Neutral Citation Number: [2006] EWCA Civ 699

Case No: A2/2000/2658(A)/FC2

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

08/06/2006

B e f o r e :

LORD JUSTICE DYSON
LADY JUSTICE SMITH
and
LORD JUSTICE MOSES

Between:

(1) KEVIN ANDREW FEAKINS
(2) SARAH BRIDGET MERET FEAKINS **Appellants**

- and -

THE DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS (ACTING BY ITS EXECUTIVE AGENCY, THE RURAL PAYMENTS AGENCY, FORMERLY THE INTERVENTION BOARD FOR AGRICULTURAL PRODUCE) **Respondent**

Mr Andrew Sutcliffe QC (instructed by Messrs Parker Bullen) for the Appellants
Ms Sarah Lee (instructed by the Legal Division of the Rural Payments Agency) for the Respondent
Hearing date : 4 May 2006

Lord Justice Moses :

Introduction

1. This is an application pursuant to CPR52.17 for permission to re-open an appeal of 23 October 2001. It is brought by Mr and Mrs Feakins ("the Feakins") against the Intervention Board for Agriculture Produce ("IBAP"). IBAP's functions have since been assumed by the Rural Payments Agency but I shall refer to the respondents as IBAP throughout. On 23 October 2001, this court dismissed the Feakins' appeal against the judgment of Ian Kennedy J of 23 June 2000. That judgment was in favour of IBAP on its application for summary judgment under RSC Order 14 on a counterclaim against the Feakins.

2. That counterclaim related to a claim for what was called "clawback". It is now suggested that the Court of Appeal was misled by an official of IBAP as to the way the system for claiming clawback was operated and as to the underlying documentation which went to support the original counterclaim. Had the Court of Appeal not been misled, so it is argued, the Feakins would have been permitted to defend the counterclaim.

3. This is the fourth action involving this applicant. The full history of this matter may be found in the decision of Jack J in an action brought by Mr Feakins against his solicitor, Mr Burstow, for negligence on 8th September 2005 - [2005] EWHC 1931 QB. Mr Feakins was successful in that action. It was that action which brought to light the inaccuracies in the statement of the official to the Court of Appeal in October 2001. But anyone wishing to have a full account should read that judgment. The consequences of IBAP's attempt to enforce the judgment it obtained, as a result of the decision of Kennedy J and the Court of Appeal in 2000 and 2001, may be followed by reading the decision of this court given in judgments dated 9 December 2005 [2005] EWCA Civ 1513. New readers, however, should begin here.

4. Mr Feakins was a successful sheep farmer and exporter with his former wife from whom he was divorced in 2000. He exported live sheep. Between 1989 and 1992 such exports were subject to a European Community system applicable only to the United Kingdom. A premium was payable on lambs of appropriate quality sold in the market for slaughter. However, if such lambs were exported elsewhere within the Community an amount equivalent to the premium had to be repaid by the exporter so as to remove the price advantage that exporter would have over other producers elsewhere within the Community. That repayment of the premium was called "clawback". Some categories of sheep had not attracted the premium and thus, when exported, were exempt. The recovery of clawback was provided for by a Community Regulation made in 1984. In the early 1990s legal challenges were raised to the clawback system. During the course of those proceedings IBAP claimed sums by way of clawback from the Feakins. Although the Feakins, along with other exporters, persisted in their legal challenge they did not, as a result of what was subsequently discovered to be the negligence of their solicitors, dispute the quantum of the sums owed.

The Clawback System

5. It is important, for the purposes of these proceedings, to give an accurate account of the system whereby exports of sheep were exempted from clawback. Sheep to be exported were required to rest at a lairage close to the port. There they were inspected by the Meat and Livestock Commission ("the MLC"). Inspectors checked to see if those sheep were exempt from clawback. If they were, an inspector would certify exemption on a form, CES3. A sheep not exempt would be readily identifiable because of a 12mm hole punched in its right ear. Sheep without such a hole were potentially exempt from clawback. If an inspector was satisfied that a sheep was exempt he would punch a 6mm hole in the left ear. If the sheep were exempt, they would be put on a loaded transporter which was sealed by the MLC. The seal numbers were recorded on the CES3. If the shipments were not exempt, the transporter was not sealed.

6. The CES3 would be put in an envelope sealed by the MLC and given to the driver. At the port it would be handed by the driver to an agent who would hand it to Customs. A second copy of the CES3 was sent by MLC to the Board. The third copy was retained by the MLC. It is vital to note that the exporter did not receive a copy of the CES3.

7. The MLC completed a further form, CES4, a copy of which was to be handed to the exporter. The completion of the CES3 followed completion of the CES4.

8. The export document was known as C1220. This was used whether or not the sheep to be exported attracted clawback. It was presented to Customs by the exporter's agent. Mr Feakins' agent, a Mr Revell, did not fill these forms out accurately. But it is important to note that, as found by Jack J, the errors did not prevent the Board accepting the shipment as exempt. It appears that very few, if any, CES3 numbers were ever included by exporters on the C1220s. The exporter's agent would not see the CES3. He would merely hand the sealed envelope containing the CES3, obtained from the driver, to the Customs. It appears he would not put the number of the CES3 on the C1220s. Although the exporter would in due course receive a copy of the CES4 and this would have a CES3 number on it, it would be too late for that number to be placed on the C1220.

9. I set out these details because they assist in determining the extent to which the Court of Appeal was misled in the description it received as to the nature of the system. The important facts to be borne in mind are that the exporter never had a copy of the CES3 and that the CES3 number was not placed on the C1220.

A Taylor v Lawrence Application

10. In *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528, five members of the Court of Appeal, including the Lord Chief Justice and Master of the Rolls, held that the Court of Appeal had an implicit jurisdiction to correct wrong decisions and thereby ensure public confidence in the administration of justice. But that jurisdiction could only be exercised to avoid "real injustice in exceptional circumstances" (see paragraph 54). Such an exercise of the residual jurisdiction of this court required it to be established clearly that a significant injustice had probably occurred and that there was no alternative effective remedy.

11. Following that decision, CPR 52.17 headed "Re-opening of Final Appeals" was promulgated on 6 October 2003:-

    "The Court of Appeal….will not re-open a final determination of any appeal unless –

    (a) it is necessary to do so in order to avoid real injustice;

    (b) the circumstances are exceptional and make it appropriate to re-open the appeal;

    (c) there is no alternative effective remedy."

12. In *Re Uddin (A Child)* [2005] EWCA Civ 52, [2005] 1 WLR 2398, the Court of Appeal considered the application of *Taylor v Lawrence* and the Rule to an application to adduce fresh medical evidence. It concluded that it was not sufficient simply to rely upon the principles in *Ladd v Marshall* [1954] 1 WLR 1489. In circumstances where fresh evidence had been discovered, the court concluded that the injustice which would be perpetrated if the appeal was not re-opened must be:-

    "so grave as to overbear the pressing claims of finality in litigation." (paragraph 21)

    It must be shown, not only that there is a real possibility that the result reached in earlier proceedings was erroneous, but that:-

    "there exists a powerful probability that such a result *has in fact* been perpetrated." (paragraph 22)

The court held that although that was a necessary condition, it was not sufficient; the court would also have to consider the extent to which the complaining party was author of his own misfortune and that there was no alternative remedy.

Events leading to hearing of the Court of Appeal in "clawback action" on 9/10 October 2001

13. Once the Feakins had issued a writ, in January 1992, against IBAP challenging the validity of the clawback system, a syndicate was formed with other exporters to pursue the action. On 10 March 1992 the European Court of Justice declared the clawback system, which had ended on 6 February 1992, unlawful; in consequence a new Regulation was promulgated for recovery of clawback, dated 13 July 1992.

14. On 27 August 1992 IBAP sent an undated letter to the Feakins alleging that they owed £431,440.34 in respect of clawback which had not been paid. The claim was made up of two annexes. Annex 2 related to a re-calculation in respect of unpaid invoices based on a four week average. Annex 3, of greater significance in this application, purported to identify:-

    "sheep meat exports in previous years incorrectly exempted for clawback.

    Exemption arose because the export declaration indicated goods were exempt from clawback but subsequently you did not supply the supporting CES form. If you are able to produce these exemption forms these charges will be deducted from the overall sum."

15. As the judgment of Jack J made clear, it was not possible for an exporter, such as the Feakins, to supply what was vaguely described as "the supporting CES form". At this stage no invoice was sent charging the Feakins the sums set out in the letter. The letter merely sought discharge of the liability unless what was described as "satisfactory proof" was sent within 28 days, with the possibility of a further extension of 60 days. There was nothing in Annex 3 which would have enabled the Feakins to identify to which particular exports the sums referred. An arbitrary reference number was allocated which would not have enabled the exporter to identify any particular export. Further, as subsequently emerged during the course of the evidence before Jack J, the reference numbers did not relate to the date order of shipments. The difficulty was compounded by the fact that the letter related to shipments in 1989, 1990 and 1991. An invoice for £435,366.06 was not sent until 22 January 1993.

16. On 6 July 1993 IBAP and MAFF served a defence to the Feakins' claim for recovery of all clawback paid, asserting the legality of the Regulations. It was not until January 1996, some eighteen months after a further reference to the European Court of Justice, in a case known as *Hedley Lomas*, that a counterclaim was served claiming £406,298.61. Following the adverse judgment of the European Court of Justice in *Hedley Lomas*, dated 9 July 1997, IBAP and MAFF sought summary judgment on the counterclaim on 30 March 1999.

17. On 14 April 2000 Kennedy J gave judgment on the counterclaim. There was a further hearing on 23 June 2000 when he made an order that the Feakins pay IBAP £406,298.61 plus interest. Permission to appeal was given but not as to the amount. Thereafter, IBAP sought to enforce the order in the latter part of 2000. In these proceedings the Feakins rely upon the fact that they found a purchaser for their farm in October 2000 and sought settlement out of the sale funds amounting to about one third of what was claimed. On 9 February 2001 IBAP rejected those proposals for settlement and the sale of Hill Farm was aborted. Thereafter, foot and mouth disease broke out. The disastrous consequences both of the Feakins' attempts to resist and avoid enforcement and of foot and mouth

disease can be seen in the judgments of this court in the appeal following the judgment of Hart J in relation to Section 423 of the Insolvency Act 1986 and in relation to foot and mouth disease clearance operations (2005 EWCA Civ 1513).

18. It should be noted that up to the hearing in the Court of Appeal of the clawback action in October 2001, little attempt had been made to challenge the amount claimed in the counterclaim by IBAP. Jack J notes that the only previous suggestion that there was a dispute about the amount was in a letter from the Feakins' then solicitor, Mr Burstow, dated 19 October 1993, in which he asserted that the sum claimed was completely different to that disclosed previously. But Mr Burstow did not ask for an explanation (see paragraph 28 of the judgment of Jack J). It was this failure to challenge the extent of liability which formed the subject matter of the action for negligence in June and July 2005.

19. Just before the hearing before the Court of Appeal in October 2001, Mr Feakins did make a witness statement, dated 26 September 2001, served on 5 October 2001. He pointed out that it was impossible for him to supply IBAP with the relevant "CES forms" because neither he nor his shipping agent had ever had those forms to produce (see paragraph 4). He asserted in that statement that almost half of the sheep which he exported to the continent were exempt sheep for which the selling farmer had not been entitled to receive any subsidy (paragraph 5). He stated that since IBAP had been able to list the amount of clawback levied on exempt sheep:-

    "they clearly have already received the CES forms from either or both HMCE and MLC."

    The hearing before the Court of Appeal on 9/10 October 2001

20. The appeal from summary judgment of 14 April 2000 was heard on 9-10 October 2001. It was focused upon the true construction or application of the amended regulation No. 1922/92 dealing with the quantification of the rate at which clawback could be claimed (see in particular paragraph 17 of the judgment in the Court of Appeal, dated 23 October 2001 in *J & SA Wood v Intervention Board for Agricultural Produce*). That appeal failed. But during the course of the appeal Mr. Feakins, as part of the syndicate bringing the appeal, sought to adduce additional evidence based upon the statement to which I have already referred. During the course of the first day of the appeal, 9 October, Simon Brown LJ referred to the approach of IBAP to another exporter, Barretts & Baird, in relation to whom IBAP had agreed to reconsider sympathetically evidence which would lead to a reduction in clawback claimed (reconsideration did, however, relate to a different issue relating to exports to Switzerland).

21. The response of counsel on behalf of IBAP was to point to the absence of documentation from the exporter which, he suggested, should have been produced in order to claim exemption. Mr Barling QC, on behalf of the respondents IBAP, demonstrated at an early stage of that appeal hearing the inadequacies of his instructions and the ignorance of IBAP as to the way the system operated. He suggested that the export declaration, C1220, had indicated that the exports were exempt from clawback but that the exporter had subsequently failed to supply what he described as "the supporting CES form" (see page 133). He stated, on the next page of the transcript, that the necessary documents for establishing exemption had never been supplied. Counsel for the appellants, including the Feakins, Mr Green QC, referred to Mr Feakins' description that the system was operated by the Meat and Livestock Commission and the Customs and Excise and that Mr Feakins had never been in a position to produce the CES form. Simon Brown LJ's response is revealing:-

"It is a very rum suggestion, if I may put it on that basis. Nobody would ever succeed on their exemptions…"

And, shortly after:-

"It is a very remarkable situation if you are really saying here he was, entitled to exemption, exemption was impossible to achieve because the forms were never in his power to produce…"

It is apparent that, on the first day of the appeal, both IBAP's counsel and thus, presumably, IBAP, and the Court of Appeal were wholly unaware of the correct system in place at the time. The Court of Appeal was, as subsequent events show, never disabused.

22. Later, on the same day, counsel for IBAP reiterated that the trader had indicated on a box on the C1220 that the goods were exempt. He explained the fact that IBAP did not raise an invoice for clawback initially, because of that indication and sent it subsequently when no evidence of exemption was received (see page 144 of the transcript). Mr Green responded, as it turns out, correctly, that the exporter only had a copy of the CES4. He suggested that Mr Feakins could produce such documents the next day of the appeal. Counsel for IBAP responded that it was far too late and his clients would not be in a position to assess such documents. Counsel for IBAP reiterated that the only evidence accepted by IBAP was a properly stamped CES3. Simon Brown LJ suggested that some explanation should be sought overnight as to why the properly signed CES4 would not be satisfactory.

23. It is thus apparent that by the close of the first day of the hearing, apart from Mr Feakins, who did not have possession of the relevant IBAP documents, no one properly understood the system for exemption and clawback. Certainly counsel for IBAP had not been placed in a position to explain it to the Court of Appeal, and the Court of Appeal was under a clear misapprehension as to the ability of an exporter to claim exemption and resist clawback.

24. Overnight a statement was obtained from Ian Basham, a team manager with IBAP. It is a statement running to 4½ pages. It is the crux of this application. It contained serious inaccuracies as to the system for exemption and clawback. I should emphasise that it does not seem to me necessary nor fair for this court to investigate how serious inaccuracies formed the substance of Mr Basham's statement. It was obtained at very short notice. No one has suggested that Mr Basham deliberately sought to mislead the Court of Appeal. But, equally, IBAP has not sought to suggest other than that the statement contained serious inaccuracies.

25. The statement of Mr Basham purported to deal with the system for operating the clawback exemption scheme. During the course of his statement he said:-

"The scheme leaflet ET2, paragraph 59, required exporters to cross-refer the C1220 with the unique sequential serial number of the CES3, by entering that serial number into Box 44 of the C1220 form. *Other exporters complied with that requirement, Mr Feakins did not*." (My emphasis).

This evidence was untrue. During the course of the negligence action before Jack J Mr Basham accepted in cross-examination that none of the other exporters had complied with the requirement. Mr Basham agreed and regretted misleading the court in that respect. There was, in reality, no basis for suggesting to the Court of Appeal that Mr Feakins had behaved in any different way from other exporters.

26. Secondly, Mr Basham suggested that Customs' main concern was not with the CES3 but rather with the C1220. Provided that document was provided, Customs would permit export to take place. Mr Basham accepted in the evidence in the negligence action, that that statement was inaccurate and misleading because Customs would not permit exports comprising exempt sheep to be exported unless both C1220 and CES3 forms, obtained from the MLC, were produced.

27. Thirdly, in a footnote on the same page of his statement, Mr Basham said that the letter from IBAP to Mr Feakins of August 1992 had incorrectly stated that:-

    "The export declaration indicated goods were exempt from clawback."

    In fact, he continued in the footnote:-

    "No such indication was present on the export declarations. This statement appears to have arisen from an administrative error resulting from a confusion of certain codes on the C1220 declarations."

28. This footnote was significantly untrue and misleading in two respects. Firstly, all but two, namely 75 out of the 77 C1220s subsequently produced by IBAP in January 2002, were stamped with words which connoted that the sheep were exempt from clawback. They were stamped with the arcane words "UK lines rejected". During the course of the hearing before Jack J Mr Basham accepted that those connoted exemption. Mr Feakins did not have those documents at the time of the hearing before the Court of Appeal on 10 October 2001. IBAP did. Thus the export documents, the C1220s, were stamped at the time by officials on behalf of IBAP with words which signified that the sheep were exempt.

29. Secondly, the footnote was misleading because it refers to an administrative error. No such error has ever been revealed. Different IBAP staff over a period of about eighteen months stamped C1220s with the words "UK lines rejected". The obvious explanation for such a stamp was that the relevant member of staff was satisfied, at the time of processing the relevant C1220s, that the documentation was in order, in other words that a CES3 had been delivered to Customs from MLC and Customs had been able to match that document with a C1220. In those circumstances the sheep, the subject matter of the export identified in the C1220, were exempt and no clawback was payable. There was no basis for suggesting that an administrative error had occurred and Mr Basham, during the negligence action, gave no explanation as to how that evidence came to be included in his statement.

30. Fourthly, this misleading evidence was compounded by Mr Basham's statement at paragraph 8 in which he said that there was no reference on the C1220 to CES3 serial numbers and that no CES forms had been received by IBAP with the C1220s or at any time later. Mr Basham was in no position to make that statement. The most obvious explanation for the fact that the C1220s had been stamped with the words signifying exemption was that, at the time, CES forms had been received. That would explain why no invoices had been sent at that time but only some two years later after a process described by Mr Basham, in the negligence action, as "a washing-up" exercise.

31. As Jack J accepted (at paragraph 81 of his judgment), the stamping on 75 out of 77 shipments signifying exemption meant that the forms had been examined and found to relate to exempt sheep. Contrary to the evidence before the Court of Appeal in 2001 and IBAP's letter of August 1992, the forms completed by the Feakins' agent did not indicate that the sheep were exempt. Something else must have indicated to IBAP's staff that the sheep were exempt. The judge could not accept that a

series of officials could make similar errors over a substantial period; he, thus, concluded that the most obvious explanation was the correct explanation, namely that the officials had correctly exempted the sheep. It appears that there were numbers of occasions when CES3s had not been attached to C1220s. Bearing in mind the subsequent evidence of the chaos of the system, that was not surprising. Jack J referred to the fact that the IBAP's own letter of claim on 13 October 1993 suggested that they were finding CES3s and matching them to C1220s in relation to shipments made two years before in 1991.

32. Fifthly, Mr Basham erroneously sought to emphasise that the CES4 form could not provide evidence that exempted sheep referred to therein were exported sheep. This too was incorrect since, as Jack J found, if a CES4 could be linked to a C1220 the two together would prove that the sheep were exempt and had been exported because if a CES4 had been brought into existence there must have been a CES3 (see paragraph 82 of his judgment).

33. In all the respects I have identified, Mr Basham's evidence was misleading. It failed to give an accurate account of the system adopted at the time. It did not disclose to the Court of Appeal that the documents on the basis of which IBAP had initially given exemption did in fact indicate that the sheep exported were exempt.

The effect on the Court of Appeal

34. Overnight Mr Feakins also prepared a second statement. In that statement he reiterated that there was no means of obtaining a stamped CES3. All he would have had returned to him was a CES4 prepared by MLC. With that statement he enclosed a large number of CES4s but pointed out that he could not match them to any CES3 without that document and there was no means of otherwise matching the CES4s he held to any particular load. He pointed out, presciently, in the last paragraph of that statement, that on an occasion in September 1991 he had been charged because IBAP did not have a stamped CES3 from the *previous* month. He suggested that in relation to each of the 78 loads if IBAP had not received stamped CES3s it would have followed the same procedure and sent invoices within one month. But IBAP did not. He had never been sent invoices until after what became subsequently known as the "washing-up" procedure.

35. On the following day, 10 October 2001, it is clear that the Court of Appeal, prompted by counsel for IBAP, now armed with the misleading statement from Mr Basham, was persuaded that the charge to clawback forming the counterclaim was wholly attributable to Mr Feakins' own failure to provide evidence that the exports were of sheep which were entitled to exemption. In that respect, it was also persuaded that Mr Feakins' claims to exemption sought different treatment from that afforded to other exporters. Mr Barling QC, on behalf of IBAP, repeated that the crucial document was a stamped CES3 married to the export document C1220. Both, suggested Simon Brown LJ, would arrive independently and neither did. Mr Barling QC, again through no fault of his own, compounded the error by suggesting that Mr Feakins had failed properly to complete the C1220s indicating exemption. He suggested that there was no means of marrying the 700 odd documents now produced to C1220s, and suggested:-

"It seems an extraordinary coincidence that neither the MLC copy nor the Customs' copy came back to IBAP."

Simon Brown LJ responded:-

"With regard to other exporters of exempt consignments they do."

Simon Brown LJ concluded the discussion with the suggestion that the court had heard enough about Mr Feakins. He said to counsel for the appellants that IBAP was entitled to lay down its own rules as to how they were to be satisfied of exempt consignments for export. It was subsequently suggested that in every other case:-

"They had at least got such a document as they required. True, it had not been properly signed. How come there were never any others? *This is not the position with any other trader who was making exempt exports. How come it justifies to Mr Feakins (sic) and apparently involved not just one body Customs getting it wrong but also the other people getting it wrong?*" (My emphasis).

36. It is clear to me that the Court of Appeal accepted that there was nothing on the documents to indicate that the sheep to which they related were exempt. Clawback had been properly claimed and the only fault was the failure of Mr Feakins to submit correct documents and to establish exemption. Furthermore, his position was to be contrasted with that of every other exporter who had properly complied with the rules in claiming and receiving exemption.

37. This belief was reiterated in the judgment dated 23 October 2001. The judgment of Simon Brown LJ, with which the other Lord Justices agreed, rejected the argument based upon the construction of the relevant Regulations and refused leave to Mr Feakins to adduce further evidence. It referred to the letter from IBAP dated August 1992 seeking supply of what was described as relevant Customs' forms (see paragraph 38). The application to adduce further evidence was rejected without hesitation and it was suggested that it would be quite impossible for Mr Feakins to satisfy what Simon Brown LJ described as "the Board's conditions for establishing the exempt status" (see paragraph 41).

38. However, at the end of the judgment, the court invited IBAP to:-

"take one last look at the material now produced on Mr Feakins' behalf and to consider whether or not at this final stage they are prepared to afford some degree of *ex gratia* concessionary relief." (see paragraph 42)

I am persuaded that the Court of Appeal was misled and that had it known the true position it is highly likely that it would have permitted the Feakins to set aside the summary judgment and defend the counterclaim. It is plain from Simon Brown LJ's approach, from which the other Lord Justices did not dissent, that despite what appeared to him to be the Feakins' inactivity in responding to the counterclaim, he was concerned as to their liability to pay clawback. Had he not been concerned, and was merely interested in the legal point as to the proper construction of the regulation, there would have been no point in suggesting that IBAP should investigate the matter overnight, still less in his reiterated expression of concern at the close of the appeal. The Court of Appeal clearly believed that clawback had been sought because the export documents, the C1220s, contained no indication that the consignments were exempt from clawback. This was simply untrue. As it now turns out, 75 out of 77 of the documents did indicate that the consignments were exempt.

39. Furthermore, the Court of Appeal believed that clawback was sought from Mr Feakins because he had failed to act as other exporters in producing the correct documents to signify entitlement to exemption. Again, this was untrue. The Court of Appeal was never put in a position to understand that the documents necessary to establish exemption were never in the hands of the exporter. Moreover, these significant misapprehensions as to the system were in the context of a background of chaos and confusion. Before Jack J there was ample evidence given as to the inadequacies of the operation of the system (see between paragraphs 56-60). IBAP's Reading office to which

certificates were sent had a reputation for inefficiency. The counting was also inefficient. On the contrary, Mr Basham had told the Court of Appeal that the system was carefully implemented to detect and deter fraud (paragraph 7 of his statement). The true position was that a number of officials over a period of 18 months had exempted all the exports, the subject matter of the counterclaim at annex 3, save for two. Although a subsequent review, to which I shall turn later, has suggested one explanation for that exemption, it is little short of inconceivable that the Court of Appeal would have dismissed the appeal in the knowledge that a substantial proportion of the sums charged by way of clawback had been previously accepted as exempt. The Court would, in my view, most likely have ordered a trial of the counterclaim to establish whether there was any other explanation for that previous stamping of exemption other than that the consignments were truly exempt.

40. For those reasons I conclude that the applicants have established, to the necessary standard of proof, that the Court of Appeal, in dismissing the application to adduce fresh evidence, was misled into an erroneous conclusion.

The Response of IBAP

IBAP's review

41. The primary resistance to the application related to a review conducted by the IBAP since October 2005, the conclusions of which were notified to the applicants by letter dated 30th March 2006. On the basis of that review and the open offer which IBAP has now made, it is contended that there is no point in re-opening the appeal and the applicants will suffer no injustice as a result. IBAP has re-examined both the unpaid invoices, the subject matter of annex 2, and the exports in respect of which clawback was claimed, the subject matter of annex 3. It has revised the figures claimed in relation to annex 2 because it has discovered that the weight of lambs in some of the consignments was such that too much clawback has been claimed. The summary judgment sum £237, 943.71 has been revised to £194,936.84.

42. In relation to annex 3, the summary judgment sum claimed of £197,422.35 has been revised to £164,972.97. Further sums have been deducted, making a total revised figure of £268,842.72 to which interest has been added. Accordingly the letter notified the Feakins that the department would accept £450,000 in full and final settlement subject to certain conditions which included withdrawal of the *Taylor v Lawrence* application and a withdrawal of any claim or damages in respect of cross-undertakings given in freezing order proceedings in 2001.

43. There remains substantial dispute as to whether those figures are correct. This is not surprising. The Court of Appeal on 23 October 2001 had suggested one final consideration of the Feakins' claim with the view to some concessionary relief. But this suggestion fell on deaf ears. Despite the courteous attempts by the Feakins' solicitor, Mr Welsh, to persuade the department to look at the underlying facts and documents, they were met with intransigence and obdurate refusal even to consider the sensible points advanced by Mr Welsh. Indeed, it is he who emerges as the only hero in the whole of these sorry proceedings. Time and again he sought to see some of the underlying documents and to ask the department fair questions about the system. He was met with total refusal, written in terms surprising from a Government Department who would, one would have thought, be anxious not to seek to recover money to which they were not entitled.

44. In a series of letters starting on 3rd January 2002, Mr Welsh of Parker Bullen solicitors wrote asking the department to take one last look; with considerable perspicacity, he suggested that the Court of Appeal had been misled and that the C1220s had in fact indicated that consignments of

sheep were exempt. He asked for a meeting. But the response of IBAP was to ask why the Feakins had not petitioned the House of Lords for permission to appeal. Eventually, by 8 March 2002, Mr Welsh had been given some copies of C1220s which showed that in fact lambs had been exempted from clawback. He asked why some copies of C1220s had been returned with the words "seals intact" and queried the accuracy of Mr Basham's statement. The response of IBAP's solicitor was to say that his client regarded the matter as closed.

45. Still, Mr Welsh did not give up, repeating that the documents seemed to show the sheep were, in reality, exempt and that that explained the failure of IBAP to claim clawback until after a considerable lapse of time. His letters show a remarkable ability, courteously to persist in seeking justice, in the face of an obdurate refusal. They provide a telling example of how good sense, patience and an absence of aggression may eventually be rewarded. Young city solicitors, fed on raw meat before breakfast, would learn much from his example. It is unnecessary to detail these letters in full but they are of significance in demonstrating why it is that the Feakins are reluctant to accept the department's analysis, now, of how much they owe and why I am reluctant to accept the accuracy of the department's response.

46. The review certainly demonstrates that up until March 2006 the claims made by IBAP, the subject matter of the original counterclaim before Kennedy J, did not represent the true extent of the Feakins' liability for clawback. Even on the department's own figures both annex 2 and annex 3 were inaccurate. In relation to annex 3 there still remains a dispute as to whether anything was owed by way of clawback. As I have recorded, 75 out of 77 of the documents indicated that various officials, over a period of 18 months believed that the consignments were exempt. Statements now produced on behalf of IBAP suggest that that was due to a mistaken instruction to give blanket exemption irrespective of entitlement. Those statements reveal why there was delay in claiming repayment until August 1992 and until the invoice was sent in January 1993. Apparently, in response to an investigation by the European Court of Auditors in 1992 it was discovered, so it was thought, that a substantial amount of clawback, £600,000, had not been collected from Barretts and Baird. I should interpose that at the time of the hearing before Kennedy J, IBAP had abandoned £334,000 out of the amount of £600,000 originally claimed by way of clawback against that particular exporter. Apparently the audit also revealed an incorrect desk instruction to exempt all the Feakins exports. According to a witness statement before this court from Mr Thompson, the officer responsible was subsequently reprimanded.

47. These investigations led to the letter dated August 1992, the claim for clawback by way of invoice in January 1993 and the substantial litigation and misery that followed.

48. It is unnecessary to resolve the issue as to precisely what is owed in respect of the claims under annex 3. The finding of Jack J in the negligence proceedings to which IBAP was not a party was that the explanation for the stamp indicating exemption on the C1220s was that the sheep were indeed exempt. Since IBAP was not a party, it is entitled to say that that is not correct. That is an issue which would have to be resolved, if it ever requires resolution, at the rehearing of the appeal to determine whether the Feakins should be at liberty to defend the counterclaim. It would be wrong for this court to reach any concluded view. I merely observe that in the context of the sorry history of this case, the correct explanation for the original exemption of the sheep, the subject matter of annex 3, could not and should not be concluded at this stage. Certainly, the review cannot be considered as disposing of the issue. There still remains a real possibility that IBAP will not be able to establish that it is owed anything under annex 3.

49. We were told, without any disclosure of the relevant materials, that the burden was upon an exporter to establish exemption. That seems likely. But that is far from saying where the burden

would lie on the counterclaim in relation to annex 3, were it to be litigated. It is strongly arguable that it will be for IBAP to prove its case. Eventually it may prove impossible for IBAP to establish that, once the C1220s were stamped to show the sheep were exempt, there was any other explanation but that the officials had the necessary documentation, in the form of CES3s, before them.

Damages received as a result of the negligence action

50. Jack J awarded damages to Mr Feakins against Burstow for negligence amounting to £270,000. Mr Feakins appealed and the appeal was compromised at 75% for loss of the chance to resist the whole claim so that the total paid was £330,000. Smith LJ, arguendo, pointed out that Mr Feakins had probably now recovered more than he would ever have to pay in relation to annex 3 as now calculated, even if he was correct in establishing that he owed no sums by way of clawback under annex 3. In my judgment, whilst that is correct, that leaves out of account the sums which remain in question under annex 2. During argument it was suggested that the Feakins had only sought to adduce further evidence in relation to that part of the counterclaim which related to annex 3. But I am satisfied, having again looked at both statements placed before the Court of Appeal in September and October 2001, that the application of the Feakins was to defend the whole of the counterclaim, not limited to annex 3. In those circumstances, in my view, it would not be right to reject this application on the basis that there was no reasonable chance of the Feakins doing better than they have already achieved in the negligence action.

51. I should mention that, in writing, further arguments were advanced on behalf of IBAP contending that, having brought the negligence action it was not open to the Feakins to make this application to re-open the appeal. That suggestion was, rightly, abandoned by Miss Lee at the outset of her argument. She also contended, in writing, that it was too late now to open the appeal having regard to the lapse of time overall and the impossibility of establishing the true position in relation to clawback. Again, that point was not pursued and, in my judgment was without merit. It is true that there was substantial delay between the time of the invoice from IBAP claiming clawback on 22 January 1993 and the time of the Court of Appeal hearing in 2001. But it must be recalled that the Feakins had joined with others in challenging the legality of the relevant legislation. Further, no counterclaim was put forward until 1996. Until the underlying documents were disclosed to Mr Welsh in 2002, there was no opportunity to see that, in fact, the documents showed that officials believed the sheep were exempt. Overall, therefore, it does not seem to me that the real injustice, which has already been demonstrated, can simply be met by suggestions that it is too late for anything to be done. Given that it is now established that sums claimed in the counterclaim were not due, it seems to me that it would be to compound the injustice by refusing to allow the appeal to be reopened. It was only during the negligence action that the true nature and extent of the misrepresentations in Mr Basham's statement were revealed. The judgment of Jack J established the inaccuracy of the counterclaim and the *Taylor v Lawrence* application was issued but one month later.

52. In response to the suggestion that the Feakins had already recovered more than they could hope to by opening the appeal, it was contended by Mr Sutcliffe QC that the damages obtained had already been exhausted by legal costs in litigation relating to the section 423 proceedings and the counterclaims relating to damages flowing from action taken to combat foot and mouth disease. It was said that all those losses flowed from the failure of IBAP to accept an offer of one third of the sale proceeds back in November 2000. If IBAP had appreciated the true value of the clawback, it would have accepted that offer. Everything else flowed from IBAP's failure.

53. It is unnecessary, in my view, to resolve that submission in this application. I should emphasise that it gives rise to difficult questions which should not be resolved until it is necessary to do so.

Conclusion

54. There is one further factor to which I have not already referred. The respondent to this application is an arm of government. This creates particular obligations in relation to the responsibility for establishing and maintaining a fair and sensible scheme in relation to agricultural exemptions and payments and in relation to litigation. That responsibility is, I am quite satisfied, now appreciated by the department. Its conduct of the review is earnest of its acceptance of the special position such government branches hold in the context of litigation. The earlier attitude of intransigence appears long since to have been abandoned. But in considering the exceptional circumstances of this case and the injustice to the Feakins it must be recalled that over the years a government department has sought to recover sums to which it now appears it was not entitled. Albeit at the last moment, it did produce a statement which was untruthful and seriously misled the Court of Appeal. In such circumstances I am satisfied that were the Feakins not permitted to re-open the appeal and challenge the counterclaim, a serious injustice would result. I should emphasise that it is not for this court to resolve whether the Feakins should be allowed to defend the counterclaim or what the result of that defence will be. But I am satisfied that, already at this stage, it has been established that the amounts claimed in the counterclaim, by way of clawback, are excessive and that the judgment of Kennedy J and the Court of Appeal has led to an erroneous result. The fact that the Court of Appeal was led to that conclusion was not the fault of Mr Feakins. Only by permitting the Feakins to re-open the appeal can justice, after so long, be achieved.

55. I wish, finally, to emphasise that my conclusion should not inevitably lead to the re-opening of the appeal. The sensible course, now, is for both parties to meet, with all cards on the table, and for there to be a full analysis of all the available material, preferably before a mediator to establish what, if any, sums are still due from the Feakins to IBAP. This will require a spirit of openness and cooperation which has never been achieved in the past but every effort must, in the interests of everyone, be made to reach finality now.

Lady Justice Smith:

56. I agree.

Lord Justice Dyson:

57. I also agree.