

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT, QUEEN'S BENCH DIVISION,
ADMINISTRATIVE COURT
MR. JUSTICE EDWARDS-STUART
CO69232012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/05/2017

Before :

LORD JUSTICE LLOYD JONES
LORD JUSTICE BEATSON
and
LORD JUSTICE MOYLAN

Between :

THE QUEEN (on the application of NEWBY FOODS **Respondent**
LIMITED)

- and -

FOOD STANDARDS AGENCY **Appellant**

Jason Coppel QC (instructed by Food Standards Agency) for the Appellant
Hugh Mercer QC and Andrew Legg (instructed by Roythornes Solicitors) for the
Respondent

Hearing dates: 9 & 10 May 2017

Judgment Approved

LORD JUSTICE LLOYD JONES :

1. This is an appeal by the Food Standards Agency (“FSA”) against the decision of Edwards-Stuart J. dated 23 March 2016, in which he allowed in part a claim for judicial review by Newby Foods Limited (“Newby”) and held, inter alia, that certain chicken and pork products manufactured by Newby should not be classified as mechanically separated meat (“MSM”) within paragraph 1.14 of Annex I to EU Regulation No. 853/2004 (“the Regulation”).

Factual and Procedural Background

2. Today the butchering of animal carcasses in the food industry across the EU is carried out in many instances not by traditional hand butchering but by machines. Newby has developed a machine to remove residual meat which remains on animal bones after the animals have been butchered. This system has been used by Newby on beef, lamb and pork bones and chicken carcasses after prime joints have been removed by other mechanical processes. The first stage of the Newby process forces meat bearing bones into contact with each other so that meat is removed from the bones by shearing forces. In a second stage the meat removed in this way is then passed through a second machine, which is effectively a mincer, producing a product which looks like minced meat. This meat product is known in the United Kingdom as desinewed meat (“DSM”), and has been regarded by many, including formerly the FSA, as distinct from MSM which is usually produced by crushing bones and their residual meat to produce what looks like a purée.
3. Under EU law important consequences flow from the classification of products derived from meat. In particular, MSM cannot be counted towards the meat content of food and must be produced under stricter hygiene conditions. Special rules apply to the labelling of MSM. Furthermore, MSM produced from ruminant bones is prohibited entirely in order to minimise the risk of the spread of Transmissible Spongiform Encephalopathies (“TSE”). DSM is not a classification within the EU legislation. This protracted litigation, of which the present appeal is merely the most recent phase, concerns the correct classification of DSM under the EU legislation.
4. The European Commission (“the Commission”) maintains that DSM is MSM. It criticised the stance of the FSA that Newby’s products were DSM rather than MSM and threatened to take action against the United Kingdom if DSM continued to be produced and sold without regard to the restrictions imposed upon MSM. This action could have involved “safeguard measures”, restricting the export of UK meat products to the rest of the EU. Notwithstanding the fact that it disagreed with the Commission’s classification of DSM as MSM, on 4 April 2012 the FSA issued a moratorium with the result that DSM could no longer be produced from beef and lamb bones, and could only be produced from chicken and pork bones if it were classified and labelled as MSM and not counted towards the meat content of products in which it was present.

5. Newby brought proceedings challenging the moratorium as based upon an error of law as to the definition of MSM in paragraph 1.14 of Annex I of the Regulation. On 16 July 2013 Edwards-Stuart J. made a preliminary reference to the Court of Justice of the European Union (“CJEU”). In its judgment dated 16 October 2014 the Tenth Chamber (Judges A. Rosas, E. Juhász and D. Šváby (Rapporteur)) made a ruling in the following terms:

“Points 1.14 and 1.15 of Annex I to Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin must be interpreted as meaning that the product obtained by the mechanical removal of meat from flesh-bearing bones after boning or from poultry carcasses must be classified as ‘mechanically separated meat’ within the meaning of that point 1.14, since the process used results in a loss or modification of the muscle fibre structure which is greater than that which is strictly confined to the cutting point, irrespective of the fact that the technique used does not alter the structure of the bones used. Such a product cannot be classified as a ‘meat preparation’ within the meaning of that point 1.15.”

6. In subsequent proceedings before the national court, in a judgment of 23 March 2016 Edwards-Stuart J. concluded that the chicken and pork products resulting from the first stage of the Newby process is not MSM. He granted the FSA permission to appeal to the Court of Appeal on limited grounds.

Legal context

7. The Regulation provides in relevant part:

“Recitals:

(2) Certain foodstuffs may present specific hazards to human health, requiring the setting of specific hygiene rules. This is particularly the case for food of animal origin, in which microbiological and chemical hazards have frequently been reported.

(9) The principal objectives of the recasting are to secure a high level of consumer protection with regard to food safety, in particular by making food business operators throughout the Community subject to the same rules, and to ensure the proper functioning of the internal market in products of animal origin, thus contributing to the achievement of the objectives of the common agricultural policy.

(20) The definition of mechanically separated meat (MSM) should be a generic one covering all methods of mechanical separation. Rapid technological developments in this area mean that a flexible definition is appropriate. The technical requirements for MSM should differ, however, depending on a risk assessment of the product resulting from different methods.

Annex 1

1.14. “Mechanically separated meat” or “MSM” means the product obtained by removing meat from flesh-bearing bones after boning or from poultry carcasses, using mechanical means resulting in the loss or modification of the muscle fibre structure.

1.15. “Meat preparations” means fresh meat, including meat that has been reduced to fragments, which has had foodstuffs, seasonings or additives added to it or which has undergone processes insufficient to modify the internal muscle fibre structure of the meat and thus to eliminate the characteristics of fresh meat.

7.1. “Meat products” means processed products resulting from the processing of meat or from the further processing of such processed products, so that the cut surface shows that the product no longer has the characteristics of fresh meat.”

The judgment of 16 July 2013

8. In his judgment of 16 July 2013 accompanying the reference to the CJEU, Edwards-Stuart J. expressed his provisional conclusions. He stated that all parties were agreed that the product of the mechanical separation of meat from flesh bearing bones carried out under high pressure was properly classified as MSM. It had the appearance and texture of a purée and was nothing like fresh meat. However he was satisfied that the DSM produced by Newby’s two-stage process was quite different in appearance and texture from the product produced by mechanical separation carried out at high pressure. He was equally satisfied that the muscle fibre structure of that DSM underwent some modification during the process. Accordingly, if it was sufficient for it to be classified as MSM that there has been any modification of the muscle fibre structure, then it was MSM.
9. The judge referred to the wording of paragraph 1.15 of Annex 1 to the Regulation. In his view the words “... and thus to...” indicated that there had to be a causal link between the loss or modification of the muscle fibre structure and the elimination of the characteristics of fresh meat. Furthermore, he did not consider that this wording could be construed to mean that any diminution, however minor, of those characteristics amounts to elimination of those characteristics. It seemed to the judge that there had to be at least a significant diminution in those characteristics before they could be said to be eliminated. He considered that in this context the relevant characteristics of fresh meat are its organoleptic properties including its taste, smell and texture.
10. The judge referred to Newby’s submission that a curious feature of the application of the Regulation is that chicken breasts are commonly removed from the carcase by mechanical means and this inevitably causes some modification of the muscle fibre structure at the point where the meat is cut. Although this process would appear to fall within the definition in paragraph 1.14, meat produced in this way is sold as fresh meat. The judge noted that Newby did not criticise this. On the contrary, Newby cited this as an example of the absurd consequences that would follow if any damage to the muscle fibre structure were to lead to the meat product in question being classified as MSM. In the alternative, Newby submitted that it demonstrated an inconsistency of the application of the Regulation.
11. The judge noted that on the interpretation of paragraph 1.14 for which the Commission contended, MSM would include the product obtained by removing meat from poultry carcasses using mechanical means if that resulted in any loss or modification of the muscle fibre structure. However, the judge observed that the

Commission appeared to tolerate the fact that meat is regularly removed from poultry carcasses by mechanical means but is not treated as MSM.

12. The judge stated that he was satisfied from the evidence produced that the product of Newby's two-stage process had not resulted in the elimination of the characteristics of fresh meat. Furthermore, he did not consider that there had been a sufficient diminution of those characteristics to prevent the product falling within the definition of "meat preparations" in paragraph 1.15.
13. The judge made a preliminary reference to the CJEU, asking the following questions:
 - (1) Do the words "loss or modification of the muscle fibre structure" in point 1.14 of Annex I to Regulation (EC) No 853/2004 mean "any loss or modification of the muscle fibre structure" that is visible using standard techniques of microscopy?
 - (2) Can a meat product be classified as meat preparation within point 1.15 of Annex I where there has been some loss or modification of its muscle fibre structure that is visible using standard techniques of microscopy?
 - (3) If the answer to [the first question] is no and the answer to [the second question] is yes, is the degree of loss or modification of the muscle fibre structure that is sufficient to require each product to be classified as MSM within point 1.14 of Annex I the same as that required to eliminate the characteristics of fresh meat within point 1.15 of that annex?
 - (4) To what extent must the characteristics of fresh meat have been diminished before they can be said to have been eliminated within the meaning of point 1.15?
 - (5) If the answer to [the first question] is no, but the answer to [the third question] is also no, what degree of modification to the muscle fibre structure is required in order for the product in question to be classified as MSM?
 - (6) On the same assumption, what criteria should be used by national courts in determining whether or not the muscle fibre structure of the meat has been modified by that degree?

The CJEU judgment

14. The CJEU proceeded to a judgment without the benefit of an Advocate General's opinion or, despite an application by Newby, an oral hearing. It delivered its judgment on 16 October 2014.
15. The CJEU set out the following factual account which is uncontroversial.

“[21] The referring court states that Newby Foods has developed a machine which is capable of removing the residual meat attached to the bones after the main part of the meat had been removed from them, without crushing those bones or liquefying the residual tissues. That machine, which operates essentially by means

of shearing, can be distinguished from those operating at high pressure, which turn the residual tissues into a viscous paste. The resulting product, which, at the end of the first production stage, passes through a perforated plate with 10 mm diameter apertures, is then processed in another machine which minces it by making it pass through a filter with 3 mm diameter apertures. This product, which looks like ordinary minced meat, is marketed in the United Kingdom as ‘desinewed meat’. As regards its appearance, that product is clearly distinguishable from mechanically separated meat obtained at high pressure. According to the applicant in the main proceedings, no one would classify the product obtained by means of its machine as anything other than meat.

[22] Also according to the applicant in the main proceedings, the ‘desinewed meat’ which it produces contains only very rarely particles of bones, bone skin or bone marrow; however, the presence of occasional shards of bone cannot be excluded.”

16. Newby was supported by the FSA in its key submission which the CJEU summarised as follows:

“[23] According to the applicant in the main proceedings and the FSA, by reference to the documents mentioned in paragraphs 18 and 19 of the present judgment, the product obtained by means of that process does not correspond to the definition of ‘mechanically separated meat’ within the meaning of Regulation No 853/2004, in the absence of ‘significant’ loss or modification of the muscle fibre structure, that is to say, in the absence of a change which is sufficient to eliminate the characteristics of fresh meat. That product should rather be classified as ‘meat preparations’ within the meaning of point 1.15 of Annex I to that regulation.”

17. The CJEU reformulated the questions referred (at [40]):

“By its questions, which it is appropriate to examine together, the referring court is essentially asking whether points 1.14 and 1.15 of Annex I to Regulation No 853/2004, which contain the definitions of the concepts of ‘mechanically separated meat’ and ‘meat preparations’ respectively, must be interpreted as meaning that the product obtained by the mechanical removal of meat from flesh-bearing bones after boning or from poultry carcasses must be classified as ‘mechanically separated meat’ within the meaning of that point 1.14 only where the process used results in a loss or modification of the muscle fibre structure which is significant, while the classification as ‘meat preparations’ within the meaning of point 1.15 must be chosen where that loss or modification is not significant. Secondly, in the event that that interpretation should prevail, the referring court seeks to ascertain what degree of modification or loss is required for that modification or loss to have to be regarded as significant and what process should be used in order to determine whether the degree thus required has been attained.”

18. The CJEU addressed the reformulated questions in the following way (at [41] – [43]):

“[41] It must be stated at the outset that the definition of the concept of ‘mechanically separated meat’ set out in point 1.14 of Annex I to Regulation No 853/2004 is based on three cumulative criteria which must be read in conjunction with one another, namely (i) the use of bones from which the intact muscles have already been detached, or of poultry carcasses, to which meat remains attached, (ii) the use of methods of mechanical separation to recover that meat, and (iii) the loss or modification of the muscle fibre structure of the meat thus recovered by reason of the use of those processes. In particular, that definition does not make any distinction as regards the degree of loss or modification of the muscle fibre structure, with the result that any loss or modification of that structure is taken into consideration within the context of that definition.

[42] Consequently, any meat product which satisfies those three criteria must be classified as ‘mechanically separated meat’, irrespective of the degree of loss or modification of the muscle fibre structure, in so far as, by reason of the process used, that loss or modification is greater than that which is strictly confined to the cutting point.

[43] In the case of use of mechanical processes, that third criterion allows ‘mechanically separated meat’ within the meaning of point 1.14 of Annex I to Regulation No 853/2004 to be distinguished from the product obtained by cutting intact muscles; the latter product does not show a more general loss or modification of the muscle fibre structure, but reveals a loss or modification of the muscle fibre structure which is strictly confined to the cutting point. Consequently, chicken breasts which are detached from the carcass of the animal by mechanically operated cutting rightly do not constitute mechanically separated meat.”

19. The CJEU considered that with regard to products which meet the criteria for MSM, the Regulation did not make any distinction other than that stemming from points 3 and 4 of Chapter III of Section VI of Annex III to that Regulation drawing the distinction between a low pressure process, such as that used by Newby, and a high pressure process. In the Court’s view this sub-categorization of MSM into different categories presenting different health risks was explained in recital 20. The CJEU then stated:

“[50] That recital, which clarifies perfectly the EU legislature’s intentions, adequately demonstrates that the EU legislature took into consideration from the outset the possibility that new low-pressure methods for the production of mechanically separated meat might be developed, such as, as the case may be, that used by the applicant in the main proceedings, assuming that that process demonstrates some innovation vis-à-vis methods using techniques which do not alter the structure of the bones used, of which the EU legislature was aware at the time when Regulation No 853/2004 was drafted.”

20. At paragraphs 51-54 of its judgment the CJEU compared and contrasted the definition of MSM in point 1.14 and “meat preparation” in point 1.15. It noted that the production of MSM involved neither of the processes referred to in point 1.15,

namely the addition of foodstuffs, seasoning or additives or a processing within the meaning of Article 2(1)(m) of Regulation No. 852/2004. Here it stated that:

“on the contrary, a product such as that at issue in the main proceedings corresponds to the notion of an “unprocessed processed product” within the meaning of Article 2(1)(n) of that Regulation.” (at [53])

21. It further noted that the concept of “meat preparations” has a direct link not with MSM but, rather, with the concepts of “fresh meat”, and “minced meat” which are, in principle, the only usable raw material, and secondly, with the concept of “meat products” within point 7.1 of Annex I Regulation No. 853/2004. It then stated:

“[55] In addition, as the French Government suggests, a classification of products, such as that at issue in the main proceedings, as ‘fresh meat’ within the meaning of point 1.10 of Annex I to Regulation No 853/2004 is also excluded. Disregarding their other characteristics, such products consisting in fragmented meat would be capable of coming only within the concept of ‘minced meat’ within the meaning of point 1.13 of that annex, a concept from which they must, however, be excluded by reason of point 1(c)(iv) of Chapter II of Section V of Annex III to that regulation as products obtained from bone scrapings.”

22. The CJEU considered that a classification of products as MSM had consequences with regard to Regulation No. 999/2001 (relating to TSE) and Directive 2000/13 (relating to the labelling and presentation of food). Here, the CJEU noted, first, that the method described in point 1.14 cannot be used for the processing of bovine, ovine and caprine raw material. In this regard it considered that the legislation had particularly in mind the fact that MSM could contain portions of bones and of the periosteum. It continued:

“It follows precisely from the decision making the reference that the same applies in the case of a product such as that produced by the applicant in the main proceeding.” (at [59])

Secondly it considered the classification as MSM implied a prohibition on labelling the product as “meat” (at [56])

23. The CJEU expressed its conclusion in the dispositif set out at paragraph 5 above.

The judgment of 23 March 2016

24. The matter returned to the national court where a further hearing took place on 9 and 10 February 2016.

25. In his judgment of 23 March 2016 the judge rejected a submission on behalf of Newby that since the original product that is fed into Newby’s machine consists of bones with a fairly substantial amount of meat attached it does not consist of “bones from which the intact muscles have been detached” and accordingly did not satisfy the first criterion for MSM formulated by the CJEU. In rejecting that submission the judge observed that if the submission were correct even a high pressure process of crushing the meat and bones to a slurry would not be capable of producing MSM.

26. With regard to the qualification introduced by the CJEU concerning the cutting point, the judge observed that in its desire to prefer clarity to case by case assessment the CJEU may have thrown the baby out with the bath water. The court had provided no elaboration of what was meant by the cutting point in the context of Newby's process. "Cutting" in this context must mean "severance" or "separation" (at [66]).
27. The judge considered the evidence made clear that the Newby process resulted in the separation of pieces of meat from the bones to which they were originally attached. It seemed likely that in some places the meat became separated from other pieces of meat in addition to being separated from the bone. In any event, there had been mechanical separation during the recovery of the meat (at [67]).
28. The judge observed that the judgment of the CJEU provided no clear explanation of what is meant by the "cutting point". He identified three possible readings.
 - (1) It refers to the points at which the meat has been severed or separated during the process of recovering it.
 - (2) It refers to the points where the meat has been separated from the bone.
 - (3) It refers to the cutting of intact muscles.
29. The judge rejected the second reading at the outset on the basis there was no way in which examination of any given piece of meat could distinguish between whether a particular edge had been separated from the bone or from another piece of meat.
30. The judge then reverted to the further evidence which had been lodged in relation to the Newby process. The judge addressed a submission on behalf of Newby that once the wishbone had been cut out of a chicken breast, the breast can no longer be an intact muscle. Accordingly, it was submitted, a chicken breast which is cut or scraped from the carcass after it has had the wishbone section removed would suffer a loss or modification of the muscle fibre structure at a point other than the point at which it has been separated from the carcass. The judge concluded that he was not in a position to find as a fact that Mr. Mercer's assertions about the process of removing the wishbone prior to cutting the breast of a chicken from the carcass were correct. However, he considered that it would be an absurdity if the prior removal of the wishbone section of the breast condemned the remainder of the breast to be classed as MSM. In his view a purposive approach to the interpretation of the Regulation and the judgment of the CJEU could avoid this by treating any point of cutting during the process as falling within the term of "cutting point". (at [76] - [77]).
31. In the judge's view the court must either give "cutting point" a very restrictive interpretation, which may well mean that certain accepted practices of mechanically removing chicken breasts from carcasses cannot continue without the product being classed as MSM, or adopt an expansive interpretation. The judge concluded that he should adopt a wide reading of the "cutting point". He considered that the only damage to the muscle fibre structure caused by Stage 1 of the Newby process occurred where the pieces of meat had been separated either from the bone or from each other. To construe "cutting point" as meaning only places where an intact muscle is cut from the bone would limit the exception to the removal of chicken breasts and, on the material before the court, possibly not even to that. In coming to

this conclusion the judge was also influenced by Article 11 TFEU. Faced with a stark choice of two alternatives, one of which would go a little way towards the promotion of sustainable development and the other of which was environmentally wasteful, the court should adopt the former unless there were compelling reasons for not doing so.

32. Referring to his rejection of “what the CJEU obviously considered was the correct result” the judge noted that it had reached that conclusion without the benefit of the evidence before him. The approach required by the authorities was that the national court must decide the case in the light of the principles established by the judgment of the CJEU but on the basis of the facts found by the national court.
33. The judge therefore concluded that the “cutting point” of the muscle fibre produced by the first stage of the Newby process refers to every severed edge of the pieces of flesh that emerge from that process. (at [85])
34. The judge also referred to paragraph 55 of the judgment of the CJEU and its reference to Newby’s products being obtained from bone scrapings. The judge made a clear finding that Newby’s products are not obtained from bone scrapings. He stated that if the CJEU was to be taken as having determined the contrary, that conclusion was based on a mistaken understanding of the facts and it was the view of the facts taken by the national court which must prevail.

Grounds of appeal

35. The FSA now appeals by leave of Edwards-Stuart J. on the following grounds.

Ground 1: The learned judge erred in his conclusion that Newby’s chicken and pork product as identified in paragraph 101 of the judgment, did not constitute mechanically separated meat within point 1.14 of Annex I to Regulation (EC) No. 853/2004.

Ground 2: The learned judge erred in his analysis and application of the authorities as to when a domestic court is free to depart from the conclusions of the CJEU (which had been to the opposite effect). This was a case where the CJEU had based the conclusions on the factual evidence provided to it by the High Court and was not analogous to previous domestic authorities where the CJEU had ventured views on matters which had simply not been canvassed before the domestic courts.

Ground 3: The learned judge erred in interpreting the words “in so far as, by reason of the process used, that loss or modification is greater than that which is strictly confined to the cutting point” as establishing anything other than a narrow exception to the principle that the category of MSM extended to any products which showed any loss or modification to muscle fibre structure. The learned judge erred in ruling that the “cutting point” of the muscle fibre produced by the first stage of the respondent’s process refers to every severed edge of the pieces of flesh that emerge from that process. The reasoning adopted by the learned judge was erroneous since it (a) extended the exception to the point where it undermined the rule, and (b) led to a finding that products were not MSM which the CJEU plainly considered to be MSM.

Discussion

Grounds 1 and 3

36. It is convenient to consider Grounds 1 and 3 together.
37. At paragraphs [41] to [43] of its judgment, set out above at [18], the CJEU addresses the reformulated questions as a matter of principle. At paragraph [41] it gives a clear answer to the first of the reformulated questions. It identifies the three cumulative criteria within the definition of MSM which it paraphrases as follows:
- (1) The use of bones from which the intact muscles have already been detached, or of poultry carcasses, to which meat remains attached;
 - (2) The use of methods of mechanical separation to recover that meat; and
 - (3) The loss or modification of the muscle fibre structure of the meat thus recovered by reason of the use of those processes.

It then states that the definition does not make any distinction as regards the degree of loss or modification of the muscle fibre structure and that, as a result, any loss or modification of that structure is taken into consideration within the context of that definition. That conclusion is sufficient to dispose of the principal submission of Newby and the FSA on the reference.

38. However, paragraphs [42] and [43] of the judgment qualify this general statement by creating an exception in the case of loss or modification which is confined to the cutting point. The exception has no basis in the Regulation and is, in my view, a gloss on the legislation imposed by the CJEU. Nevertheless, these paragraphs are an authoritative statement of the law which is binding on this court. When the matter returned to the referring court Newby relied on this qualification and persuaded the judge on the basis of further evidence that Newby's process did not involve loss or modification of muscle fibre structure except at the cutting points where meat had been severed by the process. Argument before us has concentrated on whether the judge was correct in that conclusion.
39. To my mind, the scope of the exception and the intention of the CJEU are apparent from a close examination of the judgment. Although the final words of paragraph [42]

“in so far as, by reason of the process used, that loss or modification is greater than that which is strictly confined to the cutting point”

when considered in isolation might suggest that the exception is of general application, consideration of its context shows that that is not the case. It is clear that the CJEU was here responding to an argument on behalf of Newby and the FSA to the effect that the mechanical removal of chicken breasts from a chicken carcass would necessarily involve a loss or modification of muscle fibre structure at the point at which the breast was cut away and that, accordingly, if any loss or modification of muscle fibre structure were sufficient to bring the product within the definition in paragraph 1.14, all mechanically separated chicken breasts would have to be classified as MSM. The Court's gloss on the Regulation concerning the cutting point is the basis on which it rejected that argument. The qualification in relation to the

cutting point is not of general application but is limited to the cutting of intact muscles.

40. First, this is apparent from other passages in the judgment. At paragraph [41] the Court's paraphrase of paragraph 1.14 emphasises in the case of the first criterion the use of bones from which the intact muscles have already been cut. At paragraph [43] the Court states in terms that the third criterion allows MSM to be distinguished from the product obtained by cutting intact muscles, explaining that the latter product reveals a loss or modification of the muscle fibre structure which is strictly confined to the cutting point. It then goes on to state in terms that chicken breasts detached from the carcass by mechanically operated cutting rightly do not constitute MSM. There is a further reference to the removal of intact muscles from bones at paragraph [45]. Secondly, if the cutting point exception were given the wide reading for which Newby contends it would exclude from classification as MSM products made by repeated mechanical cutting of meat left on bones or carcasses from which intact muscles had previously been removed. The only loss or modification of the muscle fibre structure in such a case would be at the cutting points, however numerous they were. That would, in my view, defeat the purpose of the classification. Thirdly, the paragraphs of the judgment of the CJEU in which it applies the principle to the particular facts of this case demonstrate that the Court cannot have intended the cutting point exception to bear such a wide meaning.
41. I am, therefore, unable to agree with the judge's broad interpretation of the qualification as referring to every severed edge of the pieces of flesh that emerge from the Newby process. The qualification relates to cutting intact muscles from the animal. In the case of the Newby process, the product is not obtained by cutting intact muscles but by cutting or otherwise removing the meat left on the carcass after the intact muscle has been removed. Mechanical separation of residual meat from bones produces separation, shearing or cutting and hence modification to the muscle fibre structure at other points in addition to the point from which the intact muscles have been removed. The CJEU concluded as a matter of principle that meat which is mechanically separated from bones from which the intact muscles have already been detached shows a more general loss or modification of muscle fibre structure beyond the cutting point.
42. I have referred earlier to the fact that when the matter returned to the referring court it was submitted on behalf of Newby that since the bones fed into the machine for the first stage of the Newby process had substantial amounts of meat attached, the Newby process did not satisfy the first of the criteria identified by the CJEU i.e. it was said that it did not involve the use of "bones from which the intact muscles have already been detached or poultry carcasses, to which meat remains attached". The judge rejected that argument, correctly in my view, on the ground that if that were correct even a high pressure process of crushing such meat and bones to a slurry would be incapable of producing MSM. As Mr. Coppel points out, it must follow that the product of Newby's process is not obtained by cutting intact muscles. The intact muscles have already been detached from the bones. In the case of chicken carcasses the requirement that intact muscles have already been detached does not apply. It seems to me that this explains why the CJEU had to address the question of the cutting point in the context of the three limbs of the definition of MSM. I should add that to the extent that there may be an intact muscle left on a chicken carcass after

removal of the breast or on a pork bone after the removal of the prime cuts of pork, it may well be that the process would involve the cutting of intact muscles within the qualification created by the CJEU. However, the product of the first stage of the Newby process would still in part comprise MSM and the entire product would have to be classified as MSM.

43. In coming to his conclusion the judge referred to the need to have regard to Article 11 TFEU and to interpret point 1.14 of the Regulation and paragraphs 41 and 42 of the judgment of the CJEU in a manner that promotes environmental protection rather than undermines it. He thought this a powerful point. He considered that to treat DSM produced by Newby as MSM was to waste a product that the informed observer would regard as meat, albeit not of the best quality. He stated that there was an environmental cost for treating this product as MSM. More pigs would have to be raised, slaughtered and butchered in order to make up the shortfall. He considered this contrary to the objective of promoting sustainable development. While this might be an appropriate factor to take into account in interpreting an EU measure in other circumstances, there is no scope for such an approach here. The CJEU was made aware of the argument that classifying Newby's products as MSM was a waste of good meat. Nevertheless it attached no weight to that consideration. The intention of the CJEU is clear. Moreover, the preamble to the Regulation (Recital 9) makes clear that the principal objective of the classification is to secure a high level of consumer protection with regard to food safety. The reading favoured by the judge would undermine that objective.
44. For these reasons I consider that the judge erred in giving such a wide interpretation to the exception created by the CJEU. In my view his conclusion that the product of the Newby process is not MSM is inconsistent with the statement of principle by the CJEU at paragraphs [41] to [43] and was not open to him.
45. I would accordingly allow the appeal on Grounds 1 and 3.

Ground 2

46. Reference has been made earlier in this judgment to the way in which the CJEU in its judgment proceeded to apply its statement of the law to the facts as it understood them from the order for reference.
47. On behalf of the FSA Mr. Coppel submits that to the extent that the CJEU made specific findings about Newby's products, it was not legitimate for the national court to depart from those findings. He submits that those findings were not inconsistent with the factual background as set out in the order for reference (c.f. *Arsenal Football Club PLC v. Reed* [2003] EWCA Civ 96; [2003] 2 CMLR 25) nor had important facts not been made clear to the CJEU (c.f. *Revenue and Customs Commissioner v. Aimia Coalition Loyalty UK Ltd.* [2013] UKSC 15; [2013] 2 CMLR 1398). In this regard he referred us to certain recent decisions of the CJEU in which that court not only provided an answer to the questions of law which had been posed but also stated its conclusion as to the application of that law to the facts of the case as stated in the order for reference (Case C-288/15 *Medical Imaging Systems GmbH (MIS) v. Hauptzollamt Munchen*, 9 June 2016; Case C-441/15 *Madaus GmbH v. Hauptzollamt Bremen*, 9 February 2017). He also referred us to Broberg and Fenger, Preliminary References to the European Court of Justice, 2nd Ed. (2014) at 3.1, where the authors

suggest that there is a growing trend on the part of the CJEU to decide itself the application of the law in terms which leave no discretion to the referring court.

48. Mr. Mercer, on behalf of Newby, submits that, while the national court is bound by the ruling of the CJEU on questions of EU law, it is not bound by any of its conclusions of fact including its conclusions as to the application of the law to the facts of the present case. He submits that in the present case the CJEU has exceeded its powers by seeking to reach definitive conclusions on the application of the principles to the facts and that this was a matter for the national judge on the basis of the evidence, including new evidence.
49. It is understandable that, on occasion, the CJEU may consider it helpful to the referring court if it provides not only an abstract statement of the law in response to the questions posed, but also expresses its view as to how that statement of the law may apply to the facts of the case as it understands them. There will be occasions, as in the present case, when such an expression of view may elucidate the abstract statement of law. However, any stated conclusions of the CJEU as to the application of the law to the facts are not binding on the national court. On the contrary, it is for the national court to find the relevant facts and to apply the law as stated by the CJEU to those facts once found. The matter was explained by Lord Reed in *Aimia* in the following terms.

“[54] Article 267 TFEU confers on the Court of Justice jurisdiction to give preliminary rulings concerning (a) the interpretation of the Treaties and (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. In the present case, it is the court’s jurisdiction to rule on the interpretation of the VAT directives which is relevant. On the other hand, putting the matter very broadly, the evaluation of the facts of the case, and the application of EU law to those facts, are in general functions of the national courts. The relevant principles were summarised more precisely by the Court of Justice in *AC-Atel Electronics Vertriebs GmbH v Hauptzollamt München-Mitte* (C-30/93) [1994] E.C.R. I-2305 at [16]–[18]:

“16. On that point, it should be borne in mind that Article [267] of the Treaty is based on a clear separation of functions between the national courts and the Court of Justice, so that, when ruling on the interpretation or validity of Community provisions, the latter is empowered to do so only on the basis of the facts which the national court puts before it (see the judgment in *Firma Wolfgang Oehlschläger v Hauptzollamt Emmerich* (104/77) [1978] E.C.R. 791, point 4).

17. It is not for the Court of Justice, but for the national court, to ascertain the facts which have given rise to the dispute and to establish the consequences *1418 which they have for the judgment which it is required to deliver (see the judgment in *Pabst & Richarz KG v Hauptzollamt Oldenburg* (17/81) [1982] E.C.R. 1331; [1983] 3 C.M.L.R. 11, paragraph 12).

18. It is, moreover, solely for the national court before which the dispute has been brought, and which must assume the responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of

each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the question which it submits to the court (see the judgments in *Société alsacienne et lorraine de télécommunications et d'électronique (Alsatel) v Novasam SA* (247/86) [1988] E.C.R. 5987; [1990] 4 C.M.L.R. 434 , paragraph 8, and in *Enderby v Frenchay HA* (C-127/92) [1993] E.C.R. I-5535; [1994] 1 C.M.L.R. 8, paragraph 10).”

50. However, in the light of the conclusions to which I have come in relation to Grounds 1 and 3, Ground 2 does not arise for decision. The statement of law set out in paragraphs 41-43 of the judgment of the CJEU, properly understood, was conclusive of the present dispute and left no scope for argument as to the application of the law to the facts. It was not open to the judge to conclude that the products of Newby's process are not MSM.

Bone scrapings

51. In its judgment the CJEU stated (at paragraph [55]):

“In addition, as the French Government suggests, a classification of products, such as that at issue in the main proceedings, as ‘fresh meat’ within the meaning of point 1.10 of Annex I to Regulation No 853/2004 is also excluded. Disregarding their other characteristics, such products consisting in fragmented meat would be capable of coming only within the concept of ‘minced meat’ within the meaning of point 1.13 of that annex, a concept from which they must, however, be excluded by reason of point 1(c)(iv) of Chapter II of Section V of Annex III to that regulation as products obtained from bone scrapings.”

52. Earlier in its judgment (at paragraph [22]) the CJEU had referred to Newby's case in the national proceedings that DSM which it produced contained only very rarely particles of bones, bone skin or bone marrow but that the presence of occasional shards of bone could not be excluded. However, the CJEU's conclusion that products of the Newby process constituted products obtained from bone scrapings was the opposite of the FSA's conclusion in March 2009. Furthermore, Edwards-Stuart J. found that the submission of the French Government was the exact opposite of that attributed to it by the CJEU. In these circumstances it is not surprising that Newby sought to challenge this finding of the CJEU when the matter returned to the national court.

53. The judge dealt with the matter in the following terms:

“[88] Mr Coppel candidly told the court that the FSA was rather surprised at the reference to bone scrapings in [55] of the Judgment, but he submitted that it was not a finding that could be challenged.

[89] However, having regard to the evidence as a whole, and particularly as to the quantity of meat that is typically on the bones, and Ms Glover's email, together with the fact that it is Newby's evidence that the bones which have little meat on them are taken out of the line, I have no hesitation in finding that Newby's product is not obtained from bone scrapings. If the CJEU is to be taken as having determined the contrary, then in my judgment that conclusion was based on a

mistaken understanding of the facts and that it is the view of the facts taken by this court which must prevail.”

54. I consider that it was open to Edwards-Stuart J. to decide this issue. He was not bound by the conclusion of the CJEU as to the application of the law to the facts of this particular case.
55. On the hearing of the appeal before us, Mr. Coppel sought to challenge the decision of the judge on this point. Mr. Mercer objected on the ground that the FSA had not obtained permission to appeal on this ground. I would refuse permission to appeal on this ground. If I am correct in my conclusion that in the light of the CJEU’s ruling on the law the national court was bound to conclude that the product of the Newby process was MSM, the question whether that product is obtained from bone scrapings is academic.

LORD JUSTICE BEATSON:

56. I agree.

LORD JUSTICE MOYLAN:

57. I also agree.