OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 13 DECEMBER 1973

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Verwaltungsgericht of Frankfurt-on-Main. It raises a complex of questions as to the consequences, under the relevant Community legislation, of the loss by an importer of a licence for the importation of cereal products.

Your Lordhips will remember that Regulation No 120/67/EEC of the Council established the common organization of the Community market in cereals.

In the preamble to that Regulation it is recited that:

'the competent authorities must be in a position constantly to follow trade movements in order to assess market trends and to apply the measures laid down in this Regulation as necessary;'

and that:

'to that end, provision should be made for the issue of import and export licences accompanied by the lodging of a deposit guaranteeing that the transactions for which such licences are requested are effected'.

This explains why paragraph (1) of Article 12 of the Regulation provides that imports into the Community or exports therefrom of any of the products to which the Regulation applies are to be subject to the submission of an import or export licence issued by a Member State and continues:

'The issue of such licences shall be conditional on the lodging of a deposit guaranteeing that importation or exportation is effected during the period of validity of the licence; the deposit shall be forfeited in whole or in part if the transaction is not effected, or is only partially effected, within that period.'

Paragraph 2 of Article 12 provides for the adoption of detailed rules for the application of that Article. So far as this case is concerned, the relevant detailed rules are those contained in Regulation (EEC) No 1373/70 of the Commission.

Article 2 (1) of that Regulation provides: 'An import . . . licence shall authorize and require the importation ... under that licence, of the net quantity of the specified product during the period of validity of the licence, which ... may be accompanied by advance fixing of the levy ... under conditions laid down by the rules relating to each sector.'

Your Lordships are familiar with the system of advance fixing of levies by means of certificates. It has only a fringe relevance in this case.

Article 8 (2) of the Regulation provides, so far as material:

'Licences and certificates shall be drawn up at least in duplicate, the first copy of which, called "Titular Holder's Copy", marked "No 1", shall be issued without delay to the applicant and the second, called "Issuing Agency's Copy", and marked "No 2" shall be retained by the issuing agency. Copy No 1 of the licence or certificate shall be submitted to the office responsible for completing:

(a) in the case of an import licence ... import customs formalities;

.....

After attribution of the quantity and endorsement by the office referred to in the preceding paragraph, Copy No 1 of the licence or certificate shall be returned to the party concerned.'

Article 15 is a long Article of which the following provisions are particularly relevant:

'1. As regards the period of validity of licences and certificates:

(a) the obligation to import shall be considered to have been fulfilled and the right to import pursuant to the licence or certificate shall be considered to have been exercised on the day when the customs formalities referred to in (a) of the second subparagraph of Article 8 (2) are completed;

. . . . . .

2. Release of the security shall be subject to production of proof:

(a) as regards imports, of completion of the customs formalities referred to in (a) of the second subparagraph of Article 8 (2) relating to the product concerned;

. . . . . .

3. The proof required under paragraph 2 shall be furnished . . .

(a) in cases referred to in paragraph 2 (a) of this Article . . . by production of Copy No 1 of the licence or certificate . . . endorsed in accordance with the provisions of Article 8;

. . . . . .

4. Where a licence or certificate . . . is lost, issuing agencies may, exceptionally, supply the party concerned with a duplicate thereof, drawn up and endorsed in the same way as the original documents and clearly marked with the word "Duplicate" on each copy.

Duplicates may not be submitted for purposes of effecting import . . . transactions.'

The Commission explains in its Observations that the reason for this last provision lies in an anxiety to prevent the possibility of a fraudulent trader taking advantage twice of an advance fixing certificate, once by using an allegedly lost licence embodying such a certificate and a second time by using the duplicate. The purpose of the duplicate is thus only to enable the holder to secure the release of so much of the security as is attributable to importations effected under the licence before its loss.

Article 16 provides, so far as relevant:

'1. The security shall be released as soon as the proof referred to in Article 15 (2) and (3) of this Regulation has been furnished.

2. Subject to the application of Article . . . . 18, where the obligation to import . . . has not been fulfilled the security shall be forfeit for an amount equal to the difference between:

(a) . . . the net quantity indicated in the licence or certificate; and

(b) the net quantity actually imported . . .

3. On application by the titular holder of the document, Member States may release a part of the security in proportion to the quantities of products in respect of which the proofs referred to in Article 15 (2) and (3) have been furnished . . .'

Lastly Article 18 provides, so far as relevant, as follows:

'1. Where, as a result of *force majeure*, import . . . cannot be effected during the period of validity of the licence or certificate, the Member State issuing the licence or certificate shall decide, at the request of the titular holder, either that the obligation to import . . . is cancelled, the security being released, or that the period of validity of the licence or certificate is extended for such period as may be considered to be neccessary in view of the circumstances invoked. The time limit may be extended after the period of validity of the document has expired.

The decision to cancel or to extend shall be restricted to the quantity of the product which could not be

imported . . . because of *force majeure.*

. . . . . .

3. Where the competent agency accepts that there is a case of *force majeure,* the Member State concerned shall immediately notify the Commission which shall inform the other Member States thereof.
4. The titular holder of the licence or certificate shall furnish proof of the circumstances considered to be a case of *force majeure.*'

Such are the provisions with which the Court is concerned in this case.

From the way in which the Verwaltungsgericht of Frankfurt states the acts of the case in its Order for Reference, I infer that it has not completed the process of finding them, but has thought it better to make an early reference to this Court, in part at least so that it can know what issues of fact it needs to make findings upon. It seems that, with that reservation, the facts may be summarized as follows. The plaintiffs are a firm of importers carrying on business in Hamburg. They applied to the defendant, the appropriate German authority, for a licence to import 2 000 tons of wheat bran pellets, and lodged the appropriate security. They duly received such a licence dated 15 June 1972 and valid until 31 October 1972. Under this licence they effected a number of importations, amounting in all to about 821 000 kg, particulars of which were endorsed on the licence. Then, on 17 October 1972, they sent the licence by registered post to their Rotterdam agents, Peterson's Havenbedrijf NV, ('Peterson's') in order to enable the latter to effect an importation of some 60 000 kg of pellets. At the same time they asked Peterson's, as soon as the customs formalities in respect of that importation were completed, to forward the licence by express post to a firm called Bachmann in Bremen, who were, so the plaintiffs allege, to effect the importation of the balance of pellets covered by the licence. On 25 October 1972 Peterson's received the licence back from the customs authorities at Rotterdam and, on the same day, so it is alleged, despatched it by express, but not registered, post to Bachmann's. It is said that the use of a registered letter in such circumstances would be unusual in the Netherlands, although it would be normal practice in Germany. Your Lordships have some experience that seems to confirm this suggestion — see Case 61/72, *Mij PPW Internationaal NV v Hoofproduktschap voor Akkerbouwprodukten* [1973] E.C.R. 301, where the authority responsible in the Netherlands for issuing licences itself sent one by ordinary post. Be that as it may, the plaintiffs say that the letter containing the licence never reached Bachmann's so that Bachmann's were unable to use it to effect the outstanding importations. On 16 November 1972 the plaintiffs applied to the defendant under Article 15 (4) of Regulation No 1373/70 for a duplicate of the licence, which was duly issued.

The dispute in the proceedings before the Verwaltungsgericht of Frankfurt-on-Main is as to whether, in those circumstances, the plaintiffs are entitled to have the whole of their security released to them or whether, as the defendant contends, they are liable to forfeit that part of it, amounting to some 11 400 DM, that was attributable to the importations covered by the licence but not in fact effected thereunder.

The plaintiffs place in the forefront of their argument a contention that the definitive loss of an import licence is not a case of force majeure covered by Article 18 of Regulation No 1373/70, but that it entails, as a matter of interpretation of Articles 2 (1) and 15 (4), the automatic disapperance of the obligation to import. The reason, they say, is that the loss of the licence involves the loss of the right to import, from which the obligation to do so is inseparable. In the alternative they claim the benefit of Article 18.

The Commission contests the suggestion that the loss of a licence automatically extinguishes the right and the obligation to import. All that such loss does, it argues, is to prevent the exercise of the right and the performance of the obligation unless and until the licence is found again before the expiry of the period of its validity. The Commission accepts however that the loss of a licence may amount to a case of *force majeure*. It insists only that Article 18 should be so interpreted and applied as to avoid abuse.

No one has put forward an argument urging the Court to reject both the plaintiffs' first contention and the view that the loss of a licence may constitute a case of *force majeure*. To my mind such an argument would be untenable. As the preamble to Regulation No 120/67 makes clear, the object of the licensing system is only to enable the competent Community authorities to assess market trends so that they can exercise their powers to manage the market in an informed manner. In the light of this it would be unduly harsh to penalize by the forfeiture of his deposit a trader who showed that he had been unable, through no fault of his own, to perform his obligation to import. Indeed the very existence of Article 18 evinces that such is not the intention of the legislation.

My Lords, I can see no reason for saying that the accidental loss or destruction of a licence cannot constitute a case of *force majeure* within that Article. Of course it does not prevent importation altogether, since a fresh licence can be applied for. But, for this, fresh security must be lodged. What the loss of a licence prevents is importation under that licence and the concern of the trader is as to the fate of the security lodged by him for that licence. Reference was made in argument to the provisions that Article 18 replaced, in which there was a catalogue of examples of cases of *force majeure*. It was pointed out that all those examples were of events that prevented the movement of the goods themselves, such as war, shipwreck, strikes and the like. But the catalogue was not meant to be exhaustive and it did contain one example of a legal rather than physical impediment, namely 'interdictions d'exportation ou d'importation édictés par les États'. In any case, Article 18 contains no such catalogue.

The Court has been called upon in a number of cases to interpret the expression '*force majeure*' in provisions in pari materia with Article 18. The first and perhaps the most pertinent of those cases is Case 4/68, *Firma Schwarzwaldmilch GmbH v Einfuhr- und Vorratsstelle für Fette* (Rec. 1968, p. 549). The Court there pointed out that the concept of force majeure could vary in its content according to the context in which it was to be given effect to and that accordingly it must, in the present context, be interpreted in the light of the purpose of the regulation in point and of the particular nature of the legal rights and obligations created by that regulation. The public interest, which required that the Community authorities should be in a position to forecast the trends of trade as accurately as possible, and so required the deposit of security for the issue of import licences, also required that trade should not be obstructed by the imposition on traders of excessively rigid obligation. The threat of the loss of their security was intended to deter traders who obtained import licences from failing to effect the importations thereby authorised. It followed that, in principle, a trader who had taken all due care and who was prevented by circumstances beyond his control from effecting an importation should be freed from the obligation to effect it. Circumstances beyond a trader's control were to be understood as meaning circumstances which a prudent and diligent trader would regard as improbable and the consequences of which he could not avoid except at excessive cost. This interpretation of the

concept of force majeure was reiterated by the Court in Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (Rec. 1970, p. 1139) and in Case 25/70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster, Berodt & Co.* (ibid at p. 1179), in both of which the Court emphasized the flexible nature of that concept.

Those cases are in my opinion sufficient authority for saying that a trader who is prevented from effecting an importation by the loss of his licence may, provided he can show that the loss was not due to any lack of reasonable care on his part, claim to be relieved under Article 18. It is interesting however to note that, in *The Turul* [1919] A.C. 515, the Judicial Committee of the Privy Council held that the master of a ship who was prevented from sailing within the days of grace appointed under Article 1 of the sixth Hague Convention by the circumstance that he had been, through no fault of his own, deprived of his ship's papers and charts, had been the victim of *force majeure* within the meaning of Article 2 of that Convention. This is a concrete authority for the view that the concept of *force majeure* can cover the case of one who is prevented from doing something because, through no fault of his own, he has been deprived of a document which is essential to enable him to do it.

I would accordingly reject the Plaintiffs' first contention, because it is inconsistent with the view that the matter is governed by Article 18 and because there are good reasons for preferring that view. It seems to me that, if the authors of the Regulation had intended that the loss of a licence should automatically extinguish the rights and obligations to which its issue gave rise, they would expressly have said so and would have gone on to provide for the Commission to be informed of the loss, so that it could adjust its statistics, as does paragraph 3 of Article 18. They would also, I think have included a provision as to proof on the lines of paragraph 4 of that Article.

I am therefore of the opinion that questions I and II (a) referred to the Court by the Verwaltungsgericht of Frankfurt should be answered as follows:

'I. Articles 2 (1) and 15 (4) of Regulation (EEC) No 1373/70 of the Commission are not to be interpreted as meaning that the loss of an import licence automatically entails the lapse of the obligation to import created by its issue.

II. (a) The loss of such a licence constitutes a case of *force majeure* within the meaning of Article 18 of that Regulation if it has occurred despite the holder of the licence taking all the care that is to be expected of a prudent and diligent trader.'

Question II (b) posed by the Verwaltungsgericht of Frankfurt is in effect as to the standard of care to be expected of a prudent and diligent trader. Does a trader fall below that standard if he sends a licence by ordinary post? My inclination would be to say that he does. The loss of documents in the post is unfortunately a familiar occurrence and the normal way of guarding against it is to register. It is submitted for the plaintiffs that this is not a perfect safeguard. I agree, but common experience is that to send documents by registered post does reduce the risk of their loss. I have however come to the conclusion that it is not for this Court to say whether in a particular case a particular trader has or has not taken due care. I think that that is a matter to be determined by the national Court, which is in a position to weigh all the factual circumstances in which the trader found himself, including, in a case like the present, such factors as the degree of urgency, the postal facilities available on the spot and so on.

I am therefore of the opinion that question II (b) should be answered as follows:

'Whether the holder of a licence has in a particular case taken all the care that is to be expected of a prudent and diligent trader is a matter to be determined by the competent national Court after weighing all the factual circumstances in which that trader found himself.'

The last question posed by the Verwaltungsgericht of Frankfurt (question II (c)) is whether a request can be made under Article 18 (1) after the expiry of the period of validity of the licence. My Lords, I have no doubt that the answer to that question must be 'Yes'. An event constituting a case of *force majeure* may occur so close to the date of expiry of a licence that there is no time for the trader concerned to put the machinery of Article 18 in motion before that date. Indeed news of the event may not reach him until after that date. It would be arbitrary in the extreme to say that in such a case he was to be deprived of the benefit of Article 18.