

**IN THE HIGH COURT OF JUSTICE  
COURT OF APPEAL (CIVIL DIVISION)  
ON APPEAL FROM BRISTOL DISTRICT REGISTRY  
MR JUSTICE PLENDER  
7BS90943**

Royal Courts of Justice  
Strand, London, WC2A 2LL

26/01/2010

**Before :**

**LORD JUSTICE SEDLEY  
LORD JUSTICE LONGMORE**

**and  
LORD JUSTICE AIKENS**

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**Between:**

|                                                                 |                    |
|-----------------------------------------------------------------|--------------------|
| <b>MILK SUPPLIES LIMITED &amp; OTHERS</b>                       | <b>Appellants</b>  |
| <b>- and -</b>                                                  |                    |
| <b>DEPARTMENT FOR ENVIRONMENT, FOOD<br/>&amp; RURAL AFFAIRS</b> | <b>Respondents</b> |

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**Mr Paul Stanley (instructed by Burges Salmon LLP Bristol) for the Appellant  
Mr George Peretz (instructed by Rural Payments Agency, Reading) for the Respondent  
Hearing date : 25 November 2009**

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**Lord Justice Aikens :**

1. This appeal from the order of Plender J dated 20 March 2009 concerns the legal consequences of subsidiary companies receiving funds under the European Community's system of export refunds for agricultural products as a result of an "abus de droit" as understood in Community law, or as I shall call it, in "abuse of rights". In his judgment<sup>1</sup>, Plender J described the legislation governing the Community's system of export refunds for agricultural products as diffuse, prolix and technical. One can only agree. The principal issues on this appeal are: (a) whether the parent company of wholly owned subsidiaries is legally liable to repay export refunds received by the subsidiaries, when both parent and subsidiaries have been in "abuse of rights" as that term is understood in Community law; and (b) whether the parent company is also liable to pay penalties incurred by the subsidiary companies as a result of the same "abuse of rights" in obtaining export refunds. Plender J answered "yes" in each case.

***The parties, the facts and the history of the proceedings***

2. The following facts and matters are not in dispute between the parties.

3. The present action was brought by the claimant, Milk Supplies Limited (“MSL”). It is a company engaged in the business of exporting dairy products from the United Kingdom. It is a medium-sized company and it is the fifth largest exporter of agricultural products from the United Kingdom. It has made significant drawings on the export refund system for agricultural products that has been set up under Community law. The drawings were £1.18 million in 2000-2001 and were £6.88 million in 2002. Mr Robert Bamber was, at all relevant times, a director of MSL.
4. MSL is the parent company of seven subsidiary companies. The subsidiary companies were incorporated on 19 July 2000. MSL owns all the shares of each of those companies. They are known as Milk Supplies (One) Limited, Milk Supplies (Two) Limited and so on up to Milk Supplies (Seven) Limited. They will be called “the subsidiaries”, although it will be convenient to refer to MSL and its subsidiaries collectively as “the appellants”. The subsidiaries were originally set up for other purposes. However, each of the subsidiary companies subsequently became engaged in the export of dairy produce from the UK, but on a small scale. Each subsidiary falls within the definition of “small exporters” for the purposes of Commission Regulation 800/1999 of 15 April 1999.<sup>2</sup> I will call that Regulation “Regulation 800”.
5. The Defendant to the action is the Department for the Environment, Food and Rural Affairs, known as “DEFRA”. DEFRA is entrusted, through its executive agency, the Rural Payments Agency (“the RPA”), with the administration of the European Community’s system of export refunds for agricultural products.
6. Regulation 800 lays down detailed rules for the application of a system of export refunds on specified agricultural products and products processed from them. The refunds are designed to make up the difference between the Community price for the products in question and the world price for such products, which is almost invariably lower. The aim of the system is to enable goods whose price is maintained at a high level by the Community’s intervention arrangements to be exported at prices which are competitive on the world market. The intervention price of agricultural products changes very frequently, sometimes more than once in a day. The rate of export refund is altered with equal frequency.
7. Regulation 800 varied the system of export refunds made by the Community, following the Agreement on Agriculture, which was one of the Multilateral Agreements on Trade in Goods annexed to GATT and concluded under the aegis of the World Trade Organisation in the Uruguay Round. Export refunds are now allocated from a Community budget of €415 million, which is (effectively) capped by Article 9(1)(d) of the Agriculture Agreement. In order to ensure that payments do not exceed this cap, the European Commission requires exporters to apply in advance for Refund Certificates. That regime applies to “large traders”.
8. However, a proportion of the available export refund budget is reserved to small exporters. They are not required to obtain Refund Certificates in advance. The reasons for this small exporters scheme are described in the third and seventh preamble to Regulation 800.
9. Commission Regulation 1520/2000 of 13 July 2000,<sup>3</sup> (“Regulation 1520”) laid down further detailed rules for the application of the system of granting export refunds on goods processed from agricultural products. For the “small exporters” scheme, refunds are to be paid on a “first come, first served” basis subject to a maximum payment of €75,000 per small trader. Article 14 of Regulation 1520 provides that exports not covered by a certificate are eligible for export refunds “only if the applications previously lodged by the exporter in accordance with paragraph 2 of Section VI of Annex F during the budget year in question relate to a total amount of less than €75,000”.
10. In 2001 and 2003 each of the subsidiaries exported milk products to Canada and the USA. In each case the value of the exported milk products was less than €75,000. The judge found<sup>4</sup> that the pattern of the activities of MSL and its subsidiaries for the relevant exports in 2001 and 2003 was as follows: each of the subsidiaries purchased the product (anhydrous milk fat enriched with

sugar) from a company called Roil Foods. The subsidiary then sold the product to MSL Trading, a company formed in 1999 by Mr Robert Bamber and his wife. MSL Trading sold the product onwards to another company called Van Kam Trading. That company paid MSL Trading for the product and MSL Trading then reimbursed the relevant subsidiary. However, the subsidiaries did not themselves pay Roil Foods for the product. The purchase price of the product was paid to Roil Foods by MSL itself.

11. Each of the subsidiaries claimed export refunds under Regulation 800 and Regulation 1520 as “small exporters”. The appropriate export refund was paid by the RPA to the bank account of the subsidiary in question. In each case substantially the whole of the export refund was then paid over to MSL. Part of the export refund was used to repay MSL for the sum it had paid to Roil Foods, being the price of the milk products sold by Roil Foods to the subsidiary. If there was any balance left (i.e. any difference between the export refund received and the price charged by Roil Food to the subsidiary for the products supplied), then that balance was kept by MSL but accounted for in the group accounts as an inter-company debt due from MSL to the subsidiary concerned. It was therefore treated in the accounts as an asset of the relevant subsidiary.
12. Between 27 March and 8 July 2007 MSL made various exports to Canada of milk powder enriched with sugar. This product was for use in the manufacture of ice cream. MSL claimed a refund in respect of each export. The total refund claimed for these exports was €904,993.54. DEFRA (via the RPA) refused to pay this sum for reasons I will explain below. MSL began the present action against DEFRA to recover that money on 7 December 2007.
13. In the action started by MSL, DEFRA admitted the claim; that is, it accepted that the export refunds claimed by MSL for its exports to Canada in 2007 were legitimate and that MSL was, in principle, entitled to receive that amount of export refund. However, DEFRA made a counterclaim against MSL and made each of the subsidiaries a defendant to the counterclaim. DEFRA asserted that each of the subsidiaries had obtained their refunds for exports made in 2001 and 2003 by an “abuse of rights”, which had been committed by each of the subsidiaries and, more importantly, by MSL itself. DEFRA therefore counterclaimed for (a) the repayment of all the export refunds made to each of the subsidiaries; (b) the payment of penalties and (c) interest. DEFRA asserted that, in accordance with Articles 52 and 51 of Regulation 800, each of the subsidiaries was liable for its proportion of the export refund it had received plus the associated penalty and interest. It also claimed that MSL was “the beneficiary” of the export refunds which had been “unduly received” by the subsidiaries, within the meaning of Article 52.1 of Regulation 800. DEFRA therefore claimed that MSL was jointly and severally liable with each subsidiary for (a) the export refund received by each subsidiary; (b) the penalty for which each subsidiary was liable; and (c) interest on those sums. DEFRA claimed that the total amount due to it from MSL (and the subsidiaries collectively) equalled £759,239.39.
14. However, DEFRA (through the RPA) had withheld payment of legitimate export refunds from MSL (in respect of the exports made by MSL in 2007) amounting to £618,287.76. It said that it was entitled to set off that sum against those sums which it claimed it was entitled to counterclaim because of the “abuse of rights” by MSL and the subsidiaries. DEFRA therefore counterclaimed only the net balance, amounting to £140,951.62. The appellants agreed that if DEFRA’s arguments were correct, then it was entitled to retain the sums otherwise due to MSL and would be entitled to judgment on the counterclaim for the sum of £140,951.62.
15. The claim and counterclaim were tried by Plender J on 17 March 2009. He handed down judgment on 20 March 2009. By his order of 20 March 2009, he dismissed the claim and ordered that MSL pay to DEFRA the sum of £141,999.68. He also ordered that the subsidiaries pay their due proportions of that total sum to DEFRA, as set out in his order of 20 March 2009. It is not necessary to set out the details here. The total sum that the judge ordered to be paid by MSL (and the subsidiaries in proportion) consisted of: (a) the balance of the export refunds paid to the subsidiaries (i.e. taking account of the sums withheld from MSL by DEFRA); and (b) penalties

which the judge held were due from MSL (and the subsidiaries in proportion) under Regulation 800.

16. Mr Paul Stanley, for the appellants, frankly acknowledged that the subsidiaries are not able to reimburse DEFRA for the export refunds that they have received or to pay the 50% penalties and interest for which the judge has held them liable. However, MSL would be able to pay the sum claimed to DEFRA. So the practical importance of the appeal lies in whether MSL is liable to reimburse the export refunds, penalties and interest to DEFRA.

***The principle of “abus de droit” or “abuse of rights” in European law and the relevant findings of fact concerning “abus de droit” in this case***

17. Both DEFRA and the appellants accepted before the judge and before us that there is a well-established principle of Community law, known as “abus de droit” or “abuse of rights”.<sup>5</sup> The concept pre-supposes a right granted by a law, often a right to money or some fiscal advantage, for a particular, identified purpose. The abuse occurs when a person formally observes the preconditions to obtaining the right, but in fact the person has taken advantage of the right for a purpose for which the right was not intended when it was created. In Case C-110/99, *Emsland Stärke v Hauptzollamt Hamburg-Jones*<sup>6</sup>, the European Court of Justice set out what has to be established before a court can make a finding of “abuse of rights” under Community law. The Court held:

“52. A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved.

53. It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it. The existence of that subjective element can be established, inter alia, by evidence of collusion between the Community exporter receiving the refunds and the importer of the goods in the non-member country”.

18. In Case C-255/02, *Halifax and Others v Commissioners of Customs and Excise*,<sup>7</sup> the Court of Justice stated that it has to be established that the financial advantage obtained as a result of the actions of a party must be contrary to the purpose of the relevant Community rules or regulations concerned. The Court also stated that it must be demonstrated, by reference to objective factors, that the essential aim of the transactions concerned was to obtain a financial advantage from the relevant Community rules or Regulations.
19. Before the judge and before us, the parties also referred to Articles 1 and 4 of Council Regulation 2988/95 of 18 December 1995.<sup>8</sup> on the protection of the European Communities’ financial interests. Articles 1(1) and (2) and Article 4(1) to (4) provide:

“Article 1

1. For the purposes of protecting the European Communities’ financial interests, general rules are hereby adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law.

2. “Irregularity” shall mean any infringement of a provision of community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure”.

“Article 4

1. As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage:

– by an obligation to pay or repay the amounts due or wrongly received,

....

2. Application of the measures referred to in paragraph 1 shall be limited to the withdrawal of the advantage obtained plus, where so provided for, interest which may be determined on a flat-rate basis.

3. Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal.

4. The measures provided for in this Article shall not be regarded as penalties”.

20. The judge recorded<sup>9</sup> that MSL and the subsidiaries admitted that the arrangements whereby the numbered subsidiaries would make the purchases from Roil Foods and sell the produce to MSL Trading (which then sold it to Van Kam) had no other purpose than the obtaining of export refunds payable to the subsidiaries. The judge then found:

“The arrangements whereby those subsidiaries passed on substantially the whole of the payment to the parent had no purpose other than that of putting MSL in much the same position as that in which it would have been if it had been eligible to obtain, and had obtained, export refunds itself. The conditions artificially created by this course of conduct may be identified as eligibility for export refunds to be paid to MSL”.<sup>10</sup>

21. The judge therefore found that the conduct of both MSL and the subsidiaries had as their purpose the obtaining of an advantage contrary to the objectives of Community law applicable in the case by artificially creating the conditions required for obtaining that advantage. The judge therefore found, as a fact, that both MSL and the subsidiaries had been engaged in an “abuse of rights” as understood by Community law.
22. The judge also recorded<sup>11</sup> that it was agreed by the parties that the exports were actually made by the subsidiaries. There was no suggestion by DEFRA (either before the judge or us) that either the subsidiary exporter or any officer or member of staff of MSL intentionally provided false information or otherwise behaved dishonestly. There was also no suggestion by DEFRA that the transactions were a sham.
23. Before us, Mr Stanley therefore accepted the judge’s finding of fact that the arrangements made by MSL and the subsidiaries whereby the latter obtained the export refunds in 2001 and 2003 and passed them on to MSL constituted an “abuse of rights” under Community law. He also accepted that it was an “abuse of rights” by MSL as well as the subsidiaries.

***The Regulations relied on by DEFRA as the basis for its claim to recover export refunds and penalties from the subsidiaries and from MSL***

24. Chapter 2 of Title IV of Regulation 800 has the sub-heading “Penalties and recovery of amounts overpaid”. Article 51.1, 51.3, 51.4, 51.7 and 51.8 provides as follows:

“Article 51

1. Where it is found that an exporter with a view to the grant of an export refund has applied for a refund exceeding that applicable, the refund due for the relevant exportation shall be that applicable to the products actually exported, reduced by:

(a) half the difference between the refund applied for and that applicable to the actual export;

[or]

(b) twice the difference between the refund applied for and that applicable where the exporter intentionally provides false information.

.....

3.

The penalty provided for in point (a) of paragraph 1 shall not apply:

(a) in case of force majeure,

(b) in exceptional cases where the exporter, on his own initiative, immediately after becoming aware that the refund applied for is excessive, notifies the competent authority thereof in writing, unless the competent authority has informed the exporter that it intends to examine the request or the exporter has otherwise become aware of this intention, or the competent authority has already established that the refund requested was incorrect;

(c) in cases of obvious error as to the refund applied for, recognised by the competent authorities;

(d) in cases where the refund sought is in accordance with Regulations (EC) No 1222/94, and in particular Article 3(2) thereof, and is calculated on the basis of the average quantities used over a specific period;

(e) in cases of weight adjustment in so far as the difference in weight is due to a difference in the weighing method applied.

4. Where the reduction provided in points (a) and (b) of paragraph 1 results in a negative amount, the exporter shall pay that negative amount.

.....

7. The penalties shall not apply simply where the refund applied for is higher than the refund applicable pursuant to Articles 4(2), 18(3), 35(2) and/or 50.

8. Penalties shall apply without prejudice to additional penalties laid down at national level.

.....”

25. Article 52.1, 52.2, 52.3 and 52.4 of Regulation 800 provides as follows:

“Article 52

1. Without prejudice to the obligation to pay the negative amount pursuant to Article 51(4) the beneficiary shall reimburse refunds unduly received, which includes any penalty applicable pursuant to Article 51(1) and interest calculated on the time elapsing between payment and reimbursement. However:

(a) where reimbursement is covered by an unreleased security, seizure of that security in accordance with Article 25(1) or 35(1) shall constitute recovery of the amounts due;

(b) where the security has been released, the beneficiary shall pay that part of the security which would have been forfeited, plus interest calculated from the date of release to the day preceding that of payment.

Payment shall be made within 30 days of receipt of the demand for payment.

Where beneficiaries are asked to reimburse funds, for the purpose of calculating interest the Member State may consider payment to be made on the 20<sup>th</sup> day following the date of the request for reimbursement.

The rate of interest applicable shall be calculated in accordance with national law; it may not, however, be lower than the rate applicable for the recovery of amounts under national provisions.

Where payment is made unduly as a result of an error by the competent authorities, no interest or at most an amount corresponding to the profit realised unduly, to be determined by the Member State, shall be collected.

Where the refund is paid to an assignee, he and the exporter shall be jointly and severally liable for reimbursement of amounts over-paid, securities unduly released and interest relating to the exports concerned. The assignee's liability shall, however, be limited to the amount paid to him, plus interest.

2. Amounts recovered, amounts pursuant to Articles 51 (4) and (5) and interest collected shall be paid to the paying agencies, which shall deduct the amounts concerned from European Agricultural Guidance and Guarantee Fund (EAGGF) expenditure, without prejudice to Article 7 of Council Regulation (EEC) No 5595/91.

Where the time limit for payment is not met, Member States may decide that, in place of reimbursement, any amounts overpaid, securities unduly released and compensatory interest shall be deducted from subsequent payments to the exporter concerned.

The second subparagraph shall also apply to amounts to be paid pursuant to Article 51(4) and (5).

.....

4. The reimbursement obligation referred to in paragraph 1 shall not apply:

(a) if the payment was made by error of the competent authorities itself or of the Member States or of another authority concerned and the error could not reasonably be detected by the beneficiary and the beneficiary for his part acted in good faith; or

(b) if the period which passed between the day of the notification to the beneficiary of the final decision on the granting of the refund and that of the first information of the beneficiary by a national or Community authority concerning the undue nature of the payment concerned is more than four years. This provision shall apply only if the beneficiary has acted in good faith.

The acts of any third party relating directly or indirectly to the formalities necessary for the payment of the refund, including the acts of the international control and supervisory agencies, shall be attributable to the beneficiary.

The provisions of this paragraph shall not apply to advances on refunds. In case of non-reimbursement due to the application of this paragraph, the administrative sanction pursuant to point (a) of Article 51(1) shall not apply.

.....”

### *The judge’s conclusions*

26. Plender J concluded that, within the terms of Article 52.1 of Regulation 800, MSL was “the beneficiary” of the export refunds, which had been “unduly received” because they had been obtained as a result of an “abuse of rights” as understood by Community law. He held that the word “beneficiary” was broad enough to include a company that “derived a **benefit** in consequence of an amount over-paid to a related company”.<sup>12</sup> Therefore, he held, MSL itself was liable to reimburse to DEFRA all the export refunds that had been “unduly received” by the subsidiaries.
27. The judge also found that the subsidiaries, as “exporters” within Article 51.1 of Regulation 800, had applied for export refunds which exceeded those that were applicable, because, in fact, they were entitled to none at all. That was because of his finding that the claim and receipt by the subsidiaries for the export refunds was an “abuse of rights”.
28. The effect of the judge’s conclusion on the application of Article 51 to the subsidiaries was as follows: given the “abuse of rights” by each of the subsidiaries, then, in accordance with Article 51.1(a) of Regulation 800, the export refund “applicable” in respect of each export by each subsidiary was zero. Because each of the subsidiaries was an “exporter” within Article 51.1 and it had applied for an export refund which was in excess of that which was applicable (i.e. zero), under the terms of Article 51.1(a), the actual refund due to each of the subsidiaries, as an “exporter”, had to be reduced by half the difference between the refund applied for by that subsidiary and zero. Because the reduction provided for under Article 51.1(a) resulted in a negative amount equal to 50% of the actual export refund obtained by each subsidiary, therefore, in accordance with Article 51.4, each subsidiary, as the “exporter”, was liable to pay that negative figure (equal to 50% of the export refund actually received) to DEFRA (as the paying authority). In accordance with Article 51.3, the sum to be repaid was a “penalty”.<sup>13</sup>
29. The judge finally held that because MSL was “the beneficiary” of the export refunds that had been “unduly received” within Article 52.1, therefore, in accordance with that provision, MSL itself was liable to reimburse DEFRA with both the refunds and “any penalty applicable pursuant to Article 51.1”. On the facts of this case, this meant that MSL was liable to pay, as a penalty, a further 50% of the value of the export refunds received by the subsidiaries.<sup>14</sup>
30. The judge refused permission to MSL and the subsidiaries to appeal his decision. However permission to appeal was granted by Rix LJ on 8 July 2009.

### *The issues on the appeal*

31. Three issues arise on this appeal. These are:
  - (1) Is MSL itself liable (jointly and severally with each of the subsidiaries in respect of each subsidiary’s respective proportion of the whole refund obtained), to repay the whole of the export refund obtained by the subsidiaries for the 2001 and 2003 exports, because MSL was, itself, a “beneficiary” for the purposes of Article 52.1 of Regulation 800?
  - (2) Is each of the subsidiaries liable to pay a “penalty” equal to 50% of the export refund that each obtained in respect of the 2001 and 2003 exports, pursuant to Article 51.1(a) and 51.3 of Regulation 800, in addition to the obligation to repay the export refunds themselves?



(3) If the answer to (2) above is “yes”, then is MSL itself liable (jointly and severally with each of the subsidiaries for their respective proportions of the penalties due) to pay the total penalties of 50% of the export refunds, in accordance with Article 52.1 of Regulation 800?

32. I will set out first the arguments and my answers concerning Issue (1), then deal with those concerning Issues (2) and (3), which go together.

***Is MSL liable itself to repay all the export refunds obtained by the subsidiaries because it is “the beneficiary” within Article 52.1?***

33. Mr Stanley for the appellants accepted that each of the subsidiaries was an “exporter” within the meaning of Article 51.1 of Regulation 800. He also accepted that each of the subsidiaries was a “beneficiary” of the export refunds that it had received, within the meaning of Article 52.1. In addition, he accepted that, given the findings of the judge on “abuse of rights”, each of the subsidiaries had “unduly received” export refunds in the amount actually received from DEFRA (via the RPA). The appellants therefore have to accept that each of the subsidiaries, as a “beneficiary” within the meaning of Article 52.1, was obliged to reimburse DEFRA, as the paying authority, the amount of the export refund that it had received, together with interest as provided for in Article 52.1.
34. Mr Stanley submitted that the word “beneficiary” is ambiguous; it could refer to the person or entity that has directly benefited from a payment or it could refer to those who have also indirectly benefited from a payment. But Article 52.1 refers to “**the** beneficiary”, rather than “**a** beneficiary” of the refunds “unduly received”. That suggests, he submitted, that the words “the beneficiary” more naturally must refer to the person or entity that actually receives the export refund. That, he submitted, is reinforced by the use of the verb “reimburse”, which implies that the money must be repaid by the person or entity to whom it was paid in the first place. He also submitted that the appellant’s interpretation of “beneficiary” is supported by the fact that Article 52.1 appears to assume that it is “the beneficiary” that will reimburse both the refunds “unduly received” and also “any penalty applicable pursuant to Article 51(1)”. However, he submitted, it is clear that it is “the exporter” who is liable to pay a penalty under Article 51.1 and 51.4.
35. Lastly, but most importantly, Mr Stanley submitted that the appellants’ interpretation is supported by the final paragraph of Article 52.1, which deals with the case where the export refund has been paid to an “assignee”. In such a case the assignee is to be jointly and severally liable for reimbursement of the amounts overpaid, to the extent of the amount actually paid to the assignee, plus interest. That demonstrates, he submitted, that the legislators had in mind a specific class of persons who would be liable to make repayment other than the entity that had originally been given the right to receive the export refund.<sup>15</sup> The word “beneficiary” should not be interpreted to embrace persons or entities that are neither direct beneficiaries of refunds unduly received nor those who are assignees of the right to receive export refunds.
36. For DEFRA, Mr Peretz submitted that the words “the beneficiary” in Article 52.1 must be interpreted in the context where they occur, i.e. in Articles providing for the reimbursement of penalties and amounts overpaid, in particular where there had been an “abuse of rights”. The correct interpretation of the words “the beneficiary” is “the recipient of an abusive advantage”. That will account for the use of the definite article. He submitted that the provision dealing with “assignees” was necessary to deal with the particular position that they would be in; it would have been wrong to make them liable for the whole sum “unduly received” by the “exporter” or other entity to whom the export refunds were to be paid if the “assignee” had only received a portion of the refund.
37. In the course of the hearing I was much attracted by the arguments of Mr Stanley on this issue, which he put with great clarity and persuasiveness. However, upon reflection, I have concluded that I cannot accept them. First, the words “the beneficiary” must be interpreted in their context, which is in an Article in Title IV, Chapter 2 of Regulation 800, which Chapter is dealing with

“Penalties and recovery of amounts overpaid”. Secondly, the words “the beneficiary” are part of the phrase “the beneficiary shall reimburse refunds unduly received”. It is accepted that the words “unduly received” are wide enough to encompass refunds that have been received in “abuse of rights”. Thirdly, the words “the beneficiary” must refer to whichever entity has “benefited” from the refunds which were “unduly received”, in this case by virtue of an “abuse of rights”.

38. Fourthly, the question of which entity, in any particular case, has benefited from refunds “unduly received” must be a question of fact. The judge has found, as a fact, that MSL itself was a party to the “abuse of rights” by being involved in the mechanism that enabled its subsidiaries to obtain the export refunds as “small exporters”. It was intended that MSL should have the benefit of those refunds, because that was why the arrangements were set up in the first place. The subsidiaries were used simply to funnel the export refunds to MSL. The judge also found that the export refunds remitted to each of the subsidiaries was passed, without deduction, directly to the parent company MSL. He has found that MSL has retained any balance after paying for the product exported by the subsidiaries. Although those balances were recorded in the group accounts as debts owing to the respective subsidiaries, for all practical purposes it is MSL that has had the advantage of the export refunds “unduly received”.
39. Given those findings of fact, the inescapable conclusion must be that MSL was, in practical terms, “the beneficiary” of the export refunds that were “unduly received” by the subsidiaries within the meaning of those words in Article 52.1. In my view the words “the beneficiary” must be broad enough to embrace the parent company which has received directly from its wholly owned subsidiaries the export refunds that were “unduly paid” to those wholly owned subsidiaries, particularly when the parent company set up the scheme for that purpose in the first place. MSL is therefore “the beneficiary” that must “reimburse” the refunds “unduly received” in accordance with Article 52.1. It is accepted that none of the exceptions set out in Article 52.4 apply.
40. My decision that MSL is “the beneficiary” of the export refunds “unduly received” is based firmly on the facts of this case as found by the judge. I wish to emphasise that I am not making any general conclusions on the scope of the words “the beneficiary” in Article 52.1. That would be a matter for the European Court to decide.

***Are the subsidiaries liable to pay a penalty under Article 51.1 and 51.3?***

41. Mr Stanley submitted that in considering this question it is important to keep in mind the nature of the “abuse of rights” doctrine and also some competing principles of Community law. He submitted, and I accept, that the “abuse of rights” doctrine is a general principle of Community law, which is founded on the premise that the formal requirements of the relevant Community legislation have been satisfied.<sup>16</sup> The doctrine enables the Community authorities or a court applying the principle to look behind the adherence to the formal requirements of the relevant Community legislation. It enables those authorities or the court to examine whether the purpose of the acts by an entity which formally comply with the legislation is to obtain an advantage contrary to the objectives of the particular Community law concerned and whether it does so by artificially creating the conditions required to obtain that advantage.<sup>17</sup>
42. However, Mr Stanley submitted that there is an equally well established principle of Community law that there must be legal certainty with regards to the imposition of penalties, whether criminal or non-criminal, by virtue of Community legislation. He cited (amongst other cases) the decision of the European Court in Case 117/8, *Karl Konecke GmbH & Co, KG v Bundesanstalt für landwirtschaftliche Marktordnung* [1984] ECR 239, of 25 September 1984.<sup>18</sup> He submitted that in two leading cases dealing with the doctrine of “abuse of rights”, the European Court has emphasised that if there has been a breach of that doctrine, that will lead to repayment of the advantage obtained by the “abuse of rights”; but it must not lead to the imposition of a penalty if that would infringe the doctrine of legal certainty.<sup>19</sup>

43. Mr Stanley noted that in the *Halifax* case<sup>20</sup> the European Court stated, in the context of the “abuse of rights” doctrine, that Community legislation must be certain and that the requirements of legal certainty “must be observed all the more strictly in the case of rules liable to financial consequences, in order that those concerned may know precisely the extent of their obligations which [those rules] impose on them”. In the same case, the Court went on to hold<sup>21</sup> that a finding of an “abusive practice” in that case (which concerned an alleged abuse of the right to make deductions from VAT due), must not lead to a penalty being imposed. The Court commented that for such a penalty to be imposed, “a clear and unambiguous legal basis would be necessary”.
44. Mr Stanley also emphasised that in Regulation 2988/95 itself, Article 4.3 specifies that acts which have as their purpose the obtaining of an advantage contrary to the objectives of Community law “...shall result, as the case shall be, either in a failure to obtain the advantage or in its withdrawal”. Moreover, Article 4.4 states that the measures provided for in Article 4 “shall not be regarded as penalties”.
45. Lastly, Mr Stanley draws attention to Recitals 63 and 64 of Regulation 800, which provides:

“.....

(63) Whereas the Community rules provide for the granting of export refunds on the sole basis of objective criteria, in particular as to the quantity, nature and characteristics of the product exports, and its geographical destination; whereas, in the light of experience, measures to combat irregularities and notably fraud harmful to the Community budget should be intensified; whereas, to that end, provision should be made for the recovery of amounts over-paid and sanctions to encourage exporters to comply with Community rules;

(64) Whereas, to ensure the correct functioning of the system of export refunds, sanctions should be applied regardless of any subjectivity of the fault; whereas it is nevertheless appropriate to waive sanctions in certain cases, and notably where there is an obvious error recognised by the competent authority, and to provide harsher sanctions in cases of intent; whereas those measures are necessary, and should be proportionate, sufficiently dissuasive, and uniformly applied throughout the Member States;

..... “
46. Mr Stanley submits:
  - (i) on the basis of these principles, the subsidiaries fulfilled all the “objective criteria” of Regulation 800, in applying for and obtaining the export refunds;
  - (ii) the “abuse of rights” doctrine presupposes that the objective criteria have been fulfilled, but deals with the case where there is an ulterior purpose to the actions concerned, viz. to obtain an advantage contrary to the objectives of European law. In that case, as Article 4.3 of Regulation 2988/95 states, the advantage must be either refused or withdrawn;
  - (iii) that cannot permit the imposition of a penalty. To do so is contrary to legal certainty and Article 4.4 of Regulation 2988/95;
  - (iv) Article 51.1 does not clearly and unambiguously stipulate that a penalty must be paid if export refunds have been obtained by exercise of an “abuse of rights”. It is, as recital 63 makes clear, focusing on “objective criteria”.
47. Once again, Mr Stanley put forward these arguments in a most elegant and persuasive manner; but I cannot accept them. First, it is, in my view, clear and unambiguous that Article 51 is dealing with the imposition of penalties, even in the case where there has been a non-intentional application for an export refund which exceeds that which is “applicable” to the export

concerned: see Article 51.3. Secondly, even assuming that the subsidiaries did satisfy all the “objective criteria” to make an application for an export refund, there can be no doubt that the refund applied for exceeded the refund “applicable”. An export refund cannot “applicable” if it is applied for in “abuse of rights”. MSL and the subsidiaries have accepted the judge’s finding that they were acting in “abuse of rights” in setting up the arrangements and applying for the refunds through the subsidiaries in the manner that they did.

48. Thirdly, once it is accepted that the export refund “applicable” is less than that obtained, then Article 51.1(a) and 51.4 are clear and unambiguous as to the consequences. The refund due for the relevant exportation is to be reduced by half the difference between the refund applied for and that applicable. In this case the export refund applicable was zero. As no export refund should have been obtained, the result of the reduction provided for in Article 51.1(a) is a negative amount, because zero less 50% of the refund actually applied for produces a minus figure.<sup>22</sup>
49. Lastly, on my reading of Article 51 and assuming the reasoning so far is valid, there is no scope for the non-application of the provisions. The “exporter”, i.e. the subsidiaries, “shall pay” the negative amount that results from the calculation in accordance with Article 51.1(a): see Article 51.4.
50. Therefore, in agreement with the conclusion of the judge, although I have reached the same result by a slightly different route, the subsidiaries are liable to pay penalties equal to 50% of the export refunds that each obtained.

***Is MSL liable to pay the penalties for which the subsidiaries are liable?***

51. Mr Stanley points to the fact that Article 51.1 and 51.4 stipulate that it is “the exporter” that must pay the sum due in accordance with the terms of that Article. On any view, he submits, MSL is not an “exporter”, because it is agreed that it was the subsidiaries that actually made the exports. Therefore, he submitted, MSL cannot be liable to pay the penalties incurred by the subsidiaries under Article 51.1.
52. This argument does not deal with the clear wording of Article 52.1. I have already decided that this provision imposes a liability on MSL, as “the beneficiary”, to reimburse the export refunds that have been “unduly received”. Article 52.1 stipulates that such a reimbursement “includes any penalty applicable pursuant to Article 51.1 and interest calculated on the time elapsing between payment and reimbursement”. Therefore, once it has been determined that MSL is the “beneficiary” of the export refunds “unduly received”, Article 52.1 imposes on it a duty also to reimburse the “penalty applicable pursuant to Article 51.1”. It could not be clearer.
53. I therefore reject this third point.

***Conclusion and disposal***

54. MSL is liable to reimburse DEFRA for the export refunds which were “unduly received” by the subsidiaries. The subsidiaries are liable to pay penalties under Article 51 of Regulation 800. MSL, as “the beneficiary” under Article 52.1, is also liable to pay to DEFRA penalties equal to 50% of those export refunds. Interest is payable on both those sums, as set out in the order of the judge.
55. This appeal must therefore be dismissed.

**Lord Justice Longmore**

56. I agree.

**Lord Justice Sedley**

57. I agree.

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<sup>1</sup> [2009] EWHC 503 (QB)

<sup>2</sup> OJ 1999 L102/11

<sup>3</sup> OJ 2000 L177/1

<sup>4</sup> Para 19 of the judgment

<sup>5</sup> As the judge remarked in paras 1 and 2 of his judgment, “abuse of rights” is a troublesome concept to the common lawyer. But there is no doubt of its existence in the French and other Romano- Germanic traditions of jurisprudence. (See eg. the address of M. Jean-Marc Sauvé, Vice-Président du Conseil D’Etat: 7 March 2007). It has been adopted by Community law from those traditions

<sup>6</sup> [2000] ECR I-11569 at paras 52-53

<sup>7</sup> [2006] ECR I-1609 at para 86

<sup>8</sup> OJ 1995 L312/1

<sup>9</sup> Para 22 of the judgment

<sup>10</sup> Para 22 of the judgment

<sup>11</sup> Para 23 of the judgment

<sup>12</sup> Para 27 of the judgment

<sup>13</sup> Para 23 of the judgment

<sup>14</sup> This is the effect of paras 23, 25-29 of the judgment

<sup>15</sup> In this regard Mr Stanley noted the terms of Recital 65 to Regulation 800, which stipulated that “...in order better to protect the Community’s financial interest, provision should be made, where the right to a refund is transferred, for that obligation [i.e. to reimburse amounts overpaid] be extended to the transferee;...”

<sup>16</sup> He gave, as an example of this principle, the wording of Article 4.3 of Regulation 2988/95, quoted at para.19 above

<sup>17</sup> I have followed the wording of Art.4.3 of Regulation 2988

<sup>18</sup> Case 117/83 at para 11 in particular

<sup>19</sup> Case C-110/99 *Emsland-Stärke v Hauptzollamt Hamburg-Jones* [2000] ECR I-11569 at para 56; Case C-255/02 *Halifax and others v Commissioners of Customs and Excise* [2006] ECR I-1609 at para 93

<sup>20</sup> Case C-255/02 [2006] ECR I-1609 at para 72

<sup>21</sup> At para 93

<sup>22</sup> To give the simplest example: if the refund applied for was €1000 and the refund “applicable” was zero, then the sum to be reimbursed must be €500