding should not be delayed in the light of "the possibility of funds becoming exhausted or the ending of the Programme". It must therefore have been obvious to all applicants that the LEADER funds were likely to have been quickly allocated and then dissipated by the successful applicants in respect of their own projects.

62. In these circumstances, given the finite amount of resources available to SKDP and the fact that, in particular, other third parties might be prejudiced if the validity of their grant allocation during the 2013 funding round were somehow now to be put in doubt by the granting of an order of *certiorari*, this is in itself a reason why in the exercise of the court's discretion an order of *certiorari* positively quashing the 2013 LEADER allocations should not issue. In this context it should be observed that the Supreme Court has frequently stated that *certiorari* should not issue where other third parties who are not before the Court have acted to their detriment in reliance on the validity of an administrative decision which is later shown to be legally invalid: see, e.g., *The State (Cussen) v. Brennan* [1981] I.R. 181.

63. In a similar vein it may be said that those who received LEADER funding from SKDP in 2013 all acted on the assumption that the grant allocations were valid and have changed their position by spending these moneys. It would be unfair now which might have the effect of calling the validity of these allocations even indirectly into question. This is especially so given that no interim or interlocutory relief was sought against either SKPD or the other grantees of this aid restraining the spending of these grant monies pending the outcome of the present proceedings.

Conclusions

64. In summary, therefore, I am the view that:

65. First, Barrett J. was correct to hold that any legitimate expectation which the applicant might have acquired by reason of past practice of the SKDP was defeated by the change of circumstances with which the board was faced and, specifically, the acute funding shortfall. In line with the reasoning of Dunne J. in *Curran*, Barrett J. was correct to hold that this in itself constituted an objective circumstance which justified the departure from any previous held legitimate expectation. In addition, I would go further and hold that the previous practice of the SKPD of "first recommended, first funded" did not give rise to any implied promise or representation that this practice would always be invariably followed in every case, so that, in any event, no legitimate expectation could properly arise.

66. Second, I consider that Barrett J. was in error in failing to hold that the SKDP acted *ultra vires* the provisions of Article 75(1)(a) of the Council Regulation and Article 5(2) and Article 11 of the Operating Rules by adopting a new criterion at its meeting on the 4th June 2013. It is implicit in these provisions that the Board cannot make decisions by reference to criteria different to those in the Operating Rules and previously employed by the Evaluation Committee to evaluate applications, since if that were so an essential safeguard in the entire process which was designed to ensure consistency and correctness in the application of these public funds could be set at naught. The entire system of the allocation of LEADER funds presupposes, moreover, that the criteria to be used *for each funding round* should be consistent and not be variable *throughout the process*.

67. While the applicant is clearly entitled to a declaration to this effect, I would not, in the exercise of my discretion, go any further. In particular, I would not grant him an order of *certiorari* which would have the effect of positively quashing the allocation of funds by SKDP in the 2013 LEADER funding round, since this would call into question the validity of funding granted to third parties who have acted to their detriment in the meantime.

68. Finally, since the decision of the 4th June was not a "grant decision" for the purposes of Article 23.1 of the Operating Rules, the applicant enjoyed no right of appeal in respect of that decision. He cannot, accordingly, be faulted for seeking a judicial review of that particular decision by reason of his failure to exhaust appellate remedies. It is, however, otherwise, in the case of the decision of the 25th June 2013, as a perfectly adequate remedy was available to him in respect of that decision.

69. Given that I have found that there has been no breach of any legitimate expectations, no claim for damages in this respect can follow. It equally follows that given the absence of any suggestion of *mala fides*, no claim for damages can arise, the declaration as to the *ultra vires* decision notwithstanding: see *Pine Valley Developments Ltd. v. Minister for Environment* [1987] I.R. 23.

70. It follows, therefore, that I would allow the appeal in part and dismiss the appeal in part and grant as relief a declaration that the decision of the Board made on the 4th June 2013 to defer Mr. O'Donoghue's application by reference to the new criteria adopted on that day was *ultra vires* the Board.