JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
21 April 2004 *

In Case T-172/01,

M., residing in Athens (Greece), represented by G. Vandersanden and H. Tagaras, lawyers,

applicant,

v

Court of Justice of the European Communities, represented by M. Schauss, acting as Agent, assisted by T. Papazissi, lawyer, with an address for service in Luxembourg,

defendant,

* Language of the case: French.

APPLICATION for annulment of the refusal to grant the applicant a survivor's pension in right of her former husband,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: A.W.H. Meij, President, N.J. Forwood and H. Legal, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 14 May 2003,

gives the following

Judgment

Legal background

1 Article 15(7) of Regulation No 422/67/EEC, 5/67/Euratom of the Council of 25 July 1967 determining the emoluments of the President and Members of the Commission and of the President, Judges, Advocates-General and Registrar of the Court of Justice (OJ, English Special Edition 1967, p. 222), as amended, in

particular, by Article 2(3) of Council Regulation (Euratom, ECSC, EEC) No 1416/81 of 19 May 1981 (OJ 1981 L 142, p. 1) (hereinafter 'the Emoluments Regulation') determines the financial rights of persons entitled under the abovementioned Members of the Community institutions by analogy with Articles 22, 27 and 28 of Annex VIII to the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations').

2 Article 27 of Annex VIII to the Staff Regulations states:

'The divorced wife of an official or a former official shall be entitled to a survivor's pension, as defined in this chapter, provided that, on the death of her former husband, she can justify entitlement on her own account to receive maintenance from him by virtue of a court order or as a result of a settlement between herself and her former husband.

The survivor's pension may not, however, exceed the amount of maintenance paid at the time of her former husband's death, the amount having been adjusted in accordance with the procedure laid down in Article 82 of the Staff Regulations.

...'

Background to the dispute

3 In 1981, the applicant married Mr M., who held the office of Judge at the Court of Justice from 1983 to 1997. Their marriage was dissolved by divorce granted by

decree nisi on 26 February 1997, then by decree absolute on 14 July 1998. The religious certificate of divorce, the drawing up of which constitutes a necessary formality in Greece in the case of a religious marriage, was issued on 4 March 1999.

4 By fax of 15 March 1999, Mr M. sent an official certificate of divorce to the Personnel Division of the Court of Justice.

5 According to a memorandum of 2 June 1999, entitled 'Retirement pension of Judge [M.]', sent by that institution's Head of Personnel Division to the Head of its Finance Division:

'Judge [M.] has just informed us that he [has been] divorced [since] 26 February 1997. The ecclesiastical divorce was granted on 4 March 1999.

In addition, he has confirmed to us, through Ms [K.], that no maintenance was paid to his ex-wife.'

6 Under a holograph will drawn up on 22 September 1999, Mr M. appointed his brother universal legatee in respect of his assets. A certificate drawn up on 31 August 2000 by the clerk of the Monomeles Protodikio (Court of First Instance (single judge)), Athens (Greece) states that the deceased's brother is his sole testamentary legatee in respect of the entire assets of the estate

7 Mr M. died on 23 March 2000.

8 As the divorced spouse of a former Member of a Community institution, Mrs M. applied to the administrative services of the Court of Justice, by letter of 18 July 2000, for the grant of a survivor's pension in right of the late Mr M. In that letter, the applicant referred to an agreement between herself and Mr M., 'relating to the payment of maintenance, which [her] husband [had] put into effect even before the divorce was granted'.

9 By letter of 5 October 2000, the administrative services of the Court of Justice replied to the applicant that she could be entitled to the survivor's pension provided for in Article 15 of the Emoluments Regulation, provided that she could justify entitlement on her own account, on the death of her former husband, to receive maintenance from him by virtue of a court order or as a result of a settlement between herself and the late Mr M.

10 Mrs M. replied, by letter of 8 November 2000, that Mr M. had himself offered her monthly maintenance of BEF (Belgian francs) 200 000 (EUR 4 957.87), to which she had agreed.

11 According to the applicant, an agreement to that effect was concluded orally by Mr and Mrs M. in the spring of 1999, at a meeting arranged in Athens between the former spouses, at which Mr O. was present.

12 In support of her claims, Mrs M. annexed to her letter of 8 November 2000 two affidavits made by Mr O. and Mr P. on 6 and 7 November 2000 respectively.

13 In his affidavit, Mr O. claims to have witnessed, a few weeks after the decree absolute was pronounced, a conversation between the former spouses, during which Mrs M. agreed to Mr M.'s paying her maintenance of BEF 200 000 per month.

14 In his affidavit, Mr P. claims to have personally seen, on at least one occasion, the handing over by a third party to Mrs M., from Mr M., of a sum of money which she told him was a maintenance payment.

15 By memorandum of 5 March 2001, the Financial Controller of the Court of Justice asked the Court's Director of Personnel and Finance for clarification of the information that could justify the payment of a survivor's pension to Mrs M. He referred to the abovementioned memorandum from the Head of the Court's Personnel Division of 2 June 1999. The Financial Controller raised the question, in particular, of whether there might be any bank records from which the movements of funds corresponding to payment of any maintenance could be traced.

16 Following the implied rejection of her claim for a survivor's pension, the applicant submitted a complaint against that decision on 23 March 2001.

17 That complaint was rejected by decision of the Complaints Committee of the Court of Justice of 29 May 2001, on the ground that Mrs M. had not proved to the requisite legal standard that she was entitled on her own account to maintenance from her former husband by virtue of a court judgment or as a result of a settlement. Firstly, that decision stated that the two affidavits were not corroborated by any written record concerning the existence of the alleged agreement, the amount of the maintenance to which such an agreement related or its implementation, or by any other evidence. Secondly, the decision noted that, shortly after the ecclesiastical divorce granted on 4 March 1999, Mr M. had

informed the Court's Personnel Division that 'no maintenance was paid to his ex-wife' and that that statement had not been subsequently revoked. The Complaints Committee inferred from that statement that Mrs M. did not satisfy the condition to which Article 27 of Annex VIII to the Staff Regulations makes entitlement to a survivor's pension subject.

18 Against that decision rejecting her complaint, Mrs M. brought the present application for annulment, which was lodged at the Registry on 26 July 2001.

Procedure before the Court of First Instance

19 Since the President of the First Chamber, B. Vesterdorp, was unable to take part in the proceedings, Judge A.W.H. Meij was designated to take his place, by decision of the President of the Court of First Instance of 21 September 2001.

20 The defendant lodged its defence on 11 October 2001.

21 By letter of 18 December 2001, the brother of Mr M., on his own initiative, sent the defendant a set of documents which he considered might help to clarify the facts.

22 The defendant produced before the Court a number of those documents received from the brother of Mr M., in an annex to the rejoinder lodged on 16 January 2002. In that document, the defendant also requested that the Court summon Mr T. as a witness.

23 After the end of the written procedure, the applicant lodged, by letter of 15 February 2002, two further affidavits, drawn up on 6 and 7 February 2002, concerning inter alia the conduct of the divorce proceedings between the former spouses, the supposed consent of Mr M. to pay maintenance to his ex-wife and the circumstances in which the payment of such maintenance took place.

24 Since Judge Moura Ramos was unable to sit because of the expiry of his term of office as a Judge at the Court of First Instance, the President of the Court of First Instance designated, pursuant to Article 32(3) of the Rules of Procedure of the Court of First Instance, Judge N.J. Forwood to complete the Chamber hearing the case.

25 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure and, subject to the observations of the parties, to examine as witnesses Mr O. and Mr T.

26 By letter of 11 March 2003, the Court invited the parties to submit their comments on that measure of inquiry within 15 days.

27 By letter of 24 March 2003, the applicant submitted that examination of Mr O. was essential and left the examination of Mr T. to the discretion of the Court.

28 By order of 3 April 2003, the Court (First Chamber) decided to examine Mr O. and Mr T. as witnesses with regard to any settlement agreed by the former

spouses and providing, according to the applicant, for maintenance from Mr M. for Mrs M., and with regard to the continued payment of such maintenance until the death of Mr M.

29 At a hearing *in camera* held on 14 May 2003, prior to the hearing of oral argument on the same day, Mr O. and Mr T. were examined as witnesses in accordance with the requirements laid down in Articles 65 to 75 of the Rules of Procedure.

30 During the hearing of oral argument, which was also held *in camera*, the parties presented their pleadings and gave their replies to the Court's questions.

31 Following that hearing, the Court decided to stay the closure of the oral procedure in order to ascertain whether it was in possession of all the evidence necessary for it to give judgment or whether, on the contrary, further measures of inquiry or of organisation of procedure were necessary.

32 In the final analysis, the Court considered that it had been provided with sufficient information by way of the documents in the file, the arguments of the parties and the evidence of witnesses at the hearing on 14 May 2003. In particular, it did not consider that examination of further witnesses was necessary to establish the truth of the situation, since the applications made to that effect by the two parties did not refer to any factual evidence which might affect its assessment of the relevant circumstances of the case.

33 Accordingly, the President of the First Chamber declared the oral procedure closed and that the case should proceed to deliberation by decision of 23 October 2003.

Forms of order sought by the parties

34 The applicant claims that the Court should:

— annul the contested decision;

— acknowledge her entitlement to the grant of a survivor's pension;

— set the amount of that pension at BEF 200 000 (EUR 4 957.87) per month;

— order the defendant to pay the costs.

35 The defendant contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Admissibility of the evidence offered in the light of Article 48(1) of the Rules of Procedure

36 During the hearing of oral argument, the applicant disputed the admissibility of the documents produced by the defendant in the annex to the rejoinder.

37 For its part, the defendant contended that the evidence offered by the applicant in the annex to her letter of 15 February 2002, consisting of two further affidavits made by witnesses, was inadmissible.

38 The Court recalls that Article 48(1) of the Rules of Procedure provides:

'In reply or rejoinder a party may offer further evidence. The party must, however, give reasons for the delay in offering it.'

39 The evidence submitted by the defendant in the annex to the rejoinder, consisting of the holograph will made on 22 September 1999 by Mr M., the certificate of succession issued by the Monomeles Protodikio, Athens, and Mr M.'s bank statements and transfer orders, satisfies the requirements of that provision.

40 It was only by letter of 18 December 2001, after the defence had been lodged on 11 October 2001, that the brother of Mr M. sent those documents to the defendant. The latter was therefore unable to produce them when lodging its defence.

41 The defendant could thus validly annex to its rejoinder the documents which it put forward as having been received from the brother of Mr M. and of which the applicant has not disputed the origin.

42 Those documents must therefore be admitted as cogent evidence before the Court.

43 By contrast, the two pieces of evidence which the applicant asked to have placed on the file after the end of the written procedure, in her letter of 15 February 2002, consisting of two affidavits made on 6 and 7 February 2002, must be rejected as out of time.

44 Although the requirement that the procedure be fair may, in certain circumstances, lead the Court to allow the lodging of evidence offered after the rejoinder, that requirement applies in a case such as this only if the person offering the evidence was unable, before the end of the written procedure, to obtain possession of the evidence in question, or if evidence produced belatedly by the other party justifies completing the file so as to ensure observance of the rule that both parties should be heard.

45 Firstly, there is nothing to show that the applicant was unable, at the time when she lodged her application, to produce the two affidavits constituting the latest evidence offered by her, having regard to the identity of the proposed witnesses and to the issues on which it is suggested that the Court examine them.

46 Secondly, even if its purpose is to counterbalance the effect of the production of the documents annexed to the defendant's rejoinder, the latest evidence offered by the applicant does not relate to new issues which were being introduced into the case at that late stage, or, in particular, to the provisions of Mr M.'s will, but to the general context of the relations between the two former spouses and to the payment of maintenance by Mr M. Those issues were raised from the start of the dispute and their relevance did not come to light with the production of the evidence offered in the annex to the rejoinder.

Substance

47 In support of her action, the applicant puts forward three pleas in law, alleging that the pre-litigation procedure was irregular, that the statement of reasons for the contested decision rejecting her complaint was defective and that that decision was vitiated by an error of law.

The first plea in law: irregularity in the pre-litigation procedure

Arguments of the parties

48 The applicant complains that the defendant did not, at any stage of the pre-litigation procedure, ask her to produce documents or other specific evidence in order to prove the truth of her version of the facts.

49 The defendant replies that it was not up to it to request a particular document, but that it was sufficient for it to invite the applicant, as it maintains that it did in its letter of 5 October 2000, to produce documents justifying her entitlement to maintenance in the context of the rules applicable.

Findings of the Court

50 It was for the applicant to produce, on her own initiative, all the evidence that she considered necessary and sufficient to 'justify', within the meaning of the first paragraph of Article 27 of Annex VIII to the Staff Regulations, entitlement to the maintenance to which she claimed to be entitled by virtue of the settlement pleaded.

51 Consequently, the letter of 5 October 2000 from the Head of the Personnel Division of the Court of Justice, inviting the claimant to 'send [him] documents justifying [her] entitlement to maintenance', even though it did not identify the specific nature of the documents to be produced, was nevertheless sufficiently precise in that regard, so that there is no irregularity capable of vitiating the procedure.

52 Moreover, it would have been inappropriate for the defendant to invite the applicant to produce specific evidence in support of her pension claim, since, as the applicant herself maintains in the presentation of her third plea in law, all forms of evidence normally allowed both by the applicable national law and by the Rules of Procedure are admissible in that regard.

53 The first plea in law must therefore be rejected.

The second plea in law: defective statement of reasons for the contested decision rejecting the applicant's complaint

Arguments of the parties

54 The applicant submits that the defendant was not entitled, without giving further reasons, in the absence of which any judicial review of the contested decision would be prevented, to characterise as insufficient the affidavits of Mr O. and Mr P. produced in support of her claim for a survivor's pension.

55 The contested decision rejecting her complaint is doubly vitiated by a defective statement of reasons in that regard, in view of the clear and irreproachable moral integrity of Mr O. and Mr P. The defendant does not explain at all why the applicant should have produced written documents in support of the statements made by those individuals.

56 In any event, the applicant notes that there is a contradiction between the defendant's recognition of the validity of oral agreements concerning maintenance and its requirement that written documents be produced to corroborate the affidavits establishing the existence of such an agreement.

57 The defendant contends that sufficient reasons were stated for the contested decision, since the applicant understood the reasoning on which the rejection of her claim for a survivor's pension was based, and that that reasoning enables the Court to review the legality of the decision.

58 As regards the moral integrity of the persons making the affidavits, it cannot have the effect of automatically conferring evidential value on those affidavits, unless it is accepted that the Community's administrative services must be satisfied with such affidavits, without further examination, whenever they are produced in support of an application for reimbursement of expenses or for financial benefits claimed under the Staff Regulations.

59 Finally, it is not contradictory to recognise the possibility of creating an entitlement to maintenance by oral agreement while at the same time requiring a written document corroborating affidavits provided by third parties. Although the defendant concedes that Greek law, which it accepts as the law governing the conditions of validity of the agreements in question, does not make the validity of such agreements dependent on their being in written form, that same law allows the existence of such agreements to be proved without the production of a written document only in well-defined circumstances.

Findings of the Court

60 In stating that it considered the affidavits made before an Athens notary by Mr O. and Mr P. to be insufficient, in the absence of corroboration by any other document or evidence, to justify entitlement to maintenance as the basis for the grant of a survivor's pension, the Complaints Committee of the Court of Justice acquainted both the applicant and the Court of First Instance with the circumstances of fact and of law forming the basis of the contested decision. That decision therefore satisfies the obligation to state reasons.

61 Moreover, it must be borne in mind that the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested decision (Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35).

62 Consequently, in so far as the applicant complains that the defendant too summarily declined to accept the evidential value of the affidavits of Mr O. and Mr P., having regard inter alia to the recognised good moral character of those individuals, that claim, alleging an error in the assessment of the value of the documents produced, actually relates to the criticism of the merits of the contested decision.

63 The same applies to the alleged contradiction between the acceptance of the validity of an oral agreement and the requirement of written documents, which, if it were established, could constitute an error of law, but would not indicate any inadequacy in the statement of reasons.

64 Those claims will therefore have to be examined when the third plea in law is considered, that is, in ascertaining whether the Complaints Committee of the Court of Justice was right to consider that the affidavits made by Mr O. and Mr P. did not prove, by themselves, that the applicant was entitled to maintenance from her former husband as a result of a settlement.

65 In those circumstances, the second plea in law must be rejected.

The third plea in law: error of law arising from the defendant institution's refusal to regard as established the applicant's entitlement to maintenance as a result of a settlement, within the meaning of Article 27 of Annex VIII to the Staff Regulations

66 In order to decide on the merits of the contested decision, the Court must determine whether it can be regarded as established that Mrs M. is entitled to maintenance as a result of an oral agreement between herself and her former

husband, maintenance which, when he died, Mr M. would have been liable to pay to his former wife. Such maintenance would render Mrs M. eligible, up to the amount thereof, for a survivor's pension pursuant to Article 27 of Annex VIII to the Staff Regulations.

67 It is important to ascertain first whether the alleged agreement could lawfully be concluded in oral form.

Validity of providing for maintenance by oral agreement for the purposes of the first paragraph of Article 27 of Annex VIII to the Staff Regulations

68 First, it is necessary to identify the law governing the conditions in which an agreement providing for maintenance could, in some circumstances, be validly concluded in oral form by Mr and Mrs M.

69 The two parties agree that this question must be resolved on the basis of the relevant provisions of Greek civil law.

70 The Court observes in that regard that the terms of a provision of Community law — such as the first paragraph of Article 27 of Annex VIII to the Staff Regulations, which is applicable in this case on account of the reference to that provision in Article 15(7) of the Emoluments Regulation — which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent interpretation, which must take into account the context of the provision and the purpose of the relevant rules (Case T-43/90 *Díaz García* v *Parliament* [1992] ECR II-2619, paragraph 36).

71 However, even in the absence of such an express reference, the application of Community law may necessitate a reference to the laws of the Member States where the Community judicature cannot identify in Community law or in the general principles of Community law criteria enabling it to define the meaning and scope of a Community provision by way of independent interpretation (*Díaz García* v *Parliament*, cited above, paragraph 36).

72 In this case, the concept of 'maintenance ... as a result of a settlement between herself and her former husband', within the meaning of the first paragraph of Article 27 of Annex VIII to the Staff Regulations, cannot be given an independent Community interpretation. On the contrary, the concept of a maintenance obligation agreed between former spouses by reason of their divorce is one of the financial consequences arising from the decree of divorce pronounced on the basis of the rules of the applicable civil law.

73 Consequently, the conditions governing the validity of an agreement providing for payment of maintenance for the divorced spouse of a servant of the Communities or, in this case, a former Member of a Community institution must, in principle, be determined in accordance with the law which governs the consequences of divorce, that is, in this instance, Greek law, pursuant to which the divorce was granted (see, to that effect, Case 24/71 *Meinhardt* v *Commission* [1972] ECR 269, paragraph 6).

74 It is common ground that the relevant provisions of the Greek Civil Code allow, in the case of divorce, the establishment of entitlement to maintenance for a former spouse by mere oral agreement between the former spouses.

75 Mr M. could therefore validly consent to pay maintenance to Mrs M. by oral agreement.

76 Since such an oral agreement is valid in that form under the applicable national law, it must now be examined whether its existence may, in this case, be considered to be established, in the absence of a written document, on the basis of oral evidence.

Admissibility of witness evidence for the purpose of establishing the existence of a settlement

— Arguments of the parties

77 The applicant submits that the existence of entitlement to maintenance payable to her under a settlement within the meaning of the first paragraph of Article 27 of Annex VIII to the Staff Regulations may be demonstrated by any evidence normally allowed by Greek law or by the Rules of Procedure.

78 In this case, Article 393(1) of the Greek Code of Civil Procedure requires documentary evidence, and excludes the evidence of witnesses, as proof of an agreement relating to a financial obligation in excess of a maximum amount, increased from EUR 1 467.35 to EUR 5 869.41 by the new legislative provisions.

79 However, under Article 394 of that Code, the evidence of witnesses is admitted even with regard to agreements relating to sums exceeding that legal maximum, where:

— rudimentary evidence in writing exists, arising from a document having evidential value;

— it is physically or ethically impossible to obtain written evidence;

— it is established that a document that was drawn up has been accidentally lost;

— the nature of the legal transaction or the specific circumstances which surrounded it, especially if commercial dealings are involved, justify recourse to witnesses.

80 The present case is clearly covered by both the second and the fourth of those exceptions. Any 'negotiation' by Mrs M. of the amount or details of the maintenance, such as the frequency and method of payment or the drawing up of a written document, was out of the question if the risk of aggravating Mr M.'s very critical state of health at the time of his meeting with Mrs M. was to be avoided.

81 In the defendant's opinion, the types of evidence which may be admitted in order to establish the existence of the settlement pleaded are those resulting, on the one hand, from the provisions adopted with regard to payment of the financial benefits provided for by the Staff Regulations and contained in the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1), which was then in force, and, on the other, from the rules of Greek law relating to proof of agreements for the payment of maintenance by reason of divorce.

82 Although, in the defendant's submission, Greek law permits the creation by oral agreement of entitlement to maintenance in the case of divorce, it nevertheless requires documentary proof, by means of a document drawn up in advance by the parties, of agreements relating to a financial obligation the amount of which, as in this case, exceeds the legal maximum.

83 The affidavits made by Mr O. and Mr P. do not constitute the documentary evidence envisaged by Article 393(1) of the Greek Code of Civil Procedure. Those two documents may only, at the very most, supplement rudimentary evidence in writing.

84 In any event, the procedural admissibility of testimony as evidence does not oblige the court to accept the substance of that testimony. Assessment of its trustworthiness is in the free and absolute discretion of the court, which does not have to justify the fact that it may have disregarded it.

— Findings of the Court

85 The principles governing the admissibility of types of evidence for the existence of an oral agreement providing, by reason of the divorce of the former spouses, for maintenance for Mrs M. from the deceased are governed, on the same basis as the conditions of validity of such an agreement, by Greek law (see, to that effect, the judgment in *Meinhardt* v *Commission*, paragraph 12).

86 Since Greek law does not make the validity of an agreement providing for maintenance dependent on the existence of a written document, the Court of First Instance cannot disregard a type of evidence allowed under the applicable national law for the purpose of establishing the existence of such an agreement lawfully concluded in oral form.

87 Although the admissibility of types of evidence for the existence of the agreement pleaded is thus governed by Greek law, it is nevertheless for the Court of First

Instance, hearing an action brought against a refusal to grant a survivor's pension considered to arise from the application of the first paragraph of Article 27 of Annex VIII to the Staff Regulations, to ascertain, in order to ensure the correct application of that provision, whether the conditions required by the national law are satisfied (see, to that effect, *Meinhardt* v *Commission*, paragraph 12).

88 That obligation presupposes compliance with the provisions of the Court's Rules of Procedure and with the general principles applicable to the taking of evidence, in particular as regards the admissibility of types of evidence and, therefore, the evidence of witnesses, the procedures for examining the witnesses summoned and the interpretation which must be given to the facts adduced by those witnesses. Like any court, the Court of First Instance must exercise its jurisdiction in accordance with the provisions conferring it.

89 It is common ground that the agreement pleaded must be regarded as providing for maintenance entailing financial obligations amounting to more than the maximum above which Greek law excludes, in principle, recourse to witness evidence so far as contracts are concerned.

90 However, at the hearing of oral argument, the applicant maintained, without being effectively contradicted on this point by the defendant, that her former husband would never have agreed to put in writing an agreement providing for the payment to her of maintenance.

91 It must also be conceded that the relations between former spouses may, in circumstances such as those of this case, make it extremely difficult for one of them to ask the other for written evidence of an agreement made between them.

92 It follows that the applicant may be considered to have found it physically and ethically impossible, within the meaning of the second indent of Article 394 of the Greek Code of Civil Procedure, to obtain a written document recording the conclusion of the agreement pleaded.

93 For the purpose of establishing the existence of that agreement, the evidence of witnesses must therefore be regarded as admissible on the basis of the consistent provisions of Greek law and the Rules of Procedure. The evidence of witnesses is, in this case, both allowed by the aforementioned provisions of the Greek Code of Civil Procedure and provided for by Article 65(c) of the Rules of Procedure.

94 However, only the testimony which was obtained by it at the hearing held on 14 May 2003 in accordance with Articles 65 to 76 of the Rules of Procedure constitutes testimony admissible as such by the Court of First Instance. The affidavits made by Mr O. and Mr P. cannot be accepted as constituting testimony for the purposes of those provisions since, in the proceedings before the Court of First Instance, they have no status other than evidence offered in support.

Existence of an oral agreement providing for the payment to Mrs M. of maintenance within the meaning of the first paragraph of Article 27 of Annex VIII to the Staff Regulations

— Arguments of the parties

95 The applicant maintains that Mr M. had honoured the agreement concluded orally by the former spouses, providing for maintenance for her, despite the

difficulties resulting from his health problems. Because of his reluctance to engage in bank transactions, Mr M. arranged, for the purpose of implementing the agreement, for two payments in cash to be handed over to Mrs M. in person, through a third party.

96 A first payment was made in June 1999, shortly before Mr M. was hospitalised for an operation, and a second in September 1999, following a temporary improvement in Mr M.'s state of health, in the fortuitous presence of Mr P.

97 Each of those two payments, which were made in June 1999 and September 1999 respectively, represented the aggregate payment of four monthly instalments of the alleged maintenance and therefore amounted to the equivalent in Greek drachmas of BEF 800 000 (EUR 19 831.48).

98 At the time of the payment made in June 1999, Mr M. calculated the monthly instalments as from 1 March 1999, although the divorce formalities had not yet been completed at that date. The payment made in September 1999 included the monthly instalment due in respect of the following month of October.

99 The absence of subsequent payments stemmed from the serious and sudden deterioration in Mr M.'s state of health. He was also undergoing treatment abroad for most of that period.

100 Nevertheless, actual payment of maintenance within the meaning of Article 27 of Annex VIII to the Staff Regulations is by no means a condition for the grant of entitlement to a survivor's pension. Recognition alone of entitlement to maintenance, by virtue of a court order or as a result of a private settlement, is sufficient in that regard.

101 In any event, the records of payments found in the applicant's bank accounts, combined with the affidavits made by Mr O. and Mr P., show beyond any reasonable doubt the genuineness of the monthly payments and the continuity, regularity and amounts of those payments.

102 The defendant objects that the evidence put forward by the applicant does not prove to the requisite legal standard that she satisfies the conditions for the grant of a survivor's pension within the meaning of Article 27 of Annex VIII to the Staff Regulations.

103 As is evident from the term 'justify' in the first paragraph of that provision, the former spouse claiming such a pension must demonstrate the existence of a settlement providing for a maintenance obligation and the validity of that settlement on the death of the person liable. Any relaxation of those requirements would be contrary to the aforementioned provision and to the principle of sound financial management enshrined in Article 274 EC and Article 2 of the Financial Regulation.

104 Assuming that Mr M. made payments to the applicant, the legal basis of those payments remains to be established. In the absence of written evidence, any conclusion as to such a legal basis can be drawn only in the light of the circumstances of this case. The applicant's bank statements do not in any way demonstrate the existence, content or implementation of the settlement pleaded.

105 With regard to Mr M.'s health problems which, according to the applicant, were the cause of the cessation of payment of the maintenance, the defendant points out that the state of health of the person concerned did not prevent him from personally giving payment instructions to his bank during the weeks preceding his death, despite the reluctance to engage in bank transactions which the applicant attributes to him.

106 Neither the documents recording the transactions on Mr M.'s bank accounts nor even his will contain the slightest record or mention of the agreement allegedly concluded. In view of the importance, amount and unusual nature of that agreement, it is incomprehensible that Mr M. did not think it necessary to inform his legatee and the third parties concerned of the obligations into which he had entered towards Mrs M.

— Findings of the Court

107 In accordance with general procedural principles and with the first paragraph of Article 27 of Annex VIII to the Staff Regulations, it is for the applicant to adduce evidence establishing, to the satisfaction of the Court, that she was entitled on her own account, on the death of her former husband, to receive maintenance from him as a result of a settlement between herself and her former husband.

108 The testimony of Mr O., the evidential value of which as to the facts which it records must be accepted, enables the Court to consider it to be established that, in the spring of 1999, there took place between Mr and Mrs M. a conversation during which the former spouses came to an agreement that Mrs M. would receive from her former husband a sum of BEF 200 000 (EUR 4 957.87).

109 In that regard, Mr O. made it clear that he could not remember any negotiations or discussions about the amount, but that he knew that the former Mr and Mrs M. 'had spoken and [that] Mrs M. had said that she agreed to BEF 200 000'.

110 Although the other witness examined by the Court, Mr T., expressed the view that the circumstances recounted by Mr O. were very unlikely, it must be pointed out that, although Mr T. was in regular telephone contact with Mr M. in the spring of 1999, he was not in Athens at that time and could not therefore have any knowledge of Mr M.'s actions and movements unless and in so far as the latter saw fit to mention them to him. Consequently, Mr M.'s silence on this matter vis-à-vis Mr T. does not necessarily mean that the conversation in question did not take place.

111 However, it cannot automatically be inferred from the testimony of Mr O. that the expression of intent recorded by him must be interpreted, for the purpose of applying the Staff Regulations, as a settlement by which Mr M. gave a legally binding undertaking to pay maintenance to Mrs M. in a monthly amount of BEF 200 000 (EUR 4 957.87), thereby recognising her entitlement to such maintenance.

112 It is for the Court alone to characterise in legal terms, in the light of the categories of contract recognised under the Greek law and taking account of all the facts of the case, the conversation which was reported to it by one of the witnesses and which, if the alleged money payments are disregarded, is the only tangible expression of any intention on the part of the former spouses to provide for maintenance by way of a settlement between them.

113 It must be noted in that regard that in Greek law not every expression of intent creates an agreement and that in that legal system, as indeed in others, under varying names, a category known as 'acts of kindness' is recognised, which includes promises accepted, where these are made in a spirit of solicitude or decency but without any intention on the part of the person giving such a promise to accept any legal liability or assume any obligation of performance.

114 The circumstances of this case as a whole, as they appear from, inter alia, the corroborative testimonies of Mr O. and Mr T. in this regard, do not give grounds for considering that the inference of an intention on the part of Mr M. to be bound by a legal obligation to pay maintenance to his former wife is proved to the requisite legal standard.

115 In the first place, such an inference is contradicted by the fact that Mr and Mrs M. opposed each other in divorce proceedings which lasted almost 10 years and following which Mr M. obtained a final decree of judicial separation which did not render him liable to pay any maintenance to his former wife.

116 Moreover, it is common ground that, for the six years prior to the final granting of the divorce, the spouses lived separately and that no money payment was made by Mr M. to his wife during that period.

117 It cannot therefore be considered credible that, as soon as the divorce was granted, Mr M. would hasten to declare himself liable to pay maintenance for which he had, until then, successfully refused to assume liability.

118 A more likely explanation is that given in the testimony of Mr O., according to which the offer made by Mr M. to his former wife to pay money to her was prompted by a concern to salve his conscience and to put his affairs in order as dictated by his religious and moral convictions. However, it must be stated that such a concern, arising when the legal obligations stemming from the marriage had lapsed, is one of the motives likely to prompt acts of kindness which do not create binding effects.

119 Moreover, as Mr O. also points out in his testimony, Mr M. was in the habit of making numerous gifts out of generosity, in particular to charities. The behaviour thus recounted suggests the character of someone more inclined to be generous by choice than to submit to imposed constraints.

120 In the second place, it is equally clear from the testimony of Mr O., as well as from the statements of the applicant, that Mr M. attached extreme importance to ensuring that the agreement which he had reached with his former wife did not receive any publicity and did not affect his relationships, in particular of a financial nature, with third parties.

121 Mr O. mentions inter alia the desire expressed by Mr M. that the witness should say nothing to anyone about the conversation which he had witnessed and his wish that people, and in particular the members of his family, should not know that he had given money to his former wife. According to the same witness, Mr M. stated that he would feel dishonoured if a commitment on his part to pay money to his ex-wife came to the knowledge of third parties.

122 Those statements by Mr O. confirm what was said by Mrs M. herself at the hearing, to the effect that Mr M. would never have agreed to draw up a written record of the transaction which had taken place between the former spouses.

123 That constant concern demonstrated by Mr M. to keep the transaction secret is corroborated by the fact that Mr M. never brought its existence to the knowledge of the Community administrative services responsible for paying his retirement pension or to that of Mr T., who had power of attorney in connection with his banking affairs in Luxembourg, and by the total silence which, as is common ground, Mr M. observed in his will with regard to that transaction.

124 It is inconceivable that, if he had indeed intended to contract a debt of maintenance to his former wife following the divorce, Mr M. would have refrained from mentioning in his will the existence of a liability which could, in such circumstances, have encumbered his estate.

125 It must be pointed out in that regard that, under the Greek Civil Code, the obligation of a person liable to pay maintenance does not lapse with the death of that person.

126 The character, both non-binding and secret, which Mr M. thus intended to confer on the transaction between himself and his former wife necessarily means both that the transaction cannot be pleaded against third parties, and therefore against the defendant's administrative services, and that it may not be relied on in legal proceedings.

127 In those circumstances, that transaction can be regarded only as an act of pure kindness which Mr M. performed towards Mrs M. and by which he did not in any way intend to commit himself legally to pay any maintenance that he might have considered himself liable to pay to the person concerned vis-à-vis third parties or courts having jurisdiction.

128 It follows from the foregoing that Mrs M.'s entitlement to maintenance from Mr M. on his death as a result of a settlement between herself and her former husband cannot be considered to be established.

129 The absence of any intention to produce binding legal effects between the former spouses is, if it were necessary, corroborated by the absence of credible proof of implementation by Mr M. of a settlement providing for maintenance.

130 It is true that, in principle, proof of the genuineness of monthly payments fixed by word of mouth and evidence of the amount, regularity, continuity and legal basis of those payments are such as to support an inference that the deceased consented to be bound, until the time of his death, by an oral agreement providing for such maintenance for his former spouse (see, to that effect, the judgment in *Meinhardt* v *Commission*, paragraph 12).

131 However, in this case, no substantiating document of banking origin or of any other nature provides support for the proposition that there were regular payments and, in the final analysis, the applicant herself mentions only two payments in cash which were made in June and September 1999 through a third person.

132 Moreover, even the proposition that cash was handed over on two occasions is only a claim. The only person, Mr P., who has declared before a notary that he witnessed cash being handed over on one of those occasions (see paragraph 14 above) had no knowledge of the amount which was brought to the applicant and, with regard to its origin and nature, was only able to repeat what he was told, in particular by the recipient of the sum handed over.

133 Consequently, the defendant did not err in law in refusing to grant the claim for a survivor's pension submitted by the applicant, on the ground that the condition to which the first paragraph of Article 27 of Annex VIII to the Staff Regulations makes the grant of such a pension to the divorced wife of a former official or, in this case, of a former Member of a Community institution subject, was not satisfied.

134 It follows that the action must be dismissed as unfounded.

135 There is therefore no need to rule on the applicant's other heads of claim requesting that the Court, firstly, acknowledge her entitlement to the grant of a survivor's pension and, secondly, set the monthly amount of that pension at BEF 200 000 (EUR 4 957.87).

Costs

136 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 88 of those Rules of Procedure, in proceedings between the Communities and their servants the institutions are to bear their own costs.

137 If those provisions are applied, by analogy, to the present case (see, to that effect, the judgment of the Court of Justice in Case C-163/88 *Kontogeorgis* v *Commission* [1989] ECR 4189, paragraph 17), the parties must be ordered to bear their own costs.

On those grounds

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Dismisses the application;**

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

Meij Forwood Legal

Delivered in open court in Luxembourg on 21 April 2004.

H. Jung
Registrar

A.W.H. Meij
President