Judgment 11/2007 **Jersey Fishermen's Association Ltd et al v States of Guernsey – Judicial Committee of the Privy Council (JCA/62/2005) – 2nd May 2007**

Sea Fish Licensing (Guernsey) Ordinance, 2003 – whether ultra vires – appeal from Court of Appeal (See Judgments 30/2004, 32/2004 and 34/2005) – Ordinance making power of the States – European Communities (Implementation) (Bailiwick of Guernsey) Law, 1994 – legislative regime relating to waters around the Channel Islands and the United Kingdom – European Community and the Common Fisheries Policy – powers of the States to legislate by Ordinance, and by Projet de Loi sanctioned by Order in Council, contrasted – 2003 Ordinance fell outside the powers conferred by the 1994 Law – 2003 Ordinance declared invalid as respects the 3 to 12 mile belt – held to be severable and to be valid as respects the 3 mile belt. (Order in Council registered by the Royal Court on 16th July 2007)

AT THE COURT AT BUCKINGHAM PALACE

The 2nd day of May 2007

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

IN COUNCIL

The following report of the Judicial Committee of the Privy Council was read—

"Having considered an appeal praying Your Majesty to reverse, alter or vary the judgment of the Court of Appeal of Guernsey dated 9th June 2005 (revised 13th July 2005) or to grant further relief, in the matter between

(1) JERSEY FISHERMEN'S ASSOCIATION LTD
(2) IF LTD
(3) INTERFISH WIRONS LIMITED
(4) SCERENE FISHING COMPANY LIMITED
(5) JOHN HARTLEY LOVELL
Appellants

- and -

STATES OF GUERNSEY
Respondent

and having heard submissions from both sides, we have agreed to report to Your Majesty as our opinion that:

1. the 2003 Ordinance was and is invalid as regards the 3 to 12 mile belt, but that it is severable and, subject to the deletions indicated in paragraph 59 of the judgment, valid in relation to the 3 mile belt of territorial sea around the Bailiwick, and that the appeal should be allowed to that extent; and

2. the parties are invited to make written submissions on costs within 21 days.

HER MAJESTY was pleased by and with the advice of Her Privy Council to approve the report and to order that those charged with administering the Government of the Island of Guernsey and all others whom it may concern are to ensure that it is punctually observed and obeyed.

Christine Cook
Deputy Clerk of the Privy Council

Privy Council Appeal No 62 of 2005

(1) Jersey Fishermen's Association Ltd
(2) IF Ltd
(3) Interfish Wirons Limited
(4) Scerene Fishing Company Limited
(5) John Hartley Lovell
Appellants

v.

States of Guernsey *Respondent*

FROM

THE COURT OF APPEAL OF GUERNSEY

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 2nd May 2007

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Present at the hearing:-

Lord Scott of Foscote
Lord Phillips of Worth Matravers
Lord Rodger of Earlsferry
Lord Brown of Eaton-under-Heywood
Lord Mance

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*[Delivered by **Lord Mance**]*

Introduction

1. The Bailiwick of Guernsey is a dependency of the Crown, part of the original Duchy of Normandy. It is within the British Islands (consisting of the United Kingdom of Great Britain and Northern Ireland, the Channel Isles and the Isle of Man) but not in the United Kingdom, although the United Kingdom represents it internationally. There are statutes of the United Kingdom Parliament which relate to the Bailiwick, and are expressed to apply there directly or upon the making of a subsequent Order in Council or ministerial order, but the

role of the United Kingdom Parliament in this respect is potentially controversial, at least in the Bailiwick (cf The Government and Law of Guernsey, D. Ogier, 2005, Chap. 9). The main focus of this appeal is however on legislative and judicial institutions of the Bailiwick which continue to reflect its original status, with Her Majesty acting in each case through her Privy Council. Hence indeed the present appeal to the Board.

2. It is accepted that Her Majesty in Council could in theory legislate without any initiative from the Bailiwick, but in practice there would be prior consultation with the Bailiwick. The normal legislative process is for the Queen in Council to act on the initiative of the respondent, the States of Deliberation of Guernsey ("the States"), which is the Island's parliamentary assembly now constituted under The Reform (Guernsey) Law, 1948, as subsequently amended. The States approves a *projet de loi*, which the Bailiff through the Lieutenant-Governor petitions Her Majesty in Council to sanction. The Privy Council acts through a Committee for the Affairs of Guernsey and Jersey, of which the Secretary of State for Constitutional Affairs is a member. His Department may invite the views of other interested departments and parties, and sometimes suggests alterations which may lead to the States reviewing and resubmitting the *projet*. Once royal sanction is obtained, an Order in Council embodying the *projet* is transmitted to the Royal Court which has the obligation of entering it on the Island's Register, whereupon it becomes a *loi* or law.

3. In the course of history, and on one view with the sanction of an Order in Council dating back to 1568, another "customary" legislative mechanism developed, in which Her Majesty in Council has no involvement. Until 1948 the Royal Court (another emanation of royal authority) had power to make ordinances (*ordonnances*). Such ordinances were technically provisional for 12 months (though renewable), and could only be made permanent after approval by the States. Under the 1948 Act "the powers and functions of a legislative nature theretofore exercised by the Royal Court" were (with minor exceptions relating to the defence regulations and the rules of court procedure) vested in and exercisable by the States, and ordinances made were to be permanent, unless expressed to the contrary. The 1948 Act did not attempt to define the scope of the power to make ordinances, which the Board will have to consider. The Board is also concerned on this appeal with another category of ordinance, made as delegated legislation under an enabling power in a *loi* or law. It is common ground that the *vires* of both categories of ordinance are susceptible to judicial review, and that any ordinance may be repealed or amended by a later Order in Council or ordinance.

The present appeal

4. In the present appeal various Jersey and English West Country fishing concerns are the appellants and the States of Deliberation are the respondents. The appeal concerns the *vires* of The Sea Fish Licensing (Guernsey) Ordinance, 2003, relating to a 12 mile belt of waters adjacent to the Bailiwick. In name an ordinance, its ostensible status was and is as a form of delegated legislation made under the authority of a *loi*, The European Communities (Implementation) (Bailiwick of Guernsey) Law, 1994 (Order in Council No. III of 1994). The 2003 Ordinance is not confined to the Bailiwick's 3 mile belt of territorial waters, but applies to the whole 12 mile belt adjacent to the Bailiwick. The appellants submit on various grounds that the powers conferred by the 1994 Law did not extend to the making of the 2003 Ordinance. They also challenge the Ordinance both as inconsistent with article 28 of the Treaty establishing the European Community and as founded on incorrect legal advice (the latter a challenge which assumes that such an ordinance may be subject to judicial review on

such a ground). In response, and if necessary, the States submit that it was within the States' customary power to make the 2003 Ordinance without the sanction of an Order in Council. They further submit that, even if it was beyond their power to make an Ordinance extending to the whole 12 mile belt, the Ordinance should be allowed to stand in relation to the Bailiwick's 3 mile belt of territorial sea. They join issue on the submissions raised regarding article 28 and incorrect legal advice (with which the Board will deal separately after other issues). The Lieutenant Bailiff (Mr Patrick Talbot QC) on 29th June 2004 upheld the appellants' contentions, refused severance and declared the whole Ordinance invalid. The Court of Appeal (Mr Richard Southwell QC, Mr Peter Smith QC and Mr David Vaughan QC) on 13th July 2005 allowed the States' appeal, declared the whole Ordinance valid, and further declared that, had it reached the contrary conclusion, the Ordinance would have been severable so as to be limited to the Bailiwick's 3 mile territorial sea.

The 1994 Law

5. The 1994 Law provided:

> "THE STATES, in pursuance of their Resolution of the 28th day of May, 1993, have approved the following provisions which, subject to the Sanction of Her Most Excellent Majesty in Council, shall have the force of law in the Bailiwick of Guernsey.
>
> Implementation of Community provisions.
> 1. The States may by Ordinance make such provision as they may consider necessary or expedient for the purpose of the implementation of any Community provision.
> ….
>
> Interpretation.
> 3.(1) In this Law-
>
> "Community provision" means-
>
> (a) any provision contained in or arising under the Community Treaties or any Community instrument ….;
> (b) any right, power, liability, obligation, prohibition or restriction created or arising, or any remedy or procedure provided for, by or under the Community Treaties; and
> (c) any decision or expression of opinion of the European Court or any court attached thereto under the Community Treaties;
>
> whether or not directly applicable in or binding upon the Bailiwick.
>
> "implementation", in relation to a Community provision, includes the enforcement or enactment of the provision, and the securing of the administration, execution, recognition, exercise or enjoyment of the provision, in or under domestic law. …..
>
> General provisions as to Ordinances.
> 4. (1) An Ordinance under this Law-
>
> (a) may be amended or repealed by a subsequent Ordinance hereunder;
> (b) may contain such consequential, incidental, supplementary and transitional provision as may appear to the States to be necessary or expedient.
>
> (2) Any power conferred by this Law to make an Ordinance may be exercised-

> (a) in relation to all cases to which the power extends, or in relation to all those cases subject to specified exceptions, or in relation to any specified cases or classes or cases;
> (b) so as to make, as respects the cases in relation to which it is exercised-
> (i) the full provision to which the power extends, or any lesser provision …..
> (ii) the same provision for all cases, or different provision ….
> (iii) any such provision either conditionally or subject to any prescribed conditions.
> (3) Without prejudice to the generality of the foregoing provisions of this Law, an Ordinance under this Law-
> …..
> (b) may direct that any Community provision …. shall extend to the part of the Bailiwick to which the Ordinance applies with such exceptions, adaptations and modifications as may be specified in the Ordinance;
> ….
> (d) may make any such provision of any such extent as might be made by Projet de Loi other than any provision which imposes or increases taxation or which takes effect from a date earlier than that of the making of the Ordinance."

A "Community instrument" under the European Communities (Bailiwick of Guernsey) Law 1973 section 1(1) means any instrument issued by a Community institution.

6. The language of section 3(1) makes clear (and the States Advisory and Finance Committee policy letter preceding the *projet de loi* confirms) that the 1994 Law was intended to enable the States to extend Community provisions to the Bailiwick even if they were *not* under Community law binding upon the Bailiwick either directly (e.g. as regulations) or indirectly (e.g. as directives). However, the 2003 Ordinance was proposed by policy letter of 7th February 2003 and enacted by the States on 1st April 2003 on the basis that the Common Fisheries Policy and European law *required* that all British registered vessels fishing within the 12 mile belt adjacent to Guernsey should be subject to "a restrictive scheme of fishing vessel licensing", and that it was incumbent on "all Member States", and so apparently on Guernsey, to implement such a scheme. The recital to the 2003 Law states that it was for the purpose of implementing Regulations (EC) No. 3690/93 and 2371/2002. Throughout the proceedings below (despite some reservations expressed by the Court of Appeal in its judgment) as well as on this appeal, such statements have been treated by both parties as incorrect in several respects. Guernsey was neither a Member State nor for present purposes part of one. Under the relevant Community Regulations (EEC) Nos 3760/92 and 3690/93, Guernsey registered fishing vessels were not as such "Community fishing vessels" (defined as "fishing vessel[s] flying the flag of a Member State and registered in the Community"), and "Community fishing waters" (defined as "waters under the sovereignty or jurisdiction of the Member States") did not include the Bailiwick's 3 mile belt of territorial waters.

<u>The 2003 Ordinance</u>

7. The 2003 Ordinance provided by section 1(1) that, subject to limited exceptions:

> "fishing for any sea fish within British fishery limits adjacent to the Bailiwick by British fishing boats is prohibited unless authorised by licence granted by the States of Guernsey Fisheries Committee …."

Under section 18(1), "British fishery limits" were defined as British fishery limits set by or under section 1 of the Fishery Limits Act 1976; "British fishery limits adjacent to the Bailiwick" were defined as "that part of British fishery limits" within a 12 mile belt around the Bailiwick (excluding the territorial seas adjacent to Alderney and Sark); "British fishing boat" was defined as a fishing boat registered in the United Kingdom under Part II of the Merchant Shipping Act 1995 (or exempted from registration under section 373 of the Merchant Shipping Act 1894) or registered under the laws of the Channel Islands or the Isle of Man or British owned; and "British owned" was defined as "owned by a person who is, within the meaning of the Merchant Shipping Act 1894 as it has effect in the Bailiwick, a person qualified to own a British ship or owned by two or more persons any one of whom is a person so qualified".

8. Section 2 made clear that any such licence might be limited by area, periods, times or voyages, descriptions and quantities of fish or method and might contain conditions. Section 3 indicated that, in deciding whether to grant a licence, the Committee might take into account any relevant factor, including "the record of the applicant in fishing in British fishery limits adjacent to the Bailiwick during the period" of the year to 30th September 1992. Section 4 required the master, owner and charterer of any licensed vessel to provide the Committee with any information requested. Sections 6 and 7 provided that British fishery officers should have extensive powers for enforcement in relation to any British fishing boat within British fishery limits adjacent to the Bailiwick as well as in relation to any British fishing boat registered in Guernsey anywhere outside those limits, and sections 9 to 15 made extensive provision for criminal penalties and in some cases disqualification from licence holding.

<u>The waters around the Channel Islands and United Kingdom, and the European Community</u>

9. This appeal requires consideration of the position of the Channel Islands (consisting of the separate Bailiwicks of Guernsey and Jersey) and of the United Kingdom in relation to their adjacent waters, the position of the Channel Islands in relation to the European Community and the impact of the Common Fisheries Policy of the European Community. These are matters of complexity, in relation to which the Court of Appeal gave a full account of the legislative and regulatory history in paragraphs 4 to 67 of its judgment to which reference may usefully be made. The Board will attempt to state the salient aspects. In doing so, it will for simplicity ignore the further complexity arising after 1998 from Scottish devolution, since this can have no effect on the resolution of the issues.

10. Waters over which states exercised territorial and fisheries jurisdiction traditionally extended to 3 miles. European initiatives led to more expanded regimes. First, by the London Convention 1964 it was agreed that coastal states should have the exclusive right to fish and exclusive jurisdiction in fishery matters within a 6 mile belt, while fishing within the 6 to 12 mile belt would only be permitted by the coastal state and by the fishing vessels of any other contracting state which had habitually fished there between 1953 and 1962 (and then only for stocks and in grounds habitually exploited there). The Board notes in parenthesis that the Common Fisheries Policy of the European Community has maintained this approach until (currently) 31st December 2012, justifying it on conservation grounds and as "preserving

traditional fishing activities on which the social and economic development of certain coastal communities is heavily dependent" (Regulation (EEC) No 3760/92, recitals and article 6, and Regulation (EC) No 2371/2002, recital (14) and article 17 – see paragraphs 22 and 25-26 below).

11. The United Kingdom gave domestic effect to the London Convention by declaring that British fishery limits were to be "the seas surrounding the United Kingdom, the Channel Islands and the Isle of Man to a distance of 12 miles", consisting of an exclusive 6 mile belt and an outer belt between 6 and 12 miles: cf the Fishery Limits Act 1964, later re-enacted in the Sea Fisheries Act 1968 and the Fishery Limits Act 1976. Under provisions which became section 2(2) to (7) of the 1976 Act, foreign fishing boats (defined as fishing boats not registered in the United Kingdom, Channel Islands or Isle of Man) were prohibited to enter or fish within the outer belt, save as permitted by international law or convention or by ministerial designation. (The relevant United Kingdom Ministers were the Minister of Agriculture, Food and Fisheries, now the Secretary of State for Environment, Food and Rural Affairs - "DEFRA", and ministers with parallel responsibilities with respect to Scotland and Northern Ireland). All fishing boats registered in France were in the event so designated by The Fishing Boats (France) Designation Order 1965.

12. By the 1976 Act, and in response to a European Community Council resolution of 3 November 1976, the United Kingdom extended British fishery limits to 200 miles. Section 11(3) permitted the extension by Order in Council of the prohibition on fishing by foreign fishing boats in sections 2(2) to (7) to the Isle of Man or any of the Channel Islands. The latter power was exercised by The Fishery Limits Act 1976 (Guernsey) Order 1989, but confining the prohibition to British fishery limits adjacent to Guernsey, defined as the 12 mile belt around Guernsey.

13. In 1967 the United Kingdom made provision for the conservation of fish stocks by the Sea Fish (Conservation) Act 1967, later amended by the Fishery Limits Act 1976 and the Fisheries Act 1981. As well as enabling limits to be prescribed for fish landed or sold in England and Wales and for nets and gear, the legislation introduced a power for United Kingdom Ministers by order to prohibit fishing without a licence (a) by any fishing boats within British fishery limits and (b) by British fishing vessels (defined as fishing vessels registered in the United Kingdom or British owned) within any specified area outside those limits (section 4(1) and (12)). The introduction of a licensing scheme by the United Kingdom in respect of its flag vessels was, as will appear, a requirement of European Community law (paragraphs 22-23 below).

14. The United Kingdom duly introduced such a scheme by the Sea Fish Licensing Order 1989 (SI 1989 No. 2015), replaced by the Sea Fish Licensing Order 1992 (SI 1992 No. 2633). British fishing vessels (defined as above) were, under the 1989 Order, prohibited from fishing without a licence in any of the ICES (International Council for the Exploration of the Sea) areas specified in the schedules. Under the 1992 Order, the prohibition was widened to cover fishing "anywhere". In the case of each Order, the prohibition expressly excluded the 12 mile belt around the Isle of Man, which lay within ICES area VIIa covering the Irish Sea, and the 12 mile belt around the Channel Islands, which lay within ICES area VIIe covering the Western English Channel.

15. Section 24 of the 1967 Act enabled an Order in Council to be made applying certain of the Act's provisions to British fishing vessels registered in the Isle of Man or any of the

Channel Islands. In relation to the Channel Islands, the Sea Fish (Conservation) (Channel Islands) Orders 1981 as amended successively in 1989 and 2001 were made. They applied the minimum size prescribed in relation to Great Britain to carriage of fish "within or outside British fishing limits on a British fishing boat registered in [Guernsey or Jersey]" or in the case of a British fishing boat not so registered "in British fishing limits adjacent to [Guernsey or Jersey]". They gave United Kingdom Ministers power to make orders in respect of nets and gear carried within British fishery limits (except in the territorial waters) adjacent to Guernsey or Jersey by fishing boats registered in Guernsey or Jersey. They further gave United Kingdom Ministers power by order to prohibit fishing, without a licence granted by the Guernsey or Jersey Committee responsible for Fisheries, (a) by any fishing boats (British or foreign) within British fishery limits adjacent to Guernsey or Jersey (including territorial waters) and (b) by British fishing boats registered in Guernsey or Jersey in any other specified area. The fact that this power has not been exercised by United Kingdom Ministers is part of the background to the making by the States of the 2003 Ordinance.

16. In 1987 the United Kingdom extended its territorial waters to 12 miles by the Territorial Sea Act 1987. Section 4(4) provided that Her Majesty

> "may by Order in Council direct that any of the provisions of this Act shall extend, with such exceptions, adaptations and modifications (if any) as may be specified in the Order, to any of the Channel Islands or to the Isle of Man".

The territorial waters of the Isle of Man and of Jersey have been extended to 12 miles by Order in Council in (respectively) 1991 and 1997. Those of Guernsey have not been extended, and remain at 3 miles.

17. Within its 3 mile territorial belt, the Bailiwick has by use of the States' customary power legislated to make The Fishing Ordinances, 1969, 1988 and 1997. These covered matters such as the landing, import and export of fish and types of nets and boats. They did not introduce any form of licensing arrangements for fishing boats. But the 1988 and 1997 Ordinances introduced a prohibition (overlapping with that applying under section 2(2) to (7) of the 1967 Act but limited to the Bailiwick's territorial belt) on entry and fishing by any foreign fishing boat, with exceptions in respect of entry for purposes recognised by international law or convention. Outside the 3 mile territorial belt, waters adjacent to Guernsey remained British fishery limits under the United Kingdom legislation (paragraphs 11-12 above).

18. Jersey has introduced a licensing scheme by the Sea Fisheries (Licensing of Fishing Boats) (Jersey) Regulations 1996 made pursuant to a Jersey law, the Sea Fisheries (Jersey) Law 1994. The Jersey Regulations prohibit fishing without licence within the Jersey territorial sea (the 12 miles belt around Jersey –paragraph 16 above) by a fishing boat registered in Jersey or any other part of the British Islands. The Isle of Man has also introduced such a scheme, by the Sea Fish (Specified Manx Waters) Licensing Order 1990. But the position in early 2003 was that neither in the United Kingdom nor in Guernsey was there any domestic legislative requirement for Guernsey registered fishing boats to be licensed, and the waters within 12 miles of Guernsey were open to fishing by all United Kingdom and Jersey registered fishing boats. Foreign registered fishing boats were under the United Kingdom legislation excluded from the 6 mile belt, and were (subject to designation, as in the case of France) restricted by reference to their fishing history within the 6 to 12 mile zone around Guernsey. Guernsey fishing boats were subject to Jersey licensing (or in the

event informal permissive arrangements) while fishing within the 12 mile belt of territorial waters around Jersey. The States became anxious that there should be a Guernsey licensing scheme to control fishing in the waters adjacent to Guernsey.

19. Initially, it was envisaged that this would be done by Order in Council under the Sea Fish (Conservation) (Channel Islands) Orders, 1981, 1989 and 2001. A draft Sea Fish (Guernsey) Licensing Order was prepared in conjunction with United Kingdom officials, but in August 2002 the then Lord Chancellor's Department informed the Guernsey authorities that before any such Order in Council would be enacted (a) Guernsey should agree on reciprocal arrangements with the United Kingdom (whereby any fishing boat with a full United Kingdom licence, at least up to a certain maximum size, would be given a licence to fish in Guernsey) and (b) Guernsey and Jersey should agree on the number of each Bailiwick's boats that would receive licences to fish in the other's waters, and pending such agreement, undertake to allow each Bailiwick's vessels with a recent track record of such fishing to continue fishing in the other's waters. It is not for the Board to express any view on these conditions, but condition (b) in particular is said to have proved a stumbling block for Guernsey. For whatever reason, no agreement was reached on a mutual quota, and there was disagreement about Guernsey's view that any track record should be measured by reference to the calendar year ending on 30th September 1992, the date when Guernsey first announced (although how far the announcement was directed at or reached Jersey fishermen appears contentious) its wish to introduce a licensing scheme taking into account fishing in that year.

The Bailiwick and the European Community

20. In these circumstances the Guernsey authorities decided upon a different route. As the Board has already noted, the ostensible basis for the 2003 Ordinance was that European Community law *required* a licensing scheme in respect of all fishing boats registered in the British Islands, including the Bailiwick, but it is on this appeal common ground that there was no such requirement. Upon the United Kingdom's adherence by the Treaty of Accession to the European Community, special arrangements were negotiated in respect of the Channel Islands and accepted unanimously by the States of Guernsey on 15th December 1971. They were set out in Protocol No. 3 signed on 22nd January 1972. This Protocol applies to the Channel Islands "the Community rules on customs matters and quantitative restrictions …. under the same conditions as they apply to the United Kingdom". It further provides that in respect of agricultural products (defined to include fish) "the levies and other import measures laid down in Community Rules and applicable in the United Kingdom shall be applied to third countries" and that "Such provisions as are necessary to allow free movement and observance of normal conditions of competition in trade in these products shall also be applicable". It continues:

> "The Council, acting by a qualified majority on a proposal from the Commission, shall determine the conditions under which the provisions referred to in the preceding paragraphs shall be applicable in these territories".

Council Regulation (EEC) No 706/73 adopted under this last sub-paragraph states merely that Community rules relating to the trade in agricultural products also apply to the Islands. Community rules regarding fishery products placed on sale in Guernsey are therefore applicable in the Channel Islands. But it is common ground between the parties before the Board on the present appeal that Community rules relating to fishing access and conservation, including licensing rules, established by the Regulations described in the next paragraphs are

not applicable, likewise that the 3 mile belt of territorial waters around the Channel Islands is not part of the Community waters referred in to such Regulations (paragraph 6 above). The nature and effect of the Community rules established by the Community's Common Fisheries Policy are nonetheless central to this appeal.

The Common Fisheries Policy

21. Under the Treaty establishing the European Community, Member States have since 1st January 1979 transferred to the Community exclusive competence to legislate in the matter of conservation measures in the waters under their jurisdiction, even where the Community has not yet adopted any such measures: *Commission v. United Kingdom* (Case 804/79) [1982] 1 CMLR 543. The modern Common Fisheries Policy of the Community dates from Regulation (EEC) No 170/83 of 25th January 1983, supplementing the original free trade area in fish and fish products with rules designed inter alia to conserve fish stocks. In this context, the Board notes The Fishing (Bailiwick of Guernsey) Law, 1989, which made it an offence in Guernsey for the master, owner and any charterer of a fishing boat to fish "within fishery limits in contravention of an enforceable Community restriction relating to sea fishing" (section 1) and enabled the States by Ordinance to "make such provision as appears to them to be requisite for the enforcement of [such] restriction" (section 8(1)). Section 9 defined "fishery limits" as that part of British fishery limits adjacent to and within the 12 mile belt around the Bailiwick. By the Fishing (Amendment) (Bailiwick of Guernsey) Law, 1992 the States' power under section 8(1) was converted into a power for the Sea Fisheries Committee (now the Commerce and Employment Department) to legislate by Order. The Sea Fisheries Committee policy report leading to the 1989 law proceeded on the basis (the contrary of which is presently accepted by both the States and the appellants) that the Bailiwick had an obligation under Protocol No. 3 to comply with the conservation regime established by the Community.

22. By Regulation (EEC) No 163/89 each Member State was required to submit to the Commission detailed information regarding all fishing vessels registered in its registry. In 1992 Regulation (EEC) No 170/83 was replaced by Regulation (EEC) No. 3760/92. This was a framework regulation which required the Council of Ministers, "in order to ensure the rational and sustainable exploitation of resources", to "establish Community measures laying down the conditions of access to waters and resources" (article 4) and to "set the objectives and detailed rules for restructuring the Community fisheries sector with a view to achieving a balance on a sustainable basis between resources and their exploitation", and such restructuring was to "take account on a case-by-case basis of possible economic and social consequences and of the specificities of the fisheries regions" (article 11). The Council was also to establish a Community system laying down rules for the minimum information to be contained in licences (article 5(1)), and article 5 further provided that, once the Community system applied:

> "(1) ……. Member States shall be required to operate national systems of fishing licences. Except where otherwise provided, all Community fishing vessels shall be required to have a fishing licence, which is attached to the vessel. …..
> (2) The licensing system shall apply to all Community fishing vessels in the Community fishing waters, or operating in the waters of third countries or on the high seas. …. "

"Community fishing vessel" was defined by article 3 as "a fishing vessel flying the flag of a Member State and registered in the Community". Guernsey is neither a Member State nor, for

present purposes, to be treated as one under Protocol No. 3 (paragraphs 6 and 20 above). Fishing boats registered in Guernsey are not to be treated as registered in the Community (or as flying the flag of a Member State, although Guernsey registered vessels do in fact fly the Union Jack). The framework regulation was not, therefore, to apply to fishing vessels registered in Guernsey. Article 6 authorised the continuation by any Member States within its 12 mile limit of the restrictive approach to access for fishing to which the Board has already referred (paragraph 10 above). In this context, Annex I did not treat the waters of the outer belt between 6 and 12 miles around Guernsey as "coastal waters of the United Kingdom". Article 8 permitted the Council to restrict the exploitation rates in fisheries in Community waters or outside such waters for Community fishing vessels.

23. Pursuant to Regulation (EEC) No 3760/92, Regulation (EC) No. 3690/93 was made "establishing a Community system laying down rules for the minimum information to be contained in fishing licences". Article 1 provided that "(1) A Community system of fishing licences shall be established laying down rules on the minimum information to be contained in the fishing licences referred to in Article 5 of Regulation (EEC) No 3760/92, and "(2) All Community vessels shall be required to have a fishing licence for the vessel". Article 3 provided that "The flag Member State shall issue and administer fishing licences for the fishing vessels flying its flag, having due regard to the provisions of Article 11 of Regulation (EEC) No 3760/92". Under articles 4 and 8 each Member State was to ensure that the information about each vessel flying its flag was accurate, to transmit it to the Commission, or any other Member State inspecting the vessel, and to ensure that it corresponded with that in the Community register of fishing vessels. Under article 9 the Council was to decide by the end of 1994 "on the provisions proposed by the Commission concerning fishing licences applicable to Community fishing vessels and to vessels flying the flag of a non-member State and operating in the Community fishing area whose activities are subject to measures regulating the exploitation of certain resources".

24. Regulation (EC) No. 2371/2002 was entitled "on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy". It recites the scope and objectives of the Common Fisheries Policy as covering "conservation, management and the exploitation of living aquatic resources and aquaculture, as well as to the processing and marketing of fishery and aquaculture products, where such activities are practised on the territory of Member States or in Community waters or by Community fishing vessels or nationals of Member States, bearing in mind the provisions of Article 117 of the United Nations Convention on the Law of the Sea, without prejudice to the primary responsibility of the flag State" (article 2). Chapter II (articles 4 to 10) provides for measures falling under the heading conservation and sustainability. The Council was to establish Community measures governing access to waters and resources and the sustainable pursuit of fishing activities (article 4) as well as recovery plans for areas outside safe biological limits (article 5) and management plans (article 6). The Commission and Member States were to have certain emergency powers (articles 7 and 8).

25. Under article 9(1), any Member State was free to "take non-discriminatory measures for the conservation and management of fisheries resources …. within 12 nautical miles of its baselines" provided that the Community had not adopted measures specifically for this area and provided that the measures taken were no less stringent than existing Community legislation. However, where such measures were likely to affect the vessels of another Member State, such measures were only to be taken after consultation with the Commission, the other Member State and the Regional Advisory Councils concerned (article 9(2)). Recital

(11) sets the background to article 9 by explaining that conservation and management measures should be allowed in the 12 miles belt "provided that, where such measures apply to fishing vessels from other Member States, the measures adopted are non-discriminatory and prior consultation has taken place ….". The discrimination in mind thus appears to have been against other Member States. Under article 10, Member States were also free to take measures for the conservation and management of stocks in waters under their sovereignty or jurisdiction, provided that they applied solely to fishing vessels flying the flag of the Member State concerned and registered in the Community and were again no less stringent than existing Community legislation. Article 9 thus posits that Member States have sovereignty or jurisdiction for fishing purposes over a 12 mile belt, within which it provides that they may take measures applying both to their own vessels and on a non-discriminatory basis to other Member States' vessels, while article 10 posits that Member States would or might have sovereignty or jurisdiction over a further, wider sea area, within which they could only take measures applying to fishing vessels of their own flag.

26. Article 17 provides for equal access by Community fishing vessels to waters and resources in all Community waters, with the exception permitting Member States to continue to restrict fishing "in the waters up to 12 nautical miles from baselines under their sovereignty or jurisdiction" (paragraph 10 above). Again, Annex I to the Regulation did not in this context treat the waters within the 12 mile belt around the Bailiwick as coastal waters of the United Kingdom. Article 20 permitted the Council to establish catch and/or fishing effort limits and to allocate them among Member States.

27. Pursuant to article 6 of Regulation (EEC) No 3670/93 and now article 20 of (EC) No 2371/2002, further Regulations have from year to year established the total allowable catches ("TACs") for Community vessels in Community and certain non-Community waters and for their allocation among Member States, using ICES areas for this purpose (see e.g., for 1999, Regulations (EC) Nos 48, 51, 53, 63 and 65/99 and more recently, for 2005, Regulation (EC) No 27/2005, which also records and allocates TACs agreed with and allocated to certain third countries under international agreement with them).

28. Against the background of the special relationship between Guernsey and the European Community, the States Advisory and Finance Committee wrote its 1993 policy letter to the President of the States, which in turn led to the *project de loi* which became The European Communities (Implementation) (Bailiwick of Guernsey) Law, 1994.

Vires under the States' "customary" power to make Ordinances

29. It is convenient to start with the States' alternative submission (paragraph 4 above), that it was within the States' customary power to make the 2003 Ordinance. Not until the oral hearing before the Court of Appeal do the States appear to have suggested that the customary power enabled them to make such an ordinance with extra-territorial effect. Their prior written submissions and the Court of Appeal's interlocutory judgment dated 8th July 2004 (granting a stay as regards territorial waters of the Deputy Bailiff's order setting aside the 2003 Ordinance) state and record that the extra-territorial validity of the 2003 Ordinance depends upon whether the Ordinance fell within the powers conferred on the States by the 1994 Law. Nor was any "strong reliance" placed on any contrary argument in the Court of Appeal. Nevertheless Southwell JA said that he would, if necessary, have been minded to "hold that the customary powers were sufficiently wide to enable the States, in the difficult situation reached in 2003, to fill the vacuum with appropriate licensing provisions by

Ordinance, at least on a temporary basis pending agreement with and action by UK Ministers" (paragraph 101). In saying this, he found assistance in authorities on the extra-territorial jurisdiction of colonial legislatures (paragraph 83).

30. The scope of the States' power to make ordinances was reviewed in the "Chuter Ede" Report of the Privy Council on Proposed Reforms in the Channel Islands of March 1947 (Cmd. 7074), which stated:

> "The scope of such Ordinances is not clearly defined but appeared to be regulated by custom and tradition; it is clear, however, that they cannot impose taxation or alter existing written and customary law, and that an Ordinance which conflicts with such law is inoperative."

How far "custom and tradition" can be said to justify an ordinance such as the 2003 Ordinance is the matter that the Board has to consider. By the specific exceptions which it identified, the Chuter Ede report appears to have had in mind written laws made with the consent of the Queen in Council and (so it has been surmised) customary law in the sense of the *Grand Coutumier de Normandie* compiled in the Channel Islands in the thirteenth century. However that may be, it is clear that an ordinance cannot affect (and may subsequently be overridden by) an Order in Council. Further, although there was a suggestion in the courts below that the right to fish in territorial waters was a customary right which the Ordinance could not abrogate, this suggestion was not pursued before the Board, at least in any manner which lends it conviction. The *Grand Coutumier de Normandie* is unlikely to have had in mind today's motorised fishing boats, some of them described by the States in argument as "monsters" (in size).

31. A century earlier in 1848, Commissioners appointed to inquire into the state of the criminal law in the Channel Islands referred in their second report to an Order in Council of 1568, which stated, inter alia, that "all Graunts and Confirmacions of Priviledges from the Queen's Majestie …. shalbe alwayes inviolably observed, maynteyned and kepte in force with the credit of the Bailyeff and recorded Juratts, to be obeyed in all their ordinances made and to be made for the good Governmente, Suretie, and Quietnes of the said Isle", but commented that they had "not been able to form an accurate opinion on the effect of the particular order". However, they observed that an *Approbation des Lois* ratified and approved by the Queen in Council on 27th October 1583 "clearly proved …. that Ordonnances were made by the Court … at the time of that work and long before, with respect to the repair of roads, the assize of bread, the regulation of public amusements, the right of sporting, and other subjects of local police". The Commissioners recorded that:

> "The Jurats in an answer transmitted to the Privy Council on the 10th January, 1737, thus define the powers of the Royal Court: 'We have never pretended to be invested with the power and authority of making laws, and it is what neither we nor our predecessors before us, ever assumed; but we beg to acquaint your Lordships, that this Court has always, as well by the nature of our constitution, as by virtue of sundry charters from the Crown, and other express orders in Council, deemed itself authorised and empowered to make regulations, and set down such rules and methods as were necessary for enforcing and putting in due execution the laws of the Island.'

The Commissioners continued:

> "The practice, however, has far exceeded these limits. The received opinion, at present, as to the limit of the legislative power of the Court …. is that it is incapable of passing and enforcing Ordonnances which militate against any Order in Council or any other law passed by an authority superior to that of the Royal Court, but that its power in other respects is unrestrained. ….. The principal Ordonnances, at present in force, regulate law proceedings, the highways, the harbours, the right of gathering vraie, or sea-weed for manure, the importation and exportation of provisions, and the mode of taxation. The duties and discipline of the militia are also regulated by Ordonnances of the Royal Court. Obedience is enforced by fine and imprisonment …. "

The "Kilbrandon" Report on Relationships between the United Kingdom and the Channel Islands and the Isle of Man of 1973 did not examine the relationship between laws and ordinances, or the power to make the latter, but noted at paragraph 1363 that "In international law the United Kingdom Government is responsible for the Islands' international relations".

32. For the appellants, Mr James Dingemans QC submits that the 2003 Ordinance was beyond the customary power of the States. First, it applied to fishery limits defined as that part of British fishery limits within the 12 mile belt around the Bailiwick of Guernsey (though the 3 mile belt of territorial waters around Alderney and Sark was excluded, no doubt as lying within their jurisdiction). It thus purported to cover waters outside the Bailiwick's territorial waters and jurisdiction. Second, and as a result, it applied to waters which the United Kingdom had legislated to bring within British fishery limits and in relation to which a number of Orders in Council including Orders under the Sea Conservation Act 1967 had legislated, either positively or permissively, in certain respects (paragraphs 12 and 15 above). Third, it applied not merely to Guernsey registered or owned fishing boats, but to all fishing boats which were registered (or, under the Merchant Shipping Act 1894, s. 373 exempted from registration) in the United Kingdom, the Isle of Man or the Channel Islands or which were British owned. Thus, it applied to a large number of fishing boats not registered in Guernsey which would already have fishing licences for European Community purposes issued by the relevant United Kingdom or Jersey authorities. It also purported to confer powers for enforcement on British fishery officers generally, rather than on the very few such officers who are Guernsey based, and to create broad offences in the event of obstruction of such officers.

33. The principle governing the extra-territorial jurisdiction of colonial legislatures is stated in Halsbury's Laws of England (4th ed; 2003 reissue), volume 6 title: Commonwealth, paragraph 840 as follows:

> "The rule is not that the territorial limits of a legislature define the possible limits of its legislative enactments; rather the rule is that those enactments which purport to have an extra-territorial operation, application or effect will be valid only if they bear a substantial relationship to the peace, order and good government of the territory concerned, whether generally or in respect of particular subjects. In particular, legislation creating any liability must base that liability on some fact, circumstances, event or thing which is relevantly connected, to a sufficient degree, with the territory concerned."

In *Croft v. Dunphy* [1933] AC 156, 162 the Board observed that, in relation to an independent state:

> "… whatever be the limits of territorial waters in the international sense, it has long been recognised that for certain purposes, notably those of police, revenue, public health and fisheries, a state may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory."

The Board applied a like principle to a dominion with power to legislate for specific purposes (in the case in question, Canada acting pursuant to a power to make customs laws). The principle was further considered and applied in Australian authorities such as *Bonser v. La Macchia* (1969) 122 CLR 177, 189 and 224-5, *New South Wales v. The Commonwealth of Australia* (1975) 135 CLR 337; *Robinson v. Western Australian Museum* (1977) 138 CLR 283, although the Court of Appeal erred in the present case in thinking that the legislation was upheld in the last case. Broadly, a subordinate legislature may legislate with extra-territorial effect where the legislation has in nature and effect a sufficiently substantial relationship with the peace, order and good government of the relevant territory and is for a purpose for which the subordinate legislature has power to legislate.

34. While fully accepting this principle, the Board considers that it has no direct application to the States' customary power to make ordinances. The Bailiwick has the fullest possible extra-territorial law-making competence by means of *projet de loi* made law with the sanction of an Order in Council. The analogy of a subordinate legislature if anything understates the Bailiwick's status in this respect. But the States' power to legislate by ordinance without the sanction of an Order in Council is by definition a less extensive power, which attracts different considerations. The examples of past ordinances drawn to the Board's attention demonstrate their use to regulate internal matters, including activities within the 3 mile belt of territorial waters (cf e.g. the Fishing Ordinance 1997: paragraph 17 above). But the Board is aware of no past ordinance purporting to legislate with extra-territorial effect in a manner presenting any parallel to the 2003 Ordinance.

35. The States' power to issue ordinances has limits, so as to preclude any alteration of a law passed with Her Majesty's sanction or of customary law and so as to exclude taxation. In the Board's view, the power must also be limited generally so as to exclude international matters in relation to which the United Kingdom represents the Bailiwick. Thus, for example, the States could not by Ordinance increase the Bailiwick's territorial waters or in the Board's view declare that the Bailiwick has fishery limits extending beyond them, and this conclusion is reinforced by the consideration that the United Kingdom has by the Fishery Limits Acts 1964 and 1976 included these waters in "British fishery limits". Legislation of such a kind has potential implications both in relation to the European Community and other States, as well as in relation to the Bailiwick of Jersey. The involvement of Her Majesty in Council in legislation on international matters enables the full implications and the interests of all concerned to be taken into account.

36. Until the 2003 Ordinance, the pattern of legislative activity, both in the United Kingdom Parliament and in the Bailiwick, points in the same direction. Provision was made which would have enabled extension of Guernsey territorial waters to 12 miles or the introduction of restrictions on fishing within a 12 mile belt around Guernsey, by Order in Council or United Kingdom ministerial order, but use was deliberately not made of this. When the United Kingdom by the Fishery Limits Acts declared that the fishery limits of the British Islands should extend, first to 12 and then to 200 miles around the United Kingdom and the Channel Islands (paragraphs 11 and 12 above), it deliberately did not extend

Guernsey territorial waters, and it extended the Fishery Limits Acts to the Bailiwick only in so far as to introduce into the Guernsey law a prohibition on foreign fishing boats (defined as stated in paragraph 11 above) entering or fishing within the British fishery limit of 12 miles around Guernsey. Orders in Council made in relation to Guernsey under section 4 of the Sea Fish (Conservation) Act 1967 gave United Kingdom Ministers power by order to prohibit fishing by any fishing boats within British fishery limits adjacent to Guernsey as well as fishing by Guernsey registered fishing boats anywhere. But this power was deliberately not exercised. British fishing boats registered in the United Kingdom were expressly not prohibited from fishing within the 12 mile belt around the Bailiwick.

37. It is true that, if the customary power extended to the making of the 2003 Ordinance, it would be open, certainly to Her Majesty in Council and it may be to the United Kingdom Parliament, to overrule or amend the 2003 Ordinance. But that argument proves too much, in effectively suggesting that there is or should be no limit at all on the customary power. It also runs counter to a theme of the States's submissions before the Board, that any role of the United Kingdom Parliament in the Bailiwick's affairs is potentially controversial and that Her Majesty in Council should not as a matter of convention legislate for the Bailiwick without the Bailiwick first taking the initiative, or at the very least consenting.

38. While the 2003 Ordinance is not directly in conflict with any Order in Council, or with any ministerial order made under any Order in Council, so long as United Kingdom Ministers do not exercise their power under section 24 of the 1967 Act or under the Orders already made under it (paragraph 15 above), the general scheme of the United Kingdom and Guernsey legislation up until 2003 is thus in strong accord with what the States accepted prior to the Court of Appeal hearing and with what the Board would expect. This is that legislation in relation to fishery within British fishery limits but outside territorial waters is a matter requiring the consent of Her Majesty in Council. The 2003 Ordinance purported to legislate for fishing within the 12 mile belt adjacent to the Bailiwick by all British fishing boats (including British registered and owned and Jersey as well as Guernsey registered fishing boats) and to create offences under Guernsey law relating to the conduct of masters, owners and charterers in respect of activities within the 3 to 12 mile belt outside territorial waters not prohibited under any United Kingdom legislation. It also purported to confer powers on British fishery officers generally, rather than on the very few such officers who are Guernsey based. If the Bailiwick wanted to legislate in those respects outside its own territorial waters, it could, but it was in the Board's view incumbent on it to do so by *projet de loi* made law with the sanction of the Queen in Council.

Vires under the 1994 Law

39. The Board turns to the question whether the making of the 2003 Ordinance was authorised by the 1994 Law. Mr James Dingemans QC for the appellants submits that it was not: first, the 1994 Law did not authorise the States to legislate with extra-territorial effect, at least in relation to British fishery waters; second, whether it did or not, the terms of the 2003 Ordinance did not "implement" any Community provision or provisions within the meaning of the wide power conferred by the 1994 Law. In this connection he also deploys the second and third points raised on the issue of competence under customary law (paragraph 32 above). Finally he contends that the Ordinance is discriminatory contrary to European Community law.

40. *(a) Does the 1994 Law permit any ordinance with extra-territorial effect?* The Board does not doubt that the States could, by *projet de loi* reflected in an Order in Council, legislate with extra-territorial effect in a matter affecting the good governance of the Bailiwick. The question is however whether the 1994 Law was intended to authorise such legislation by ordinance. It is circular to suggest that the answer is to be found in section 4(2)(d) of the 1994 Law which provides that an ordinance "may make any such provision of any such extent as might be made by Projet de Loi ….". Nor does the Board find assistance in the European Communities Act 1972. Section 2(2) of that Act authorised the implementation of Community obligations in the United Kingdom by Order in Council or ministerial regulations. Section 2(6) also provided that

> "A law passed by the legislature of any of the Channel Islands …., if expressed to be passed or made in the implementation of the Treaties and of the obligations of the United Kingdom thereunder, shall not be void or inoperative by reason of any inconsistency with or repugnancy to an Act of Parliament, passed or to be passed, that extends to the Island ….. *nor by reason of its having some operation outside the Island* ……" (italics added for emphasis)

The 1972 Act is an Act of the United Kingdom Parliament. But, leaving that aside, it concerned the implementation of Community obligations binding on the United Kingdom, not implementation in the wider sense which was introduced by the 1994 Law and with which the present appeal is concerned. The policy report preceding the 1994 Law shows that the States Advisory and Finance Committee were, by the 1994 Law, intending to introduce in the Bailiwick "similar general powers" to those in section 2(2), but to go further by permitting the States where "expedient" to introduce in the Bailiwick Community provisions which were not binding on the United Kingdom or the Bailiwick.

41. Section 2(2) of the United Kingdom's 1973 Act provides specifically for Channel Islands legislation implementing binding United Kingdom obligations to be valid although "having some operation outside the Island". It can be argued that the 1994 Law must have been intended with the same effect. On the other hand, the Board finds it surprising, if so, that the 1994 Law does not then expressly repeat and reflect such an intention. The Board notes, in this connection, the Fishing (Bailiwick of Guernsey) Law, 1989, where an intended extra-territorial effect was expressly made clear. The 1994 Law also uses language which can be viewed quite narrowly: see e.g. the opening reference to its having the force of law "in the Bailiwick" and section 4(3)(b) speaking of the extension of any Community provision (with exceptions, adaptations and modifications) "to the part of the Bailiwick to which the Ordinance applies". These are however in the Board's view only weak indications of intention. More relevant is the description in the 1993 policy letter of the sort of measures specifically in mind, viz. Community measures relating to trade in fish, fishery products and other agricultural products and "such other measures as may arise within the scope of Protocol 3" – all matters that would be the subject of territorial legislation. There is no suggestion, and it is highly improbable, that the Act was passed with its use to extend to the Bailiwick Community measures relating to fishing access, conservation or licensing in mind.

42. The Board further notes that none of the other examples of the Act's use about which it has been informed comes remotely close to the 2003 Ordinance. The Board was shown the European Communities (Euro: Miscellaneous Provisions) Ordinance, 1998 (substituting references to the ECU with references to the Euro in any legal instrument) and the Summer Time (Guernsey) Ordinance, 2001 (applying European summer time to Guernsey as if it were

a Member State). They are confined and domestic measures of a quite different character to the 2003 Ordinance. Other examples cited by Southwell JA in paragraphs 48-49 of his judgment appear to be equally remote from the present Ordinance.

43. The scheme of existing legislation may also be said to make it unlikely that the 1994 Law was envisaged as an alternative route to permit legislation such as the 2003 Ordinance: in particular, the United Kingdom and Channel Island legislation in this area from 1989 to 2001 expressly excepted fishing boats from any licensing requirement within the 12 mile belt around the Channel Islands for the time being, but provided quite different means by which, by Order in Council or ministerial order, such a licensing requirement might be introduced.

44. Nevertheless, the 1994 Law was clearly envisaged as a means of introducing into the Bailiwick provisions of Community legislation, even if not binding directly or indirectly on the United Kingdom or the Bailiwick. This being the primary purpose of the Law, the States are able to submit with some force that, if a Community provision does exist with extra-territorial effect in relation to Member States, the 1994 Law must have been intended to be read widely enough to enable the implementation of such a provision in the Bailiwick; and that there is no basis in the 1994 Law upon which to exclude from this conclusion a Community provision simply because it relates to an area where another scheme of legislation was available for use to the same end. The Board considers on balance that it should proceed on this basis.

45. *(b) Does the 2003 Ordinance implement any Community provision?* The Board turns therefore to the question whether the 2003 Ordinance does "implement" any Community instrument within the meaning of the 1994 Law, assuming that the 1994 Law is in principle capable of use to implement a Community provision having extra-territorial effect. The 1994 Law enables the States "by Ordinance [to] make any such provision as they may consider necessary or expedient for the purpose of the implementation of any Community instrument". The effect of the provision which the States consider it necessary or expedient to make must, in the Board's view, actually be to "implement" some provision contained in or arising under a Community instrument, albeit with exceptions, adaptations or modifications. It cannot be sufficient that the States were under a belief, however mistaken, that the provision they believed it expedient to make would implement a provision in or arising under a Community instrument.

46. Regulations (EC) Nos. 3690/93 and 2371/2002 referred to in the 1994 Law are Community instruments. The essential question is thus whether the 2003 Ordinance can, in the terms of the 1994 Law, be said to extend "any provision contained in or arising under" them or either "to the part of the Bailiwick to which the Ordinance applies with …. exceptions, adaptations and modifications …. specified in the Ordinance". As stated above (paragraph 23), the Community scheme under Regulation (EC) No. 3690/93 provides for each Member State to issue and administer fishing licences for fishing vessels flying its flag, having due regard to the objectives and detailed rules for restructuring the Communities fisheries sector to be set by the Council under article 11 of Regulation (EC) No 3760/92. Such licences are to serve as a mechanism for gathering and recording information which is to be transmitted to the Commission, for the purposes of the Community's Common Fishing Policy. Regulation (EC) No 2371/2002 replacing Regulation (EC) No 3760/92 identifies in Chapter II the conservation and sustainability measures which the Council is to establish (cf paragraphs 24-25 above). It provides for emergency measures by the Commission and Member States. It allows measures by Member States, in respect of waters within their

adjacent 12 mile belt and waters under their sovereignty or jurisdiction provided these are no less stringent than Community measures.

47. The 2003 Ordinance is in contrast a simple licensing scheme, conferring on the States of Guernsey Sea Fisheries Committee the power to grant fishing licences and to set their provisions and conditions in relation to fishing within the 12 mile belt. Its general aims are conservation and sustainability. But the Ordinance licensing scheme provides in effect no more than a fishing permit, subject to conditions, in relation to a particular locality. It has no similarity to the Community licensing scheme. The 2003 Ordinance does not integrate the Bailiwick within the Community's Common Fisheries Policy. It does not involve the transmission of information to the Community, it does not introduce or refer to any of the Community conservation and sustainability measures established by the Council under Regulation (EC) No 2371/2002 and it does not require that due regard be had to any such measures in the issue of any licence. The 2003 Ordinance does not adopt or in any way involve the Bailiwick in the Community scheme of total allowable catches (though the Board understands that the catch of Channel Islands registered fishing boats is in practice, whatever the legal position, included by the United Kingdom in its returns to the relevant Community authorities.)

48. Article 5 of Regulation (EC) No 3760/92 requires each Member State to apply the Community licensing scheme to its flag vessels wherever on the seas such vessels might be. The Bailiwick of Guernsey is not a Member State or part of the United Kingdom, and is a separate jurisdiction from Jersey. An extension of the Community provisions for licensing by ordinance to the Bailiwick would on its face involve a licensing scheme limited to Guernsey registered fishing boats. The Ordinance in contrast introduces a licensing scheme for United Kingdom, Isle of Man, Jersey and British owned fishing boats. The United Kingdom is a Member State, but Jersey and the Isle of Man are for present purposes not.

49. The States argue that the 1994 Law entitled them to legislate for all "British fishing boats" registered in all or any of these jurisdictions. The States can, in other words, treat all such jurisdictions as if they represented a single unit surrounded by one 12 mile belt, and fill a "gap" left around Guernsey by the legislation of the principal jurisdiction (the United Kingdom). This involves an interpretation of the scope of the 1994 Law which the Board considers that it cannot bear. The 1994 Law entitles the States to extend a non-binding Community provision to the Bailiwick. It does not give the States the right to extend such a provision anywhere else, or to legislate for, or as if it were part of, any other jurisdiction. It does not entitle the States to legislate for the United Kingdom. Even less can it entitle the States to legislate for another jurisdiction such as Jersey which is, like the Bailiwick itself, not part of the Community for relevant purposes. United Kingdom registered fishing boats should (and would almost certainly) have their own United Kingdom licences satisfying the requirements of the Common Fisheries Policy. The exclusion from the prohibition on fishing without a licence under the Sea Fish Licensing Order 1992 of the 12 mile belt around the Bailiwick (paragraph 14 above) may mean, at least in theory, that there could be British shipping boats active exclusively within 12 miles of the Channel Islands which had no Community licences for any area and that it is arguable that this may be contrary to a obligation on the United Kingdom under Regulations (EEC) 3760/92 and (EC) 3690/93 to ensure that all fishing boats flying its flag should have such a licence, but, if the United Kingdom is in that small respect in breach of its Community obligation, that is a matter for the United Kingdom to address. As to the Isle of Man and Jersey, no Community provision requires fishing boats registered in those jurisdictions (not being British owned) to have any

Community licence, although those jurisdictions have introduced their own domestic licensing legislation.

50. Even under the wide provisions of the 1994 Law, the Board does not therefore consider that the States can be regarded as extending the Community provisions regarding licensing to the Bailiwick with adaptations or modifications, by a licensing scheme covering not merely Guernsey registered boats, but also boats registered outside the Bailiwick in other jurisdictions, some not even in the Community for present purposes. The "gap" in the overall licensing scheme to which the States refer results from the deliberate decision by the United Kingdom legislative authorities to permit fishing in the 12 mile belt around the Bailiwick under the United Kingdom licensing scheme (paragraph 14 above), and from equally deliberate ministerial decisions leading to the non-exercise to date of the existing United Kingdom ministerial power to introduce a licensing scheme for all British fishing vessels in the 12 mile belt or to extend the Bailiwick's territorial waters to 12 miles (paragraphs 15-16 above). A licensing scheme filling that "gap" under the United Kingdom scheme or by use of the United Kingdom ministerial power would or would be likely to involve reconciling different interests of different components of the British Islands, which appears to be why none has so far been introduced. But that is a reason why a decision on such a matter might be expected to be taken under the United Kingdom legislation or by a law receiving the sanction of an Order in Council.

51. The licensing scheme introduced by the 2003 Ordinance was confined to fishing within the 12 mile belt of British fishery limits adjacent to the Bailiwick, rather than fishing everywhere as required under the Community scheme. There was thus no licensing scheme and no prohibition on fishing without a licence in respect of Guernsey registered fishing boats outside the 12 mile belt. If the Ordinance could otherwise be regarded as implementing the Community provision for licensing, that might be regarded as no more than a (fairly major) adaptation of the Community scheme to the Bailiwick. But along with the other differences, it underlines the difficulty about treating the Ordinance as implementing any Community provision within the 1994 Law.

52. Article 9 of Regulation (EC) 2371/2002 permits Member States to take non-discriminatory measures for conservation and management within a 12 mile of their baselines. But this is by way of derogation from the Community's otherwise exclusive right to take such measures, and is limited to measures compatible with and no less stringent than existing Community legislation and well as subject to prior consultation with specified Community organs and councils. Since it is common ground that Community legislation and measures and Community consultation processes on conservation and management had no application in the Bailiwick, there was in this respect no Community right or scheme from which to derogate. There never has been any obstacle to the Bailiwick introducing a licensing scheme in its territorial waters and the only obstacle to its doing so in the 3 to 12 mile belt adjacent to it arose not from any Community legislation, but from its lack under its own domestic law of any jurisdiction over such waters. As the Board has observed (paragraph 25 above), article 9, in enabling a Member State to take conservation and management measures within a 12 mile limit, posits Member States' sovereignty or jurisdiction over such waters. The Council Resolution referred to in paragraph 12 above and the general expansion of fisheries limits throughout the world no doubt explain why. To treat article 9 as if it were itself designed to expand Member States' jurisdiction to introduce measures (rather than as providing a liberty to derogate) and on that basis to argue that the States were "implementing" a Community provision by introducing a licensing scheme extending beyond

the Bailiwick's limited territorial jurisdiction is to stretch article 9 and the 1994 Law beyond their proper bounds.

53. Article 9 of Regulation 2371/2002 also prohibits discriminatory measures against other Member States (paragraph 25 above). The Ordinance licensing scheme applies to British fishing vessels, including therefore United Kingdom registered boats, but not to fishing boats registered in other Member States. On the basis that the Bailiwick is not within the Common Fisheries Policy, Treaty obligations binding it in relation to France would presumably have precluded any licensing scheme in relation to French boats (paragraph 11 above). But the consequence is that any attempt to justify the Ordinance licensing scheme by reference to article 9 meets the additional difficulty that the scheme is on its face discriminatory towards United Kingdom boats compared with other Member States' boats. The Board has already stated its opinion that the terms of the 1994 Law do not allow the Bailiwick to legislate for United Kingdom boats as if it were part of a Member State, rather than a non-Member introducing its own domestic legislation reflecting Community legislation.

54. The Board accepts that the words of the 1994 Law are broad. But in the Board's view and for the reasons explained, the licensing provisions introduced by the 2003 Ordinance are of a quite different character to, and share virtually nothing except the name with, any of the provisions of the two European Community Regulations which they are recited as "implementing". The Board has reached the conclusion that the 2003 Ordinance fell outside even the wide powers conferred by the 1994 Law, and therefore that, if its terms were to become law in the Bailiwick, this could only have been by the mechanism of a *projet de loi* with the sanction of the Queen in Council.

Article 28 of the Treaty establishing the Community

55. The Board can deal briefly with Mr Dingemans' submission that the 2003 Ordinance in any event infringed Article 28 of the European Community Treaty, as impeding trade between Member States. The Board in considering this submission will proceed on the basis that the Bailiwick is under Protocol No 3 to be treated as part of the Community, to an extent requiring it to avoid introducing any such impediment. Even if this were not so, it may no doubt be argued in relation to the 1994 Law that it cannot have been meant to authorise the making of an ordinance the effect of which would be contrary to Article 28. Proceeding on that assumption, the Board is still unable to accept Mr Dingemans' submission. In *Cornelis Kramer and others [Officier van Justitie v Kramer]* (Joined cases 3, 4 and 6/76) [1974] ECR 837, the European Court held that:

> "56. The answer to the question whether a measure limiting agricultural production impedes trade between member states depends on the global system established by the basic community rules in the sector concerned and on the objectives of those rules. …. Measures for the conservation of the resources of the sea through fixing catch quotas and limiting the fishing effort, whilst restricting 'production' in the short term, are aimed precisely at preventing such 'production' from being marked by a fall which would seriously jeopardize supplies to consumers. Therefore, the fact that such measures have the effect, for a short time, of reducing the quantities that the states concerned are able to exchange between themselves, cannot lead to these measures being classified among those prohibited by the treaty, the decisive factor being that in

> the long term these measures are necessary to ensure a steady, optimum yield from fishing."

In the Board's view, those words would cover this case. At least if the 2003 Ordinance implemented provisions of Regulations (EC) Nos 3690/93 and/or 2371/2002 within the meaning of the 1994 Law, it cannot be regarded as involving a relevant impediment to trade between Member States. The Board only adds that it seems open to very considerable doubt whether the licensing scheme set up under the 2003 Ordinance could anyway be regarded, even within the wide words of *Procureur du Roi v. Benoît and Dassonville* (Case 8/74), as "capable of hindering, directly or indirectly, actually or potentially, intra-Community trade". The operation of the licensing scheme might, if skewed unfairly, have such an effect, but that is a different matter.

Incorrect legal advice

56. The Board can also deal briefly with the submission that the 2003 Ordinance is invalid or should be set aside because it was based on legal advice which is accepted for present purposes to have been incorrect (paragraphs 6 and 20 above). The Board will assume, without deciding, that a Guernsey court would have jurisdiction to make such a declaration or to set the Ordinance aside on such a ground in an appropriate case, whether the Ordinance be viewed as subordinate legislation under the 1994 Law or as validly made under the customary power. Nonetheless, this would in the Board's view be an improbable case for its exercise. Whatever the ostensible reasoning behind the Ordinance, it is clear, particularly with the hindsight of the States' attitude in this litigation, that the States would, even in the absence of any perceived Community obligation, have been keen to make the Ordinance on any basis open to them, whether under the broad terms of the 1994 Law or under the customary power if available.

Severance

57. There remains the question whether the 2003 Ordinance can be upheld as a measure made under the customary power to take effect within the 3 mile territorial belt adjacent to the Bailiwick (excluding the territorial seas adjacent to Alderney and Sark). Mr Dingemans did not submit that the customary power did not permit the States to introduce a licensing scheme within the Bailiwick's territorial waters (even though this is within the area where United Kingdom legislation also gives United Kingdom ministers a right to introduce such a scheme: paragraph 15 above). On that basis the issue is whether the 2003 Ordinance can and should be severed and restricted to the 3 mile belt. In *Dunkley v. Evans* [1981] 1 WLR 1522 a two-judge Divisional Court (Ormrod LJ and Webster J) held valid a ministerial prohibition of herring fishing within British West Coast fishery limits although this mistakenly purported to include a 40 mile by 9 mile area adjacent to the Northern Irish coast in relation to which power to make prohibition orders had been excluded and vested in the Department of Agriculture (Northern Ireland). The excluded area represented only 0.8% of the total purportedly covered by the order, and it was "difficult to imagine a clearer example …. of a law which the legislative body would have enacted independently of the offending portion and which is so little affected by eliminating the invalid portion" (p.1525B).

58. In *DPP v. Hutchinson* [1990] 2 AC 783 Lord Bridge of Harwich speaking for the majority of the House of Lords accepted that severance might be possible on either of two alternative bases, one where a test of textual severability was satisfied, the other if a test of

"substantial severability" was satisfied. As to the latter, he said that "when the court must modify the text in order to achieve severance, this can only be done when the court is satisfied that it is effecting no change in the substantial purpose and effect of the impugned provision" (p.811G), and that in this respect the court should "abjure speculation as to what the maker of the law might have done if he had applied his mind to the relevant limitation on his powers" (p.813D-E). In *DPP v. Hutchinson*, neither test was satisfied. Byelaws prohibiting access to the area of the Greenham Common military airbase were *ultra vires* for failure to provide for the preservation of rights of free access by commoners exercising rights of common and their animals, but byelaws which permitted free access of this nature would necessarily be "of a totally different character" and "quite incapable of serving the legislative purpose which the Greenham byelaws, as drawn, are intended to serve" (p.813G-H).

59. In the present case, it might at first sight appear that the Ordinance cannot be severed textually. The greater part by far of the Ordinance relates to fishing in the 3 to 12 mile belt lying outside the Bailiwick's territorial waters, and there may, if relevant to consider, be said to be correspondingly more room for doubt about whether the licensing scheme would have been introduced simply for the territorial waters. On the other hand, the legislative pre-history and correspondence bears out the States' desire to restrict access, and by the Fishing Ordinance 1997 the States had recently legislated to restrict entry and fishing in the Bailiwick's territorial waters by all foreign fishing boats. However, textual severance is in fact possible, as demonstrated neatly by the interlocutory judgment of the Court of Appeal (The Hon. Mr Michael Beloff QC, Mr David Vaughan QC and Mr Patrick Hodge QC) on 8th July 2004. In granting a stay of the Lieutenant Bailiff's order in the 3 mile territorial belt, the Court identified deletions from the 2003 Ordinance, which would once made mean that it enjoyed the presumption that it extended only to the Bailiwick, including (but not beyond) its territorial waters. The Board will restate those deletions with some modifications and additions (shown in bold) which appear to it to be appropriate: *Preamble:* all words **(and footnotes)** after the **date 26th March, 2003"** in the **first** line**, down to and including the date "20th December 2002" in the sixth line**; *Section 1(1):* the words "within British fishery limits adjacent to the Bailiwick"; ***Section 3(a):*** **the words "in British fishery limits adjacent to the Bailiwick";** *Section 6(1)(a):* the words "within British fishery limits adjacent to the Bailiwick"; *Section 6(1)(b):* the words "outside those limits"; *Section 6(4):* the words "within British fishery limits"; and *Section 8(1):* the definition of British fishery limits adjacent to the Bailiwick.

60. The Board considers therefore that the 2003 Ordinance can be severed textually so as to be limited in effect to the 3 mile belt of territorial waters of the Bailiwick. Even had this not been so, the Board would consider that the Ordinance could have been limited to the 3 mile belt under Lord Bridge's test of substantial severance, since its terms can apply with equal relevance and without significantly different legal effect in those waters as they would to a wider 12 mile belt. The only alteration required would in effect be to read the words "not exceeding 12 miles" in the definition of "British fishery limits adjacent to the Bailiwick" as if they read "not exceeding 3 miles".

Conclusion

61. In these circumstances and for the reasons given, the Board will humbly advise Her Majesty that the 2003 Ordinance was and is invalid as regards the 3 to 12 mile belt, but that it is severable and, subject to the deletions indicated in paragraph 59 above, valid in relation to

the 3 mile belt of territorial sea around the Bailiwick, and that the appeal should be allowed to that extent. The parties are invited to make written submissions on costs within 21 days.