JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

9 July 1997 *

In Case T-455/93,

Hedley Lomas (Ireland) Ltd, a company incorporated under Irish law, established in Dublin,

Sharpbond Trading Ltd, a company incorporated under English law, established in Stratford-upon-Avon (United Kingdom),

J. & S. A. Wood (Livestock Exports) Ltd, a company incorporated under English law, established in Redditch (United Kingdom),

J. & S. A. Wood, established in Redditch,

Lesley Dorothy Joan Mills, residing in Framlingham (United Kingdom),

Live Sheep Traders Ltd, a company incorporated under English law, established in Framlingham,

* Language of the case: English.

Livestock Sales Transport Ltd, a company incorporated under English law, established in Framlingham,

Peter Ziokowski, residing in Folkestone (United Kingdom),

Brigstock Farms Ltd, a company incorporated under English law, established in London,

K. A. & S. B. M. Feakins, established in Llancloudy (United Kingdom),

Deaconvale Ltd, a company incorporated under English law, established in Gloucester (United Kingdom),

represented by Conor Quigley, of the Bar of England and Wales, instructed by A. M. Burstow, Solicitor, Crawley (United Kingdom), with an address for service in Luxembourg at the Chambers of Jean-Marie Bauler, 42 Grand-Rue,

applicants,

v

Commission of the European Communities, represented by Thomas Van Rijn and Christopher Docksey, of its Legal Service, acting as Agents, and by Philippa Watson, of the Bar of England and Wales, with an address for service in Luxem-

bourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by J. E. Collins, of the Treasury Solicitor's Department, acting as Agent, and by Gerald Barling QC, of the Bar of England and Wales, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

APPLICATION for the annulment of Article 2 of Commission Regulation (EEC) No 1922/92 of 13 July 1992 amending Regulation (EEC) No 1633/84 laying down detailed rules for applying the variable slaughter premium for sheep, repealing Regulation (EEC) No 2661/80 and determining the conditions for the reimbursement of the clawback following the judgment of the Court of Justice in Joined Cases C-38/90 and C-151/90 (OJ 1992 L 195, p. 10),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: K. Lenaerts, President, P. Lindh and J. D. Cooke, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 21 November 1996,

gives the following

Judgment

Legislative context and the background to the claim

1 The common organization of the market in the sheepmeat and goatmeat sector was established by Council Regulation (EEC) No 1837/80 of 27 June 1980 (OJ 1980 L 183, p. 1, hereinafter 'Regulation No 1837/80').

2 Article 9 of this regulation, as substituted by Council Regulation (EEC) No 871/84 of 31 March 1984 (OJ 1984 L 90, p. 35), empowered the United Kingdom to grant a variable slaughter premium for sheep.

3 In order to prevent the payment of such a premium from disrupting interstate trade and from distorting competition between producers in different regions, paragraph 3 of this article provided that in the event of payment of premium on any such products, measures had to be taken to ensure that an equivalent amount — commonly referred to as 'the clawback' — would be levied on the export of the products from the Member State in question.

4 Commission Regulation (EEC) No 1633/84 of 8 June 1984 (OJ 1984 L 154, p. 27, hereinafter 'Regulation No 1633/84') laying down detailed rules for applying the variable slaughter premium for sheep and repealing Regulation (EEC) No 2661/80, provided detailed rules for the calculation and collection of the clawback.

5 Article 4(1) and (2) of this regulation provided:

'1. For the United Kingdom, the amount to be charged on departure of the products referred to in Article 1(a) and (c) of Regulation (EEC) No 1837/80 from region 5, in accordance with Article 9(3) of that regulation, shall be fixed each week by the Commission. It shall be equal to the amount of the premium fixed in accordance with Article 3(1), for the week during which departure of the products in question took place.

2. On departure of the products referred to in Article 1(a) and (c) of Regulation (EEC) No 1837/80 from the territory of region 5, a security shall be lodged. The security shall be fixed by the United Kingdom at a level which covers the amount due pursuant to paragraph 1; it shall not be less than the forecast amount of the premium for the week preceding that during which departure takes place. The said security shall be released as soon as the amount referred to in paragraph 1 has been paid.'

6 Council Regulation (EEC) No 3013/89 of 25 September 1989 on the common organization of the market in sheepmeat and goatmeat (OJ 1989 L 289, p. 1, hereinafter 'Regulation No 3013/89'), applicable as from 1 January 1990, repealed Regulation No 1837/80 and instituted a new common organization. This regulation provides for a unified common organization of the market, subject to certain transitional provisions. In particular, those provisions include authorization to the United Kingdom to grant a variable slaughter premium until the end of the 1992 marketing year. Article 9(3) of Regulation No 1837/80, as amended, was replaced in substantially identical terms by Article 24(5) of Regulation No 3013/89. In the

event of that premium being granted, the clawback was to be imposed on meat leaving the United Kingdom.

7 Commission Regulation (EEC) No 3246/91 of 7 November 1991 authorizing the United Kingdom to discontinue granting the variable slaughter premium for sheep in Great Britain and derogating from Regulation No 1633/84 (OJ 1991 L 307, p. 16), authorized the United Kingdom to discontinue the variable slaughter premium from the beginning of the 1992 marketing year.

8 In 1990, references were made to the Court of Justice for preliminary rulings on the validity of Article 4(1) and (2) of Regulation No 1633/84.

9 In its judgment of 10 March 1992 in Joined Cases C-38/90 and C-151/90 *Lomas and Others* [1992] ECR I-1781 (hereinafter the '*Lomas* judgment'), the Court of Justice ruled as follows:

'1. Article 4(1) of Commission Regulation (EEC) No 1633/84 of 8 June 1984 laying down detailed rules for applying the variable slaughter premium for sheep and repealing Regulation (EEC) No 2661/80 is invalid inasmuch as, by providing for the charging, by way of the clawback, of an amount which in most cases is not exactly equal to that of the slaughter premium actually granted, the Commission exceeded the powers conferred on it by Article 9(3) of Council Regulation (EEC) No 1837/80 of 27 June 1980 on the common organization of the market in sheepmeat and goatmeat, as amended by Council Regulation (EEC) No 871/84 of 31 March 1984. Accordingly, Article 4(2) of Regulation No 1633/84 is also invalid in so far as it requires a security to be lodged in order to ensure that the amount due pursuant to Article 4(1) is charged;

2. The declaration that Article 4(1) and (2) of Regulation No 1633/84 is invalid may not be relied upon with effect from a date prior to that of this judgment, except by traders or those entitled through them who initiated proceedings or made an equivalent complaint under the applicable national law before that date;

3. The United Kingdom is obliged by Community law to require the production of documents relating to operations involving the export of sheep or sheepmeat subject to payment of the clawback and to impose effective penalties on traders who make false statements in such documents.'

10 In consequence of that judgment, the Commission adopted on 13 July 1992 Regulation (EEC) No 1922/92, amending Regulation No 1633/84 and determining the conditions for the reimbursement of the clawback following the judgment of the Court of Justice in Joined Cases C-38/90 and C-151/90 (OJ 1992 L 195, p. 10, hereinafter 'Regulation No 1922/92' or the 'Contested Regulation').

11 Article 1(1) of this regulation, replacing Article 4(1) of Regulation No 1633/84, is worded as follows:

'1. For the United Kingdom, the amount of the clawback to be charged on departure of the products referred to in Article 1(a) and (c) of Regulation (EEC) No 3013/89 from region 1, in accordance with Article 24(5) of that regulation, shall be equal to the amount of the premiums fixed in accordance with Article 3(1) and actually granted for the same products subject to the said clawback.

At the request of the operator the amount of the clawback shall be fixed equal to the average amount of the premium fixed for the week of departure of the products and the three previous weeks.

Operators shall indicate within 28 days of notification by the competent United Kingdom authorities on which of the abovementioned options they intend to proceed. The option chosen shall apply to all clawback for which the operator is liable.

In the case of the first option chosen, the operator shall, at the same time, provide satisfactory [proof] to the competent United Kingdom authorities, of the amount of premium actually granted for the products subject to the said clawback. The period for providing proof may be extended by those authorities by a further 60 days.

In the case of the second option chosen, the competent United Kingdom authorities shall notify the operators of the amount of clawback calculated in accordance with the second subparagraph.

In case of failure to indicate the chosen option within 28 days or failure to provide, in the case of the first option chosen, the said proof within a further period of 60 days the security shall be forfeited in full.'

12 Article 2, the provision contested in the present action (hereinafter the 'Contested Article'), is worded as follows:

'1. Operators or those entitled through them who, prior to the judgment of the Court of Justice of 10 March 1992 in Joined Cases C-38/90 and C-151/90, initiated proceedings or made an equivalent complaint under the applicable national law in relation to the method of calculation of the amount of the clawback under Article 4(1) of Regulation (EEC) No 1633/84, are entitled to reimbursement, within the time-limits and according to the procedure laid down in the relevant national law, of the difference between the clawback they paid and the amount of the premium, fixed in accordance with Article 3(1) of the aforementioned regulation actually granted for the same products.

Alternatively, at the request of the operator, reimbursement can be made of the difference between the clawback actually paid and the average amount of the premiums fixed for the week of departure of the products and the three previous weeks.

2. Before the 30 November 1992, the persons referred to in paragraph 1 shall give the competent United Kingdom authorities a specification of:

— the date at which their claim commences,

— the amount of the clawback paid from this date until 10 March 1992,

— and, unless they have made a request under the second subparagraph of paragraph 1, the premium actually granted for the same products subject to the clawback,

and proof satisfactory to the competent United Kingdom authorities as far as the above elements are concerned.

3. The competent United Kingdom authorities shall, before 31 December 1992, inform the Commission of the number of claims for reimbursement made pursuant to paragraph 1 with a specification of the period to which the claim refers and the amount of reimbursement claimed.'

13 The applicants in the present case are engaged in the export from the United Kingdom of sheepmeat and, in particular, of live sheep. On various dates between 1980 and 1992 they paid sums of money to the competent authority in the United Kingdom responsible for operating the variable slaughter premium scheme, the Intervention Board for Agricultural Produce (hereinafter the 'Intervention Board'). These payments were made on foot of invoices for amounts of clawback calculated by the Intervention Board and based on the applicants' customs declarations of the quantities and categories of sheep exported. Invoices still outstanding at 10 March 1992 were not paid by the applicants in view of the *Lomas* judgment. The applicants had initiated legal proceedings prior to 10 March 1992, the date of delivery of the *Lomas* judgment, seeking recovery of the sums which they had paid pursuant to Article 4 of Regulation No 1633/84.

14 In 1994 a number of further questions were referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty on the validity and interpretation of Article 4(1) of Regulation No 1633/84, as amended by Regulation No 1922/92.

15 In its judgment of 8 February 1996 in Case C-212/94 *FMC and Others* v *Intervention Board for Agricultural Produce and Another* [1996] ECR I-389 (hereinafter the '*FMC* judgment') the Court ruled as follows:

'1. Consideration of the questions raised has disclosed no factor of such a kind as to affect the validity either of Article 4(1) of Commission Regulation (EEC) No 1633/84 of 8 June 1984 laying down detailed rules for applying the variable slaughter premium for sheep and repealing Regulation (EEC) No 2661/80, as amended by Article 1 of Commission Regulation (EEC) No 1922/92 of 13 July 1992 amending Regulation No 1633/84, cited above, and determining the conditions for the reimbursement of the clawback following the judgment of the Court of Justice in Joined Cases C-38/90 and C-151/90, or of Article 2 of Regulation No 1922/92.

2. The requirement of proof laid down in Article 4(1) of Regulation No 1633/84, cited above, as amended by Article 1 of Regulation No 1922/92, cited above, and in Article 2 of the latter regulation, is to be interpreted as

meaning that traders are required to supply proof to the satisfaction of the competent United Kingdom authorities, in accordance with national law and within the period prescribed by Regulation No 1922/92, of the amount of the premium actually granted for products subject to clawback, provided that the applicable national rules do not affect the scope or effectiveness of Community law.

3. As regards claims for repayment of clawback unduly paid prior to 10 March 1992, paragraph 30 of the judgment in *Lomas and Others* (Joined Cases C-38/90 and C-151/90) is to be interpreted as meaning that traders or those entitled through them who prior to that date initiated proceedings or made an equivalent complaint under the applicable national law may rely on the invalidity of Article 4(1) and (2) of Regulation No 1633/84, cited above, as from the date of its entry into force, subject to the application, within the limits set by Community law, of any national rules limiting the period prior to the submission of a claim in respect of which repayment of a sum unduly paid may be obtained.

4. With regard to matters not governed by Article 2 of Regulation No 1922/92, cited above, national courts called upon to give judgment on a claim for reimbursement of clawback unduly charged must apply their national law, provided the detailed rules laid down therein are not less favourable than those governing similar domestic actions and are not so framed as to render virtually impossible or excessively difficult the exercise of rights conferred by the Community legal system.'

Procedure before the Court and forms of order sought

16 The case commenced as an application lodged at the Registry of the Court of Justice on 11 September 1992 registered as Case C-356/92 and the written procedure took place before the Court of Justice. Two other applications were lodged at the Registry of the Court of Justice on 11 September 1992, in Case C-355/92 and in Case C-357/92; and a fourth application was lodged on 24 September 1992, in Case C-370/92.

17 By order of 3 November 1992 the four cases were joined for the purposes of the procedure and the judgment.

18 By order of the President of the Court of Justice of 18 March 1993, the United Kingdom was granted leave to intervene in support of the form of order sought by the Commission.

19 In consequence of the entry into force on 1 August 1993 of Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21), the joined cases were transferred to the Court of First Instance by order of the Court of Justice of 27 September 1993. They were entered in the registry of the Court of First Instance under the case numbers T-455/93, T-454/93, T-456/93 and T-457/93 respectively.

20 By letter dated 6 June 1994, the applicants in Cases T-455/93, T-456/93 and T-457/93 applied for the proceedings to be stayed pending delivery of the judgment of the Court of Justice on the reference for a preliminary ruling in Case C-212/94 (the *FMC* judgment), and, by order of the Court of First Instance of 25 October 1994, the proceedings in the four cases were stayed.

21 Following the delivery of the *FMC* judgment on 8 February 1996, the Court, by letter of 26 March 1996, requested the observations of the parties on the resumption of the proceedings.

22 On 24 April 1996 the Commission submitted its observations to the effect that the applicants had no interest in continuing the proceedings as their arguments had been dealt with in the *FMC* judgment. In letters dated 3 and 17 May 1996, the applicants emphasized their distinct position as exporters of live sheep and submitted that the *FMC* judgment was limited to the interests of operators exporting meat.

23 By letters of 4 September 1996, 8 July 1996 and 27 August 1996 the applicants in Cases T-454/93, T-456/93 and T-457/93 indicated to the Court that they wished to discontinue the proceedings and, by order of the President of the Fourth Chamber of 2 October 1996, these cases were removed from the register.

24 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry. It decided however to put a series of questions to the Commission which were answered on 30 August 1996. The parties presented oral argument at a hearing in open court on 21 November 1996.

25 The applicants claim that the Court should:

— declare the application admissible;

— declare Article 2 of Regulation No 1922/92 void;

— order the defendant to pay the costs incurred by each of the applicants.

26 The Commission contends that the Court should:

— dismiss the application in its entirety; and

— order the applicants to pay the costs.

27 The United Kingdom contends that the Court should:

— dismiss the application in its entirety.

Substance

28 As the defendant and the intervener do not deny and it is otherwise clear that the applicants are directly and individually concerned by the Contested Article within the meaning of the fourth paragraph of Article 173 of the EC Treaty, the application is accordingly admissible.

On the admissibility of the plea in law concerning the validity of Article 2 of Regulation (EEC) No 1922/92 in so far as it applies to trade in live sheep

29 In the letters referred to at paragraph 22 above and particularly in the course of the oral hearing, the applicants sought to distinguish the situation of the live trade from that of the sheepmeat trade and argued that the *FMC* judgment was concerned only with the latter. They submitted that the *FMC* judgment, while it upheld the validity of the Contested Article, was concerned only with the sheepmeat trade in that, under the applicable regulations, the products had to be exported within 21 days of receipt of the premium by the operator, who was usually the producer. In those cases the calculation of the clawback by reference to the average rate of premium over a four-week period was likely to give a result relatively close to the amount of premium actually paid. On the other hand, in the case of the live trade, the sheep must be placed in quarantine for 30 days prior to export and the date of placing in quarantine is deemed to be the date of export for the purpose of satisfying the 21-day rule, although clawback is determined at the actual date of export, by which stage the rate of clawback would be radically different from the rate of premium actually paid. Moreover, the sheep continue to

fatten during the quarantine period, with the result that clawback is applied to a greater weight than that by which the premium was calculated. In support of this plea in law, the applicants commissioned an expert report which they sought to put in evidence at the hearing.

30 Both the Commission and the United Kingdom objected to the introduction of the expert report after the close of the written procedure, on the ground that they had no opportunity of considering it before the hearing. In any event, they argued, this plea went beyond the scope of the application as originally defined and was inadmissible by virtue of Article 48(2) of the Rules of Procedure of the Court of First Instance.

Findings of the Court

31 Article 38(1) of the Rules of Procedure of the Court of Justice, which applied when the case was commenced and which corresponds precisely to Article 44(1) of the Rules of Procedure of the Court of First Instance, provides that an application is to state, *inter alia*, the subject-matter of the proceedings and a summary of the pleas in law on which it is based. Article 42(2) of the former Rules, which corresponds to Article 48(2) of the latter, provides that no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or fact which come to light in the course of the procedure.

32 Given that the regulations in question governing the operation of the variable slaughter premium scheme have at all material times applied both to live trade and to trade in sheepmeat, the distinct position of operators in the former trade must have been apparent to the applicants from the outset and could have been put forward as the basis of a separate plea in the application. The delivery of the judgment in the *FMC* judgment does not constitute a new matter of law or of fact which would permit the applicants to invoke the exception to the rule contained in Article 48(2) aforesaid. The Court considers therefore that this additional plea in law is inadmissible and for that reason it declined to admit in evidence at the hearing the expert report which the applicants sought to submit.

33 The Court notes in any event that as the proceedings initiated by the applicants before the national court are still pending, its ruling on this additional plea does not deprive them of an opportunity of raising it in those proceedings. The national court remains competent to consider whether the circumstances of the applicants entitle them to distinguish the ruling in the *FMC* judgment and, if it considers it necessary, to refer any relevant question of Community law to the Court of Justice under Article 177 of the EC Treaty.

34 The applicants also raise two other pleas in law in support of their claim for annulment; the first alleges breach of the principles of legal certainty and of the protection of legitimate expectations; the second alleges breach of the principle of proportionality.

The first plea in law alleging breach of the principles of legal certainty and of the protection of legitimate expectations

Arguments of the parties

35 The applicants' first plea is divided into two limbs. The first concerns the rules of English law applicable to the recovery of sums unlawfully paid to a public authority. The second relates to the conditions for reimbursement laid down by the Contested Article.

— The first limb, relating to the English law of recovery

36 The applicants maintain that the measure at issue breaches the principles of legal certainty and of the protection of legitimate expectations because, at the time when they initiated their proceedings, they were entitled to expect that recovery of the

sums due would take place in accordance with the principles of English law. They explain that, by writs issued in the English High Court prior to delivery of the *Lomas* judgment, they commenced proceedings for the recovery of the clawback paid by them. Their primary claim in those proceedings is that they are entitled to sue for recovery of the full amount of the sums paid because there was no lawful power on the basis of which the national authorities had any grounds for demanding payment of the clawback. In the alternative, they claim that, even if the Intervention Board had power to demand payment of the clawback, no lawful demand for payment was ever made, since the demands issued were all based, as regards the calculation of the amount due, on an invalid provision, namely Article 4 of Regulation No 1633/84. In the further alternative, the applicants claim that they are entitled to recover the difference between the clawback charged and the amounts which would have been paid had a lawful system of calculation been in operation.

37 According to the applicants, the Court of Justice explicitly recognized in the *Lomas* judgment that it is for the national court to determine the right of recovery. They concede that the Court of Justice appeared to be of the view that only the difference between the clawback and the premium should be recoverable. However, they consider that it did not give a definitive ruling on that point, since at no stage did it determine the rules by which recovery was to take place. On the contrary, the Court of Justice appears to have left it to the national courts to determine the applicable rules, since paragraph 30 refers to those who had initiated proceedings 'under the applicable national law'. Consequently, it is for the national court to determine whether the right of recovery is merely limited to the difference between the clawback and the premium actually granted or, alternatively, whether the applicants are prima facie entitled to recover the amounts paid in full, subject to a valid defence by the Intervention Board, such as that of unjust enrichment.

38 In the applicants' view, it is apparent from the principles set forth by the House of Lords in *Woolwich Equitable Building Society* v *Inland Revenue Commissioners* [1993] A. C.70 (hereinafter 'the *Woolwich EBS* case') that they are prima facie entitled to recover in full the clawback paid, subject only to such valid defence as the defendant might raise. The Contested Article, which replaces the national rules relating to recovery, prejudices the applicants' legitimate expectation of recovery and the principle of legal certainty because it makes it more difficult to pursue the claims for the sums in question. Whilst, under English law, the amounts paid were

recoverable in full as of right, subject to any adequately substantiated defence being raised, the Contested Article removes the need for the Intervention Board to provide a defence and requires the applicants to claim only the difference between the amount paid and the amount which should have been paid.

39 Finally, the applicants consider that the Commission was not obliged, pursuant to Article 176 of the EC Treaty, to adopt the provision at issue.

— The second limb, relating to the conditions for reimbursement laid down by the Contested Article

40 The applicants submit that the method of reimbursement provided for in the second subparagraph of paragraph 1 of the Contested Article suffers from the same flaw as that contained in the method of calculation set out in Article 4(1) of Regulation No 1633/84, held invalid by the Court of Justice in the *Lomas* judgment. The two methods closely resemble one another, in that the method in issue provides for reimbursement to be made of the difference between the clawback actually paid and the average amount of the premiums fixed for the week of departure of the products and the three previous weeks, while Article 4(1) fixed the clawback as equal to the amount of the premium for the week during which departure from the United Kingdom of the products in question took place.

41 As regards the alternative method provided for in the first subparagraph of paragraph 1 of the Contested Article, entitling operators to reimbursement of the difference between the clawback paid and the premium actually granted for the same products, the applicants consider that it imposes a burden of proof which it is impossible to discharge, for the simple reason that the premiums in question were paid to the farmers, not to the exporters, and therefore the latter cannot establish with any degree of precision the amount of premiums granted.

The arguments of the Commission and the United Kingdom

42 In response to the first limb of the plea, the Commission states that there are numerous reasons for which the applicants clearly could not have had any legitimate expectation of recovering the full amount of clawback paid. First of all, the *Lomas* judgment clearly shows that the applicants were not entitled to reimbursement of the full amount of clawback paid but merely to the difference between the premium granted and the amount of clawback paid, assuming that the latter sum is greater than the former. Secondly, at the time when the applicants initiated their proceedings before the High Court, it was not even clear that the method of calculating the clawback was invalid, since the Court of Justice had not yet delivered the *Lomas* judgment. Similarly, given that the judgment of the House of Lords which is relied on by the applicants was not delivered until 20 July 1992, after the adoption of the Contested Article, the Commission finds it difficult to comprehend how it could have given rise to any legitimate expectation whatever on the part of the applicants. Clearly, prior to delivery of that judgment, there was no right to recovery under common law in cases such as the present. Furthermore, the applicants must have foreseen that, if the Court of Justice annulled the method of calculation laid down by Article 4 of Regulation No 1633/84 in its judgment in *Lomas*, the Commission would have no option but to adopt a provision such as the one at issue in order to comply with the obligation imposed on it by Article 176 of the EC Treaty. Finally, the applicants' interpretation of the phrase appearing in paragraph 30 of the *Lomas* judgment referring to proceedings initiated 'under the applicable national law' is quite wrong.

43 In response to the second limb of this plea, the Commission states that it should not be impossible for an exporter to ascertain the amount of the premium paid for products in respect of which clawback has subsequently been paid. However, it concedes that this could be difficult and that it is for that reason that the Contested Article provides for a second method of reimbursement. That second method constitutes an equitable solution for those who have suffered as a result of the illegality of the method laid down by Article 4 of Regulation No 1633/84.

44 The United Kingdom considers that the first plea in law is founded on a false premiss, inasmuch as it assumes that the applicants are entitled to recover all sums paid by way of clawback, while the *Lomas* judgment clearly shows that their right to reimbursement is limited solely to any overpayments made. Clearly, even if the Contested Article had never been adopted, the applicants would have had to establish, in accordance with the national rules relating to the burden of proof, the amount of the overpayments allegedly made by them. In the United Kingdom's view, nothing in the judgment of the House of Lords which is relied on by the applicants alters that burden of proof. The only consequence arising from the adoption of the Contested Article is that it creates a second method of recovery which is intended to mitigate the difficulties which the applicants might encounter in discharging the burden of proof.

Findings of the Court

— The first limb: the English law of recovery

45 Prior to the *Lomas* judgment, demands for payment of clawback made were not entirely devoid of lawful authority notwithstanding the declaration of invalidity made in that judgment in respect of Article 4(1) and (2) of Regulation No 1633/84 (see paragraph 9 above).

46 In declaring Article 4(1) and (2) invalid, the Court of Justice pointed out that although the charging of any sum of money upon exportation of products from one Member State to another constituted in principle an obstacle to their free movement within the common market, such a charge might nevertheless be justified in an organization of the market which has not yet been completely unified where it was intended to offset inequalities arising from the fact that that organization had not yet been fully achieved, in order to enable products covered by the organization to circulate on equal terms without thereby artificially distorting competition between producers in different regions (paragraph 15 of the *Lomas* judgment). It followed that the clawback had to be charged in such a way as to ensure that it neutralized the premium on departure from the region concerned of

the products which had benefited from that premium, without working to the advantage of producers in that region, as would be the case if the amount charged by way of the clawback were lower than that of the premium granted, or affecting their competitive position, as would be the case if the clawback were higher than the premium (paragraph 17 of the *Lomas* judgment).

47 Thus, the ruling of the Court of Justice was not directed at the principle of charging clawback as such but at the fact that Article 4(1) failed to ensure that the method of calculating the clawback achieved the aim of neutralizing the premium upon export of the products. This was confirmed by the Court of Justice in the *FMC* judgment, where it declared that the charging of clawback was valid in principle (paragraph 28). Failure to recover any clawback whatsoever would have resulted in an even more flagrant distortion of competition between producers and would have been incompatible with the principle upon which the charging of the clawback was based. A Member State availing of the facility to pay a variable slaughter premium was accordingly under a duty in Community law to ensure that it was administered in a manner which did not conflict with this principle.

48 It should also be noted that the duty of the national authority in the United Kingdom to demand payment of clawback upon export of products which had benefited from a premium derived not from Article 4 of Regulation No 1633/84 but from Article 9(3) of Regulation No 1837/80, later amended by Regulation No 871/84, and subsequently from Article 24(5) of Regulation No 3013/89, which indicated that an amount equivalent to the premium would be charged when those products left the territory of the Member State concerned. Despite the *Lomas* judgment, a Member State which had availed of the power to pay a variable slaughter premium under Article 9(1) of Regulation No 1837/80, as subsequently amended, was under a duty to ensure that an amount equivalent to the premium paid was charged in respect of products which left its territory. It follows that demands for clawback made by a national authority on the basis of Article 4 of Regulation No 1633/84 were not wholly devoid of lawful authority notwithstanding the subsequent declaration of invalidity of paragraphs 1 and 2 of that article.

49 In addition, premiums paid to operators prior to the date of the *Lomas* judgment were received by them in full knowledge of the conditions laid down for such a scheme under Community law. It must be assumed that the operators were willing to accept the fact that an amount equivalent to the premium received would be charged upon the products in the event of export. Such a repayment obligation formed an integral part of the operation of the variable premium scheme in Community law. It follows that there could, in fact, have been no legitimate expectation on the part of any operator who had received a premium for certain products that he had an entitlement to retain the benefit of that premium in the event of his exporting those products. Indeed, the applicants acknowledge in their pleadings that the amounts demanded from them by way of clawback prior to the date of the *Lomas* judgment were paid by them in the belief that they were in law obliged to do so. In other words, their expectation at the time when they purchased the products from operators who had benefited from payment of the premium was that the premium would be clawed back if the products were exported.

50 In so far as the applicants rely upon principles of English law in support of their plea, it must be pointed out that the operation of the scheme under English law is itself derived from the measures laid down for the purpose in Community law. The applicants could not have expected to avoid paying the clawback in view of the fundamental requirement of the operation of the variable premium scheme that artificial distortion of competition between producers in different regions be eliminated. It follows that, contrary to the applicants' assertion, the determination of claims for reimbursement in accordance with national law following the *Lomas* judgment could not result in a situation in which operators would be reimbursed the full amount of clawback charged and not merely the difference between the excess clawback and the amount of the premium actually paid.

51 While the interpretation and application of national law is exclusively a matter for the national courts, a party invoking the principle of legitimate expectation before this Court on the basis of a particular entitlement under national law bears the onus of proving with sufficient certainty the existence of that entitlement as a matter of fact. Accordingly, if the right to recover clawback unlawfully charged prior

to 10 March 1992 must be determined by reference to English law, as the applicants contend, the Court does not consider that it has been established that English law did in fact give rise as from that date to a legitimate expectation of the kind asserted by the applicants.

52 It is evident that the decision of the House of Lords in the *Woolwich EBS* case (see paragraph 38 above), when delivered on 20 July 1992, represented an important change in the existing law in relation to claims for recovery of sums paid to a public authority under protest on foot of a demand later found to be *ultra vires*. This is clear from a reading of the speeches of all of their Lordships including, for example, Lord Browne-Wilkinson who, speaking as one of the majority in the House, said: 'My Lords, in this case your Lordships are all agreed that, as the law at present stands, tax paid under protest in response to an *ultra vires* demand is not recoverable at common law. .... The issue which divides your Lordships is whether this House should now reinterpret the principles lying behind the authorities so as to give a right of recovery in such circumstances. On that issue, I agree with my noble and learned friend Lord Goff that, for the reasons he gives, it is appropriate to do so'.

53 Finally, the Court notes that in its consideration of the factors giving rise to a right of recovery and, in particular, the possibility that the unjust enrichment of a claimant might be a ground for disallowing recovery of sums unduly charged by and paid to a public authority, the House of Lords itself took note of the judgment of the Court of Justice in Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595. In that judgment the Court of Justice held that Community law did not prevent a national legal system from disallowing repayment of charges where repayment would entail unjust enrichment of the recipient, even where the charges in question had been exacted by a national authority in breach of Community law. As the applicants have themselves acknowledged in their pleadings, it remains for the national court hearing their pending claims to determine whether considerations of unjust enrichment would preclude them from recovering the sums claimed in whole or in part.

54 In the light of the foregoing considerations, the Court concludes that the applicants have not established the existence of any legitimate expectation on their part, either as a matter of fact or in consequence of national law, to full recovery of clawback paid prior to the date of the *Lomas* judgment. Nor have they established any breach of the principle of legal certainty (which was also taken into account by the Court of Justice in the *FMC* judgment; see paragraph 26 quoting Question 1 from the national court).

55 The first limb of this plea in law must therefore be rejected.

— The second limb, relating to the conditions of reimbursement laid down by the Contested Article

56 It is notable that paragraph 1 of the Contested Article gives precise effect to the declaration of invalidity in the *Lomas* judgment by confirming the entitlement of operators to reimbursement of the difference between the clawback they paid and the amount of the premium actually granted for the same products. This method of calculation was upheld by the Court of Justice in the *FMC* judgment (paragraphs 34 to 36 and 45).

57 The alternative method of calculating the amount to be reimbursed is based on the average amount of premiums over a period of four weeks. This alternative was made available because of the difficulties which at least some operators had experienced in providing proof as to the premiums actually paid to the farmers from whom they had purchased the products in question. The fact that such a method has been provided does not, in the Court's judgment, invalidate a rule laid down in implementation of Article 9(3) of Regulation No 1837/80 and Article 24(5) of Regulation No 3013/89 and which, indeed, has been upheld by the Court of Justice in the *FMC* judgment (paragraphs 37 to 45).

58 The applicants' first plea must, accordingly, be rejected.

The second plea, alleging breach of the principle of proportionality

Arguments of the parties

59 The applicants consider that Article 2 of Regulation No 1922/92 breaches the principle of proportionality, in that it imposes, for the purposes of obtaining the reimbursement to which they are entitled, a burden of proof which it is impossible to discharge. Its effect is also to deny them an effective remedy, to which they are entitled under Community law (see the judgments of the Court of Justice in Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio*, and Joined Cases C-6/90 and C-9/90 *Francovich and Others* v *Italy* [1991] ECR I-5357), and constitutes a breach by the Commission of the duty of cooperation incumbent on it by virtue of Article 5 of the EC Treaty.

60 The Commission and the United Kingdom state in reply that the methods of reimbursement laid down by the Contested Article are consistent with its objective, which is to ensure the application of the principle of clawback as defined in Article 9(3) of Regulation No 1837/80 and to give full effect to the *Lomas* judgment, and are also necessary for the attainment of that objective.

61 Moreover, as regards the principle of proportionality, the Commission maintains that to order reimbursement of the full amount of clawback paid by the applicants would be contrary to that principle. Such a measure would have the effect of deducting from Community funds, for the benefit of the applicants, substantial sums to which the latter have no legal entitlement and would give them an unjustified advantage over their competitors.

62 The United Kingdom observes that the measure at issue is consistent with the *Lomas* judgment and cannot, therefore, constitute a breach of the principle of proportionality. In its view, it is entirely normal for a person claiming reimbursement of sums unduly paid to be required to establish the existence and extent of the overpayment.

Findings of the Court

63 It should be borne in mind that the Contested Article applies to operators or those claiming through them who had already, prior to 10 March 1992, initiated appropriate proceedings at national level seeking to recover clawback paid prior to that date. By initiating such proceedings, those operators had already undertaken to discharge the burden of proof incumbent on any party seeking to recover money due in a civil claim, namely that of establishing to the requisite standard of proof under national law the precise amount of the overpayment which it claimed to have made. The Contested Article does not alter that position but merely confirms the entitlement of such operators to reimbursement of the difference between the clawback they paid and the amount of the premium actually granted for the products in question. It leaves to the relevant rules of national procedure both the time-limits involved in the bringing of such claims, subject to certain provisions set out in the Contested Article, and the standard of proof required to establish the amount of that difference in any given case (see, in this regard, paragraphs 46 to 77 of the *FMC* judgment).

64 The difficulties of proof adverted to by the applicants do not derive from the provisions of the Contested Article as such, but result from the manner in which they had conducted their business at the relevant time and especially from the fact that farmers from whom sheep were purchased were not asked to provide appropriate documentation concerning any premiums paid. As the Court of Justice held in the *FMC* judgment, it was not manifestly inappropriate for exporters to bear the burden of proof, and both Article 9(3) of Regulation No 1837/80 and Article 24(5) of Regulation No 3013/89 had clearly laid down that the amount of the clawback was to be equivalent to the amount of the premium. Thus a prudent trader, knowing that he would be liable to pay the clawback upon export of the products, should have taken the necessary steps to obtain the evidence which would be required in due course to establish the equivalence of the amounts in question (paragraph 36).

65 The applicants' second plea must therefore be rejected.

66 It follows that the application must be dismissed.

Costs

67 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful and the Commission has applied for costs, the applicants must be ordered to pay the costs. The United Kingdom, which intervened in support of the Commission, must bear its own costs, in accordance with Article 87(4) of those Rules.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicants jointly and severally to pay the costs of the Commission;

3. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

Lenaerts Lindh Cooke

Delivered in open court in Luxembourg on 9 July 1997.

H. Jung K. Lenaerts

Registrar President