

Judgment 30/2004

Jersey Fishermen’s Association Limited et al v. The States of Guernsey – Royal Court (Civil action file 804) – 29 June, 2004

Sea Fish Licensing (Guernsey) Ordinance, 2003 – judicial review – whether ultra vires as respects British fishery waters between 3 and 12 miles from the relevant Guernsey – locus standi – delay – assistance of Policy Letters as travaux préparatoires – review of European Union, United Kingdom and Guernsey legislation – Guernsey not obliged under European law to introduce the licensing scheme – 2003 Ordinance held to be unlawful and of no effect.

IN THE ROYAL COURT OF GUERNSEY

The 29th day of June, 2004 before Patrick J Talbot Esquire, QC, Lieutenant Bailiff, sitting alone:-

In the matter of

JERSEY FISHERMAN’S ASSOCIATION LIMITED

IF LIMITED

INTERFISH WIRONS LIMITED

SCERENE FISHING COMPANY LIMITED

JOHN HARTLEY LOVELL

Applicants

v

THE STATES OF GUERNSEY

Respondents

Whereas on 11th, 12th, 13th, 26th, 27th February 2004, the Lieutenant Bailiff considered the question of the lawfulness of the Sea Fishing Licensing (Guernsey) Ordinance, 2003 and heard thereon Advocates G. S. K. Dawes and R. J. McMahon, Counsel for the Applicants and Respondents respectively the Lieutenant Bailiff this day gave judgment in the terms attached hereto and DECLARED and ORDERED as follows:

- (1) The Sea Fish Licensing (Guernsey) Ordinance 2003 is unlawful and of no effect;

- (2) The Respondents shall pay the Applicants’ costs of and relating to each of the applications herein on the recoverable basis, such costs to be taxed if not agreed;
- (3) Liberty to apply on 48 hours notice to the opposing parties for directions as to the future conduct of this matter;
- (4) To the extent that it may be necessary the Respondents are granted leave to appeal the decision herein to the Court of Appeal;
- (5) The Respondents’ application for a stay in the declaration herein is dismissed.

S. M. D. ROSS

Her Majesty’s Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

BETWEEN:

THE JERSEY FISHERMEN’S ASSOCIATION LIMITED
IF LIMITED
INTERFISH WIRONS LIMITED
SCERENE FISHING COMPANY LIMITED
JOHN HARTLEY LOVELL

Applicants

-v-

THE STATES OF GUERNSEY

Respondent

APPROVED JUDGMENT

Introduction

1. In these proceedings the Applicants, (who are respectively a Jersey company, three English registered companies and an English-based individual), claim by way of judicial review a declaration that the approval by the Respondent (“the States”), on 26th March 2003 of an Ordinance, The Sea Fish Licensing (Guernsey) Ordinance 2003, (“the 2003 Ordinance”), was *ultra vires* the relevant enabling or establishing power and so unlawful and of no effect or; alternatively, a declaration that the 2003 Ordinance is lawful and effective only to the extent that it purports to regulate fishing licensing within 3 miles of the Island of Guernsey and that it should be amended by severance of the allegedly unlawful parts which purport to control the use of the waters in the area between 3 and 12 miles of the relevant Guernsey baselines. The relief is sought on the grounds set out in the Applicants’ Amended Causes.

2. So the Applicants’ primary case is that the 2003 Ordinance is bad insofar as it purports to operate within the area of British fishery waters (or British fishing limits) between 3 and 12 miles of the acknowledged Guernsey baselines, in that it was made by the States outside their powers under section 1 of The European Communities (Implementation) (Bailiwick of Guernsey) Law, 1994, (“the 1994 Law”) – see ***Bassington v HM Procureur*** (1998) 26 GLJ 105 at page 124F.
3. The burden of proof is on the Applicants and it is often said that a strong case needs to be made out before a Court should hold the exercise of a power by a government authority invalid – see the English practice as set out in paragraph 65 of volume 1(1) of *Halsbury’s Laws of England*, 4th ed. 2001 Reissue, which I accept as containing a sound principle which I should apply in Guernsey to this challenge. Advocate McMahon for the States argues that the fact that the 2003 Ordinance was approved by the States after debate means that the Court ought to be slow to strike it down on the ground of a lack of vires or unreasonableness or wrong use of the States’ discretion relating to the draft Ordinance placed before them on 26th March 2003; there is, he contends, therefore, a high threshold for the Applicants to surmount.
4. It may also, I think, be important to bear in mind the subtle difference between secondary or delegated legislation laid before the UK Parliament for approval and the exercise of legislative power by the States by Ordinance, without the need to obtain any approval of the Ordinance from Her Majesty the Queen in Council before the Ordinance should form part of Guernsey’s operative law. I heard very interesting and well-developed argument from Counsel on both sides about the legislative process of the States in Guernsey as contrasted with the making of such secondary or delegated legislation by the UK Parliament and it was suggested that a Guernsey Ordinance may properly be regarded as having a more immediate, or “higher”, status than a UK Statutory Instrument. It *may* also follow that the threshold for the Applicants to get over is bigger or higher to surmount than an equivalent English threshold, but, whilst this may be of relevance in another case, I have not found it necessary to reach a decision on the point in order to reach my conclusion in this case.

Preliminary Points

5. At the outset some preliminary points arise for decision.

First, is the First Applicant, (which I shall call “the JFA”), entitled to claim judicial review of the 2003 Ordinance in the Royal Court? This is, of course, a question of *locus standi*.

Secondly, the time taken by the Applicants to bring these proceedings before the Royal Court is criticised strongly by the States and it is argued on their behalf by Advocate McMahon that, under the inherent powers of the Royal Court and in accordance with the perceived need to bring such claims urgently, the Court should dismiss the applications on the ground of undue delay, rather than considering any alleged delay in the context of the Court’s agreed discretion in cases where judicial review is sought.

Thirdly, the question arises for decision whether the decision by the States to legislate by ordinance in the form of the 2003 Ordinance is justiciable at all, *i.e.* Is the decision of the States, taken after debate on the floor of the States, to approve and implement the 2003 Ordinance open to challenge in the Royal Court at all?

6. I shall deal with these preliminary challenges first. Before I do so, I need to express my thanks to Counsel. I record the very considerable assistance received by me from Counsel’s helpful and thorough written and oral submissions on this issue, and on all other issues in the case. The Court could not, in my view, have been better served. If I do not in this Judgment refer to all the points which they argued before me that does not mean that I have not taken them into account for the purpose of reaching my decision; I have done so.
7. I, therefore, now turn to deal with the three preliminary points.
8. Until affidavit evidence was put in by the Applicants, and in particular on behalf of the JFA, the States challenged the right of THE JFA to claim judicial review of the 2003 Ordinance. But the affidavit evidence lodged on behalf of the Applicants early in January 2004 clearly established, to my mind, that THE JFA is sufficiently interested, in the legal sense, in the subject-matter of the 2003 Ordinance to be entitled to challenge its validity in the Royal Court. The evidence then put in on behalf of the Applicants, in my view, clearly establishes that THE JFA, on behalf of its members, represents the interests of at least 80% of Jersey commercial fishermen, including some of those who have received “acceptable” licences under the 2003 Ordinance or have had their applications refused. By way of general summary, it seems that the majority of THE JFA’s members have either had their applications for licences refused by the relevant Guernsey

authority, The Sea Fisheries Committee (“the Committee”), or may be awaiting the determination by the Court of this challenge.

9. In any event, after the affidavit evidence had been put in by the Applicants, Advocate McMahon’s argument on *locus standi* ceased to appear so strong and, indeed, I think he did not really pursue it. In these circumstances, I find that the *locus standi* of the JFA, and the right of all five Applicants to claim judicial review of the 2003 Ordinance, is made out.
10. I now deal with the second preliminary point taken by the States.
11. It seems that judicial review in the Royal Court is only now beginning to occupy the Court more than on an occasional, or rare, basis; it has not been claimed on very many occasions in the past. But, the right to review executive and administrative decisions in the Royal Court was duly recognised by the Court of Appeal in *Bassington v HM Procureur* (above) (1998) 26 GLJ 105. In that case, the issue was whether notices issued by HM Procureur under a criminal Law could be challenged before the Royal Court. The Court of Appeal considered the history of judicial review in Jersey and the Isle of Man and, at p. 115 B/D, concluded that there was no absolute bar preventing the Royal Court from reviewing decisions of HM Procureur and, at pp. 116/118, concluded that the remedy of judicial review is, indeed, available in the Royal Court.
12. I add that, although judicial review is in its relative infancy in the Royal Court, it seems to me likely that the practice of the Courts in England and Wales will be of some persuasive assistance to the Royal Court in the development of the remedy and there is more than a hint of this, in my view, in the recent Practice Direction No. 3 of 2004, issued by HM Deputy Greffier on 26th April 2004, which governs the procedure to be adopted by applicants seeking judicial review in the Royal Court after that date.
13. The second preliminary point really, I think, amounts to this: Should the Royal Court impose a preliminary, procedural stage on the Applicants in this case, requiring them to persuade the Court, *inter alia*, both that a case is made out which is serious enough to be heard, (which is not denied by the States,) and that the applications were made sufficiently promptly so that the Applicants should not be shut out on the ground of undue delay? Was there a procedural hurdle, which the Applicants had to clear, before becoming entitled to a full hearing of their applications for judicial review?

14. Lieutenant Bailiff Day, who, of course, has life-long experience of Guernsey practice, concluded in *Old Government House Hotel Limited v The President of the Island Development Committee and Mighty Mouse Limited* (2003) 17 December 2003, at paragraph 34 of his Judgment, that the Royal Court itself should, when an application for judicial review is received, first decide “whether it is right to allow an applicant to proceed to a full hearing for judicial review so as to remedy its complaints”. The learned Lieutenant Bailiff decided that the Royal Court should adopt the English practice of an application for leave or permission to bring the proceedings.

15. As I understand the English practice, the permission stage has always been governed by rules of Court. The Royal Court itself governs its own procedure and, of course, issues rules of Court, including The Royal Court Civil Rules 1989 (“the RCCR”), and the Royal Court is entitled to issue such rules of court of its own motion, and historically has always done so. In this sense, the Royal Court is obviously different from the UK Parliament passing delegated or subordinate legislation in the form of statutory instruments, or otherwise, by way of secondary legislation, imposing rules of practice and procedure on court users.

16. As I indicated to Counsel during the oral hearings, I had real doubt whether the Royal Court should, without proper, prior warning to the parties, and especially to the Applicants, and after the proceedings had been instituted, impose upon the Applicants a leave or permission stage. As I look at it, at the time when these applications were made, mid-November 2003, justice required that such leave or permission stage should be made clear to possible applicants either in the RCCR, or in Practice Directions given or handed down by the Royal Court, and although I do not in any way wish to doubt the inherent power of the Court to govern its own procedure, after hearing argument during the oral hearing, I told the parties that I had decided not to take the same course as Day LB had taken in the *Old Government House Hotel* case. In other words, I concluded that once the proceedings had been instituted, the Applicants were permitted to have them heard at a full hearing and that any points which might otherwise have been raised, (apart from *locus standi*, which obviously goes to the right of Applicants to *bring* proceedings,) the other points relied upon by Advocate McMahon should be considered by me as part of the full hearing, if necessary in the context of my discretion as to whether or not to grant the relief sought. It follows, therefore, that I shall deal with Advocate McMahon’s arguments on delay by all the Applicants later in this Judgment.

17. The second preliminary point will not, of course, be of any concern in relation to future applications for judicial review, which after 26th April 2004 have been, and will be, governed by the new Practice Direction No. 3 of 2004, which specifically imposes a leave or permission first stage.
18. The third preliminary challenge, which in many ways was the most important, was not, in the event, pursued by Advocate McMahon on behalf of the States; but I consider it necessary to say a few words about it anyhow.
19. The constitutional position is clear. The States may in certain circumstances make an Ordinance without needing to obtain an Order of Her Majesty in Council, which *is* required to approve a Law. I refer to Advocate Dawes’ book, *The Laws of Guernsey* (2003), at p. 12, where he suggests that this course may not be very common, but does not doubt that the States have a power to legislate domestically in this way. It seems that some time after 6th August 2002 the Committee decided that a local or domestic Guernsey legislative route rather than a Ministerial Order from the then MAFF, (which was being delayed by the UK Government,) should be examined as a way of achieving their aim of a restrictive fishing boat licensing system for British fishing boats operating within the entire area of 12 miles of the Guernsey baselines, ignoring, as I shall for the rest of this Judgment, questions relating to median. The route chosen was, on the face of it, a domestic Guernsey route, namely, to legislate by way of Ordinance passed by the States pursuant to an existing Law, namely, the 1994 Law.

The making of the 2003 Ordinance

The Policy Letter dated 7th February 2003

20. The reasoning behind the decision of the Committee to take this course appears in the Policy Letter to the President of the States from Deputy Lyndon Trott, the Vice-President of the Committee, dated 7th February 2003, which is headed “IMPLEMENTING A FISHING LICENSING REGIME FOR THE BAILIWICK OF GUERNSEY”, (“the Policy Letter”).
21. A considerable part of the argument of Counsel before me related to the terms of the Policy Letter. It is, therefore, appropriate for me to set out its material terms, which I shall now do, highlighting some passages with my italics, where I think it useful to do so. I have found the

Policy Letter to be a helpful historical introduction to the need for the 2003 Ordinance as perceived by the Committee.

“The absence of a formal fishing vessel licensing regime within the Bailiwick of Guernsey has serious consequences for the management of fishing effort, the conservation of fish stocks and the ability of the fishermen of Guernsey, Alderney and Sark to access international markets.

Accordingly, strenuous efforts have been made by the ... Committee since 1992 to introduce a licensing scheme by means of a Ministerial Order made under UK legislation. However, for the complex reasons set out in this report, the Committee has been unable to conclude licensing by this route and is now proposing its introduction by means of domestic legislation. The purpose of this report is to set out the history, nature and importance of an appropriate licensing regime and to seek the approval of the States of [the 2003 Ordinance].

1.0 Introduction

- 1.1 A restrictive scheme of fishing vessel licensing *has long been required for the Guernsey 12 mile area in accordance with European obligations*. The Committee has been working towards implementing such a scheme since 1992.
- 1.2 The UK, Jersey and Isle of Man have already licensed their fishing fleets, and at the present time the only British fishing vessels exempt from the need for fishing vessel licences are vessels fishing exclusively for eels, un-powered vessels of less than 10 metres length overall, and all British registered vessels operating within 12 miles of the Bailiwick of Guernsey.
- 1.3 The area of sea bounded by the 12-mile limit around the Bailiwick covers approximately 1,500 square miles and includes the 3-mile territorial seas of Guernsey, Alderney and Sark, and the 3-12 mile belt around the Islands that is defined as British fishery limits adjacent to Guernsey*. [The * refers to a footnote in the following terms: For the purposes of this report, the terms “Bailiwick waters” or “12-mile sea area” refer to the area of sea encompassed by the 12-mile fisheries limit around the Islands. *However, the territorial sea over which each Island exercises direct control ends at the 3-mile limit. Discussions are in progress with HM Government over the possibility of extending to 12-miles the Bailiwick territorial waters, but this issue, which is complicated by international obligations which come with acquiring responsibility for such an area, may not be resolved for some time. However, under European legislation and the Ordinance proposed in this letter, the States through the*

Committee will be able to exercise licensing control over fishing vessels within the 12-mile limit.]

- 1.4 The area is an extremely productive fishery attracting considerable effort from British and French vessels. First sales by British vessels alone from this area are estimated to exceed £10,000,000 per annum.

2.0 Licensing is a legal requirement

- 2.1 *In accordance with the Common Fisheries Policy and European Law, all Member States are required to operate restrictive fishing vessel licensing schemes.*
- 2.2 EC Regulation No 3690\93 reads, “**All community fishing vessels shall be required to have a fishing licence**”. Furthermore, “**Fishing vessels shall be forbidden to catch, retain on board, transfer or land fish where a fishing licence has not been granted**”.
- 2.3 *The Fishing (Bailiwick of Guernsey) Law 1989 as amended extends all relevant enforceable Community Restrictions relating to fishing to the 12-mile area. As a consequence, Guernsey is obliged to implement a restrictive fishing vessel licensing scheme.*

3.0 The Importance of Licensing to the Bailiwick Fleet

- 3.1 Bailiwick fishermen have recognised for many years that a fishing vessel licensing system is essential for the 12-mile area if the Islands are to manage the resource in a sustainable manner, including the Guernsey Fishermen’s Association President recently made public his Association’s support for the early introduction of a Bailiwick licensing scheme.
- 3.2 The overall aim of Fishing Vessel Licensing is to protect the fishable stock and maintain it at a sustainable level for future generations through regulating the activities of commercial fishermen. It is a conservation tool that is used throughout the world.
- 3.3 Licensing imposes a series of conditions on commercial fishermen which typically include, defining where a vessel may fish, determining the species which may be caught, specifying the amounts of the species that may be retained at any time of the year, and controlling the types of fishing gear that may be used.
- 3.4 Worldwide, many fish stocks are known to be at the lowest level ever, hence the much publicised dramatic cuts in cod, whiting and haddock quotas through Europe introduced earlier this year. The need to feed the ever increasing population, coupled with

advances in gear technology and catching efficiency means that pressure on the fishable resources is immense, and *controls on fishing effort have become a necessity.*

3.5 Open access to the fishable stock is often cited as the main cause of fish stock depletion, *and in accordance with the Common Fisheries Policy and European Law all Member States are required to operate restrictive Fishing Vessel Licensing schemes in order to protect the fishable stock for future generations.*

3.6 *The longer the Bailiwick remains without a licensing scheme, the greater the danger of increased competition from UK registered fishing vessels operating in local waters. Under licensing, fishing effort will be strictly limited to those vessels that qualify for a licence, and this represents a considerable safeguard against over-fishing.*

3.7 ...

3.8 European markets are extremely important to the viability of the local industry accounting for over 80% of all Bailiwick fish sales. *Given that European law requires that all vessels that land fish into another country must possess a recognised Fishing Vessel Licence, the importance of resolving this issue at the earliest opportunity is obvious.*

4.0 Licensing by Ministerial Order

[In section 4 of the Policy Letter the shadow licence scheme and the negotiations between the Committee and MAFF are discussed in paragraphs 4.1-4.7.]

4.8 In addition, the wording of a Ministerial Order entitled The Sea Fish (Guernsey) Licensing Order has been agreed by all parties and is currently ready to be placed before Parliament. This Order, if enacted, would prohibit British fishing boats from fishing within British fishery limits adjacent to the Bailiwick of Guernsey unless authorised by a licence granted by the Committee.

4.9 Consequently, everything is in place to introduce licensing through UK legislation with the exception of a signature by a Minister on the Licensing Order. However, the signature has not been forthcoming and on the 6th August 2002, the Lord Chancellor’s Department informed the Guernsey authorities that a Licensing Order for Guernsey would not be enacted until agreement had been reached between Jersey and Guernsey over access arrangements for vessels wishing to fish in each other’s waters.

4.10 Specifically, Guernsey was advised that the UK Government was of the view that a Licensing Order for Guernsey should proceed under the following conditions:

- (i) Guernsey undertakes, on application, to issue any fishing vessel holding a full UK licence with a licence to fish within the Guernsey 12-mile limit;
- (ii) Guernsey and Jersey undertake to pursue separately between themselves how many of their non-UK licensed vessels will have access to each others’ waters on a one for one basis;
- (iii) Pending an agreement on the above between Guernsey and Jersey, both Bailiwicks undertake to allow vessels with a recent track record of fishing in each other’s waters to continue to do so.

4.11 In relation to item (i), the Committee is confident that it can agree with the UK satisfactory arrangements for dealing with licensed British fishing vessels given that much preparatory work has been undertaken in drawing up a draft Fisheries Management Agreement that was to be part of the package of measures associated with the Ministerial Order. The stumbling block has been the implications for Guernsey for items (ii) and (iii) which are explained in more detail below.

5.0 Discussions with Jersey

5.1 Jersey implemented their own licensing scheme in 1996. Numerous meetings between Guernsey, Jersey and the United Kingdom have taken place since 1998 at official and political level, in an effort to reach agreement on inter-Island access arrangements, and many schemes have been considered over the years. Indeed, the President and Vice-President made a concerted effort to progress a suitable agreement with Jersey at a meeting with Jersey officials and politicians on 18th November 2002.

5.2 Inter-Island licensing is a highly complex subject and a number of critical issues have emerged from discussions which include:

- restrictions on the number of Guernsey vessels permitted into Jersey waters under the new Bay of Granville Agreement;
- the lack of an incentive for Jersey to negotiate;
- the problem of reconciling the different track record periods which formed the basis of the Guernsey entitlement system and the Jersey licensing arrangements.”

[Note: The Bay of Granville Agreement covers fishing activity in the waters between Jersey and France and includes a cap of 30

vessels on Guernsey vessels able to access territorial waters around Jersey.]

“ ...

- 7.2 *The effect of the UK’s decision to delay progressing the Licensing Order until the Island reaches agreement with Jersey in effect provides Jersey with a veto over the Guernsey licensing scheme. The Committee cannot agree to the terms and prolonged negotiation over access has resulted in stalemate. Accordingly, it has become clear that a satisfactory inter-Island agreement will only be achievable once Guernsey is able to negotiate on equal terms with Jersey, i.e. we both have licensing schemes in place.*

8.0 The problems of reconciling different track records

- 8.1 The starting point for licensing within Europe was to cap the size of the European fleet. As a result, every licensing scheme invited fishermen to demonstrate that they were fishing commercially within a certain area during a specified track record period. Guernsey/Jersey discussions are complicated by the fact that each administration used differing track record reference periods to establish a cap on fleet size.
- 8.2 *What Jersey is proposing is allowing their vessels, who have a more recent track record than Guernsey fishing vessels, to access our waters to the detriment of legitimate local fishermen who may have been fishing for profit at the same time as the Jersey track record above and are unable to obtain a Guernsey licence because of our different starting point.”*

[Note: the separate UK, Jersey and Guernsey licensing regimes and their evolution are described in paragraph 8.3.]

“ ...

- 8.5 Presently, all Jersey vessels are able to fish within the Guernsey 12-mile area quite legally since the only requirement is their registration as a British fishing vessel. ...

...

- 8.9 The current status of discussions with Jersey can be summarised as follows:
- currently, no incentive exists for Jersey to agree an equitable licensing arrangement with Guernsey since all

British registered vessels may fish within the Bailiwick of Guernsey’s 12-mile area unrestricted.

- Jersey territorial water has been severely restricted through their licensing scheme and the Bay of Granville Agreement and no British vessels other than Jersey registered vessels have been granted a licence.
- the concept of deciding which vessel may access each other’s waters on the basis of a recent track record is unacceptable to the Committee.
- the Committee believes that the existing licensing arrangements between Jersey and the UK, whereby fishermen are able to trade licences with one another in order to access each other’s fisheries may be the best solution for the long term for Jersey and Guernsey.
- Guernsey is committed to further discussions on inter-Island licensing for the benefit of fishermen from all Islands, but cannot accept UK pre-conditions to a Ministerial Order.

9.0 Licensing by Ordinance

9.1 *The Committee has known for some time that the States has within its power the ability to make domestic legislation in order to prohibit fishing within the 12-mile area by any registered British fishing vessel unless it is in possession of a licence issued by the Committee. This is possible by the powers conferred on the States by [“the 1994 Law”].*

9.2 When this option was first discussed some years ago it was decided to progress a licensing regime via a Ministerial Order as this was considered to be the quickest and most efficient mechanism for achieving licensing at that time. History has shown that to be a naïve belief.

9.3 *As a result of the indefinite delay in progressing a Ministerial Order by HM Government, the Committee revisited the option of implementing licensing via domestic legislation and has been working with Crown Officers in preparation of appropriate local legislation. The [2003 Ordinance] has been drafted, and approved by the States Legislation Committee.*

9.4 In addition, the Committee has consulted fully with the States of Alderney and the Chief Pleas of Sark over the implications for licensing within their territorial waters. Both these Islands recognise that they require a licensing scheme for the benefit of their fishermen, and wish to implement licensing *within their territorial waters* by means of separate ordinances. *Under the*

terms of the [1994 Law], the States of Guernsey has no power to legislate [for] the territorial (3-mile) waters of Alderney and Sark, those Islands must therefore enact their own Ordinance for those waters.

- 9.5 Both Alderney and Sark have concluded that while they wish to make local ordinances they could not realistically operate independent licensing schemes under local legislation and wish to cede licensing administration to the Committee.
- 9.6 *The Committee is determined to meet its European obligations and wishes to implement a restriction of fishing vessel licensing within the 12-mile area at the earliest opportunity, to enable regulation of fishing on an equal basis to all other British jurisdictions.*
- 9.7 *Approval by the States of the [2003 Ordinance] will allow the UK and Guernsey to meet those obligations, and will put the Islands of Jersey and Guernsey on an even footing. The Committee regards this as an essential precursor to further negotiations with Jersey over implementing an equitable inter-Island licensing scheme.*

...

10.0 Implementation Period

- 10.1 While the Committee is anxious to introduce licensing as soon as possible, it recognises that it would be unreasonable to all concerned if the proposed Ordinance was to come into effect overnight. Accordingly it has agreed with Alderney and Sark and the groups which represent the fishermen of the three Islands that there will be a six-month implementation period during which:

- The [Committee] can familiarise the industry with the licensing procedures and the issue of licences can take place;
- Fishermen without a licensing entitlement who wish to continue operating commercially can take steps to acquire entitlements;
- The States of Alderney and the Chief Pleas of Sark can introduce appropriate Ordinances;
- The Committee can continue to explore with the UK the status of British fishing vessels under the new licensing regime by building on earlier discussions surrounding the draft Fisheries Management Agreement;

- Discussions can continue with Jersey over the question of reciprocal access.

11.0 Economic, Environmental and Resources Implications

- 11.1 *The introduction of the proposed legislation will assist in safeguarding the future of the Guernsey fishing fleet and their continuing contribution to the Island’s economy. There will be environmental benefits in terms of long-conservation of fish stocks through the ability to manage the effort in our waters better than in the past. ...*

12.0 Summary and Conclusion

- 12.1 *In accordance with the Common Fisheries Policy and European Law, all Member States are required to operate restrictive fishing vessel licensing schemes.*
- 12.2 *The 1,500 square miles of water surrounding the Bailiwick is the only area of British waters that is not protected by licensing legislation.*
- 12.3 *Fishing vessel licensing is an important tool in the conservation and management of fish stock and it is imperative that legislation be put in place to safeguard these stocks.*
- 12.4 The Committee has been working with the United Kingdom Authorities since 1992, in an effort to implement the fishing licensing regime for Bailiwick waters by Ministerial Order. In addition the Committee has administered a shadow-licensing scheme since 1993, in a manner consistent with the controls and procedures applicable to UK licensing.
- 12.5 In August 2002 the Lord Chancellor’s Department indicated that completion of the Ministerial Order was now dependent on an agreement being reached between the Bailiwicks of Guernsey and Jersey on access arrangements for vessels wishing to fish in each other’s waters.
- 12.6 The UK’s decision to delay progressing the Guernsey licensing Order (after working to that end for some 10 years) until agreement over access is reached has in effect provided Jersey with a veto over Guernsey Licensing until such time as Guernsey agrees to Jersey terms which, on the basis of talks so far, would be to the detriment of the local industry. The Committee cannot agree to Jersey terms and prolonged negotiation over access has resulted in stalemate.

- 12.7 *Following further discussions with UK officials and in the light of responses received from Jersey the Committee has concluded that HM Government will not conclude this matter in the near future.*
- 12.8 The Committee has consulted fully with the External Relations Sub-Committee of the Advisory and Finance Committee which agrees that Guernsey cannot accept the UK’s pre-conditions to implementing a Licensing Order. *As a consequence, an alternative approach involving local legislation is required.*
- 12.9 Alderney and Sark have been consulted and are supportive of the implementation of local ordinances to control licensing in their waters and for the licensing to be administered and enforced by the Committee.
- 12.10 The speedy conclusion of this long running issue is welcomed by the professional fishermen of Guernsey, Alderney and Sark in the interests of fisheries management, conservation and access to markets.
- 12.11 The [2003 Ordinance] has been approved by the States Legislation Committee.”
22. As requested by the Committee, the Policy Letter and the 2003 Ordinance were placed before the Members of the States for consideration before a debate on the floor of the States, and this took place on about 7th March 2003 when the documents were published in Billet d’ Etat IV of 2003.
23. On 26th March 2003, a debate took place in the States on the Committee’s request to the States to approve the 2003 Ordinance, (and I have seen an 8-page transcript of the debate). After debating the matter for quite a time, the States approved the 2003 Ordinance and agreed that the prohibition of fishing within the Bailiwick’s 12-mile waters without a licence contained in section 1 of the 2003 Ordinance should be brought into force on 1st October 2003, thereby agreeing with the Committee’s request for a period of six months to pass during which some or all of the events listed in paragraph 10 of the Policy Letter could take place.
24. It is sufficient, I believe, for me to state at this stage of the Judgment that discussions continued between the Guernsey and Jersey Fisheries authorities thereafter, including a meeting in April 2003 and another meeting on 9 June 2003 between their representatives and legal advisers, to which I shall refer later in the context of the alleged delay of the Applicants in bringing these proceedings. Furthermore, the Committee seems to have taken steps to introduce the structure of the new licensing scheme to local, and Jersey, and UK, fishermen, those with so-called “shadow

licences” being given an indication that they would be likely to be granted a licence under the 2003 Ordinance; and by some means or other the details of the new scheme came to the attention of the JFA, and its solicitors, by about early July 2003.

25. Thereafter, some members of the JFA, and, perhaps, some of the individual Applicants as well, applied to the Committee for licences under the new regime. The Committee took some time to deal with the applications for licences which it had received, and licences to successful applicants were issued some time in about mid-September 2003, which was, of course, only a short time before the prohibition in section 1 of the 2003 Ordinance was due to come into force. The individual Applicants were either not granted licences under the new regime or were offered licences subject to conditions, which they now say are unacceptable to them. Further, many members of the JFA applied for licences, and only, I think, eleven owners of Jersey registered boats were granted licences acceptable to them.

The 1989 Law

26. It is necessary to deal now with some of the earlier Guernsey legislation relating to commercial fishing so that the 2003 Ordinance can best be seen in its relevant historical context.
27. First, under the Fishing (Bailiwick of Guernsey) Law 1989 (“the 1989 Law”), amended by the Fishing (Amendment) (Bailiwick of Guernsey) Law, 1992, - (in each case, therefore, the legislation receiving approval and sanction of the UK Government in the form of an Order of Her Majesty in Council) - offences in contravention of an enforceable Community provision of the kind mentioned in section 1, as so amended, committed within Guernsey’s 3-mile territorial waters, and up to the 12 miles limit of British fishery limits, became enforceable in the Guernsey Courts. Advocate McMahon argued that the waters covered by the 1989 Law appear, therefore, to be the same as those covered by the 2003 Ordinance and that the same offences as would be enforceable in the UK’s domestic Courts if committed in other parts of the UK’s 12-mile waters than Channel Islands waters as part of EC law thereby became offences under Guernsey’s own domestic law. I accept this general summary of the effect of the 1989 Law as correct, whilst noting that the Order in Council route was, in fact, taken. Advocate McMahon argues that if either Law had been proposed after the coming into force of the 1994 Law, the States could have chosen to legislate by Ordinance passed by the States.

28. The 1989 Law was passed after the States had considered a Policy Letter dated 19th June 1989. In this Policy Letter it was said that the Committee “was concerned to achieve effective conservation measures and proper control of fishing in British waters around the Bailiwick to assure conservation of fish stocks and protection of fishing opportunities.” Paragraphs 2 to 6 of this Policy Letter were in these terms:

- “2. The Committee has been advised that Guernsey has an obligation under Protocol 3 of the Treaty of Accession to the [EEC] to comply with the conservation regime established by the Community.
3. It is therefore proposed that the conservation measures implemented in the waters around the Bailiwick should be precisely those determined by the European Community through their regulations and that legislation should be enacted within the Bailiwick to this effect. It would however continue to be possible to make special provision for the Islands of the Bailiwick, by Ordinance, by applying additional, non-discriminatory measures where particular local circumstances prevail. For example, Guernsey would wish to maintain the existing conservation measures with regard to ormers and to trawling in bays.
4. The Committee recognises that common, effective conservation measures are to the benefit of all fishermen and the Committee would wish the Island to contribute fully to the common strategy. Since fish generally migrate through the waters around Guernsey into the Channel, there is no reason from the point of view of conservation for having a regime for fish in Bailiwick waters which is different from that of the EC.
5. Therefore legislation needs to be prepared to give the Bailiwick courts powers to penalise contraventions of EEC fishing legislation within British waters adjacent to the Bailiwick (that is to 12 miles or the median whichever is less) and to provide for penalties and powers for Sea Fishery Officers to take action in enforcing this legislation. The penalties and the powers of Sea Fishery Officers should mirror existing UK law. This is necessary so that every boat is treated in the same way in all British waters. We are advised that the services of the Fisheries Protection Squadron of the Royal Navy will be available to enforce the

legislation in the waters between 3 and 12 miles from the Bailiwick and it is important that they should have powers to act as British Sea Fishery Officers in the waters around the Bailiwick as in other waters around Britain.

6. The Committee believes that such legislation will enable stocks of fish around the Islands to be conserved and protected in the interests of the whole Bailiwick.
”

29. I mention one important point before passing from the 1989 Law. Advocate Dawes on behalf of the Applicants argued that the Policy Letter relating to the 1989 Law contained the same sort of errors of legal analysis, relating, in particular, to the alleged “obligations” of the Guernsey authorities to comply with the Common Fisheries Policy, etc., as were later to be set out in the Policy Letter itself, and that these errors must mean, as a matter of law, that the 1989 Law was made *ultra vires* and was unlawfully passed by the States, with the result that it too was unenforceable as part of Guernsey law. But a declaration to that effect is not part of the relief claimed by the Applicants and it is important to bear in mind, I believe, that, whatever the result of these proceedings, the validity of the 1989 Law, which obtained sanction of Her Majesty in Council will, therefore, remain unchanged.

The 1994 Law

30. As I said at the beginning of this Judgment, a challenge to the validity of the 2003 Ordinance has been mounted by the Applicants. It is a powerful challenge and is made on subtly different bases. Advocate Gordon Dawes on their behalf argues both that the 2003 Ordinance is *ultra vires* the power contained in section 1 of the 1994 Law and that, even if such argument were not accepted by the Court, there were so many wrong statements in the Policy Letter that it is unreasonable to treat the 2003 Ordinance as enforceable against the Applicants in any way. He also has an argument based on European law.

31. I, therefore, turn to the 1994 Law itself.

32. The material provisions of the 1994 Law are, in my view, the following:

“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.

...

3. (1) In this Law –

“Community provision”

means –

- (a) any provision contained in or arising under the Community Treaties or any Community instrument (in each case within the meaning of section 1(1) of the European Communities (Bailiwick of Guernsey) Law 1973);
- (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 or 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;

...

4. (1) An Ordinance under this Law –

...

- (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 (whether by way of exception or otherwise);
 - (ii) the same provision for all cases, or different provision for different cases or classes of cases, or different provision for the same cases or class of case for different purposes;
 - (iii) any such provision either unconditionally or subject to any prescribed conditions.

(3) Without prejudice to the generality of the foregoing provisions of this Law, an Ordinance under this Law

- (a) may make provision in relation to the creation, trial ... and punishment of offences; ...
- (b) may direct that any Community provision, or any provision of any Order in Council, Ordinance or Act of Parliament or of any order, rule, regulation, scheme, warrant, byelaw or other instrument made under any Order in Council, Ordinance or Act of Parliament, shall extend to the part of the Bailiwick which the Ordinance applies with such exceptions adaptations modifications as may be specified in the Ordinance; ...
- (d) may make any such provision of any such extent as may be made by *Projet de Loi* ...”

33. The 1994 Law duly received the sanction of Her Majesty in Council after the States had approved it and, in doing so, they considered a Policy Letter dated 16th April 1993 explaining the reasons why they were being asked to approve the Law.

34. In accordance with the usual practice of the Royal Court to take *travaux préparatoires* into account, where necessary, when construing Laws and Ordinances, I have found this Policy Letter of assistance for the purpose, at least, of understanding as much as possible of the background to the 1994 Law. This Policy Letter first referred to what is called “a special relationship”, as expressed in Protocol 3 to the EEC Treaty of Accession of the UK, and also specifically to

Articles I (1) and I (2) of Protocol 3, which were set out. Paragraphs 12 and 13 of this Policy Letter read as follows:

“12. In the [UK], section 2(2) of the European Communities Act, 1972, provides that Her Majesty, by Order in Council, any designated Minister or Department of H.M. Government by regulations, may implement any EC obligations of the [UK]. This has proved to be a swift and expedient way of implementing EC obligations.

13. H.M. Procureur has advised that Guernsey could seek similar general powers by way of an Order in Council that would give the States the ability to implement EC Regulations and Directives by Ordinance not only when it was necessary to do so by virtue of the Bailiwick’s obligations under Protocol 3, *but also when it was expedient to do so in cases where the Insular authorities wanted to enact a Regulation or Directive that was not actually binding on the Bailiwick. Although such ‘umbrella’ legislation would be used initially to implement measures applying to trade in fish and fishery products*, it would be the intention to encompass trade in other agricultural products as and when existing local legislation becomes inadequate, and to implement such other measures as may arise within the scope of Protocol 3. An order in Council as proposed would avoid both the time consuming process of having to introduce a *Projet de Loi* each time an EC rule has to be implemented locally, and the necessity to apply for derogation whilst waiting for such *Projets* to be prepared and sanctioned.”
The italics are mine.

It was also recorded in paragraph 15 that the Committee had confirmed that the preparation of enabling legislation “along the lines advised by H.M. Procureur would be both appropriate and desirable”. If I may so, the advice given by the then Procureur seems to me to have been an accurate analysis of the legal position.

35. Guernsey’s position in relation to the European Union (“the EU”) needs to be carefully borne in mind. Guernsey is not a member of the EU, but its relationship with the EU is dealt with in the Community Treaties and, in particular, in Protocol 3 to the Treaty relating to the accession of the UK to the then EEC signed at Brussels on 22nd January 1972.

36. On some occasions since the coming into force of the 1994 Law Guernsey has adopted European measures, or some parts of them, and various examples of such legislation were produced to me by Counsel. I do not think that it is necessary for the purposes of the present case to know, other than in a general sense, what may have happened on other occasions, and I do not, therefore, intend to refer to these Ordinances in this Judgment.

The 1997 Fishing Ordinance

37. Advocate Dawes drew to my attention the contrast between the approach taken by the Committee in the Policy Letter and their approach taken in 1996/7 in relation to the passing of The Fishing Ordinance 1997 (“the 1997 Ordinance”), which, *inter alia*, governs the import and export of fish and the control of landing of fish within the Bailiwick. The main points appear to me to be these, although I admit that I have not found the drafting of the 1997 Ordinance all that easy to follow. First, the 1997 Ordinance relates primarily to Guernsey’s 3-mile territorial waters and, in contrast to the position under the 2003 Ordinance and in the 1989 Law, does not “trespass” into the area of British fishery limits adjacent to Guernsey between the outer edge of those waters and a 12-mile limit, the 3-12 mile area. Secondly, the Policy Letter dated 7th August 1996 relating to placing the 1997 Ordinance before the States for approval, included these words:

“1. ...
[HMG] is progressing an Order ... giving the Island authorities jurisdiction to licence fisheries efforts **beyond** the 3 mile limit into the British waters surrounding the Bailiwick which extend to 12 miles or the median Line with France and Jersey. Currently neither the UK Government or the Island has jurisdiction to licence vessels operating in these waters. The Committee proposes to approach the States with a complete and separate Ordinance relating to the licensing of fisheries in these waters *as soon as the Ministerial Order is in place*. [my italics]

2.25 The Bailiwick is well protected by legislation preventing fishing by foreign vessels. This legislation also covers fishing activities inside Territorial limits, but the Committee has been advised by the Law Officers of the Crown that local legislation concerning access to Guernsey Territorial Waters should be brought

into line with existing British and European legislation. It is proposed that all fishing vessels other than those registered in the UK, Channel Islands or Isle of Man would be prevented from entering Guernsey’s three mile limits, except for a legitimate purpose recognised in International law.”

The 2003 Ordinance

38. I shall now consider the 2003 Ordinance itself against the legislative background and history, which I have tried to set out in sufficient detail.
39. The 2003 Ordinance is divided into five parts and much of the Ordinance is taken up with its enforcement by British Sea Fishery Officers and the Guernsey Courts. It is, however, necessary to note at this stage that, if the 2003 Ordinance was validly made, and is not open to legal challenge by the Applicants, a right of appeal to the Royal Court by a person aggrieved by a decision of the Committee to refuse an application for a licence or to impose a condition in respect of a licence is provided in section 16; and each of the individual Applicants other than the JFA has, I believe, appealed to the Royal Court against the refusal of licences or the grant of licences on conditions unacceptable to them. Sensibly, these appeals remain in the background, perhaps under some form of informal stay, and would only come into contention between the Applicants and the Committee in the event that I were to dismiss the applications for judicial review.
40. The preamble to the 2003 Ordinance recites that the States, under their resolution dated 26th March 2003, “in exercise of the powers conferred on them by sections 1 and 4 of the [1994 Law] and all other powers enabling them in that behalf, and for the purpose of implementing Council Regulation (EC) No. 3690/93 of the 20th December 1993 and Council Regulation (EC) No. 2371/02 of the 20th December 2002”, made the Ordinance. Part I of the Ordinance relates to the prohibition of unlicensed fishing and section 1, so far as is material, is in the following terms:
- “1. (1) Subject to sub-section (2), fishing for any sea fish within British fishery limits adjacent to the Bailiwick by British fishing boats is prohibited unless authorised by a licence granted by [the Committee] and for the time being in force ...”

The 2003 Ordinance contains many detailed definitions and I note that there are definitions of “sea fish” and “fishing boat” in the definition section, section 18. Of more importance, I think, may be the definitions of “British fishery limits”, “British fishery limits adjacent to the Bailiwick” and “British fishing boat”. “British fishery limits” is defined to mean British fishery limits set by or under section 1 of the Fishery Limits Act of 1976 and “British fishery limits adjacent to the Bailiwick” is defined as meaning “that part of British fishery limits not exceeding 12 miles from the baselines from which the breadth of the territorial sea adjacent to the Bailiwick is measured, but not extending beyond the median line”. “British fishing boat” is defined as meaning a fishing boat which is (a) registered in the UK under Part II of the Merchant Shipping Act 1995 (b) registered in accordance with the laws of any of the Channel Islands or the Isle of Man, (c) exempted from registration by regulations under section 373 of the Merchant Shipping Act 1894; or (d) “British owned”, the last term being also defined in section 18.

41. As I have mentioned, the preamble refers to two EC Council Regulations. The first Regulation No. 3690/93 of 20th December 1993, provided a system within the EU for laying down rules for the minimum information to be contained in fishing licenses. Article 1 of that Regulation also provided that all community fishing vessels should be required to have a fishing licence for the vessel and that fishing vessels should be forbidden to *land* fish where a fishing licence had not been granted or where the fishing licence had been withdrawn or suspended. Provision was also made in Articles 3 and 7, read together, for flag Member States to issue and administer fishing licences for the fishing vessels flying their flags and to be empowered to appoint the competent authorities for issuing fishing licences. Article 7.1 also provided that flag Member States should take the appropriate measures to ensure that the system was effective.
42. Regulation No 2371 of 20th December 2002 related to the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy of the EU. In paragraph (11) of the preamble it was provided as follows:

“In their 12 nautical mile zone, Member States should be allowed to adopt conservation and management measures applicable to all fishing vessels, 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, and that the Community has not adopted measures specifically addressing conservation and management within the area.”

It seems that the policy behind this Regulation included the underlying idea of the Common Fisheries Policy to conserve, manage and exploit fisheries and expressly stated that, in order to achieve such aims, it was necessary to reduce the size of the EU fishing fleets.

43. I note that it is the Guernsey authority, namely, the Committee, rather than the UK Government, as the relevant Member State and flag state, which has taken steps to bring the restrictive fishing boat licensing scheme under the 2003 Ordinance into existence for British fishing boats. I believe that it is safe for me to conclude that the UK Government did not encourage the Committee to take the course which it did, and that the position of the UK Government remains that set out by the then Lord Chancellor’s Department in August 2002, including the use of a Ministerial Order to introduce a licensing system for British fishing boats within the area of 3-12 miles from the Guernsey baselines outside Guernsey’s territorial waters and for the entire area of 12 miles from the same baselines to be controlled and managed thereafter by the Committee.
44. I also proceed upon the basis that, before the making of the 2003 Ordinance, the only part of the 12-miles British fishery limits around the UK, the Channel Islands and the Isle of Man, which did not have a fishing boat licensing scheme in operation, was the area of 12 miles surrounding the Bailiwick of Guernsey. All other parts of British limits had such a restrictive scheme in force.
45. The most material question is: Did the States have power or *vires* under the 1994 Law to give themselves power to deal with fishing waters between 3 and 12 miles beyond Guernsey’s acknowledged territorial waters up to the 3-miles limit?
46. Only if they did have such a power would it be material, in my judgment, to consider whether or not the 2003 Ordinance was made by the States as a provision which they considered “necessary or expedient for the purpose of the implementation of any Community provision” within the meaning of section 1 of the 1994 Law.
47. Before I deal with Counsel’s arguments on the live issues between the parties I have found it useful to identify the material points on which they seem to agree. I believe that it is common ground between the parties, at least for the purposes of these proceedings, that:

1. The Guernsey authorities were not at the time of the debate in the States and the States’ decision on 26 March 2003 to approve the 2003 Ordinance, and are not now, under any

European obligations to bring a fishing licence scheme into effect for British fishing boats; it, therefore, follows that the references to “European obligations” and “European legislation” in paragraph 1.1, and the footnote to paragraph 1.3 of the Policy Letter, were wrongly expressed and, indeed, they are not relied upon by Advocate McMahon in his arguments on behalf of the States as being correct statements of the legal position. (His primary submission is that the 2003 Ordinance is domestic legislation of Guernsey, and is valid pursuant to section 1 of the 1994 Law.)

2. The Common Fisheries Policy of the EU does not apply directly to Guernsey fishing waters and the waters adjacent to Guernsey are not Community waters for the purposes of the Common Fisheries Policy. Guernsey is, of course, not a Member State or a flag state. If either concept is relevant for present purposes, the United Kingdom is the relevant Member State and flag state.
3. The territorial waters or territorial seas of Guernsey comprise the area of three miles from the baselines from which they are traditionally measured only, and under the established position at international law it is for the United Kingdom, (and not for the States) to decide, if it should think fit, to extend Guernsey’s territorial waters or territorial seas to any other limit, whether a 12-miles limit or any other lesser limit – see sections 1 and 4(4) of the Territorial Sea Act 1987. The area between 3 and 12 miles around Guernsey comprises British fishery limits adjacent to Guernsey – see paragraph 3 of the Schedule to the Fishery Limits Act 1976 (Guernsey) Order 1989 – and it is for the UK to decide, if appropriate, after due compliance with the constitutional convention that nothing will be done of such a nature without first consulting the Guernsey authorities, to deal by Order in Council with that part of its fishery limits as surrounds the Bailiwick of Guernsey beyond Guernsey’s 3 mile territorial waters (cf. the position of Jersey where its territorial waters were extended to 12 miles by the Territorial Sea Act 1987 (Jersey) Order 1997.)
4. The 1989 Law did not contain any *obligations* on the Guernsey fishing authorities, *i.e.* the Committee, to bring a “restrictive” British fishing boat licensing scheme into operation.
5. If otherwise valid, the 2003 Ordinance *would* amount to a Community provision within the wide definition of that term in the 1994 Law. This concession was made by Advocate

Dawes in the course of his oral submissions, but I make no finding as to whether or not it was correctly made.

48. Advocate Dawes on behalf of the Applicants argues that, insofar as it operates beyond the 3 mile territorial waters of the Bailiwick of Guernsey, the 2003 Ordinance is unlawful and that it is not possible for the States to legislate by Ordinance under the 1994 Law in the area of waters which comprise British fishery limits between 3 miles and 12 miles from the traditional Guernsey baselines, unless those waters have earlier been added to Guernsey’s territorial waters, whether by Order under the Territorial Sea Act 1987 or otherwise dealt with by a Ministerial Order under the Sea Fish (Conservation) Act 1967 upon the lines of the draft Order which awaits approval from the UK Government and ministerial signature. He also contends that no Community provisions were implemented under the 2003 Ordinance, whether under Regulation 3690/93/EC or under Regulation 2371/02/EC, and that the 2003 Ordinance did not implement any obligation of the United Kingdom, in particular, it did not implement any such obligation under the Common Fisheries Policy.
49. By way of further or alternative submission, Advocate Dawes, whilst accepting that the States may, in limited circumstances, legislate extra-territorially by Ordinance in a proper case where it is either essential or necessary to do so for the good government of Guernsey, contends that it was neither essential nor necessary to do so for the good government of Guernsey since the obvious or necessary course to take was to wait until a Ministerial Order under the Sea Fish (Conservation) Act 1967 was signed.
50. The principal submission of Advocate McMahon on behalf of the States is that it is abundantly clear that the 2003 Ordinance did not exceed the enabling or establishing power contained in section 1 of the 1994 Law, to which reference was expressly made, and is lawful. He argues that the 2003 Ordinance did, in fact, implement parts of the two EC Regulations in issue which relate to issuing and administering fishing licences for fishing vessels of Member States, in this case British fishing vessels, and these provisions are Community provisions within the scope of section 3(1) (a) and (b) of the 1994 Law.
51. I am convinced by Advocate Dawes’ principal argument. I consider that there is no real doubt that the States exceeded their power in passing the 2003 Ordinance. In my judgment, the States’ power to legislate, independently of the United Kingdom Government, in relation to the licensing

of British fishing boats, is limited to Guernsey’s territorial waters of three miles, unless such a power is granted to the States by Law approved by Her Majesty in Council.

52. Although the scope of the 1994 Law is, indeed, wide, I have concluded that it does not extend so far as Advocate McMahon contends. The waters beyond the 3 mile limit of Guernsey’s territorial waters up to the 12 mile point or the median are *British* fishing waters, in respect of which the United Kingdom is the State with powers to license British fishing boats; the States have no such inherent power and cannot, in my view, take such a power for their own by using an Ordinance purporting to bring two EU Regulations into Guernsey domestic law. It is accepted by the States that there was no obligation on them under EU law to bring the licensing scheme for British boats wishing to fish within 12 miles of the Bailiwick into force and, whatever may be the obligations or duties of the United Kingdom as the relevant Member State and flag state under the two EU Regulations, it cannot, in my judgment, be within the powers of the States to purport to “perform” such obligations or duties as though they were obligations or duties of their own. It is not for the States to perform the UK’s obligations or duties for the area of 3-12 miles beyond Guernsey’s own territorial waters without the consent of the UK, which is the State responsible for such British fishing waters. Only if the UK Government expresses its agreement to such a course either by making a Ministerial Order of the form negotiated up to August 2002 or by obtaining the sanction of Her Majesty in Council to a *Projet de Loi* approved by the States can the relevant Guernsey authority, the Committee, lawfully set up and operate a licensing scheme for British fishing boats of the kind legislated for in the 2003 Ordinance; and no such expression of agreement has been forthcoming. Quite the contrary; there is no evidence of any such agreement.
53. It must, therefore, follow, in my judgment, that the taking of such power on to themselves by the States purportedly under section 1 of the 1994 Law was *ultra vires* and therefore unlawful. I do not have any doubt that the 2003 Ordinance would have been lawful if it had been limited to Guernsey’s 3mile territorial waters only.
54. If I were wrong in my conclusion, and the States had not acted *ultra vires* their powers under Section 1 of the 1994 Law in making the 2003 Ordinance, I would have decided that the exercise of their power was not unreasonable and that there was no other reason for striking down the 2003 Ordinance. Although there were obvious legal errors in the Policy Letter, *i.e.* errors relating to EU law, the substance of the Policy Letter is, in my judgment, sufficiently clear to have informed the members of the States properly of the reasoning of the Committee for seeking to

introduce a licensing scheme for British fishing boats within the 12 mile limit of British fishing limits around Guernsey.

55. There is no suggestion of bad faith on the part of the Committee and I consider that three matters show, with a sufficient degree of clarity, that the States had enough accurate material before them on 26th March 2003 to reach a fair decision on the motion before them.
56. First, the substantial majority of the contents of the Policy Letter set the scene for the Members of the States historically and explained the “political” background to the proposal to pass the 2003 Ordinance. Here it is important to remind myself that it is not part of the process of the Court to interfere with political debate.
57. Secondly, the debate on that day, as shown in the transcript, gave the States a clear option, in my view, whether or not to approve the motion without stressing the alleged (and erroneous) view of the Committee, (and their legal advisers,) that Guernsey was under obligations under European law to introduce the licensing scheme.
58. And lastly, there is no evidence before me that suggests that the members of the States were told that the legal position had been wrongly set out in the Policy Letter relating to the 1997 Ordinance, where the law had, in my judgment, been accurately set out.
59. In other words, I would have decided that the States had considered that it was, at least, expedient, if not necessary, to pass the 2003 Ordinance to implement a licensing scheme on the lines of that reflected in the EC Regulations. It is to be noted that the test is what the States considered, and the Applicants have not, in my judgment, established that the States, or any of their Members, did not consider that it was either necessary or expedient to implement the licensing scheme; since the burden of proof is on the Applicants, I conclude that they have not satisfied it here.
60. It was suggested, in reliance upon pages 126-128 of the Judgment of the Court of Appeal in ***Bassington v. HM Procureur***, that the States had a power to legislate “extraterritorially” if to do so was necessary for the good government of Guernsey. In ***Bassington*** the degree of extraterritorial activity by HM Procureur, who, of course, carried out his duties on the Island, was limited – see page 128 – and it is not surprising, I feel, that the Court of Appeal expressed

themselves on the subject of extraterritoriality in the manner in which they did. But here the alleged extraterritorial activity in respect of which the States have legislated in the 2003 Ordinance is of an entirely different scale and, as I think is clear from their Judgment, it cannot, in my view, have been the intention of the Court of Appeal to have given the States power to legislate extraterritorially on a *carte blanche* basis. The obvious answer to any such suggestion would, I think, be: Of course not.

61. The extraterritorial effect of the 2003 Ordinance, in my view, is its entire substance, rather than a minor aspect of it, and I consider that the States cannot successfully argue for its validity on the back of the Judgment in *Bassington* and the cases there mentioned relating to legislation by subordinate legislatures. (It is not necessary for me to deal in this Judgment or even begin to decide the question whether the States of Guernsey are or are not a subordinate legislature.)

62. I must also mention one more point. The Applicants argue, in the event that I had found the 2003 Ordinance to have been made within the enabling power, in the manner set out in paragraphs 74-79 of Advocate Dawes’ written submissions in reply, that EU law comes into the picture in the form of Article 28 of the EC Treaty, and that the Ordinance is repugnant to Article 28 and unlawful for this reason as well. He argues that it is a measure equivalent to a quantitative restriction on the free movement of good prohibited by Article 28, by which Guernsey is bound under Articles 1.1 and 1.2 of Protocol 3 to the Treaty of Accession. Then he proceeded as follows-

“Article 28 EC prohibits “...measures which are capable of hindering directly or indirectly, actively or potentially, intra-Community trade”.

Paragraphs 76 and 77 of the submissions read as follows, and are the best way, in my view, of understanding the arguments-

“76. The 2003 Ordinance is undoubtedly a measure for these purposes. Despite the fact that the 2003 Ordinance purports to apply to British and Jersey vessels only, intra-Community trade is at least potentially affected since other Member State nationals and undertakings have substantial interests in UK and Jersey fishing vessels, (as evidenced in the case of the UK by the *Factortame* litigation. If other Member States nationals and undertakings do not have active shareholdings or interests in any of the Applicants at the moment, such interests are sufficiently likely in the future for the 2003 Ordinance potentially to hinder intra-Community trade.

77. That the 2003 Ordinance is capable of hindering directly or indirectly the trade in fish caught in Guernsey waters is evident from the Police Letter, the Minutes of the Deliberations of the States which proceeded the adoption of the 2003 Ordinance and the number of licenses granted under the 2003 Ordinance. The licensing regime established in the 2003 Ordinance is intended and operated to protect Guernsey vessels from UK and Jersey competition and to force Jersey to agree fishing access with Guernsey on terms favourable to the latter.”

Advocate McMahon contended that the issue in relation to Article 28 was this; Whether or not the 2003 Ordinance was validly made and if so, is it repugnant to Article 28? He submitted that it was not and that European Law just did not come into the question. I agree with him. To my mind the 2003 Ordinance is not a trading rule within the meaning of Article 28, and I agree that the 2003 Ordinance escaped the application of the test in *Dassonville* because it has no impact directly or indirectly on goods imported into Guernsey from outside the British Islands, and I lean to the view that Advocate McMahon is also right in submitting that the 2003 Ordinance concerns fishing licences which are not within the scope and meaning of Article 28. As Advocate McMahon put it in his oral submissions, EU law is simply not engaged in this case.

Discretion

63. Since I have decided that the 2003 Ordinance was made by the States *ultra vires* and that the Applicants’ challenge to it is a good one, I next need to decide, in the exercise of my discretion whether or not to grant the Applicants any relief, if I should refuse to do so on any of the grounds put forward by Advocate McMahon on behalf of the States.
64. I have decided that I should not refuse the Applicants relief and I propose, subject to any further submissions from Counsel, to make a declaration in favour of each of the Applicants in the form set out in the first part of paragraph 1 of the prayer for relief in the Amended Causes to the effect that the Ordinance, that is to say, The Sea Fish Licensing (Guernsey) Ordinance 2003, is unlawful and of no effect.
65. The reasoning for my decision on discretion is this. First, the 2003 Ordinance was made after a very long period of discussion and negotiation between the Guernsey authorities, the Jersey authorities and the UK Government, which probably started in the early 1990’s and which

continued after the making of the 2003 Ordinance itself; meetings took place in April and June 2003. On the facts of the case, I consider that the fact that, at least at a political level, discussions were continuing between officers and legal advisers with a view to negotiating to a satisfactory conclusion the differences between Guernsey and Jersey, is a material factor, perhaps a highly material factor; it suggests to me that the making of the 2003 Ordinance may have been regarded by the Committee as a step towards agreeing terms with their Jersey counterparts and that this *may well* have also encouraged them against bringing section 1 of the 2003 Ordinance into operation until 1st October 2003; the last two bullet points in paragraph 10 of the Policy Letter also confirm this to be the case. Whilst I confirm that applications for judicial review must be made promptly, this factor helps me to decide what “promptly” may mean in the case of the Applicants.

66. Secondly, the Committee itself took quite a long time after the making of the 2003 Ordinance to bring a licensing system into force and I find that it was not really until early July 2003 that the Committee began to take steps urgently to explain the new system to interested parties in any detail and to ask those with “shadow licences” and other applicants whether they wished to apply for licences. Thereafter, the Committee took about two months or so to collate applications, including those from the Applicants (including those from JFA members), and it seems that it was not until mid-September 2003 that the Committee reached conclusions on the applications made to it, and that on some occasions this process trickled on into October 2003.
67. Thirdly, I do not find that it is right to conclude that the Applicants, including the JFA’s members in relation to whom the evidence may relate, “slept on their rights” to claim judicial review. The case relates to a challenge to the 2003 Ordinance itself, and not, as in some of the English “delay” cases cited to me by Advocate McMahon, to the allegedly unreasonable exercise of unchallenged powers – *e.g.* **R v Aston University Senate, ex parte Roffey** [1969] 2 QB 538. The issue in this case is a large one, and involves a challenge of a fundamental nature to a decision of the States. A challenge to the very validity of an Ordinance is a very serious matter and I would be wary, in any event, of dismissing it on the ground of delay.
68. Fourthly, whilst Advocate McMahon rightly points out that the Applicants, (including members of the JFA) applied for licences under the 2003 Ordinance, without first challenging its validity, (and I bear in mind on this point the persuasive English authorities of **R v Highbury Corner Magistrates’ Court, ex parte Ewing** [1991] 3 All ER 192, especially *per* Lord Donaldson MR at

pages 195j/196b and ***R v London Borough of Redbridge, ex parte G.*** [1991] C.O.D. 398), I have decided that the Applicants’ Causes were, in the factual circumstances of this case, lodged within a reasonable period, but only just within such a period. Once Guernsey Advocates, Ozannes, were instructed, they took a short time only to apply to the Court for relief, however long their clients and, in some cases, their English or Jersey legal advisers, may have taken to seek the assistance of Guernsey Advocates. I consider that it would offend the justice of the case to disallow the Applicants the relief to which they would otherwise be entitled on this ground.

69. Fifthly, I consider that it is more than likely, indeed, intrinsically very likely, that, if the 2003 Ordinance were to be declared unlawful, the Committee would treat those to whom it had granted licences under it as holding some form of “shadow licences”, (as they had done in many cases during the period from the early 1990s to 1st October 2003,) and would not treat them as fishing unlawfully without valid licenses. I do not, therefore, find that to allow the 2003 Ordinance to fail would amount to such interference with the good administration of business by the Committee, as the relevant Guernsey authority, that relief should be refused. It would, of course, have been better for the Applicants to have made their applications earlier than they did, in particular, earlier than 1st October 2003. But I do not think that the delay was so long as to have made it unreasonable.

70. I have had some doubt on the question of the exercise of my discretion; but, in the event, I have decided that the applications were made in time, but only just in time.

Relief for the Applicants

71. Finally, I have decided to strike the whole of the 2003 Ordinance down on the *ultra vires* ground rather than tinker with it so that it can apply within the 3 miles Guernsey territorial waters limit. I do not think that severance would work practically and, again, I also doubt whether, on the assumption, (which I believe it is reasonable for me to make,) that the long-standing (and apparently successful) “shadow licence” scheme would be resurrected by the Committee if the 2003 Ordinance was declared void, such tinkering would be justified. I shall, therefore, grant a declaration in the form set out in paragraph 64 of this Judgment.

00000000000000000000000000000000