

ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
22 October 1996 ^{*}

In Case T-19/96,

John Carvel, residing in London, and

Guardian Newspapers Ltd, a company governed by English law, whose registered office is in Manchester, United Kingdom,

represented by Onno W. Brouwer and Frédéric P. Louis, of the Brussels Bar, assisted by Deirdre Curtin, of the University of Utrecht, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

applicants,

v

Council of the European Union, represented by Diego Canga Fano, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

APPLICATION for the annulment under Article 173 of the EC Treaty of the decision of the Council to refuse to grant access to the applicants to certain Council documents pursuant to Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43).

^{*} Language of the case: English.

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

composed of: K. Lenaerts, President, P. Lindh and J. D. Cooke, Judges,

Registrar: H. Jung,

makes the following

Order

Facts and procedure

- 1 By application lodged at the Registry of the Court of First Instance on 6 February 1996, John Carvel and Guardian Newspapers Ltd brought an action under Article 173 of the EC Treaty seeking annulment of the decision contained in the letter of the Secretary General of the Council dated 27 November 1995 addressed in response to a request made by the applicants under Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43, hereinafter 'Decision 93/731') to be given access to certain documents of the Council.
- 2 By a letter dated 2 February 1994 addressed to the Council, the applicants sought access, in accordance with Decision 93/731, to certain documents relating to several meetings of the Council of Ministers of Social Affairs, Justice and Home Affairs and Agriculture. At item 11 in the letter the applicants sought, in particular, access to 'the decisions of the Justice Council of 29/30 November' 1993 (hereinafter 'Justice Council').
- 3 In an initial decision, the Council refused to grant the applicants access to the documents that had been requested. This decision was the subject of proceedings brought by the applicants and was annulled by a judgment delivered by the Court of First Instance on 19 October 1995 (Case T-194/94 *Carvel and Guardian Newspapers v Council* [1995] ECR II-2767).

- 4 Pursuant to the judgment of the Court of First Instance, the Council reviewed the applicants' request. By a letter dated 27 November 1995 the Secretary General of the Council furnished the applicants with a number of the requested documents and, in particular, the minutes of the meeting of the 'Justice Council' on 29 and 30 November 1993, together with the press release which enabled the applicants to identify the principal decisions taken by the 'Justice Council' and contained a list of those who had participated in the meeting in question. Access was refused, however, in respect of five items in the minutes of the Agriculture Council meeting of 24 and 25 January 1994 in respect of which the Council invoked the exception in favour of the protection of the public interest pursuant to Article 4(1) of Decision 93/731.
- 5 On 16 January 1996, the legal representatives of the applicants wrote to the Secretary General of the Council protesting that the letter of 27 November 1995 failed adequately to comply with the original request of 2 February 1994 because it omitted to furnish certain documents which, according to the applicants, came within point 11 of that letter under the heading 'the decisions of the Justice Council of 29/30 November'. Counsel for the applicants maintained in particular that it was clear from the terms of the press release for the meeting of 29 and 30 November that a number of texts had been adopted by that Council and that the minutes of the meeting indicated that certain 'A' points had been agreed which were not mentioned in the press release. Furthermore, they noted that the provisional agenda for the meeting of the 'Justice Council' made reference to two further documents which had not been furnished by the Secretary General of the Council in his letter of 27 November 1995. Consequently, the legal representatives demanded that the missing documents be furnished to them by 1.00 p. m. on 19 January 1996 at the latest.
- 6 By a letter of 19 January 1996, the Secretary General of the Council acknowledged receipt of the letter from the legal representatives of the applicants on 16 January 1996. He informed them that the request would be examined and dealt with as expeditiously as possible but stated that the deadline set could not be regarded as binding. The Secretary General gave an assurance that the matter was receiving the Council's urgent attention.

- 7 The applicants lodged their application at the Registry of the Court on 6 February 1996. The application was served to the Council on 14 February 1996.
- 8 On 8 February 1996, the Secretary General of the Council gave a substantive reply to the letter of 16 January 1996 from the legal representatives of the applicants and furnished a number of the documents itemized at point 11 of the applicants' letter of 2 February 1994.
- 9 In its defence lodged at the Registry of the Court on 25 March 1996, the Council requested the Court to rule that the application had become devoid of purpose or, in the alternative, that the application was inadmissible as having been lodged prematurely. The Council also requested the Court to order the applicants to pay the costs of the proceedings.
- 10 By letter of 23 May 1996 the Council furnished additional documents to the applicants.
- 11 On 4 June 1996 the applicants lodged at the Registry of the Court a request to withdraw the proceedings and have the case removed from the register, together with an application for an order that the Council pay the costs and a statement of observations upon that application.
- 12 In a statement of observations upon the withdrawal of the proceedings lodged by the Council at the Registry of the Court on 28 June 1996, the Council welcomed the applicants' request for the discontinuance of the proceedings but applied, pursuant to Article 87(5) of the Rules of Procedure of the Court of First Instance, for an order that the applicants pay the costs of the proceedings.

Arguments of the parties

- 13 Notwithstanding the fact that they have withdrawn their application, the applicants ask that the Council be ordered to pay the costs of the proceedings. They recall that at item 11 of the letter of 2 February 1994, they had requested access to 'the decisions of the Justice Council of 29/30 November'. According to the applicants, this request could only be construed as a request for access to the texts of the decisions adopted by the 'Justice Council' and not merely for a list of those decisions. The letter of 27 November 1995 failed properly to respond to the original request because it had merely furnished the press release from which it was intended that the applicants should identify the principal decisions taken by the 'Justice Council' in question. Moreover, the applicants argue that their application was not premature because it had been lodged only one day before the expiry of the time-limit for bringing an action against the decision of the Council of 27 November 1995.
- 14 The applicants further contend that their application had not in any event become devoid of purpose following the Council's letter of 8 February 1996. They consider that in that letter too the Council failed adequately to respond to their original demand of 2 February 1994 because the documents furnished by the Council were incomplete so that the applicants were obliged to submit further demands for the production of missing items. They recall that it was not until the letter of 23 May 1996 that the Council finally furnished all of the documents which they had requested.
- 15 According to the applicants, even following the Council's letter of 23 May 1996, the application itself did not become devoid of purpose. They argue that both the correspondence exchanged with the Council and written pleadings in the case demonstrate that the Council continued to take an unduly restrictive view and a generally obstructive attitude towards its disclosure obligation, incompatible with the right of access afforded to the applicants and the general public to Council documentation. On that basis, the applicants claim to have had a sufficient interest to continue to seek annulment of the Decision in order to establish their entitlement and to ensure that the defendant mends its ways in the future by abandoning its unduly restrictive, formalistic and unlawful approach towards requests for access to Council documents.

- 16 Nevertheless, given that the Council has furnished the greater part of the material which they had requested, the applicants consider that it is not appropriate to oblige the Court to be concerned with the matter further. The applicants submit, however, that the withdrawal should not penalize them in costs as they did no more than exercise their rights as citizens of the European Union under Decision 93/731. They emphasize that the failure of the Council to furnish the requested documents before the expiry of a time-limit for bringing an action against the Secretary General's letter of 27 November 1995 left them with no choice but to lodge the application which they could not then withdraw until after the receipt of the Council's letter of 23 May 1996.
- 17 The Council contests the applicants' demand that it pay the costs of the proceedings and requests that the basic rule in Article 87(5) of the Rules of Procedure be applied according to which a party which withdraws an action is required to pay costs if asked for by the other party.
- 18 It submits that the application was premature and, in the alternative, was inadmissible in any event as having been rendered devoid of purpose once the Council had furnished its response on 8 February 1996 to the request made in the letter of 16 January 1996. The Council considers that it replied correctly to the applicants' request in the letter of 27 November 1995 because it furnished all the documents envisaged at items 8 to 11 of the applicants' letter of 2 February 1994, namely the minutes of the meeting of the 'Justice Council' on 29 and 30 November 1993, together with the press release which identified the decisions taken and the attendance record.
- 19 According to the Council, it was not until the letter of 16 January 1996 that the applicants explained that the phrase 'the decisions of the Justice Council of 29/30 November' used in their request of 2 February 1994 at item 11 was intended to obtain the texts of decisions adopted by the Council and not merely the list of decisions. It considers that in this letter the applicants thereby made a fresh request

for access to additional documents identified for the first time, including documents listed as 'A' points in the minutes.

- 20 The Council submits that its Decision 93/731 is concerned with access to documents and not with the furnishing of information generally. It adds that the minutes of and the press release for the meeting of the 'Justice Council' on 29 and 30 November 1993 were the only documents which contained the actual decisions adopted by the 'Justice Council'.
- 21 Finally, the Council argues that the applicants made a mistake in law in that they did not challenge the right act. In its letter of 19 January 1996, the Council had undertaken to review the request made in the letter of 16 January and did so. According to the Council, the applicants should have challenged the decision made on foot of that review and not the decision contained in the letter of 27 November 1995.

Findings of the Court

- 22 In conformity with Article 99 of the Rules of Procedure, the case must be ordered to be removed from the register and a decision must be given as to costs. In view of the importance of the arguments raised by the parties in their observations, the President of the Fourth Chamber decided to remit consideration of that decision to the chamber.
- 23 In accordance with the first subparagraph of Article 87(5) of the Rules of Procedure, a party who discontinues or withdraws from proceedings is to be ordered to pay the costs if they have been applied for by the other party. However, upon application by the party who discontinues or withdraws from proceedings, the costs are to be borne by the other party if this appears justified by the conduct of that party.

- 24 The Court considers, accordingly, that pursuant to Article 87(5), the onus lies upon the applicants to establish that, in the particular circumstances relevant to the commencement of the action and to the subsequent withdrawal of the proceedings, there has been conduct on the part of the Council which justifies derogation from the general rule in the first subparagraph of that provision so that the defendant should be ordered to bear the costs of the proceedings.
- 25 The Court notes that in the original letter of application of 2 February 1994, the applicants had requested specifically 'access to certain documents which are itemized below'. At items 8 to 10 they asked for certain reports, minutes and voting records for meetings of the 'Justice Council' which had taken place on 29 and 30 November 1993. Amongst the documents thus itemized, the applicants had specified at item 11 'the decisions of the Justice Council of 29/30 November'.
- 26 In responding to the request made at items 8 to 11 of that letter, the Council, in its letter of 27 November 1995, furnished copies of the minutes of the 'Justice Council' meeting on 29 and 30 November, together with the press release of that Council on the basis of which the applicants could identify the principal decisions taken, as well as the attendance record. There was no voting record as such as no voting took place at the meeting.
- 27 The Court considers that in the context of a letter such as that of 2 February 1994 in which specific categories of documents were identified as 'minutes' or 'reports', the additional request made under point 11 for 'decisions of the Justice Council of 29/30 November' was ambiguous in the absence of any specification as to whether a list of decisions or the texts of decisions was sought. It was therefore not unreasonable of the Council to treat that expression as referring to those documents it held which contained the record of actual decisions taken during the session.

- 28 Although the applicants were able, upon an examination of the documentation furnished with the letter of 27 November 1995, to identify further documents, such as those referred to in paragraph 5 above, as documents which it considered fell within the scope it had originally intended under item 11 of the request, it does not follow that the Council had acted unlawfully or unreasonably in construing the expression in the manner it did at the time.
- 29 On the other hand, the Court considers that the applicants acted unreasonably in purporting to fix a deadline of less than three days for compliance with the request contained in its letter of 16 January 1996 in circumstances where the origin of the misunderstanding now under consideration by the Court lay in the applicants' own choice of wording in item 11 of the request of 2 February 1994.
- 30 It is not contested by the applicants that when initiating the proceedings on 6 February 1996 they were conscious that the proceedings might require to be withdrawn when the substantive reply to the request made in the letter of 16 January 1996 was furnished, as had been promised in the letter of 19 January 1996.
- 31 Having regard both to the time which elapsed between the communication of the decision of 27 November 1995 and the clarification by the applicants in the letter of 16 January 1996 of the intended scope of their request and to the assurance given by the Council in the letter of 19 January 1996 to consider the request of 16 January 1996 and give the matter urgent attention, the Court could not conclude that the applicants had been unnecessarily compelled to initiate the proceedings by conduct on the part of the Council.

- 32 In view of the fact that the proceedings are to be withdrawn, the Court considers it inappropriate and unnecessary to determine the issues raised by the parties in their observations where those issues go to the merits of the substantive grounds advanced in the action. In the circumstances of the case, accordingly, it is sufficient for the Court to find that the applicants have not discharged the burden of proof required to displace the operation of the primary rule in Article 87(5) of the Rules of Procedure and to satisfy the Court that there has been conduct on the part of the defendant which would justify visiting the costs of the proceedings upon it.
- 33 Accordingly, the rule embodied in the first sentence of the first subparagraph of Article 87(5) of the Rules of Procedure must be applied and the applicants must be ordered to pay the costs of the proceedings.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby orders:

1. Case T-19/96 shall be removed from the register.
2. The applicants shall pay the costs of the proceedings.

Luxembourg, 22 October 1996.

H. Jung

Registrar

K. Lenaerts

President

II - 1529