Neutral Citation Number: [2022] EWHC 1505 (Admin)

Case No: CO/4360/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(Sitting in Leeds)

Leeds Combined Court Centre
1 Oxford Row
Leeds LS1 3BG

Date: 5th July 2022

Before :

MR JUSTICE EYRE

- -

Between :

THE QUEEN (on the application of NEWBY FOODS LIMITED)	**Claimant**
- and -	
FOOD STANDARDS AGENCY	**Defendant**

- -
- -

Hugh Mercer QC and Freddie Popplewell (instructed by **Roythornes Ltd**) for the **Claimant**
Malcolm Birdling and Emma Mockford (instructed by **Legal Services, Food Standards Agency**) for the **Defendant**

Hearing date: 9th June 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE EYRE

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be **10:30am** on **5th July 2022**

Mr Justice Eyre:

Introduction.

1. The Claimant operates a meat-processing business and is a Food Business Operator for the purposes of the regulations which I will consider below. It is not approved to produce or to sell Mechanically Separated Meat ("MSM") nor does it have the facilities which are required for the lawful production of MSM.

2. The Claimant formerly separated residual meat from the bones of butchered animals though a process ("the Old Process") which resulted in the production of Desinewed Meat ("DSM"). DSM was not a term derived from the applicable regulations but the Claimant and, at that stage, the Defendant believed that it was not MSM as defined in the regulations. The European Commission took a different view and in response to the Commission's concerns the Defendant imposed a moratorium ("the Moratorium") on the production of DSM. The Claimant challenged the imposition of the Moratorium by way of judicial review proceedings which involved a number of first-instance hearings; a reference to the CJEU leading to the judgment of 16th October 2014 in Case C-453/13R ("the CJEU Judgment"); and, on 3rd April 2019, to the decision of the Supreme Court in *R (on the application of Newby Foods Ltd) v Food Standards Agency* [2019] UKSC 18 ("the Supreme Court Judgment"). As a result of those proceedings the product of the Old Process was found to be MSM.

3. Following the decision of the Supreme Court the Claimant introduced new processing arrangements ("the New Process") for the separation of meat from bones. It believed that this process resulted in a product which was not MSM. There had been exchanges and meetings between the Claimant and the Defendant in the course of those dealings and I will consider those further below.

4. The Defendant's staff visited the Claimant's premises and viewed the New Process on 23rd July 2019 and 10th September 2021. The latter visit resulted in the sending of the Defendant's letter of 28th September 2021 ("the Decision") in which the Defendant expressed its conclusion that the product of the New Process was MSM.

5. The Claimant brings judicial review proceedings challenging the Decision on four grounds. First, Ground 1A, that the Defendant erred in law in failing to address the question of whether the New Process caused a loss or modification of the muscle fibre structure of the meat being processed. Second, Ground 1B, that the Defendant erred in law in characterising the resulting product as MSM because it had failed to take account of the fact that before being subjected to the separation of bone and flesh, the meat had been processed in such a way as to become a meat preparation for the purposes of the regulations. Third, Ground 2, that the Defendant's conclusion that the New Process resulted in MSM was an abuse because it was contrary to the legitimate expectation which had arisen from the Defendant's correspondence. Fourth, Ground 3, that there had been a failure to give adequate reasons for the Decision. Grounds 1B and 2 were closely related, as were Grounds 1A and 3. Although Mr Mercer QC for the Claimant advanced his case on all four grounds, he accepted that the principal submission (in his words "the guts of the case") was Ground 1B.

6. Fordham J gave permission and also allowed the admission of expert evidence. The purpose of that evidence was better to enable the court to understand the background

and the technical issues involved. The expert evidence was helpful in that respect but as matters have turned out was of limited value beyond that and on both sides much of the evidence, both lay and expert, addressed matters of limited relevance.

The Regulatory Background.

7. The Defendant was created by the Food Standards Act 1999. The relevant regulations remain enforceable as Retained EU Legislation.

8. By article 17 of Regulation (EC) 178/2002 food business operators were made responsible for ensuring that the food they produced satisfied the requirements of food law relevant to their activities. Similarly article 3 of Regulation (EC) 852/2004 and article 3 of Regulation (EC) 853/2004 made it clear that responsibility for compliance with those regulations lay with the food business operator in question.

9. Regulation (EC) 852/2004 addressed the hygiene of foodstuffs. The following definitions from chapter I article 2(1) are relevant.

> "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, parted, 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."

10. Regulation (EC) 853/2004 laid down specific hygiene rules for food of animal origin. The following recitals are of note:

> "(2) Certain foodstuffs may present specific hazards to human health, requiring the setting of specific hygienic rules. This is particularly the case for food of animal origin, in which microbiological and chemical hazards have frequently been reported.
>
> (8) Taken together, these elements justify a recasting of the specific hygiene rules contained in existing directives.
>
> (9) The principal objectives of the recasting are to secure a high level of consumer protection with regard to food safety, in particular by making food business operators throughout the Community subject to the same rules, and to ensure the proper functioning of the internal market in products of animal origin, thus contributing to the achievement of the objectives of the common agricultural policy.
>
> (20) The definition of mechanically separated meat (MSM) should be a generic one covering all methods of mechanical separation. Rapid technological developments in this area mean that a flexible definition is appropriate. The technical requirements for MSM should differ, however, depending on a risk assessment of the product resulting from different methods"

11. Chapter I article 2 provided as follows for the applicable definitions:

> "The following definitions shall apply for the purposes of this Regulation:
>
> 1. the definitions laid down in Regulation (EC) No 178/2002
> 2. the definitions laid down in Regulation (EC) No 852/2004
> 3. the definitions laid down in Annex I;

and

4. any technical definitions contained in Annexes II and III…"

12. Annex I point 1 included the following definitions in respect of meat:

> "1.1. 'Meat' means edible parts of the animals referred to in points 1.2 to 1.8, including blood…
>
> 1.10. 'Fresh meat' means 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 carcases, 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…"

13. It will already be apparent that the issue before me turns on the proper interpretation of the definition at 1.14.

14. Then, at point 7.1 "meat products" were defined as:

> "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".

15. Annex III Section V set out various requirements. The Claimant's case in large part depends on seeing Chapter II point 3 of this section as part of the definition of MSM. That chapter says:

> "Food business operators producing minced meat, meat preparations or MSM must ensure that the raw materials used satisfy the following requirements.
>
> 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 tissue;
>   (c) It must not derive from:
>   (i) scrap cuttings and scrap trimmings (other than the 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).
>
> 2. The following raw material may be used to prepare meat preparations:
>   (a) fresh meat;
>   (b) meat meeting the requirements of point 1; and

(c) if the meat preparation is clearly not intended to be consumed without first undergoing heat treatment:

(i) meat derived from the mincing or fragmentation of meat meeting the requirements of point 1 other than point 1(c)(i);

and

(ii) MSM meeting the requirements of Chapter III, point 3(d)

3. The raw material used to produce MSM must meet the following requirements.

(a) It must comply with the requirements for fresh meat;

(b) The following material must not be used to produce MSM:

(i) for poultry, the feet, the neckskin and head;

and

(ii) for other animals, the bones of the head, feet, tails, femur, tibia, fibular, humerus, radius and ulna."

16. The proper interpretation of chapter II point 3 is to be considered not just in the context of the other parts of chapter II but also in the wider context of the regulation and in particular of the balance of section V of annex III. The section is entitled "minced meat, meat preparations, and mechanically separated meat (MSM)". The nature of the other chapters of the section appears sufficiently from their titles. Thus chapter I deals with "requirements for production establishments"; chapter III with "hygiene during and after production"; and chapter IV with "labelling".

The Factual Background in Further Detail.

17. The butchering of carcases in the meat industry is frequently carried out using machines. Such mechanical butchering typically leaves significant quantities of sound meat (in the sense of meat which would be acceptable for human consumption when removed from the carcass) remaining attached to the bones. It is not economic for that meat to be removed from the bones manually. The use of mechanical methods to harvest that remaining meat and to separate it from the bones can result in MSM. Underlying the matters I have to decide is a question as to whether, and if so in what circumstances, there can be mechanical methods of harvesting of that meat which do not result in MSM. As Lord Sales pointed out, at [6], in the Supreme Court Judgment important consequences flow from the characterisation of a meat product as MSM. Thus it does not count towards the meat content of food; it must be produced under stricter hygiene conditions than other meat products; and a specific approval is needed for its production. MSM is not well-regarded in the meat industry. It is seen as a low-grade, low-value product which does not function well in prepared products. Indeed, at least some in that industry refer to MSM produced by high pressure methods as "pink slime".

18. The Claimant has striven throughout to act lawfully. It has incurred considerable expense in order to implement a process which it believes results in a quality product which is markedly different from that resulting from high pressure methods of meat separation and which falls outside the legal definition of MSM. If that product is in fact MSM then that expenditure will have been in vain and the Claimant's survival as a

going concern will be threatened because it does not have an approval to produce MSM and its facilities are not such as would enable it to obtain such an approval.

19. It is also said with some force that the New Process enables the safe gathering of edible meat from mechanically boned carcases ([2017] EWCA Civ 40) and that it is similar to processes used by other food processing business operators in the United Kingdom. If the fruit of such processes is properly to be characterised as MSM then large quantities of edible meat will go to waste leading in turn to the need for more animals to be reared and slaughtered than would otherwise be the case. It is apparent that the Defendant has some sympathy with this view. It was for this reason that it was initially supportive of the contention that DSM was different from MSM and not subject to the restrictions attaching to that product. Moreover, that sympathy is, at least in part, the explanation why a joint working party of the Defendant and representatives from the meat industry is undertaking consultation on the question of whether, following the departure of the United Kingdom from the European Union, there should be modification of the definition of MSM or of the regulations governing its use and production. However, for the reasons Lloyd-Jones LJ explained in the Court of Appeal's consideration of the Old Process at [43] as approved and supplemented by Lord Sales in the Supreme Court Judgment at [75] those are not matters which I can take into account when considering the proper interpretation of the regulations here.

20. It is to be noted at this stage that at the hearing the parties were agreed as to the meaning of the external and internal muscle fibre structure of meat. The external muscle fibre structure is the structure of the lines of muscle as they appear to the naked eye. In response to a question from the court counsel for the Defendant agreed on instructions that the internal muscle fibre structure is the internal cell structure of the muscles and changes to that structure can be detected by microscopic analysis but not by the naked eye. Since the hearing the Defendant has reflected and has written to the court saying that the agreement went further than it now believes to be correct. In particular the Defendant now takes the view that the term the internal muscle fibre structure relates not to, or at least not just to, the internal cell structure of the muscles but rather to the structure of the internal muscle fibre. The difference being that changes to the latter but not the former are potentially detectable by the naked eye. At my invitation the Claimant has responded to the correspondence from the Defendant and has repeated its contention that the agreed position at the hearing correctly stated the meaning of the internal muscle fibre structure. The distinction between the different meanings of the internal muscle fibre structure is not material for the purposes of my decision and is not a question I have to determine. Accordingly, it suffices to note the development in the Defendant's position and the Claimant's response thereto.

21. In the Old Process as developed by the Claimant residual meat was removed from carcases in two stages. First, the meat-bearing bones were forced into contact with each other and the meat was removed from the bones by the shearing process which took place during that contact. Second, the meat so removed was passed through another machine resulting in a product which looked like minced meat.

22. The Defendant had taken the view that the production of DSM which had resulted from the Old Process and from similar processes undertaken by other meat producers did not involve loss of the muscle fibre structure and so was not MSM within the meaning of the regulations. The European Commission disagreed and expressed the view that the resulting product was MSM. In response to those concerns the Defendant gave notice

on 5th April 2012 of the Moratorium which came into effect on 26th May 2012 in respect of the separation of meat from poultry or pork bones. The Moratorium provided that the production of DSM from such bones could continue but that product was to be considered as MSM and to be subject to the provisions governing the production of MSM. Notice of the Moratorium was accompanied by guidance from the Defendant. That guidance identified the following as "activities outside the scope of the Moratorium":

> "Residual non ruminant meat which has been removed from the bone, either with a knife or hand held powered equipment with a cutting or shearing action, and which does not involve removing the meat by means of applying low or high pressure techniques, is not considered to be MSM.
>
> If the product obtained from the process described in the bullet point above contains cartilage, sinew or bone fragments/chips, it may be passed through a meat separator to remove such cartilage, sinew or fragments, and is not considered to be MSM.
>
> DSM produced from portions of non ruminant meat (which is not on the bone, and that has not been obtained by mechanical separation) by passing it through a meat separator to remove sinew or fat is not considered to be MSM.
>
> Meat removed by mechanical means from non ruminant bone-in cuts of meat that have not been subject to any previous boning[1] is not considered to be MSM. Examples include wishbone meat, and recognised pork and poultry cuts. This process is regarded as mechanical deboning as it is the removal of bones from meat, rather than the removal of residual meat from bones"

23. As the CJEU Judgment noted at [29], the Defendant took note of the European Commission's position in the Moratorium and the accompanying guidance but "distanced itself from that position". The Defendant continued thereafter to express its disagreement with the interpretation advanced by the Commission and drew attention to the "innovative nature" of the Old Process and of similar processes being used to recover meat from butchered carcases.

24. As the Claimant was not approved to produce MSM the Moratorium had the effect of prohibiting the use of the Old Process to separate meat from bones. The Claimant brought judicial review proceedings challenging the lawfulness of the Moratorium.

25. In the course of those proceedings Edwards-Stuart J requested a preliminary ruling from the CJEU as to the correct interpretation of points 1.14 and 1.15 of annex I of regulation 853/2004. In essence the issue was whether a product was to be regarded as MSM if there was any modification whatsoever of the muscle fibre structure (see the CJEU Judgment at [34]). Before the CJEU both the Claimant and the Defendant contended that a product was only MSM if there had been a "significant" loss or modification of the muscle fibre structure such as to eliminate the characteristics of fresh meat. They contended that for the purposes of the regulations the product of the Old Process was a meat preparation rather MSM. The CJEU disagreed. At [41] – [43] the court identified the three criteria satisfaction of which will cause a meat product to be MSM. It also explained in the following terms that any modification of the muscle fibre structure other than that which is strictly confined to the cutting point will involve a loss or modification of the muscle fibre structure satisfying the third criterion:

> "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 1 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 carcases, 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 1 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 carcase of the animal by mechanically operated cutting rightly do not constitute mechanically separated meat"

26. At [49] – [50] the CJEU explained the relevance of recital 20 to its interpretation of the regulation. That recital clarified the intention of the legislature and demonstrated that it had been anticipated that innovative low pressure methods of separating meat from bones would be developed and had been intended that the product of such methods would nonetheless be MSM.

27. At [52] and following the CJEU addressed the contrast between MSM and a meat preparation for the purposes of the regulation. It explained that the production of MSM involved neither the addition of foodstuffs, seasonings, or additives nor the processing of the meat. The CJEU said the concept of meat preparation was linked not with MSM but with those of fresh meat and minced meat and also with the concept of meat products. In [54] the CJEU said that fresh meat and minced meat were "in principle the only usable raw material".

28. The matter came back before Edwards-Stuart J who had to consider whether the product of the Old Process was or was not MSM in the light of the criteria for MSM laid down by the CJEU ([2016] EWHC 408 (Admin)). It was common ground that the first two criteria were satisfied and the issue was whether the loss or modification of the muscle fibre structure involved in the Old Process was confined to the cutting point. That turned on whether the cutting point was to be interpreted widely as referring to every point at which the meat was severed or separated or as being limited to the original cutting of intact muscles. Edwards-Stuart J adopted the wider interpretation and, as a consequence, concluded that the Old Process did not produce MSM.

29. On appeal from that decision both the Court of Appeal and the Supreme Court held that the narrower interpretation was correct and that the cutting point exception was limited

to the original cutting of intact muscles with the consequence that the product of the Old Process was MSM.

30. At [38] Lord Sales, with whom the other members of the Supreme Court agreed, said that Edwards-Stuart J had been right to conclude that the CJEU had interpreted the regulations "with a view to achieving clarity in the application of point 1.14 rather than making it depend on a case by case assessment by microscopic examination of muscle fibres". At [56] Lord Sales said that the CJEU had reiterated the point that "the definition of MSM does not depend on an analysis of the degree of loss or modification of the muscle fibre structure removed by [the Old Process] or equivalent processes". Then at [57] he explained that:

> "Instead, the CJEU held that a much clearer line of demarcation applies. Meat removed from a carcase will not be MSM if it is removed by mechanical means in the first phase of cutting meat from the whole carcase, but will generally be MSM if it is removed by mechanical means thereafter. For animals other than poultry, this is explained by the focus on the prior detachment of "the intact muscles" as the critical aspect of the first criterion for MSM in [41], together with the CJEU's emphasis in [42] that to escape categorisation as MSM any loss or modification of muscle fibre structure must be "strictly confined to the cutting point". It is straightforward to know whether a carcase has gone through the initial phase of having meat cut from it, and there is no requirement for refined processes of microscopic investigation to be applied"

31. For the Claimant Mr Mercer relied on the use by Lord Sales of the word "generally" in the second sentence of [57]. He said that by the use of that word Lord Sales had indicated that there could be circumstances in which the mechanical removal of meat might not cause the resulting product to be MSM. It is right that the use of "generally" would appear to indicate a qualification and to envisage the possibility that meat could be mechanically removed without the end product being MSM. The qualification must, however, be read in the context of the rest of [57] and of the Supreme Court's decision as a whole. When that is done it is apparent that it would only be in some unspecified exceptional circumstances that the product of the mechanical removal of meat after the first cutting would not be MSM. It is also to be noted that the judgment resulted in the conclusion that the product of the Old Process was MSM.

32. In the light of those decisions the Claimant reflected on the position and considered what it could do to continue the recovery of meat from butchered carcases without causing the end product to be classified as MSM. Douglas Manning, the Claimant's Operations Director, explained his approach thus at [15] – [16]:

> "15. I pored over all the Court Judgments until I knew them back to front; the High Court, the ECJ, the Appeal Court, the Supreme Court and then it clicked. All of the courts followed the lead of the ECJ; Newby's old product was MSM because it was an unprocessed product, namely fresh meat, making it MSM and not a Meat Preparation as Meat Preparations are a processed product in accordance with the definition in para. 1.15 of the relevant annex to Regulation 852/2004.
>
> 16. I then looked to the regulations to look at what the legitimate processes actually are that turn fresh meat from being unprocessed to processed and realised that both the Redmond letter and the Lawrence letter give examples of some of the legitimate recognised products… "

33. At [21] Mr Manning said that the rebuilding of the Claimant's production processes was undertaken in the light of "the knowledge gained …from the four court judgments

and seven years of legal battles, as well as letters and meetings with the FSA over the same years".

34. As a result of that cogitation the Claimant concluded that if fresh meat were to be processed so as to become a meat preparation before the meat was separated from the bones then the resulting product would not be MSM. In legal terms the view was taken that the effect of the regulations (and in particular of annex III section V chapter II.3 of regulation 853/2004) was that if the raw material used to create a product was not fresh meat then the resulting product would not be MSM. That interpretation is the basis for Ground 1B of the Claimant's challenge to the Decision and I will consider it further below.

35. It was on the basis of that interpretation that the New Process was developed. For both pork and poultry products the initial and final stages are the same but for most pork products there is an additional second stage. The first stage for all products is an extrusion process in which raw meat travels up a conveyor and is forced through a narrowing auger (for poultry products) or a series of metal die (for pork products). For both poultry and pork that process breaks the meat down into smaller fragments but the bone and the meat are not separated from each other nor is there any change in the internal muscle fibre structure of the meat. The Claimant causes microscopic analysis to be undertaken to ensure that the first stage of the New Process does not alter the internal muscle fibre structure of the meat. The final stage for all products is for the meat to be fed into a Sepamatic machine which uses a perforated drum in conjunction with a crushing belt. This machine removes from the meat connective tissue such as sinews and cartilage together with bone fragments (to the extent that those fragments have not already been removed by the second stage where that is used). The second stage for most pork products is for the meat fragments resulting from the extrusion process to be fed into a Marel ProTEN machine. There pressure is applied causing the bones to rub the meat from each other after which the meat passes through a filter and is then fed into the Sepamatic machine for removal of the connective tissue and any remaining bone fragments while the bones remain inside the filter.

36. There had been continuing exchanges between the Claimant and the Defendant. It is of note that the Claimant has striven to find ways in which it can lawfully recover meat from butchered carcases. There is no doubt that it has engaged in careful reflection and has incurred substantial expense in seeking to do so. There is no dispute that for its part in the run up to and during the previous litigation the Defendant was supportive of the Claimant's intentions and conscious both of the benefit of recovering meat from carcases economically and of the innovative steps which the Claimant has taken. In that regard it is to be remembered that, as noted above, the Defendant had distanced itself from the stance of the European Commission and had favoured the Claimant's interpretation of the nature of DSM rather than that adopted by the Commission and subsequently by the CJEU. Mr Manning says that although the Claimant and the Defendant "worked hand-in-hand" up to 2019 the Defendant's approach changed thereafter with a failure to engage with the Claimant or to respond to correspondence. The Defendant denies any change of attitude. It does accept that the need to address the consequences of the United Kingdom's departure from the European Union and of the Covid-19 pandemic diverted attention from this issue and meant that the engagement with the Claimant was reduced. In addition the Claimant contends it is being singled out and that other businesses operating similar processes have not been told that their

products are MSM or been threatened with enforcement action. The Defendant denies that the Claimant is being victimised and it is of note the Claimant does not advance the alleged conduct as a ground of its challenge to the Decision.

37. In addition to the guidance which accompanied the Moratorium the following letters are relevant as the basis of the Claimant's contention that the Decision is contrary to a legitimate expectation created by the Defendant.

38. On 23rd July 2013 Liz Redmond, the Defendant's Veterinary Director, wrote to the Claimant ("the Redmond Letter"). Miss Redmond began by repeating the Defendant's interpretation of the regulations and confirming that the Defendant had questioned and was continuing to question the Commission's interpretation of the meaning of MSM. The bulk of the letter was concerned with ruminant bones to which different considerations applied because of concerns about transmissible spongiform encephalopathies. However, Miss Redmond concluded by saying:

> "Finally, we are satisfied that the mechanical separation of meat other than fresh meat (e.g. cooked or cured meat) from non-ruminant bones does not fall within the definition of MSM under the EU Hygiene Regulations. Such material will instead fall as appropriate within the 'meat product' or 'meat preparations' definitions in the EU Hygiene Regulations and will be considered to be meat for the purpose of food labelling legislation. The option of producing such non-ruminant product is therefore available to food business operators"

39. In August 2015 the Claimant wrote to the Defendant seeking approval as a minced meat establishment. On 12th October 2015 John Lawrence, the Defendant's Operations Head Veterinarian, replied ("the Lawrence Letter") saying that the Defendant was not satisfied that the proposed production method using extrusion amounted to mincing. He then said:

> "It is the understanding of the FSA that the boned-out material you propose using in the Sepamatic machine undergoes an 'extraction and/or extrusion' process. The resultant processed meat would therefore, under EU Regulations, require approval as a meat preparation, which I note you already hold"

40. The New Process was put in place in 2019 following the Supreme Court decision. On 23rd May 2019 representatives of the Defendant attended at the Claimant's premises. The New Process was not inspected at that stage. However, the Claimant did explain to the Defendant that it had relied on the Redmond and Lawrence letters in conjunction with its interpretation of the court judgments and the regulations to develop the New Process and was doing so on the footing that the end product was a meat preparation and not MSM.

41. The New Process was inspected by the Defendant on 23rd July 2019 although the report arising out of that inspection was not provided to the Claimant until after the commencement of these proceedings. Commenting on the extrusion process the authors of the report said that "the appearance of the final product is not much different from the one entering the process…". The New Process was described and the report's authors noted that the microscopic tests undertaken on the Claimant's behalf showed that "the muscular structure of the meat has not been modified by the process". They noted without comment the Claimant's argument that the product of the New Process was not MSM either by reason of the raw material entering the Sepamatic machines not

being fresh meat or because that raw material had not been boned out by the extrusion process.

42. A further inspection took place on 10th September 2021. That inspection followed a meeting between the Claimant and the Defendant on 18th August 2021 which had been triggered by the stoppage of two pallets of the Claimant's poultry products at customs in Belfast. In the meeting the Claimant had contended that the changes it made had meant that the process being used had substantially changed from that which had been considered by the Supreme Court so that the resulting product was no longer to be classified as MSM. The purpose of the inspection was said to be to determine whether the processes then being used by the Claimant were the same as had been held by the Supreme Court to result in the production of MSM. The New Process was described. Addressing the processing of poultry, the report said that there was not a significant change in the raw materials after the first stage, the extrusion process, and that this process did "not substantially alter the initial product". Turning to the processing of pork the report said that the extrusion process cut the product into smaller portions but did not substantially alter the product. It said "no separation takes place at this stage, only fragmentation of the initial product". The report concluded by noting that the Claimant's contention was that the end product was not MSM was "based on the categorisation of the raw materials". The Claimant's contention was that the product had ceased to be fresh meat before the separation of bone and meat took place and that instead it had become a processed product in respect of which the separation of bone and meat did not result in MSM. The authors of the report noted that the extrusion process did not appear to have altered the meat being processed substantially. As a consequence they took the view that the raw material as being put into the Sepamatic machines "remained an unprocessed product". That had the consequence, the authors said, that "the production processes are not significantly different from those on which the Supreme Court made their judgment, and therefore the product should be classed as MSM".

43. That report led to the Decision. The letter of 28th September 2021 noted the Claimant's contention that the changes it had made from the process which had been considered by the Supreme Court were substantial such that the product was no longer to be classified as MSM. Reference was made to the September 2021 visit and a copy of the report arising out of that visit was attached. The letter then said:

> "as per the attached report and based on the information gathered during the visit, we have concluded that the changes made in the process at [the Claimant] have not fundamentally altered the process from that assessed by the Supreme Court".

44. Accordingly, it was said that for the Claimant to be able to market the product of the New Process lawfully it would have to obtain MSM approval. The letter added that if the Claimant continued to place the product on the market without approval the Defendant would initiate enforcement action.

Ground 1B: The Alleged Error of Law in classifying the Product of the New Process as MSM.

45. The Claimant's argument is based on the provision at point 3 of annex III section V chapter II of regulation 853/2004 that the raw material used to produce MSM must comply with the requirements for fresh meat. The Claimant says that this provision forms part of the definition of MSM with the consequence that a product which is not

made out of fresh meat cannot be MSM. A meat preparation within the meaning of point 1.15 of annex I is not, the Claimant says, fresh meat even though it must retain the characteristics of fresh meat. The extrusion stage of the New Process constitutes processing for the purposes of the regulations by virtue of the definition of processing at article 2(1)(m) of regulation 852/2004. As a consequence the product which emerges from the first stage of the New Process has been processed and is a meat preparation and not fresh meat. That becomes the raw material to which the New Process applies the processes which separate bone and meat. Those processes do not result in MSM because they are being applied to a product which is not fresh meat.

46. The Defendant says that this argument is based on a misreading of the regulations. The provisions at point 3 of annex III section V chapter II are not part of the definition of MSM instead they are requirements imposed on those producing MSM. The definition of MSM is to be found in annex I point 1.14 as interpreted by the CJEU and the Supreme Court involving consideration of whether the three criteria identified by the CJEU are present. The Defendant also says that even if the provision at annex III section V chapter II.3 is part of the definition of MSM then the product of the New Process is nonetheless MSM because a meat preparation remains fresh meat. That is because meat preparation is a sub-set of fresh meat and not something other than fresh meat.

47. In support of the Claimant's interpretation of the annex III section V chapter II.3 provision Mr Mercer pointed out that article 2 of regulation 853/2004 made reference to "technical definitions" in annexes II and III, thereby contemplating that at least parts of those annexes were definitional. He said that the Redmond letter indicated that this was also the view of the Defendant at least at the time of that letter. Mr Mercer also prayed in aid the fact that the CJEU had, at [54], described fresh meat and minced meat as being "in principle the only usable raw material."

48. I reject the Claimant's interpretation of annex III section V chapter II.3. That provision was not purporting to define MSM by providing an addition to the definition at point 1.14 of annex I. It was not laying down pre-conditions which had to be fulfilled for a product to be MSM. Instead it was laying down the requirements which had to be met for MSM to be produced and marketed lawfully. Mr Birdling and Miss Mockford were right to say in their skeleton argument at [42] that the effect was that "some products satisfying the definition of MSM may not be marketed because they do not comply with the raw material requirements." I am satisfied that the interpretation advanced by the Claimant is untenable when the provision is read in the context of the definition at 1.14 and of the other parts of annex III section V. As to the former point: 1.14 is avowedly definitional and although its main focus is on the processes which will lead to a product being MSM it includes reference to the material elements which are necessary for the definition to be satisfied (namely the references to "meat", "flesh-bearing bones", and "poultry carcases") and which formed subject-matter of the first criterion identified by the CJEU. It is of note that when identifying the "three cumulative criteria" on which the definition of MSM is based and which are required for a product to be MSM the CJEU made no reference to a fourth or different criterion relating to the material used in addition to that required to satisfy the first criterion. I do not read the reference at [54] of the CJEU Judgment to "the only usable raw material" as indicating anything different. In my judgment the CJEU is there referring to the material which can be used to make a meat preparation and not to the necessary constituents of MSM. What is being said is that a meat preparation must be made from fresh meat or minced meat.

However, even if the reference is to MSM the expression that a particular raw material is in principle the only usable one is to be seen as a reference to that which can lawfully be used (and so according with the Defendant's interpretation) rather than to the elements which are necessary as a matter of definition. Turning to the context of chapter II Mr Mercer accepted that chapters I and III of annex III section V were not definitional (and it is readily apparent that the other chapters of that section are also not definitional) but contended that chapter II was to be seen as different from those chapters and as being definitional. I disagree: chapter II is most naturally read as imposing requirements in the same way as the other chapters of that section do rather than as being a provision different in kind from the other parts of the section. Thus a product resulting from the use of mechanical means to separate meat from the femur of a pig (or any other of the sources prohibited by 3(b)) would be MSM if intact muscles had already been detached from that bone and if there was a loss or modification of muscle fibre structure other than at the cutting point (so satisfying the three criteria identified by the CJEU) but it would have been MSM produced in contravention of the requirements of chapter II. I am strengthened in my reading of these provisions by recital 20 to the regulation which focuses attention on the methods used to create MSM without making reference to the material being used.

49. It follows that the question of whether the product of the New Process was MSM depended on the application of the three criteria identified by the CJEU as explained by the Supreme Court and without any additional requirement that the material used be fresh meat. There was no error of law involved in the Defendant's failure to conclude that because the first stage of the New Process involved processing such as to create a meat preparation then the final product of the process could not be MSM. That question was immaterial to the issue of whether or not the end product was MSM. Ground 1B of the Claimant's challenge, accordingly, fails.

50. That conclusion renders academic the debates as to whether the product of the first stage of the New Process was a meat preparation and whether a meat preparation is different from fresh meat or remains a sub-set within that category. The points were, however, fully argued and I will deal with them shortly.

51. The Claimant's argument was that by reason of article 2(1)(m) of regulation 852/2004 extrusion was a process. Both as a matter of fact and by reason of that definition the extrusion substantially altered the initial product. As a result of the extrusion that initial product became a processed product for the purposes of article 2(1)(o) of 852/2004 but more significantly became a meat preparation for the purposes of annex I point 1.15 of regulation 853/2004. That was because although the meat had been processed the processes had not been sufficient to modify the meat's internal muscle fibre structure and had not eliminated the characteristics of fresh meat.

52. The Defendant accepted that extrusion was capable of being a process and of resulting in processed meat for these purposes but did not accept that it necessarily did so. It said that extrusion was only processing if it substantially altered the initial product. Here the assessment made as a matter of fact during the September 2021 visit was that the extrusion had not substantially altered the raw material with the consequence that there had not been any processing.

53. The question turns on the proper interpretation of article 2(1)(m). Is extrusion necessarily and by reason of that provision a process which substantially alters the raw

material or does it only amount to processing if it has the effect in fact of substantially altering that material? The matter is finely balanced. In favour of the Claimant's interpretation is the point that article 2(1)(m) refers to "any action that substantially alters the initial product" and then lists a number of actions which are included in that category. As a matter of syntax that is most naturally read as indicating that the actions which are included are to be regarded as necessarily being within the category of actions which substantially alter the initial product. However, the contrary view can be supported by reference to article 2(1)(n) and to the nature of the processes listed in article 2(1)(m). The former envisages that products which have been "divided, parted, severed, sliced, boned, minced, skinned, ground, cut, cleaned, trimmed, husked, milled, chilled, frozen, deep-frozen, or thawed" will not be processed products or at least will not be necessarily such. Moreover, at least some of the actions listed in article 2(1)(m) are such that they will not necessarily alter the initial product substantially. Thus while maturing or drying meat for 3 weeks might well properly be said to effect a substantial alteration doing so for 12 hours is unlikely to be so regarded. Those factors would indicate that article 2(1)(m) is to be read as providing that only an action which substantially alters the initial product are to be regarded as processing and as setting out a non-exhaustive list of actions which are potentially capable of having that effect. On balance I am satisfied that the latter factors indicate the correct interpretation and that extrusion only constitutes processing if it substantially alters the initial product.

54. Whether there has been a substantial alteration of the initial product will be a matter of fact and degree. In the circumstances here the Defendant's staff found in September 2021 that there had not been a substantial alteration. In that regard it is to note that the Defendant's staff assessed the extrusion as bringing about only a fragmentation of the pork. It is apparent from annex I point 1.15 of regulation 853/2004 that fragmentation does not necessarily amount to processing. In the light of that finding the Defendant was entitled to conclude that at the time the residual meat was separated from the bones the material to which the mechanical separation was applied was not a processed product or a meat preparation. If it had been necessary to do so I would have held that the Defendant's conclusion in that regard was not to be overturned on public law grounds.

55. My conclusions as to the effect of annex III section V chapter II.3 and as to whether the product of the extrusion was a meat preparation make the question of whether a meat preparation is raw material such as to "comply with the requirements for fresh meat" for the purposes of that provision even more academic. The point was again fully argued but my conclusion can be stated very shortly. I have concluded that a meat preparation can be fresh meat or at least can be material complying with the requirements for fresh meat and that meat preparations are a sub-set of fresh meat (albeit a sub-set to which a number of specific provisions apply) rather than being outside the definition of fresh meat. There are two reasons for this. The first is the very wide scope of the definition of fresh meat. In particular it only excludes meat which has undergone a preserving process (and not all such processes). It is, accordingly, envisaged that meat which has undergone other processes will remain fresh meat. Second, the processes which convert fresh meat into a meat preparation must be such as are "insufficient to modify the internal muscle fibre structure of the meat and thus to eliminate the characteristics of fresh meat". The words I have quoted indicate that the internal muscle fibre structure is regarded as being the key characteristic of fresh meat. In the absence of such modification the characteristics of fresh meat will remain, it would be bizarre if the

effect of the regulations was that a product which had to retain the characteristics of fresh meat was not within the definition of fresh meat.

The Allegation that the Decision was contrary to a Legitimate Expectation created by the Defendant.

56. The basic principles are not contentious and can be stated shortly having regard to the analysis by the Court of Appeal in *R (Bibi) v Newham LBC* [2001] EWCA Civ 607, [2002] 1 WLR 237 at [33] - [39]; by the Privy Council in *United Policyholders Group & others v Att-Gen of Trinidad & Tobago* [2016] UKPC 17, [2016] 1 WLR 3383 at [36] – [39]; and by the Supreme Court in *Re Finucane's Application for Judicial Review* [2019] UKSC 7 at [62] – [64]. It can be an abuse of power giving rise to a public law ground of challenge for a public body to act in a way which is contrary to a legitimate expectation that it would exercise its powers in a different way. The expectation in question has to have arisen from a statement of the public body with such statement being clear, unambiguous, and not subject to any relevant qualification. In addition the circumstances have to be such that it is unfair for the public body to go back on the expectation. However, a statement of a public body cannot preclude that public body from performing a statutory duty nor can it permit a public body to adopt an incorrect view of the law. Thus, although it can be abusive for a public body to exercise a discretionary power contrary to a legitimate expectation, a public body cannot by its statements, even if relied upon by others, abdicate its duties nor can it re-write the law. It matters not for current purposes whether that is because statements which would lead to an abdication of the body's duties or which involve a misreading of the law cannot properly be regarded as having given rise to such an expectation or because the expectation cannot be seen as legitimate for these purposes.

57. The Claimant's case as to legitimate expectation is closely related to its Ground 1B interpretation argument. The expectation which is said to have been created by the Redmond and Lawrence letters together with the Moratorium guidance is that if the Claimant's processes were organised in accordance with a reasonable understanding of the letters then the resulting process would be regarded by the Defendant as compliant with the regulations in the sense that the product of the processes would not be regarded as being MSM.

58. Mr Mercer accepted that if the law is clear with the consequence that the Claimant's contention as to the definition of MSM is clearly incorrect then there is no scope for a legitimate expectation leading to a different result. However, he says that the position is different if there is legitimate scope for differing interpretations of the relevant provisions. He says that the position here is that there is such scope and that, as a consequence, the Claimant had a legitimate expectation that the Defendant would proceed on the footing that the Claimant's interpretation of definition of MSM was correct. I disagree with that analysis for the following reasons.

59. The circumstances here do not involve the Defendant either exercising a discretion or setting out a policy or making statements as to how it will exercise its discretionary powers. Instead the question is one of statutory interpretation involving consideration of how the regulations are to be interpreted with regard to the definition of MSM. The Defendant and now the court have to consider whether the product of the New Process is MSM within the meaning of the regulations. As a matter of statutory interpretation there can only be one correct answer to that question. The court in considering the

meaning of legislation cannot say a number of differing interpretations are equally valid: either the product of the New Process is MSM or it is not. It will often be the position that a number of differing interpretations of a particular provision are properly arguable but ultimately there can only be one correct interpretation and having determined what that correct interpretation is the court must regard other interpretations as incorrect. Contrary to Mr Mercer's contention it is not open to a public body to bind itself to interpret legislation in a particular way if that interpretation is found to be incorrect. That is so regardless of whether the meaning of the relevant provision is clear or opaque and regardless of whether only one or more than one interpretation is properly arguable. Here if the product of the New Process was MSM on a proper interpretation of the regulations then it is to be regarded as MSM by the Defendant and by the court. In those circumstances it would not be open to the Defendant to say that it would not treat that product as MSM still less could it be said that a decision to regard it as MSM was susceptible to a public law challenge. I have already explained the reasons why I have concluded that the Claimant's interpretation is incorrect and that the product of the New Process is properly to be classified as MSM. In those circumstances this ground of challenge falls away.

60. Moreover, the Claimant's contention that the Redmond and Lawrence letters gave rise to a legitimate expectation cannot be sustained in the light of the terms of those letters and of the Claimant's action even when they are seen in the context of the surrounding circumstances.

61. The Redmond letter was at most an indication of the Defendant's understanding of the correct interpretation of the regulations at the time of the letter. It cannot properly be seen as having been an indication that the Defendant would persist in that view let alone that it would persist in the view notwithstanding the approval of a different interpretation by the courts. The letter was sent before the decisions of the CJEU, the Court of Appeal, or the Supreme Court and cannot have been read as a statement of an approach which would be persisted in after such decisions.

62. The Lawrence letter was similarly not a representation as to the approach to be taken to the New Process let alone a clear and unambiguous statement that the product of the New Process would not be regarded as being MSM. The letter must be seen in its context. It was simply saying in short terms that the result of the process proposed at that time would not be minced meat but that it would appear to be a meat preparation. Mr Lawrence did not address at all the question of whether the product would be MSM and his letter cannot be read as an indication that the product would not be MSM. It is also to be noted that whatever was being considered by Mr Lawrence at the time of the letter it cannot have been the New Process. Mr Manning made it clear that the New Process was only formulated after reflection on all the relevant judgments including those of the Court of Appeal and the Supreme Court both of which came after the Lawrence letter.

63. The events at the Claimant's meeting with the Defendant in 2019 do not advance matters. At most the effect was that the Defendant was put on notice that the Claimant regarded the Redmond and Lawrence letters as supporting its contentions but it is not suggested that the Defendant accepted that the Claimant was right to do so let alone that there was a clear and unambiguous statement to that effect.

64. It is apparent from the Claimant's evidence that there were two stages in the development of the New Process. The first stage was the reflection by Mr Manning on the various court judgments and his conclusion from that reading that the end product would not be MSM if at the time the meat and bones were being separated the raw material to which that separation was applied was not fresh meat. That conclusion was crucial to the development of the New Process and came from Mr Manning's consideration of the judgments and not from reliance on a statement by the Defendant. As will be apparent I have concluded that the conclusion which Mr Manning reached was wrong as a matter of law. The second stage was the adoption of the view that the product of the extrusion process would not be fresh meat but a meat preparation. Even taking the Claimant's case at its highest it is only the Lawrence Letter which might be said to provide some support for that view but as I have explained that is not the correct reading of it and the letter was not such as to give rise to a legitimate expectation even approaching that on which the Claimant relies.

65. It follows that the challenge on Ground 2 fails.

Grounds 1A and 3: The alleged Error of Law in failing to determine whether the New Process resulted in a Loss or Modification of the Muscle Fibre Structure and the alleged Failure to give adequate Reasons.

66. These grounds are closely related. It is said that for the Defendant to find that the product of the New Process was MSM the Defendant had to find that process resulted in the loss or modification of muscle fibre structure but there was no finding in that respect. That, the Claimant says, amounted to an error of law in that the Defendant concluded that the product was MSM without identifying one of the necessary criteria for MSM as being present. The Decision is also said to be flawed through the absence of adequate reasons in that the Defendant did not state that there had been a loss or modification of muscle fibre structure or explain why it had concluded, if it had, that there had been such a loss or modification. Similarly, the Claimant says that the Defendant failed adequately to explain why it had concluded that the New Process was not materially different from the Old Process. In addition it is said that although the report noted that the Claimant had said that the Redmond and Lawrence letters suggested that the New Process was permitted neither the report nor the Decision explained why the Defendant believed it was entitled to resile from the position taken in those letters.

67. There is no substance in these contentions. The context of the Decision is important and was well known to both the Claimant and the Defendant. Part of that context was the Claimant's contention that the crucial difference between the New Process and the Old Process was the insertion of a new stage meaning that the material was no longer fresh meat at the time the meat was separated from the bones. I have already explained why that contention was flawed. By way of the context of the Decision it has to be remembered that MSM results if there has been any loss or modification of the muscle fibre structure other than at the initial cutting point. Both the CJEU and the Supreme Court emphasised that the question of whether there was such a loss or modification was a practical and pragmatic matter. The Claimant placed considerable emphasis on the fact that there had been no change of the internal muscle fibre structure. It made sure to provide the Defendant with evidence from the microscopic analyses showing that there had been no such change. However, although it was necessary to show that there had been no change of the internal muscle fibre structure if the product was to be

within the definition of a meat preparation that was not determinative for the purposes of the definition of MSM where the question was one of loss or modification of the muscle fibre structure whether internal or external.

68. Here there was clearly a loss or modification of the external muscle fibre structure at the point (whether at stage 2 or stage 3) in the New Process where meat and bones were separated. The Claimant's development of the New Process had not been aimed at avoiding such a loss or modification and that was not the way in which the Claimant had sought to overcome the consequences of the judgments of the CJEU and of the Supreme Court. Instead the Claimant had focused on inserting a further stage so as to convert fresh meat into a meat preparation before the separation of meat and bone. The process remained one in which meat was separated from the bone to which it had been attached. It cannot realistically be contended that this did not involve a loss or modification of the muscle fibre structure. As Lloyd-Jones LJ said at [43] "… Mechanical separation of residual meat from bones produces separation, shearing or cutting and hence modification to the muscle fibre structure at other points in addition to the point from which the intact muscles have been removed…." That exercise occurred in both the Old Process and the New Process. It was not suggested that the New Process did not involve the mechanical separation of meat from bones at a stage after the initial butchering of the carcases (rather that was its whole purpose). In those circumstances it was not necessary for the Defendant to make a separate express finding that there had been a loss or modification of the muscle fibre structure and there was no error of law in the failure to express such a finding.

69. I turn to the question of whether the Defendant adequately explained the reasons for the Decision. There is no substance in this ground of challenge. It was unsurprising that the report and the Decision focused on the key argument advanced by the Claimant namely that the introduction of the extrusion stage meant that when the meat and bone were separated the raw material was a meat preparation with the consequence that the resulting product was not MSM. The report and the Decision made the Defendant's reasoning in that regard perfectly clear. They explained that the Defendant had concluded that the extrusion had not materially altered the meat passing through that process and had as a consequence rejected the premise of the Claimant's argument. The Claimant and the court were readily able to identify the Defendant's reasoning in that regard.

70. Following on from that the conclusion that the New Process was not materially different from the Old Process was expressed in short but entirely adequate terms. The point was made shortly but it was being explained that the Defendant took the view that the introduction of the extrusion stage had not materially altered the nature of the process because it did not materially alter the meat passing through it.

71. It is correct to say that neither the report nor the Decision explained in terms that the Defendant was abandoning the position set out in the Redmond and Lawrence letters or, as the Claimant puts it, resiling from that position. However, the contention that this was an inadequacy in the Decision cannot be sustained in circumstances where it was by no means at the forefront of the Claimant's argument to the Defendant. The report suggests that the Claimant referred to the letters not on the basis that the Defendant was bound by the views expressed therein but rather as support for the Claimant's interpretation of the regulations and as a reason why the Defendant should accept that as the correct interpretation. Moreover, as explained above, the contention that the

letters gave rise to such a legitimate expectation that the Defendant would interpret the regulations in the way for which the Claimant contended was untenable.

72. The Defendant's reasoning was set out shortly and was addressed to the form of argument being advanced by the Claimant at the time rather than the somewhat fuller case being presented now by the Claimant's legal team but it cannot credibly be contended that the Defendant failed adequately to explain why it had concluded that the product of the New Process was MSM.

Section 31 (2A) of the Senior Courts Act 1981.

73. By this provision the court "must" refuse to grant relief on a judicial review application "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". That requirement may be disregarded if it is appropriate to do so "for reasons of exceptional public interest" but it is not suggested that there are any such reasons here.

74. This provision is potentially relevant if I am wrong as to Ground 1A or 3. It will be relevant if, contrary to my conclusions above, the Defendant erred in law in failing to make an express finding that the New Process involved the loss or modification of muscle fibre structure or in failing to explain that the presence of mechanical separation of bone and meat causing loss or modification of muscle fibre structure was the reason why the New Process was not materially different from the Old Process. In those circumstances I am satisfied that it is highly likely that the outcome would not have been substantially different for the Claimant if the finding had been expressly considered or the reason more fully explained. In those circumstances even if Grounds 1A and 3 had otherwise been made out I would have been compelled by section 31(2A) to refuse relief. First, that is because in light of the nature of the process and for the reasons I have explained above it was inevitably the case that the mechanical separation of meat from bone involved a loss or modification of the muscle fibre structure such that if the Defendant had considered making an express finding in that regard the finding would necessarily have been that there had been such a loss or modification. Second, it is because the crucial issue was whether the introduction of a new stage in the process meant that the product was not MSM because it meant that the raw material at the time of the separation of meat from bones was not fresh meat. That was the argument which formed the basis of Ground 1B. As I have already explained the Claimant's interpretation of the regulations is incorrect. It is manifest that the Claimant has been able to address the issues and the conclusion as to the legal test and consequently as to the nature of the New Process would have been no different even if the Defendant's reasoning had been spelt out more fully.

Conclusion.

75. In those circumstances the claim is dismissed.