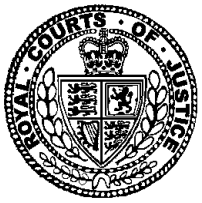

Neutral Citation Number: [2014] EWHC 1340 (Admin)

Case No: CO/6923/2012

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

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
London EC4A 1NL

Date: 7 May 2014

Before:

MR. JUSTICE EDWARDS-STUART

- -

Between:

The Queen (on the application of Newby Foods Ltd)	**Applicant**
- and -	
Food Standards Agency	**Respondent**
(No. 7)	
The European Commission	**Interested Party**

- -
- -

Hugh Mercer Esq, QC & Andrew Legg Esq
(instructed by **Clarke Willmott LLP)**) for the **Applicant**
Jason Coppel Esq, QC (instructed by **Food Standards Agency**) for the **Respondent**
Nicholas Khan Esq & Ms. Zahra Al-Rikabi
(instructed by the **European Commission**) for the **Interested Party**

Hearing date: 18th December 2013;
Additional written submissions: 17th February 2014; 26th and 27th February 2014

- -

Approved Judgment

Mr. Justice Edwards-Stuart:

Introduction

1. This is, I think, the seventh judgment in this case. The subject of this judgment is an application by the Claimant for a declaration that the European Commission ("the Commission") has acted in a manner that was calculated to undermine an order of this court and is thereby in contempt of court.

2. In the first judgment I referred the principal questions of interpretation of the relevant EU regulation to the Court of Justice of the European Union. The second judgment concerned an application by the Claimant for interim relief pending the decision from the Court of Justice. By an order dated 26 July 2013 I granted the Commission permission to intervene in the proceedings, which it duly did. I subsequently granted relief but not to the full extent sought by the Claimant. The background giving rise to this dispute and the application for interim relief is set out in full in my first and second judgments, but for ease of reference I will summarise the salient facts.

3. 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.

4. 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.

5. 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. The Claimant has developed such a machine. By means of a vibrating piston, operating at a much lower pressure than the early crushing machines, the meaty 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.

6. It is the Claimant'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. The Claimant submits that no-one would describe it as anything else.

7. The second stage in the Claimant'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 was 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.

8. Desinewed meat is regarded by many, including - until April 2012 at least - the Defendant, the Food Standards Agency ("FSA"), as being quite different from MSM produced by the high-pressure process described in paragraph 4 above.

9. The source of this dispute is Regulation (EC) No 853/2004 of 29 April 2004. This lays down "specific hygiene rules for food of animal origin". Annex I to the Regulation contains definitions[1]. By paragraph 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."

10. The principal issue in this case is whether the product of the Claimant's two stage process is MSM within the meaning of paragraph 1.14 or is fresh meat that satisfies the last part of the definition of meat preparations in paragraph 1.15. That was the subject of the questions referred to the Court of Justice.

The positions taken by the parties

11. The view taken by the 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[2].

12. 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. In support of this position, the Claimant submitted 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.

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. Matters came to a head in early 2012 following a visit to the Claimant's factory by inspectors from the Commission's Food and Veterinary Office ("FVO"). The conclusion from that audit was that the Commission did not recognise desinewed

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1 This definition appears also in Article 3, paragraph 1(n) of Regulation (EC) No 999/2001 which lays down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies.

2 Undated written evidence to the Committee (probably May 2012).

meat as a legally acceptable term for product derived from meat from flesh bearing bones and obtained by mechanical means, irrespective of the degree to which the muscle fibre structure was modified or lost in the process. Discussions were then held between the Commission and the FSA, with the result that on 4 April 2012 the FSA issued an announcement entitled "Moratorium on de-sinewed meat", by which meat producers in the United Kingdom were prevented from producing desinewed meat from the bones of cows and sheep by the end of April 2012. In relation to meat produced from poultry and pig bones, from the end of May 2012 this was to be classed and specifically labelled as MSM. That meant it could no longer count towards the meat content of a product.

15. Desinewed meat that had been produced at the time of this announcement was allowed to remain in circulation. In fact, the Claimant had 51 tonnes of de-sinewed lamb meat that was in frozen storage. For some reason it had not been sold at the time and was the subject of one of the subsequent applications for interim relief made by the Claimant.

16. Thus, since the moratorium, 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.

The course of these proceedings

17. For the reasons that I gave in my first and second judgments I concluded that the Claimant had a strong case on the construction of the regulations and that it was clear in the light of the evidence that the Claimant's desinewed meat produced from pork and poultry was quite different from the MSM produced from those animals under a high-pressure process. However, since the question of construction was and is essentially a matter of Community law I decided to refer it to the Court of Justice of the European Union. That court has not acceded to a request for the proceedings to be expedited, so they will run their usual course and it is therefore likely that the interim relief that I granted will remain in force for some time.

18. The interim relief that I granted in principle on 26 July 2013 (it was specifically granted subject to hearing any submissions to be made by the Commission) permitted the Claimant to continue the production of desinewed meat from pigs and poultry and to sell it as a meat preparation pursuant to paragraph 1.15 of Annex I of the Regulation, and also permitted the Claimant to sell the 51 tonnes of desinewed lamb meat that was held in frozen storage as a meat preparation pursuant to the same paragraph, but on the basis that this was to be used for pet food and for consumption by cats and dogs only. For reasons that it is not necessary to explain in full at this stage, I subsequently amended the second part of the order so as to permit the sale of the 51 tonnes of frozen meat only to the FSA but at a fair market price. After hearing submissions from the Commission, the first part of the order was made unconditional.

19. However, in relation to the production of desinewed meat using the bones of ruminants, I was not prepared to grant the Claimant interim relief. I found that the balance of convenience did not come down in favour of the Claimant. This was

principally because of the evidence as to the existence of a public health risk, albeit one that I thought was very low.

20. At paragraph 93 of my second judgment I said this:

> "In the light of the information about the financial consequences for the Claimant of the imposition of the moratorium, I approach this application on the basis that the Claimant is likely to go out of business in the absence of some form of interim relief that permits it to continue production of some de-sinewed meat without having to classify it as MSM."

21. An issue has arisen as to the extent to which this information about the financial position of the Claimant was correct. The Commission now contends that the information given to the court by the Claimant was misleading and that its financial predicament was not nearly as serious as had been claimed.

22. The application that has given rise to this judgment is one that was issued by the Claimant on 3 December 2013 seeking the following relief:

> "A declaration that if the European Commission takes action that will have the effect of interfering with paragraph 2 of the order of 26 July 2013 and/or paragraphs 1-3 of the order of 16 August 2013 it will be in contempt of court. This is intended to uphold the integrity of the rule of law and the court's authority. The European Commission applied to intervene in these proceedings, which permission was granted. It appeared at a hearing held on 26 September 2013, filed and served a skeleton argument and supporting evidence to resist the granting of interim relief to the Claimant in these proceedings, in support of the Defendant. In relation to the continued production of lamb desinewed meat, the Commission and the Defendant was successful. In relation to the same of 51 tonnes of lamb desinewed meat and the continued production of pork and poultry they were unsuccessful. Notwithstanding that the Court has heard the evidence and reached a view as to what justice requires in this matter, the European Commission has threatened to take measures that would undermine court orders."

23. In its written submissions dated 16 December 2013 the Claimant sought to amend this application for a declaration by adding the words "and would constitute a breach of the duty of sincere cooperation pursuant to TFEU Article 4(3)" [3].

24. This is clearly a very serious application and, indeed, a novel one. The application was made on two grounds. The first related to alleged interference with the grant of relief in relation to the 51 tonnes of frozen lamb desinewed meat. It was said that there was evidence that the Commission was intending to take safeguard measures should that consignment of lamb be placed on the market. However, since the hearing on 18 December 2013, at which I directed that the 51 tonnes could be sold only to the FSA, this potential ground of interference has really become academic and so I do not consider that it is appropriate to say very much more about it.

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[3] In fact, the reference should be to the Treaty on the European Union ("TEU"), and not the Treaty on the Functioning of the European Union ("TFEU").

25. The second ground relates to the interim relief in relation to the continued production of desinewed meat from pork and poultry. It is said by the Claimant that at a meeting of the Advisory Group on the Food Chain and Animal and Plant Health hosted by DG SANCO in Brussels on 22 November 2013, a M Poudelet, Director of Directorate E, Safety of the Food Chain, at the Commission, said that the Commission intended to ensure that the Claimant was not able to sell its product outside the UK unless it was labelled as MSM. The Claimant relies on a quotation from a report of what was said at the meeting (taken by an employed lawyer who was present and circulated by an e-mail dated 25 November 2013) which is in the following terms:

> "DG SANCO wants the products to be sold on UK territory otherwise the DSM from poultry and pork must be labelled as MSM if they are sold out of UK. The FSA is asked to guarantee this."

26. A similar account of what was said has been provided to the Claimant by a Mr. Dirk Dobbelaere, the Secretary General of an organisation known as CLITRAVI.

27. In a witness statement dated 16 January 2014 Mr. Bishop, the Managing Director of the Claimant, said that a buyer employed by a major customer of the Claimant had sent an e-mail dated 13 January 2014 in which he said:

> "It seems that your Pork Meat Preparation can not be sold as a meat product when it is sold outside the UK."

28. According to Mr. Bishop, this information had come from CLITRAVI, which had provided the customer with a copy of an e-mail from the Commission dated 10 January 2014 circulating a document that was described by its author as a "draft summary record" of the meeting of 22 November 2013. This contained the following paragraph:

> "FSA was asked by [the Commission] to follow the Newby case closely to know where its products are distributed and placed on the wider EU market. The Meat industry in the EU should ensure that if they buy MSM from this company it is labelled correctly as MSM since the judge's decision is valid only in the UK. Ideally it would be processed and consumed within the UK. [The Commission] then stressed that the interim relief currently granted in the Newby case raises a labelling issue and no safety concerns."

29. In his witness statement Mr. Bishop then said this:

> "10. I am advised by my legal advisers that the High Court Judgment did not restrict the sale of meat preparations to the territory of the UK only. Therefore the Commission's comment in the draft minutes are false and misrepresent the true position in a way that is highly prejudicial to Newby.
>
> 11. The above evidence shows that the comments of the Commission in the meeting of 22 November 2013, as recorded and circulated, are causing harm to Newby's business by alarming one of our customers, with the resulting risk that we lose their business. If the terms of the Court orders made to date were strictly observed, our

> business ought to be able to survive until the outcome of the proceedings before the European Court (despite the continuing negative effects of the moratorium on our business).
>
> 12. However, if the Commission continues to make statements to the effect that Newby's product cannot be sold as a meat preparation outside of the UK that such comments will be highly likely to cause our business to fail. This is because almost all of our customers (and certainly all of our major customers) export the finished products to Europe and would in all likelihood stop dealing with us if the meat we supply had to be labelled as MSM, or if they believed the Commission (albeit wrongly) that the meat we supply had to be labelled as MSM."

30. Mr. Bishop then prepared a second witness statement dated 27 January 2014 to which he exhibited a document attached to an e-mail that was sent by the British Meat Producers Association to its members on 16 January 2014. The document was described as "BMPA Update 16 January 2014" and, at paragraph 8, it attached the draft summary record of the Advisory Group's meeting of 22 November 2013.

31. Mr. Bishop exhibited also a copy of the FSA's Chief Executive's report dated 21 January 2014, which contained a section dealing with these proceedings. Paragraph 6.3 of that report was in the following terms:

> "As Newby will be required to sell the lamb DSM to the FSA, this will mitigate the risk of the European Commission issuing safeguard measures. However, the production and sale of poultry and pork product by Newby as a meat preparation (rather than mechanically separated meat) under the Court Order of 16 August, continues to present a risk of infraction proceedings against the UK by the Commission because, according to the Commission's interpretation, it constitutes failure to implement and enforce EU law. While the impacts of infraction proceedings are generally less significantly negative than the impacts of safeguarding measures they can nonetheless be material. We will continue to work with the Commission to try and mitigate the risks of infraction proceedings."

32. Mr. Bishop submits that this paragraph implies that the continued sales of pork and poultry products lawfully produced by the Claimant poses a risk to the UK meat industry in general when in fact the Commission has conceded in court that it proposes to take no enforcement action in respect of these products. Mr. Bishop submits that by making these points in such a public way, the FSA "hugely enhances the risk that an actual or prospective customer of Newby will not do business with Newby on account of the supposed (but in reality non-existent) risk of EU Commission infraction proceedings".

33. It is clear that the Claimant's application raises at least two threshold questions. First, does the grant of interim relief by a national court have any binding effect on either the Commission or the courts of another Member State? If not, second, is the Commission under any duty to respect the order: that is to say, is it under any duty not to take any steps actively to undermine it?

34. In the light of Mr. Bishop's statement at paragraph 10 of his first witness statement that he had been advised by his legal advisers that my order did not restrict the sale of the Claimant's meat preparations to the territory of the UK, I invited submissions from the parties as to whether or not my order granting interim relief was valid only in the United Kingdom. The parties responded to that request.

The submissions of the parties on jurisdiction

35. The Claimant submits that the starting point in the context of this case is that all meat preparations lawfully produced and marketed in the UK must in principle be admitted to the markets of all Member States. It submits that the determination of the court of one Member State as regards an applicable EU rule "must, as a rule, be recognised by all the other Member States". It submits that that recognition operates as a presumption that the determination of the first Member State is correct, and any finding to the contrary by another Member State "must be based on concrete, objective and verifiable evidence": that proposition is derived from case C-163/09 *Repertoire Culinaire* [2010] ECR I-12717, at [41].

36. One difficulty with the second of these propositions, it seems to me, is that I have not determined, or purported to determine, the true meaning of paragraphs 14 and 15 of the Regulation. I have merely said that I consider that the Claimant has a strong case that its interpretation is correct, and on the basis of that conclusion (and other findings) I was prepared to grant interim relief. However, the Claimant is correct to submit that the effect of my order is that it is lawful for the Claimant to continue to produce desinewed pork and poultry without having to label it as MSM.

37. The Claimant relies on the principle of sincere cooperation referred to in Article 4.3 of TEU, which replaced Article 5 of the European Economic Community Treaty. In *Zwartveld*, Case C-2/88 [1990] ECR I-3365, paragraphs 17 and 18 of the judgment of the Court were in the following terms:

> "17. In that community subject to the rule of law, relations between the Member States and the Community institutions are governed, according to Article 5 of the EEC Treaty, by a principle of sincere cooperation. The principle not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law, if necessary by instituting criminal proceedings ... but also imposes on Member States and the Community institutions mutual duties of sincere cooperation ...
>
> 18. This duty of sincere cooperation imposed on Community institutions is of particular importance *vis-a-vis* the judicial authorities the Member States, who are responsible for ensuring that Community law is applied and respected in the national legal system."

38. That case concerned a request by a national court for the production of certain reports in the possession of a Community institution so the facts were very different from those of this case. However, the observation that the duty of sincere cooperation

imposed on Community institutions is of particular importance *vis-a-vis* the judicial authorities of member states is, in my view, an important one.

39. In the present case, as I have already said, I gave the Commission permission to intervene in the proceedings and to be heard on the question of interim relief. The Commission quite properly took that opportunity and its views were taken into account before the court made a final decision.

40. In Cases C-143/88 and C-92/89, *Zuckerfabrik* [1991] ECR I-415, the Court said this, at paragraphs 16 and 17:

> "16. … In cases where national authorities are responsible for the administrative implementation of Community regulations, the legal protection guaranteed by Community law includes the right of individuals to challenge, as a preliminary issue, the legality of such regulations before national courts and to induce those courts to refer questions to be Court of Justice for a preliminary ruling.
>
> 17. That right would be compromised if, pending delivery of a judgment of the Court, which alone has jurisdiction to declare that a Community regulation is invalid ... , individuals were not in a position, where certain conditions are satisfied, to obtain a decision granting suspension of enforcement which would make it possible for the effects of the disputed regulation to be rendered for the time being inoperative as regards them."

At paragraph 33 the Court then said this:

> "... suspension of enforcement of a national measure adopted in implementation of the Community regulation may be granted by a national court only:
>
> (i) if that court entertains serious doubts as to the validity of the Community measure and, should the question of the validity of the contested measure not already have been brought before the Court, itself refers that question to the court;
>
> (ii) if there is urgency and a threat of serious and irreparable damage to the applicant;
>
> (iii) and if the national court takes due account of the Community's interests."

41. It seems to me that the position must be even stronger if the validity of the Community measure is not in issue, but only the Commission's interpretation of it. It is, in my view, implicit in these observations of the Court that if a national court satisfies the criteria laid down by the Court for, in effect, suspending the operation of a Community measure, it would be the duty of the relevant Community institutions, pending the judgment of the Court of Justice, to respect the decision of the national court and not to seek to undermine it.

42. However, it is clear also from these authorities that it is only the Court of Justice that has jurisdiction in relation to the acts of the Commission (it is unnecessary for the purposes of this judgment to explore how extensive the Court's powers are). No authority has been cited to me that suggests that a national court has any jurisdiction over the acts of the Commission committed outside the territorial jurisdiction of that court, even if the Commission has intervened in any relevant proceedings in the national court. I do not need to consider the position in relation to acts committed within the jurisdiction of the national court because there is no suggestion of such conduct here.

43. The Claimant submits that the Commission knew when it applied to intervene in these proceedings that any relief granted would permit the sale of the Claimant's products throughout the European Union. This is correct. In its application to intervene, dated 9 August 2013, the Commission said this:

> "5. Pending the preliminary ruling, the measures contained in the Order would have an immediate effect on the internal market since the products permitted to be placed on the market would then, in principle, be in free circulation throughout the EU. This would be very likely to give rise to a negative reaction from other Member States, the operators and consumers, which in turn risks causing considerable problems for all meat products coming from the UK.
>
> 6. As regards the aspect of the Order concerning poultry and pig MSM, operators in other Member States would certainly draw the authorities' attention to the fact that the products in circulation are not in conformity with the labelling requirements observed in those Member States in pursuance of EU law. It would be considered that consumers were being seriously misled as to the characteristics of the products in question, and there is a great probability that Member States would adopt protective measures in order to protect their consumers from the placing on their respective markets of such products."

44. In its written submissions the Claimant contends that "there is very real concern that the Commission is taking steps to influence Member States and members of the European meat industry not to buy Newby's pork and poultry products unless they are labelled as MSM". It submits also that if customers in Europe stopped buying the Claimant's pork and poultry products it would have a devastating effect and could put the Claimant out of business.

45. I am in no doubt that any attempt by the FSA (as opposed to the Commission) to ensure that desinewed meat produced by the Claimant from pork and poultry was not sold outside the United Kingdom would be a breach of the order of 16 August 2013. However, there is no evidence whatever that the FSA has attempted to do this. The evidence shows only that M Poudelet of the Commission has requested the FSA to guarantee that pork and poultry desinewed meat is labelled as MSM if it is exported from the United Kingdom.

46. The Commission has filed no evidence in opposition to the Claimant's application and so I accept the draft summary record of the meeting of 22 November 2013 as being accurate. In addition, I see no reason to doubt the contents of the e-mail dated 25 November 2013 which records M Poudelet as asking the FSA to guarantee that the Claimant's desinewed meat produced from pork and poultry is labelled as MSM if it is sold outside the United Kingdom.

47. The Commission submits that this court has no jurisdiction "to control or otherwise seek to sanction" the exercise by the Commission of the autonomous powers conferred on it by TEU and TFEU. It submits that the application for a declaration of a prospective contempt of court is no more than a "thinly veiled attempt to obtain an injunction" against a Commission institution. Since a national court cannot grant such an injunction, it should not make a declaration that is intended to have a similar effect.

48. In the light of the authorities that I have already mentioned, the Commission submits that the Court of Justice has exclusive jurisdiction to decide the lawfulness of the acts of Commission institutions.

The conduct of the Commission

49. At the time when the court made the order of 16 August 2013 there was no evidence that the Commission had given any serious consideration to the question of whether or not the desinewed meat produced by the Claimant could properly be regarded as a meat preparation under paragraph 15 of the Regulation. The evidence suggested that the Commission had simply closed its eyes to the factual basis of the Claimant's position because it had adopted the approach that the product was MSM if "any" alteration of the muscle fibre structure of the meat had taken place. Since that interpretation of the Regulation, if correct, is clearly satisfied in respect of the Claimant's desinewed meat, the Commission would not have had to look any further. But it is apparent from the documents in the case that there is a responsible body of opinion in the European meat industry, not only within the United Kingdom but also in other Member States, that questions the Commission's dogmatic approach to this issue. However, the notes of the meeting of 22 November 2013 provide some ground for thinking that in the face of some lobbying from the European meat industry the Commission may now be prepared to investigate and reconsider its position without waiting for a ruling from the Court of Justice.

50. Whilst these matters are of no direct relevance to the issues raised by this application, they provide some background to and explanation for the reaction of the Commission to the interim relief granted to the Claimant in relation to the production of desinewed meat from pork and poultry.

51. I consider that, in one sense at least, M Poudelet was correct when he said (as on the material available I find that he did) that my order is "valid only in the UK". I cannot see how the courts of one Member State can be bound by an order for interim relief in an administrative matter made by a court of another Member State, and I did not

understand Mr. Hugh Mercer QC, for the Claimant, to contend the contrary[4]. However, as a matter of judicial comity, if nothing else, I would expect the courts of one Member State to have proper regard for a determination by a national court of another Member State on a point of Community law and to the reasons for it. But I have not determined any question of Community law: I have concluded only that the Claimant should be entitled to some interim relief pending the determination by the Court of Justice of the questions referred to it.

52. It seems to me that whether or not it is appropriate to permit the distribution of the Claimant's desinewed meat from pork and poultry within any particular Member State, pending the decision of the Court of Justice, must be a matter for a court of that state having regard to the circumstances prevailing within its own jurisdiction.

53. But the question raised by this application concerns the position of the Commission, not of the courts of another Member State. In the absence of any clear authority, I am not prepared to hold that anything done by the Commission outside the territorial jurisdiction of the courts of England and Wales can amount to a contempt of court under English law. I leave open the question whether the same can be said of a deliberate act committed within the jurisdiction, but that is not a question that I have to address and so I will say no more about it.

54. That conclusion would be sufficient to dispose of this application as originally lodged, but, as I have already mentioned, in its written submissions the Claimant made an application to amend the draft declaration.

55. In the context of this part of its application the Claimant submitted that M Poudelet's statement that the order of the English court is valid only in the United Kingdom is nevertheless relevant to the question of whether the Commission may have acted in breach of the principle of sincere cooperation.

56. It is clearly the function of the Commission to implement European legislation within the powers given to it by the European Treaties. As I have already concluded, the national courts of a Member State do not have the jurisdiction to determine the lawfulness or otherwise of the acts of Commission institutions: it is clear from the authorities that the exclusive jurisdiction to do that rests with the Court of Justice. However, the same authorities show that the duty of sincere cooperation owed by Commission institutions is of particular importance *vis-a-vis* the judicial authorities of Member States. The reason for that, I assume, is that in each Member State it is the courts that are responsible for ensuring that the citizens of that state can enjoy the rights conferred by Community law. That duty on the national courts can extend to the grant of interim relief if it appears that a person within its jurisdiction is or may be deprived of the exercise of its Community law rights: see *R v Secretary of State for Transport, ex p Factortame* [1991] 1 AC 603.

57. As a corollary of the obligation that rests on national courts it seems to me that the duty of sincere cooperation owed by Commission institutions must extend to according full and proper respect to orders made by the courts of Member States that

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[4] Mr. Nicholas Khan, who appeared for the Commission, drew my attention to Article 81 TFEU, which provides for the adoption of measures to develop judicial cooperation only in "civil matters", a concept which does not extend to public or administrative law.

are intended to secure or preserve individual rights under Community law. In my view, the exercise of that duty involves avoiding conduct that is deliberately directed at undermining an order of a national court made after due inquiry into the relevant facts. All the more so where the Commission has intervened in the relevant proceedings before a national court and has been given a full opportunity to put forward its position.

58. It appears to have been common ground, at least at one stage, and, if it is not any longer, it is my view that if a product is lawfully produced in accordance with an order of a national court it follows that it is, in principle, entitled to be put into free circulation in other Member States unless and until the Court of Justice, or a national court acting within its own jurisdiction, declares otherwise. It is not in my view proper for a Commission institution itself to declare that the decision of the national court is of no effect outside the jurisdiction of the Member State concerned, if that is done in a manner that implies that the court order can just be ignored. That is the function of the appropriate court (whether that is a national court or the Court of Justice will depend on circumstances).

59. In circumstances like those of the present case, and in a matter which concerns the labelling of a product, it is my view also that it would be improper for the Commission to inform representatives of the European meat industry that its members should not buy a particular product that has been lawfully produced in a member state pursuant to an order of a court of that state simply because it disagrees with that order.

60. By contrast, I consider that the Commission is entitled to inform the competent authorities of Member States of its interpretation of a particular Community regulation and, if within its powers, to take appropriate steps to ensure that the regulation (as interpreted by the Commission) is complied with in those Member States. In that way, if a citizen of a particular Member State is aggrieved by the manner in which its competent authority is seeking to enforce the particular regulation, it can have recourse to its own national courts which will ordinarily have jurisdiction over the competent authority of that Member State. In this way, the rights of European citizens under Community law can be safeguarded in the manner indicated by the Court of Justice in *Zuckerfabrik*.

61. In this particular context, I note that the Commission accepts that, contrary to the position where public health concerns arise, it has no direct powers over the labelling of meat products where enforcement is in the hands of national authorities.

62. But to these observations I would add one important qualification. The Commission has specific duties in relation to the safeguarding of human and animal health. If, in seeking to discharge these duties, the Commission acting in good faith take steps that conflict with an order made by a national court, then I would not regard such conduct as necessarily amounting to a breach of the principle of sincere cooperation. It seems to me that the duty to preserve health must override a duty of sincere cooperation in the unlikely event that the two conflict. Whilst I do not consider it appropriate to make any decision in relation to that part of the Claimant's application that concerns the 51 tonnes of frozen lamb, I would merely observe that there might have been considerable difficulties in the way that part of the Claimant's application.

The statements in relation to the Claimant's financial position

63. At paragraph 17 of its further submissions dated 17 February 2014, the Commission said this:

> "The Court's finding that Newby had shown that interim relief was required to prevent Newby's insolvency was based only on Newby's unsubstantiated assertions. Newby's own audited accounts for the year to 31 March 2013 reveal however that its claims of urgency require close scrutiny."

64. The Commission pointed out that the Claimant's accounts for the year ending 31 March 2013 - a period of which ten months fell within the moratorium on the production of desinewed meat from pork and poultry, and eleven months fell within the moratorium on ruminant meat - the Claimant made profits of £1.4 million (as against £2.26 million in the previous year) and paid an increased dividend, although its turnover fell from £18.7 million to £10 million. The Directors Report attributed the loss of turnover to the moratorium but noted that the Claimant had remained profitable and had explored "new opportunities for growth" in other areas of successful activity. The report concluded by saying:

> "Overall the directors are satisfied with the direction of the business and are confident of its continued profitability and success."

65. The Commission also drew attention to the fact that a shareholder of the Claimant is a very substantial company, Lamex Food Group Ltd, which had a turnover in 2013 of nearly £750 million. This state of affairs, submits the Commission, is in stark contrast to the picture painted by the Claimant of a small struggling company with no resources to fall back on. In these circumstances the Commission submits that it is "open to the Court to consider whether it should set aside the Order of its own initiative" pursuant to CPR 3.3.

66. The Claimant makes four points in response to this:

    i) It is too late: these points could and should have been raised earlier.

    ii) The Claimant did not mislead the court.

    iii) The points made are irrelevant to the grant or maintenance of interim relief.

    iv) It is wrong for the Commission to say that instructing businesses outside the UK to label the Claimant's products as MSM is unlikely to cause the Claimant's business to fail.

67. I am not persuaded by the first point, which relies on an assertion that the Commission should have asked for a copy of the Claimant's 2013 accounts instead of waiting until they were published by Companies House on 18 December 2013. In my view, the court has a direct interest in the proper disclosure by a party of information relevant to an application for interim relief: it is not for a party in default to say that its opponent could have discovered the true position if it had made certain enquiries.

68. In his third witness statement, dated 26 February 2014, made in response to the Commission's complaint of inaccurate disclosure, Mr. Bishop, the Claimant's Managing Director, said this, at paragraph 5(b):

> "After the moratorium, Newby stopped production of ruminant meat preparations, but did not ever sell its pork and poultry products as MSM. Instead, Newby continued producing pork and poultry meat preparations from specified cuts (e.g. meat that had not been subject to prior boning) that were permitted by Trading Standards, with the oversight of the Food Standards Agency - again as described previously in Doug Manning's evidence. These permitted cuts were further limited on a regular basis, and Newby were told by the FSA in August 2013 that if the interim relief was not maintained by the Court that permission to use these cuts would also be withdrawn. Therefore if the Court's interim relief in respect of pork and poultry had not been maintained in September 2013, Newby would have had to cease production of meat preparations and would have gone out of business. Newby has never been licensed to produce MSM and have never sold MSM."

69. Mr. Bishop went on to say that the Claimant never claimed that it was at risk of insolvency. Its point was that it would go out of business because it would make no commercial sense for its shareholders to continue to support it. Mr. Bishop said that if the Commission continues to make damaging statements to the effect that European users of the Claimant's desinewed meat must label it as MSM, the Claimant will lose customers and it is likely that its business will fail.

70. By way of explanation of the Claimant's turnover, Mr. Bishop says that a significant proportion of its pre-moratorium overall turnover - about 25% - was in respect of activities unaffected by the moratorium. Following the moratorium, those activities accounted for nearly 50% of the Claimant's turnover. Mr. Bishop says that the relevant part of the Claimant's turnover fell from about £14.5 million to just under £4 million in the year following the moratorium. At these levels of turnover, he says, the Claimant could not support its overheads.

71. The evidence produced by the Claimant must be looked at in its context. For example, the first witness statement of Mr. Manning was produced in June 2012, at a time when the full effects of the moratorium would not have been known. Some of what he said in that witness statement, therefore, was speculation. That is not only understandable, but was perfectly obvious to the reader. Mr. Manning's fourth witness statement, made in May 2013 in support of the application for interim relief, contained no inaccuracies that I can detect.

72. I have of course read Mr. Bishop's third witness statement with some care. I am not persuaded that the Claimant has deliberately misled the court at any previous stage of these proceedings. However, I have to say that I did have the impression that the Claimant was a wholly independent small company and I was quite unaware that it had a very substantial shareholder. Whilst I accept Mr. Bishop's point that a shareholder, however substantial, is unlikely to put money into an ailing business, I consider that this is a fact that should have been mentioned. However, I am not satisfied that the court's decision would have been materially affected by such disclosure had it been made.

73. In essence, I consider that whilst the Claimant could and should have set out the details of its shareholders more fully, I regard the submissions by the Commission criticising the Claimant's disclosure as containing an element of over-reaction.

74. In these circumstances I do not consider that it would be appropriate for the court to consider reopening the order of interim relief. Enough is enough.

The disposal of this application

75. The Claimant is not entitled to a declaration that the Commission is in contempt of court. That part of its application fails and must be dismissed.

76. In relation to the Claimant's proposed amendment to its application, I consider that dealing with it on this application would cause no injustice to the Commission - which is why I have done so. However, I do not consider that it would be appropriate to grant any form of declaratory relief. I have set out in this judgment my views on the scope of the duty of sincere cooperation as it applies in the circumstances of this case. That in my judgment should provide sufficient clarification of the position: I do not consider that there is anything to be gained by attempting to formulate some form of declaration. It will be apparent from what I have said that I consider that the Commission's conduct since the grant of interim relief is in some respects open to criticism.

77. I will, if necessary, hear counsel for the parties on any further matters arising out of this judgment or the form of relief.