OPINION OF ADVOCATE GENERAL TESAURO

delivered on 5 June 1997 *

1. In these proceedings, the English company, Blackspur DIY, in receivership, and its managing shareholders, Messrs Kellar, Glancy and Cohen (hereinafter collectively referred to as 'the appellants') ask the Court to annul the judgment of the Court of First Instance of 18 September 1995 [1] which rejected in its entirety their claim that the Council and the Commission be ordered to pay compensation for the damage allegedly suffered by them as a result of the imposition of an anti-dumping duty on imports of paint brushes from the People's Republic of China.

Facts

2. Following a complaint from the *Fédération Européenne de l'Industrie de la Brosserie et de la Pinceauterie* (European Brushware Federation, hereinafter 'the EBF'), the Commission opened an investigation into imports of certain types of paint brushes originating in China. Following an undertaking given by the Chinese importer concerned to limit exports, the procedure was closed without the application of any anti-dumping duty, by Council decision of 9 February 1987, 87/104/EEC. [2]

3. In 1988, the EBF lodged a second complaint, this time concerning the Chinese importer's failure to fulfil its undertaking. After reopening the anti-dumping procedure, the Commission adopted Regulation (EEC) No 3052/88 of 29 September 1988 imposing a provisional anti-dumping duty on imports of certain types of paint, distemper, varnish and similar brushes originating in the People's Republic of China, [3] which entered into force on 5 October 1988. The provisional anti-dumping duty was imposed at the rate of 69% of the net unit price of the products in question (see Article 1(2)).

By decision of 14 November 1988 (88/576/EEC), [4] the Council repealed its previous decision (87/104/EEC) and, on 20 March 1989, it adopted Regulation (EEC) No 725/89 'imposing a definitive anti-dumping duty on imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China and definitively collecting the provisional anti-dumping duty on such imports'. [5] The duty was fixed at the same rate as the provisional duty.

* Original language: Italian.

1 — Case T-168/94 [1995] ECR II-2627.

2 — OJ 1987 L 46, p. 45.

3 — OJ 1988 L 272, p. 16.

4 — OJ 1988 L 312, p. 33.

5 — OJ 1989 L 79, p. 24.

4. Blackspur, which was incorporated in 1988 with the object of selling and marketing tools for amateur home improvers, placed a first order in July of that year, according to the reconstruction of events by the Court of First Instance, [6] for the purchase of brushes from China. They were cleared though customs on 5 October 1988, the date of entry into force of Regulation No 3052/88 imposing the anti-dumping duty. The United Kingdom authorities required the duty to be paid on 5 March 1990. Blackspur was placed in receivership in August 1990 and subsequently went into liquidation.

5. By judgment of 22 October 1991, [7] the Court of Justice, in proceedings under Article 177, held that Regulation No 725/89 was invalid. [8] The Commission therefore reopened the investigation [9] and, by decision of 18 May 1993, [10] closed the anti-dumping proceedings without imposing protective measures.

6. On 5 August 1993, the appellants instituted proceedings before the Court of Justice seeking compensation for the entirety of the damage suffered by them as a result of the Community's conduct in connection with the imposition of the anti-dumping duty. The case was remitted to the Court of First Instance pursuant to Article 4 of the Council Decision amending Decision 88/591/ECSC, EEC, Euratom establishing the Court of First Instance of the European Communities. [11]

The judgment of the Court of First Instance

7. In the proceedings before the Court of First Instance, the Commission and the Council raised an objection of inadmissibility based on the view that the appellants had failed entirely to show the existence of factors giving rise to non-contractual liability on the part of the Community: illegality of the contested conduct, damage suffered and a causal link between such damage and the allegedly unlawful conduct. That objection was considered in conjunction with the substance of the case.

6 — As the Commission observed in its response, there appears to be some contradiction in the applicants' indication of the date of the first order. In their application, they say July 1988 whereas in their reply that date is expressly amended, it being specified that the first order was placed in May 1988. In their appeal, they state that the first order for £100 000 was forwarded in April 1988 (in the application at first instance it was stated that the contract was still being negotiated with the exporter) but was then only partially confirmed the following July.

7 — Case C-16/90 *Nölle* [1991] ECR I-5163.

8 — In particular, the Court held that the normal value of the products in question was not determined 'in an appropriate and not unreasonable manner', resulting in an infringement of Article 2(5)(a) of Council Regulation (EEC) No 2423/88 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1).

9 — See the notice concerning the anti-dumping proceeding relating to imports of paint, distemper, varnish and similar brushes originating in the People's Republic of China (OJ 1992 C 24, p. 3).

10 — Decision 93/325/EEC terminating the anti-dumping proceeding relating to imports of paint, distemper, varnish and similar brushes originating in the People's Republic (OJ 1993 L 127, p. 15).

11 — Council Decision 93/359/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21).

8. The Court of First Instance specifically referred to an earlier decision of the Court of Justice according to which 'the Community's non-contractual liability ... is dependent on the coincidence of a series of conditions as regards the unlawfulness of the acts alleged against the Community institutions, the fact of damage and the existence of a causal link between the conduct of the institution concerned and the damage complained of' [12] and the fact that it is incumbent on the applicant to prove the causal link (as well as the other conditions for liability). [13] The Court of First Instance then confined itself to the matter of the causal link and reached the conclusion that, in the case before it, the applicants had not provided any proof thereof. The application was therefore dismissed.

9. In particular, the Court of First Instance, after noting that the applicant company had not produced to the Court its balance sheets for the years 1988/89 and 1989/90, analysed the documentation drawn up by a firm of chartered accountants in order to assess the merits of the applicants' allegations concerning the cause of the damage (paragraph 44).

From the documentation produced by the applicants, and in particular Annex 22 to the reply, the Court of First Instance noted that, between the date on which it was set up and August 1990 (when it was placed in receivership), Blackspur imported only one consignment of brushes from China, to a total value of £40 948.38 (in fact, net of duty and VAT the figure was £22 831.55). From the accountants' report also produced by the applicants, the Court noted that Blackspur had a turnover of £1 435 384 over the period extending only from 1 July 1988 to 31 August 1989.

10. The Court of First Instance went on to observe that Blackspur's statement that the import of brushes from China accounted for half of its turnover in the period prior to imposition of the anti-dumping duty was uncorroborated by any evidence.

The Court of First Instance also found that, according to the letter from the chartered accountants, 40.44% of its turnover for the same period resulted from sales of brushes for a total value of £580 503 — which was inconsistent with Blackspur's statement that it could not find alternative sources of supply because of the imposition of the duty. As regards the following period (September 1989 to July 1990), the Court noted from the abovementioned accountants' letter that Blackspur's turnover increased by some

12 — See paragraph 38 of the contested judgment.

13 — In addition to the judgments cited by the Court of First Instance, see Case 40/75 *Société des Produits Bertrand* [1976] ECR 1, paragraph 14; Joined Cases 197-200, 243, 245 and 247/80 *Ludwigshafener Walzmühle* v *Council and Commission* [1981] ECR 3211, paragraphs 51 to 55; and Case 310/81 *EISS* [1984] ECR 1341, paragraph 16.

30%, despite the sharp fall in sales of brushes from 40.44% to 3.01%.

11. The Court of First Instance therefore came to the conclusion that the loss of the commercial outlet represented by the sale of Chinese brushes could not have prevented Blackspur from continuing its commercial activities until August 1990, when it was placed in receivership. In particular, the Court noted that there was nothing in the chartered accountants' letter to show how the loss of the market in cheap brushes had influenced Blackspur's financial results to such an extent that it was unable to give effect to the commercial plan approved by its bank; and that there was no other evidence to support the applicant's explanation that its poor financial results were attributable to the discontinuance of its sales of Chinese brushes.

12. In the absence of proof of the causal link between the allegedly unlawful conduct and the damage complained of, Blackspur's claim for damages was rejected without any further consideration of the existence of damage or unlawful conduct. Consequently, the Court of First Instance rejected the claim for damages also made by the other applicants, both as guarantors under an obligation to honour commitments given to the company's creditors and as members who had witnessed the loss of value of their shareholding in the company and the loss of their capital contributions.

The appeal against the judgment

13. By a document lodged on 27 November 1995, the appellants appealed to the Court of Justice, requesting: (a) that the judgment of the Court of First Instance be set aside; (b) that the case be remitted to the Court of First Instance for judgment; and (c) that the Council and the Commission be ordered to pay the costs of the proceedings in their entirety.

14. The appellants put forward numerous grounds of appeal, under the headings of breaches of procedure and infringements of Community law.

15. The appellants' first ground of appeal is that, in paragraph 41 of its judgment, the Court of First Instance erred in law by attributing to them the statement that the sale of Chinese brushes accounted for half of Blackspur's turnover, whereas the appellants had, in their application to the Court of First Instance, merely stated that the sale of brushes originating in China should have accounted for half of the company's turnover. They also claim that the Court of First Instance was wrong to attribute to the appellants the statement that the loss of £586 000 was a result of the company's being put into liquidation, whereas in fact they had linked that loss with a time prior to the liquidation and had not therefore attributed it to the latter. In their view, the errors thus committed by the Court of First Instance involved an

error in law consisting in the failure to take proper account of their arguments.

16. The appellants' second ground of appeal is that, in paragraph 43 of its judgment, the Court of First Instance appears to draw support for its decision from the fact that Blackspur, on being asked to produce to the Court balance sheets for the years 1988/89 and 1989/90, allegedly gave the unacceptable answer that it was not in a position to do so. In actual fact, according to the appellants, the Court of First Instance never asked for balance sheets to be produced but only requested details of the company's turnover for the years in question.

17. A further ground of appeal relied on is that, in paragraph 44, the Court of First Instance treats as the only evidence of a causal link the letter concerning Blackspur's financial results, drawn up by a firm of chartered accountants. However, the Court omitted to take into account Annex 1 to the application and Annex 26 to the reply and failed to order measures of inquiry. By acting thus, the Court of First Instance failed to avail itself of significant evidence and based its views as to the existence of a causal link on a piece of evidence (the chartered accountants' letter) which had been drawn up specifically in order to comply with the request concerning turnover, but not for the purposes of analysing the issue of a causal link.

18. The appellants recognize,[14] however, that, in paragraphs 47 and 48 of its judgment, the Court of First Instance elaborated a different basis for the decision as an alternative to what it had argued up to that point, with the result that, according to the appellants, the criticisms made earlier fall to be considered only if the grounds of the judgment, as set out in paragraphs 47 and 48, are also vitiated by an error in law. In particular, according to the appellants, the Court of First Instance relied on the figures for brush sales from 1 July 1988 to 31 August 1989 (representing about 40.44% of turnover) in order to reject the assertion that it was the imposition of the anti-dumping duty that made it impossible to find alternative sources of supply and, consequently, obliged Blackspur to withdraw from the market for sales of cheap brushes. There too, they claim, the Court of First Instance erred in law my misrepresenting their case: they had merely claimed that the imposition of the duty had prevented them from importing Chinese brushes as planned, but certainly not brushes from elsewhere. The appellants' efforts to import brushes from elsewhere were unsuccessful, so that their business was inevitably damaged.

In particular, according to the appellants, the absence of brush sales as from November 1989 can only be attributed to the introduction of the duty. The appellants complain that the Court of First Instance failed to consider in that connection the information contained in Annex 1 to the application and

14 — See paragraph 52 of the appeal.

attached no importance to the statements made at the hearing by Mr Cohen. Mr Cohen had explained how, after the imposition of the duty, Blackspur had succeeded in obtaining some stocks of brushes which allowed it to continue in business for a short time; but, once those stocks were exhausted, Blackspur had been unable to find other sources of supply.

19. According to the appellants again, the Court's inference in paragraph 48 of the judgment that the loss of brush sales did not prevent Blackspur from continuing its commercial activities and even increasing its turnover is wholly inappropriate. Its continued trading and its increase in turnover were merely the results of the efforts made by the English company to survive the imposition of the duty — efforts which proved insufficient. In particular, if it had examined Annex 1 to the application, the Court of First Instance would have discovered that Blackspur's aggregate turnover from 1 September 1989 to 31 July 1990 should have amounted to £4 402 225, whereas it turned out to be only £1 864 016. The appellants also challenge the Court's statement that the chartered accountants' letter does not disclose the reasons for which the turnover achieved was not sufficient to allow Blackspur to give effect to the commercial plan approved by the bank, contending that the Court used that letter for a purpose other than that for which it was intended, namely to give details of turnover. On the other hand, the Court failed to take account of the statements of the independent financial adviser, as set out in Annex 26 to the reply. According to the appellants, the Court's finding that there was no other evidence and that the accountants' letter was not relevant to assessment of the causal link ultimately reversed the burden of proof, making it incumbent on the appellants to disprove the existence of factors which would have broken the chain of causation.

20. Turning to the Court's rejection of the claims for compensation made by the members and the management of Blackspur, the appellants state first that the Court of First Instance misrepresented their case by saying in paragraph 51 of the judgment that the guarantees furnished by them required them to introduce capital into Blackspur. In actual fact, the directors were obliged to pay Blackspur's debts.

Secondly, the Court of First Instance erroneously relied on the judgment in *Dumortier Frères* [15] to establish a proposition of law that any loss caused by the institution of insolvency proceedings amounted to indirect and remote damage, for which the Community could not therefore be held liable.

Thirdly, the lack of evidence of the causal link between the conduct of the institutions

15 — Joined Cases 64/76, 113/76, 239/78, 28/79 and 45/79 *Dumortier Frères* [1979] ECR 3091, paragraph 21.

and the damage complained of by the members and directors of Blackspur was established by the Court of First Instance as a result of the fact that, erring in law, it refused to admit the witness evidence of Blackspur's independent financial adviser, who wrote the statement contained in Annex 26 to the reply.

21. The defendant institutions contend that the appeal is inadmissible and, in the alternative, unfounded. In the event of the Court's considering the application well founded and consequently annulling the decision of the Court of First Instance, the defendants contend that the Court of Justice, pursuant to the first paragraph of Article 54 of its EC Statute, should give final judgment in the matter, without referring the case back to the Court of first Instance, rejecting the appellants' original claims as inadmissible and, in part, unfounded.

22. I consider the pleas put forward to be partly inadmissible and partly unfounded.

(a) Blackspur's appeal

23. I shall first analyse the criticisms made of the grounds set out in paragraphs 47 and 48 of the judgment of the Court of First Instance. Since those grounds — if free of defects which may be attacked before the Court under Article 168a of the Treaty and Article 51 of the Statute of the Court of Justice — are intrinsically capable of supporting the conclusions reached by the Court of First Instance, the criticisms made against other parts of the judgment become irrelevant — but in any event I reserve the right to revert to those criticisms later. Secondly, as I have already pointed out, the appellants themselves have conceded that the other alleged defects in the grounds of the judgment have no bearing on the reconstruction of events undertaken by the Court of First Instance in the part of the decision under review here.

24. The Court of First Instance, on the basis of information supplied by the appellants, inferred that, in the period from July 1988 to August 1989, Blackspur was in a position to locate other sources of supply to replace the brushes on which the duty was imposed, so much so that in fact it sold substitute goods to an aggregate value of £580 503. That fact, which cannot be denied since it comes from the documentation produced by the appellants in response to requests from the Court, rightly seemed significant to the lower court since, as it had noted earlier, in paragraph 45, the only consignment of brushes imported from China was valued, including duty and VAT, at £40 948.38. That value, even if increased by the 40% profit which the appellants claim to make on the products in question, nevertheless amounts to barely more than one-tenth of the value of the brushes sold in the year 1988/89.

The statement by the Court of First Instance that Blackspur had other sources of supply

which allowed it to sell non-Chinese brushes thus appears to be substantially correct. The same can be said of the inference drawn by that court as to the existence of a contradiction between that finding of fact and the appellants' view that the imposition of a duty (dating back to October 1988) compelled Blackspur to abandon the market in cheap brushes. The sales of brushes in the period following the imposition of the duty, thanks to non-Chinese sources of supply, could only prompt the Court to conclude that there was insufficient evidence of a causal link between the imposition of the duty and the decline in sales of brushes which occurred subsequently between November 1989 and August 1990.

25. Nor can the correctness of that inference, based as it is on an assessment of evidence in the file, be challenged before the Court of Justice. The scope of the Community appeal court's review is of course limited to matters of law, the Court of First Instance alone being entitled to determine and evaluate matters of fact. The only exception is where the substantive inaccuracy of its findings is attributable to the documents submitted to it — but that is not the case here. [16]

26. The appellants complain that the Court of First Instance did not take account of the explanations given on that point by Mr Cohen, one of the appellants, and did not order any measures of inquiry in that regard either. On the first point, it need merely be observed that the statements made by Mr Cohen added nothing to the facts established by the Court of First Instance from documents, namely that, even after the imposition of the duty, Blackspur succeeded in locating on the market considerable quantities of brushes that were not subject to the duty. As regards the request for preparatory inquiries, it was, if the appellants are given the benefit of the doubt, made in paragraph 13 of the application in the form of a request that the facts be investigated by means of 'a measure of inquiry', without any further details except for the clarification that an inquiry should be undertaken if any assertions of fact were disputed. The absence of any evidence of a causal link was in fact objected to by the Commission and the Council in their respective statements of defence [17] but their objection did not give rise to any more specific request for preparatory measures from the applicants.

In general, the Community judicial process has always been governed, as far as the onus of proof is concerned, by the principle that it is incumbent on the party who relies on particular facts to identify and produce evidence such as to convince the Court of the exist-

16 — See Case C-136/92 P *Brazzelli Lualdi* v [1994] ECR I-1981, paragraph 49. I also regard as indicative of a restrictive approach in the Court's case-law the fact that even that concession to the review by the appellate court is contained in an *obiter dictum* and since then, as far as I know, it has never actually been given effect, even though it was mentioned as a principle in the order of 14 October 1996 in Case C-268/96 *Stichting Certificatie* [1996] ECR I-4971.

17 — See paragraph 16 of the Commission's defence and paragraph 81 of the Council's defence.

ence of those facts. [18] That rule, moreover, is in conformity with a fundamental procedural principle which, albeit with slight variations, is common to the judicial practice of the Member States. In the present case, in response to the challenge by the Commission and the Council, the appellants failed to produce sufficient evidence at the outset to justify the adoption of measures of inquiry by the Court of First Instance [19] or — as regards the witness evidence mentioned at the hearing by counsel for the appellants — to specify the witnesses to be called, the facts to be considered and the reasons for the requested hearing; [20] furthermore, it cannot even be said that they requested preparatory measures in sufficiently clear and specific terms to oblige the Court of First Instance expressly to state its reasons for granting them or declining to do so. It cannot therefore be said that, on the point at issue here, the judgment was vitiated by an error in law.

27. As regards the appellants' criticisms of paragraph 48 of the contested judgment, I would point out that the reasoning developed in it by the Court of First Instance is nothing more than the consequence of what was noted in the earlier paragraphs, in particular paragraph 47, a fact made clear by the first sentence of the paragraph in question. In response to the finding — which was not contested — that there were substantial sales of brushes (albeit of non-Chinese origin) even after the imposition of the duty and that there was an increase in aggregate turnover in the financial year 1989/90, notwithstanding the decline in sales of brushes, the Court of First Instance considered that no causal link had been demonstrated between the sale of Chinese brushes and financial results which were so disastrous that the banks were prompted to call in receivers.

In that regard, the appellants seek, in the last analysis, to criticize the assessment of evidence by the Court of First Instance. Their plea is therefore inadmissible in view of the unreviewable authority of the lower court to evaluate evidence. [21] The Court of Justice has so far imposed only one limitation on that authority, concerning the distortion of evidence [22] — but I do not perceive any such defect in the reasoning of the Court of First Instance. Nor can it seriously be considered that the absence of any reference in the judgment of the Court of First Instance to Annex 1 to the application constitutes an error of law affecting the assessment of evidence, within the limits laid down in that regard by the case-law of the Court of Justice. The Court of First Instance is certainly not

18 — It is a procedural rule whose existence is acknowledged by all the legal commentators. Representative examples are: Vandersanden and Barav, *Contentieux Communautaire*, Brussels 1977, p. 50; Brealey, 'The Burden of Proof before the European Court', in *European Law Review*, 1985, p. 250; Lasok, *The European Court of Justice. Practice and Procedure*, Second Edition, London 1994, p. 362. For case-law, see Case 44/76 *Milch-, Fett-, und Eier-Kontor* [1977] ECR 393, paragraph 16, and Case 346/82 *Favre* [1984] ECR 2269, paragraphs 31 and 32.

19 — See Case 51/65 *ILFO SPA* [1966] ECR 87, in particular at p. 96.

20 — See Case 35/67 *Van Eick* [1968] ECR 329, in which what is stated above is regarded as an expression of the fundamental principles on which procedural law is based; therefore, although that statement was made in relation to administrative proceedings before a disciplinary board, it can be extended to proceedings before the Community judicature: to that effect, see Vandersanden and Barav, op. cit., p. 55, and Lasok, op. cit., p. 371.

21 — See Case C-136/92 P *Brazzelli*, cited in footnote 16, paragraph 66; the order of 17 September 1996 in Case C-19/95 P *San Marco* [1996] ECR I-4435, paragraph 40, according to which 'it is for the Court of First Instance alone to assess the value of the evidence produced to it'.

22 — See Case C-53/93 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42.

required to explain why any specific document produced is irrelevant, particularly where, far from satisfying the strict requirements that must be met in such circumstances, the document in question is nothing more than a list of hypothetical sales forecasts which, moreover, was drawn up *ex post facto* and on a basis which is not clarified, [23] since the original commercial plan was never produced. [24]

28. Nor can it be said that the lack of evidence was made up for by the production, by fax of 14 April 1997, of the report of the administrative receiver and a letter from him explaining his functions. Indeed, without its being necessary to analyse its content, that document, as contended by the defendant institutions at the hearing, must be regarded as inadmissible, having been produced out of time, and should not therefore be taken into account. Article 118 of the Rules of Procedure of the Court of Justice makes Article 42(2) applicable to appeals against judgments of the Court of First Instance but does not mention paragraph 1 of that article, thereby impliedly precluding, at the appeal stage, the production of further evidence by the parties, even if they give reasons for the delay in offering it. That, moreover, appears to be perfectly consistent with the different role played by the Court of Justice in appeal proceedings, in which the facts, and therefore the means of establishing and assessing them, must be accepted as they appear in the analysis made by the Court of First Instance, without there being any possibility of further measures of inquiry, not even where it considers that that analysis may be vitiated by contravention of legal rules: in such circumstances the proper course of action is for the judgment to be set aside and the case to be referred back to the Court of First Instance.

Furthermore, in the present case no adequate reasons were given for the delay in producing the document, it not being sufficient for that purpose that the Commission and the Council had referred to a similar document in their reply before the Court of Justice, since, being dated November 1990, it must be presumed to have been available to the appellants, or in any event to the administrative receiver, from the early stages of the receivership. No argument has been put forward to rebut that presumption.

29. The rejection as unfounded and inadmissible of the part of the of appeal concerning the grounds stated by the Court of First Instance in the paragraphs following paragraph 47 necessarily means, on the basis of what the appellants themselves have indicated, that the other grounds of appeal must

23 — Annex 1 to the application is nothing more than a projection, of hypothetical financial results drawn up after the event by the firm of chartered accountants Stoy Hayward in October 1992 and forwarded to Blackspur's lawyers. The forecast covers the period September 1989 to August 1990.

24 — In general, the evidence produced by the appellants to the Court of First Instance came, wholly or in part and directly or indirectly, from Blackspur or its directors. There is no need for me to dwell on the irrelevance of such evidence — I shall merely repeat what was said by Advocate General Darmon in his Opinion, delivered on 12 April 1989, in Joined Cases 193/87 and 194/87 *Maurissen and Others* v *Court of Auditors*, in which the Court delivered judgment on 11 May 1989 ([1989] ECR 1045): 'No document purporting to support a party's allegations which emanates from that party should be taken into account by the Court' (paragraph 65 of the Opinion).

also be rejected since they are levelled against reasoning that was given *ad abundiantam* and are therefore irrelevant. [25] However, for the sake of completeness, I shall also examine the other complaints directed against the judgment of the Court of First Instance.

30. One of the complaints is in essence that two statements were attributed to the appellants which they did not make. As regards the first, according to which half of Blackspur's turnover was accounted for by sales of Chinese brushes, it is wholly irrelevant. The Court of First Instance, considering that assertion to be unproven, based its reasoning on the documents before it, concluding that sales of Chinese brushes did not, before the imposition of the duty, represent half of Blackspur's turnover, thus aligning itself with the statements actually made by the appellants.

As regards the second wrongly attributed statement, namely that the loss of £586 000 was the result of Blackspur's being put into liquidation, that is in fact what was stated in paragraph 41 of the judgment. However, the Court of First Instance demonstrated that it perfectly understood the appellants' submissions where, at the end of paragraph 48, it refers to their views in these terms: 'Blackspur's liquidation was attributable to poor financial results occasioned by the discontinuance of its sales of Chinese brushes, depriving it of profits estimated by the applicants to be £586 000, following the imposition of an anti-dumping duty on those brushes'. Thus, the Court of First Instance understood the applicants' position exactly as they has stated it: the financial loss was a cause of the company's liquidation, not a consequence.

That ground of appeal is thus wholly unfounded and must be rejected.

31. As regards the second complaint, it does not in fact appear that the Court of First Instance asked the appellants to produce balance-sheets. However, as significantly acknowledged by the appellants themselves, the fact that the Court criticized the failure to produce documents not requested has absolutely no bearing on its assessment. In fact, the Court (in paragraph 44) accorded to the documentation produced, and in particular a letter written by a firm of chartered accountants relating to Blackspur's financial results, the same value as a balance-sheet. As regards the appellants' statement, in paragraph 42 of the appeal, that that part of the judgment, although not strictly relevant to the Court's reasoning, also needs to be commented on because the very fact of including it implies that some importance was attached to it, it seems hardly comprehensible and at most supports the view that the Court's error was irrelevant.

25 — See the order of the Court of Justice of 25 Mach 1996 in Case C-137/95 *SPO and Others* v *Commission* [1996] ECR I-1611, paragraphs 47 to 49.

32. As regards the complaint concerning the failure to make, in paragraph 44 of the judgment, any reference to Annex 1 to the application and Annex 26 to the reply, with the result that the Court appears to have relied exclusively on the letter from Stoy Hayward produced by the appellants in reply to questions from the Court concerning turnover, it has already been stated that the evaluation of evidence is a matter for the Court of First Instance and cannot be reviewed by the Court of Justice.

Nor, in this specific case, can it be said that the Court of First Instance distorted evidence by inferring from it things which it clearly did not contain. In fact, the document considered by the Court of First Instance appears to be the most comprehensive and comprehensible source of information concerning Blackspur's financial situation, with particular reference to the importance of brush sales as part of the aggregate turnover of the company — a matter justly regarded as decisive in determining whether there was a causal link. Moreover, it has already been stated that the failure to consider a document containing hypothetical sales forecasts drawn up *ex post facto* and on an unexplained basis, like Annex 1 to the application, does not appear open to criticism. As regards Annex 26 to the reply, it merely comprises a number of statements by a financial adviser, who, likewise on the basis of information received from one of the appellants, [26] submits that the main cause of the receivership of Blackspur was the loss of the opportunity to sell brushes from China. It was therefore justified for that document not to be specifically mentioned in the reasoning of the Court.

Nor can it be said a that there was any distortion of evidence regarding the letter from Stoy Hayward, considered by the Court, simply because it was produced by the appellants in order to respond to a question from the Court concerning turnover and not to explain the causal link. On this point, all I need say is that the documents produced avail, and must be considered, on the basis of what they contain, and not according to the intentions of their authors. The Court did consider the objective information contained in that document (in particular the turnover figures and the percentage of sales accounted for by brushes) and the fact of having relied on it to show the lack (or lack of any proof) of a causal link does not amount to a distortion of evidence. [27]

(b) The appeal by the directors

33. As regards the rejection of the claims made by the appellants, Messrs Kellar,

26 — The observation made in footnote 24 applies here.

27 — Moreover, the appellants themselves, in footnote 14 of the appeal, conceded that the document produced contained not only turnover figures but also information concerning the source of the financial results.

Glancy and Cohen, directors of Blackspur, the latter criticize paragraph 51 of the judgment, alleging that it misdescribed their claims. In particular, according to the way in which the relevant part of paragraph 51 of the judgment is described in paragraph 75 of the appeal, it would appear that the Court of First Instance interpreted the claims of Blackspur's directors as being directed towards obtaining compensation for the loss suffered as a result of the loss of the capital which they contributed as guarantors for Blackspur. If that is the case, then the Court of First Instance misinterpreted the claim since, as guarantors, the appellants did not contribute capital to Blackspur but paid its debts, as they in fact stated.

However, that criticism is based on a clearly erroneous and partial reading of paragraph 51 of the judgment, in which the Court of First Instance sets out the compensation claims of the appellants, drawing a clear distinction between what they claim: as directors (and members) who contributed to the capital of the company and lost their contributions; as members who saw the possibility of obtaining income from their capital holding disappear; and, finally, as guarantors 'obliged to honour the personal guarantees which they had given to their company for the unrecovered amount of its debt'. There was thus no error or omission on the part of the Court of First Instance in setting out the appellants' claims.

34. As a further ground of appeal relating to the part of the judgment which rejected the directors' claims, the appellants complain of a misinterpretation by the Court of First Instance of the judgment of the Court of Justice in *Dumortier Frères*. [28] In their view the principle cannot be educed from that judgment that losses deriving from insolvency proceedings amount to indirect and remote damage of such a kind that the Community cannot incur non-contractual liability.

Without its being necessary to examine in detail the real legal scope of the Court's dicta in *Dumortier Frères*, it need only be observed that the reference to that decision appears not to be of any relevance to the reasoning on which the judgment was based. The Court of First Instance dismissed the directors' claim for damages as such since, in the absence of proof of a causal link between the unlawful conduct of the institutions and the harm complained of by the company, there could certainly be no link between such conduct and the harm complained of by the company's members and guarantors, any such further harm being connected with the impact of the allegedly unlawful conduct on the assets of the company (see paragraphs 51 and 52 of the judgment). Here too, the reasons given were given *ad abundiantam* and no ground of appeal directed against them can succeed.

35. As regards costs, under Articles 69 and 122 of the Rules of Procedure, the fact that the appellants have failed entirely in their submissions means that they must be ordered to pay the costs.

28 — Judgment of 4 October 1979, cited in footnote 15.

Conclusion

36. In the light of the foregoing observations, I propose that the Court of Justice:

(1) dismiss the appeal as partly unfounded and partly inadmissible;

(2) order the appellants to pay the costs, including those of the proceedings before the Court of Justice.