OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 9 JULY 1981

My Lords,

The applicant in this case, Mr Benoît Suss, a former official of the Commission, was the victim of an assault on 3 May 1977 in which he received injuries to his head, left eye and left knee, resulting in his retirement with effect from 1 December 1979 under Articles 53 and 78 of the Staff Regulations.

This action is not concerned with the decision to retire him, which was based on his total incapacity for work caused by his injuries, but with the grant of the benefits due under Article 73 of the Staff Regulations and the Rules on the Insurance of Officials of the European Communities against the Risks of Accident and Occupational Diseases ("the Rules").

By Article 19 of these Rules "Decisions ... assessing the degree of permanent invalidity shall be taken by the appointing authority in accordance with the procedure laid down in Article 21

— on the basis of the findings of the doctor(s) appointed by the institutions; and

— where the official so requests, after consulting the Medical Committee referred to in Article 23."

Article 20 provides:

"The decision defining the degree of invalidity shall be taken after the officials injuries have consolidated. To this end, the official concerned must submit a medical report stating that he has recovered or that his condition has stabilized and also setting out the nature of his injuries.

Where it is impossible to define the degree of invalidity after medical treatment is terminated, the findings of the doctor(s) referred to in Article 19 or, where appropriate, the report of the Medical Committee referred to in Article 23 must specify a deadline for reviewing the official's case.

Where the degree of invalidity is considered to amount to at least 20% the appointing authority shall grant a provisional allowance corresponding to the undisputed proportion of the permanent invalidity rate. That allowance shall be set off against the final benefit."

Article 21 provides:

"Before taking a decision pursuant to Article 19, the appointing authority shall notify the official or those entitled under him of the draft decision and of the findings of the doctor(s) appointed by the institution. The official or those entitled under him may request that the full medical report be communicated to a doctor chosen by them.

Within a period of 60 days the official or those entitled under him may request that the Medical Committee provided for in Article 23 deliver its opinion.

Where, on expiry of this period, no request has been made for consultation of the Medical Committee, the appointing authority shall take a decision in accordance with the draft previously supplied."

By Article 23 the Medical Committee is to consist of three doctors — one appointed by the appointing authority, one by the official concerned and one appointed by agreement between the first two doctors. "On completing its proceedings, the Medical Committee shall set out its opinion in a report to be communicated to the appointing authority and to the official or those entitled under him."

After the accident Mr Suss was seen by three doctors, one of whom, Dr Fromes, examined the knee injury. On 13 June 1978, over a year after the accident, Mr Suss was examined by the doctor appointed by the Commission, Dr M. He took the view that the injuries had not yet consolidated and that Mr Suss should be re-examined a year later. He asked Dr Fromes for his prognosis and that he should arrange for Mr Suss to be seen by a neurologist. Thereafter, Mr Suss underwent a number of examinations by several different doctors. On 30 November 1978, he wrote to the Commission enclosing copies of two medical certificates relating to the injuries to his head and eye. Neither appears to have stated clearly that he had recovered or that his condition had stabilized. Indeed, the certificate concerning his head injury suggested the contrary and recommended a further examination after six months' time. On 13 February 1979, Dr M. replied to Mr Suss — asking him to obtain a medical certificate relating to his knee injury and an up-to-date certificate concerning his head injury. He also requested Mr Suss to make an appointment to see him.

For various reasons, it proved impossible to fix an appointment in February, March or April. The two medical certificates asked for by Dr M. were only sent to Mr Suss in April. On 10 May, Mr Suss wrote to the Commission submitting all the certificates he had. A week later he was examined by Dr M., who drew up a report, dated 25 May, assessing Mr Suss' permanent partial invalidity in respect of the three injuries. The three assessments came in total to 37.25% but they were reduced because of what is now accepted to be an erroneous opinion. The Director-General for Personnel and Administration, who exercises the powers conferred upon the appointing authority in these matters (see Article 4 of the Commission's Decision of 5 October 1977, published in the Staff Courier of 17 November 1977), wrote to Mr Suss on 24 July enclosing Dr M.'s findings, which he said constituted a draft decision awarding him a lump sum representing his permanent partial invalidity at the rate of 34%. He added that if there was no request for a Medical Committee the notification in that letter would be regarded as a formal decision and asked for the number of the

bank account into which BFR 3 187 129 (corresponding to a 34% award) should be paid. On 7 September Mr Suss requested an opinion of the Medical Committee provided for in Article 21 of the Rules on the basis that the medical certificates sent by him showed an invalidity rate assessed at 50% plus something for aesthetic damage. He repeated a request that he had made earlier for the payment of a provisional allowance under the third paragraph of Article 20. On this occasion he specifically asked for the sum referred to by the Commission to be paid.

The Head of Division I of Directorate B of the Directorate-General for Personnel and Administration replied to this letter on 22 October, acknowledging Mr Suss' request for the matter to be referred to the Medical Committee but declining to grant a provisional allowance on the grounds that (1) the provisional allowance is only payable when, after medical treatment has terminated, the degree of invalidity cannot be fixed definitively: this did not apply to Mr Suss; and (2) the figure of 34% found by Dr M. was not undisputed because it covered three different injuries, each one giving rise to a potential dispute save the eye injury, where the maximum amount had been awarded. Nevertheless, the letter indicated that a provisional payment would be made in respect of the eye injury, despite the first ground relied on to justify withholding the allowance. A provisional payment of 25% was made apparently on 29 November 1979.

On 15 November the Director-General for Personnel and Administration wrote to Dr M. asking him to represent the Commission on the Medical Committee. When Mr Suss learned of this he wrote to the Commission on 19 December protesting about this appointment and complaining about the Commission's repudiation of the permanent partial invalidity rate fixed by Dr M. On 30 January 1980 the Director-General for Personnel and Administration replied, saying that Dr M. had been appointed because he was already acquainted with Mr Suss' case and that the Rules did not allow one of the parties to challenge the appointment to the Medical Committee made by the other party. Furthermore, he refused to accept that the undisputed proportion was 34%.

By letter of 12 February 1980 lodged at the Commission two days later, Mr Suss made a formal complaint under Article 90 of the Staff Regulations concerning the constitution of the Medical Committee, the delays in the proceedings and his retirement on the ground of invalidity. Nothing was heard from the Commission. The four-month period set by Article 90 (2) expired on 14 June. On 10 September, within the three-month period for appealing from the implied rejection of the complaint, Mr Suss lodged his application at the Registry.

This makes, in essence, three claims (1) that Dr M. is not eligible for membership of the Medical Committee and should be replaced by another doctor; (2) that the Commission should pay an additional provisional allowance corresponding to a permanent invalidity rate of 12%; (3) that the Commission should pay default interest at 13% on the whole of the sum due to Mr Suss and running from the date his injuries consolidated to the date of payment.

The Commission lodged its defence on 15 October and, on the same day, wrote to Mr Suss to inform him that it had acceded to his second claim and the money had been paid over on 10 October 1980. That claim can therefore be considered to have been settled. In the meantime, Mr Suss had made an application for interim relief under Article 83 of the Rules of Procedure which was rejected on 3 November.

In addition to the three claims made in the form of order in the application, Counsel for Mr Suss sought to adduce three more in the reply. There is clear authority that an action before the Court can be considered only with reference to the form of order contained in the application commencing proceedings (see, for example Case 83/63 *Krawczynski* v *Commission* [1965] ECR 623 at p. 633, Case 48/70 *Bernardi* v *Parliament* [1971] ECR 175 at p. 183; Case 232/78 *Commission* v *France* [1979] ECR 2729 at p. 2737 and Case 125/78 *GEMA* v *Commission* [1979] ECR 3173 at p. 3191). The three additional claims must, therefore, in my view be rejected as inadmissible.

Since the 12% referred to in the second claim made in the application apparently has been paid, that leaves only the first and third for consideration. The Commission has challenged their admissibility on the basis that the application does not seek the annulment of the Commission's "decision" of 30 January 1980 against which, it is said, the complaint was directed. Instead it only mentions the implied decision rejecting the complaint. This decision confirmed the earlier one and for that reason does not constitute a decision that can be challenged; insofar as it seeks to challenge the earlier decision the application is out of time.

Although raised in the written submissions this objection, in my view rightly, was not developed in the oral argument. The objection seems to me to be unfounded and I would reject it.

It is true that in form Mr Suss appeals against the implied rejection of his complaint but it is abundantly plain that he is attacking the legality of the acts, or the failures to act, which are specified. He cannot attack these before the Court unless he makes a complaint as is provided for in Article 90 (2) of the Staff Regulations, and that complaint is rejected expressly or impliedly. Even though in a sense the rejection of a complaint against an unlawful act confirms the unlawful act, it seems to me that so long as the complaint is made in due time, as here it was, and so long as the application to the Court is made within the period prescribed from the rejection of the complaint, as here it was, it is quite impossible to say that the rejection of the complaint is a purely confirmatory act which must be ignored and that the only relevant date for the calculation of limitation periods is the original act complained of. Here the act is said by the defendant to be in the letter of 30 January and the defendant contends accordingly that Mr Suss is out of time. Even if that were so, Mr Suss in my opinion carried out the procedures as he was required to do and his claim is admissible.

Mr Suss says that Dr M. cannot validly be a member of the Medical Committee

because he was the doctor who had been appointed by the Commission for the purposes of Article 19 of the Rules. Otherwise he would be made a member of what is essentially a committee hearing an appeal from his own decision where he would be judge and party. It is said, secondly, that he is an advisor to, or otherwise connected with, the insurance company with whom the Commission has insured its officials. The Court should accordingly declare that some other doctor must be appointed.

In Case 156/80 *Morbelli* v *Commission* (judgment given on 21 May 1981, not yet reported) the Court accepted that the composition and functioning of the Medical Committee may be reviewed to ensure that Articles 19 and 23 of the Rules are complied with, and it seems to me that this may be done even before the Committee has reported.

The Court, however, in that case pointed out that the structure of Article 23 is that the official and the institution may each appoint a doctor in whom they have confidence. That would seem to me to make it possible for an official to appoint a doctor who had attended him and who had formed an opinion in his favour. So if the official is examined by a doctor on behalf of the institution and that doctor has formed a view unfavourable to the official, the institution may in the ordinary way appoint him to the Medical Committee. The fact that a doctor has been appointed for the purposes of Article 19 of the Rules does not seem to me *ipso facto* to disqualify him. The Medical Committee is not an appeal tribunal in the ordinary sense. It is the function of the Committee to find the facts and to make an assessment in the light of the material before them and their medical experience. The fact that one or two of the doctors have already examined the patient and formed an opinion does not preclude their participating in this task. The integrity of their investigation is assured by their professional standards and the neutrality of the third member appointed by the other two doctors or by the Court. There may be cases where it would be wise and fair for an institution to appoint some other doctor than the doctor appointed under Article 19 of the Rules. Subject to the second point taken by Mr Suss nothing is suggested in the present case which would disqualify Dr M. on that basis. I would accordingly reject the first point.

The second argument, it seems to me, should also be rejected. At the hearing, Counsel for the Commission said, without being challenged by Counsel for Mr Suss, that Dr M. is not employed by the insurance company. It is accepted that the Commission and the insurance company have agreed that the doctor appointed by the Commission under Article 19 of the Rules shall be a doctor mutually acceptable to them. Dr M. is in private practice and the fact that he may act regularly in cases of this kind does not, in my opinion, disqualify him. There is nothing to indicate that Dr M. would be influenced by the insurance company when forming his opinion or act other than impartially.

Mr Suss claims interest at 13% on the amount due to him from time to time after taking into account the provisional payments, from the date which the Medical Committee eventually decides is the date upon which his injuries consolidated.

Before considering whether there has been any wrongful delay or conduct by the Commission, which would justify the awarding of interest, it seems to me right to consider whether the starting date taken by Mr Suss is the correct one. In my view it is not.

The sequence of events under Articles 19 and 20, so far as relevant, seems to me to be (i) the official must submit a medical report stating that he has recovered or that his condition has stabilized; (ii) only after that is received is there an obligation to define the degree of invalidity; (iii) the doctor appointed makes his findings; (iv) the appointing authority prepares a draft decision and notifies the official; (v) after 60 days, if no request for a Medical Committee is received, the appointing authority must take a decision in accordance with the draft; (vi) if the matter goes to the Medical Committee, the appointing authority must take a decision after consulting that Committee. So long as there is no wrongful delay by the authority in reaching that stage, the earliest time from which interest can run, it seems to me, is the date when the decision is taken defining the degree of invalidity, and not the date when the injuries are found to have consolidated.

This, however, is subject to the obligation to grant a provisional allowance corresponding to "the undisputed proportion of the permanent invalidity rate" where the degree of invalidity "is considered to amount to at least 20%". Whatever the difference, in relation to the degree of permanent invalidity, between "assessed" in Article 19 and "considered" in Article 20, it seems to me that there cannot be an "undisputed proportion of the permanent invalidity rate" until the doctor appointed under Article 19 has made his findings, although I recognize that it is arguable that the third paragraph of Article 20 could be construed so as to give a looser discretion. There cannot, in my view, therefore, be any obligation to make a provisional payment until that event. Unless that event is wrongfully delayed or caused to be delayed by the Commission, no liability for interest can arise until after the date of the event.

Mr Suss has ascribed to Dr M. the delay in awarding the provisional allowance. It has been alleged that Dr Fromes had been delegated by Dr M. to investigate Mr Suss' condition and had been guilty of failing to pass on to the Commission the medical certificates Mr Suss had given him. Dr Fromes is also supposed to have sub-delegated his powers to other doctors who examined Mr Suss. The sole evidence for this appears to be a letter by Dr M. to Dr Fromes on 21 June 1978.

It does not, in my view, prove any kind of delegation, even if this were possible in law. Furthermore, Mr Suss' own view of the position is apparent from two

letters he wrote dated 23 and 30 November 1978 from which it is plain that he knew then that Dr Fromes was not acting on behalf of the Commission. The Commission cannot therefore be held responsible for any delays that may have been caused by the doctors consulted by Mr Suss.

Moreover, it was for Mr Suss, not Dr M. to initiate the procedure by submitting the medical reports required by the first paragraph of Article 20. This he did only on 30 November 1978. He presented two medical certificates relating to his head and eye injuries. Both were dated July 1978 and had been in his possession for some time. The first suggested that his head injury had not yet stabilized and that a further examination would be necessary; the second hinted that there might be further complications. Not unnaturally Dr M. asked him for another certificate concerning the head injury and one covering the knee injury. Mr Suss has himself pleaded that the eye injury consolidated only on 30 March 1979. However that may be, the certificates he submitted to the Commission on 10 May 1979 showed that the head injury could be said to have consolidated as from 1 January 1979. Two certificates relating to the eye injury are dated 2 and 30 March respectively. The latter does not state whether the condition of the eye had stabilized or consolidated; the former clearly states that it had not. The conclusion seems to be that the failure to produce the medical report beforehand was due, more than anything else, to the nature and gravity of his head and eye injuries.

Dr M. drew up his report without delay on 25 May. The claim for interest must therefore, in my view, be rejected insofar as it relates to the period before then.

Mr Suss asked for a provisional allowance to be paid by letters dated 7 and 24 September 1979. On 22 October he was told that he was not entitled to an allowance but that 25% would be paid and, as already stated, this was done on 29 November 1979. On 19 December and 22 January, he again asked for payment of the percentage accepted by Dr M. He claimed interest on the sum which had not been paid. The balance of the amount accepted by Dr M. was paid only when the defence was lodged.

At the time when the Commission made its payment of 25%, it is clear that the Commission "considered" that the overall degree of invalidity amounted to at least 20%. Moreover (and without finding it necessary to consider whether the Medical Committee can award less than the finding of the doctor appointed under Article 19) it seems to me clear that in this case the Commission did not dispute the proportion of the permanent invalidity rate fixed by Dr M. The Commission's letter of 24 July 1979 sufficiently establishes that. Accordingly it seems to me that there really is no justification for the Commission's failure to pay the 34% at the time when the 25% was paid and that interest should be awarded on 9% of the total from 1 December 1979 until the date of payment of the balance. Although the

Court, or the Advocate General alone, has on occasion considered that interest should only be awarded from the date of the complaint (see Case 144/77 *Jacquemart* v *Commission* [1978] ECR 1967 and Advocate General Warner's opinion in Case 40/79 *Mrs P.* v *Commission* (5 February 1981), yet this does not seem to be an absolute rule and, in Case 185/80 *Garganese* v *Commission* (2 July 1981) the Court awarded interest from the dates when the payments withheld fell due, not from the date of the complaint, on the ground that it was equitable to do so. In this case, Mr Suss had clearly made his claim and the Commission had considered and wrongly rejected it. It seems to me appropriate and equitable, accordingly, in the present case to award interest from 30 November 1979 (see also Case 115/76 *Leonardini* v *Commission* [1978] ECR 735).

Although by letter dated 30 January 1980 the Commission appeared to be accepting that Dr M.'s calculation which reduced 37.25% to 34% was wrong in principle, and although 37% was the figure eventually paid, Mr Suss was at the time putting forward his claim for a payment of 34% and it seems to me appropriate to take that figure for the purposes of calculating interest.

The rate of interest claimed by Mr Suss is 13%, that being, it is said, the bank rate in Luxembourg for medium and short-term loans. The Court has, on a number of occasions, taken 8%. In the present case the Commission does not resist 13% as the appropriate rate and, in a time of changing interest rates, the figure adopted by the Court may have to be reviewed from time to time. It seems to me appropriate to award interest at the rate which is agreed between the parties. Accordingly, I would award interest on the amount of 9% from 30 November 1979 until 10 October 1980 at the rate of 13%.

Both parties have asked for costs. Mr Suss failed in his application for interim relief and must therefore pay his own costs of that. He has, in my view, lost the first of his principal claims and has been partly successful in the third, the second having been conceded. In the circumstances, it seems to me right that the Commission should be ordered to bear its own costs in the action pursuant to Article 70 of the Rules of Procedure, and to pay a third of those incurred by Mr Suss, pursuant to Article 69 (3).