Neutral Citation Number: [2009] IEHC 192

THE HIGH COURT

1990 4509 P

BETWEEN

JOHN AHERN AND OTHERS

PLAINTIFFS

AND

THE MINISTER FOR AGRICULTURE AND FOOD, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 24th day of April, 2009.

The issue
The issue with which the Court is concerned on this application arises in the context of a claim for assessment of damages suffered by the 40th named plaintiff, James Kavanagh, as a result of the mistake of law of the first defendant found in the judgment of the Supreme Court in *Duff v. Minister for Agriculture (No. 2)* [1997] 2 I.R. 22. As I understand it, Mr. Kavanagh accepts that the assessment of damages should proceed on the basis of the formula set out in my first judgment in the *Duff* case, delivered on 25th March, 1999, as the probable basis on which farmers who had invested heavily in milk production would have been allocated additional milk quota in 1984/1985 if the first defendant (the Minister) had not committed the error of law found by the Supreme Court. The formula is that the allocation would have been 50% of the difference between:

(a) targeted milk production (based on the product of projected cow numbers and projected milk yield) for the end of plan; and

(b) the quota actually allocated for production in 1983, if any.

That judgment recognised that the farmers who had "invested heavily in milk production" included dairy farmers who were planned under the Farm Modernisation Scheme (F.M.S.) in 1979 and 1980 and dairy farmer participants in the rescue package known as the Reduced Interest Scheme (R.I.S.).

By order of the Court, made on 14th January, 2007, by consent of Mr. Kavanagh and the defendants, it was ordered, pursuant to Order 35 of the Rules of the Superior Court 1986 (the Rules), that two issues of fact between the parties, or mixed issues of law and fact, be determined at the outset before the reception of any other evidence and without pleadings, namely:

(A) Whether and to what extent the planning status of Mr. Kavanagh's holding at Luggacurran, Portlaoise, Co. Laois, has any bearing on his claim for compensation; and

(B) Whether the R.I.S. plan of Mr. Kavanagh was a three, four or five year plan for the purposes of assessment of damages and for that purpose, if required by the parties, to address or move to any consequential inferences or findings of fact.

At the hearing of the issue on 3rd April, 2009, the Court was informed that the issue at (A) is "no longer an issue".

This judgment relates to the issue at (B). The Court was told that the plaintiff is now contending for a four year plan, not a five year plan. Further, the Court was told that the issue falls to be determined on the basis of two assumptions, which may be challenged later. The first is that Mr. Kavanagh was eligible to participate in the R.I.S. The second is that his application to participate was formally accepted.

The evidence
At the hearing of the issue, the evidence adduced on behalf of Mr. Kavanagh was the evidence of Mr. Jim McCarthy. In 1983 Mr. McCarthy was employed by Avonmore Creameries Limited as an agricultural adviser. In that capacity, he prepared a document headed "Farm Plan and Annual Cash Flow Budgets for Reduced Interest Scheme for farmers in severe financial difficulty" for Mr. Kavanagh's mother, with whom Mr. Kavanagh was farming at the time at Luggacurran, Co. Laois. Mr. Kavanagh was a customer of Avonmore Creameries Limited. The purpose of Mr. McCarthy's evidence was to explain the production plan incorporated in that document, which I will refer to as "the 1983 Plan". It emerged during the cross-examination of Mr. McCarthy that Mr. Kavanagh had participated in the F.M.S. and his application under that scheme was introduced in evidence and the projection for milch cows for the year 1984 in it was put to Mr. McCarthy. I mention that as a preface to making it clear that I do not consider the contents of the application under F.M.S. 1979/1980 as being relevant to the issue before the Court.

Mr. Paud Evans, an official in the Minister's Department, gave evidence on behalf of the defendants. The main thrust of Mr. Evans' evidence in chief was what the Minister would have concluded, in the context of the allocation of additional milk quota for the purposes of Article 3 of Council Regulation E.E.C./857/84, was the targeted milk production in the 1983 plan, which obviously would have involved identifying the end point of the 1983 plan. I allowed the evidence *de bene esse*. In my view, the defendants' approach in adducing that line of evidence was misconceived and I so find. So also was the characterisation by counsel for the defendants of the question which arises as a question as to what, on the balance of probabilities, the Minister, in 1984, would have made of the 1983 plan in the context of deciding how he would have calculated the additional quota, if any, to which he might have found Mr. Kavanagh entitled. My judgment of 25th March, 1999 was concerned with the determination of the scheme which the Minister would have put in place for allocating additional quota in 1984/1985 if he had not committed the error of law found by the Supreme Court. The issue now before the Court arises in the context of the application of the notional scheme to Mr. Kavanagh. The issue is an issue of fact. In other words, it raises the following question: what, as a matter of fact, was the duration of Mr. Kavanagh's production plan embodied in the 1983 plan. The policy factors which informed my decision of 25th March, 1999 as to the scheme which would have been put in place had the Minister not erred in law have no relevance whatsoever to the issue which is now being determined. Therefore, to the extent that there is evidence before the Court as to what the Minister would have concluded in relation to the duration of Mr. Kavanagh's production plan, I have attached no weight to that evidence.

The R.I.S.
The R.I.S. was introduced by the Minister on 1st April, 1982, in association with the Associated Banks (AIB, Bank of Ireland, Northern Bank and Ulster Bank) and the Agricultural Credit Corporation (ACC). Its purpose, as stated in the introduction, was "to sustain in business potentially viable farmers who cannot meet interest payments in full and who are, consequently, in severe financial difficulties". The benefit the farmer gained by being accepted for participation in the R.I.S. was that the interest rate payable by him on borrowings which were exclusively for farming purposes would be reduced by up to 8¾%, provided that the farmer was not liable for a rate below 10½% as a result. The lending institution recouped the interest forgone through State subvention. The scheme was to apply for three years, which I understand to mean that the farmer would get the benefit of the scheme for three years. There was a proviso that the benefits might, in certain circumstances, be spread over a four year period, but all that meant was that the maximum benefit to which a farmer was entitled (£87.50 per £1,000 of eligible borrowings per annum over the three year period of the scheme) might be utilised over a four year period. The scheme when introduced related to existing borrowings (advances made between 1st January, 1976 and 31st December, 1980), even if restructured subsequently.

The way the scheme worked was that the applicant farmer had to submit the application to the relevant lending institution. The lending institution had primary responsibility for assessing eligibility. The onus was on the lending institution to transmit a form to the Department containing agreement on the issue of customer confidentiality and summary details of the farmer's farm business situation. It is clear from Mr. Evans' evidence that random scrutiny of the applications was conducted in the Department. The provision of the scheme which is of most relevance for present purposes is para. 3 of the Eligibility Conditions which provided as follows:

> "In the case of all beneficiaries, it must be established that the farm business will, with the aid of the Scheme, be a viable concern at the end of the period of the Scheme, i.e., that the farm business will be able to meet all current farm business expenses, including loan repayments and family living expenses. A financial reconstruction programme must be drawn up in every case to ensure that such viability can, in fact, be achieved and this programme must be implemented in full."

The scheme envisaged the lending institution clawing back any benefits which the farmer received to which he was not entitled and the lending institution recompensing the Exchequer for its contribution to those benefits.

The 1983 plan
Mr. McCarthy explained that there was no prescribed format for a "financial reconstruction programme" under the R.I.S. He devised his own format, in which he gave the following details:

(1) Farm details: setting out acreage (140 acres) and adjusted acreage (110 acres) of grassland; existing buildings and building requirements, which included a silage pit; and machinery.

(2) Mr. Kavanagh's financial liabilities as of 12th August, 1983 to Bank of Ireland, ACC and Avonmore Co-Op.

(3) Under the heading "Proposals for the next 4 years":

> "Milk 80 cows @ 800 gallons/cow,
>
> Rear 20 replacement heifers per annum.
>
> Construct required buildings as finance becomes available".

(4) Fixed costs (oil, machinery maintenance etc.) per annum.

(5) Living expenses per annum.

(6) Cash projection up to 31st December, 1983, which showed the amount available to meet repayments on borrowings for the latter half of 1983.

(7) Livestock programme, to which I will return.

(8) Annual cash flow projections, to which I will return.

(9) His conclusion, in which Mr. McCarthy stated as follows:

> "The important aspects in this plan are to achieve the planned targets, i.e. Cow Numbers and Milk Yield/Cow. As you will readily read from the plan investments we will be very much limited until 1985 and if targets are being achieved then further investments could be implemented. Out wintering some of the stock may be necessary."

Mr. McCarthy invited Mr. Kavanagh to study the plan critically and to consult him on any queries he had before passing it on to ACC.

The livestock programme showed the actual numbers, presumably as of 12th August, 1983, and projected numbers for 1984, 1985 and 1986 for dairy cows, in-calf heifers (i.e. replacements), one to two year olds and calves. It also showed "sales" which included projected numbers of cull cows, calves and one to two year olds. It also set out the target milk yield per cow in gallons. The targeted milk production for 1986 is calculable from the figures given at 52,500 gallons (70 cows x 750 gallons per cow). No information is given in relation to 1987 in the livestock programme.

In relation to the annual cash flow projections, the projections relate to 1984, 1985 and 1986. As I understand it, Mr. McCarthy used a template in use at the time by ACOT (the predecessor of Teagasc). With a few exceptions, the information contained in the projections is extrapolated from the information contained in the earlier part of the 1983 plan. The exceptions are as follows:

> (a) Simple arithmetic reveals that the projected milk sales are based on a price of 68p per gallon in each year, which I assume was the prevailing price in August 1983.
>
> (b) The values ascribed to stock, as I understand it, were based on the prices prevailing in August 1983.
>
> (c) The figure for interest on short term working capital is the same for each year, £400, and Mr. McCarthy's evidence was that it was based on what he called "merchant interest", which I understand to be interest payable to organisations such as Avonmore.
>
> (d) The fixed costs figure is increased for 1986 from £5,520, the figure for 1984 and 1985, to £7,000. Mr. McCarthy's recollection was that the increase was intended to cover the cost of one milk tank to meet increased milk production.

Mr. Kavanagh's case that the 1983 plan was a four year plan is based entirely on what follows the heading "Proposals for next four years", namely, the reference to 80 cows @ 800 gallons per cow. The figure 80 can be extrapolated from the Livestock Programme by adding the dairy cows and replacement heifers for 1986 (70 + 20) and deducting the cull cows in the same year (10) giving a figure of 80. The 800 gallons figure does not appear anywhere else. In explaining the statement in the concluding section that "out wintering some of the stock" might be necessary, as I understand Mr. McCarthy's evidence, this possibility was pointed to so as to give comfort to the lending institutions that it would not be necessary to finance new buildings to accommodate the stock. It is interesting to note that the increase from 84 to 106 to which Mr. McCarthy referred in this context was the increase in all stock numbers from August 1983 to 1986. Mr. McCarthy's evidence was that "the planned targets" referred to in the concluding section referred to 80 cows yielding 800 gallons per cow. However, the context suggests that it was the planned targets from August 1983 to December 1986.

Counsel for Mr. Kavanagh submitted that, on the evidence, the Court must accept Mr. McCarthy's evidence that the 1983 plan was a four year plan, in the absence of contradictory evidence. Mr. McCarthy was put in the unenviable position of having to testify as to a plan he constructed over a quarter of a century ago. In my view, the plan speaks for itself.

Counsel for the defendants submitted that when one looks at the 1983 plan with a view to ascertaining for what period production was planned for, the answer is that it was planned up to the third year. Figures are only worked out to the end of 1986. As regards what was described as "an aspirational target" for 1987 of 80 cows yielding 800 gallons per cow, it was submitted that no calculations of additional input costs or other factors appear to have been properly worked out, nor is it clear whether, or to what extent, additional capital investment would have been necessary to reach that target. It was pointed out that the 1987 target was likely to require additional capital cost. However, the R.I.S. scheme was not intended to cover future borrowing nor the costs of a fresh capital expenditure.

Conclusion

In my view, in interpreting the 1983 plan to ascertain the targeted milk production for the end of the plan, regard must be had to the purpose for which the plan was prepared. It was prepared, as its heading clearly indicates, for the purposes of the R.I.S., in other words, as a financial reconstruction programme as required by para. 3 of the Eligibility Conditions in the R.I.S. Its purpose was to support Mr. Kavanagh's application for participation in the R.I.S. Therefore, its primary objective was to illustrate that the farming enterprise of Mr. Kavanagh and his mother would be a viable concern at the end of the three year period of the R.I.S., that is to say, at the end of 1986. Therefore, in my view, it was a three year plan ending at the end of 1986.

The reference in the 1983 plan to a proposal for a milk yield for the succeeding four years based on 80 cows yielding 800 gallons per cow, in my view, does not render the plan a four year plan for the purpose of the quantification of the additional quota which would have been allocated to Mr. Kavanagh as a participant in the R.I.S., for the fundamental reason that the end point of a plan designed for the purposes of securing participation in the R.I.S. was the end point of the scheme, that is to say, the end of 1986.

Moreover, while the 1983 plan does aspire to a milk yield of 64,000 gallons after four years, that is to say, in 1987, the methodology applied in the 1983 plan in relation to the years 1984, 1985 and 1986 is not applied to 1987. As regards 1987, the 1983 plan is not a "financial reconstruction programme" as required by the R.I.S. Presumably, the reason that Mr. McCarthy did not project forward to 1987, so as to show viability at the end of 1987, was because to do so would be outside the R.I.S. scheme, which applied for three years only. Apart from that, as a matter of fact, Mr. McCarthy did not do a viability plan for 1987. He did not do cash flow projections for 1987 of the type necessary to demonstrate viability.

Even if he had, in my view, as a person qualifying for the allocation of additional quota as a participant in the R.I.S., the targeted milk production for the end of the plan would be 52,500 gallons, the 52,500 gallons projected for 1986.

Order

The answer to issue (B) in the order of 14th January, 2007 is as follows:

> "The reduced interest (R.I.S.) plan of the 40th named plaintiff was a three year plan for the purposes of the assessment of damages in these proceedings."