McNICHOLS ✓ 6

THE HIGH COURT

1983 No. 4209P

BETWEEN

ANTHONY McNICHOLL LIMITED AND OTHERS

PLAINTIFFS

AND

THE MINISTER FOR AGRICULTURE

DEFENDANT

Judgement of Mr. Justice Costello delivered the 22nd day of April 1986

Mary P. O'Donoghue
Registrar

Introduction

Each of the plaintiff companies (all of whom are associated as subsidiaries of a Swedish company) entered into separate contracts with the Department of Agriculture for the purchase of boxed boneless beef held in intervention storage by the Department. Their contracts required them to export the beef within five months of delivery and to provide security for the fulfilment of this obligation at a stated rate. Each company entered into an agreement to sell the beef to their parent company in Sweden but a portion of the beef that had been purchased was stolen in England whilst on route to Sweden and proof of its export from the Community was not available to the plaintiffs. The Minister informed each of the plaintiffs that he intended to exercise his right to forfeit the security which each had given, the amount to be forfeited being based on the tonnage not exported. (Between them, the five plaintiff companies failed to export 20 tonnes, approximately). These proceedings were then instituted and the Minister's decision has been challenged on two principal grounds: (a) that under Community law the right to forfeit did not arise when the breach of the obligation to export resulted from circumstances amounting to "force majeure", and that such circumstances had arisen in this case; and (b) that Community law imposed on the Minister an obligation to exercise the discretion as to forfeiture given to him by the relevant Regulation in accordance with the principle of proportionality, and that he had failed to observe this principle in the decision he had reached and that it was therefore invalid.

Having heard evidence I indicated that I considered that I

should refer certain questions to the Court of Justice under Article 177 of the Rome Treaty. I set out hereunder the facts of the case as established by the evidence, the issues that arise from them and the questions on which the ruling of the Court of Justice is sought.

THE FACTS

(a) The EEC Regulations

Commission Regulation (EEC) No 2173/79 of 4 October 1979 contains detailed rules for the disposal of beef bought in by intervention agencies. Having recited earlier Regulations relating to the common organisation of the market in beef and the need to guarantee the fulfilment of contractual obligations by the lodging of security which can be partly or wholly forfeited depending on the gravity of the breach involved, it dealt in Title 1 with "Sales at prices fixed in advance", the types of sales with which this case is concerned. Article 2(2) made provision for what the purchasing applicant was required to do and in particular provided that "the application must be supported by a security in favour of the intervention agency". The amount of the security referred to in Article 2(2) was fixed at 50 ECU per tonne by Article 15(1) and Article 16 made provision for its forfeiture in the following terms:

Article 16

1. "If the purchaser does not pay for the product within the time limit specified in Article 18(1) the contract shall, without prejudice to the provisions of paragraphs 2 and 3, be cancelled by the intervention agency in respect of the quantity not paid for.

2. Except in cases of force majeure the security shall be forfeit;

(a) in proportion to the quantity not paid for within the specified time limit, if the quantity paid for is not less than 60% and not more than 95% of the quantity covered by the contract;

(b) in total, if the quantity paid for is less than 60% of the quantity covered by the contract.

3. In cases of failure to comply with the other obligations laid down in the contract, the competent authority of the Member State concerned may declare the security totally or partly forfeit, depending on the seriousness of the breach concerned.

The competent authorities of the Member States shall notify the Commission of cases where the preceding subparagraph is applied, specifying the circumstances involved and the action taken."

It will be noted that paragraphs 1 and 2 refer to non-paymer of the product bought by the applicant and to the time limit for payment specified in Article 18(1) and for forfeiture of the security in cases of non-payment. In this case forfeiture was claimed under paragraph 3, "by reason of a failure to comply with the obligations laid down in the contract", namely the obligation to export. It is to be noted that an express exception in cases of force majeure is made in respect of forfeitures under paragraph (2), but that no such exception is expressly made in respect of forfeitures under paragraph (3).

(b) <u>The Plaintiffs' contracts with the Department of Agriculture</u>.

The plaintiffs, as I have said, are all associated companies. They applied at different times to the Department of Agriculture to purchase different quantities of boned beef which the Department then had in storage in intervention because it was considered that the demand for the beef would exceed the supply and it was believed that by this means the group of companies as a whole would receive a larger supply than if a single large application by one company was made. Particulars of the contract quantity and the amount of security provided by each company are given in the following table.

Purchaser	Contract Quantity	Security Rate (per tonne)	Security furnished
Anthony McNicholl Limited	16 tonnes	£1,796.63	£ 28,752.00
Andrimex Ltd.	1 tonne	£1,796.63	£ 1,796.63
Sparib Ltd.	77 tonnes	£1,589.33	£122,378.41
Calendule Associates Ltd.	48 tonnes	£1,489.33	£ 76,287.84
Dantean Traders Ltd.	24 tonnes	£1,796.63	£ 43,119.12
Totals	166 tonnes	-	£272,334.00

.It will be noted that the rate of the security required in two cases (that of Sparib Ltd and Calendule Associates Limited) was slightly less than the rate which applied in the case of the other three plaintiffs. This was because their contracts were dated the 23rd July, 1982 whilst the other three were dated the 29th September, 1982 and the rate of exchange had altered in the meantime. It should also be noted that the contract quantity (on which the total value of the security was based) was not in fact fully taken up by each of the plaintiffs. The plaintiff companies only took delivery of 161.175 tonnes, but I do not consider that this has any material effect on the issues in this case.

Although the contracts were entered into on different dates the terms and conditions of each contract were the same. Prior to the contract each plaintiff was informed that a security would be required, of the rate per tonne of the security, and that it could

be given by way of guaranteed cheque, banker's draft or banker's guarantee. Each plaintiff gave an undertaking to pay for and remove the meat within two months of the date of the acceptance of the offer to purchase and each agreed to export the meat within five months of the date of the conclusion of the contract of sale. Satisfactory proof of export (by means of a document referred to as a "T5") was required.

Each plaintiff gave suitable security (by means of a banker's letter of guarantee). Each paid for the meat they collected within the specified time. But only portion of the meat collected was exported. It is agreed that out of the total of 166 tonnes 20.047 tonnes were not exported. Insurance against loss of the security and refunds was effected.

(c) The contract of carriage

The contract of carriage for the beef that was stolen was effected on behalf of each plaintiff by a sixth company in the group, known as N.W.L. Ireland Ltd. The particular consignment with which this case is concerned consisted of 763 cartons of beef all of which had been sold by the plaintiffs to their parent company, ABO Annerstaedt. The consignment was to be delivered to Stockholm and it was necessary to route it through England. N.W.L. Ireland Ltd. telephoned a firm of carriers with whom they had previously done business and who they considered to be reliable carriers (Terrytrans Ltd., of Belfast) and entered into a contract of carriage with that firm. An International Consignment Note was issued which specified that the carriage was subject to the Convention on the Contract for the International Carriage of Goods by Road (CMR). Unknown to the plaintiffs Terrytrans Limited sub-contracted the contract of carriage to an English Company called Charles Ward International Transport Ltd., of Uxbridge Ltd.,

England. The meat was loaded into a container No. 1245 and placed on a trailer and tractor unit owned by that company. It was shipped in this way on the 21st October 1982 via the ports of Rosslare (in Ireland) and Fishguard (in England) and arrived at the depot of Charles Ward International Transport Ltd., at Uxbridge on the 23rd October. Whilst on these premises the container and the meat inside it was stolen on the night of the 26th-27th October. It was never seen again and it is accepted that it was not exported from the geographical territory of the E.E.C. The failure to prove that the meat had been exported exposed the plaintiff companies not only to the danger of forfeiture of their security but also to the loss of the refunds to which they were entitled under E.E.C. Regulations in respect of tonnage exported.

(d) The circumstance of the theft

The evidence of Mr Charles Ward a director of Charles Ward International Transport Limited established a number of important facts about the theft of the meat. Due to a mechanical breakdown of the Tractor Unit the container was brought to Uxbridge for repairs instead of being immediately loaded onto a ship at a port in England. He last saw it parked in the Company's depot on the evening of Tuesday 26th October, still on the trailer on which it had arrived. It was due to leave the next day for shipment to Sweden, but on the morning of the 26th he found that it had been stolen and he immediately informed the police.

As a precaution against theft whilst in the company's depot a security device was placed on the trailer, known as a trailer kingpin lock. He failed to put the key to this device however in a secure place, such as a safe, but he left the key in an open

drawer in his office. Someone took the key from the drawer, unlocked the security device and drove away the trailer with the container on it. The container was later found abandoned and empty. Mr. Walsh is satisfied that some person associated with the company was involved in the theft. He stated that a person who he described as his "partner" in the business was then at that time facing a serious criminal charge but was free on bail; that after the theft of the meat his partner absconded and left England and is now in South America. Whilst Mr. Ward has no positive evidence to establish that his partner committed the theft I am satisfied that either his "partner" or an employee of the firm was a party to the theft. I am also satisfied that the principal director of the firm, Mr. Charles Ward, was negligent in not taking adequate precautions against the possible theft of the consignment. The loss of the meat and the resulting failure to export it was therefore caused by a combination of (a) fraud and (b) negligence of the directors and/or employees of the carriers, Ward International Transport Limited.

(e) <u>The forfeiture of the plaintiffs' security.</u>

By telex of the 28th October N.W.L. Ireland Ltd. informed the Department of Agriculture of the theft and claimed that if the meat was not recovered that this was a case of force majeure. By letter of the 1st February 1983 more detailed information was given to the Department including a police report and an insurance investigation report. A request was made that the securities given should not be forfeited as the loss of the consignment was "completely outside the control of the plaintiff companies." The Department replied on the 1st May 1983 pointing out that it would not accept that the circumstances of the theft

constituted force majeure and it later wrote to each plaintiff declaring its intention to forfeit the security by reference to the tonnage not exported by each plaintiff. It is clear that the Department did not consider that the question of the moral blame (if any) attributable to the plaintiffs was a material factor to be taken into account. Shortly afterwards these proceedings were instituted in which the validity of the Department forfeiture is challenged.

It will be noted that the Department did not claim to forfeit the entire security given by the five companies, but based the forfeiture on the tonnage not exported by each. I set out hereunder the tonnage involved in respect of each company, the value of the beef not exported, the amount of the security claimed in respect of each company and the refunds which each company has lost due to failure to prove the tonnage exported.

Company	Quantity not exported	Value of beef not exported	Security forfeited	Refunds foregone
Anthony McNicholl Ltd.	11.046 tonnes	£34,371.02	£19,845.47	£3,816.50
Andimex N.V.	1 tonne	£ 2,840.06	£ 1,796.63	£ 345.51
Sparib Ltd.	3.001 tonnes	£ 8,108.25	£ 4,769.58	£1,036.87
Calendule Associates Ltd.	0.995 tonnes	£ 2,700.50	£ 1,588.53	£ 345.33
Dartean Traders Ltd.	4.005 tonnes	£11,361.36	£ 7,183.42	£1,383.70
Totals	20.047	£62,381.19	£35,187.63	£6,927.97

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THE ISSUES

It was submitted on behalf of the plaintiffs as follows:-

(1) (a) Article 16(3) of Regulation No. 2173/79 is to be interpreted so as to include the exception in cases of force majeure referred to in Article 16(2). As a result, in cases where a failure to comply with a contractural obligation was a result of force majeure no forfeiture of any part of the security referred to in the Regulation was permitted. Alternatively, by virtue of the general principles of Community Law the Department was required to interpret Article 16(3) as meaning that in cases where a failure to comply with a contractual obligation arose as a result of force majeure it should not forfeit any party of the security referred to in the regulation;

(b) in the circumstances of the present case the failure to export arose from circumstances amounting to force majeure and accordingly no part of the security should have been forfeited.

(2) (a) When exercising its discretion to forfeit a security in whole, in part or not at all under Article 16(3) of the said Regulation the Department was obliged to take into account the principle of proportionality developed by the jurisprudence of the Court of Justice.

(b) There was a failure to take this principle into account in the present case as there had been no loss caused to community funds by the breach of the plaintiffs' obligation and the forfeiture resulted in the payment by the exporter of an amount which exceeded to a substantial degree any profits that might have been made by deliberate re-sale of the meat within the territory of the community.

(c) The principle of proportionality required the Department to consider whether the plaintiffs' failure to comply with

their contractural obligations was caused by force majeure or alternatively in circumstances in which little or no moral blame was to be attached to them. In the circumstances of the present case breach of obligation arose from force majeure or alternatively from circumstances in which little or no moral blame could be attributed to the plaintiff. The Department failed to take these matters into account and accordingly its decision was invalid.

It was submitted on behalf of the Department that whilst not admitting that the exception of force majeure applied to Article 16(3) that in fact the circumstances of the theft did not amount to force majeure.

It was also submitted that in so far as it was necessary to do so the principle of proportionality was applied in this case. It was open to the Department in each case to have forfeited the whole of the security of each plaintiff. This was not done. Instead a proportion only of the total security was forfeited based on the total quantity which each plaintiff failed to export. Thus the principle of proportionality was respected.

Questions

It is clear that questions have been raised as to the interpretation of Regulation No. 2173/79 of 4 October 1979. I consider that a decision on these questions is necessary to enable me to give judgment in these proceedings. I propose therefore under Article 177 to stay these proceedings and to request the Court of Justice to give a ruling of the following questions:-

(1) (a) Is Article 16(3) of Regulation No. 2173/79 to be interpreted so as to include the exception in cases of force majeure contained in Article 16(2) so that an Intervention Agency is required, in cases where a failure to comply with a contractual obligation

arose as a result of force majeure, not to forfeit any part of the security therein referred to?

(b) Alternatively, do the general principles of Community Law require an Intervention Agency to interpret Article 16(3) as meaning that where a failure to comply with a contractual obligation arose from force majeure it should not forfeit any part of the security referred to therein?

(2) If the answer to either part of question (1) is in the affirmativ does a case of force majeure arise where a failure to export a product results from (i) the fraud, or (ii) the negligence or (iii) a combination of fraud and negligence of an independent transport contractor employed by the exporter to transport the product out of the Community?

(3)(a) When exercising its discretion to forfeit a security in whole or in part or not at all given by Article 16(3) of the said Regulation is the Intervention Agency obliged to take into account the principle of proportionality as developed in the jurisprudence of the Court of Justice?

(b) If the answer to (a) is in the affirmative where an obligation to export a quantity of beef purchased from an Intervention Agency is supported by the security referred to in the said Regulation,is the principle of proportionality properly applied when the Intervention Agency fixes the amount of the security to be forfeited by reference to the tonnage which the exporter had failed to export?

(c) If the answer to (a) and (b) is in the affirmative is the princip infringed when an Intervention Agency,in deciding to forfeit the security in whole or in part or not at all, fails to take into account in addition to the factor referred to at (b):

(i) The extent (if any) of the moral blame attached to the

exporter for the failure to export;

(ii) the fact that the failure to export arose from force majeure (if such be the case);

(iii) the fact (if such be the case) that no loss was suffered to Community funds by the failure to export;

(iv) the profit which might have been made on a re-sale within the Community of the unexported goods.

Approved

SL

23/6/82