

**FOOD STANDARDS AGENCY
NORTHERN IRELAND**

APPLICANT

**GEORGE McCABE
EUROFREEZE (IRELAND) LIMITED**

RESPONDENTS

1. This is an application by the Food Standards Agency (FSA) under Article 8 of the Food Safety (Northern Ireland) Order 1991 (“the 1991 Order”) to condemn 257 pallets of fresh meat and meat products contained in the cold store premises of Euro Freeze (Ireland) Limited (EF).
2. An appeal against a decision of FSA to revoke the Fresh Meat Licence and Poultry Meat Licence of EF was adjourned as EF had, subsequent to the decision to revoke, been granted a new licence by the District Council to whom responsibility for licensing had been transferred in January 2006. In the event that this appeal requires to be heard it was agreed by both parties that any facts found by me in the course of the Food Condemnation Hearing would be valid in the course of any hearing on the appeal.
3. The FSA is the competent authority (CA) in the United Kingdom for food and feed safety. Its main purpose is to protect public health from risks which may arise in connection with the consumption of food and to protect the interest of consumers in relation to food. The veterinary service of the Department of Agriculture and Rural Development (DARD) carry out a supervisory inspection and enforcement role on behalf of the FSA.
4. EF trades from premises at Attybaron, Ross Road, Lisnskea Co.Fermanagh and operates as a cold store licensed by the FSA for the storage of both red meat and poultry meat. George McCabe is a Director of EF.
5. On the 25th August 2005 a 23,000kg consignment of chicken breasts in a sealed container from the Peoples Republic of China had been stopped at Belfast Port. The consignee was EF. Upon inspection it was discovered that the container did not contain Chinese labelled poultry but cartons of poultry meat bearing Italian commercial labels and an Italian Official Veterinary Health Mark. Because of a possible fraud involving counterfeit food labelling, the consignment was destroyed.
6. Following upon this discovery, Mr Bastion, the Veterinary Officer employed by DARD with responsibility for EF checked the EF premises and confirmed that there was no suspect material there.
Indeed it should be stated that there was no conclusive evidence presented to me implicating EF in involvement with the consignment from China and no prosecution was taken by the authorities against EF.
7. Having said that, suspicions raised by the purported destination of the consignment being EF, caused DARD to visit and search the EF premises.

Mr Danny Gray, a Deputy Principal in the DARD Veterinary Service Enforcement Branch, obtained an Entry Warrant to search the EF premises on the suspicion that they were 'being used for the purposes of the illegal importation, storage and handling of chicken from Asia'.

8. On the 9th November 2005, Mr Gray led the search operation of EF premises by DARD staff and the PSNI. Photographs were taken by DARD staff and a video by PSNI. A number of record books and floppy discs were seized.
9. No evidence was found of meat having come from China and no documentary evidence was found implicating fraud or a clear trading link with China.
10. The inspectors did, however, allege that there were breaches of the regulations as a number of pallets bore no health marks or broken health marks. Additionally the finding of a vac pac machine, a strapping machine, empty boxes bearing health marks, a large number of flat packed boxes and a number of health marks from other premises in Spain, Germany, Holland and the UK, led the inspection team to strongly suspect that EF was engaged in the re-packaging of food contrary to the terms of its Licence.
11. Mr Gray served a Detention Notice detaining the entire contents of the cold store, which was sealed.
12. On 18th November 2005, the FSA suspended EF's licences to operate as a licenced cold store for red and white meat for human consumption.
13. On 30th November 2005, a 'Withdrawal of Detention of Food' notice was served in respect of products detailed in the schedule attached thereto. On the same date a Detention Notice was served in respect of 257 pallets, which were removed to the Interfrigo store, Antrim between 1st and 7th December 2005.
14. Further 'Withdrawal of Detention of Food' Notices were served on the 7th and 8th December 2005. However, following upon a change of attitude by FSA a further Detention Notice was served on the 9th December 2005.
15. On 23rd December 2005 the Food Condemnation Notice was served on EF in respect of the 257 pallets, the subject of this hearing.
16. On 30th December 2005, the final Detention of Food Notice was served in respect of 626 pallets. It is understood that a Food Condemnation Notice has been served in respect of these pallets and will be the subject matter for further hearing, the date of which has yet to be fixed.

THE APPLICANT'S EVIDENCE

17. **MR MCCONVILLE** is a senior meat inspector employed by DARD. Between the 12th December 2005 and the 10th January 2006 he led an inspection of the 257 pallets which had been transferred from EF to the Interfrigo Store, Antrim. Samples from each of the pallets were inspected and the majority photographed and videoed. His remit essentially was to check the integrity of the health marks (HM) on the packages of meat. The pallets came mainly in two forms
- a. Boxes of meat.
 - b. Blocks of meat individually polywrapped built up on the pallet and wrapped in plastic liner.

Mr McConville took the view that each box or polyblocks should have an individual HM. He stated that the application of HM's to products is vitally important and that the HM must be applied to packets in such a way that the HM is destroyed on the package being opened. Most importantly a Mr Perry of the FSA provided him with copies of HM's and product labels marked authentic or illicit. He was asked to note if any similar labels were found applied to any of the meat during his inspection. Of the HM's provided to him he discovered an 'illicit' HM on 21 pallets of pork jowel from Spain and on a consignment of German beef. He has asked that I condemn the contents of all 257 pallets, and has described the reason for each pallet on the inspection sheet, which he dictated at the time of the inspection. The grounds of condemnation ranged from illicit health marks, no health marks, improperly applied health marks, discolouration of food, freezer burn, polyentrapment, to lymphatic and tonsillar tissue found in some products. In particular a number of health marks from other premises were found in EF. In regard to a number of products, he stated that there was evidence of re-packaging based on boxes, which had been turned inside out, and different types of liner within the boxes.

18. **MR RADAKOVIC** is a Veterinary Advisor employed by the FSA and up until September 2002, was the Principal Veterinary Surgeon for the Meat Hygiene Service in Great Britain. He stated that meat may not appear as abnormal, but if not produced in accordance with the regulations, it is unfit. He referred to Article 14 (7) of the Community Directive 178/2002, which provides that food is deemed to be safe if produced in accordance with Community Regulations. Logically, it is unsafe if not produced within the regulations. He visited the Interfrigo Store on three occasions. He asked to look at representative samples of 257 pallets stored at Interfrigo. He looked at the evidence and notes of DARD officials and expressed his opinion about these. He examined 26 pallets being approximately 10% of the whole consignment. He chose randomly. He could find no discrepancies in the records of the DARD officials. He stated his findings in relation to his examinations. He stated further that the absence or the improper use of health marks and/or the use of an illicit HM on fresh meat was a serious fundamental breach of Community Rules

19. **MR ROSS** is the Principal Veterinary Officer of the FSA and is responsible for meat hygiene and imported food. He stated that a HM identified the country of origin and contained an approval number issued for premises after a licencing authority had licenced those premises. It was a unique number and should be used only in the premises for which it was issued. Where a health mark was missing or shown not to be genuine, the whole source and provenance of the meat was in question. There was no assurance that the meat had been produced in accordance with European or National directives and the safety of the meat could not be stood over. There is no reason why HM's should be found in premises other than the premises to which it was issued. One reason for an unscrupulous person to have such HM's would be to re-package and re-circulate meat from an unknown source and give it an integrity which it doesn't merit.

By means of a RASFF (a means of communication between member states of any serious incident concerning food and feed) he forwarded details of HM's which were found on EF premises to the various member states and following replies demonstrated how the following HM's were illicit: -

- Holland 307 EEG.
- Ireland 318 EEC.
- UK 9502 EEC.
- UK 9097 EEC.
- D NW-EZ-556 EWG
- ESP 10.03903/L CEE.

HM's similar to the illicit Spanish and German HM's were found on products in the EF premises. He gave evidence detailing the requirements as to how a HM should be applied and a product properly wrapped and packaged.

20. **MICHAEL HATCH** is the Enforcement Divisional Veterinary Office of DARD who stated that when the HM's of other premises, a strapping machine and vac pac machine were found he formed the opinion there was a facility for re-packaging and re-labelling. In addition, there were flat packs of unused cardboard boxes and pallets with empty cardboard boxes. The empty boxes were wrapped in clingfilm and this suggests they were going to be re-used. He prepared a report summarising all the evidence in respect of each of the pallets.
21. **DANNY GRAY** is a Deputy Principal with DARD. He led the search operation at EF. There were two search teams headed respectively by Thomas McAuley and Ms Grainne Maguire. He gave evidence of finding the empty boxes, flat packed boxes, vac pac and strapping machines and HM's. He compared the strapping on the spool on the strapping machine with strapping on the boxes and concluded it was the same type. He had seen a pallet of unpackaged meat which Mr McCabe had removed from the Cold Store. It should be stated at this stage, that this particular allegation was illustrated to be entirely erroneous. He had a telephone conversation with Mr McCabe on 10th November 2005. He asked him a number of specific questions as to what they had found. Mr McCabe advised him that he stored packaging on behalf of customers, that the quality of material with a problem was small, and that he could provide explanations. However, he knew nothing whatsoever about

the HM's and had no idea how they had come to be there. The witness had sent a letter to Mr McCabe on 25th November 2005 asking him to account for the traceability of the food and advising that the records taken by the FSA would be made available to assist him, but he had not received any reply.

22. **GRAINNE MAGUIRE** is a Veterinary Officer with responsibility for seven independent EEC approved cold stores and seven cold stores integrated with either cutting or slaughter premises. She gave evidence of her findings and stated, in her experience, she had never seen packaging stored in such a manner. There was no system in EF of pallet identification. She believed the strapping machine to be new and that it had a huge capacity. She had never seen a strapping machine in a stand-alone cold store. There was no reason to have a vac pac machine in a cold store, which should not have exposed meat. She also found strapping reels and a big plastic bin (dolav) of smelly plastic liners.

23. **MR JACKSON** is a Principal Environmental Health Officer with FSA. On 7th December 2005 he visited the Interfrigo cold store with representatives of the European Commission and the Belgium competent authority, whose members included Dr. Thill, the Official Vet for the Belgium plant with the HM 161/1. He examined the pallets which were polywrapped. He noted there were different types of polythene wrapping on the block and stated that one of the types was not used in the plant of Belgium 161/1. The wrap on the block on the pallet, to which 161/1 was applied, was thinner and lighter in colouring to that which Dr. Thill showed him as being the wrapping used in 161/1. On the outside of the shrink-wrap there was a label applied, which bore the HM 161/1. Dr Evers removed the label from the clingfilm and showed it to him. The back was covered with material, which suggested that this label had been removed from a box and applied to the wrap around the polyblock. Dr Thill had concluded that the meat on the pallet had not originated from Belgium plant 161/1.

THE RESPONDENTS EVIDENCE

24. **GEORGE McCABE** gave evidence that his premises were inspected weekly on an unannounced basis by Mr Bastion, a Veterinary Officer employed by DARD. Other officers would visit and an audit had been carried out on his premises. No Chinese chicken had ever been located in his premise and no complaints were lodged in respect of any breach of the relevant regulations. The vac pac machine was not working, the strapping machine had not worked for up to five months. He stored packaging material for external customers. It was not unusual for polyblocks to only have HM's on the pallet and not on the individual polyblocks. He explained how there had been a complaint about the Belgium meat, which came in two consignments. A meat inspector John Doherty was engaged to check the quality of the meat. Pending the result of this inspection, the meat was being held in the store, but it was not intended for human consumption. He sent through his documents dealing with the traceability of consignments of French and German beef and Spanish pork jowel. There was a dispute over a consignment from Challenger Foods. When these goods were returned to him they were marked "hold". He did not intend them for human consumption pending resolution of a problem over the quality and identity of the product. Other operators did not examine their products for freezer burn and discolouration. He had never experienced freezer burn resulting in condemnation. He stated there were three reasons for HM's from other premises being found at EF:-
- a. His store operator Mr O'Neill photocopied product labels for the purpose of identifying pallets within the store. He took from the product a label with a date on it, made a number of copies, and put them on the inside of the bottom rack of the pallet in the cold store so that he could identify the pallets in that row.
 - b. His son had photocopied a number of documents as part of a project for his degree.
 - c. The service man who serviced the office photocopier had photocopied a number of labels in order to remedy defects and test their repair.
25. **JOHN McCARTHY** is a retired Food Safety Officer. Whilst he did not have a great deal of experience of visiting cold stores, he found the EF to be exceptionally clean and that Mr McCabe conducted an efficient operation. He noted two strapping machines and a vac pac machine but he did not closely examine them. He did not perceive how a re-packaging operation could be done by four people. His experience as an Environmental Health Officer was that if someone put a 'hold' notice on a pallet or consignment of food, under no circumstances would he seize it. He further stated that he would not seize it if had an illicit HM on it. He asked Mr McConville, in the course of his inspection, what the problem was and was told it was pallet numbers. He saw some light green discolouration on the surface of the pork jowel but on noting the condition of the fat he concluded it was in very good condition. He did see freezer burn but regarded this as a 'quality' issue, as opposed to a 'fitness' issue.

26. **JOHN DOHERTY** is the Managing Director of Food Consulting Limited which provides auditing and inspection services. On 25th October 2005, he was contacted by SGS Purfleet on behalf of IHAK, a meat trading company, to inspect a consignment of meat stored at EF and which had been supplied to them by a Belgium meat plant. It was common for material to be kept in a cold store pending examination and commercial discussion. He could form an opinion as to the quality of the meat, but it was up to the competent authority to determine whether the meat was fit for human consumption or not. Once food is put into the food store, it cannot be taken out again for human consumption. Food which is of questionable quality would normally be held in a separate area of the cold store and marked "hold". If food was found to be fit, it may go on for human consumption, but if not fit, it will not go on for human consumption. When he arrived a part of the material had already been sorted. He understood that EF had retained unacceptable meat, and had shipped some of the meat deemed to be acceptable. The meat was inspected, one pallet at a time. If both he and Mr McCabe agreed the material was acceptable, the meat still in its blue liner was removed from the carton and stacked on one pallet. If unacceptable, the lid was replaced on the box and that carton was stacked on a different carton. He believed a HM may have been taken off a box and put on one of the pallets. In his opinion the consignment should never have left Belgium and this raised questions in regard to the individual inspection officers, including Dr Thill. Mr Doherty produced photographs of the strapping machine and gave evidence in relation to his inspection of same. There was a considerable amount of corrosion on the support frame and significant staining on the front stainless steel panel. He also gave evidence on the strapping, vac pac, freezer burn and discolouration.
27. **DR SLIM DINSDALE** is an Independent Food Safety and Quality Consultant. He described how the relevant regulations had changed in January 2006 and resulted in a diminishing importance of the classic HM. Much more reliance was placed on the documentation to check traceability of a product and a HM is part of that process. Documentation takes precedence over any HM as it is easier to fabricate a HM than documentation. He was surprised that the FSA had not checked the documentation. He commented upon the evidence given by Mr Ross on the Spanish and German Health Marks. Polyentrapment would not be a reason to condemn food. It is an occupational hazard in dealing with frozen food. Freezer burn was not a breach of the regulations and there would always be drip present in vac pac meat. In relation to discolouration one needed to look at the extent and nature of the discolouration. Whilst a sticking wound in the tissue of meat is not good practice it increases risk by a measurable amount and, if found in frozen meat, it would be trimmed off. The regulations relating to lymphatic tissue applied only to UK meat and were introduced following upon the BSE crisis. If there was a problem with meat it should be segregated and identified in such a way that it could not leave the cold store. Some plants will have a separate area in the cold store marked off. He stated in relation to the Belgium beef, that there was a strong argument that the unfit meat should have gone straight to the pet food store, but, as long as it was segregated and could not go on a market there is an argument that it could wait for a commercial decision. He did not however have a great deal to do with cold stores and his main involvement

was with unfrozen meat. He had never noticed the strapping machine in the cold store, but would not be surprised to find one. He would be surprised if someone would be involved in packaging low grade meat such as beef cheek meat or pork jowel, as opposed to for example, strip loins. The business HACCP plan looked to be in line with the action taken by Mr McCabe. He gave evidence as to the requirements of HM's as contained in paragraphs 10 – 14 of his statement. He finished by commenting upon the result of the microbiological tests conducted by Beechwood Laboratories. The figures for chicken breast strip in pallets 80 and 82 were on the limit of acceptability for quality. The German beef sample was getting up to the limit, but had further to go than the chicken. The pork jowel was perfectly ok and in surprisingly good condition.

28. **PATRICK BOYLE** is the proprietor of Ballymooney Meats. Two pallets of lamb owned by him were sent to EF for storage in error. Both pallets were labelled in the same way. The meat was fit for human consumption. He only held a national licence, not an EEC licence. This meant he could not trade or sell meat to Northern Ireland. There was no HM on the product, but it had never been intended to go to Northern Ireland.
29. **PETER HANNON** has been involved in the meat industry for the past 27/28 years and is based in Moira. He regularly attends cold stores and he has a cold store in Moira. Pork jowel, beef cheek and chicken skin are lower quality products as opposed to primal cuts. However they both require the same degree of packaging. A 25% saving on costs can be affected by having the meat in the form of polyblocks. It is common in Spain and Germany to have pallets of polyblocks which only have a health mark on the outside of the pallet. He has never had any trouble from his supervisory veterinary officer in Northern Ireland. He had seen a strapping machine in Ulster Cold Stores, but was not aware if they had it in 2005. He described the system he used in the event of a dispute on the quality of the meat. It is not the prerogative of the cold store owner to put food into the pet food store. It is best to “hold” it and notify the parties. A decision would be made following an inspection or chemical analysis. The system of disposal of boxes would be to accumulate them on a pallet and put pallet wrap around them. There is no financial incentive in re-packaging beef cheek and pork jowel. It would be difficult to falsify the documents to accompany the re-packaged product. The people who receive the meat could tell the quality of the meat.
30. **PATRICK O'NEILL** is a forklift driver, employed by EF. When products arrived at the cold store they are kept together. “Hold” products are kept at the end of the store. His practice was that he ‘possibly’ took a product label of the product and ‘probably’ got it photocopied. He left it in the office to be photocopied. He would be handed back a sheet with the labels. They were sticky labels. He would probably have a label for each pallet and would stick it on the frame of the pallet. If there were twenty pallets on the lorry you would get three sheets. In relation to the Spanish HM'S. He thought he took two of these labels to make copies. In relation to a consignment of frozen German beef he had noted that two pallets had spilled on the floor of the

delivery lorry. He rebuilt these pallets. There had been health marks on the shrink-wrapping around the spilled pallets.

31. **MR MARK ELDER** is an employee of Moy Park. He had attended as the result of a witness summons. He had visited EF on five occasions in and around November/December to identify Moy Park products. There were 97 pallets of chicken skin which came from Moy Park but which were the property of Mr McCabe. Chicken skin is a by-product of their process. It is of low value and what they don't use is designated as pet food. This was a special order for Mr McCabe and was produced in 20-kilogram bags. They put two Health Marks on each bag and a product description label which was unique to that product. It was put onto a pallet, strapped and put into cold store and then shipped out. He was confident that the product had left Moy Park with the appropriate labels, as was the normal practice. It would be a laborious test to re-package chicken skin and would not be profitable.
32. **MR ROSBOTHAM** is the manager of Hannon Meats in Moira, run by Peter Hannon. He dealt with Ulster cold stores and was there on one occasion with Peter Hannon inspecting product. A box was opened and re-strapped on a strapping machine. He thought this was within the last year, but definitely would have been in last 18 months.

ADDITONAL EVIDENCE

33. At the end of the defence case, Mr McConville was recalled to give evidence of his findings on meat which had been tempered for organoleptic (sight and smell) inspection. In a number of products he noted blood clots, tonsilar tissue and lymph node saliva glands. He demonstrated the tonsilar tissue on video. He gave further evidence in relation to five of the alleged illicit Health Marks being found as opposed to nine, as referred to by Mr Ross in his evidence.

34. **MR MALACHY DONAGHY** also gave evidence. He is a qualified Veterinary Surgeon. He conducted an inspection of the tempered meat with Mr McConville. Firstly they examined the bag. They then took the meat out and examined the amount of food present. He smelled the meat and commented on this, the colour of the meat and the texture of the meat. He agreed with the findings noted by Mr McConville. As a qualified Veterinary Surgeon for 26 years, he had no difficulty in identifying tonsilar material.

35. Dr Dinsdale furnished a written statement on identification of tonsilar tissue.

Two further witnesses were recalled. Ms Maguire give evidence of her experience on the requirement of HM and polyblock and was cross-examined about her evidence on the strapping machine in light of the photographs produced by Mr Donaghy.

Mr Ross gave evidence that he had stated the illicit German HM marks had been found in nine pallets, because this was the information given to him.

Mr Steele gave evidence in accordance with his written statement of evidence.

THE LAW

36. Article (8) of the 1991 Order provides for the seizure and inspection by an authorised officer of food, which is intended for human consumption.

Article 8 (6) provides

“ If it appears to a justice of the peace, on the basis of such evidence, as he considers appropriate in the circumstances, that any food falling to be dealt with by him under this article fails to comply with Food Safety requirements, he shall condemn the food and order –

- a. The food to be destroyed or to be so disposed of as to prevent it being used for human consumption; and
- b. Any expenses reasonably incurred in connection with the destruction or disposal to be defrayed by the owner of the food.

Article 5 (2) provides

“Food fails to comply with food safety requirements if:-

- a. It has been rendered injurious to health by means of the operations mentioned in Article 6;
- b. It is unfit for human consumption;
- c. It is so contaminated (whether by extraneous matter or otherwise) that it would not be reasonable to expect it to be used for human consumption in that state;
- d. And references to such requirements or to food complying with such requirements shall be construed accordingly”.

Article 7 (2) provides

“Where any food which fails to comply with food safety requirements is part of a batch, lot or consignment of food of the same class or description, it shall be presumed for the purposes of this Article and Article 8, until the contrary is proved, that all the food in that batch, lot or consignment fails to comply with those requirements”.

Article 4 provides that there is a presumption that food has been or is intended to be for sale for human consumption until the contrary is proved.

Article 25 makes further provision in relation to food safety requirements as follows: -

“(1) Regulations under this part may;

- a. make provision for prohibiting or regulating the carrying out of commercial operations with respect to any food, food source or contact material –
 - (i) which fails to comply with the regulations;
 - (ii) in relation to which an offence against the regulations has been committed, or would have been committed if

any relevant act or omission had taken place in Northern Ireland; and

- b. without prejudice to the generality of Article 8, provide that any food which, in accordance with the regulations, is certified as being such food as is mentioned at sub-paragraph (a) may be treated for the purposes of that Article as failing to comply with food safety requirements.

37. As at September 2005, storage of meat in a cold store was regulated by the Fresh Meat (Hygiene and Inspection) Regulations (Northern Ireland) 1997 (The Red Meat Regulations) and the Poultry Meat, Farm Game, Bird and Rabbit Meat (Hygiene and Inspections) Regulations (Northern Ireland) 1995 (The White Meat Regulations). These regulations have been made in pursuance of Section 25 of the 1991 Order.

The Red Meat Regulations

- Schedule 12 makes regulations in respect of the format of Health Marking of products.
- Schedule 13 makes regulations for the wrapping and packaging of products.
- Schedule 14 makes regulations in regard to the storage of fresh meat and cold stores for re-packaging centres.
- Regulation 12 (1) (e) states that a person shall not sell fresh meat for human consumption unless it has been given a Health Mark in accordance with the requirements of Schedule 12.
- Regulation 19 sets out the duties of an occupier among which are to:
 - (g) ensure that the Health Mark is properly applied as provided for in Regulation 10 and that any labels on which the Health Mark is printed are used properly;
 - (h) ensure that the OVS or Meat Inspector is notified immediately when any information at the occupier's disposal reveals a serious health risk;
 - (i) in the event of a serious health risk, ensure that fresh meat is withdrawn if it has been obtained under or stored in conditions similar to those which produced the risk and is itself likely to present the same risk.

The White Meat Regulations

- Regulation 11 sets out the requirements of Health Marking.
- Regulation 12 sets out the requirements of storage.
- Regulation 13 sets out the requirements for wrapping and packaging.
- Regulation 17 contains similar provisions to regulation 19 of the Red Meat Regulations.

38. S.R. 2004/505 has amended Article 5 of the 1991 Order as follows:-

- Article 5(2) "For the purposes of this Part food fails to comply with food safety requirements, it is unsafe within the meaning of Article 14 of Regulation (EC) Number 178/2002 and references to food safety

requirements or to food complying with such requirements shall be construed accordingly”.

- Article 5(3) “In determining for the purposes of paragraph (2) and Article (6) whether any food is injurious to health, regard should be had to the matters specified at sub-paragraphs (a) to (c) of Article 14(4) of Regulation 178/2002”.

39. EC Regulation 178/2002 has direct effect and Regulation 14 provides: -
1. Food shall not be placed on the market if it is unsafe.
 2. Food shall be deemed to be unsafe if it is considered to be:
 - (a) injurious to health;
 - (b) unfit for human consumption.
 3. In determining whether any food is unsafe, regard shall be had:
 - (a) to the normal conditions of use of the food by the consumer and at each stage of production, processing and distribution.
 - (b) to the information provided to the consumer, including information on the label, or other information generally available on the consumer concerning the avoidance of specific adverse health effects from a particular food or category of foods.
 4. In determining whether any food is injurious to health regard shall be had:
 - (a) not only to the probable immediate and/or short-term and/or long-term effects of that food on the health of a person consuming it, but also on subsequent generations;
 - (b) to the probable cumulative toxic effects;
 - (c) to the particular health sensitivities of a specific category of consumers where the food is intended for that category of consumers.
 5. In determining whether any food is unfit for human consumption, regard shall be had to whether the food is unacceptable for human consumption according to its intended use, for reasons of contamination, whether by extraneous matter or otherwise, or through putrefaction, deterioration or decay.
 6. Where any food which is unsafe is part of a batch, lot or consignment of food of the same class or description, it shall be presumed that all the food in that batch, lot or consignment is also unsafe, unless following a detailed assessment there is no evidence that the rest of the batch, lot or consignment is unsafe.
 7. Food that complies with specific Community provisions governing food safety shall be deemed to be safe insofar as

the aspects covered by the specific Community provisions are concerned.

8. Conformity of a food with specific provisions applicable to that food shall not bar the competent authorities from taking appropriate measures to impose restrictions on it being placed on the market or to require its withdrawal from the market where there are reasons to suspect that, despite such conformity, the food is unsafe.
 9. Where there are no specific Community provisions, food shall be deemed to be safe when it conforms to the specific provisions of national food law of the Member State in whose territory the food is marketed, such provisions being drawn up and applied without prejudice to the Treaty, in particular Articles 28 and 30 thereof.
40. Regulation 48 of the Transmissible Spongiform Encephalopathy Regulations (Northern Ireland) 2002 (The TSE Regulations) prohibits the sale of specified risk material (SRM) for human consumption. SRM includes tonsillar material

SUBMISSIONS

41. THE APPLICANT

These are as set out in the skeleton argument dated 6th May 2006 and written submissions dated 22nd June 2006 prepared by Dr. Sharpe BL. Essentially Dr. Sharpe submits that breaches of the Red and White Meat Regulations result in food automatically failing to comply with food safety requirements. He argues that the converse of Regulation 14 (7) of the EC Regulation 178/2002 must also be true in that food which does not comply with specific community provisions governing food safety shall be deemed not to be safe.

In addition to breaches of domestic regulations, he submits there is also a direct breach of Article 14 EU Regulation 178/2002 when the Red and White Meat Regulations are breached as they implement specific community provisions governing food safety. This is also the case in relation to the Transmissible Spongiform Encephalopathy Regulations (Northern Ireland) 2002.

He relied upon 'The Queen on the Application of the Food Standards Agency –v- The Brent Justices' [2004] EWHC 459 (Admin) as authority for the proposition that if any food is unfit for human consumption or fails to comply with the food safety requirements it is mandatory that the food be condemned.

He submitted that there were breaches of the regulations in HM's being: -

- (c) absent.
- (d) not conforming.
- (e) broken.
- (f) illicit.

Freezer burn and polyentrapment were evidence of breaches of the Wrapping and Packaging Regulations. The presence of blood clots, lymph nodes, bone in meat and tonsillar material constituted breaches of the regulations.

He submitted that a 'Hold' notice on product was capable of various meanings and was not an indicator that the product was not for human consumption. A 'Hold' notice could not rebut any presumption that the food is intended for human consumption.

Finally, and most importantly, he submitted that the use of illicit Health Marks, the re-used packaging material, empty boxes, discarded meat wrappings, the presence of a strapping machine, a vac pac machine, tables and weighing scales all prove conclusively that Mr McCabe was re-packaging products in breach of the fundamental terms of his licence as a cold store proprietor. It followed therefore that all products within the cold store must be suspect.

42. RESPONDENT

These are as set out in the skeleton argument dated 18th May 2006 and written submissions prepared by Mr. O'Hara QC and Mr. Fitzpatrick BL dated 21st June 2006.

The Respondent submits that the FSA, having failed to locate any Chinese chicken on his premises, 'threw the book' at him and have applied the law against him on a strict liability basis despite the fact that the standards of practice in his store are no different than the standards which prevail in all other cold stores in Northern Ireland.

This is evidenced by: -

- (a) an item on the FSA website wherein Jon Bell, the Chief Executive of FSA, in referring to documentary checks of products at EF concluded "This is almost complete and so far no identifiable food safety issues have been found".
- (b) a note from Ms Connelly of FSA that the Food Veterinary Office of the European Commission had threatened that the release of food from an unlicensed (at this time the EF licence had been revoked) cold store could result in a "complete halt of meat industry in UK".

Counsel for the Respondent referred to the discrepancies in the evidence of the witnesses called by the Applicant and strenuously attacked the applicant for his failure to check the provenance of the products through the documents which it had seized from EF.

Counsel argued that if HM's are approved by the country of origin that no action will be taken when they are imported in to the UK. Additionally, a polyblock with a single HM on shrink-wrapping satisfied the statutory requirements.

Products with a 'Hold' notice were not intended for sale for human consumption at the time the FSA search was conducted.

Finally they submitted that the Respondent could not have conducted a re-packaging operation under the gaze of regular inspections by Mr Bastion, the DARD Veterinary Officer, and other Veterinary Officers, who in the past had attended to complete audits of the premises. In any event, the re-packaging of products such as beef cheek meat, chicken skin and pork jowel would not have been profitable.

FINDINGS

43. One of the most important issues in this case, is the allegation that the Respondent was involved in re-packaging products in contravention of the terms of his licence.

I shall deal with this issue firstly as my conclusion will have a substantial bearing on other issues arising in this case.

Breaches, which on the face of them appear to be major, may be treated less seriously if it is found that Mr McCabe was not carrying out a re-packaging operation. Alternatively, issues which initially appear minor may have a greater import in the event of a finding of re-packaging.

A licence issued by DARD on 1st February 2002 under the White Meat Regulations authorised the premises to operate as a cold store, as defined in Regulation 2, with only packaged meats to be stored in the cold store.

A licence issued by DARD on 9th May 2002 under the Red Meat Regulations authorised the premises to operate as a cold store, for the storage of frozen meat, as defined in Regulation 2.

It is a condition of both licences that ‘the occupier should ensure that all appropriate requirements of the regulations are complied with’.

The re-packaging of products would be a fundamental breach of these licences.

44. No direct evidence of re-packaging was presented by the Applicant, who states that there is strong circumstantial evidence which points to the inevitable conclusion that re-packaging did take place.

In considering the circumstantial evidence, I remind myself that circumstantial evidence can be very cogent evidence, but the law is clear, that where a case is based on circumstantial evidence, that evidence must be examined and treated with great care.

So stated Hutton LCJ (as he then was) in ‘The Queen –v- Robert William Anderson’ when he reviewed the authorities as to how circumstantial evidence should be treated. He cited the words of Lord Normand in ‘LEJZOR TEPER –v- The Queen’ [1952] AC 480 which, to my mind, are particularly apt in this case.

“Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. Joseph commended the steward of his house, “put my cup, the silver cup in the sacks ‘mouth of the youngest’ ”, and when the cup was found there Benjamin’s brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the

accused's guilt from circumstantial evidence to be sure that there were no co-existing circumstances which would weaken or destroy the inference".

In this, case suspicion was undoubtedly cast upon EF when a suspect delivery of meat consigned to EF arrived in the province and was destroyed.

Subsequently the FSA committed a large amount of finance and manpower to a search of the EF premises but found nothing relating to the suspicion upon which the second warrant granted to the FSA was based.

There is always potential in such circumstances, and I stress 'potential', for evidence to be manufactured, or exaggerated, or for an overbearing approach to be adopted by an authority which results in the elevation of minor breaches of regulations into major issues.

Accordingly, whilst I am empowered by Article 8(6) of the Food Safety Act to determine whether the food in this cold store complies with food safety requirements 'on the basis of such evidence as I consider appropriate in the circumstances', it appears to me that proof of facts of re-packaging based upon circumstantial evidence must meet the same high standards as required in a criminal case.

45 **EMPTY BOXES**

Ms Maguire gave evidence that she found to the right of the freezer area, a half full pallet of empty white boxes. They still had the Belgium 161/1 HM on them. In the big store area, she found 24 pallets of similar empty boxes. She counted 40 boxes on each, calculating that there were over 1000 boxes. Additionally there were other pallets with used empty boxes.

Mr McCabe and Mr Doherty explained how they had inspected the Belgium meat consignment and took meat which they regarded as fit out of the boxes, retaining the wrapping liner, and built them up on a polyblock basis, thereby leaving empty boxes. Mr McCabe's practice was to retain the boxes on pallets and break them down for disposal at a later date.

Because of her experience of cold stores Ms Maguire concluded that the reason for boxes to be stacked in this manner was for their re-use particularly in light of the number of them and that they still retained a Health Mark. She had never seen packaging being stored in such a manner.

It appears to me that these boxes could easily have been broken down and disposed of at the same time as the inspection by Mr McCabe and Mr Doherty. I am concerned about their number, about them being retained with a Health Mark number on them and being protected by shrink-wrap and that when Mr Gray returned to check these boxes on 12th November they were no longer there. However, this aspect of evidence on its own would not lead me to conclude there was re-packaging.

46. **RE-PACKAGING EQUIPMENT**

Equipment for re-packaging was found by the investigating team made up of three strapping machines, a vac pac machine, tables, weighing scale and reels

of strapping tape. One of the strapping machines was old and the other two were of a similar manufacture.

One of the strapping machines was in close proximity to a vac pac machine and could be seen on video and photographs taken on behalf of the Respondent and the Applicant. None of the witnesses for the Applicant had inspected either the strapping machine or the vac pac machines.

Ms Maguire from her visual inspection of the strapping machine had concluded that it was new because it was clean, shiny and she saw no evidence of rust. "The lead was trailed across the floor to be plugged into the electrical point. If not in use it would have been covered by debris and dust. It struck me as unusual to have a strapping machine in a cold store. Stand-alone stores do not warrant a strapping machine of this magnitude". She had only seen strapping machines of this capacity in cutting and slaughter houses. "This machine has a huge capacity.

In premises of 50 to 100 employees this type of strapping machine would be used". Ms Maguire had worked in cold stores for the past 6 years and had never seen a strapping machine in a stand-alone cold store. Whilst it was necessary at times to re-strap boxes, a hand held strapping machine would be appropriate for the amount of strapping required in a stand-alone cold store.

Mr McCarthy and Mr Doherty on behalf of the Respondent gave evidence that the levels of staff at EF would be insufficient to adequately deal with a re-packaging system. However, the evidence of Ms Maguire that the strapping of a box would take seconds was not contradicted by Mr Hannon or Mr Rosbotham. Indeed the evidence of Mr McCarthy on this point was predicated on the basis that it was fresh meat which was being re-packaged as opposed to frozen meat. One of the main thrusts of his evidence on the unlikelihood of re-packaging was the absence of either knives or protective materials. These, of course, would not be required for the re-packaging of frozen meat.

Mr McCabe give evidence that the strapping machine had not worked for the last 5 months and that he had difficulty in getting someone to service it.

Mr Doherty stated that he had been requested by the Respondent to enter the case as an expert witness. He was aware of the allegation of re-packaging and attended EF at Mr McCabe's invitation 'to examine his stores, facilities and equipment'. He noted, "two strapping machines, both of which were fairly old and in poor condition; one did not appear to be working at all."

It is not without significance that despite attending to inspect machines to give expert evidence on re-packaging Mr Doherty's attention was drawn to 2 strapping machines in an old store (marked number 5 on the map of the premises) and not to the strapping machine in the main cold store complex referred to by Ms Maguire in her statement of evidence dated 2nd February 2006.

The strapping machine in the cold store complex was the machine which founded the belief of the FSA that a re-packaging operation existed and I find

it incredible that Mr Doherty's attention was drawn to 2 strapping machines (one of which was completely dilapidated) in a store rather than the strapping machine in the cold store complex.

Mr Doherty did return to EF in the course of the hearing (22nd May 2006) to inspect a third strapping machine and took photographs to indicate the machine he had inspected. He stated that the machine had a considerable amount of corrosion on the support frame and significant staining on the front stainless steel panel. He could not find a plate indicating the date of manufacture, but estimated that it was 10 to 15 years old.

Mr Fitzpatrick revisited this issue with Ms Maguire when she was recalled on other matters. Ms Maguire would not concede that it was the same machine and maintained her position that the machine she saw looked 'new'.

Firstly, I conclude from my inspection of the photographs and video that the machine referred to by Ms Maguire is one and the same machine as inspected by Mr Doherty on 22nd May 2006. Secondly, I accept Ms Maguire's evidence is an entirely truthful description of the impression gained by her of the machine on that occasion in the circumstances that pertained at that time.

In any event, on the basis of Mr McCabe's evidence, whether it was new or old, the machine was working and available for use from 5 months prior to the date of the search on 9th November 2005. I was somewhat surprised that having heard some of the evidence on the strapping machine prior to his inspection on 22nd May 2006, Mr Doherty did not in fact examine the machine to ascertain if it was in working order.

Mr Hannon and Mr Ross gave evidence of seeing a strapping machine in Ulster Cold Stores. Neither described the type or capacity of the strapping machine which they allege they saw. It appears to have been up to a year and a half ago that they saw the strapping machine. Mr Hannon was not aware if it was there in 2005. Indeed when he had visited Ulster Cold Stores in the week prior to giving evidence he was told that they did not have a re-strapping facility.

The evidence of Mr Hannon and Mr Rosbotham was forcibly put to Ms Maguire upon her recall by Mr Fitzpatrick. She stated in 2005 she had visited Ulster Cold Stores on 15 occasions. One of her colleagues had visited on 16 occasions and another on 13. None of them had ever seen a strapping machine.

I accept the evidence of Ms Maguire on this point and conclude that the presence of a strapping machine of such magnitude in a stand-alone cold store strongly points towards a re-packaging operation. I also take cognisance of the fact that Dr Dindsale stated that he had never noticed a strapping machine in a cold store.

47. **THE VAC PAC MACHINE**

Ms Maguire had not inspected this machine. She stated that there was no reason to have a vac pac machine in a cold store as a cold store should not have exposed meat.

Mr McCabe stated that it was not working. It had been used in a former business but when this closed he took it to EF to store it.

Mr Doherty noted that the sealing bars were missing and stated that this vac pac machine would not be of any use in a cold store as it was not big enough. It was designed more for a retail outlet.

To my mind, the presence of a vac pac machine in a stand-alone cold store is highly significant. Quite simply it should not be there. If Mr McCabe is being truthful, that he was simply storing it, then I would have expected it to be in the old store room (number 5 on map) along with the two other strapping machines. The fact that it was alongside the strapping machine in a room (described at one stage by Mr McCabe as the 'packaging room') just beside the cold store and in close proximity to empty boxes is highly significant. This is particularly so when one considers the presence of smelly bin liners in a dolav, with which I shall deal later.

48. **STRAPPING TAPE**

Ms Maguire had found 3/4 reels of strapping tape and in the cold store pallets of new reels, guessing that there were 20 on each pallet. Mr McCabe stated that these had been present when he took over the running of the store from a Mr Nethercott in 2000. The evidence given by Mr Doherty was examined in detail both in main and cross-examination and I concluded on viewing the photographs and the DVD, and hearing the evidence, that the tape reel on the strapping machine examined by Mr Doherty on 22nd May 2006 was not the same tape of reel as found by Mr Gray and Ms Maguire on 9th November 2005. On this basis the evidence of Mr Gray that the strapping, which he found on boxes, was of a similar type to the tape on the reel of the strapping machine remains uncontroverted.

49. **DOLAVS OF SMELLY LINERS**

Ms Maguire found a dolav of smelly plastic liners. The dolav was a plastic container approximately 5ft by 4ft and 3ft high. This was in the same area just outside the freezer where the empty boxes, strapping machine and vac pac machine were found. She also found a dolav of used smelly liners in the old cold store (area 5).

Mr Doherty discounted that these could have come from the re-organisation of the Belgium meat. Upon enquiry by me in the course of submissions, Mr Fitzpatrick gave as a possible explanation that they had covered food which was had gone into the pet food store. However, no evidence whatsoever was given by Mr McCabe or any of his witnesses to explain the presence of a dolav of smelly bin liners which had once contained food particularly in the area just outside the freezer unit where a strapping machine and vac pac machine were present. Dr Dindsale indicated in cross-examination that the

wrapping was in contact with the meat, he could think of no reason why the liners would have been there. Again this points strongly towards evidence of re-packaging.

50. **RE-USE OF PACKAGING**

Pallets 95, 100, 102 and 127 all contained cartons with the lids turned inside-out. Mr McConville described that, on close examination, the boxes had been turned inside-out. They were from a company called Keypack. Their logo was on the inside of the box. Apart from being a breach of the regulations, the re-use of boxes strongly suggests that re-packaging has taking place. No explanation has been given as to why these boxes were found in this condition. I further note that on pallet 59 a torn health mark was on the lid of a box which did not match the bottom of the box. I note that Dr Radakovic did acknowledge that there could be differences between the lid and the bottom of a box. Finally on pallet 39 meat described as forequarter on the box label turned out to contain Brazilian loins. The box label stated “slaughtered in Ireland”. Mr McConville stated that he could not imagine how Brazilian meat could be in an Irish box other than because of re-packaging.

51. **HEALTH MARKS FROM PREMISES OTHER THAN EUROFREEZE**

In the course of the search on 9th November 2005 Health Marks relating to six other premises were found. These were: -

- a. Holland 307 EEG.
- b. Ireland 318 EEC.
- c. UK 9502 EEC.
- d. UK 9097 EEC.
- e. D NW-EZ-556 EWG.
- f. ESP 10.03903/L CEE.

These health marks were printed on to A4 sheets of adhesive labels, with 8 labels per page. On some of the pages labels were missing, indicating that they had been taken off. If there was one consistent piece of evidence among all the witnesses in this case, it was that health marks should not be found in premises other than the premises to which it is issued. A health mark is a unique number and should only be used in the premises to which it is issued. Even if genuine, such health marks should not be in possession or under the control of anyone other than the official veterinarian for the approved premises.

Dr Dinsdale said he was unable to give any reasonable explanation for the presence of such Health Marks at EF.

Ms Maguire put it succinctly when she said “I can see no legitimate reason *and there is no legitimate reason* (my italics) why premises other than those who own a health mark should have someone else’s health mark”.

Only two witnesses gave an explanation for their presence: -

Mr Ross stated, “One reason for an unscrupulous person to have such health marks would be to re-package and re-circulate the meat from an unknown source and give it some integrity which it doesn’t merit”.

Mr McCabe accepted that a significant number of these health marks had been found in his store. He gave three reasons: -

- a. His store operator Mr O’Neill photocopied product labels for the purpose of identifying pallets within the store.
- b. In 2004, his son Kieran had done a project for his degree entitled “You’re telling porkies”. He had produced a number of copies of health marks, some of which he had included in his project.
- c. The person who serviced the office photocopier had copied a number of labels to test the machine.

Those at (c) related to the Spanish health marks of which there were an extremely large number. Only Mr O’Neill gave evidence to corroborate this. His evidence was contradicted by the evidence of Mr McCabe and his own written statement and Mr Nethercotts statement. He gave me the impression of a loyal employee doing his best for his employer. He stated at the commencement of his evidence that his practice was to “possibly” take a product label and he would “probably” have a label for each pallet.

Mr McCabe stated on 18th May 2006 that as his son was doing exams during the next two weeks he would not be giving evidence. The evidence in this case was not completed until 5th June 2006 and submissions were made on 28th June, but no application was made by the Respondent to call his son as a witness following the completion of his exams.

The service operator of the photocopier was a former manager of EF. Whilst I was under the impression that he was to give evidence, he did not do so. A statement from him dated 30th May 2006 was handed in wherein he stated that he would run off approximately 100 pages to ensure that the machine was working properly. He did not recall what he would have copied on 23rd August 2005. Having come from an office background myself I indicated surprise in the course of the hearing that use would be made of adhesive type copied paper as opposed to scrap paper for the purpose of testing repairs to a photocopy machine.

Significantly, no evidence can be found on DVD or photographs of the Respondent or the Applicant of the practice to which Mr O’Neill referred. Indeed no evidence of same was given by either Mr Doherty or Mr McCarthy.

I conclude that these explanations are completely untrue and that the reason for the presence of these illicit health marks point strongly to the conclusion reached by Mr Ross to which I have already referred above.

52. In the course of the search of the Respondent’s computer records, a proforma letter was discovered bearing the heading ‘Darcy Foods’ and electronically signed by Mr McCabe. The letter offers a re-packaging and a re-labelling

service for “returned or out of date stock”. Whilst it was conceded by Mr McCabe that such a service would be illegal he knew nothing of this letter and pointed out that it had an incorrect address as it bore the name of the towns Ballybay and Castleblaney. In my view this letter, on its own and, particularly, when combined with the illicit Health Marks points strongly towards a conclusion of re-packaging.

53. Mr McCabe, Mr Hannon and Mr Elder gave evidence that it would not be financially viable to re-package low-grade products such as pork jowel, beef cheek meat and chicken skins.

Additionally the Respondent forcibly submits that if re-packaging was taking place it would have been noted by the regular inspector Mr Bastion or one of the other inspectors.

At the end of the day it is difficult to speculate the intentions of an unscrupulous person who wishes to profit from the re-packaging of food. There is no doubt that such a person could take steps to avoid the attention of inspectors. Mr Bastion was not called either by the Applicant or the Respondent. He may simply have visited the freezer area where the products were stored. Indeed Mr McCarthy only ventured into the adjoining area when on a walk during his lunch break and Dr Dinsdale did not see the strapping machine.

54. Having reviewed the evidence of empty boxes on pallets, the presence of a strapping machine, a vac pac machine, tables and scales all in the same area close to the freezer room, an area described by Mr McCabe as the packaging area, reels of strapping tape, a draft letter offering a re-packaging service and, in particular, A4 sheets of illicit health marks with labels having already been taken off the A4 sheets leaving a blank space, and the lies told by Mr McCabe to explain them, I am driven inexorably to the conclusion that re-packaging contrary to the terms of his licence was taking place at EF.

THE AUTHENTICITY OF THE HEALTH MARKS

55. Mr Ross confirmed to the European Commission, by way of the Rapid Alert System for Food and Feed (RASFF), the finding of the illicit health marks. These were forwarded by the Commission to the Central Competent Authority (CA) in each of the relevant countries, who replied with information on authentic health marks in comparison with illicit health marks.

Having reviewed the evidence I find the following health marks to be unauthentic and set out the reasons for this conclusion: -

NW-EZ-556

The German CA stated that on the date given on the specimen label (31st May 2005) the company did not have any such labels. The labels were only ordered by the Germany Company on 12th July 2005 and received on 26th July 2005. Secondly the Company use rolls of labels and not A4 sheets. Thirdly

the German Company used only date stamp with the month and year, whereas the specimen had day, month and year. Additionally the date on the specimen was typed in English. Evidence was given that generally when food is produced, its destination or purchaser is unknown.

- I am satisfied on this evidence that the above health mark is not authentic.

10.03903/L CEE Health Mark

The Spanish CA provided an authentic health mark from the relevant Spanish Company. I accept that comparison with the specimen sent by Mr Ross and found at EF illustrates that the latter was not authentic. I do not accept Mr Fitzpatrick's contention that the sample sent by the Spanish CA is a product label. The sample clearly has the oval health mark printed on it. Additionally Dr Dinsdale, when asked to comment on the EF specimen label stated that on the face of it he did not doubt the Spanish CA. He did go on to say that he always liked to go back to the source and verify it himself. A great deal of evidence was taken up on tracing the provenance of a product through documentation. The FSA were strongly, and in my view, correctly criticised by Mr Fitzpatrick for their failure to check the documents. The evidence as to what actually was checked is unclear, but evidence was given that the documents were checked. No evidence was given as to the results of any such checks.

Mr McCabe gave evidence of the provenance of the Spanish and German products through the purchase and delivery documents. These were provided to the FSA when Mr McCabe lodged his statement of evidence dated 5th May 2006.

Again it is unclear as to what documents the FSA obtained from EF in November 2005 compared with the documents accompanying Mr McCabe's Affidavit.

Having said that Mr McCabe was afforded the opportunity, well before 5th May 2006, to present documentary evidence to the FSA. Mr Gray wrote to Mr McCabe on 25th November 2005, stating that to enable DARD to consider whether the food products in EF were fit or not, he should:

'Provide a list to me forthwith of all those who have their own product in your cold store. In relation to meat owned by Eurofreeze, provide sufficient authentication of its provenance to assure the Department that each item is fit for human consumption. This information should be provided to me at the above address. If need be you may be given access to your records which are currently being held by the Food Standards Agency'

Mr McCabe stated he handed this letter to his Solicitor but I am at a loss to understand, if he relied so heavily on the documentation for the provenance of the product, why he did not immediately reply to Mr Gray.

I am further surprised that no attempt was made by the Respondent, on learning of the responses from the relevant Central Authorities, as to the authenticity of the German and Spanish health marks on the products in

Eurofreeze to contact the FSA to have the matter referred back to the competent authorities.

- On the basis of the evidence therefore, I concluded that the Spanish health mark is not authentic.

HOLLAND 307 EEG

The health marks found at EF were on A4 sheets and did not contain serial numbers. The authentic health marks forwarded by the Dutch CA came on rolls and did contain serial numbers.

- I concluded that this health mark is not authentic.

IRELAND 318 EEC

UK 9097 EEC

On the basis of the comparisons with the authentic sent by the Irish and UK CA,

- I am satisfied that these health marks found at EF are not authentic.

UK 9502 EEC

The only difference between the authentic health marks sent by the CA and EF specimen was the thickness of the oval surrounding the number. On the basis of the evidence of Mr Elder, I am not satisfied that the EF specimen was not authentic. It should of course not have been at EF premises.

These findings, when added to the findings at paragraph 54 leave me in no doubt that there was a re-packaging operation at EF

56. Dr Sharpe submitted that if I made such a finding of fact that all of the contents of the cold store should be condemned. I do not accept this, but acknowledge that it does have an important bearing on the issues arising in respect of the food products contained within the store. It is appropriate at this stage, therefore, that I consider the effect of the finding that there was a re-packaging operation on the pallets of food which bore the illicit Spanish and German Health marks.
- 57 Irrespective as to whether I accept Mr McConville's criticism of the pork jowel and irrespective of the microbiological results, I have no alternative but to condemn the entirety of the pork jowel (pallets 1-21). Mr McCabe's evidence as to the provenance of the pork jowel cannot prevail over the fact that the product bore illicit health marks. This is particularly so when the pork jowel had thin black strapping similar to the strapping found at EF.

Further, having determined effectively that he lied to the Court as to the reasons for the illicit health marks being present in his premises, his evidence on the documentation of the product carries very little weight, particularly in the absence of a proper pallet identification system.

58. On a similar basis, I must condemn the pallets of German beef (pallets 45-56). Five of these pallets bore the illicit German health mark. Of these five, three had the same serial number 00103. Mr Fitzpatrick was justifiably critical of Mr Ross's evidence that he had been told that nine pallets contained the illicit

German health marks when, infact, only five health marks were found. Mr Ross explained he would have been told that there were nine but could not indicate where this information had come from.

Looking at it in the round, I found Mr Ross to be an impressive and truthful witness. This was one of largest operations ever carried out by the FSA in this jurisdiction. It was done in a most transparent way, with every step being documented, photographed and filmed. The findings of the FSA were available for inspection by the Respondent.

Mr Fitzpatrick also points to the fact that the German products bore an additional HM number 550 which was never checked by the German Company or the German CA.

On the evidence upon which I have to decide this application, I know nothing about the authenticity of the Health Mark 550. I do know from the German CA, that the Health Mark used by the German Company prior to NW-EZ-556 was EZ 751. I also know that the company uses consecutive serial numbers, and this further influences my conclusion that these health marks are not authentic.

I do not know how these illicit health marks came to be on the German product and Mr McCabe has given no explanation for same. Again his evidence on the provenance of the product through the documentation cannot prevail over illicit health marks being placed on the product.

THE BELGIUM BEEF

59. In his Affidavit Mr McCabe stated that this consignment was being held in a store for assessment following the refusal of a client to accept it, alleging that the meat was of bad quality. He elaborated somewhat on this in giving evidence, stating that whilst initially he didn't think the problem was great, he became more concerned and told the people from whom he had bought the meat of his concerns. As a result of this Mr Doherty was engaged to inspect the food.

Mr McCabe explained how on 9th November 2005 some of the pallets consisted of boxes and some were polyblocks "they had all originally been in boxes. This changed when Mr Doherty examined on 3 days preceeding 9th November 2005". This was not correct because Mr Doherty gave evidence that when he arrived part of the material had already been sorted. The meat had come in two shipments and all of the first and a small part of the second shipment had already been sorted. Mr McCabe had retained the unacceptable meat and shipped off to another customer the meat he deemed to be acceptable.

This was of particular concern to me as I had understood from Mr McCabe, that Mr Doherty had overseen the inspection of all the Belgium meat.

I became even more concerned when Mr Doherty conceded in cross-examination that he was not familiar with the Red and White Meat Regulations in any great detail. Further he described that his role was to observe and to report to his client “it was not my function to make any decision”.

The situation is that, in respect of the meat which Mr Doherty did see, cartons were rejected because they were in very poor condition. Although the shipments were described as beef head, a wide range of types of material were found within the shipment.

The primary reasons for objection were: -

1. Beef head meat smelling off and/or discoloured.
2. Fore and hindquarter primals unsuitable for processing and smelling off.
3. Adhesion of cardboard to top surface of meat due to poor folding of the polyliner.
4. Other reason – mince beef, pig meat, foreign body (label).

It appears to me that because of the amount of meat which was found to be unacceptable, and the condition of same, that consideration should have been given to condemning the entire consignment.

Under Regulation 19(h) and (i) of the Red Meat Regulations. Mr McCabe as the occupier of the premises, had a duty to ‘ensure that the OVS or Meat Inspector is notified immediately when any information at the occupiers disposal reveals a serious health risk and, in the event of a serious health risk, ensure that meat is withdrawn if it had been obtained under or stored in conditions similar to those which produced the risk, and is in itself likely to present the same risk’.

Mr Doherty confirmed that the condition of the meat, which he inspected, revealed ‘a serious health risk’. Dr. Dinsdale stated that a serious health risk only arose when a product contained dangerous chemicals. It was however Mr Doherty who saw the meat at close quarters, Dr Dinsdale did not. He infact conceded he had not seen the product first hand. The condition of the meat, as described by Mr Doherty was quite deplorable.

If Mr Doherty had been aware of the regulations, having concluded that the meat constituted a serious health risk, I have no doubt that he would have notified the OVS or Meat Inspector immediately. I am entirely surprised that this was not done. Similarly, I have no doubt that he would have ensured that the entire consignment was withdrawn in accordance with Regulation 19(1)(i).

The responsibility under Regulation 19(1)(h) and Regulation 19(1)(i) is of course Mr McCabe’s. He also has a duty under Regulation 19(1)(b) to take all practical steps to secure compliance by any person employed by him, or by any person invited onto the premises, with the Provisions of the Regulations.

Although there was a system whereby Mr McCabe and Mr Doherty inspected the meat together, the ultimate decision was down to Mr McCabe. If Mr Doherty had disagreed he would have reported this to his instructing clients.

Mr Doherty was asked during evidence in chief, if a cold store operator was qualified to inspect meat. He replied, “He could form an opinion. It is down to the competent authority to determine whether meat is off or not”. Mr Radakovic also stated that a Cold Store operator may not have sufficient expertise to identify food as good or bad.

In this situation, Mr McCabe proceeded to make a decision himself, on which meat was fit and which meat was not, prior to the arrival of Mr Doherty. After Mr Doherty arrived he had the ultimate decision as to whether the meat was fit or unfit. At no time was the OVS contacted.

In these circumstances, I conclude there has been a breach of Regulation 19(1)(b), Regulation 19(1)(h) and Regulation 19(1)(i).

I would have no hesitation in condemning the entirety of the Belgium consignment on this basis.

60. I now turn to the finding of Mr McConville following his inspection at Interfrigo and his organoleptic examination.

It appears to be common case between the Applicant and the Respondent that the following pallets are unfit for human consumption: -

- 97 and 115 to 125.

These were boxes of Belgium beef found by Mr McConville and which of course had been declared unfit by Mr McCabe and retained in their boxes.

Mr McConville had condemned pallet 121 and Mr Donaghy pallets 118, 119 and 124 in their organoleptic examination.

61. One fault common to all the Belgium products 161/1 CEE was that the health mark was applied to the side of the carton and not to the lid of the box.

Mr Radakovic gave evidence that the absence or the improper use of a health mark and/or the use of an illicit health mark on fresh meat, is one of the serious fundamental breaches of community rules as given effect in applicable meat regulations which would warrant meat to be declared as failing the food safety requirements. This is regardless whether or not during examination the meat concerned has been visibly normal. Such meat he says cannot be placed on the market for human consumption (Regulation 12(1)(e), Schedule 12, Red Meat Regulations).

Mr Ross in his evidence described how under Schedule 13, the Health Mark must be applied in such a way that it is torn when the package is opened, non-destruction of the mark being permissible only where the packaging itself is destroyed on opening.

This leads me to consider whether all of the Belgium product (unfit meat in boxes and fit in polyblocks) should be condemned by reason of the fact that when the consignment arrived in the store it was all contained within boxes which did not have the health mark correctly applied.

62. Dr Sharpe argues that if I find there has been a breach of the regulations there is no discretion and I must find that the product does not meet food safety requirements and so condemn it. I do not accept this argument. There is no doubt that under Article 5(2) of the Food Safety Act, if I find food is unfit for human consumption, I have no discretion and must condemn it.

It appears to me however that Article 25 states that if there has been a breach of the regulations, such food may be treated as failing to comply with food safety requirements. In other words, where there is a breach of the regulations, I have a discretion as to whether I treat such a breach as a failure to comply with food safety requirements. Whether I would or not, would depend on the extent of the breach. If, of course, I hold that there has been a breach of the food safety requirements, then I must condemn the product.

One of the difficulties I have in this regard is that Article 25 of the 1991 Order states that regulations MAY make provisions for failure to comply with the regulations and may provide that food which has breached the regulations may be treated as failing to comply with food safety requirements. I have been unable to find anything in the regulations, which actually makes such provision.

Dr Sharpe, when I enquired, was unable to point to any such provision. He relied upon the case of *The Brent Justices* as authority for this proposition. Dr Sharpe argued that as the Northern Ireland 1997 Regulations are similar to the 1995 English Regulations I should follow what was said by Mr Justice Stanley Brunton at paragraph 3

“It will be noted that the Notice did not allege that the meat itself was defective, diseased or unfit for human consumption. The failure to conform with the regulation specified in the Notice related to the wrapping and packaging of the meat. The Fresh Meat (Hygiene and Inspection) Regulations 1995 provide in effect that a failure to comply with the requirements for the wrapping and packaging of fresh meat contained in Schedule 13 of those regulations, in-corporated through Schedule 12, results in the meat failing to comply with food safety requirements. That failure to comply with food safety requirements applies both under the regulations and under the Act itself by virtue of Section 26, which permits an extension for the meaning of the expression “failing to comply with food safety requirements” by the regulations”

I have compared our 1991 Order and Regulations with the corresponding English Order and Regulations and find that they are similar. Whilst I am not bound by the ‘*Brent Justices*’ decision it is highly persuasive as to the fact that a breach of the regulations may constitute a failure to comply with food safety requirements.

In the circumstances of this particular consignment I must conclude that the improper use of the health mark is a serious and fundamental breach of the Red Meat Regulations causing a failure of the consignment to meet food safety requirements.

63. Of 24 pallets of Belgium meat, 11 have been declared as unfit by Mr McCabe in his inspection with Mr Doherty.

- Of these 11 a number had product sticking to the cardboard box.
- Pallet 117 had three separate health marks attached, product was stuck to the lid and no weights were recorded on the boxes.
- Pallet 119 had beef in bags with a knot on the bags which is a highly unusual practice.
- Pallet 125 had different colours of liner and inconsistency of meats. According to Mr McConville, this suggests that meat was packed at different times.

Of the other pallets built up on polyblocks numbered 52, 57, 103, 104, 105, 106, 107, 108, 109, 112, 113 and 114,

- Five had no health marks at all.
- One had three different health marks.
- In eleven, the liners did not enclose the product.
- None had health marks on the liners.
- In pallet 104 there were two types of plastic liner with two different colours and two different gauges. The product was inconsistent in that it contained the diaphragm of the animal. Mr McConville states that this would not be expected to be found in beef trimmings. It was found in heavier gauge. There were cuts from the peritoneum which shows different types of meat removed during the slaughter. Mr McConville states that inconsistencies to this degree suggest that the blocks are packaged at different times and are not from the same consignment of meat.
- In pallet 106 had product in a pale blue liner and some in a heavier gauge. This suggests that the blocks were not packaged at this same time. Primal cuts showed up and would not be expected to be seen in beef trimming. There was also polyentrapment.
- Pallet 109 had two different types of liners.
- Pallet 130 also had polyentrapment. Mr McConville explained that this was caused when product is placed in the liner and pressed down into the meat. The freezing will trap the liner within the spaces of the meat. He states that if there was polythene in the content of the meat it is incorrectly packaged and is a breach.
- On pallet 113 some of the blocks of meat were unwrapped and thereby were in breach of the regulations. Additionally the products were placed directly on a wooden pallet. This is a breach of the regulations as the meat must be protected from contamination.

It should be said at this stage that issue was taken by the Respondent that no proper record was taken by Mr McConville of pallets which had collapsed during the transport from EF to Interfrigo.

We do know that Pallet 113 did have a health mark when noted at EF on 9th November 2005. The HM was of course non-conforming, being on the side of the box. This pallet however would have been built up by Mr McCabe following the separation of the meat.

In any event I can only deal with the product as it is found and there is no doubt, that by the description given by Mr McConville it is in breach of the regulations.

When I consider all the matters as set out above I conclude that these pallets are unsafe, in that they do not comply with the relevant community provisions under Article 14(7) Regulation Number 178/2002.

In addition to the ground, under which I have previously condemned this consignment, I also condemn it for the reasons set about above.

65. One of the matters which concerned me mostly about this product was the admission by Mr McCabe that, in reconstituting the fit meat onto a new pallet, a label was removed from a box and placed upon the pallet. This was a serious breach of the regulations done with the full consent of Mr McCabe. This new pallet should have been health marked in the appropriate manner in the presence of the OVS. As Mr Radakovic stated if a box is opened a Cold Store operator has to reseal it with the health mark which is given to his Cold Store at the time of licensing. He stated there should be a system to know who is applying the health mark and why, so that subsequent dealers will know that something has happened for it to be resealed. Dr Dinsdale stated that if anyone other than an authorised officer applied a HM and there is no good reason for it, there is a breach of the regulations. He emphasized that the attachment of an HM should be strictly under the control of the OVS. The practice adopted by Mr McCabe in this instance and his blatant disregard of the regulations again adds to my conclusion that re-packaging was taking place.
66. That however is not the end of the matter in relation to the Belgium Meat. It is alleged that there was a 'hold' notice on this product indicating that, at that time, it was not meant for human consumption.

Mr Fitzpatrick in his helpful summary of the various pallets has entitled this section as "Belgium Beef marked Hold"

I have to say that I cannot find any evidence that it was infact marked 'hold'. Mr McCabe did not give such evidence either in his statement or his main examination. By contrast he indicated in both how the 'Challenger' products were marked 'hold' when brought into his store.

Mr Doherty did not give such evidence. He stated in general terms that when a product is subject to dispute it is usually marked 'hold' and segregated from other material in the store. At no time, however, did he state that this product was marked 'hold'.

Mr McConville gave evidence that if there was a 'hold' label on a pallet, he made a note of it on his inspection sheets. No note is made on any of his inspection sheets of a 'hold' label on any of the Belgium product. In cross-examination Mr Fitzpatrick illustrated three examples (pallets 167, 168 and 169) of how the inspection sheets did not record 'hold', but that the photograph of the pallet showed 'hold'. It was never put to Mr McConville that any such mistake was apparent from the photographs of the Belgium pallets. I have gone through all the photographs of the Belgium pallets and can find no 'hold' notices attached to any. 'Hold' notices are evident on a number of photographs of pallets but not in respect of the Belgium product.

In the absence of any evidence of a 'hold' notice, the Respondent has failed to rebut the presumption under Article 4 of the 1991 that the Belgium product was intended for sale for human consumption.

67. If I am mistaken in my assessment of the evidence on the 'hold' label, I will go on to consider the effect of a 'hold' notice on this product. Such a consideration will in any event, be necessary in respect of the products which did have a 'hold' notice attached to them.

Firstly, no enquiry was ever made by the Applicant from the Respondent as to what was meant by 'hold'. I have to say I find it surprising that in seizing food, no such enquiry was ever made. I am equally surprised that at the time of seizure no explanation was proffered by the Respondent to the effect that such goods were not meant for human consumption. Be that as it may, it was evident that 'hold' has a number of possible meanings.

Mr McCabe gave evidence that anything which was marked 'hold' was not for human consumption. He explained how there was a difference between 'hold' and 'not fit for human consumption'. In 'hold' a further appraisal has to be done before the final decision is taken in human consumption. He was asked what would happen if he decided a product was unfit. He replied "if it is mine, we would mark it unfit for human consumption and put it in the pet food store. If I am not the owner, then we will consult with the owner and make a recommendation to him. Normally he would accept that recommendation and it would be marked unfit and put in the pet store".

There is an example in pallets 71 to 73 of product being marked 'not fit for human consumption'. It appears to me from Mr McCabe's evidence that his idea of 'hold' was that he at all times intended the product to be sold for human consumption. If it was subsequently determined that the foods were not fit only then would he make a decision that the goods were not fit for human consumption.

In particular, having found as a fact that re-packaging was taking place at Eurofreeze, I could not be satisfied that the putting of a 'hold' notice on a product rebutted the Article 4 presumption.

In addition, having determined that a number of the Belgium pallets were unfit, no notice as in 71-73 was placed upon each pallet. Indeed no effort was made to immediately take them to the pet food store.

This breach of Schedule 14(2)(b) of the Red Meat Regulations further strengthens my view that Mr McCabe has not rebutted the Article 4 presumption.

FERNE FOOD SAMPLES

68. Pallets 71, 72 and 73 were described as Q A samples and each were marked “not for human consumption”. The evidence was that they were actually fit for human consumption.

Mr Elder of Moy Park explained that often they are free samples of a new product which is being assessed on the market.

Mr McConville made similar investigation into these products. He spoke to Ferne Foods who own the products. Ferne Foods said they were used for product recall purposes.

If a company sells chicken to a customer and the customer has a problem with the chicken, the producer can go to his samples and confirm or deny if the problem exists. Ferne Foods appear themselves to have marked the samples as not for human consumption.

In light of the fact that the samples were owned by Ferne Foods, and that they themselves had marked them as not for human consumption I conclude on the balance of probability, that they would not have been so used. As owners, Ferne Foods could have recalled them at any time. It is not in Mr McCabe’s power to use them without the permission of Ferne Foods.

I do not accept Dr Sharpe’s contention that there was a breach of Schedule 14(2)(b) of the Red Meat Regulations. This regulation requires unfit meat to be stored separately from other fresh meat but did not apply to meat which is not for human consumption. Ordinarily such meat would not be held in a cold store. However, it was fit and accordingly I do not propose to condemn these three pallets.

CHICKEN SKINS

69. The chicken skins were contained in pallets 157 – 196 and 202-257. There was no dispute between the parties that these chicken skins were produced by Moy Park, a firm held in high repute throughout the UK and rest of Europe.

We know from Mr Elder, as referred to paragraph 31, that each 20kg block was given two health marks and a unique product label.

However, when inspected at Interfrigo the large majority of the pallets no longer had health marks attached but still retained the product label.

No one has given any explanation as to where the health marks disappeared. It cannot be explained by the possible collapse of pallets. Each pallet contained 50 blocks with 2 health marks attached. This means that 100 health marks have been lost from the majority of the 97 pallets of chicken skin. The

loss of so many health marks again adds to and strengthens the finding of re-packaging.

Some health marks were found.

In pallet 181 one block out of 50 had one health mark. The three bottom rows containing 15 blocks had one health mark making a total of 16. Mr McConville was correct when he said that one would expect to see all of the products with health marks, not some of them.

A similar finding was made in respect of pallet 188. 20 blocks had health marks and the other 30 did not. Again this demonstrated an inconsistency because one would expect every block to have a health mark instead of just the last 4 rows.

A further inconsistency came to light in the examination of pallets 165, 173 and 244 which were examined together. The product on pallet 244 was wrapped in slightly thicker liners and apart from not having any health marks, did not even have a product label. Whilst the blocks in the pallets weighed 20kg the blocks on the other pallets weighed 13kg.

In pallet 204 the health mark was found on cardboard dividers which were in between the rows of blocks. They could not have been seen until the blocks were opened. In respect of these Mr McConville argued that there was a breach of the regulations as they were not applied to the polyliner and would not have been destroyed on opening.

A similar finding was made in respect of pallets 214 and 252. It may be that these particular pallets collapsed and had been rebuilt.

However, despite the provenance of these chicken skins not being in dispute, I have no hesitation in declaring these products as unsafe when I combine my finding of re-packaging, the totally unexplained disappearance of so many health marks and the inconsistencies to which I have referred. I deem the products unsafe by reason of Article 14(7) of Regulation (EC) No. 178/2002. I also conclude that they should be treated as failing to comply with food safety requirements.

70. Some further criticism were made of the chicken skins in that Mr McConville found freezer burn on pallets 180, 187, 191 and 221. Additionally he found frozen drip on pallets 183 and 188. I did not get the impression that either the freezer burn or drip caused a problem to any great extent. Mr McConville's concern with freezer burn and drip was essentially that they evidenced a breach of the wrapping and packaging regulations. However he did state when describing his inspection sheets 219-223 that the product was well wrapped. The freezer burn and drip has appeared in a minimal number of the total product and may be explained by the collapse of pallets. I would not therefore condemn these products on the basis of freezer burn and drip.

One final matter occurs. Mr Elder in his evidence stated that chicken skins are used mainly for chicken nuggets, chicken burgers and pet food. Importantly

he also said that they have a shelf life of 6 months. At the time of the seizure they were still within their shelf life. At the time of the application to me their shelf life had expired and I must condemn them. Additionally, on this ground, and, for the reasons which I have given previously, I cannot be satisfied that if returned to Mr McCabe they would not be sold for human consumption.

BALLYMOONEY MEATS

71. Pallets 197 and 198 contained lamb shanks . There was a product label attached but no health mark on the box, liners or vac pacs.

I refer to the evidence of Patrick Boyle at paragraph 28. There is no doubt that this meat was owned by Ballymooney meats and that it was fit for human consumption. There is equally no doubt that it was in breach of Regulation 12 of the Red Meat Regulations in not having any health mark at all. Indeed Mr McCabe would have been aware that Mr Boyle was not entitled to trade or sell meat in Northern Ireland.

I do not believe Mr Boyle and do not accept that this product was sent to Euro Freeze by mistake. Mr McCabe has a duty to ensure that the Red Meat Regulations are adhered to and has failed to do so in allowing meat to enter his premises without a proper health mark,

In light of my finding of re-packaging, a product coming into a cold store in Northern Ireland without health marks from a trader who does not have a licence to trade in Northern Ireland is highly significant and I therefore conclude that this product is in breach of the food safety requirements and is unsafe.

CHALLENGER FOODS

72. There were 7 pallets of chicken pieces in blocks (85, 87, 88, 89, 90, 91, and 92).

Mr McCabe accepted that these products were defective and did not have proper health mark labels.

In a number of the pallets Mr McConville found product in a green liner within a blue liner, which suggested re-packaging to him.

On pallet 93 there was a evidence of a label partially removed.

Pallet 90 had odour emanating from the product.

Pallet 91 had damaged boxes.

Pallet 88 had signs of leakage.

Pallet 87 had an odour from the product and green discolouration. Additionally there was evidence of re-packaging in that cardboard was stuck to the inner liner.

Pallet 89 had freezer burn, slight odour, damaged boxes, liner stuck to the product and leakage into cardboard.

Pallet 85 had liner tied in knots. This is significant, states Mr McConville, as tying in a knot is not a commercial practice and this suggests to him that it was not done at the time the chicken was produced.

There is no doubt that the product is in contravention of the White Meat Regulations in that they had no health marks and for the other reasons which I have detailed above and which evidence I accept.

73. Again, I have to consider the effect of a 'hold' notice on this product. Mr McCabe gave evidence as to having sold this product originally to Challenger Foods. When he pressed for payment an issue was raised as to the quality of the goods. Mr McCabe took the product back to EF on 30th September 2005 and alleged that the product returned was different to that which he supplied and that it was contained in different boxes. The goods were marked 'hold' in accordance with his HACCP plan. He stated it would have been inappropriate to put the product into the pet food store until it was decided the product was not fit for human consumption. "if you disposed of the goods immediately it would be difficult to recover money". He stated that while they did not have a health mark he hadn't checked the quality other than check that it wasn't the goods he sent out. His intention was to have an independent survey carried out similar to the Belgium situation.

I do not accept his evidence on this. On his own admission the provenance of the food was entirely unknown in that he alleges that they were not the goods he sent out. They did not have a health mark. It is a term of his licence that all products coming into his store should comply with the regulations. These clearly did not and should have been immediately consigned to the pet food store. There is no reason, in view of their condition, that an inspection could not have taken place there.

In any event I do not accept that it was his intention to have an independent inspection carried out. In the Belgium situation it was, it will be recalled, the third-party IHAK who engaged the services of an inspector. Mr McCabe had taken it upon himself to decide on the fitness of the meat prior to Mr Doherty being engaged.

I have no reason to believe that he would have acted differently in this instance. This is evidenced by the fact that he had taken no steps to engage an independent inspector between the goods arriving in the store on 30th September 2005 and being found by FSA on 9th November 2005, almost 6 weeks later.

Accordingly I conclude that the ‘hold’ notice in this incidence did not rebut the presumption that the goods were intended for human consumption. The fact that they were still in the cold store and no steps had been taken by Mr McCabe to appoint an inspector indicates to me that Mr McCabe still intended that they should be for human consumption.

Additionally as in the incidence of the Belgium product my finding that there was a re-packaging operation, leads me to conclude that Mr McCabe has not rebutted the presumption.

74. I should add that I do not accept that Mr McCabe acted in accordance with this HACCP plan.

This sets out: -

POLICY DOCUMENT

“All damaged or out of date stock must be marked ‘Hold’ and not dispatched.

It must be brought to the attention of management who after inspection will discuss with stock owners.

If the stock is considered unfit for human consumption by management, a recommendation will be put to stock owners to allow this product be marked unfit for human consumption and transferred to the pet food store.

If the stock owner is not in agreement or management is undecided, the assistance of the veterinary officer in charge will be sought”.

They should have been marked ‘unfit for human consumption’ and transferred to the pet store. There was obviously no agreement between Mr McCabe and Challenger Foods, but, yet again as in the Belgium instance, the assistance of the Veterinary Officer was not sought.

FRENCH BEEF

75. Pallets 131-156 and 199-200 contained beef trimming. These were built up in polyblocks. There were 40 blocks wrapped in blue liners. Each pallet was then shrink-wrapped. The Applicant found fault with this product on the following grounds: -

- a. On pallets 134 and 147 no health marks were found at all.
- b. On the remaining pallets there was a health mark on an A4 page – this however was inside the shrink-wrap. It did not comply with the regulations as it was easily removable and was not destroyed upon opening the shrink wrap as required by Schedule 13 part 2 (1)(c) of the Red Meat Regulations and Schedules 11 and 13 of the White Meat Regulations.
- c. There were no health marks on the individual polyblocks.
- d. Lymph nodes/tissue was found in 12 of the 28 pallets.
- e. Freezer burn was found on 10 of the 28 pallets.
- f. Tonsillar material was found on pallets 131, 133, 134, 136, 138, 140 145 and 146 .

No criticism is made by the FSA as to the authenticity of the French health marks.

76. I have reviewed all the evidence as to how a health mark should be applied in order to conform with regulations and my conclusions are as follows: -
In a polyblock consisting of boxes or individual blocks wrapped in liner, a health mark should be applied to each box or block. There is an exception in regard to blocks of white meat on a pallet which are going to another cutting plant. In those circumstances the health mark may be applied to the whole pallet. There would also be an additional document attached indicating that the meat was going on for further treatment. A polyblock of naked meat with shrink-wrap, provided that it is of sufficient strength and completely encloses the product, may comply with the regulations in relation to wrapping and packaging. It would depend on the circumstances of each case. In such an event a health mark on the pallet may be sufficient provided that it is destroyed when the packaging is taken off.

In coming to this conclusion I am strongly influenced by the evidence of Mr Elder, that it is the practice in Moy Park to place health marks on each individual polyblock. Mr McConville also made a good point when he stated that if a health mark was knocked off a pallet it increased the importance of having a health mark on each individual package.

Having said that, I am also satisfied by the evidence given on behalf of the Respondent that, the regulations/directives in other European Companies may not be strictly complied with and that there is a wide spread practice of placing a health mark only on the outside of the pallet.

I am not unduly concerned in this particular instance by the absence of health marks from pallets 134 and 147. All the rest of the pallets have health marks, and it may well be that the reason that these had no health marks was because of collapse.

I am however concerned that the health marks were placed inside the shrink-wrap and could be easily removed. They would certainly not have been destroyed upon the shrink-wrapping being removed.

In light of my finding of re-packaging in EF it leaves this particular product open to manipulation by reason of the failure of health marks to comply with the regulations. However, it is most unlikely that any such manipulation had taken place as I accept that this product only arrived at EF on 8th November 2005 and was only brought into the store on 9th November 2005.

Accordingly, I hold there has been a breach of the regulations but on this sole issue I would not have exercised my discretion to deem the product failed to comply with food safety requirements.

77. Schedule 11(2)(k) of the Red Meat Regulations requires the occupier of the cutting premises to remove, in the case of red meat from bovine animals, obvious nervous and lymphatic tissue.

There was no serious dispute that lymph nodes were found. Dr Dinsdale stated that one would normally expect to see some lymphatic tissue but that any obvious tissue such as lymph nodes should be removed.

The Respondents submitted that in relation to lymphatic material there was no relevant provision under the Red Meat Regulations to deal with imported product. However, the Red and White Meat Regulations implement European Directives 64/433 and 71/118.

Dr Radakovic in cross-examination was adamant that France would have equivalent regulations as a member state which would apply to a cutting plant in France.

In these circumstances, the findings of lymph nodes is significant. It is a breach of the regulations. I conclude firstly that in these circumstances the food fails to comply with food safety requirements under the 1991 Act, and is unsafe within the meaning of Article 14 of EU Regulations 178/2002.

Accordingly I condemn the entirety of the consignment taking into account the 1991 Order and Article 14(6) of the EU 178/2002. Whilst some samples were taken from other pallets which did not contain lymphatic tissue, this did not constitute the detailed assessment as envisaged by Article 14(6).

78. At the commencement Dr Sharpe BL applied to include the lymphatic tissue as a ground of condemnation. I granted this application as tempering of meat was to take place and the Respondent would have the opportunity to carry out his own investigation on this matter.

Mr Fitzpatrick objects to the reliance on evidence of tonsillar material in that no similar application was made as for lymphatic tissue. Further no reference to tonsillar tissue was made by any of the witnesses for the Applicant in any of their comprehensive statements. He argued further that he did not have an opportunity to cross-examine Dr Radakovic on this issue nor to deal with it when Dr Dinsdale was giving evidence.

Dr Sharpe counters this by pointing out that any issues arising from the organoleptic examination had been 'parked' pending the examination of tempered meat by the Respondent.

Following an adjournment for the parties to discuss the procedure in the case, I indicated that I would allow the defence time to have the meat examined and if appropriate recall Mr McConville for cross-examination at a later stage.

My duty in this case is to ensure that meat which is unfit for human consumption or which fails to comply with food safety requirements does not make its way onto the market for human consumption. I cannot fail to condemn meat which should be condemned simply because no formal application was made to amend the grounds for condemnation. If a product contains tonsillar material I would condemn it.

What I must do is ensure that the Respondent has a proper opportunity to dispute the allegation that it is, in fact, tonsillar material. There is always going to be difficulty in this regard in that Mr McConville's evidence, by agreement, was not given on the organoleptic examination until after both Dr Radakovic and Dr Dinsdale gave evidence. I did make it clear that either could be recalled on this issue. A statement of Dr. Dinsdale was submitted wherein he stated that the only way of identifying tonsillar tissue is by microscopic examination by a suitably skilled person.

As against this both Mr McConville and Mr Donaghy gave clear evidence that they saw tonsillar tissue. Mr McConville made the point strongly that the video evidence was part of his statement "it is clearly stated in the video that it was tonsillar tissue and it is clear to be seen". Mr McConville demonstrated on the video that tonsillar tissue was present. He relied on 25 years experience as a qualified Meat Inspector. He described how a Meat Inspector looked at pathology and abnormalities. They are specifically trained in regard to post mortem inspection. When tasked by Mr Fitzpatrick with Dr Dinsdale's conclusions, he replied, "this (microscopic examination) would give you concrete confirmation. I know what tonsillar tissue looks like. It is a part of meat inspection. At the time of the BSE crisis, we had to have zero tolerance in regard to specified risk materials".

"I know emphatically what lymphatic tissue and tonsillar looks like".

I have to say I was impressed by Mr McConville's conviction, experience and knowledge on this issue. In reaching a conclusion I was greatly exercised by the failure of the FSA to contact the French Producing Plant or the French CA in regard to product containing tonsillar tissues emanating from the French Plant. Such a failure would be inconsistent with the presence of tonsillar material. The failure, however, was not Mr McConville's but his superior officers to whom he had reported the presence of tonsillar material.

Taking all these matters into consideration I conclude on the balance of probabilities that the French product did contain tonsillar tissue.

I accordingly condemn it as being unfit for human consumption and failing to meet food safety regulations and being unsafe. I am satisfied that the Respondent did have the proper opportunity to contest this issue. As stated, a written statement was furnished by Dr Dinsdale. Mr Radakovic and Dr Dinsale could have been recalled. The allegation of tonsillar material was

contained in both the inspection sheets and videos disclosed to the Respondent.

However, in the interest of fairness, I will postpone condemnation of this product on the ground of tonsillar tissue until 31st September 2006 to enable the Respondent to recall either Mr Radakovic or Dr Dinsdale or to submit any further evidence of any inspection they might wish to make.

One final matter occurs. There is a letter from the French Company, which produced the beef, dated 2nd June 2006 attesting that all beef head produced in this plant does not contain SRM. If this is correct, my finding of fact on the presence of tonsillar tissue calls into question whether the product at EF was the same as issued from Defial and provides another reason for condemning the entire product.

DUTCH CHICKEN FILLETS

79. Pallets 76-82 contained jumbo boxes of chicken breasts wrapped in blue plastic liners. A number of packages were taken for organoleptic examination and no complaint has been made in respect of the quality of this product. No issue has been taken with the authenticity of health marks found. The Applicant's criticism is that the health mark does not conform in that:-
- a. It was smaller than the minimum size set out in the Red and White Meat Regulations.
 - b. The health mark was not on the jumbo box itself. It was applied to the surface of the liner so that the bags could be opened without destroying the label.

Mr Ross stated "my expectation of a health mark for a jumbo box whether red or white meat, and I have seen square jumbo boxes and hexagonal jumbo boxes, is that there should be health marks full size 6 ½ by 4 ½ placed so that when the lid is opened the health mark would be destroyed. It may take more than two health marks to ensure that the box can't be opened with destroying the health marks".

Mr McCabe gave evidence that the product was purchased from Swift Provisions and delivered to Eurofreeze on 8th July 2005.

It appears to me that either the jumbo box itself must be appropriately health marked so that when opened the health marks are destroyed or, if the box is not so marked, then each of the blocks must be health marked so that the health mark is destroyed when opened.

Mr Radakovic gave evidence as to duties of occupiers of cold stores, stating that any operator receiving meat should ensure that it is correctly health marked. "If there is any discrepancy in regard to the health mark, if it doesn't

comply, it should not be kept in the cold store. The cold store is licensed to store packaged meat, which complies with the regulations”.

Again in light of my finding of re-packaging, I conclude that this breach of the regulations leads to this product failing to comply with food safety requirements and is unsafe within the terms of Article 14 of 178/2002. I would not have reached this conclusion solely on the size of the health marks.

INTERNATIONAL MEATS

80. Pallets 60-63 and 128 contained beef flank in white boxes, wrapped either in blue liner or in vac pacs.

No health marks were found in either of the boxes, liners or vac pacs.

Further complaints were made of: -

- a. Discolouration (60, 61 and 61).
- b. Liners not enclosing product and the exposed product sticking to the cardboard box (62).
- c. Decomposition (60).

Four of five pallets were noted to have a ‘hold’ label, the exception being pallet 60. Mr Donaghy gave evidence that pallet 60, on an organoleptic examination, gave an unacceptable odour and was unfit for human consumption, and unsafe.

Mr McCabe stated in his Affidavit that the product had been marked as ‘hold’ because of insufficient labelling.

International meats only have a home market licence and the intention of International Meats was to sell it on the home market. No evidence was given on behalf of International Meats, as indicated in Mr McCabe’s Affidavit, and no documentation on purchase/delivery was presented.

In his oral evidence Mr McCabe stated he put a ‘hold’ label on because, if he dispatched these goods it would give the impression they were bound for export. “I would have had to consult with the Vet before releasing it to International Meats. I would have consulted with the Vet to see how it could be handled or if it could be handled at all”.

Despite his avowed intention, Mr McCabe had not contacted the Vet by 19th November 2005. On the basis of his conduct with the Belgium meat, I conclude that he had absolutely no intention of contacting the Vet. This product, without any health marks, should not have been allowed in the cold store. Again I refer to the evidence of Mr Radakovic “If there is any discrepancy in regard to the health mark, if it doesn’t comply it should not be kept in the cold store”.

I refer to my previous conclusion on the 'hold' label in light of my finding on re-packaging and I condemn this product as failing to comply with food safety requirements and being unsafe.

81. I have reviewed the entirety of the evidence on discolouration. I conclude that with this particular product, the extent of the discolouration was such that it was unfit for human consumption. In doing so, I take into account Mr McConville's evidence of decomposition and product sticking to a cardboard box, which in itself is evidence of a breach of the wrapping and packaging regulations.

Mr Donaghy gave evidence in accordance with his statement dated 24th February 2006. At the very commencement of his cross-examination, Mr Donaghy volunteered that the statement did not reflect the entirety of the box examination sheets. He explained that his statement had been presented to him and he read it over, "I didn't check it against the box examination sheets and should have done it". It was Mr Hatch who had prepared the statement and the findings of paragraph 7 were based on Mr Hatch's interpretation of the examination sheets.

Such a practice, to put it mildly, is highly irregular. Mr Donaghy accepted that he had signed a statement prepared by someone which purported to reach conclusions by him, without him having personally checked those conclusions. In such circumstances any Court would be slow to accept such evidence.

There are however a number of other factors which I have to take into account. Firstly, there was no attempt by Mr Donaghy to conceal the background to the making of the statement. He brought it to the attention of the Court quite openly.

I have already referred to this being a transparent investigation. Indeed the effectiveness was demonstrated when Mr Gray dipped his foot into the pool of suspicion, as referred to at paragraph 21 and the safeguard procedures of photographs and videos, which he himself had put in place, snapped back to bite him. Whilst the process adopted in preparing the statement is entirely wrong, I found Mr Donaghy to be a truthful witness.

Secondly, the inspection of the tempered meat had taken place on 27th January and 29th January 2006. The essential protection the Court has in this case is that the findings of Mr Donaghy are recorded on the video. It is actually Mr Donaghy's voice on the video.

Thirdly, whilst he acknowledged he should have checked the examinations sheets at the time of the making of his statement in February 2006 he had, at the time of giving evidence, looked at the examination sheets. He stood over his findings and would have condemned more pallets if he had drafted paragraph 7 of the statement himself.

I take into account that the box of meat examined by Mr McConville was normal, but note that the box examined by Mr Donaghy had a slight sour smell and discolouration in one piece.

When I take into account that pallet 60 did not have a 'hold' label, none of the pallets had any health marks, the findings of the tempered meat examination, the finding by Mr McConville on the inspection at Interfrigo particularly of decomposition and product sticking to a cardboard box which is in itself evidence of a breach of the wrapping and packaging regulations, I condemn this product as unfit for human consumption, failing to comply with food safe requirements and being unsafe.

DUTCH BEEF

82. There were two pallets of Dutch beef 98 and 111.

These were criticised on the grounds: -

- a. Non-conforming health marks. On pallet 11 there was a health mark on the shrink-wrapping, but on a pallet card on number 98.
- b. No health marks on the individual blocks.
- c. Three different types of liners on the individual blocks.
- d. Incorrect product description.

I do not take any account of the criticism at (d). The product was described as 60/40 lean/fat. A colleague of Mr McConville 'suggested' to him that it appeared to be 60/40 fat. No other criticism was made of the quality of the product and I conclude that it was fit for human consumption.

Mr McConville described a pallet card as a piece of paper which identified the pallet. This would not comply with the regulations. I have already held that regulations require the individual packages to be health marked. In a cold store, which operated in accordance with the terms of its licence, I may not have exercised my discretion to deem it as non-compliant with food safety requirements on the basis of 'business practice'.

However, these breaches of the regulations in a cold store which does not operate in the terms of its licence lead me to conclude that these products failed to comply with food safety requirements and are unsafe.

DANISH CROWN PORK DIAPHRAM

83. Pallet 126 contained 35 boxes of pork. I am unclear as to the basis upon which the FSA seek to condemn this product.

The examination sheets states that a health mark was found "on box". It was intact. There was also a product label. I must assume that the health mark was on all the boxes as Dr Sharpe has not sought to condemn this pallet in respect of any defect of health marking.

The organoleptic examination describes the odour as 'slightly stale' and the meat was coloured brown on the surface. Neither Mr McConville nor Mr Donaghy have given evidence that it was unfit for human consumption.

The only criticism appears to be that two cartons which had been previously opened had suffered freezer burn. It was agreed by Mr Radakovic that one to two boxes may be opened upon receipt in order to check the contents. Additionally, the boxes may have been opened at the time of the inspection on 9th November 2005.

Ordinarily, I would have not have condemned this product for the above reasons. However, Mr McCabe stated in evidence that the pallet had been in his store for some time and that it had been noted to be out of date. This being so it should not have gone on for human consumption. Mr McCabe states a 'hold' label was attached to it, but this was not recorded by Mr McConville. In any event, at that stage, this product should have been taken out of the cold store.

Again, in light of my findings of re-packaging, the retention of an out-of-date product in a cold store causes me great concern. I conclude therefore that this product does not comply with food safety regulations and is unsafe.

WENDERLAND BACON

84. Pallet 129 contained 14 boxes of pork loins. They had a German health mark on the product and two Dutch health marks on the boxes and vac pacs.

Mr McConville noted previous strap marks on the boxes indicating previous usage and, therefore, in breach of the packaging regulations.

There was a note "for return Darcy Foods". Mr McCabe explained that sometimes he got returns on sale of bacon, e.g. if there were black marks on the bacon. He built them up on a pallet and intended to send them back to Germany. Again, if he regarded them as unfit for human consumption, he should not have kept them in the cold store. He has not rebutted the presumption that they were for human consumption.

When one adds my finding of re-packaging to the evidence of re-use of boxes, I regard this product as not complying to the food safety regulations by reason of the above breaches. I also regard it as unsafe and, accordingly, condemn it.

MISCELLANEOUS PALLETS

85. I do not intend to set out the evidence in detail in respect of the rest of the individual pallets.

I have reviewed all the evidence in respect of each of these pallets. I have taken into account the findings which I have set out previously. I have also taken into account evidence of no health marks, broken health marks,

decomposition, health marks not properly applied to ensure that they are broken when a box is opened. I have further taken into account examples of Brazilian strip loin being in a box the product label of which says the product was slaughtered and de-boned in Ireland, tops and bottoms of boxes not matching, box labels describing forequarters but containing Brazilian loins, production dates stroked out, marks of previous straps on boxes, boxes overfilled, bone in product, expiry dates stroked out, products past their expiry date, loin of inconsistent sizes, lids of boxes turned inside out, blood clots.

I have taken into account freezer burn and polyentrapment only where they clearly demonstrate breach of the wrapping and packaging regulations. Mr Fitzpatrick has described these 46 miscellaneous pallets as being on 'hold' Mr McConville however, only noted 'hold' notices on 8 of them i.e. 35, 41, 59, 66, 94, 138, 140 and 141 and a "not for resale" notice on pallet 84. On the evidence before me, I do not accept that a 'hold' notice was attached to the other pallets. I refer to and adopt my previous findings on the 'hold' notices in respect of these pallets. Having considered the above matters I condemn the remaining pallets as failing to comply with food safety requirements and being unsafe.

86. It is of course possible in reviewing 8 folders, examinations sheets, and 20 days of evidence that I have missed or misconstrued pieces of evidence. If it is of any assistance, I should point out that I was generally impressed with the evidence of Mr McConville, Mr Ross and Ms Maguire on behalf of the Applicants. Mr McConville is a Meat Inspector of vast experience and Ms Maguire has more experience of cold store practices than anyone else in the case. I find them all to be truthful witnesses. Both Mr Radakovic and Dr. Dinsdale were impressive witnesses and were extremely helpful to me in the course of this case.

At the end of the day, it was Mr McConville who inspected the meat, which I am asked to condemn. His findings were independently reviewed by Mr Radakovic and found to stand-up. This was a thorough and pain staking investigation by the FSA. With the two exceptions I have referred to, it was conducted fairly and transparently, with their findings subject to verification through the photographs and videos taken.

Having concluded that, with the exception of the Ferne Foods Products, the rest of the products do not comply with food safety regulations and are unsafe. I make an order for the food to be destroyed or to be so disposed off as to prevent it from being used for human consumption. I further order that any expenses reasonably incurred in connection with the destruction or disposal to be defrayed by the owner of the goods. In light of the findings which I have made, I do not believe that I have any discretion on this issue. However, if I had, I would have made a similar order. In the event as to any dispute as to what expenses have been reasonably incurred the matter may be referred back to me.

ADDENDUM

GERMAN BEEF

87. In light of my findings of re-packaging and the use of an illicit health mark on this product, the absence of health marks in the individual blocks, together with a number of examples of staining on liners, I am led to conclude in addition to the grounds previously set out, that this product does not comply with food safety requirements and is unsafe.