Northern Ireland Assembly

Committee for Agriculture, Environment and Rural Affairs

OFFICIAL REPORT (Hansard)

Independent Panel for Review of Decisions: Brian Little and James O'Brien

11 February 2021

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Declan McAleer (Chairperson)
Mr Philip McGuigan (Deputy Chairperson)
Ms Clare Bailey
Mrs Rosemary Barton
Mr John Blair
Mr Maurice Bradley
Mr Harry Harvey
Mr William Irwin
Mr Patsy McGlone

Witnesses:

Mr Brian Little	Independent Adviser
Mr James O'Brien	Independent Adviser

The Chairperson (Mr McAleer): I welcome, via StarLeaf, James O'Brien, barrister at law, and Brian Little, who is a voluntary advisor. Thank you, gentlemen. You are very welcome. I ask you to take up to 10 minutes to outline the issues that you wish to bring to our attention about the independent panel for review of decisions. Members will want to ask some questions thereafter. Brian and James, you are very welcome.

Mr James O'Brien (Independent Adviser): Thank you, Chairman.

Mr Brian Little (Independent Adviser): Thank you, Chairman. Can everybody hear us OK?

The Chairperson (Mr McAleer): Yes; absolutely.

Mr Little: I thank you, Chair and members, for the opportunity to listen to James and me on behalf of Jim Shannon and the Calverts. We think that we can make a contribution to the subject, and we have proceeded accordingly.

If you do not mind, I am going to try to stay with Christian names, with the exception of the Chair, because it will help us to move this thing forward. We have provided you with something like 200 pages of documentation. It is rather important that we say right from the front that we provided that to substantiate and support our analysis and forensic activity, and we will refer to specific pages as we go through, if that will be any help in understanding what is going on.

We started researching the subject six months ago. We have no doubt that it is very important for the past and the present but, equally, the future, as we face reducing budgets, increasing challenges in knowledge, if you like, in the Department and elsewhere, and with the challenges that will lead to likely disputes, we need to make sure that we have a mechanism that will work for everybody.

I will refer first of all to document B. That is an attempt to give a chronology to and a timeline for judicial reviews (JRs) that are associated with single farm payments going as far back as 2011. The opportunity was provided to DAERA and the Ulster Farmers' Union (UFU) to contribute to that process. The document that we provided to you, which we call the 21-pager from O'Brien and Little, has been circulated to over 100 people. We have gone about having a very open and transparent engagement process to try to get people to think through the issues. We recognise that the Department, the Committee and the Minister have a very full agenda. We are attempting to help with this one part of the equation if we can.

I place on record my thanks to John McGrath and the team at DAERA, who professionally provided a lot of the information that you see at reference G. That has been really helpful and useful in what we are doing. There is one exception, which is a public interest issue that I will probably refer to later. Thank you all very much, and bear with us as I now start.

I will start by reading from the Hansard report of the previous review that you gentlemen had as a Committee, which was on 22 September 2015. It is at reference A. At that time, William Irwin was Chair, the current Chair was a member and Mr Poots, who will, hopefully, be back as Minister in March, was a member. I want to read for everybody — about 150 or 200 people are listening — exactly what Mr Poots said at that time. He said:

> *"When I was Environment Minister, the Planning Appeals Commission arrived at loads of decisions that I did not agree with, but I accepted them. It is the same when you take a case to a court of law or wherever. Lots of decisions are made. You could think that a certain decision is fundamentally flawed and absolutely disagree with it and say that the court got it wrong, but, unless you can appeal to a higher court, you cannot change it. "*

Crucially, he then said:

> *"However, this singular Department in the Northern Ireland Executive, as far as I am aware, is the only one that will dismiss an appeals panel case that it has lost. It will walk in and, with the stroke of a pen, say that the case does not meet the criteria. People must not have understood what they were doing. They were too empathetic to individuals, so we do not accept the panel's decision. With respect, I do not accept what you are doing as a Department. I do not accept that what you are doing is aligning closely with European legislation because the individuals who sit on the panel should be the individuals who have to take charge of the decisions that they make. If they do not get the decisions right, they should be held to account. If they are not capable of doing the job, DARD should not appoint them in the first instance. If you appoint people who are capable of understanding complex legislation, you should have the decency to accept their opinions when those opinions go against what DARD has acted on."*

You will all have heard the response from the Minister on 17 November to William Irwin's question, when he stated:

> *"I have made it clear to my officials that I will not be overturning the decisions of an independent panel" — [Official Report (Hansard), 17 November 2020, p20, col 1],*

and that that should be the final decision. Many of you who heard that as far back as November will assume that the Department was following what the Minister asked it to do. You would assume that, effectively, no re-examination was going on and that the Department was proceeding to implement those decisions. Some of you will know that, at the session on 28 January, Mr Irwin asked this question:

> *"thank you for your presentation. ... I welcome the fact that there have been moves to legislate in order to make the independent panel's adjudication the final decision. That is good, Jason, and I welcome that ... I am aware, via press reports, that a number of cases, in which the independent panel has adjudicated in favour of a farmer, are sitting with the Department because it still has not made a decision on those. What is the reason for that, given the Minister's current position on it?"*

Dr Foy replied:

> *"Our position up to this point has been,"*

and I underline this:

> *"and may continue to be, that we need to examine the panel's recommendations — at this point, they are still recommendations — to ensure that they are in keeping with the law as written and the regulations that still apply to schemes and scheme rules."*

It is very important that the Department has in its mind the statutory responsibilities that it has to discharge as well. In crafting the changes in the legislation, we need to be exceptionally careful about how we deal with that.

You will find in reference G26 a list of the seven cases that are under review. There is a combination, as you can see, of statutory management requirement (SMR) cases, active farmer cases and entitlement cases. I make that point because a lot of people, when speaking to me or asking questions of us, do not realise the challenge that we have in getting the legislation changed or how we need to go about doing that.

In short, I can go back to a comment from 2015 by Mr Irwin:

> *"I feel — I think this is also the feeling of the Committee — that an independent review panel should make the final decision and that that decision should be final. Once you go down the road of nitpicking what you do and do not agree with, I think it is very unfair to the farmer or to the applicant to the panel. In fairness, any farmers I have been talking to who have gone to an independent review panel understand that it makes the final decision. As you said, in some cases, that is not the final decision and the Department has overruled that. That is an issue."*

The gentleman representing DARD at that time, Mr Brian Lamont, said:

> *"It is, but, again, it is tied up with the EU legislation, which empowers the Department to make the final decision. Another perspective could be that, if you put in place a revised facility or process where the independent panel has the final decision, you would need to ensure that that panel has knowledge and expertise that is equal to the paying agency and has access to the professional knowledge and skills that the paying agency has access to."*

The point that I am going to deal with, which John Blair raised at a previous session when talking about the appointments to the Committee, is the issue that is connected to the 17 people and why this is important.

Our paper attempts to explore the matter from the point of view of planning, processes, people and proper governance. I will now hand over to James O'Brien, who will take you through circumstances when there has been the opportunity to go only to the judicial review, where there have been challenges to the Department on these issues, what the outcomes have been in the five judicial review cases from 2016 and what the implications are for us as we try to change the law.

Mr O'Brien: Good morning, Mr Chairman and members of the panel. First, I will provide some of my background. I do not know whether any of you know me. I qualified as a solicitor in 1990. I became a partner in a firm in 1993. I have always worked in rural practices in country towns. I set up my own practice in Magherafelt in 1998. I was a member of the independent appeals panel from its inception in 2002 until 2008. In 2012, I transferred from being a solicitor to go to the Bar, and I have practised as a barrister since then. I also farm on a part-time basis on the family farm, which was a dairy farm but is now a suckler beef farm.

I joined the UFU's legislation committee in 2011. I was the deputy chairperson of that committee from 2015 to 2017, and I was the chairperson from 2017 until 2019. However, in that capacity, you do not advise the UFU on decisions such as those to commence judicial reviews. That decision is ultimately taken by the board, generally after recommendations from the executive. I am also a member of the UFU's executive. I am the deputy chair of my local UFU association, and, in that capacity, I have a seat on the executive.

I was the junior counsel in the first judicial review that was brought by, or had the support of, the UFU: Ian Marshall's case. I had already acted for Mr Marshall in front of the independent appeals panel, which recommended that his case be allowed, and that is one of the decisions that Brian referred to that was then rejected. At the start of the judicial review procedure, I suggested to the UFU that it speak to its counterparts in the National Farmers' Union (NFU) to find a senior counsel with specialist knowledge in agriculture and EU law. Hugh Mercer QC was the recommendation of the National Farmers' Union. That was how he became involved in various Northern Ireland judicial reviews. He was, in my opinion, an excellent choice. He is good to work with and is very knowledgeable. In fact, if any of you Google him, you will see the man's impressive depth and breadth of knowledge.

The first judicial review, which was Ian Marshall's case, involved a refusal to pay the single farm payment on the basis that Mr Marshall had committed an intentional breach of the statutory management requirements, and, as a pollution incident had occurred on his farm, the breach was held to be intentional rather than negligent. In front of the panel, I argued that it was a negligent breach, and the panel accepted that. That was overruled by DARD, which continued to hold that it was intentional and imposed a substantial penalty on his single farm payment on that basis. A judicial review was then brought to overturn that decision. In the arguments that DARD advanced for its decision, it sought to reverse the burden of proof by arguing that, once the breach had occurred, it was for Mr Marshall to show that it was not intentional, which is a clear overturning of the rule that should apply.

The case was heard by Mr Justice Maguire. He gave what was, in my view, a very strong ruling. He found very strongly against DARD. He gave seven reasons for his decision, and those are in the judgment, which, I think, is in our papers. Having found that to be the case, he remitted the matter to DARD so that it could make a new decision. He also stated that the decision should not be made by Mr Lavery, who made the first decision, and that he should not be involved in the process. He found that Mr Lavery had misdirected himself in coming to the initial decision.

My view at the time was that I found Mr Justice Maguire's decision to be a very strong decision against DARD, the principles that it applied and how it applied them. The matter was remitted back to DARD to come to a new decision, and, four months later, it came back with the same decision. Again, Mr Marshall's case had been turned down and found that the breach was intentional. On that occasion, DARD based the decision on the European Court of Justice's ruling on the Dutch case of van der Ham, which set out principles for intentional behaviour. Although it was an affirmation of existing law, that decision was made in 2014, two years after the events occurred on Mr Marshall's farm that gave rise to the findings.

A second judicial review was brought against that decision. It did not proceed to a hearing, as it was settled after a negotiation. A joint statement was issued. DARD accepted that if it was to use the van der Ham test, it must give Mr Marshall opportunities to make submissions on it, and that had not been done. It agreed to pay all the single farm payments that were due to Mr Marshall and the costs of the judicial review proceedings. Again, that was a further success for the Ulster Farmers' Union, one that I felt that was entirely unnecessary, as there should never have been a second decision.

Mr Little: Can I take over, James?

The senior counsel for JR2 and JR3, which was on the challenge of the elimination panels, was a gentleman called Dr Tony McGleenan. He is one of the top judicial review barristers in Northern Ireland. If you look at document B24, you will see, from the taxpayer's point of view, how much he was charging for his fees. You will see that for JR2 and JR3, those fees were very low. In essence, that says to me, although I am not part of the legal privilege, that he identified right from the start that JR2, which James just described, was settled. For JR3, which was on the elimination panels, it did not look as though he spent more than a day and a half on it before concluding that it did not carry water legally.

Before we come back to JR3, I will move quickly to JR4. Basically, JR4 was settled before it went to the leave hearing, and it concerned a farmer in Fermanagh. JR5 was the Barnwell Farms case, which was an active farmer's case. Although James was not directly involved in that case, he can give you an assessment of the relevance of the judgment. I will reinforce that in all three levels, which are the process that was involved, the legal side and the senior officials, it was found that the senior officials were not doing what they ought to in accordance with the law. In the case of JR1, the senior official was Noel Lavery, the permanent secretary, and, in JR5, it was Brian Doherty, the head of the paying agency.

James, do you want to say a few words on JR5, and I will return to JR3?

Mr O'Brien: I did not appear in that matter, but I have read the judgment, which is concerned with whether the applicant qualified as an active farmer. He had the same situation as Mr Marshall. He had been turned down by DAERA. He appealed to the independent panel, and it recommended that his appeal be allowed. It was turned down again by DAERA, and the judicial review was taken forward. It was heard by Madam Justice Keegan. It was, in my view, a comprehensive judgement and one of general relevance, setting out what constituted an active farmer and also the procedures that should be followed.

The judge was critical of that judgement in the tests that DARD applied in coming to its conclusion that it should not follow the panel's recommendation, and she found that the panel's recommendations should have been followed and that its reasoning in the matter was not adequate or sufficiently rational. It is perhaps one of the drawbacks of the judicial review process that, in dealing with these matters, the court is required to confine itself to looking at this decision within certain narrow grounds as to whether the decision maker has followed all the relevant tests. If it has, the judicial review court cannot overturn the decision and substitute its own, even though it might feel that it would come to a different decision. It has to respect the decision if the decision maker has followed the proper legal considerations.

Mr Little: I will turn now to JR3. I will remind you of Clare's question at the session on the 28 January:

> *"In April 2018, DAERA tried to instigate a new single-stage process and remove the independent panel. The Ulster Farmers' Union (UFU) filed a judicial review in that case,"*

— we call it JR3 —

> *"and the Department reversed its move to remove ... What was the rationale for the Department wanting to do that?"*

Dr Foy replied:

> *"The review ... was instigated at the request of the Minister at the time, and the rationale for that was a fairly high degree of dissatisfaction with the length of time that the process was taking and"*

the number of cases.

> *"The Minister asked for a more streamlined process that would render,"*

the activity being more effective, whatever etc. It goes on with Ms Bailey asking:

> *"When we had a Minister until January 2017, was it part of their instruction ... to remove the ... panel?"*

Dr Foy replied:

> *"Not necessarily specifically to remove the independent panel. I do not think that the Minister's instructions were as prescriptive as that. It was to review the process in its entirety and develop a process that was more responsive, with which the farmer had more engagement and involvement and that was faster in giving final decisions to farmers."*

Ms Bailey said:

> *"The following year, it was officials' decision to try to remove the independent panel at that time, according to the strategy from a previous Minister, when the Assembly was down."*

So, in the three years when the Assembly was suspended, there was an attempt, initially by Noel Lavery and then subsequently by the current permanent secretary, to take out the stage 2 panels in the process. In my view, they obviously got advice from the senior counsel who said that, legally, they did not have the ability to do that and it was not likely to work.

I want to say a little about the situation in 2015. As you will see from the paperwork, more than 800 cases, from 2005 to 2014, had not been addressed, and they were not addressed until Dr McMahon allocated a team of six people to them in 2018 and 2019 to clear them up before Brexit. On top of that, we had some 800 active farmer and young farmer cases, and there were 2,000 to 3,000 cases from 2005 to 2016 to be resourced and sorted out. The proposition was that taking out the independent panels would save us time. It was entirely wrong. I am glad that Dr McGleenan advised the Department, as it would appear, that it needed to stop that and go back and fix the basics. That was very important. I have been able to verify that position with Minister McIlveen, broadly speaking, from October, and that would be to the best of her recollection of what happened.

I refer particularly to a response from the UFU, written by a gentleman called James McCluggage, to the 2017 consultation, which you will find in document F, pages 5 to 7. That is the legal background.

I will now spend a little bit of time explaining why we think this aspect is important. It basically says that when anybody takes this to court, on two judgements, Hugh Mercer has got wins in all cases; two were winning judgements, and three were settled earlier. Those decisions are being made in the interpretation of law at the most senior levels, but they cost over £100,000. We have to find a way of combining sufficient legal knowledge on the panel — we view that as being the supreme agricultural appeal panel (SAAP) — with reasonable costs, and we can do that for £4,000 or £5,000, not £100,000.

I will refer to the suggestion with regard to the supreme agricultural appeal panel on page 2. I will walk through that, and we will finish in the next few minutes. Changing the law to the final decision is not likely to be sufficient. We have to protect the other aspect of DAERA's view of its responsibilities and how it can discharge them in accordance with the law. The supreme agricultural appeal panel is proposed as a five-person panel. We were asked to write more, which we have done at pages 18 and 19, about how that might work and what it could work for. Specifically, we have already had a confirmation from Mr Mercer QC on the five judicial review cases. He is also a deputy High Court judge in England, and he has offered, if the Minister is minded, to be one of the people to chair that group — just to help — for the first three years, at effectively much lower rates, using the deputy judge rates. He is also mindful that the protocol and the European dimension are likely to add even further complexity for us in Northern Ireland.

For completeness, earlier this week, we asked whether Dr McGleenan would also consider allocating five to seven days, at most, per year to help in this area. Both gentlemen can earn considerably more elsewhere, but, hopefully, in the spirit of public service, if they are prepared to do that and the Minister and the Committee are minded to help with that proposition and make it real with the Department, that would make a great deal of sense.

John Blair asked about the 17 people and the need to refresh the panel in 2022. We simply do not have enough people with agricultural law knowledge. You need to get a blend of both, and that is the reason why we suggest that three members who do stage-2 panels would also participate on the supreme appeal panel.

There is one other aspect. Something that was agreed in 2018 is a problem for a number of cases that have been in touch with us, and that is that they are not being allowed to put in new evidence and other issues that effectively need to be considered at the stage-2 panel after stage 1. They take the view that, basically, they only really understood what they were being required to present at that point. Frankly, we think that, legally, that is not right and should be undone and set back.

Finally, it is our view that we could consider historic cases. I can say a little bit about my background here. I was involved in Westminster in the BBRS — the business banking resolution scheme. It is a voluntary scheme from seven banks that formally launches next Monday and which will try to solve disputes dating back to 2001. Although there could theoretically be 60,000 complaints, it is really targeted at those 300, 400 or 500 people who, based on what has happened in the past, still wake up every day worrying that they have not had justice or a resolution. I think that that scheme will be helpful for those individuals, and, similarly, if you ask me about how many people have been in contact, I can deal with that.

I apologise that we have taken a little bit longer than we wanted. Hopefully, that has not upset you and it provides some background. Thank you very much for listening.

The Chairperson (Mr McAleer): Thank you, Brian and James. You have provided us with an amazing amount of detail and information. Your preparation has been phenomenal. It is a very helpful contribution.

The issue affects many farmers. Indeed, having attended independent panels with farmers in the past, I have seen their frustration and disillusionment when the panel finds in their favour but the Department does not accept it. That needs to change. When Dr Foy told us recently that the Department would introduce legislative changes to give powers to the independent panel so that its findings would be binding, that was broadly welcomed.

Harry, you are down to ask a question.

Mr Harvey: Thank you very much, Chair. It is good to see you, James and Brian.

Mr Little: Thank you, Harry.

Mr Harvey: You know that the Department is happy to progress the issue and instate the panel as the final decision-making body on appeals. The Minister, as you know, has already stated his willingness to do that. Obviously, it needs go through the proper legislative process, with the usual consultation stage. It has been suggested that the independent panel was too empathetic in the consideration of numerous appeals, which, therefore, in the Department's view, clouded its professional judgement. That was cited by officials as a reason why the Department did not always agree with the panel's decision. What is your assessment of that?

Mr Little: James, would you like to discuss your experience first?

Mr O'Brien: Yes. As I have stated, I have considerable experience of sitting on those panels and would doubt that assessment. I would dispute it in its entirely. From my own personal, hands-on experience of panels. I never found that to be the case. The panels always reached their decisions within the law. The Department says that panel members were too empathetic at times, but even if panels had a degree of sympathy for the applicants, that is something that all bodies in any judicial or quasi-judicial position have to deal with. You do not allow that to cloud your judgement. You may have sympathy for an applicant for the hard times that they are suffering, but you have to reach your decision within the confines of the law. It has always been my experience that panels did so.

Since 2008, I have represented a number of applicants in front of panels, and it has always been my experience that the decisions, judgements and conclusions reached were always reasoned, professional and well drafted. They were not governed by empathy or sympathy; they always found a reasoned analysis and found within the law. Indeed, on many occasions, the findings went against any natural sympathy that they had for the applicants, and they decided the case in a proper manner. Generally, they are professional individuals: lawyers, retired civil servants or public officials. They are generally professional, knowledgeable individuals; they are not governed by sympathy.

Mr Harvey: One of the key findings by Justice Keegan against the Department was its failure to engage with the core issues being raised by the applicant. In your view, how can that be better addressed?

Mr Little: The core issue here was that the head of the paying agency, Brian Doherty, with the technical people assessing it, did not pay sufficient attention to what the independent panel was actually considering, had said, etc. In fact, Judge Keegan, as you mentioned, in effect said, "Until you deal with that, how can you make any assessment of this being right?". I will add to that little bit about empathy. I can tell you that Dr McMahon does not have an awful lot of empathy, because, for 80 months, Ian Marshall and, for 62 months, Vi Calvert had basically no money. They got the equivalent of it at the borrowing rate, which was effectively 1% over the Bank of England rate, as compensation for the hassle that they had been through in the previous 60 months. That is against the backdrop of our being lectured about managing public money properly. Let us be clear: those judicial reviews cost the Department over £300,000 and the UFU a quarter of a million pounds. That should never — never — have been necessary.

Mr Harvey: OK. On the supreme panel proposal, if the current independent panel is given final decision-making authority and is still going to be a recommendatory body, would that not negate the need for an additional panel? The right of appeal would therefore be to the independent review panel. Who would rule on that?

Mr Little: That is a very good question, Harry. The reason that we have come to the view that we need to have a supreme panel, with the expertise of a chairperson such as a Hugh Mercer or a Tony McGleenan, is that it brings a legal dimension to keeping it up to date on the discipline side. It also allows the Department to say that, "If you are still uncomfortable and feel that these people do not understand the law, you can take it to people who do". If the DAERA people make an official decision that, "This does not comply with the law, and the independent panel is still wrong", it is up to them to justify their existence to that panel. That panel is £5,000, in my estimate, not £100,000.

We have to find a way of providing a proper dispute resolution process. If we had people of the quality of Hugh Mercer, Tony McGleenan and co offering to help to do that at essentially the rates that Mr Mercer is talking about, it would be great. That would give the Department a bit of legislation, as a backdrop, that basically says, "That group becomes the people who make sure that we keep the law".

Mr Harvey: OK. On the super appeals panel, what cost would be imposed on applicants and the Department per case and even in totality, Brian?

Mr Little: We have put in a proposal that the farmer would pay up to potentially £1,500. Our current proposal is that that would not be refunded, although we are thinking about that. I will come back to it in a minute. In principle, the aim being looked at is greater than £5,000. Taking into account the judge's rate for a day and the rate of a preparation day across the other panels, we estimate the cost to be about £5,000. That is 5% of what it currently is to do that. We also anticipate, by the way, that there probably will not be any more than there have been historically. There will not be any more than maybe three to five future cases a year. I am probably going to get a question on the historical thing; I will come back to you later. That is our estimate and the process. It is important that we recognise that DAERA has a statutory responsibility to meet the law, but what we do not need as a solution is a £100,000 judicial review. That is quite wrong.

Mr Harvey: OK. Just to finish, on the super appeal panel, what personal responsibility would be placed on individual panel members, given that the panel would carry the responsibility for the final decision?

Mr Little: OK. James, do you want to take that?

Mr O'Brien: I am afraid that I do not really understand your question, Harry. You might say that that is a lawyer's get-out, but it is not intended in that way. What do you mean by "responsibility"?

Mr Harvey: Obviously, they have responsibility for the decision, so I just wonder —.

Mr O'Brien: The individuals whom we have suggested to chair the panel are highly experienced lawyers; they are very capable of assessing a case and coming to a reasonable decision. It ultimately comes back to what Brian said at the beginning: if they do not find in the person's favour, there will always be an element of, "Well, I believe that the panel got it wrong", but you have that with any decision-making body.

You have it at the minute where a decision is made by a DAERA official. You have a responsibility to consider it and get the proper decision. They would also, if they are making a decision as a quasi-judicial body, ultimately be subject to the rules of and sanctions of judicial review.

Mr Little: That is an important point. The key is to make sure with Dr Foy that the legislation is written in such a way that it would protect, if you like, all the parties involved in this activity.

By the way, I have written directly to Dr Foy since he gave evidence about a week ago, and he provided a lot of information, so I am hopeful that we will engage with him to talk through the situation.

Harry, you asked about the £1,500 —

Mr Harvey: Yes.

Mr Little: — and I did not respond. We have reconsidered that since. The current situation would probably be that in stage 2 you would get your money back; therefore you could have that position here. In my view, the supreme appeal panel should decide what proportion of that money would be returned to the applicant. If the applicant is confident in their case, they would have a 300%-plus return in that the claim, if they win it, is greater than £5,000.

Mr Harvey: OK, thank you very much, gentlemen.

Mr McGlone: Thank you for your details. You have given considerable thought to the evidence that has been given to us and to the information from the Department.

Bear with me as I talk this through. I am intrigued by the notion of a supreme agricultural appeal panel. I do not dispute that you need experts. I just want to talk this process through.

James is a very knowledgeable person in the law. The Department has said to us that it is going to change and will uphold and adhere to the decisions of independent panel, of which James is a member. We just heard that someone may refer their case to the supreme agricultural appeal panel.

Two or three things flow from that. James will know where I am going because he has been on enough social security appeals tribunals to know the circumstances under which you refer those to the likes of the Social Security Commissioners, which is almost the type of situation that we are talking about, who have to think in terms of process, natural justice or an element of a piece of information that should have been taken into consideration, but which was not, by the independent panel — we will call them the tribunal, for want of a better word.

When we come to the stage when, for some reason or other, a decision of the independent panel is referred to the supreme agricultural appeal panel, you are saying that if somebody is disenchanted by the outcome of that, they can take it to a judicial review. Presumably — this is where I am going, and James may already be there before me — that process could take us right back to square one, where the Department itself may intervene by requesting to make a submission to the supreme agricultural appeal panel or to JR its decision.

In essence, we could be introducing a multi-tiered process of scrutiny and review only to open up another can of worms. In other words, you are obviating the actual problem by creating a further problem. You are opening up another challenge for the Department just to negate the good work being done to rectify something by obliging it to adhere to the decision of the independent panel in the first place.

I am sure that you are conscious of that, but when you create another tier of legalities, those are subject to people who could, justifiably, argue, "Look, we want to make a case to this", in this instance, the Department.

Mr Little: I will walk you through that, Patsy. It is a very good question. If we make the independent panel the final arbiter, and it is essentially trying to consider all the law regulations or whatever, there ought to be very few situations in which an agriculture person in the Department still feels that decision to be wrong. The only route available today, and probably in the legislation as changes currently intend, is that you would have to take that to judicial review, at £100,000. We are talking about probably one of the top two to three individuals in the country, such as Hugh Mercer, taking such judicial reviews, particularly on some of the agricultural stuff. The probability of somebody saying to somebody of that ilk, "I really don't understand what you are doing legally", when he has won two cases and settled three here, which is a five-out-of-five record, is pretty unlikely.

Mr McGlone: I am sorry, but I do not get your point, Brian. Something being pretty unlikely and *[Inaudible]* are two different things.

Mr Little: The quality of the guys who would be legally chairing the supreme agricultural appeal panel means that they would be acutely aware of what all the laws, regulations and whatever else are. The point that I am making is that, if Mr Mercer were chairing this — it is our expectation that he would be one of the chairs, alternating with A N Other — he would know exactly what the risks were of anything being challenged by the Department. Fundamentally, he has won two cases out of two and has settled three cases out of three. This is a top-notch —.

Mr McGlone: The capacity of one individual does not make the point, not to my mind anyway. I am not disputing any individual's capacity. What I am saying is that it does not mean that the decision would not be subject to challenge.

Mr Little: No, that is fair. The bottom line is that we have had four challenges out of 300 cases to independent panels. There have been 50 cases that were overruled by the Department, and only two of those cases went to judicial review, because nobody else could afford to do so. When some of you ask me about some of the historical cases, I am going to tell you my experience to date.

Mr McGlone: My point is that those decisions that were challenged were challenged because the Department overruled them. The whole point of our discussion, I presume, is that the Department overruled the right decisions of an independent panel, and people were very frustrated that the Department overruled them.

Mr Little: Correct.

Mr McGlone: If you are to introduce a mechanism that removes the wherewithal of the Department to overrule the panel's decision, what sorts of cases should be going to the panel?

Mr Little: Very few, because, in principle, the only basis on which the Department can challenge is if the DAERA panel does not understand what the law is and has got it wrong. The basis on which it can challenge is purely on the law or the regulations. That is why the panel would have three good agriculture people and one or two good legal people on it. Out of the 50 people whose cases have been overruled since 2015 and the two people's cases that went to judicial review, we are probably saying that the vast majority of them had no route forward after the independent panel was basically closed down by recommendation. They had no ability to challenge the decision legally or in any other way, because a judicial review would cost £100,000.

Mr McGlone: I get all that, but I also get the capacity for it to be opened up for the Department to challenge the fact that it had potentially not been able, under the new, proposed legislation, to challenge the decision at the supreme agricultural appeal panel, or even go to JR.

Mr Little: Patsy, if the technical people in DAERA feel that they are that good and feel that strongly in the law that they can overrule the independent panel and are going to have a good go at the supreme agricultural appeal panel, I wish them good luck.

Mr McGlone: It did not stop them before from overruling good people. We have one of them here, who is a very knowledgeable person who sat on the panel before.

Mr O'Brien: Patsy, I have one thing to say on that, if you will permit me. I take your point that, if the panel has the final decision, yes, that would be subject to judicial review scrutiny. I cannot put it any clearer than what Brian has said: it is not very likely. The reason that I think that it is not very likely is that it is easy at the minute for DAERA, which makes the decision, to overrule it. That has always been the case. It is not confined to DAERA. Other Departments take that approach too. They make their decisions and put them to applicants. The position is unstated, but it is there, and it is that, if you do not like our decision, you can take it to judicial review. DAERA will now be on the reverse of that. It will have to make the case for a judicial review and will have to get past the leave hearing. It will have to show very good grounds for judicial review. I agree entirely with Brian that, given the calibre of the supreme agricultural appeal panel, that is not very likely.

To answer your question, no, we cannot rule it out. Once you give anyone a decision-making power, it is subject to judicial review scrutiny. The reality is that you know that you must first get leave and show, on the balance of probability, that there is a case. The onus would move to DAERA to have to do that, rather than it being on an applicant who has been turned down by DAERA.

Mr Little: May I deal with it in another way, Patsy? Paragraph 4.5 of the consultation document that was issued in 2017 states:

> *"It is not enough to state that the Department's decision is incorrect. It is for the farmer to demonstrate how the initial decision is incorrect. It is important that they provide as much information and evidence as possible".*

The onus is therefore on the farmer. We view that it should read, "It is not enough to state that the independent panel's final decision is incorrect. It is for the Department to demonstrate in its response why it believes, legally, that the panel is wrong. Furthermore, those officials who have made that decision must be prepared to provide the legal information and evidence to the supreme panel and attend and support same in front of the SAAP should the applicant decide to appeal to the SAAP".

The Chairperson (Mr McAleer): OK. A couple more members are looking in.

Mr McGlone: Thanks in the meantime.

Mr Irwin: Thank you for your presentation. I know that you have laboured the question, but, as you know, two weeks ago, Dr Foy said to the Committee, on behalf of the Department, that the Department would take on board the recommendation of the Minister and would accept the independent panel's recommendations as final.

Mr Little: May I correct you? In response to you, he specifically said:

> *"Our position up to this point has been, and may continue to be, that we need to examine the panel's recommendations — at this point, they are still recommendations — to ensure that they are in keeping with the law".*

It was like the Minister's comment. He did not say to you that that will be the final decision and that there will be no legal challenge. That is the point that Jim and I want to drive through. If they were to change the legislation to let that occur, that would be fine. There would then be no need for a supreme panel.

Mr Irwin: OK. That makes it clear. That would be very important. We cannot have such a situation. For many years, I have highlighted the situation and represented people at independent panels and reviews. I have found that many farmers were left frustrated and angry by decisions. They thought that they had won their case only to find out a number of weeks later that the Department had overruled the independent panel’s decision.

That makes it clear. I understand where you are coming from now. It is very important that it be put into legal text that the independent panel's view is final. In that situation and if that were the case, you do not think that there would be a necessity to have a supreme panel.

Mr Little: If the legislation were absolutely clear and if the legal responsibilities and everything else were there, yes. The reason that we have this process instead of judicial review is that the next stage cannot be a £100,000 problem for an applicant. It simply cannot.

Mr Irwin: I accept that, and that is why there were so few judicial reviews. Many people cannot afford them.

Mr Little: Absolutely.

Mr Irwin: On the matter of historical cases, the Assembly was not in operation from 2017 for almost three years. A number of decisions were made during that time, one of which I have sitting on my desk. It is a similar situation, whereby the independent panel ruled in favour of a young farmer but the Department subsequently overruled. Can you see a way forward with that situation?

Mr Little: I will deal with that as a historical case. Some of you may have heard me on the 'Farm Gate' radio programme sandwiched between Jason Foy's evidence to yourselves and the Chair's comment about the mini-inquiry, where I referred to the number of people calling into Mr Shannon's office or into me or wherever. I will summarise that for you, and then deal with the point that Rosemary quite rightly raised the last time.

So far, 37 cases have come to Jim or me. There are cases from between 2001 and 2012, cases from 2012 up until 2017, and cases after 2017. I have heard of only six people so far who are prepared to go forward to a panel to have the decision challenged. In my view, we have sufficient evidence to justify that position. The vast majority of people are too scared of the Department or too scared of their wife to raise the issue again and have instead moved on with their life. I can relate to that. I referred earlier to the business banking scheme back to 2001. Although there is potentially a reservoir of

60,000 people involved, there are probably only 300 to 400 people affected. It will therefore not surprise you, I hope, that my provisional view is that, even if you were to let all those people go forward to the supreme panel with a historical case, I doubt whether there would be more than 10 or 12 cases taken.

A lot of you may decide, "Well, we don't legally need to do this, and it doesn't really matter". I can tell you that, for those 10 individuals, which probably includes the young farmer whom you just mentioned, this is something that they get up most days and think about. From a mental health point of view and whatever else, we should try to find a way of allowing those historical cases to be assessed.

I have also had a whole lot of people tell me that £1,500 is really too much in order to do it, yet, in the same breath, they tell me that they are owed £70,000 or £80,000. If they know how to make more money out of farming with that return and are confident of their position, that is up to them, but it is insane. If they are confident in their case and in what they are doing, they should have the confidence to go forward and spend £1,500 to do that. It is not a large amount of money to spend if the claim is greater than £5,000.

I will finish by saying that my current assessment is that I very much doubt whether the total value of all that will come forward — we will find out in the next month — will be more than the amount of money that has been wasted on judicial reviews by the Department or by the trade union on trying to support this. It will be less than half a million quid, but it is important to those individuals.

Mrs Barton: James and Brian, thank you very much for your presentation. It was informative and interesting.

I will continue on from what William was saying about the panel. Surely a simple answer, and you have partially answered it, would be what we already have for planning and benefits appeals, whereby the applicant who has been turned down appeals to the panel. The panel makes a decision, and if the Department does not like it, surely it is up to the Department to challenge it and not up to the applicant to have to go through another appeals process.

Mr Little: You make a very good point, Rosemary, about who should be the person to push that back. You have to allow applicants to say whether they want to continue to be involved in trying to defend or explain their position. You would have to substitute that individual for the independent panel justifying its position in law or something else. I can relate to what you are saying, but the point that I am making is that, ultimately, if DAERA says no and is prepared to challenge a decision, it has to be the applicant or the independent panel then to challenge that, and it could be either.

Mrs Barton: I imagine that it would be the independent panel.

Mr Little: Yes, that is —.

Mrs Barton: Surely the independent panel would do it.

Mr Little: Yes. You could have the independent panel present the position to the supreme panel.

The Chairperson (Mr McAleer): Are you happy enough, Rosemary?

Mrs Barton: Thank you. I have one more point, Chair. You are quite interested in historical cases. You believe that thought should be given to looking at historical cases, especially those from during the time when the Assembly was not sitting.

Mr Little: Rosemary, I believe that cases should be looked at in their entirety. I am largely coming at it from the point of view of what is fair and reasonable. A fortnight ago, you asked a very good question about what the position is in the devolved Governments etc. You were told that, with the exception of our country, all the other countries' Ministers are involved. A couple of weeks ago, Jim Shannon was able to confirm to me that, in both England and Wales, Ministers sign off these things. You have probably already seen this in Hansard, but subsequent research found that, in 2012, that was essentially changed here. I therefore question why, if there had never been any political discussion or debate on the issue, the Minister suddenly came out of the loop. Harry previously asked a question — I did not realise its significance at the time — about whether we have ever had the Minister challenge an independent panel, and the short answer is that, after 2012, Ministers did not see the decisions. As

Edwin basically said, "Now I know why nobody is giving me any of the things that the Department is turning down. People are not giving them to me".

Mrs Barton: Thank you.

Mr Blair: Brian mentioned comments and questions that I had raised about the appointment of panels.

Mr Little: Yes.

Mr Blair: I am keen to hear your take on it. I understand that there is, to some extent, a limit to the pool of available people. I also have concerns, because any panel that is taking decisions or making recommendations on legislative issues, especially where reimbursement is involved, should have a recorded appointments system, and there should be a level of accountability in that regard. My concerns are based on the lengthy duration of time that existing panels have served.

Mr Little: Yes. On your comment the last time, and the reply that you got from Gregor and co, I will say that the panels have been in existence, as you heard, for three to five-plus years. The Department is due to renew the panels' membership or decide what else to do in January 2022. Quite rightly, you asked about the public appointments process. I believe that Jason replied by saying that that all needs to be looked at. We certainly agree with that. The specific point that James and I probably want to emphasise is that we all need to recognise that there is a relatively small pool of capable people here. A pool of around 20 is probably sufficient, not only to support the independent panels but to provide the three additional members that would rotate, if you like, on the supreme panel, should that become something that has to be put in place.

Mr Blair: We can review that as we go forward. Thanks for that.

Mr Little: If those two particular individuals were to offer their services, they should be considered seriously by the Minister and the Committee as the people to deal with historical cases in particular and the probably very few cases going forward.

Mr Blair: Thank you.

The Chairperson (Mr McAleer): That is great. We have gone around the room, and all members have asked good questions, which have been well answered. Brian and James, thank you for your input.

I have one question to finish. Do you accept that the main issue is that the decision of the independent panel needs to be upheld? Do you broadly accept that view?

Mr Little: Yes. Absolutely.

The Chairperson (Mr McAleer): I think that that is the consensus around the room as well. Thank you very much. No doubt we will be in contact and have further engagement as time progresses.

Mr Little: If we can, we hope to engage with each of the stakeholders and with the Department to try to do as much behind the scenes as we can to work our way through this so that what comes out of the consultation is as high a level of consensus as we can get in order to make things as easy as possible.

The Chairperson (Mr McAleer): Brilliant. We will also consider your evidence as part of our wider work with other stakeholders. Thank you very much, Brian and James. It has been nice to put faces to the names.

Mr O'Brien: Thank you very much.

Mr Little: Thank you.