JUDGMENT OF THE COURT (Grand Chamber)

16 December 2008 *

In Case C-47/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 31 January 2007,

Masdar (UK) Ltd, established in Eversley (United Kingdom), represented by A.P. Bentley, QC, and P. Green, barrister,

appellant,

the other party to the proceedings being:

Commission of the European Communities, represented by J. Enegren and M. Wilderspin, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: English.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, M. Ilešič (Rapporteur) and T. von Danwitz, Presidents of Chambers, A. Tizzano, J.N. Cunha Rodrigues, R. Silva de Lapuerta, J. Malenovský, A. Arabadjiev and C. Toader, Judges,

Advocate General: J. Mazák,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 February 2008,

after hearing the Opinion of the Advocate General at the sitting on 12 June 2008,

gives the following

Judgment

1 By its appeal, Masdar (UK) Ltd ('Masdar') requests the setting aside of the judgment of 16 November 2006 in Case T-333/03 *Masdar (UK)* v *Commission* [2006] ECR II-4377 ('the judgment under appeal'), by which the Court of First Instance of the European Communities dismissed its action for compensation for the damage that it purportedly suffered as a result of the non-payment of services which it had provided under Community assistance projects.

Background to the dispute

2 At the beginning of 1994, under the Community programme of Technical Aid to the Commonwealth of Independent States (TACIS), a contract was concluded between the Commission of the European Communities and Hellenic Management Investment Consultants SA ('Helmico') for the purposes of a project in Moldova. That contract ('the Moldova contract') formed part of a project entitled 'Assistance to Organisation of a Private Farmers' Association' ('the Moldova project').

3 In April 1996, Helmico and Masdar entered into a contract whereby Helmico subcontracted to Masdar the provision of some of the services to be carried out under the Moldova contract.

4 On 27 September 1996, another contract was concluded between the Commission and Helmico. Under that contact ('the Russian contract') Helmico undertook to provide services in Russia for a project entitled 'Federal Seed Certification and Testing System' ('the Russian project').

5 In December 1996, Helmico and Masdar entered into a subcontract for the Russian project in substantially the same form as the agreement signed in April 1996 in relation to the Moldova project.

6 Towards the end of 1997, Masdar began to be concerned about delays in the payments due from Helmico, which blamed the Commission. Masdar contacted the Commission's services and discovered that they had paid all Helmico's invoices up to that date. Upon further investigation, Masdar learned that Helmico had been informing it late or incorrectly of the payments received from the Commission.

7 On 2 October 1998, a meeting took place between a director of Masdar and representatives of the Commission ('the meeting of 2 October 1998') to discuss the problems with Helmico.

8 On 5 October 1998, the Commission sent a letter to Helmico stating that it was concerned about the fact that differences of opinion between Helmico and Masdar could jeopardise the implementation of the Russian project and emphasising the importance that it attached to the successful completion of that project. It asked Helmico for an assurance in the form of a declaration signed jointly by Helmico and Masdar. The letter specified that, failing receipt of such an assurance by Monday 12 October 1998, the Commission would explore alternative means of ensuring completion of the project.

9 On 6 October 1998, Helmico sent a reply to the Commission's services stating that the differences of opinion had been settled. That reply stated that Helmico had agreed with Masdar that all future payments, including those of invoices currently being processed in respect of the Russian project, should be made to a bank account designated by Masdar and not to Helmico's bank account. The letter contained the handwritten note: 'Agreed Mr S, Masdar, 6 October 1998'. A letter framed in similar terms, bearing the same date and countersigned by the chairman of Masdar, was sent to the Commission in relation to the amounts payable in respect of the Moldova contract.

10 On 7 October 1998, Helmico sent the Commission two further letters, also countersigned by Mr S on behalf of Masdar. Their content was the same as that of the letters of 6 October, except that the letter concerning the Russian contract did not mention any bank account, while the letter concerning the Moldova contract indicated the number of a bank account in Athens, in Helmico's name, for future payments.

11 On 8 October 1998, Helmico wrote two letters to the task managers for the projects concerned, in the 'contracts' department of the Commission, requesting that all future payments under the Russian contract and the Moldova contract be made to a different Helmico account in Athens.

12 On the same day, Helmico and Masdar signed an agreement giving Masdar's chairman power of attorney to transfer funds from the two accounts specified in the letters to the Commission of 7 and 8 October 1998.

13 On 10 November 1998, the Commission issued its end-of-project report on the Russian project. Of the six heads of assessment, four were assessed 'excellent', one 'good' and one 'generally adequate'. The report concluded that 'the project was conducted and completed in an exemplary manner'. On 26 February 1999, the Commission issued its end-of-project report on the Moldova project, for which two heads of assessment were 'good' and four were 'generally adequate'.

14 On 29 July 1999, the Commission sent a letter to Masdar in which it stated that, on being notified of the existence of financial irregularities between Helmico and Masdar during the performance of the Russian contract and the Moldova contract, the Commission had suspended all payments outstanding. Aware of Masdar's financial difficulties, the Commission informed Masdar that it proposed to pay EUR 200 000 under the Russian project to the Helmico account referred to in that company's instructions dated 8 October 1998. The sum of EUR 200 000 was paid into that account in August 1999 and was then transferred to Masdar's account.

15 Between December 1999 and March 2000, the chairman of Masdar wrote to various Commission officials, and to the Commissioner for External Relations, Mr Patten. Among several points raised was the question of payment for the services provided by Masdar.

16 On 22 March 2000, the Director-General of the Common Service for External Relations of the Commission wrote to the chairman of Masdar that:

'After intensive consultation (in which we considered several options, including a final settlement of both contracts by means of additional payments in favour of Masdar, calculated on the basis of work done and expenditure incurred by you), it has been finally decided by the Commission services to proceed with recovery of the funds previously paid to the contractor, Helmico. Legally, it seems that any direct payments to Masdar (even through Helmico's bank account over which you have power of attorney) would be seen, in case of insolvency of Helmico, as a collusive action by Helmico trustees or creditors; it would be furthermore uncertain whether in a legal dispute between Helmico and Masdar, funds paid by the European Commission could definitely remain with Masdar, in accordance with the Commission's best intentions.'

17 On 23 March 2000, the Commission wrote to Helmico informing it that it declined to pay the outstanding invoices and requesting the return of funds totalling EUR 2 091 168.07. The Commission took that course of action after finding that Helmico had been guilty of fraud in the performance of the Moldova contract and the Russian contract.

18 On 31 March 2000, Masdar brought an action against Helmico before the High Court of Justice (England & Wales), Queen's Bench Division, claiming EUR 453 000 by way of payment for the services subcontracted under the Moldova contract and the Russian contract. Those proceedings have been stayed indefinitely.

19 On 4 April 2000, the Commission issued two formal recovery orders to the attention of Helmico pursuant to Article 28(2) of the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1), as applicable at the material time.

20 In the course of 2000 and 2001, Masdar contacted the Commission to explore the possibility of the Commission paying it for the work carried out and invoiced to Helmico. A number of meetings on that subject were held between Masdar's lawyers and the Commission.

21 On 16 October 2001, the Commission replied that the information had been forwarded to the competent services in the Directorate General for Budget, to the European Anti-Fraud Office and to the financial and contractual unit dealing with TACIS programmes, and that the Commission would take all steps to pursue the directors of Helmico.

22 On 1 February 2002, in a written reply to a request from Masdar's lawyers, the Commission explained that two formal recovery orders had been issued on 4 April 2000 to the attention of Helmico for a total of EUR 2 091 168.07, one with respect to the Moldova contract for EUR 1 236 200.91 and the other with respect to the Russian contract for EUR 854 967.16.

23 On 18 February 2003, another meeting was held between Masdar's lawyers and the Commission.

24 On 23 April 2003, Masdar's lawyers sent the Commission a registered letter which ended with the following statement:

'… unless the Commission services are able to come forward, by 15 May 2003, with a concrete proposal for remunerating my client for the services provided, an application will be made to the Court of First Instance seeking reparation from the Commission pursuant to Articles 235 EC and 288 EC …'

25 By fax dated 15 May 2003, the Commission suggested to Masdar's lawyers that a meeting should be held to discuss the possibility of an amicable settlement on the basis of which the Commission would pay Masdar EUR 249 314.35 for the work done after discovery of Helmico's fraud, on condition that Masdar provided evidence of an agreement that it would be paid directly by the Commission if it completed the Russian project and the Moldova project.

26 By registered letter of 23 June 2003, Masdar's lawyers replied to the Commission, rejecting the Commission's suggestion as a basis for continuing negotiations and setting out details of Masdar's claim and the terms and conditions on which it would agree to a meeting.

27 That registered letter was followed by a fax dated 3 July 2003 in which Masdar's lawyers requested a reply from the Commission on the possibility of setting up a meeting, before 15 July 2003, on the terms proposed. In that fax, Masdar's lawyers added that, failing such a meeting, an action would be brought before the Court of First Instance.

28 By letter dated 22 July 2003, the Commission replied that it did not see any possibility of satisfying Masdar's request for payment.

Procedure before the Court of First Instance and the judgment under appeal

29 By application lodged on 30 September 2003, Masdar brought before the Court of First Instance an action for damages pursuant to Article 235 EC and the second paragraph of Article 288 EC. Masdar based its claim for compensation on the principle of the prohibition of unjust enrichment (*de in rem verso*); the principle of *negotiorum gestio*; breach of the principle of the protection of legitimate expectations; and, finally, on the allegation that the acts of the Commission constitute fault (*faute*) or negligence which caused it loss.

30 On 6 October 2005, an informal meeting was held before the Court of First Instance, as a measure of organisation of procedure, to explore the possibility of an amicable settlement.

31 At the end of the hearing, which took place on the same day, the Court of First Instance granted the parties time until 30 November 2005 to explore the possibility of an amicable settlement.

32 By letter lodged at the Registry of the Court of First Instance on 29 November 2005, the Commission informed the Court that it had not been possible for the parties to reach an amicable settlement.

33 After noting at point 69 of the judgment under appeal that '[Masdar]'s claim for compensation is based, first, on rules on non-contractual liability which do not entail unlawful conduct on the part of the Community institutions or its agents in carrying out their task (unjust enrichment and *negotiorum gestio*) and, secondly, on the body of rules on the non-contractual liability of the Community for the unlawful conduct of its institutions and agents in carrying out their task (breach of the principle of the protection of legitimate expectations and fault or negligence of the Commission)', the Court of First Instance rejected, first of all, the arguments based on unjust enrichment and *negotiorum gestio* for the following reasons:

'91. … the rules on non-contractual liability, as provided for in the majority of national legal systems, do not necessarily contain a condition relating to unlawfulness or fault with regard to the defendant's conduct. Actions based on unjust enrichment or *negotiorum gestio* are designed, in specific civil law circumstances, to constitute a source of non-contractual obligation on the part of persons in the position of the enriched party or the principal involving, in general, either refund of sums paid in error or indemnification of the manager respectively.

92. It does not therefore follow that those pleas regarding unjust enrichment and *negotiorum gestio* put forward by [Masdar] should be dismissed solely on the ground that the condition relating to the unlawfulness of the conduct of the institution is not satisfied, as submitted primarily by the Commission.

93. … the second paragraph of Article 288 EC founds an obligation for the Community to make good any damage caused by its institutions, without restricting the rules governing the non-contractual liability of the Community solely to unlawful conduct on the part of those institutions …

…

95. In order to determine whether those principles apply, it must therefore be examined whether the conditions governing the action *de in rem verso* or the action based on *negotiorum gestio* are satisfied in this case.

96. In that regard it is clear … that in the factual and legal context of this case actions based on unjust enrichment or *negotiorum gestio* cannot succeed.

97. According to the general principles common to the laws of the Member States, those actions cannot succeed where the justification for the advantage gained by the enriched party or the principal derives from a contract or legal obligation. Further, in accordance with those same principles, it is generally possible to plead such actions only in the alternative, that is to say, where the injured party has no other action available to obtain what it is owed.

98. It is common ground in this case that there is a contractual relationship between the Commission and Helmico, on the one hand, and between Helmico and [Masdar], on the other. The direct harm alleged corresponds to the payment owed to [Masdar] by Helmico under the subcontracts concluded between those two parties, which contain [a choice of jurisdiction] clause in that respect, designating the courts of England and Wales as having jurisdiction over any contractual disputes. It is therefore unquestionably Helmico's responsibility to pay for the work carried out by [Masdar] and to incur any liability arising from non-payment, as is shown, moreover, by the legal proceedings brought by [Masdar] against Helmico to that effect before the High Court of Justice, which are currently pending but stayed. The possible insolvency of Helmico is no reason for the Commission to take on that liability, since [Masdar] cannot have two sources in respect of the same entitlement to payment. According to the documents in the file, and as is not disputed by the parties, those proceedings before the High Court of Justice relate to the payment of the services at issue in the present proceedings.

99. It follows that any enrichment of the Commission or impoverishment of [Masdar], as it arose from the contractual framework in place, cannot be described as being without cause.

100. … The conditions governing the civil action based on *negotiorum gestio* are manifestly not satisfied for the following reasons.

101. Performance by [Masdar] of its contractual obligations with regard to Helmico cannot reasonably be described as benevolent intervention in another's affairs which it is imperative to manage, as required by the action in question … Finally, [Masdar]'s argument is also in conflict with the principles of *negotiorum gestio* as regards the principal's awareness of the manager's action. The manager's action is generally carried out without the knowledge of the principal, or at least without the latter being aware of the need to act immediately. Yet [Masdar] itself submits that its choice to continue with the work in October 1998 was induced by the Commission.

102. In addition it is not without relevance that, according to case-law, it is the economic operators themselves who must bear the economic risks inherent in their operations, taking account of the circumstances of each case …

103. It has not been established that [Masdar] suffered unusual and special damage going beyond the limits of the economic and commercial risks inherent in its operations. In all contractual relationships there is a certain risk that a party will not perform the contract satisfactorily or will even become insolvent. It is for the contracting parties to mitigate that risk in a suitable manner in the contract itself. [Masdar] was not unaware that Helmico was not fulfilling its contractual obligations, but knowingly chose to continue to fulfil its own obligations rather than to take formal action. In so doing it ran a commercial risk which could be described as normal …'

34 Subsequently, the Court of First Instance also rejected Masdar's other pleas. Masdar's arguments alleging breach of the principle of the protection of legitimate expectations were rejected by the Court of First Instance on the following grounds:

'119. … the right to rely on the principle of the protection of legitimate expectations … extends to any individual who is in a situation in which it is clear that the Community administration has, by giving him precise assurances, led him to entertain justified expectations. Irrespective of the manner in which it was communicated, precise, unconditional and consistent information coming from authorised and reliable sources amount to such assurances... It is also established in the case-law that the principle of the protection of legitimate expectations constitutes a rule of law conferring rights on individuals... The Community may thus incur liability for infringement of that principle. Nevertheless economic operators must bear the economic risks inherent in their operations having regard to the circumstances specific to each case...

120. According to the case-file, the expectations cited by [Masdar] relate to the payment by the Commission for services provided under contract to Helmico. It is clear in this case that the written documents emanating from the Commission before the Court cannot in any way be interpreted as precise assurances that the Commission undertook to pay for [Masdar]'s services which could give rise to justified expectations on its part.'

35 At paragraphs 121 to 129 of the judgment under appeal, the Court of First Instance substantiated the finding made in paragraph 120 of that judgment with a detailed examination of the evidence before it.

36 With regard to the plea alleging that the Commission failed to exercise care, the Court of First Instance found as follows:

'140 It is clear from [Masdar]'s pleadings that the conduct of the Commission complained of is the suspension of payments to Helmico. The Commission's conduct is unlawful, according to [Masdar], because it did not exercise reasonable care to ensure that that suspension did not cause harm to third parties and, if necessary, to indemnify those third parties for the damage thereby suffered.

141 …[F]irst of all … [Masdar] merely states that such a duty of care exists, without adducing the slightest proof or putting forward legal arguments in support of its claim or specifying the origin and scope of that duty. The Court takes the view that a very vague reference to the general principles of non-contractual liability for fault under civil law systems and the principle of tortious liability for negligence under Anglo-Saxon systems does not show that the Commission is under an obligation to have regard to the interests of third parties when it makes a decision regarding the suspension of payments in the course of its contractual relationships … The Court also considers … that [Masdar] has not shown that there is a causal link between breach of the alleged obligation and the damage pleaded …'

Forms of order sought

37 By its appeal, Masdar claims that the Court should:

— set aside the judgment under appeal;

— order the Commission to pay to Masdar the sum of EUR 448 947.78 claimed by Masdar at first instance or, failing that, the sum of EUR 249 314.35 or such other sum as the Court considers appropriate, plus interest on the sum chosen;

— order the Commission to pay the costs of the present proceedings and of the proceedings before the Court of First Instance.

38 The Commission contends that the Court should:

— dismiss the appeal;

— in the alternative, should the Court set aside, in whole or in part, the judgment under appeal, dismiss Masdar's claim for monetary compensation;

— order Masdar to pay the costs of the present proceedings and of the proceedings before the Court of First Instance;

— in the alternative, should the Court find for Masdar, order Masdar to bear one-third of its own costs as incurred in the proceedings before the Court of First Instance.

The appeal

39 Masdar relies essentially on five pleas in law in support of its appeal, alleging in respect of the judgment under appeal: (i) errors in law and failure to state reasons in relation to the treatment of the issue of unjust enrichment; (ii) distortion of the facts and error in law in the treatment of the issue of *negotiorum gestio*; (iii) breach of the principle of the protection of legitimate expectations and inconsistency in the reasons stated; (iv) incorrect treatment of the plea alleging fault (*faute*) or negligence; and (v) incomplete assessment of the facts.

The first plea in law, alleging errors in law and failure to state reasons in relation to the treatment of the issue of unjust enrichment

Arguments of the parties

40 Masdar claims that the Court of First Instance erred in finding that Masdar had merely acted in pursuance of its contractual obligations towards Helmico.

41 In addition, the Court of First Instance erred in law, according to Masdar, by failing to take into consideration the fact that the Commission was no ordinary co-contractor vis-à-vis Helmico, but one with powers of recovery. By leaving Masdar to complete the works and by then exercising its powers of recovery, the Commission — which had thereby emptied the previously existing contractual relations of their content — unduly enriched itself.

42 The Commission notes that Masdar did not terminate its contracts with Helmico.

43 In any event, according to the Commission, the Court of First Instance correctly found in paragraphs 97 to 99 of the judgment under appeal that the Commission had not unjustly enriched itself, because the Commission derived its advantage from its contract with Helmico, and Masdar was under an obligation to act because of its subcontract with Helmico.

Findings of the Court

44 According to the principles common to the laws of the Member States, a person who has suffered a loss which increases the wealth of another person without there being any legal basis for that enrichment has the right, as a general rule, to restitution from the person enriched, up to the amount of the loss.

45 In that regard, as the Court of First Instance stated, legal redress for undue enrichment, as provided for in the majority of national legal systems, is not necessarily conditional upon unlawfulness or fault with regard to the defendant's conduct.

46 On the other hand, in order for an action for unjust enrichment to be upheld, it is essential that there be no valid legal basis for the enrichment. That condition is not satisfied, in particular, where the enrichment derives from contractual obligations.

47 Given that unjust enrichment, as defined above, is a source of non-contractual obligation common to the legal systems of the Member States, the Community cannot be dispensed from the application to itself of the same principles where a natural or legal person alleges that the Community has been unjustly enriched to the detriment of that person.

48 Moreover, since any obligation arising out of unjust enrichment is by definition non-contractual in nature, it is necessary to allow it to be invoked pursuant to Article 235 EC and the second paragraph of Article 288 EC, as the Court of First Instance did in the case before it.

49 Actions for unjust enrichment do not fall under the rules governing non-contractual liability in the strict sense, which, to be invoked, require a number of conditions to be satisfied, relating to the unlawfulness of the conduct imputed to the Community, the fact of the damage alleged and the existence of a causal link between that conduct and the damage complained of (see, inter alia, Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others* v *Council and Commission* [2008] ECR I-6513, paragraph 106 and the case-law cited). They differ from actions brought under those rules in that they do not require proof of unlawful conduct — indeed, of any form of conduct at all — on the part of the defendant, but merely proof of enrichment on the part of the defendant for

which there is no valid legal basis and of impoverishment on the part of the applicant which is linked to that enrichment.

50 However, despite those characteristics, the possibility of bringing an action for unjust enrichment against the Community cannot be denied to a person solely on the ground that the EC Treaty does not make express provision for a means of pursuing that type of action. If Article 235 EC and the second paragraph of Article 288 EC were to be construed as excluding that possibility, the result would be contrary to the principle of effective judicial protection, laid down in the case-law of the Court and confirmed in Article 47 of the Charter of fundamental rights of the European Union, proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1) (see Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37, and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 335).

51 The question whether the Court of First Instance erred in law in its examination of the issue of unjust enrichment should be examined in the light of those preliminary considerations.

52 It is apparent from the judgment under appeal that the Court of First Instance rejected Masdar's arguments on the ground that there was a contractual relationship between the Commission and Helmico, on the one hand, and between Helmico and Masdar, on the other. The Court of First instance inferred from this that any enrichment on the part of the Commission or impoverishment on the part of Masdar arose from the contractual framework in place and, in consequence, could not be categorised as 'unjust'.

53 In addition, according to the Court of First Instance, Masdar had an alternative means of obtaining what it was owed, since, under its subcontracts with Helmico, it could

bring an action against that company for breach of contract before the courts of England and Wales as designated by those contracts.

54 As was pointed out in paragraph 46 above, enrichment cannot be categorised as 'unjust', where it derives from contractual obligations.

55 On the other hand, where contracts under which services are provided prove to be invalid and cease to exist, the enrichment of the beneficiary of those services must, in accordance with the principles developed in the legal systems of the Member States, give rise, in certain circumstances, to restitution.

56 Without it being necessary to determine the circumstances in which restitution is due, it must be held that the Court of First Instance correctly applied the distinction, outlined above, between enrichment which derives from contractual relationships and enrichment which is 'unjust'.

57 For the reasons set out by the Advocate General at points 53 and 54 of his Opinion, the Court of First Instance found, correctly, that the contracts concluded between the Commission and Helmico, on the one hand, and between Helmico and Masdar, on the other, had not ceased to exist. The Court of First Instance inferred from this, correctly, that there could be no non-contractual obligation for the Community to assume responsibility for the expenses incurred by Masdar in order to complete the Russian and Moldovan projects.

58 The Court of First Instance noted, in particular, that, while fully aware that Helmico was in breach of its contractual obligations, Masdar knowingly chose to continue to fulfil its own obligations. It also pointed out that Masdar had initiated legal proceedings against Helmico, in accordance with the choice of jurisdiction clause in its contracts with that company.

59 Moreover, the Court of First Instance stated, rightly, that in all contractual relationships there is a certain risk that a party will not perform the contract satisfactorily or that it will become insolvent. That is a commercial risk inherent in the activities of economic operators.

60 That last element is of particular importance in the context of Community assistance programmes. It is not uncommon for the co-contractor to which the Community has entrusted a project to confine itself to a management role and to delegate implementation of the project to subcontractors, who may in turn subcontract work to other undertakings. In such a context, each economic operator involved in the project must accept the risk that its co-contractor may become insolvent or that it may commit irregularities leading the Community to suspend payments or even to issue recovery orders. In those circumstances, it cannot easily be accepted that the losses flowing from the materialisation of such risks must give rise to ad hoc payments on the part of the Community.

61 It follows from the foregoing that the Court of First Instance did not err in law or fail to state reasons in its treatment of the issue of unjust enrichment. The first plea in law must therefore be rejected.

The second plea in law, alleging distortion of the facts and error in law in the treatment of the issue of negotiorum gestio

Arguments of the parties

62 According to Masdar, the arguments underpinning the judgment under appeal on the issue of *negotiorum gestio* are incorrect in fact and in law.

63 The findings of the Court of First Instance that Masdar's conduct was not in the nature of benevolent intervention and that the Commission was capable of managing the projects itself are manifestly incorrect.

64 Moreover, the Court of First Instance erred in law by finding, at paragraph 101 of the judgment under appeal, that the principle of *negotiorum gestio* cannot apply where the principal is aware of the need for immediate action.

65 The Commission contends that the finding, at paragraph 97 et seq. of the judgment under appeal, that Masdar acted in pursuance of its contracts with Helmico, is a sufficient basis for rejecting the arguments regarding *negotiorum gestio*.

Findings of the Court

66 Without it being necessary to determine whether the Court of First Instance made a correct classification of the legal nature of actions based on *negotiorum gestio*, it should be pointed out that the arguments put forward by Masdar in support of this second plea in law cannot, in any case, be upheld.

67 First, Masdar cannot validly claim that its services were benevolent. In fact, both at first instance and in the context of this appeal, Masdar has stated that the reason why it continued to provide its services after discovering the irregularities committed by Helmico was because it believed that the Commission had undertaken to ensure that it would be paid for those services. That alone is sufficient to preclude a finding that the Court of First Instance distorted the facts by refusing to recognise that Masdar's conduct was in the nature of benevolent intervention.

68 Concerning, next, the argument that the Court of First Instance distorted the facts by finding that the Commission was capable of managing the projects itself, it is sufficient to note that Masdar has not provided evidence showing that the Commission was no longer able to ensure the management of the programme or of the projects at issue.

69 Lastly, as regards the argument that the Court of First Instance erred in law, it should be pointed out that, at paragraph 101 of the judgment under appeal, the Court of First Instance stated that the manager's action is 'generally' carried out without the knowledge of the principal, or at least without the latter being aware of the need to act immediately. Contrary to Masdar's argument, the Court of First Instance thus did not exclude the possibility that the principle of *negotiorum gestio* might be invoked in circumstances where the principal was conscious of such a need.

70 In consequence, the second plea in law must also be rejected.

The third plea in law, alleging breach of the principle of the protection of legitimate expectations and inconsistency in the reasons stated

Arguments of the parties

71 Masdar argues that there is inconsistency between the reasons stated by the Court of First Instance concerning unjust enrichment and *negotiorum gestio*, on the one hand, and concerning the principle of the protection of legitimate expectations, on the other.

72 Masdar notes that the Court of First Instance accepted, at paragraph 101 of the judgment under appeal, that the Commission induced Masdar to continue to provide services and, at paragraph 148 of that judgment, that the Commission and Masdar had evinced a common intention that Masdar should complete the projects and be paid. Consequently, the finding at paragraph 130 of the judgment under appeal that 'it must be concluded that the evidence available, examined separately or as a whole, does not reveal precise assurances given by the Commission which could give rise to reasonable expectations on the part of [Masdar], enabling it to rely on the principle of the protection of legitimate expectations' is manifestly incorrect.

73 In the alternative, Masdar claims that the test used by the Court of First Instance is too narrow for cases such as this. According to Masdar, precise assurances should be inferred where the conduct of the Community institution is such as to induce a

subcontractor to provide services for the benefit of the institution in circumstances where it has become clear that that subcontractor will not be paid by the main co-contractor.

74 The Commission contends, first, that that plea relates to questions of fact and is therefore inadmissible.

75 Concerning, next, the principle of the protection of legitimate expectations, the Commission notes that the Court of First Instance examined in detail, first, whether the written documents originating from the Commission could be interpreted as precise assurances that the Commission was going to assume responsibility for payments and, secondly, whether the evidence suggested that such precise assurances had been given at the meeting of 2 October 1998.

Findings of the Court

76 It should be borne in mind at the outset that the question whether the grounds of a judgment of the Court of First Instance are contradictory or inadequate is a question of law which is amenable, as such, to review on appeal (Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission* [2007] ECR I-729, paragraph 77 and the case-law cited).

77 This plea is also admissible in so far as it alleges breach of the principle of the protection of legitimate expectations. Masdar's arguments in that regard do not relate to the finding of certain facts, but concern the test used by the Court of First Instance to apply

that principle. The question whether the Court of First Instance applied the correct legal standard when examining the facts is a question of law (*Sumitomo Metal Industries and Nippon Steel* v *Commission*, paragraph 40).

78 Thus, contrary to the Commission's contention, it is necessary to examine the substance of this plea.

79 As regards, first, the alleged inconsistency of the reasons stated, Masdar argues that the findings of the Court of First Instance that the Commission and Masdar had a common objective — the completion in full of the projects as initially planned — and that the Commission had induced Masdar to continue to provide services, contradicts its conclusion that the Commission had not given precise assurances.

80 That argument cannot succeed. As the Court of First Instance pointed out at paragraph 120 of the judgment under appeal, the precise assurances alleged by Masdar related to the payment by the Commission of services which Masdar had provided to Helmico. The fact — noted by the Court of First Instance elsewhere in the judgment under appeal — that the Commission, wishing the projects to be carried out as planned, had induced Masdar to continue to provide services is clearly unrelated to Masdar's argument that the Commission undertook to pay Masdar directly. Consequently, there cannot be any inconsistency between the findings of the Court of First Instance concerning, on the one hand, the wishes expressed by the Commission concerning the completion of the projects and, on the other, the Commission's refusal to pay Masdar directly.

81 As regards, next, the test set out by the Court of First Instance in paragraph 119 of the judgment under appeal, for the purposes of applying to the case before it the principle of the protection of legitimate expectations, it must be held that that test clearly reflects settled case-law according to which a party may not plead breach of that principle unless it has been given precise assurances by the administration (see, to that effect, Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 147, and Case C-213/06 P *EAR* v *Karatzoglou* [2007] ECR I-6733, paragraph 33 and the case-law cited).

82 Masdar claims that the requirement of precise assurances must be applied with a degree of flexibility in cases such as this. Legitimate expectations arise where the conduct of the Community institution is such as to induce a subcontractor to provide services to the benefit of that institution in circumstances where it has become clear that the subcontractor will not be paid by the Community's co-contractor.

83 That argument cannot be accepted.

84 In that regard, it should be borne in mind that the system of assistance programmes provided for under Community legislation is based on the implementation, by the Commission's co-contractor, of a series of obligations entitling it to payment of the financial assistance provided for. Where the co-contractor has not implemented the project in accordance with the conditions to which the grant of assistance was made subject, it cannot rely on the principle of protection of legitimate expectations in order to secure payment of that financial assistance (see, to that effect, Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others* [2008] ECR I-1561, paragraph 56).

85 That enables the Commission, where a co-contractor is guilty of irregularities in the context of a Community assistance project, to discharge its duty to protect the financial interests and budgetary discipline of the Community.

86 In that context, which is distinguished by the great importance attaching to the financial supervision of the project, subcontractors cannot rely on vague indications to claim that they had a legitimate expectation that the Commission would make a financial gesture in their regard by paying them directly for their services. Such a legitimate expectation can arise only from precise assurances from that institution indicating unambiguously that it will guarantee payment for the subcontracted services. As the Court of First Instance found, it has not been shown that such assurances were given.

87 It follows from the foregoing that the third plea in law must also be rejected.

The fourth plea in law, alleging incorrect treatment of the plea alleging fault (faute) or negligence

Arguments of the parties

88 Masdar criticises the Court of First Instance for finding, in paragraph 141 of the judgment under appeal, that 'Masdar merely states that … a duty of care [as described in paragraph 140 of that judgment] exists, without adducing the slightest proof or putting

forward legal arguments in support of its claim', when Masdar had set out, in the light of a legal analysis of the concepts of fault (*faute*) and negligence, that where the Commission exercises its power to suspend the payment of a contract in the case of irregularities committed by the co-contractor, knowing that a subcontractor has been working for the co-contractor, it must exercise care so as to ensure that it does not harm that subcontractor. Moreover, Masdar claims that it is evident that the Commission acted negligently, because it first allowed Masdar to complete the work and only then exercised its powers of recovery.

89 The Commission contends that the Court of First Instance was right to find, at paragraph 141 of the judgment under appeal, that Masdar had failed to substantiate its argument.

Findings of the Court

90 As the Court has already pointed out, 'negligence' entails an act or omission by which the party responsible breaches the duty of care which it should have discharged, and could have discharged, in view of its attributes, knowledge and abilities (see, to that effect, Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraph 74 to 77).

91 It is therefore possible for the Community administration to be non-contractually liable for wrongful conduct where it fails to act with all necessary care and, as a result, causes harm (see, to that effect, Case 145/83 *Adams* v *Commission* [1985] ECR 3539,

paragraph 44, and Case C-331/05 P *Internationaler Hilfsfonds* v *Commission* [2007] ECR I-5475, paragraph 24).

92 That duty of care is inherent in the principle of sound administration. It applies generally to the actions of the Community administration in its relations with the public. It must, therefore, also be discharged by the Commission in its relations with Masdar and in its commitments in respect of that undertaking.

93 However, the duty of care does not have the scope which Masdar ascribes to it. It entails that the Community administration must act with care and caution. On the other hand, the administration is not required to remove from economic operators all harm flowing from normal commercial risks, such as the risk described at paragraph 59 above.

94 Moreover, as is clear from the facts described by the Court of First Instance and summarised at paragraph 14 above, Masdar received, through Helmico's bank account, a considerable sum to take account of the difficult situation in which it found itself.

95 In the light of the foregoing considerations, the Court of First Instance was right to find, in paragraph 141 of the judgment under appeal, that the Commission was not under a duty to align its decisions with Masdar's interests or to institute an ad hoc mechanism, such as the payment of the outstanding financial assistance into a special account over which Masdar had power of attorney.

96 It follows that the fourth plea in law must be rejected.

The fifth plea in law, alleging incomplete assessment of the facts

Arguments of the parties

97 Masdar claims that the Court of First Instance should have examined more fully the context in which the meeting of 2 October 1998 took place, in particular by agreeing to hear the oral testimony proposed by Masdar.

98 According to the Commission, the Court of First Instance studied in detail the question whether or not there were precise assurances, and the oral testimony offered by Masdar could not have called into question the findings made by the Court of First Instance on the basis of the other evidence submitted during the written and oral procedures.

Findings of the Court

99 As regards the assessment by the Court of First Instance of applications made by a party for measures of organisation of the procedure or of inquiry, it should be pointed out that the Court of First Instance is the sole judge of any need to supplement the

information available to it in respect of the cases before it. Whether or not the evidence before it is sufficient is a matter to be appraised by that court alone and is not open to review by the Court of Justice on appeal, except where that evidence has been distorted or the inaccuracy of the findings of the Court of First Instance is apparent from the documents in the case-file (see, inter alia, Case C-315/99 P *Ismeri Europa* v *Court of Auditors* [2001] ECR I-5281, paragraph 19, and Joined Cases C-75/05 P and C-80/05 P *Germany and Others* v *Kronofrance* [2008] ECR I-6619, paragraph 78).

100 Consequently, since no distortion or inaccuracy has been demonstrated in the present case, the Court of First Instance was entitled to consider that the evidence in the case-file was sufficient to enable it to decide the case.

101 The fifth plea in law must therefore be rejected.

102 As none of the pleas put forward by Masdar has been upheld, the appeal must be dismissed.

Costs

103 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which is applicable to appeals by virtue of Article 118 thereof, 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 Commission has applied for costs and Masdar has been unsuccessful, Masdar must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Dismisses the appeal;

2. Orders Masdar (UK) Ltd to pay the costs.

[Signatures]