OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 27 SEPTEMBER 1979

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the College van Beroep voor het Bedrijfsleven. The Appellant in the proceedings before that Court is a company called H. Ferwerda BV, which carried on business at Rotterdam as an importer and exporter of meat. I shall refer to it as "Ferwerda". The Respondent is the Produktschap voor Vee en Vlees (Product Board for Cattle and Meat) which is, among other things, the agency responsible in the Netherlands for the payment of Community export refunds on beef and veal.

In a nutshell the questions that the College van Beroep has to decide are whether Ferwerda is entitled to retain certain sums erroneously paid to it by the Respondent in respect of export refunds on consignments of frozen veal that were supplied by Ferwerda in 1976 to ships of the Holland-America line then in Bermudan waters; and, if not, whether Ferwerda is entitled to base on the error a claim for damages against the Respondent.

The Regulations fixing the export refunds on beef and veal that were in force at the relevant dates were Commission Regulation (EEC) No 584/76 of 15 March 1976 and Commission Regulation (EEC) No 2492/76 of 13 October 1976. The preamble to each of those Regulations contained recitals to the effect that the then market situation in the Community and the selling possibilities in third countries called for the granting of refunds on exports of frozen meat to certain destinations only. Those destinations were specified in the Annex to each Regulation. They were: European third countries, Jordan, third countries on the Mediterranean or on the Persian Gulf, third countries in the Arabian Peninsula and in Africa and, in the case of certain cuts, the United States of America. The Bermudas were not included. A footnote in each of the Annexes stated that "destinations mentioned in Article 3 of Regulation (EEC) No 192/75" were "also to be understood as European third countries". Regulation No 192/75 is a Commission Regulation "laying down detailed rules for the application of export refunds in respect of agricultural products". Article 3 thereof provides for supplies within the Community to ships, aircraft, international organizations and foreign armed forces to be, in certain circumstances, treated as exports from the Community. It does not extend to the victualling of ships outside the Community.

In claiming the refunds Ferwerda purported to avail itself of a procedure provided for by Article 3 of Council Regulation (EEC) No 441/69. That Regulation is described in its title as "laying down additional general rules for

granting export refunds" on certain products. From the penultimate recital in the preamble to the Regulation it seems that the idea behind Article 3 is to compensate for the fact that, in the case of some products imported from third countries, collection of the levy may be suspended by placing them in a bonded warehouse or under a "free zone procedure". The compensation takes the form of a procedure whereunder, in the case of Community products listed in Annex II to the Regulation, including beef and veal, payment of an export refund may be obtained as soon as they have been similarly placed under customs control.

Article 3 provides, so far as material:

"1. A refund or, where the refund is varied according to use or destination, the part of the refund calculated on the basis of the lowest rate shall be paid on request as soon as the products or goods listed in Annex II have been brought under a bonded warehouse or a free zone procedure.

The obligation to export those products or goods from the Community within a set time limit, except in the case of *force majeure*, shall be secured by the lodging of a deposit guaranteeing the reimbursement of an amount equal to the refund paid, plus a specified additional amount, if exportation does not take place within that period.

. . ."

Commission Regulation (EEC) No 1957/69 lays down detailed rules for the application of the procedures introduced by Regulation No 441/69, including the procedure provided for by Article 3. The provisions of Regulation No 1957/69 are somewhat complex, not least because some of them refer back to provisions of an earlier Commission Regulation, No 1041/67 EEC, which was itself replaced by Regulation No 192/75. One accordingly has to construe those references as references to the corresponding provisions of Regulation No 192/75, which are traceable through a "Table of Equivalence" annexed to Regulation No 192/75.

Article 1 (2) (a) of Regulation No 1957/69 provides in effect, so far as material, that Article 11 of Regulation No 192/75 shall apply to transactions carried out in pursuance of Regulation No 441/69. I need not set out the lengthy provisions of Article 11. Suffice it to say that, in the present context, they serve to implement the requirement in Article 3 of Regulation No 441/69 that "where the refund is varied according to use or destination" only "the part of the refund calculated on the basis of the lowest rate" is to be paid at the time when the goods are brought under customs control. They make it clear that, where, for a given product, there are destinations in respect of which no refund has been fixed, no payment at all may be made at that stage.

By the combined effect of Article 2 (1) (b) and Article 4 (1) of Regulation No 1957/69 it is provided that, where Article 3 of Regulation No 441/69 is applied, the rate of refund shall, unless it is fixed

in advance, be that in force on the day on which "the customs authorities accept the document in which the exporter states his intention to bring the goods or products under customs control with a view to their coming under a bonded warehouse or a free zone procedure with a view to exportation". Article 4 (2) provides that the goods may remain under the bonded warehouse or free zone procedure for not more than six months from that day.

Article 6 (1) provides in effect and so far as material that the deposit to be lodged under Article 3 of Regulation No 441/69 shall be 120 % of the refund paid and that it shall be forfeited "when proof is not furnished", within a prescribed time, that "the products or goods, unaltered, have left the geographical territory of the Community, or reached their destination within the meaning of Article 3 of Regulation No [192/75], within forty-five days ... from the date on which the bonded warehouse or free zone procedure ended ..."

Article 6 (5) is the provision under which, in this case, the Respondent claims to be entitled to recover the sums that it erroneously paid to Ferwerda. It is in these terms:

"The amount of the refund paid, plus any increase, shall be repaid in accordance with the provisions of this Article if the proofs referred to in paragraph 1 are not furnished within the time limits laid down. In such case, if repayment has been claimed but is not received, the deposit which was lodged shall be forfeited."

The College van Beroep found the following facts.

On 16 March 1976 Ferwerda put into a bonded warehouse at Rotterdam 4 511 kg of frozen veal, stating on the appropriate form that it was for export to "various ships" ("diverse schepen") pursuant to the provisions of Council Regulation No 441/69 and Commission Regulation No 1957/69. That frozen veal was withdrawn from bond in three consignments, the first two on 29 March 1976 and the third on 12 May 1976. The "control forms" completed when the withdrawals were effected showed the consignees to be, respectively, the "M. S. Statendam", the "M. S. Rotterdam" and the "M. S. Veendam Ned", with, in each case, an indication that the ship concerned was in the Bermudas. On the basis of the "export form" lodged on 16 March 1976 the Respondent, by note dated 13 April 1976, advised Ferwerda that it was entitled to a refund of 12 410.66 guilders. That sum was paid by the Respondent to Ferwerda on a date that the College van Beroep does not specify.

On 2 November 1976 Ferwerda similarly put into bond 820 kg of frozen veal, which it withdrew on the same day. On this occasion Ferwerda stated, both on the "export form" lodged when the goods were placed in bond and on the "control form" lodged on their withdrawal, that the destination of the goods was the "M. S. Rotterdam in the Bermudas" ("M. S. Rotterdam Bermuda-eilanden"). On the basis of the "export form" the Respondent notified Ferwerda on 23 November 1976 that it was entitled to a refund of 1 540.62 guilders plus an m.c.a. That sum too was paid by the Respondent to Ferwerda on a date that the College van Beroep does not specify.

It is common ground that Ferwerda was not entitled to the payments that it received from the Respondent. That must be so, in the first place because, at the relevant time, export refunds for frozen veal had been fixed for some destinations only, so that they could not be claimed under the procedure provided for by Article 3 of Regulation No 441/69 and, in the second place, because such refunds were not payable on supplies of frozen veal to ships in Bermudan waters.

There is a suggestion in some of the papers before the Court that Ferwerda may have been misled into claiming the refunds by a circular issued by the Respondent on 15 October 1976, in which the Respondent sought to give to meat exporters' information about the circumstances in which refunds were payable. The circular stated that they were payable on "supplies for victualling seagoing ships" ("leveranties voor de bevoorrading van zeeschepen") without qualification, i. e. without specifying that that was so only in the case of ships within the Community. It seems to me manifest, however, that that circular cannot have prompted the claim made by Ferwerda, seven months earlier, in March 1976. Nor, even supposing that the circular encouraged Ferwerda to make its second claim, in November 1976, can I see the relevance of that. As was virtually admitted in this Court on behalf of the Respondent, the reference in the export form of 16 March 1976 to "various ships" should at least have put the Respondent on inquiry, whilst the express mention in the form of 2 November 1976 of the "M. S. Rotterdam in the Bermudas" should, in itself, have led to the immediate rejection of the claim.

The rest of the material facts can be briefly stated.

As regards the deposits required under Article 3 of Regulation No 441/69 and Article 6 (1) of Regulation No 1957/69, it appears that Ferwerda had a running account with the Respondent. A sum equal to 120 % of 12 410.66 guilders was debited to that account on 5 April 1976 and a sum equal to 120 % of 1 540.62 guilders was debited to it on 12 November 1976.

On 16 December 1977 the Respondent wrote to Ferwerda pointing out that it should never have received the sums of 12 410.66 guilders and 1 540.62 guilders in question and asking Ferwerda to repay them. The Respondent added that, once Ferwerda had repaid those sums, it would be credited with the amounts of the deposits. Ferwerda complied and was credited with the amounts of the deposits on 27 December 1977. On 13 January 1978, however, Ferwerda initiated the present proceedings before the College van Beroep by way of appeal against the "decision" of the Respondent embodied in its letter of 16 December 1977.

On 15 December 1978 the College van Beroep made the Order for Reference, by which it referred three questions to this Court.

The first question is in these terms:

"Does Article 6 (5) of Regulation (EEC) No 1957/69, properly interpreted, mean that a principle of legal certainty laid down in, or applied by virtue of, a national statute may not be relied upon as a defence to a claim for repayment of a refund?"

By way of explanation of that question the College van Beroep refers to Article 9 (1) of the Dutch "In- en Uitvoerwet" (Import and Export Statute) under which a refund may be withdrawn only if the information given in order to obtain it appears to have been incorrect or incomplete, with the result that a different decision would have been taken on the application for the refund if the true position had been fully known at the time when it was examined. The College van Beroep also refers to the "Memorie van Toelichting" (Explanatory Memorandum) accompanying the Bill for that Statute, in which it was stated that the restriction to be placed by the Statute on the power to withdraw *(inter alia)* refunds was intended "in the interests of legal certainty" ("in het belang der rechtszekerheid"). The College says that, in its provisional view, the decision appealed against, in particular in so far as it relates to the claim for repayment of the refund granted by the Respondent in its note of 23 November 1976, is incompatible also "with the generally-accepted legal principle of sound administration which requires that legal certainty should not be adversely affected". The question, as the College van Beroep sees it, is whether those rules of Dutch law can be invoked as a defence to a claim made under Article 6 (5) of Regulation No 1957/69.

The College's second question is directed to ascertaining whether, in the alternative, any principle of legal certainty derived from Community law can be relied on as a defence to such a claim. That question is in these terms:

"Does it follow from a proper interpretation of Article 6 (5) of Regulation No 1957/69 that a decision calling for repayment of a refund is not subject to any principle of legal certainty derived from Community law?"

Lastly the College's third question is:

"If the answer to Questions I and II must be that it is not possible in such a case to rely on a national or Community principle of legal certainty, does Article 6 (5) of Regulation (EEC) No 1957/69 also preclude a claim for damages by the exporter against the authority that has sought repayment of the refund, based on the same facts and circumstances as might justify reliance on the principle of legal certainty if this were not precluded by Article 6 (5)?"

In this Court the Commission took *in limine* the point that Article 6 (5) did not apply at all in the circumstances of this case. I agree. It seems to me clear that, as the Commission submits, Article 6 (5) is not designed to deal with a case where there has been a mistake on the part of the national agency responsible for administering the legislation. It assumes that a payment has been correctly made to the trader concerned at the time when his goods were placed under customs control and is intented to deal with the eventuality of his not subsequently exporting the goods within the time limits mentioned in Article 6 (1). Here, as the Commission points out, Ferwerda did literally comply with the requirements of Article 6 (1) in that it did, within those time limits, furnish

proof that its goods, unaltered, had left the geographical territory of the Community. The vice in the present case does not lie in any failure on the part of Ferwerda to comply with Article 6 (1), but in the circumstance that it received at the time when its goods were placed in bond payments to which it was not entitled.

The problem to which this case really gives rise is thus somewhat different from what the College van Beroep thought it was. It is whether, where an export refund has been mistakenly paid to a trader by a national agency, the question whether the amount of it may be recovered from the recipient is governed by Community law or by national law. That is a problem of a familiar kind. One thinks of cases such as Case 26/74 *Roquette* v *Commission* [1976] 1 ECR 677, Case 33/76 *Rewe* v *Landwirtschaftskammer Saarland* [1976] 2 ECR 1989, Case 45/76 *Comet* v *Produktschap voor Siergewassen,* ibid. p. 2043, Case 118/76 *Balkan-Import-Export* v *HZA Berlin-Packhof* [1977] 1 ECR 1177 and Case 177/78 *Pigs and Bacon Commission* v *McCarren & Co. Ltd.* (26 June 1979, not yet reported), to mention only some of the more recent, where the Court has had to consider questions concerning the respective spheres of application of Community law and national laws. A principle that clearly emerges from such cases is that, where Community law does not prescribe the remedies applicable in particular situations, the remedies available under national law are to be resorted to.

Thus, given that Article 6 (5) of Regulation No 1957/69 is inapplicable, the question is whether there is any rule of Community law that governs the present situation. It seems to me clear that there is none.

Reference was made in the observations of the Respondent and in those of the Commission to Article 8 of Council Regulation (EEC) No 729/70 "on the financing of the common agricultural policy". That Article provides:

"1. The Member States in accordance with national provisions laid down by law, regulation or administrative action shall take the measures necessary to:

— satisfy themselves that transactions financed by the Fund [i.e. the EAGGF] are actually carried out and are executed correctly;

— prevent and deal with irregularities;

— recover sums lost as a result of irregularities or negligence.

The Member States shall inform the Commission of the measures taken for those purposes and in particular of the state of the administrative and judicial procedures.

2. In the absence of total recovery, the financial consequences of irregularities or negligence shall be borne by the Community, with the exception of the consequences of irregularities or negligence attributable to administrative authorities or other bodies of the Member States.

..."

As the Commission pointed out, however, that Article is essentially about the legal relations between the Community and the Member States. Any

intention on the part of its authors to regulate the relations between Member States and private persons is virtually denied by the words "in accordance with national provisions laid down by law, regulation or administrative action".

Article 8 fell to be considered by the Court recently in Case 11/76 *Netherlands* v *Commission* and Case 18/76 *Germany* v *Commission* (7 February 1979, not yet reported). In both those cases the questions that arose concerned, of course, the legal relations between the Community and Member States. But two points that were made in the Judgments in those cases seem to me relevant here.

Firstly, in both cases, the Court acknowledged that, neither under Community law nor under most national legal systems, would it be possible, in general, to recover from a person sums paid to him by a national authority in mistaken, albeit bona fide application of Community law (see paragraph 12 of the Judgment in Case 11/76 and paragraph 6 of the Judgment in Case 18/76). That negatives, as it seems to me, any possibility of interpreting Article 8 as laying down a general Community rule that restitution of such sums must be made in all cases.

Secondly the Court held, again in both cases, that, in such circumstances, Article 8 was wholly inapplicable and any resultant loss must be borne by the Member State whose agency had made the mistake. If that be right, and I do not doubt that it is, it seems logical that it should be left to each Member State to determine, by its own laws, when and to what extent it ought to bear the loss.

To that one might object that, if so, there will be lack of uniformity in the consequences of the application of Community law in the different Member States. The answer to that objection is, I think, twofold. First that this Court cannot create Community law where none exists: that must be left to the Community's legislative organs. And secondly that we are here dealing with the consequences of administrative mistakes, in other words of a situation that should be abnormal. Such mistakes should be few and far between, and should not materially affect the conditions in which traders in different Member States compete.

For the sake of completeness I should mention that I have also considered Council Regulation (EEC) No 283/72 "concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field". I can, however, see nothing in that Regulation that bears on the present problem.

Thus, in my opinion, the conclusion is inevitable that there is no pertinent Community rule, and that the matter is governed in each Member State by the law of that State. It seems to follow that in the Netherlands it is governed by Article 9 (1) of the In- en Uitvoerwet.

In the result I am of the opinion that Your Lordships should, in answer to the first question referred to the Court by the College van Beroep, rule that, where an export refund is erroneously paid by an administrative authority or other body of a Member State in purported pursuance of Article 3 of Regulation (EEC) No 441/69, the circumstances in which the amount of it may be recovered from the recipient are to be determined in accordance with the law of that State.

On that footing, the College's second and third questions do not call for any answer.