On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the parties to bear their own costs.**

Koopmans Bosco Joliet

Delivered in open court in Luxembourg on 27 September 1984.

J. A. Pompe
Deputy Registrar

T. Koopmans
President of the First Chamber

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 21 JUNE 1984

My Lords,

Article 14 (1) of Annex VII to the Staff Regulations provides:

"Officials who, by reason of their duties, regularly incur entertainment expenses may be granted a fixed rate allowance by the appointing authority, which shall determine the amount thereof.

In special cases, the appointing authority may in addition decide that part of the cost of accommodation for the officials concerned also be borne by the institution."

The applicant in this case was Head of Press and Information in the Communities Delegation in Washington between 1 October 1974 and 31 December 1982. As such there is no doubt that he did regularly incur entertainment expenses, by reason of his duties, and that the appointing authority was entitled to grant him an allowance and to consider that his was a special case, in respect of which a payment might be made under the second subparagraph of Article 14 (1). Throughout the period of his stay he claimed a monthly sum in respect of the rent of accommodation under leases, of which he supplied copies to the appointing authority in Brussels. The total amount paid from 1 January 1975 was BFR 1 115 552. In 1982 the Directorate-General for Personnel in Brussels learned that the house occupied from that date had been bought by a company owned, except as to one share, by the applicant, and leased by the company to the applicant.

The Commission took the view that the applicant had not in any real sense been paying rent, and that since he must have been aware that it was the Commission's policy not to pay an accommodation allowance except in respect of "rent", so that he was not entitled to the monies he had received, they should be recovered by deduction from sums otherwise due to him when he left the service.

No reply having been received to a complaint made by him, under Article 90 (2) of the Staff Regulations on 25 January 1983, against the decision to deduct these monies, he initiated these proceedings on 14 October 1983 under Article 91 of the Staff Regulations.

The Commission, without pressing the point, raises the question as to whether this application was made in time. It is accepted that, if he can rely on the provisions of the Court's Rules of Procedure as to extensions of time for distance, his application is in time. Otherwise it is said that the application was not made within three months of a date four months from 16 February 1983, when the complaint was registered with the Secretary-General of the Commission. He was, at the relevant time, resident in the United States of America though his lawyer practises in Brussels.

It seems to me clear that it is the place of residence of the applicant, and not the office of his lawyer, which is determinative of any extension for distance (see Case 28/65 *Fonzi* v *Commission* [1966] ECR 477) and that the extensions granted by Annex II to the Rules of Procedure apply to actions brought under the Staff Regulations (Case 31/72 *Angelini* v *European Parliament* [1973] ECR 403 at p. 409). In my view this action is, therefore, admissible.

When the applicant first went to Washington he paid rent for accommodation rented from a third party and nothing turns on the allowance for that. At the time rents were very high. He adopted the view, apparently suggested to him by the assistant to the Head of the Commission's Washington Delegation, that it was more sensible to buy with the help of a loan. With the knowledge and approval of the Assistant, and it is said, with the express approval of the Head of the Delegation, and to the knowledge of the assistants to the Directors-General of DGI and DGX, a company was formed which bought the

house and leased it to the applicant. The rent paid unter the lease was then claimed under Article 14 of the Staff Regulations. Subsequently the applicant says that the arrangement was made known to the successor to the Head of the Delegation in post at the beginning of the applicant's service.

A copy of a lease dated 1 January 1975 with a monthly rent of USD 750 was sent, apparently, on 28 April 1976 after several demands. A further lease was sent on the same day, dated 25 April 1976 for two years at a monthly rent of USD 1 200 which was said to be "considered reasonable by an independent valuer". Subsequent leases extended the tenancy at the same rent.

The applicant says that if this is the right interpretation of Article 14, the Commission cannot recover under Article 85 of the Staff Regulations, because no sum was overpaid. Whether it is a right or wrong interpretation, there is no right to recover because the Commission cannot show that he was aware (i.e. had had actual knowledge) that "there was no due reason for the payment" or that "the fact of overpayment was patently such that he could not have been unaware of it". Here, on any view, he had a reasonable belief that he was entitled to the sums paid because of the knowledge and approval of his superiors in Washington, because of what he contends is the right, or at any rate, a tenable interpretation of Article 14, and because of the fact that he knew that allowances had been paid to other officials who owned their accommodation.

The first point taken by the Commission is that there is no power under Article 14 to pay an allowance other than in respect of rent, so that a contribution towards the cost of providing accommodation would be *ultra vires*. This, in my view, is not a correct interpretation of Article 14. The words used are not "rent of accommodation" but "the cost of accommodation". "Cost of accommodation", is, in my view, wider than "rent" and permits an allowance to be paid for the expense of being accommodated which is not strictly rent. These words are to be contrasted with "rent allowance" used in Article 14 (a). The French text of Article 14 supports this construction of Article 14 itself since it speaks of "frais de logement" which again seems to me wider than "loyer" or "prix de location", though it has to be noted that Article 14 bis speaks of "indemnité de logement".

The Commission's answer is that Article 14 has been consistently interpreted as authorizing only rent between independent lessor and lessee and has been so applied. In cases where an allowance had been paid for accommodation owned by the official, it was stopped when the Commission knew the facts. The appointing authority referred to in Article 14 is the Director-General of Personnel (DG IX). Only he could authorize an allowance; the Head of the Washington Delegation had no power to do so or to diverge from the practice and policy of DG IX. Moreover, it was made plain to the applicant throughout that the only allowance paid was in respect of rent. On 9 September 1974, before his appointment took effect, the applicant was told by the Director of Personnel in Brussels "We pay the difference between your Washington rent and a notional

Brussels rent". A note sent at the same time states that Mr Mulligan is entitled to a lodging allowance which cannot "be worked out until we have a copy of his lease ... the rent must be appropriate". It "represents the difference between the actual rent paid in Washington and the notional rent for Brussels". By letter from the Director-General for Personnel of 4 December 1974, he was told, when his entitlement to a lodging allowance was confirmed, "Will you please note that you must inform the Administration at once of any changes in your situation which might affect the payment of the allowance in question".

On 20 December 1976 the applicant was told of internal service instructions to be adopted with effect from 1 January 1976. Those instructions and the explanatory memorandum make it plain that the Article 14 allowance was in respect of rent. There is no suggestion that payments could be made on any other basis. At the same time he was told that he must notify any change in his circumstances which might affect the payment of the allowance. Another version of the internal instructions was issued on 17 December 1980, and apparently sent to him. This again shows that the allowance is in respect of rent.

Throughout the period the letters sent to him by DG IX, calculating the allowance, speak only of rent and he is frequently exhorted to notify any change of circumstances.

In the applicant's favour, it seems to me on the evidence available that there is no doubt that the Head of the Delegation considered that his duties merited an entertainment and an accommodation allowance; that he was open with the assistant to the Head of the Delegation and with the Head of the Delegation about the fact that he was paying rent to a company which he owned in order to claim the allowance; that the rent was a fair rent and indeed may have been less than he would have paid for appropriate accommodation rented on the open market and, indeed, less than it cost him to service the loan he took to buy the house. Moreover it is clear that no disciplinary proceedings were taken against him in respect of what happened and I infer from that that it was thought inappropriate to take them.

On the other hand, it seems to me equally clear from the documents referred to above, that the applicant knew or must be taken to have known that the appointing authority for the purposes of Article 14 was the Director-General of Personnel. He alone could authorize the allowance, even though the Head of Delegation could make recommendations as to the appropriateness of any allowance being granted and as to the appropriateness of the accommodation in question. I also consider that, even though the Commission has misinterpreted the width of Article 14, the Director-General of Personnel was entitled, under the discretion given by that article, to authorize allowances only in respect of rent. The documents sent to the applicant made it plain that it was the practice of the Commission to pay only for rent, as he himself concedes. I do not accept the argument that he can say that

he was an exceptional case to whom the general practice did not apply because of the approval of the Head of the Delegation. If he had wished to constitute himself a special case he should have informed and sought to obtain the approval of the Director-General of Personnel. It is plain that at no time did he indicate any change of circumstances between the original lease from a third party and the arrangements he made to buy the house through a company and let the house to himself.

In my view, on the basis of the documents sent to him, he was aware that there was no due reason for any payment other than rent, since only rent was authorized by DG IX; alternatively it was patently such that he could not have been unaware of it.

It may have been very sensible to buy a house; perhaps it would have been very sensible for DG IX to accede to an open request for an allowance in respect of the cost of financing the purchase of a house, if such a request had been made. The fact, however, is that, even though he did it openly in Washington, and with full approval there, the arrangement made to form a company and go through the motions of granting a lease in order that he could claim rent, shows that he knew that he would only be granted the allowance for rent and not for the cost of purchasing a house. This latter is really what he was seeking; he knew, or plainly could not have been unaware, that he would not receive it as such unless he received special authority from DG IX and that he never sought or obtained.

The result, from what may have been financially a sensible idea to buy rather than to rent, is unfortunate, but it seems to me that he has not succeeded in showing that the Commission was not entitled to recover the monies under Article 85. The application should accordingly, in my view, be dismissed.

He should, in my view, bear his own costs. I do not consider that it can be said that he has acted unreasonably or vexatiously in causing the Commission to incur the costs of the defence. His action did not "lack any justification" (Case 54/77 *Herpels* v *Commission* [1978] ECR 585 at page 601) since he was right on the point of interpretation of Article 14, and, in the light of the persuasive arguments put forward by his advocate, he was entitled to have the matter investigated. I am accordingly of the view that each side should bear its own costs.