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Case No: CO/6923/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2016

Before :

MR JUSTICE EDWARDS-STUART

- -

Between :

The Queen **(on the application of Newby Foods Limited)**	**Claimant**
- and -	
Food Standards Agency	**Defendant**

- -
- -

Mr Hugh Mercer QC and Mr Andrew Legg (instructed by **Roythornes Limited**) for the **Claimant**
Mr Jason Coppel QC (instructed by **the Food Standards Agency**) for the **Defendant**

Hearing dates: 9th & 10th February 2016

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Approved Judgment

Mr Justice Edwards-Stuart:

1. This is the ninth judgment that I have given in this case. In the first judgment I referred certain questions of interpretation of the relevant EU regulation to the Court of Justice of the European Union ("CJEU"). That court has now given its judgment on the questions referred ("the Judgment"). My second judgment, dated 26 July 2013, concerned an application by the Claimant ("Newby") for interim relief pending the reference to the CJEU. This judgment concerns the application of the principles laid down by the CJEU in the Judgment to the process of separating fresh meat from flesh bearing bones of pork and from chicken carcasses carried out by Newby. However, to save the reader from reading the first and second judgments I shall summarise or repeat the relevant parts of them in this judgment.

2. Much of the meat that is on sale in today's shops in this country - and probably in other Member States of the European Union also - is the product of butchery by a machine, not by hand. According to the evidence in this case machines are not very efficient butchers, often leaving some 50% (and sometimes much more) of the meat on the bone. Unless this remaining meat is removed in some other way it will not be used as meat. It is, unfortunately, not cost effective in the mass market for this to be done by hand in the traditional way.

3. In the 1970s machines were developed that would crunch the bones and the residual meat against a perforated plate, with the result that the lean meat, fat and bone marrow would be extruded in a form of slurry with a viscosity not dissimilar to that of a puree. This is known as mechanically separated meat ("MSM"). The consumer would not describe it as fresh meat.

4. However, within a couple of decades improved machines had been developed which could remove the residual meat from the bone without crushing the bones or liquefying the meat. Newby has developed such a machine. By means of a vibrating piston, operating at a much lower pressure than the early crushing machines, the meat bearing bones are forced into contact with one another in such a way that most of the meat is removed from the bones by shearing forces. This meat, without any bone marrow, leaves the chamber via a perforated plate with 10 mm diameter apertures.

5. It is Newby's case that the product that emerges is clearly recognisable as meat. It can be teased apart to reveal whole pieces of meat up to about 100 mm or more in length. Newby submits that no-one would describe it as anything else.

6. The second stage in Newby's process is to pass this meat through another machine that is effectively a mincer with 3 mm apertures. The extruded product looks like ordinary mincemeat. This product is, or at least used to be, known in the UK meat trade as "desinewed meat" (or DSM) because, as with most meat mincing operations, a substantial amount of sinew and gristle is caught and left on the inside of the machine.

7. "Desinewed meat" is or used to be regarded by many, including the Defendant, the Food Standards Agency ("FSA"), as being quite different from MSM produced by the high-pressure process described in paragraph 3 above.

8. Newby was represented, as before, by Mr Hugh Mercer QC and Mr Andrew Legg, instructed by Roythornes (there has in fact been no change of solicitor because the

partner concerned, Mr Russ, has moved firms), and the FSA was represented by Mr Jason Coppel QC, instructed by the FSA.

The issue

9. The principal issue concerns the correct classification of the product that results from the process carried out by Newby to remove meat from flesh bearing bones. This is because on 4 April 2012 the FSA issued a moratorium on the production of DSM from the flesh of ruminant animals and, in the case of DSM produced from pigs, from marketing it under any description other than as MSM. Newby challenged the second part of that decision, a challenge which it maintains in the light of the Judgment of the CJEU. Newby's case is that the product of the first stage of its process is not MSM and that the FSA's moratorium was based on an error of law.

10. The moratorium was in these terms:

> "The UK has been required to re-classify the process by which a very small part of its meat processing industry removes meat from animal bones.
> The European Commission has asked that a moratorium is put in place on the production of 'desinewed meat' (DSM) from cows and sheep.Desinewed meat is produced using a low pressure technique to remove meat from animal bones. The product closely resembles minced meat, is currently a meat preparation and is regarded as meat.
> DSM has been produced in the UK since the mid-1990s. UK producers have told us that DSM is also exported by other EU countries such as Germany, the Netherlands and Spain.
> The Food Standards Agency (FSA) is clear that there is no evidence of any risk to human health from eating meat produced from the low-pressure DSM technique. There is no greater risk from eating this sort of produce than any other piece of meat or meat product. The European Commission has informed us today they do not consider this to be an identified public health concern.
> However, the European Commission has decided that DSM does not comply with European Union single market legislation and has therefore required the UK to impose a moratorium on producing DSM from the bones of cows and sheep by the end of April. If the UK were not to comply with the Commission's ruling it would risk a ban on the export of UK meat products, which would have a devastating impact on the UK food industry.
> DSM may still be produced from poultry and pig bones but from the end of May it must be classed and specifically labelled as 'Mechanically Separated Meat' (MSM), and can no longer count towards the meat content of a product."

11. Regulation (EC) No 853/2004 of 29 April 2004 lays down "specific hygiene rules for food of animal origin". Annex I to the Regulation contains definitions. By paragraph (or point – the CJEU's terminology) 1.14:

> "'Mechanically separated meat' or 'MSM' means the product obtained by removing meat from flesh-bearing bones after boning or from poultry carcasses, using mechanical means resulting in the loss or modification of the muscle fibre structure."

By paragraph 1.15

> "'Meat preparations' means fresh meat, including meat that has been reduced to fragments, which has had foodstuffs, and seasonings or additives added to it or which

> has undergone processes insufficient to modify the internal muscle fibre structure of the meat and thus to eliminate the characteristics of fresh meat."

12. It is clear from the Judgment that the CJEU considers that the product of the first stage of Newby's process should be classified as MSM. However, Newby submits that in the light of the CJEU's interpretation of paragraph 1.14, this is not an available conclusion on the facts. Newby submits that establishing the facts is the province of the national court, not the CJEU. The questions for this court are whether those two submissions are correct and, if so, whether on the facts before this court the product of Newby's process must be described as MSM.

13. It is also clear from the Judgment that the CJEU considers that the product of the first stage of Newby's process is not to be classified as a "meat preparation". I shall have to consider that point as well.

14. Although in its skeleton argument the FSA submitted that, in the light of the Judgment, "*the legal position as regards the classification of DSM is unsatisfactory, but clear*", Newby asserts that the reasoning in the key parts of the Judgment is not at all clear but that, to the extent that it is intelligible, it must be applied in Newby's favour. During the course of Mr Coppel's oral submissions I detected some sympathy for the first part of this assertion. The Commission was invited to attend but was not represented at this hearing.

The positions of the parties prior to the Judgment

15. I set this out in my second judgment, dated 26 July 2013, at paragraphs 10-16:

> 10. The view taken by the EU Commission, as stated in written evidence from the Director-General of the Health and Consumers Directorate-General to the House of Commons Environment, Food and Rural Affairs Committee, is "that <u>any</u> loss or modification of the muscle fibre structure" results in a product that must be considered to be MSM. It was stated also in the same document that "MSM is very sensitive to bacterial growth because of the raw material and the production process involved".
>
> 11. The claimant's position, which until early 2012 was also the position taken by the FSA, is that it is only if there is <u>significant</u> "loss or modification of the muscle fibre structure", the product is to be treated as MSM.
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> 12. In support of this position, the claimant submits that a change is significant only if it is sufficient "to eliminate the characteristics of fresh meat" and thus takes the product out of the definition of "meat preparations" in paragraph 1.15. Thus the principal issue between the parties (or, more accurately, between the Claimant and the Commission) is the correct interpretation of paragraphs 1.14 and 1.15 of the Regulation.
>
> 13. The Claimant submits also that to treat desinewed meat as MSM results in a substantial waste of meat that is acceptable for human consumption as fresh meat.
>
> 14. The evidence before the court shows that loss or modification of the muscle fibre structure of meat can be the result of many processes: for example, freezing and thawing, chopping and mincing. But each of the processes of freezing/thawing, chopping and mincing of fresh meat does not usually eliminate the characteristics of that meat: I do not imagine that anyone would suggest that a steak tartare is not

fresh meat, but on the evidence in this case the process of chopping the beef would cause some measurable loss or modification of the muscle fibre structure. The meat used in steak tartare is not classified as MSM because it does not fall within the opening words of paragraph 1.14 of Annex I to the Regulation, not because there has been no loss or modification of the muscle fibre structure.

15. Thus the effect of the Commission's interpretation of paragraph 1.14 of Annex I to the Regulation is that any mechanical separation of meat from the bone after initial deboning, even if carried out without any damage to the bones themselves or extraction of bone marrow, will produce a product that has to be classified as MSM. That greatly reduces its commercial value.

16. The Commission would doubtless say that the merit of its approach is that it is clear: there can be no room for misunderstanding. By contrast, the approach contended for by the claimant, formerly supported by the FSA, means that whether or not the product of the mechanical separation is to be classified as MSM has to be the result of an individual assessment of the results of the particular process employed.

16. At paragraphs 35-39 of my first judgment, I dealt in some detail with the events of the first part of 2012:

35. On 14 March 2012 the FVO [Food and Veterinary Office] auditors held their closing meeting with the FSA. An internal FSA email set out a brief record of the meeting in the following terms:

> "In summary, there was an underlying position from the FVO auditors that they do not recognise desinewed meat (DSM) as a legally acceptable term for product derived from meat from flesh bearing bones and obtained with the aid of mechanical means, irrespective of the degree to which the muscle fibre structure is modified or lost. This contrasts with the UK position where, having met the first two criteria, a DSM product can be obtained depending on the degree to which the muscle fibre structure is modified. Consequently, the FVO consider all of the DSM they saw during the course of the audit as MSM and many, but not all, of their comments arose as a result of this stance."

36. This confirms that it was the FVO's view that <u>any</u> modification of muscle fibre structure visible on microscopy analysis meant that the product had to be classified as MSM.

37. On 28 March 2012, Paola Testori Coggi, Director-General of the Health and Consumers Directorate-General, wrote to the UK Permanent Ambassador to the EU in the following terms:

> "… the findings and the preliminary assessment of the audit indicate a number of serious failures with regard to the interpretation and implementation of the above-mentioned rules by the UK authorities, which result in a violation of EU health requirements as laid down in Regulation (EC) No 853/2004 on hygiene rules for food of animal origin and in Regulation (EC) No 999/2001 on rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies, and poses a risk for public health in the UK and in other member states.

> … The production and placing on the market of a product category ('desinewed' meat) that the UK authorities erroneously consider not to fall under the definition of mechanically separated meat (MSM) as referred to in Regulation (EC) No 853/2004. The FSA UK guidance paper on this subject indicates that 'desinewed' meat would rather qualify as 'meat preparation' as the muscle fibre structure is not modified by the mechanical separation process but the audit team found consistent evidence that this product always shows modification of this structure;
>
> …
>
> As my colleagues indicated to UK officials during the above-mentioned audit, the interpretation given by the UK authorities to the provisions applicable to MSM is not correct. Such interpretation and the manufacturing practices which are based on it, have potentially very serious adverse consequences for public health and must be discontinued as a matter of urgency."

38. The letter did not explain precisely what the public health risk was or how it was said to arise.

39. On 30 March 2012, representatives of the FSA and the Commission met in Brussels. The Commission's team was led by Dr. Van Goethem. According to the FSA's note of the meeting, the FSA set out its view that there was no evidence that desinewed meat posed a risk to consumers. In return for imposing a moratorium, the FSA asked the Commission to undertake to provide a risk assessment of desinewed meat. However, the Commission was not prepared to negotiate. Dr. Van Goethem said that the Commission wished to see an immediate ban on the use of ruminant bones and the reclassification of desinewed meat as MSM or they would introduce safeguard measures, which would have very severe consequences for the UK meat industry.

17. Faced with this stance by the Commission the FSA issued the moratorium on 4 April 2012 in the terms set out at paragraph 10 above. My first judgment then continued as follows:

> 42. The following month the FSA produced a document giving guidance on the moratorium, which concluded its explanation of the background to the moratorium in these terms:
>
> > "There is no evidence of any increased food safety risks associated with non-ruminant DSM obtained by mechanical separation or the process by which it is produced. There has, however, been a difference in interpretation of the definition of 'mechanically separated meat' (MSM) in EU law between some European member states, including the UK, and the European Commission."
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> 43. In a similar vein, in the action plan prepared by the United Kingdom competent authorities in response to the report of the FVO auditors, under the heading "Action Proposed by the Competent Authority" the FSA said this:
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> > "The Food Standards Agency disagrees with the phrase in the recommendation '**avoid risks to public health**'. It was agreed at a meeting between Food Standards Agency Chief Executive Tim Smith and Paola Testori Coggi, Director-General DG SANCO on 24 May 2012 that the reference to '**risks to public health**' should be removed from the report.

> The Food Standards Agency also disagrees that material produced under low pressure falls within the definition of MSM and instead considers it to fall within the definition of 'meat preparations'.
>
> However, in order to comply with the European Commission's interpretation of EU legislation, and further to discussion with the Commission, the UK introduced a moratorium on the production of desinewed meat from ruminant bones on 28 April 2012 …"
>
> (Original emphasis)

44. On 15 May 2012 Mr. Tim Smith, the Chief Executive of the FSA, gave evidence to the House of Commons Environment, Food and Rural Affairs Committee. He said this:

> "It is easy to look back with hindsight. … What they were intending to do, in my opinion, having read their brief, was effectively to look at the processes - the low pressure methods for separating meat from meaty bones. We are talking here about bones that are sometimes 80% meat, which normally, 10, 20 years or even longer ago, would have been boned out by people with knives. There is now equipment that does that.
>
> What they were intending to do was to determine whether the muscle fibres were being damaged sufficiently to cause that to be mechanically separated meat, rather than meat that would have been boned out in the normal way. Our view was that Newby Foods and others, which have done an excellent job of innovating in this area, would be able to demonstrate, using the Leatherhead method, with histology and microscopy, that the muscles are not being damaged. We were confident that the industry was in a strong position to demonstrate that this meat was meat and not mechanically separated meat."

A little later, in answer to a question from the Chair, Amber Rudd MP, "Do you remain satisfied, Mr. Smith, that desinewed meat is no public health risk?", Mr. Smith said:

> "I do, yes. The way that the industry has approached this innovative way of effectively harvesting meat from meaty bones is entirely sensible. It is only the same as having lots of people with lots of knives at the end of the line. It is no different from that process."

45. In its written submissions to the Committee, the FSA said that in 2011 the consumer group "Which?" conducted research into consumer attitudes to meat products, including DSM. It said that this research found that consumers viewed DSM as being distinct from MSM and thought that it should count towards the meat content of the final product, whilst being identified separately as an ingredient on the label.

46. Evidence from the Commission given to the Committee in May 2013 makes it abundantly clear that the production of desinewed meat or MSM from pigs and poultry does not raise any risk to public health. So far as pigs and poultry are concerned, it is an issue about labelling. The Commission believes that it must be labelled as MSM, so that the meat content of the product attributable to the MSM must be shown as 0%.

18. I have set all this out in order to make three points. First, it is clear that the Commission has, throughout, adopted what one might call a zero tolerance approach to the process

of mechanically separating meat from flesh bearing bones, even the process used by Newby. That approach was simple: if there was any evidence of loss or modification of the muscle fibre structure in the meat produced by the process, it was condemned as MSM. There was, at that stage, no concession in relation to any such loss or modification that occurred at the point of cutting. This in itself produced a contradiction because such loss or modification that inevitably occurred at the point of cutting of meat from poultry carcasses was simply ignored. The second point is that this dispute is all about labelling: there is no evidence whatever that, so far as pigs and poultry are concerned, there is any issue about public health. The third point is that at no stage does the Commission appear to have paid any regard to the substantial wastage of edible meat that its approach involves. The fact that environmental considerations have now to be taken into account under European Law does not appear to have featured in the Commission's deliberations.

19. The written evidence of the British Meat Processing Association ("BMPA") to the House of Commons Committee in 2012 was that before the moratorium the value of bones used in the production of DSM had ranged from about £100-£300 per tonne depending on the species. It was assessed that since the moratorium the value of pork bones would be substantially reduced - according to one estimate, by up to 50% - and that the value of poultry bones could be halved. Putting it another way, the BMPA estimated that domestic production of DSM from all species was about 600 tonnes per week, representing 133,000 animals slaughtered per week. However, these figures included DSM produced from ruminants, particularly cattle and sheep, which presumably formed a very substantial part of the total. Nevertheless, it is clear that substantial numbers of pigs or poultry will have to be slaughtered every year in order to make up for the shortage of meat if all DSM as to be classified in MSM. The Commission cannot have been unaware of this.

The relevant European legislation

20. Article 267 of the Treaty on the Functioning of the European Union ("TFEU") includes the following provisions:

> "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaty;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon."

21. Article 11 of TFEU provides:

> "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."

22. Article 191 of TFEU, which appears under the heading "Environment" includes this provision:

> "1. Union policy on the environment shall contribute to pursuit of the following objectives:
> - preserving, protecting and improving the quality of the environment,
> - protecting human health,
> - prudent and rational utilisation of natural resources"

23. Article 37 of the Charter of Fundamental Rights of the European Union, which is headed "Environmental protection" and, on 1 December 2009, became legally binding on the EU institutions and on national governments with the entry into force of the Treaty of Lisbon, provides:

> "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

The English authorities

24. In *R v Secretary of State for Transport ex p Factortame (No 5)* [2000] 1 AC 525, Lord Hope said, at 550A-C:

> "In various passages elsewhere in the judgment the court expressed its opinion about the nature of the breach for the consequences of which the respondents are claiming damages. But I would not be inclined to attach much importance to these expressions of opinion, because in para 58 of the judgment the court made clear that it was for the national courts to assess the seriousness of the breach. The national courts have the sole jurisdiction to find the facts in the main proceedings. It is for them to decide how to characterise the breaches of Community law which are in issue."

25. In *Arsenal Football Club v Reed* [2003] 2 CMLR 25, Aldous LJ, with whom Clarke and Parker LJJ agreed, in relation to the jurisdiction of the ECJ said this, at paragraphs 25 and 26:

> "25.. . . There was no dispute between the parties that on a reference under Art.234 EC, the purpose of the ECJ is "to decide a question of law that the ruling is binding on the national court as to the interpretation of the community provisions and acts in question". Even so, the ECJ has jurisdiction to review the legal characterisation of facts found by the national court. Also the ECJ has in the past provided guidance in order to enable the national court to give judgment. On occasions it has "steered" the national court for the purpose of unified application of the law. However, as the House of Lords made clear in *R v Secretary of State for Transport Ex P Factortame (No 5)*, the English court is not bound by that steer and therefore, with hesitation, could conclude the case in a different way. It is the national court alone that must find the facts.
> 26. It follows that the judge was entitled to disregard any conclusion reached, in so far as it was based upon a factual background inconsistent with his judgment. Thus, upon his perception of the ECJ's judgment, he was entitled to disregard the conclusion in the ruling and decide the case upon the legal principles stated in the judgment of the ECJ."

26. Mr Coppel accepted that this authority was relevant, but he relied on the reference to the ECJ reviewing "*the legal characterisation of facts found by the national court*" and submitted that that was all that the CJEU had done in this case. However, as Mr Mercer pointed out, the authority cited for that particular proposition, *Camar & Tico v The Commission* C-312/00 P (although the "P" - indicating an appeal - was left out of the citation), was in fact a case involving an appeal to the Court of Justice against a decision of the Court of First Instance of the European Communities (Fourth Chamber). What the court said, at paragraph 69 under the heading "Findings of the Court", was this:

> "With regard to the admissibility of this ground of appeal, while it is true that under Article 225 EC and Article 51 of the EC Statute of the Court of Justice an appeal lies on a point of law only and that, therefore, the Court of First Instance has, in principle, sole jurisdiction to find and appraise the facts, the Court of Justice nevertheless has jurisdiction to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them . . ."

Mr Mercer submitted the reference to the "national court" in the judgment of the Court of Appeal, at least in so far as it was relying on the case cited, was wrong because the court referred to in the judgment in *Camar & Tico* was the European Court of First Instance, not a national court. However, it is clear that in each case the lower or national court had the sole jurisdiction "to find and appraise the facts", so whether this really makes any difference may be open to question. But, whichever way one looks at it, in my view reviewing the "legal characterisation" of facts is not the same thing as finding the facts. If the national court finds that a disputed vegetable is a potato, I do not see how any amount of "legal characterisation" by the CJEU can turn it into a tomato. However, I can see no reason why the CJEU should not find that both a potato and a tomato share some common legal characteristic by reference to Community law.

27. In *HMRC v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15, Lord Reed said, at paragraph 54:

> "Article 267 TFEU confers on the Court of Justice jurisdiction to give preliminary rulings concerning (a) the interpretation of the Treaties and (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. In the present case, it is the court's jurisdiction to rule on the interpretation of the VAT directive which is relevant. On the other hand, putting the matter very broadly, the evaluation of the facts of the case, and the application of EU law to those facts, are in general functions of the national courts. The relevant principles were summarised more precisely by the Court of Justice in *AC-ATEL Electronics* . . ."

That was a case where the Supreme Court considered that elements had been left out of account by the Court of Justice and said that it was the duty of the national court to consider all the facts found by the lower tribunal, and the questions and arguments that arose out of them, but to do so in the light of such guidance as to the law as could be derived from the judgment of the Court of Justice. Mr Coppel submitted that this was an authority of limited relevance to the questions in the present case, is a submission with which I am inclined to agree.

The European authorities

28. In *Walrave v Association Union Cycliste Internationale*, C-36/74 [1974] ECR 1405, a question arose about the freedom of movement for workers within the community and, in particular, the question of whether a provision in the rules of the Union Cycliste Internationale which required the pacemaker to be of the same nationality as the competitor (or stayer) was consistent with Community law. At paragraph 10 of the judgment of the Court, it said this:

> "Having regard to the above, it is for the national court to determine the nature of the activities submitted to its judgment and to decide in particular whether in the sport in question the pacemaker and stayer do or do not constitute a team."

29. Mr Coppel submitted that, being an old decision, this was of limited assistance. But, in any event, he said it was not a case where the CJEU could have decided any questions of fact on the material before the court.

30. In *Anita Cristini v Society Nationale des Chemins de Fer français* C-31/75, the court said at paragraph 6 of its judgment:

> "Although the Court, when giving a ruling under Article 177, has no jurisdiction to apply the Community rule to a specific case, or, consequently, to pronounce upon a provision of national law, it may however provide the national court with the factors of interpretation depending on Community law which might be useful to it in evaluating the effects of such provision."

However, that was a case where the court was in practice able to decide the merits of the dispute before it albeit, as Mr Coppel put it, at one level of abstraction.

31. In *Benedetti v Munari* C-52/76, the court said, at paragraph 25:

> "Within the framework of proceedings under Article 177, it is not for the Court of Justice to interpret national law and assess its effect. Therefore, within that framework, it cannot make a comparison of any kind whatsoever between the effects of the decisions of the national courts and the effects of its own decisions."

Mr Mercer relied on this passage which, he submitted, made the position clear. However, Mr Coppel submitted that the decision was of limited assistance, because the court was being asked about a question of national law.

32. In *Pabst & Richarz KG v Hauptzollamt Oldenburg* C-17/81, the court said, at paragraph 12:

> "It is, however, not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have the judgment which is required to deliver."

Mr Coppel submitted that this passage had to be read in its context, which was that the claimant had changed his case in the course of the proceedings before the court.

33. In *Enderby v Frenchay Health Authority* C-127/22, the Court said, at paragraph 10:

> "The Court has consistently held that Article 177 of the Treaty provides the framework for close cooperation between national courts and the Court of Justice, based on a division of responsibilities between them. Within that framework, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the question which it submits to the Court . . . Accordingly, where the national court's request concerns the interpretation of the provision of Community law, the Court is bound to reply to it, unless it is being asked to rule on a purely hypothetical general problem without having available the information as to fact or law necessary to enable it to give a useful reply to the questions referred to it . . ."

34. Mr Mercer made the point that the reference to "having available the information as to fact" in the last sentence of the passage was made in the context of the court being asked to respond to a purely hypothetical general problem: it cannot be read as indicating that the court was assuming some jurisdiction over questions of fact. In other words, as Mr Mercer put it, the purpose of putting facts before the Court was to enable it to put its statements of law into a factual context.

35. In *AC-ATEL Electronics* C-30/93, at paragraphs 16-18, the court said:

> "16 On that point, it should be borne in mind that Article 177 of the Treaty is based on a clear separation of functions between the national courts and the Court of Justice, so that, when ruling on the interpretation of validity of Community provisions, the latter is empowered to do so only on the basis of the facts which the national court put before it . . .
> 17. It is not for the Court of Justice, but for the national court, to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (see the judgment in Case 17/81 *Pabst & Richarz KG v Hauptzollamt Oldenburg* [1982] ECR 1331, paragraph 12).
> 18. It is, moreover, solely for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the question which it submits to the Court . . ."

36. Mr Coppel sought to brush these two authorities aside on the basis that they were more concerned with problems that arose when the national court did not ask the right questions. However, it seems to me that paragraphs 16 and 17 in *AC-ATEL* are unambiguous and make it very clear that fact-finding is the province of the national court, and not that of the CJEU. This conclusion is in keeping with the other authorities that I have already cited.

37. In these circumstances, to the extent that the CJEU has decided, or appears to have decided, any questions of fact in respect of which the primary evidence is before this court, it is this court, and not the CJEU, that must be the ultimate arbiter of those facts.

38. I should add that Mr Coppel referred me to "Preliminary References to the European Court of Justice", 2nd edition, 2013, by Morten Broberg and Niels Fenger. At paragraph 3.1 the authors say this:

> "On this basis, the Court of Justice has long been moving towards a more concrete style of interpretation, where the preliminary ruling is formulated in a manner that takes into account relevant aspects of the facts in the main proceedings and of the national law. Thereby, depending on the circumstances, an interpretation will be given which is still formulated in abstract terms but which in reality is tantamount to application. This is regularly expressed in the rulings themselves in the formulation whereby a given factual and legal situation such as the one before the referring court, is or is not in accordance with EU law. Indeed, sometimes the Court of Justice states that even if the actual application is a matter for the jurisdiction of the national court, the Court of Justice has enough information to decide the application of the law itself."

39. Whilst I will bear those observations in mind, as will appear from the reasons that I give later in this judgment I do not consider that this is a case in which the CJEU was in a position to make findings of fact on the material before it so as to supplant the function that properly rests with the national court.

The relevant EC regulations

40. I set out below the provisions that are of particular relevance to the Judgment and the issues before this court.

41. The definitions in Annex I to Regulation 853/2004 (the hygiene rules for foods of animal origin) that are of particular significance in relation to meat, which is defined as the edible parts of certain animals, are paragraphs 1.10 and 1.13 - 1.15. Although I have already quoted from two of them, for convenience I will set them out again:

> "1.10 "Fresh meat" means a meat that has not undergone any preserving process other than chilling, freezing or quick-freezing, including meat that is vacuum-wrapped or wrapped in a controlled atmosphere.
>
> 1.13 "Minced meat" means boned meat that has been minced into fragments and contains less than 1% salt.
>
> 1.14 "Mechanically separated meat" or "MSM" means the product obtained by removing meat from flesh-bearing bones after boning or from poultry carcasses, using mechanical means resulting in the loss or modification of the muscle fibre structure.
>
> 1.15 "Meat preparations" means fresh meat, including meat that has been reduced to fragments, which has had foodstuffs, seasonings or additives added to it or which has undergone processes insufficient to modify the internal muscle fibre structure of the meat and thus to eliminate the characteristics of fresh meat."

Processed products from meat are defined, at paragraph 7 .1, as:

> "Meat products" means processed products resulting from the processing of meat or from the further processing of such processed products, so that the cut surface shows that the product no longer has the characteristics of fresh meat."

42. The definitions in Article 2 of Regulation No 852/2004 contain the following definitions:

> ". . .

> (m) "processing" means any action that substantially alters the initial product, including heating, smoking, curing, maturing, drying, marinating, extraction, extrusion or a combination of those processes;
> (n) "unprocessed products" means foodstuffs that have not undergone processing, and includes products that have been divided, parties, severed, sliced, boned, minced, skinned, ground, cut, cleaned, trimmed, husked, milled, chilled, frozen, deep-frozen or thawed;
> (o) "processed products" means foodstuffs resulting from the processing of unprocessed products. These products may contain ingredients that are necessary for their manufacture or to give them specific characteristics."

43. Chapter II of Section V of Annex III to Regulation 853/2004 includes the following provisions in relation to the requirements for raw material:

> "1. The raw material used to prepare minced meat must meet the following requirements.
>
> (a) It must comply with the requirements for fresh meat;
> (b) It must derive from skeletal muscle, including adherent fatty tissues;
> (c) It must not derive from:
> (i) scrap cuttings and scrap trimmings (other than whole muscle cuttings);
> (ii) MSM;
> (iii) meat containing bone fragments or skin;
> or
> (iv) meat of the head with the exception of the masseters, the non-muscular part of the *linea alba*, the region of the carpus and the tarsus, bone scrapings and the muscles of the diaphragm (unless the serosa has been removed)."

The questions referred

44. These were referred by my judgment dated 26 July 2013 and were (as tidied up by the Court) as follows:

> (1) Do the words "loss or modification of the muscle fibre structure" in [point] 1.14 of Annex I to Regulation (EC) No 853/2004 [(the same words appearing also in article 3(n) of Regulation No 999/2001)] mean "any loss or modification of the muscle fibre structure" that is visible using standard techniques of my microscopy?
> . . .
>
> (2) Can a meat product be classified as a meat preparation within [point] 1.15 of Annex I [to Regulation No 853/2004] where there has been some loss or modification of its muscle fibre structure that is visible using standard techniques of microscopy?
>
> (3) If the answer to [the first question] is no and the answer to [the second question] is yes, is the degree of loss or modification of the muscle fibre structure that is sufficient to require them each product to be classified as [mechanically separated meat] within [point] 1.14 of Annex I [to Regulation No 853/2004] the same as that required to eliminate the characteristics of fresh meat within [point] 1.15 [of that annex]?
>
> (4) To what extent must the characteristics of fresh meat have been diminished before they can be said to have been eliminated within the meaning of [point] 1.15 [of Annex I Regulation No 853/2004]?

> (5) If the answer to [the first question] is no, but the answer to [the third question] is also no, what degree of modification to the muscle fibre structure is required in order for the product in question to be classified as [mechanically separated meat]?
>
> (6) On the same assumption, what criteria should be used by national courts in determining whether or not the muscle fibre structure of the meat has been modified by that degree?

45. In fact, as will appear, the CJEU did not answer the questions precisely as they were posed.

The Judgment of the CJEU ("the Judgment")

46. The decision is a judgment of the Tenth Chamber, a court of three judges. The court did not elect to have an opinion from the Advocate-General suggesting, submitted Mr Mercer, that it thought that the questions referred to it were fairly straightforward.

47. The first part of the Judgment (paragraphs 3-17) contains an impressive summary of the EU provisions in relation to hygiene, labelling and TSE so far as they concern meat. However, there is no mention of any parts of the primary legislation relating to environmental considerations: for example, Articles 11 and 191 of the TFEU.

48. From the extracts from the documents referred to in paragraphs 18 and 19 of the Judgment, it must have been clear to the Court that Newby's process involved passing bones which had meat attached through a low pressure machine. Indeed, the extracts from the evidence given by the FSA in May 2012 to the House of Commons Environmental, Food and Rural Affairs Committee, which I set out in my first judgment, showed that the product fed into Newby's machine was sometimes 80% meat. Other evidence indicated a range of 50-80% meat.

49. Accordingly, from the material set out in my first judgment the Court should have been in no doubt that the process under review involved bones which had a substantial amount of skeletal muscle fibre still attached to them.

The first requirement of paragraph 1.14 of the regulation

50. At paragraph 40 of the Judgment the Court described the essential question as whether paragraphs (or points) 1.14 and 1.15 of Annex I to Regulation No 853/2004

> ". . . must be interpreted as meaning that the product obtained by the mechanical removal of meat from flesh-bearing bones after boning or from poultry carcasses must be classified as "mechanically separated meat" within the meaning of that point 1.14 only where the process used results in a loss or modification of the muscle fibre structure which is significant, while a classification as "meat preparations" within the meaning of point 1.15 must be chosen where that loss or modification is not significant."

51. At paragraphs 41 - 43 of the Judgment, the Court went on to say:

> "41 It must be stated at the outset that the definition of the concept of "mechanically separated meat" set out in point 1.14 of Annex I to Regulation No 853/2004 is based on three cumulative criteria which must be read in conjunction with one another, namely (i) the use of bones from which the intact muscles have already been detached, or of poultry carcasses, to which meat remains attached, (ii)

> the use of methods of mechanical separation to recover that meat, and (iii) the loss or modification of the muscle fibre structure of the meat thus recovered by reason of the use of those processes. In particular, that definition does not make any distinction as regards the degree of loss or modification of the muscle fibre structure, with the result that any loss or modification of that structure is taken into consideration within the context of that definition.
>
> 42 Consequently, any meat product which satisfies those three criteria must be classified as "mechanically separated meat", irrespective of the degree of loss or modification of the muscle fibre structure, in so far as, by reason of the process used, that loss or modification is greater than that which is strictly confined to the cutting point.
>
> 43 In the case of use of mechanical processes, that third criterion allows "mechanically separated meat" within the meaning of point 1.14 of Annex I to Regulation No 853/2004 to be distinguished from the product obtained by cutting intact muscles; the latter product does not show a more general loss or modification of the muscle fibre structure, but reveals a loss or modification of the muscle fibre structure which is strictly confined to the cutting point. Consequently, chicken breasts which are detached from the carcass of the animal by mechanically operated cutting rightly do not constitute mechanically separated meat."

52. The meat produced as a result of Newby's process includes muscle fibre. That is clear from examination by microscopy and, anyway, if it were otherwise there would be no need to consider the extent to which the meat had suffered a loss or modification of its muscle fibre structure as a result of the process. Indeed, as already mentioned, the flesh bearing bones used in Newby's process are often more than 50% meat. One difficulty with the CJEU's formulation of the first criterion in paragraph 41 of the Judgment is that if some of the muscle fibre remains attached to the bones used in the process, as it clearly does, it is difficult to see how that part of the muscle fibre that has been detached can be described as "intact". I would have thought that it was, by definition, not intact because part of it is still attached to the bone.

53. Newby makes a rather different point. It submits that since the original product that is fed into Newby's machine consists of bones with a fairly substantial amount of meat attached, it does not consist of "bones from which the intact muscles have already been detached". Accordingly, submits Newby, it does not fall within the first criterion as formulated by the CJEU.

54. In a guidance note issued by the FSA in 2003, cited at paragraph 18 of the Judgment, the FSA described "desinewed meat" as:

> "Products obtained by mechanical deboning, which remove[s] definitive pieces of meat from meaty bones or carcass, **which may or may not have had the primal muscles previously removed**, such that the muscle fibre structure of the meat is substantially intact are not considered to be [mechanically separated meat]. This meat may then be desinewed and have the appearance of finely minced meat."
>
> (My emphasis)

55. Thus the first criterion in paragraph 41 of the Judgment does not sit easily with this guidance note with its reference to the bones used in processes such as that used by

Newby being bones "*which may or may not have had at the primal muscles previously removed*".

56. It appeared to be common ground that many of the skeletal muscles in pigs and poultry are relatively large. For example, I understood it to be accepted that the cut part of the breast of a chicken is either one or two muscles the inner part of the breast, sometimes called the "tender", may be a second muscle.

57. Taking an example from a pig, the meat of the loin which lies inside a rack of pork (the rib bones before they are separated) is one muscle.[1] Once the rack is cut so as to be divided into chops (with the meat still on the bone), the central muscle is no longer intact. However, the process of cutting would not damage the muscle fibre structure of the meat except at the point of cutting. Suppose that a single chop is then badly boned so that much of the meat is still left attached to the bone and that this residual meat is then removed from that bone by the process used by Newby. I do not see how that bone could be described (immediately before the process) as one from which "*the intact muscles have already been detached*". I understand that many of the bones used by Newby are similar to the pork chop used in my example. [2]

58. At paragraph 63 of the Judgment the Court said this:

> "Those recitals [(1) and (7) in the preamble to Directive 2001/101] express the finding that, although mechanically separated meat is technically fit for human consumption in so far as it is not obtained from ruminants, it is nonetheless a product of inferior quality because it consists of residual meat, fat and connective tissue which remain attached to the bones after the main part of the meat has been removed."

I should explain that Directive 2001/101 is concerned with labelling, and recitals (1) and (7) are in the following terms:

> "(1) . . . [T]he definition [of meat which was drawn up for the purposes of hygiene and protection of public health] covers all parts of animals which are fit for human consumption. It does not correspond, however, to the consumer's perception of meat and does not inform the consumer as to the real nature of the product designated by the term "meat".
>
> (7) Mechanically recovered meat [the former term for MSM] differs significantly from "meat" as perceived by consumers. It should therefore be excluded from the scope of the definition."

59. At paragraph 23 of his skeleton argument on behalf of the FSA, Mr Coppel gave this explanation of what the court meant at paragraph 41:

> "(2) [Newby's] argument in any event rests on a patent misinterpretation of the CJEU's judgment. The CJEU did not refer in §41 to bones with no muscle attached to them but bones from which the intact muscles had been detached. The "intact muscles" are muscles before the animal carcass is cut: see the reference to the production of chicken breasts in §43, a process which is effected by cutting

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1 This is an over simplification, because there are separate, intercostal, muscles between each of the rib bones.

2 As shown by the photographs at Figures 2 and 3 in Mr Manning's seventh witness statement.

> intact muscles. Once the animal is boned or butchered, whether by hand or by machine, the muscles are no longer intact. Bones carrying residual muscle meat which is left after cutting satisfy the first criterion for the production of MSM."

60. Even if Mr Coppel is right, in that once the carcass has been cut into the main sections prior to detailed butchery the muscles are no longer intact, I have some difficulty in reconciling this with the CJEU's formulation of the first criterion because Mr Coppel is referring only to the cutting of muscles, not to their removal from the bones.

61. Paragraph 23 of Mr Coppel's skeleton argument continued as follows:

> "(3) That reading is consistent with §63 of the CJEU's judgment where it refers, again in the context of the definition of MSM, to the processing of "residual meat, fat and connective tissue which remain attached to the bones after the main part of the meat has been removed". That is an accurate description of the "meaty bones" which are in fact used by Newby."

62. In my view, this does not really assist because it depends on what one means by "residual meat". The rather pejorative tone of the CJEU's description in paragraph 63 of the Judgment implies that the proportion of meat left on the bones is fairly small. However, that does not reflect the evidence which, as I have already recorded, is to the effect that the bones used by Newby often consist of at least 50% meat.

63. Further the evidence is that the meat which results from the first stage of the Newby process is a product of which an experienced observer would say: "*Those look like pieces of meat*"[3]. By contrast, the product of high pressure processes, in which both the meat on the bones are crushed, is something quite different - a distinction confirmed by evidence from the British consumer group "Which?" referred to by the House of Commons committee.

64. Mr Mercer reminded me that during the course of the hearings before me in June and July 2013 Newby put forward some amendments, one of which was that Newby's process did not meet the first requirement of the definition of MSM in paragraph 1.14, namely that the material was "flesh bearing meat and the bones after boning". Leaving aside the fact that this was a complete departure from the case that Newby had been advancing up to then, there was a further problem that I explained at paragraph 84 of my second judgment in these terms:

> "The second difficulty is that, if the assertion were correct, even the old high-pressure process of crushing the meat and bones to a slurry would not be capable of producing MSM because it, too, would not meet the first requirement of the definition. Any argument that leads to such obviously incorrect result must be flawed. In my view the flaw in the argument is that it involves the proposition that the process of deboning must involve the removal of the bulk of the meat that was originally attached to the bones. I do not see why this assumption has to be made; particularly, when if it is made, the result is an obviously incorrect conclusion."

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[3] That is effectively what Prof Groves (as she now is) said when she first saw the meat after the first stage of the Newby process: see paragraph 12 of her witness statement dated 28 June 2012. This is not consistent with this being the product of "residual meat, fat and connective tissue" as described in paragraph 63 of the Judgment.

65. Although it is not easy to follow what the Court intended to mean by its interpretation of the first limb of paragraph 1.14, the difficulty mentioned in the passage quoted above seems to me to be an insuperable objection to Newby's new submission. It seems to me that the Court's expansion of the definition given in the regulation was simply an unnecessary gloss on a provision the meaning of which is reasonably clear. The words "*flesh-bearing bones after boning*" in paragraph 1.14 are not ambiguous and, until the gloss included in paragraph 41 of the Judgment, hitherto there had never been any real uncertainty as to what they meant. Accordingly, I reject Newby's submission that the first condition of paragraph 1.14 is not satisfied.

The cutting point

66. However, this is far from the end of the matter. In its desire to prefer clarity to case by case assessment, the CJEU may have thrown the baby out with the bathwater. This is the result of its ruling that no loss or modification of the muscle fibre structure is permissible save for that "*which is strictly confined to the cutting point*". The Court has provided no elaboration of what is meant by the "cutting point" in the context of Newby's process. Since the processes used in the mechanical removal of meat, whether by the machines that remove meat from chicken carcasses or by those like Newby's for removing meat from bones at low pressure, do not involve cutting the meat by the use of a sharp blade (or blades), "cutting" in this context must mean "severance" or "separation".

67. I am not aware that the evidence shows precisely how the meat is severed from the bones. What it does show is that the product of the first stage of Newby's process looks like pieces of meat. It is clear that these pieces of meat have been separated from the bones to which they were originally attached. It seems to me to be likely also that in some places the meat becomes separated from other pieces of meat in addition to being separated from the bone. But whichever is the case, there has been mechanical separation during the recovery of the meat.

68. The Judgment provides no clear explanation of what is meant by the "cutting point". It seems to me that on one reading it refers to the points at which the meat has been severed or separated during the process of recovering it.

69. An alternative reading is to confine the "cutting point" to the points where the meat has been severed from the bone. However, since there is no way in which examination of any given piece of meat can distinguish between whether a particular edge was separated from the bone or from another piece of meat, this would lead to the exclusion of any loss or modification of the muscle fibre structure at the cutting point as being of no effect (because the producer could never show that any loss or modification of the muscle fibre structure had been confined to the point where the meat had been separated from the bone).

70. The third alternative is that suggested by Mr Coppel, which is that the saving for the cutting point refers to the cutting of intact muscles. He bases this on paragraph 43 of the Judgment. If this is right, then pork produced by Newby's process can never be anything but MSM.

71. Reverting to the evidence, the result of Newby's low pressure process is that the meat emerges from the first stage of the process in fairly small pieces, usually strips, which are often up to 100 mm or more in length. Examination by microscopy of the product

produced by the first stage of this process, being the separation of the meat from the bones, and of standard samples of meat purchased in a supermarket, which had not been recovered by mechanical separation, shows that the muscle fibre structures of the samples tested "*were almost completely intact, with only small areas of muscle fibre damage present in both the centres and the edges*". This examination was carried out by Prof Groves, an acknowledged expert in this field of microscopy, who said, in a report dated 5 August 2015, that the slight damage in the centre parts shown by all the samples tested was consistent with the "*disruption and distortion of the muscle normally seen in meat*". There appears to have been no difference between the Newby samples and those used as controls. Prof Groves thought that this damage was attributable to handling and freezing. However, she said that the damage at the edges, which was similar in appearance for all samples, was due to cutting or separation. The edges of each sample were slightly more damaged than the centres.

72. It appears clear from this report that the damage to the centre sections of the Newby samples was not caused by the process of mechanical separation of the meat from the bones: the damage was already present. The loss or modification of the muscle fibre structure caused by the mechanical separation was confined to the edges and was caused by the process of separation. For example, in relation to the sample of pork recovered after the first stage of the Newby process, Prof Groves said:

> "In the edge sections the muscle fibres were almost completely intact and similar to the centre, with some broken fibres close to the area of the cut edge."

73. In relation to the pork control sample, Prof Groves said:

> "In the edge sections the muscle fibres were almost completely intact and similar to the centre, with some broken fibres and fragments close to the area of the cut edge."

As I have already noted, Prof Groves said that the damage at the edges was similar in appearance for all samples.

74. If the "cutting point" means any point of separation, then in my view, there is nothing in the report by Prof Groves to suggest that there was any loss or modification of the muscle fibre structure of the Newby samples caused by Newby's mechanical separation process that was not "*strictly confined to the cutting point*". I accept this evidence.

75. Mr Mercer also submitted that the final sentence of paragraph 43 of the Judgment, which referred to chicken breasts which are detached from the carcass of the animal by mechanically operated cutting, did not reflect what happened in practice - at least, if the assumption being made by the CJEU was that the breast was an intact muscle until it was cut from the carcass. A copy of a brochure for a machine currently used to separate the meat from chicken carcasses described two of the steps in the process as follows:

> ". . . the wishbone is precisely cut out of the breast, resulting in a minimum bone contamination and low meat loss with the wishbone."

And then:

> "The breast fat rim remover removes the fat rim automatically from the fillet which reduces trim losses . . . In the same carousel, the fillet is scraped loose from the breast cage."

76. Mr Mercer's point arising out of this was that once the wishbone has been cut out of the breast, the breast can no longer be an intact muscle. Accordingly, a chicken breast which is cut (or scraped) from the carcass after it has had the wishbone section removed would suffer a loss or modification of the muscle fibre structure at a point other than the point at which it is separated from the carcass.

77. I am not in a position to find as a fact whether or not Mr Mercer's assertions about the process of removing the wishbone prior to the cutting of the breast of a chicken from the carcass are correct. However, it would be an absurdity if the prior removal of the wishbone section of the breast condemned the remainder of the breast to being classed as MSM. A purposive approach to the interpretation of the regulation and the Judgment can avoid this by treating any point of cutting during the process as falling within the term "cutting point".

My conclusion as to the meaning of the term "cutting point"

78. It seems to me that the court must either give "cutting point" a very restricted interpretation, which may well mean that certain accepted practices of mechanically removing chicken breasts from carcasses cannot continue without the product being classed as MSM, or adopt what Mr Coppel described as an expansive interpretation. He urged me not to adopt the latter: to do so, he submitted, would be to produce a result that the CJEU did not intend.

79. Mr Mercer had two answers to this. The first is that the court should have regard to Article 11 TFEU and interpret paragraph 1.14 of the Regulation and paragraphs 41 and 42 of the Judgment in a manner that promotes environmental protection rather than undermines it. This is a powerful point. I find that to treat the desinewed meat produced by Newby as MSM, and thereby to treat it as having a meat content of 0%, is to waste a product that the informed observer would regard as meat, albeit meat which is not of the best quality. To replace the product condemned as being MSM, and therefore not meat, has an environmental cost: more pigs will have to be raised, slaughtered and in most cases mechanically butchered (inefficiently) in order to make up the shortfall. That is contrary to the objective of promoting sustainable development.

80. I should add that I have not seen the submissions that were made to the CJEU and therefore to what extent, if at all, this point was made to the Court. At that stage it seems that the "cutting point" issue had not been raised (at least, as far as I am aware).

81. Mr Mercer's second, and more general, point is that this court is the arbiter of the facts and that the Judgment must be interpreted and applied to the facts as they are now known to be. He submits that the evidence shows that Newby's process does not modify the muscle fibre structure of the meat except at the parts where the meat has been severed during the process. It is clear to me that to adopt Mr Coppel's approach at least where pork is concerned is to give no effect to the exception made by the CJEU which permits modification of the muscle fibre structure at the cutting point. That would be a reversion to the zero tolerance approach previously adopted by the Commission.

82. Faced with this choice, which I must confess I do not find an easy one, I prefer the submissions of Mr Mercer. This is essentially because in the light of the findings of Prof Groves (in her August 2015 report) - evidence that was not before the CJEU - the only damage to the muscle fibre structure caused by the Newby stage one process occurs where the pieces of meat have been separated, either from the bone or from each other. The damage is strictly confined to those points. To construe "cutting point" as meaning only places where an intact muscle is cut from the bone would limit the exception to the removal of chicken breasts and, on the material before the court, possibly not even to that.

83. In my judgment, to adopt such a restrictive approach is to ignore Article 11 TFEU. Faced with a stark choice of two alternatives, one of which will go a little way towards the promotion of sustainable development and the other of which is environmentally wasteful, it seems to me that the court should adopt the former unless there are compelling reasons for not doing so.

84. The reason for not doing so advanced here is that that is what the CJEU obviously considered was the correct result. However, it reached that conclusion without the benefit of the evidence that is before this court. In my view, the approach required by the authorities is that the national court must decide the case in the light of the principles established by the judgment of the CJEU but on the basis of the facts found by the national court.

85. I therefore conclude that the "cutting point" of the muscle fibre produced by the first stage of the Newby process refers to every severed edge of the pieces of flesh that emerge from that process.

Paragraph 55 of the Judgment

86. At paragraph 55 of the Judgment the Court gave as a reason for excluding Newby's product from the concept of "minced meat" the fact that it represented product obtained from bone scrapings. It said this:

> "In addition, as the French Government suggests, a classification of products, such as that at issue in the main proceedings, as "fresh meat" within the meaning of point 1.10 of Annex I to Regulation No 853/2004 is also excluded. Disregarding their other characteristics, such products consisting in fragmented meat would be capable of coming only within the concept of "minced meat" within the meaning of point 1.13 of that annex, a concept from which they must, however, be excluded by reason of point 1(c)(iv) of Chapter II of Section V of Annex III to that regulation as products obtained from bone scrapings."

87. The basis for this assertion about Newby's products being obtained from bone scrapings is not explained and, in so far as it reflects a finding of fact, the authorities show that I am free to disregard it. It is directly contrary to the conclusion reached by the FSA in 2009. In an e-mail dated 16 March 2009, Rosalind Glover, an officer of the FSA, stated that:

> "I have consulted my colleagues about the processes you have at Newby Foods and the questions you raised. In summary, I am content that, from the information you have provided and that we have available Newby Foods is not making MSM; neither is Newby Foods using bone scrapings."

88. Mr Coppel candidly told the court that the FSA was rather surprised at the reference to bone scrapings in paragraph 55 of the Judgment, but he submitted that it was not a finding that could be challenged.

89. However, having regard to the evidence as a whole, and particularly as to the quantity of meat that is typically on the bones, and Ms Glover's e-mail, together with the fact that it is Newby's evidence that the bones which have little meat on them are taken out of the line, I have no hesitation in finding that Newby's product is not obtained from bone scrapings. If the CJEU is to be taken as having determined the contrary, then in my judgment that conclusion was based on a mistaken understanding of the facts and that it is the view of the facts taken by this court which must prevail.

90. There is a further problem with paragraph 55 of the Judgment, which is that its first sentence is just wrong. What the French Government actually said was the exact opposite, as paragraph 50 of its submission shows

> "In that regard, the French Government does not dispute that the product in question constitutes fresh meat within the meaning of the provision."

As the context makes clear, the provision referred to in that sentence is point 1.15, and "fresh meat", as there referred to, is in turn defined at point 1.10.

91. Accordingly, any reliance upon what the French Government is supposed to have said was clearly misconceived. It is not clear from the opening words of the second sentence of paragraph 55 whether the CJEU thought that there were "other characteristics" which prevented the product of the first stage of Newby's process from being used for minced meat. In these circumstances, it is necessary to consider the requirements of paragraph 1 of Chapter II, which I have set out at paragraph 43 above. In my view it is the product after the first stage of the Newby process that has to be considered, because if that product is not MSM, it cannot become MSM following the second stage of the process because that does not involve the removal of meat from flesh-bearing bones. It is, in effect, a mincing process.

92. In my view the product of the first stage of the Newby process is still "fresh meat" because neither it nor the original flesh-bearing bones have undergone any preserving process other than chilling or freezing. As to the second requirement, the evidence shows that the product derives from skeletal muscle. This leaves the four separate categories that are excluded by 1(c). For convenience, I will set them out again below:

> "(i) scrap cuttings and scrap trimmings (other than whole muscle cuttings);
> (ii) MSM;
> (iii) meat containing bone fragments or skin;
> or
> (iv) meat of the head with the exception of the masseters, the non-muscular part of the *linea alba*, the region of the carpus and the tarsus, bone scrapings and the muscles of the diaphragm (unless the serosa has been removed)."

93. Since Newby's product is exclusively meat that has been separated from flesh-bearing bones, it is not derived from scrap cuttings or trimmings. As to the second point, I have already concluded in the light of the evidence that it is not MSM. As to the third point, I find that it is not meat containing bone fragments or skin: whilst I accept that the

occasional tiny bone fragment may find its way into Newby's product (as Mr Manning accepts), there is no evidence that this occurs to any extent that would be greater than if the meat had been boned by hand - a sharp knife can nick a bone producing a small bone shard or fragment. It is therefore not a product which typically contains bone fragments or skin. Finally, as I have already concluded, it is not derived from bone scrapings (the only suggested candidate from the fourth category).

94. In my judgment, therefore, there is nothing in the evidence before me that would justify excluding the product of Newby's first stage process from being used to prepare minced meat (provided, of course, that it contains less than 1% salt). I must make it clear that, as a matter of caution, I am expressing this is a negative finding. This is an issue which has not been fully explored in the evidence and so I am not prepared to make a positive finding that the product of the first stage of the Newby process is raw material that can be used to prepare minced meat: I confine myself to saying that there is nothing in the evidence before me to justify a finding to the contrary.

Meat preparations

95. For the sake of completeness, I should say something about whether or not Newby's product can be classified as a "meat preparation" within paragraph 1.15 of the Regulation. At paragraphs 52-54 of the Judgment, the Court said this:

> "52. By contrast, a classification as "meat preparations", within the meaning of point 1.15 of Annex I to Regulation No 853/2004, of products which, like that at issue in the main proceedings, satisfy the criteria for mechanically separated meat is excluded by the definition laid down in that point.
>
> 53. In this regard, it should be noted that the production of mechanically separated meat involves neither of the two processes provided for in that definition, namely the addition of foodstuffs, seasonings or additives, or a "processing" within the meaning of Article 2(1)(m) of Regulation No 852/2004; on the contrary, a product such as that at issue in the main proceedings corresponds to the notion of an "unprocessed product" within the meaning of Article 2(1)(n) of that regulation.
>
> 54.Furthermore, the concept of "meat preparations" has a direct link, not with the concept of "mechanically separated meat", but rather, first, with the concept of "fresh meat" and "minced meat", which are, in principle, the only usable raw material, and, secondly, with the concept of "meat products" within the meaning of point 7.1 of Annex I to Regulation No 853/2004, which combines the concept of "meat preparations" in the event of the processing of the fresh meat used as a raw material. In that event, those two latter concepts are alternative in the sense that, depending on whether a procedure for the processing of fresh meat modifies the internal muscle fibre structure by thus eliminating the characteristics of fresh meat or does not result in such a modification, the resulting product is either a meat product or a meat preparation."

96. My understanding of what the Court said at paragraph 52 is that the reference in paragraph (or point) 1.15 of the regulation to "*processes insufficient to modify the internal muscle fibre structure of the meat*" must mean that the processes must be insufficient to cause <u>any</u> modification of the internal muscle fibre structure, and therefore does not permit some limited modification of the muscle fibre structure which is insufficient to remove the characteristics of fresh meat.

97. The second point made by the Court, in paragraph 53, is that the reference to "processes" in point 1.15 must be read as meaning any process that falls within the definition of "processing" in the definition at (m) of Regulation No 852/2004.

98. I have to confess that I find this a little hard to follow, because the definition of "*processing*" is any action that "*substantially alters the initial product*", whereas the processes referred to in point 1.15 have to be so mild as to be insufficient to cause any modification to the internal muscle fibre structure of the meat.

99. Nevertheless, it seems to me that the Court has adopted a reading of the relevant provisions that makes it impossible for Newby to contend successfully that the product of its process can be described as a "meat preparation".

Conclusion and disposal

100. For the reasons that I have now given I consider that the product that results from the first stage of Newby's process ("the Stage One Product") is not mechanically separated meat within the meaning of paragraph (or point) 1.14 of Annex I to Regulation (EC) No 853/2004.

101. For the purpose of this conclusion Newby's process is that described in the witness statements of Mr Doug Manning served in these proceedings dated 28 June 2012 (paragraphs 17-20) and 12 October 2015 (paragraphs 14, 16 and 18) such that the microstructural characteristics of the Stage One Product are consistent with those of samples 1503263 (chicken) and 1503265 (pork) examined by Leatherhead Food Research on 16 July 2015 and described in its report dated 5 August 2015.

102. Accordingly, insofar as the Decision of 4 April 2012 by the FSA ("Moratorium on desinewed meat") was that the desinewed meat produced from poultry and pig bones by Newby's process (the Product) must be classed and specifically labelled as "Mechanically Separated Meat" (MSM) and could no longer count towards the meat content of a product, that decision was wrong since it was based on an error of law.

103. The Product cannot be classified as a meat preparation within paragraph (or point) 1.15 of the regulation.

104. For the avoidance of doubt, I find that the Product is not derived from bone scrapings.

105. I will hear counsel on any other matters relating to the form of relief or costs.