

Judgment 32/2004

**The States of Guernsey v. Jersey Fishermen’s
Association Limited et al – Court of Appeal (Civil
Appeal 346) – 8 July, 2004**

Judicial Review – Sea Fish Licensing (Guernsey) Ordinance, 2003 – upon judicial review, declared invalid – application that, pending appeal, the Ordinance be deemed effective within the three mile limit – balance of convenience – alternative tests of textual and substantial severance – application granted and Ordinance to have effect subject to Schedule of Deletions. [See also Judgment 30/2004]

IN THE COURT OF APPEAL OF GUERNSEY

The 8th day of July, 2004 before The Honourable Michael Jacob Beloff Q.C., presiding,
David Arthur John Vaughan Esq., Q.C. and Patrick Stewart Hodge Esq., Q.C.

THE STATES OF GUERNSEY

Appellants

-v-

JERSEY FISHERMEN’S ASSOCIATION LIMITED

et autres

Respondents

In the appeal by the Appellants from the decision of the Royal Court made on 29th June
2004;

THE COURT this day, having heard Crown Advocate R. J. McMahon
and Advocate G. S. K. Dawes for the respective parties hereon,

ORDERED that: -

1. The order of the Lieutenant Bailiff Patrick Talbot QC dated 29th June 2004 declaring that the Sea Fishing Licensing (Guernsey) Ordinance 2003 (“the 2003 Ordinance”) was unlawful and of no effect be stayed as to its effect until hearing of the appeal herein or further order in so far as concerns the validity thereof within the Bailiwick of Guernsey’s territorial sea and that, accordingly the said Ordinance shall be effective for the said period with the deletions set out in the judgment of the Court of Appeal dated 8th July 2004.
2. There be an expedited hearing of the appeal.
3. The costs of and connected with the Appellants’ stay application be reserved to the Court of Appeal and be provided for by order made at the hearing of such appeal.

K. H. TOUGH
Registrar of the Court of Appeal

IN THE COURT OF APPEAL
CIVIL DIVISION

BETWEEN:

THE STATES OF GUERNSEY

Appellant

-v-

JERSEY FISHERMEN’S ASSOCIATION LIMITED
et autres

Respondents

JUDGMENT

1. On the 29th June 2004 Lieutenant Bailiff Patrick Talbot QC granted the Respondents a declaration that the Sea Fish Licensing (Guernsey) Ordinance 2003 (“the 2003 Ordinance”) was unlawful and of no effect. The 2003 Ordinance purported to regulate fishing within 12 miles of the Bailiwick of Guernsey and to provide for sanctions against those who without licence fished within those waters. The Appellants apply before us for an order which in effect preserves the effectiveness of the 2003 Ordinance insofar as it purports to regulate fishing within 3 miles of the Bailiwick until the substantive appeal against the Lieutenant Bailiff’s order can be made. Steps are being taken to organise a special sitting of the Court of Appeal to facilitate an expedited hearing.
2. Although the concept of staying the effect of a declaration – a non-coercive form of relief – might be thought to be a contradiction in terms, we do not doubt that this Court has jurisdiction to make an order which could, if it were

appropriate to do so, give effect to the Appellants’ application. Judicial review is now recognised in Guernsey (*Bassington et al v H.M. Procureur*: GLJ Issue 26 p.105 (“Bassington”) at p.117-118); and judicial review is axiomatically concerned with substance, not form.

3. The preamble to the 2003 Ordinance provides “*The States, in pursuance of their Resolution of the 26th March 2003, in exercise of the powers conferred on them by Sections 1 and 4 of the European Communities (Implementation) (Bailiwick of Guernsey Law) 1994¹, and all other powers enabling them in that behalf, and for the purposes of implementing Council Regulation (EC) No.3690/93 of the 20 December 1993 and Council Regulation (EC) No.2371/02 of the 20 December 2002 hereby order* “ ...

4. In respect of the 12-mile limit the Appellants accept that the 2003 Ordinance is valid, if at all, on the basis that is made pursuant to the 1994 Law. In respect of the 3 mile limit the Appellants rely not only on the 1994 Law, but also on the inherent power of the States and in this respect the point is to the words “*and all other powers enabling them in that behalf*” in the preamble . This was described in argument as the two pillars approach.

5. The various means by which the States are empowered to legislate derive from the circumstances argued by Her Majesty’s Procureur in *Bassington*.

“The States of Deliberation of Guernsey is not a body with powers laid down by legislation, but a legislature the powers of which have been developed by Guernsey common and customary law and conventions created by continuous dealings between Guernsey and the United Kingdom government (and its predecessors before the Union) over many centuries ... The constitutional relationship between Guernsey on the one hand, and the Crown and the United Kingdom Parliament and government on the other, is a complex one, governed to a substantial extent in practice by well-established conventions which in practice create limitations to the extent to which the States of Guernsey and the United Kingdom Parliament respectively legislate for the affairs of Guernsey” (p.127).

¹ The 1994 Law

6. There are two powers to legislate by way of Ordinance: the common law (or inherent) power to make an Ordinance without the authorisation of an Order in Council; and the power to make an Ordinance with such authorisation (see Halsbury’s Laws Fourth Edition, Vol 6 - para.730 - Dawes Laws of Guernsey - pp. 31-32). The extent of any inhibition on the former power e.g. to alter existing customary law may fall to be decided in the substantive appeal in this case.

7. The 1994 Law section 1(1) provides

“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.*

By reference to the 1994 Law, it is necessary for the Appellants to show in respect of either the 12 or the 3 mile limit that the 2003 Ordinance was made for the purpose of implementing a Community provision. In respect of the 12-mile limit is also necessary for them to show that (contrary to the Lieutenant Bailiff’s findings) the 1994 Law empowered the States to legislate beyond territorial waters. These will be matters for those seized of the substantive appeal. They are not for us.

8. We are, for our part, satisfied that there is an issue to be tried as to whether the 3 mile limit is validated by the 2003 Ordinance (itself validated by the exercise of inherent powers). Indeed we may properly note that the Appellants have the advantage of an unequivocal statement by the Lieutenant Bailiff in support: *“I do not have any doubt that the 2003 Ordinance would have been lawful if it had been limited to Guernsey’s 3 mile territorial waters only”* (paragraph 53). The preamble to the 2003 Ordinance suggests that the inherent power was in fact being engaged, and it is not in issue that the ordinary processes for the exercise of such power (see Dawes op.cit p.31) were deployed. Whether an exercise of such

power can be assaulted by reference the alleged motivation of those who introduced or enacted it (e.g. inter-Island rivalry) or on the basis either that it was introduced or enacted on a misunderstanding of the existing Law (eg: EU fishing law), or that its objectives were different from its achievements (e.g. the essential purpose being to impose a 12 mile limit) - all points relied on by Advocate Dawes - are not for resolution at this stage. They raise controversial questions of fact and of law (see as to the latter *Pickin v British Railway’s Board* [1974] AC 764 on the inability to impugn the validity of primary legislation by reference to motivation or misrepresentation).

9. In these circumstances the questions of the balance of convenience arise. Looking at the matter narrowly there are, on the one hand, the interests of the British/Jersey fishermen who, if the 3-mile limit were upheld until at least the appeal, will be deprived of the opportunity to fish within it. There are on the other hand, the interests of the Guernsey Fishermen who, if the 3 mile limit is not reinstated, will suffer through competition which, on appeal, it may be held they ought not to have encountered from the former group. It is difficult to evaluate the relative scale of actual loss on either hypothesis on the necessarily insubstantial material which has been placed before us.

10. The former group (Advocate Dawes’s clients) could be protected by a cross-undertaking in damages provided by the States. However, although there is a discretion to exact a cross-undertaking from a public authority where it is the beneficiary of interim relief which may cause loss to others, it should, in our view, not normally be exacted from such an authority when it is enforcing the law, and not seeking commercial advantage (see *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] 2 AC 227 per Lord Goff at p.283).

11. More important in our judgment are the broader considerations of public interest. These were adumbrated in *R v Secretary of State for Transport exp Factortame No.2* 1991 1 AC 603 per Lord Goff “*If a public authority seeks to enforce what is on the face of it the law of the land... matters of considerable weight have to be put in the balance to outweigh the desirability of enforcing, in the public interest, what is on its face the law*” (at p.673 B-E). We consider that, mutatis mutandis, these principles are applicable in this context to tilt the scales decisively in the Appellants’ favour.
12. There remains a question whether or not it is possible to give effect to the 2003 Ordinance insofar as applicable to the 3-mile as distinct from the 12-mile limit without creating a substantially different instrument, and thus usurping rather than promoting the legislative intent. It was at this hurdle that the Appellants fell before the Lieutenant Bailiff. (Judgment para 71)
13. Two alternative tests have been proposed in the jurisprudence - that of textual and that of substantial severance. (See *DPP v Hutchinson* 1990 2 AC 783 per Lord Bridge at p. 813, *R v IRC exp Woolwich* 1990 1 WLR 400 per Lord Oliver at p.1413, Lord Goff at p. 1418). The key question, as we construe these cases, is whether it can be assumed that the legislator would have enacted the instrument in its amended form.
14. In our view it is at least arguable that the intention of the States in enacting the 2003 Ordinance can be summarised in this way - to create a licensing scheme (which did not previously exist) for waters adjacent to Guernsey to the maximum degree permissible. If that be so – and we do not seek at this interim stage to pre-judge any arguments to contrary effect advanced at the substantive appeal – then it can properly be assumed that the States would have enacted the 2003 Ordinance in such altered form. It is instructive to note that in the case of

Dunkley v Evans [1989] 1 WLR 1522 severance was effected in an analogous context of legislation affecting fishing rights. The case is different in degree, but not, in our view, in kind.

15. We annex a schedule of the deletions which will be required to give effect, until at any rate the appeal, of our order, (we give liberty to apply in this connection). It is not, it will be noted, necessary to substitute 3-mile limit for the 12-mile limit expressly, since the 2003 Ordinance, so amended, will then enjoy the presumption that it extends to the Bailiwick of Guernsey, including its territorial waters (but not beyond) (Halsbury’s Laws Fourth Edition – Vol. 44(1) para. 1318) and the cases there cited.

SCHEDULE OF DELETIONS

Preamble

All words after the words “powers” in the second line.

Section 1(1)

The words “within 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)

Of “outside those limits”

Section 6(4)

“within British fishery limits”

Section 18(1)

The definition of British fishery limits adjacent to the Bailiwick.