Judgment 34/2005

States of Guernsey v. Jersey Fishermen's Association Limited et al – Court of Appeal (Civil Appeal 346) – 9 June, 2005

Sea Fish Licensing (Guernsey) Ordinance, 2003 – whether ultra vires – appeal from judicial review by Royal Court (see Judgments 30/2004 and 32/2004) – Guernsey, British and European sea fisheries legislation reviewed – Ordinance making powers of the States – extra-territorial operation – no abuse of power – no case of bad faith made out – Ordinance held to be lawful.

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

The 9th day of June, 2005 before Richard Charles Southwell, Esquire, Q.C., Presiding, Peter David Smith Esquire, Q.C., and David Arthur John Vaughan, Esq., Q.C.

Between

THE STATES OF GUERNSEY

(Appellant)

and

1. JERSEY FISHERMEN'S ASSOCIATION LIMITED

And

2. I F LIMITED
INTERFISH WIRONS LIMITED
SCERENE FISHING COMPANY LIMITED
and
JOHN HARTLEY LOVELL

(Respondents)

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

WHEREAS THE COURT**,** on 18th and 19th April, 2005, HEARD Crown Advocate R. J. McMahon and Advocate G. S. K. Dawes for the respective parties thereon;

THE COURT this day GAVE JUDGMENT in the terms attached hereto and ALLOWED the appeal, having HELD: -

1. That the Sea Fish Licensing (Guernsey) Ordinance, 2003, ("the Ordinance") was lawfully made under the European Communities (Implementation) (Bailiwick of Guernsey) Law, 1994 and that the Royal Court erred in reaching the opposite conclusion;

2. That no case of bad faith by the Appellants had been made out by the Respondents;

3. That, if the Court were wrong on the basic question of whether the States had the power to make the Ordinance, the Ordinance would readily be severable as ordered by the Court of Appeal on 8th July, 2004, so as to ensure that the Ordinance applied only to the three mile territorial sea around Guernsey;

AND REMITTED the cases to the Royal Court for the hearing by that Court of any appeals from refusals of licences under the Ordinance;

AND THE COURT, having heard counsel for the parties thereon: -

1. AWARDED COSTS to the Appellants, on the standard recoverable basis, in respect of the proceedings in the Court of Appeal and in the Royal Court;

2. GRANTED an application by the Respondents for leave to appeal to Her Majesty in Council, subject to the conditions that: -

   (i) The Respondents shall lodge the Record with the Registrar of the Judicial Committee of the Privy Council within the period of six weeks from this day; and

   (ii) The Respondents shall lodge with the Registrar of the Court of Appeal the further sum of £25,000 by way of security for costs for the due prosecution of the appeal and payment of all such costs as may become payable to the Appellants in the event of the Respondents not obtaining the relief which they seek or the appeal being dismissed for non-prosecution or their being ordered to pay the costs before Her Majesty in Council.

K. H. TOUGH
Registrar of the Court of Appeal

Approved Text
(Version of 13.7.05)

IN THE COURT OF APPEAL OF GUERNSEY
(Civil Division)

Before Richard Charles Southwell Esq QC, Presiding
Peter David Smith Esq QC
David Arthur John Vaughan Esq CBE QC

On 9 June, 2005

Between

States of Guernsey

Appellants

and

(1) Jersey Fishermen's Association Limited
(2) IF Limited
Interfish Wirons Limited
Scerene Fishing Company Limited
and
John Hartley Lovell

Respondents

Southwell JA

1. On 26 March 2003 the States of Deliberation made The Sea Fish Licensing (Guernsey) Ordinance 2003 ("the Ordinance"). The Ordinance was stated to be made "in exercise of the powers conferred on [the States] by sections 1 and 4 of the European Communities (Implementation) (Bailiwick of Guernsey) Law 1994" ("the 1994 Law") and of "all other powers enabling them in that behalf", and "for the purpose of implementing Council Regulation (EC) No.3690/93 of 20 December 1993, and Council Regulation (EC) No.2371/02 of 20 December 2002" ("Council Regulation 3690/93" and "Council Regulation 2372/02" respectively). The Ordinance provided for (inter alia) the licensing of British fishing boats within British fishery limits (extending to 12 miles from the relevant base-line) adjacent to the Bailiwick of Guernsey by the States of Guernsey Sea Fisheries Committee ("the Guernsey Committee").

2. Proceedings for judicial review of the Ordinance were started in the Royal Court on 12 November 2003 on behalf of (1) the Jersey Fishermen's Association Ltd representing the interests of a large proportion of professional Jersey fishermen, and (2) four British owners of fishing vessels (IF Ltd, Interfish Wirons Ltd, Scerene Fishing Company Ltd, and Mr J H Lovell), against the States of Guernsey.

On 27 November 2003 Mr Patrick Talbot QC sitting as a Lieutenant-Bailiff directed that preliminary issues be tried:

(1) whether judicial review was available to challenge an ordinance of the States;
(2) whether the Ordinance was outside the powers of the States.

The hearing of these issues in the Royal Court before Talbot LB took place between 11 and 27 February 2004. Post-trial written submissions were filed on 3 March 2004. After some delay, on 29 June 2004 the Lieutenant Bailiff delivered judgment and made an order declaring that the Ordinance was unlawful and of no effect. On 8 July 2004 the Court of Appeal ordered that the Royal Court order be stayed as to its effect until the hearing of the appeal by the States "in so far as concerns the validity thereof within the Bailiwick of Guernsey's territorial sea", and for this purpose ordered that the Ordinance should be effective while the stay was in force with the deletions set out in the judgment. The territorial sea round Guernsey extends only to three miles from the relevant baseline. The appeal was heard by this Court on 18 and 19 April 2005. Advocate Richard McMahon appeared for the Appellant States and Advocate Gordon Dawes for the Respondents.

3. This case involves (inter alia) consideration of

(1) the extent of the powers of the States to make Ordinances, both by virtue of the States' inherent powers, and by virtue of the 1994 Law;

(2) the effect of both UK and Guernsey legislation in relation to fishery limits within the waters round Guernsey and the regulation of fishing within those limits;

(3) the effect of Community legislation in relation to the regulation of fishing within the waters round Guernsey.

None of these matters can be put in its proper context without a sufficiently detailed examination of the relevant history. Before and at the hearing much of the relevant legislation had not been provided to the Court, and had not been before Talbot LB. Because the hearing of the appeal had been adjourned at the request of the parties over a substantial period, the Court thought it right not to arrange for a further hearing, but rather to ask for more of the relevant legislation and final speeches in writing to be provided by the parties. Thereafter further relevant authorities were found by me, and the Court therefore invited further written submissions in respect of these authorities. The Court has taken all the material supplied since the hearing fully into account.

History

4. So far as concerns the regulation of fishing in the waters round Guernsey and Jersey, in a number of 19th century UK statutes provision was made for the regulation of fishing in the waters round the "British Islands" which were defined as including the United Kingdom, the Isle of Man, the Islands of Guernsey, Jersey, Alderney and Sark, and their dependencies: see for example section 28 of the Sea Fisheries Act 1883. Under the earlier Sea Fisheries Act 1868 effect was given to a Convention between the United Kingdom and France dated 11 November 1867. The Convention contained a similar definition of the "British Islands" in Article XXXVIII. British and French fishermen were to enjoy an exclusive right of fishery within a distance of three nautical miles from low-water mark along the whole extent of the coasts of the British Islands and France respectively (Article I). Beyond these fishery limits fishing of all kinds was permitted, subject to the regulation of oyster fishing. Provision was made for legal proceedings to take place in the relevant courts, including those of Guernsey, Jersey, Alderney and Sark (sections 57 and 58 of the 1868 Act). The Royal Courts of Guernsey and Jersey were to register the Act (section 70).

5. Under the Sea Fisheries Act 1883 effect was given to a Convention between the United Kingdom, Russia, Belgium, Denmark, France and the Netherlands for the regulation of fishing in the North Sea outside territorial waters. The fishermen of each state were to enjoy an exclusive right of fishing within three miles from low water mark. Provision was made for dealing with offences committed by any person within the exclusive fishery limits of the British Islands or by any person belonging to a British sea-fishing boat outside those limits (sections 4 and 5) or by a foreign sea-fishing boat entering the exclusive fishery limits of the British Islands (section 7). Enforcement by British and foreign sea-fishery officers was dealt with in sections 11 to 14, and provision as to legal proceedings in courts including those of Guernsey, Jersey, Alderney and Sark was made in sections 15-23. The Royal Courts of Guernsey and Jersey were to register the 1883 Act: section 25.

6. It is relevant to the dispute between Jersey and Guernsey which underlies this appeal to take account briefly of developments in Jersey law concerning sea fisheries. By the Sea-Fisheries (Jersey) Law 1962 provision was made for regulating fishing within the three nautical mile territorial waters round Jersey and the Minquiers (and two miles round the Ecrehus). For example, the States of Jersey were empowered by Article 5 to make regulations as to nets and other fishing gear carried within that limit by "any British fishing-boat registered in any part of the British Islands", or by fishing-boats with no registration or registered in a country with which a relevant convention was in force.

7. As appears from the Sea Fisheries Acts 1868 and 1883 the 19th century international consensus was that fishery limits were the same as the limits of territorial seas, at 3 nautical miles from the low-water baseline. This largely remained the position until after the Second World War. In 1963-64 a European Fisheries Conference was held in London. On 2 March 1964 the Conference Final Act with three appended Resolutions, a Fisheries Convention and two agreements on transitional rights was

signed: this is often referred to as "the London Convention". By this Convention it was agreed (inter alia) that

(1) The coastal state had the exclusive right to fish and exclusive jurisdiction in matters of fisheries within the inner belt of six miles measured from the baseline of its territorial sea (Article 2):

(2) Within the outer belt between six and twelve miles measured from the baseline of the territorial sea, the right to fish should be exercised only by the coastal state and by such others of the signatory states, the fishing vessels of which had habitually fished in that belt between 1 January 1953 and 31 December 1962 (Article 3);

(3) Fishing vessels of signatory states, other than the coastal state, if permitted to fish under Article 3, should not direct their fishing effort towards stocks of fish or fishing grounds substantially different from those which they had habitually exploited, and this rule might be enforced by the coastal state (Article 4)

(4) Within the outer belt mentioned in Article 3 the coastal state had the power to regulate the fisheries and to enforce its regulations, provided that these did not discriminate against the fishing vessels of other signatory states fishing in conformity with Articles 3 and 4, and that such other signatory states were informed and consulted before regulations were issued (Article 5).

Provision was made for a median line, if the twelve mile belts might overlap (Article 7) and for transitional arrangements (Article 9). Nothing in the convention was to prevent the maintenance or establishment of a special fisheries regime as between (amongst others) France and the United Kingdom in respect of Granville Bay and the Minquiers and the Ecrehus (Article 10(d)). By Annex I the Convention was applied to (inter alia) all the coasts of the United Kingdom, "including those of the Isle of Man and the Channel Islands". Certain transitional rights off these coasts were agreed to continue until at the latest 31 December 1966. By an Exchange of Notes between the British and French Governments of 10 April 1964 it was agreed that the special regime for the waters of Granville Bay (as defined by the Convention of 2 August 1839, Regulations of 24 May 1843 and the Franco-British Agreement of 20 December 1928) and the special regime for the waters round the Minquiers and the Ecrehus (as agreed by the Franco-British Agreement of 30 January 1951) would remain in force, by virtue of Article 10(d) of the London Convention.

8. It was as a result of the London Convention that the UK Parliament made the Fishery Limits Act 1964 ("the 1964 Act"). By the 1964 Act for the purposes of the Sea Fisheries Acts the fishery limits of the British Islands (including the Channel Islands and the Isle of Man) were extended (section 1(1))

> "to a distance of **twelve** miles from the baselines from which the breadth of the territorial sea is measured and shall be divided into –
>
> (a) the exclusive fishery limits, that is to say, the said fishery limits to a distance of **six** miles from those base lines; and
>
> (b) the remainder, in this section referred to as "the outer belt"." (*my emphasis*).

This extension of the fishery limits round the Channel Islands from 30 September 1964 is of some importance for the purposes of the issues which this Court has to decide. I quote also section 1 subsections (2) and (4):

> "(2) The following provisions shall have effect with respect to foreign fishing boats within the outer belt-
>
> (a) if the boat is not registered in a country for the time being designated under this Act, section 7 of the Sea Fisheries Act 1883 shall apply as it applies with respect to the exclusive fishery limits;
>
> (b) if the boat is registered in a country for the time being so designated, the boat shall not fish or attempt to fish except in an area and for any description of sea fish so designated in relation to that country;
>
> and any contravention of this subsection shall be treated as a contravention of the said section 7."
>
> "(4) Notwithstanding anything in subsection (1) of this section, the fishery limits of the British Islands shall not include any part of the sea which is beyond the median line between the coasts of England or the Channel Islands and France, that is to say a line every point of which is equidistant from the nearest points on the low water lines of those coasts or any other line agreed between the government of the United Kingdom and the government of France."

A "foreign fishing boat" was defined in section 3(1) as primarily a boat not registered in the United Kingdom, the Channel Islands or the Isle of Man. An exception to the provisions of section 7 of the 1883 Act and section 1(2) of the 1964 Act to take account of the special regimes agreed between the United Kingdom and France was made by section 3(5).

9. The effect of the London Convention as regards the waters round Guernsey has been that in the outer belt (6-12 miles) French vessels have had limited historic rights to fish, and none in the 0-6 mile belt. But British fishing vessels (that is vessels registered in the United Kingdom, Jersey or Guernsey) have had full fishing rights in the whole of the two belts to 12 miles (or to the median line with Jersey).

10. The United Kingdom Sea Fisheries Regulation Acts were consolidated with amendments in the Sea Fisheries Regulation Act 1966. Provision was made in this Act for the establishment of sea fisheries

districts within any part of the national or territorial waters of the United Kingdom adjacent to England and Wales, and for local fisheries committees to have regulatory powers within their districts exercisable by bylaw, including restricting or prohibiting fishing for specified kinds of sea fish during any specified period, methods of fishing or the use of any instrument of fishing for sea fish. This Act did not apply to the Channel Islands.

11. Two consolidations of United Kingdom statutes relating to sea fisheries were effected in 1967. The first was the Sea Fisheries (Shellfish) Act 1967 consolidating (with amendments) enactments dating back to 1868 relating to shellfish fisheries, and providing powers for regulation and protection of shellfish fisheries. Though some sections of this Act could have been extended to the Channel Islands under Section 23, that did not happen, presumably in the case of Guernsey (and Jersey) because local legislation had provided and continued to provide for such regulation and protection.

12. The second was the Sea Fish (Conservation) Act 1967 ("the 1967 Act") consolidating (with amendments) enactments dating back to 1933, regulating the commercial use of, fishing for, and landing of sea fish, and authorising measures for the increase or improvement of marine resources. The 1967 Act included in section 4 powers for the relevant Ministers by order to provide that in any specified area fishing by British fishing boats is prohibited unless authorised by ministerial licence. Section 4 contained provisions as to the ambit of what might be licensed. Section 3 gave similar power to make orders in respect of fishing gear carried in British fishing boats in any waters adjacent to the United Kingdom and within the fishery limits of the British Islands. Under Section 24 parts of this Act could be extended by Order in Council to apply in relation to British fishing boats registered in any of the Channel Islands, and those and other parts could be so extended to any of the Channel Islands. This seems to have been the first occasion on which provisions capable of applying to Guernsey and Jersey and relating to the licensing of fishing boats had been enacted. The 1967 Act has been amended several times (eg by the Sea Fish (Conservation) Act 1992) and I will refer later to relevant amendments.

13. Under the Sea Fisheries Act 1968 ("the 1968 Act"), Section 6, foreign fishing boats not registered in a country designated under the 1964 Act were barred from entering the fishery limits of the British Islands except for a purpose recognised by international law, or by a convention between the UK government and the government of the country to which the boats belonged. A foreign fishing boat which was so registered was not permitted to fish or attempt to fish in the "outer belt" except in an area and for any description of fish designated under the 1964 Act in relation to the country which it was registered. The 1968 Act contained provisions for the enforcement of this and other requirements, including provisions as to the powers of British sea fishery officers. Under section 19(2) references to the fishery limits of the British Islands, the exclusive fishery limits and the outer belt were to be construed as not including waters within the fishery limits of the British Islands adjacent to any of the

Channel Islands; but this was subject to the power by Order in Council to extend provisions of the 1968 Act to any of the Channel Islands or to British fishing boats registered there.

14. The States of Guernsey pursuant to its customary powers made the Fishing Ordinance 1969 regulating fishing within territorial waters round Guernsey including the licensing of fish exports, but not including the licensing of fishing boats. It has not been suggested that the exercise of these powers by ordinance might have been outside the powers of the States. This Ordinance has been replaced by subsequent ordinances, in particular the Fishing Ordinances 1988 and 1997.

15. In 1970 (before the accession of the United Kingdom) the first major step was taken by the Council of the European Community to establish a common structural policy for the Community fishing industry, by Council Regulation (EEC) 2141/70. This Regulation has since been repealed, and I do not refer to the details of what was then laid down. I refer to it only as the starting point of a long series of Council and Commission Regulations by which the Community (now the European Union) has tried to impose common rules for fishing in the waters over which member states have either sovereignty, or jurisdiction for fishery purposes.

16. The United Kingdom (with Ireland and Denmark) joined the European Community from 1 January 1973. By the Act of Accession 1972, Article 100, it was provided that (notwithstanding Article 2 of Regulation (EEC) No.2141/70) until the end of 1982 the member states could restrict fishing in waters under their sovereignty or jurisdiction within a limit of 6 miles from their baselines to vessels which traditionally fished in those waters and operated from parts in the relevant coastal area. This was not to prejudice special fishing rights enjoyed on 31 January 1972. If a member state extended its fishing limits to 12 miles, the existing fishing activities within such 12 miles must ensure no retrograde change from the situation as at 31 January 1971. The limit of 6 miles was extended under Article 101 to 12 miles for certain areas, including French waters from the Channel to South Brittany. Protocol 3 to the Act of Accession dealt with the special position of the Channel Islands and the Isle of Man. The terms of Protocol 3 are not very clear. But it appears from the wording of Article 1 to be arguable that the establishment of the common fisheries policy in the waters over which member states have sovereignty or jurisdiction is to apply to the waters adjacent to the Channel Islands.

17. By the European Communities (Bailiwick of Guernsey) Law 1973 ("the 1973 Law") provision was made, in terms similar to those of the UK European Communities Act 1972 ("the 1972 Act"), inter alia, for directly enforceable Community provisions to have full legal force in Guernsey as "enforceable Community rights", and for enactments of the States for the implementation of such provisions to have similar effect. Under the 1972 Act, additionally, provision was made in respect of statutes passed by the Channel Islands legislatures by section 2(6) as follows:

> "(6) A law passed by the legislature of any of the Channel Islands or of the Isle of Man, or a colonial law (within the meaning of the Colonial Laws Validity Act 1865) passed or made for Gibraltar, 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 or Gibraltar or any provision having the force and effect of an Act there (but not including this section), nor by reason of its having some operation outside the Island or Gibraltar; and any such Act or provision that extends to the Island or Gibraltar shall be construed and have effect subject to the provisions of any such law." (*my emphasis*)

18. By the Sea Fisheries (Channel Islands) Order 1973 the relevant provisions of the 1968 Act were extended to the Channel Islands, subject in the case of Guernsey to the changes specified in Part II of the Schedule to the Order (which are not material for present purposes).

19. In 1976 EC Council Regulation 101/76 consolidated the existing Regulations (which were repealed), and required the laying down of common rules for sea fishing (Article 1). The rules to be applied by each member state for fishing in the seas within its sovereignty or jurisdiction were to ensure equal conditions of access for vessels flying a member state's flag and registered in a member state (Article 2). The Council was authorised to adopt conservation measures where there was a risk of over-fishing, including restrictions relating to the catching of certain species, to areas, to fishing seasons, to methods of fishing and to fishing gear (Article 4). Council Regulation 101/76 laid the foundation for the future development of all Community measures concerned with the common fisheries policy.

20. A major extension of British Fishery limits was effected by the Fishery Limits Act 1976 ("the 1976 Act"), section 1, which provided for limits extending to 200 miles from the baselines from which the breadth of the territorial sea adjacent to the United Kingdom, the Channel Islands and the Isle of Man was measured, except that this was only to the median line if that line was less than 200 miles from the baseline.

21. Under section 2 of the 1976 Act dealing with access to British fisheries, Ministers were given power by order to designate a foreign country and, in relation to it, areas within British fishing limits in which, and descriptions of sea fish for which, fishing boats registered in that country might fish. Apart from the access permitted by such orders, foreign fishing boats which fished or attempted to fish within British fishing limits would be guilty of an offence.

22. Section 3 substituted a new section 4 of the 1967 Act enabling Ministers by order to provide that in any specified area within British fishery limits fishing by British or foreign fishing boats was prohibited unless authorised by a licence, and that in any specified area outside British fishery limits fishing by British fishing boats was prohibited unless so authorised by a licence. The new section 4 contained numerous provisions as to the terms which could be included in such a licence.

23. Pursuant to section 11 of the 1976 Act that Act could be applied to the Channel Islands by Order in Council with appropriate changes. This was done in 1989, as I will describe later.

24. This extension of British fishery limits to 200 miles was in line with a EC Council Resolution of 3 November 1976 providing that, from the start of 1977, member states should by concerted action extend the limit of their fishing zones to 200 miles off their North Sea and North Atlantic coasts, in the light of similar unilateral extensions by other states, including the United States and Canada.

25. By the United Kingdom Fisheries Act 1981 ("the 1981 Act") substantial amendments were made to the 1967 Act. A new section 1 was inserted giving Ministers wider powers to control the landing of sea fish in Great Britain. Section 4 of the 1967 Act, dealing with the licensing of fishing boats, was extended in scope. A new section 4A was inserted to provide powers to control the transhipment of fish to any British or foreign fishing boat within British fishery limits. Section 5, dealing with restrictions on fishing for sea fish, was also extended in scope, as were sections 6 and 7 dealing with prohibitions on the landing of sea fish caught in certain areas.

26. Section 30 of the 1981 Act dealt with the enforcement of Community restrictions. Contraventions of any Community restrictions by any fishing boat within British fishery limits were made offences under UK law, and the relevant provisions in this regard of the 1967 and 1968 Acts were applied to such offences. Ministers were given power to make by order such provision as appeared to them to be requisite for the enforcement of any enforceable Community restriction or other obligation.

27. By the Sea Fish (Conservation) (Channel Islands) Order 1981 ("the 1981 Order") sections 1, 3, 4 and 5 of the 1967 Act, as amended by the 1976 Act (together with some ancillary provisions), were extended to the Channel Islands, subject, in the case of Guernsey to the changes made in the Schedule to the 1981 Order, Part I. References to "British fishery limits adjacent to Guernsey" were to be construed as references to the 12 mile limits from the Guernsey baselines, but excluded the Guernsey territorial waters, i.e. the references were to the 3-12 mile belt. Section 4 of the 1967 Act was modified so as to give Ministers power to provide (1) that in any specified area within British fishery limits adjacent to Guernsey fishing by British or foreign fishing boats was prohibited unless licensed by the Guernsey Committee; and (2) that in any area outside such British fishery limits fishing by British fishing boats registered in Guernsey was prohibited unless so licensed by the Guernsey Committee. Section 4 of the 1967 Act was also amended so as (in the event that Ministers exercised their power to impose licensing) to give power to the Guernsey Committee to prescribe charges for the grant of such licences, subject to the approval of the States of Guernsey. The licensing powers granted to the Guernsey Committee (in the event that Ministers exercised their power to impose licensing) might be exercised, in consultation with Ministers, to limit the number of fishing boats fishing in an area or fishing in any area for any description

of fish. Any order of the Ministers under section 4 should not have effect until registered in the Royal Court.

28. It appears that despite the terms of the 1976 Act as amended and of the 1981 Order UK Ministers have failed to exercise their powers to enable the Guernsey Committee to issue licences as there provided. This is a factor of no little importance when considering whether the Ordinance passed in 2003 (some 20 years later) is or is not lawful.

29. By the United Nations Convention on the Law of the Sea of 1982 it was agreed (inter alia) as follows:

(1) every state had the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles from the base lines (Article 3);

(2) the exclusive economic zone was to be an area beyond and adjacent to the territorial sea, subject to the special legal regime established in Part V of the Convention (Article 55);

(3) the exclusive economic zone should not extend beyond 200 miles from the baselines (article 57);

(4) in the exclusive economic zone the coastal state had sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed, and the coastal state should, in exercising its rights, have due regard to the rights and duties of other states (Article 56);

(5) the coastal state was to determine the allowable catch of the living resources in its exclusive economic zone, and was to take proper conservation and management measures so as to ensure that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation, and other similar provisions were agreed (Article 61);

(6) the coastal state should promote this objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to Article 61 (Article 62.1);

(7) in giving to other states access to its exclusive economic zone, the coastal state should take into account all relevant factors, including (inter alia) the significance of the living resources of the area to the economy of the coastal state concerned and its other national interests (Article 62.3);

(8) nationals of other states fishing in the exclusive economic zone should comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal state, which should be consistent with the convention and might relate to (inter alia) licensing of fishermen, fishing vessels and equipment including fees and other forms of remuneration, determining the species of fish which might be caught and fixing quotas of catch, specifying information required of fishing vessels including catch and effort statistics and vessel position reports, and enforcement procedures (Article 62.4).

30. Though 23 years have passed since this UN Convention was agreed, and though full measures complying with the Convention have been put in place by the UK Government for all other parts of the territorial seas and exclusive economic zones in the waters round the British Islands, it appears that this has not been done fully in relation to such seas and zone round Guernsey. I will describe the limited extent to which this has been done in respect of Guernsey below.

31. Council Regulation (EEC) no. 2057/82 required member states to conduct inspections, in their ports or within seas subject to their sovereignty or jurisdiction, of fishing vessels flying the flag of or registered in a member state to ensure compliance with all regulations in force concerning conservation and control measures. Such vessels (with exceptions) were to keep logbooks of their operations, and at landing places were to submit declarations indicating total allowable catches (TACs), quantities landed and location of catches for each stock of fish or group of stocks subject to TACs. By EEC Council Regulation no.170/83 the temporary powers for member states to restrict fishing round their coastlines (see paragraph 16 above) were extended to the end of 1992, and member states were permitted to extend up to 12 nautical miles for all waters under their sovereignty or jurisdiction the restrictions previously permitted only up to 6 miles. This Regulation also contained provisions requiring the formulation of conservation measures, TACs, quotas and exchanges of quotas, licensing of certain vessels (article 7), reports and information provision, and supervisory measures.

32. Between 1983 and 1992 various EC Council Regulations were made for the purposes of restructuring the fishing fleets of member states so as to establish viable fleets, and maintainable stocks of fish in the waters off the coasts of member states. The primary Regulation was Council Regulation (EEC) 4028/86 (replacing earlier Regulations and a Council Directive of 1983), which has subsequently been much amended. Commission Regulation (EEC) no.163/89 made provision for a register at the Commission of all fishing vessels registered or to be registered by member states. Further provision in respect of this register was made by Commission Regulations (EC) nos. 109/94 and 2090/98.

33. By the Territorial Sea Act 1987 ("the 1987 Act") section 1(1), the breadth of the territorial sea adjacent to the United Kingdom was for all purposes to be 12 nautical miles (in place of the long-standing 3 miles) and the baselines from which the breadth of the territorial sea was to be measured were

to be those established by Order in Council. By section 4(4) it might be directed by Order in Council that the provisions of the 1987 Act (with any changes) should extend to any of the Channel Islands or the Isle of Man. Orders have been made in 1991 to extend the 1987 Act to the Isle of Man, and in 1997 to Jersey. No such Order has yet been made in respect of Guernsey by the UK Government despite the passage of 18 years.

34. By the Fishing Ordinance 1988 and the Fishing (Amendment) (no.2) Ordinance 1988 extensive provision was made for the control of fishing in territorial waters, including control of foreign fishing boats entering such waters otherwise than for a purpose recognised under international law or under any international convention, or authorised under section 2(1) of the 1976 Act.

35. The Guernsey States Sea Fisheries Committee, in a Report to the States dated 19th June 1989 (published in Billet d'Etat XIV of 1989), proposed legislation which subsequently came into law as the Fishing (Bailiwick of Guernsey) Law 1989 ("the 1989 Law"). The terms of this Report are of some importance, and I therefore quote them at some length:

> "1. On the 25th January 1983 Council Regulation (EC) No. 170/83 established a Community system for the conservation and management of fishing resources in waters out to 200 miles from Member States coasts. Prior to 1983 conservation measures in the waters around the Islands were controlled under extended United Kingdom legislation.
>
> Enforcement by the United Kingdom of Community Conservation Regulations is effected using powers conferred by the Fisheries Act 1981. This Act is not capable of extension to the Channel Islands which means that offences against the Conservation Regulations have to be taken to UK courts for trial. In practical terms this means that the conservation measures have not been properly enforced in the waters around the Bailiwick.
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> 2. <u>The Committee has been advised that Guernsey has an obligation under Protocol 3 of the Treaty of Accession to the European Economic Community to comply with the conservation regime established by the Community.</u> (*my emphasis*)
>
> 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 in 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 power to penalise contraventions of EEC fishing legislation within British waters adjacent to the Bailiwick (that is to 12 miles or the median line whichever is less) and to provide for penalties and powers for Sea Fisheries Officers to take action in enforcing this legislation. The penalties

> and the powers of Sea Fisheries 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."

36. By section 1 of the 1989 Law

> "If a fishing boat fishes within fishery limits in contravention of an enforceable Community restriction relating to sea fishing the master, owner and charterer (if any) are each guilty of an offence".

"Fishery limits" were defined as that part of British fishery limits set by or under section 1 of the 1976 Act adjacent to the Bailiwick and not exceeding 12 nautical miles. Appropriate powers for the enforcement of section 1 were included, in particular proceedings for offences might be taken in any part of the Bailiwick. Under section 8(1) the States were empowered to make by Ordinance such provision as appears to them to be requisite for the enforcement of any restriction mentioned in section 1.

37. Mr McMahon did not rely specifically on section 8(1) of the 1989 Law in support of his submission that the Ordinance was a lawful exercise of the powers of the States. I therefore do not pursue the question whether section 8(1) could be interpreted as enabling the States to impose a licensing regime for the purposes of the enforcement of "an enforceable Community restriction relating to sea fishing" under section 1, given that the Community legislation enables licensing regimes to be established for the purposes of enforcing the common fisheries policy.

38. By the Sea Fish Licensing Order 1989 (SI 1989 no. 2015) the UK government made certain provisions under the 1967 Act for the conservation of fish stocks. I refer to this Order solely because the areas to which its provisions relate are defined by reference to the areas identified by the International Council for the Exploration of the Seas ("ICES"). ICES is primarily a scientific advisory body, and the European Council and Commission pay regard to ICES opinions and recommendations in the formulation and amendment of the common fisheries policy. The waters round Guernsey are within ICES statistical division VIIe (Western English Channel). This Order was replaced by the Sea Fish Licensing Order 1992 (SI 1992 no.2633).

39. In 1989 much of the 1976 Act (see paragraphs 20-24 above) was extended with changes to the Bailiwick of Guernsey by the Fishery Limits Act 1976 (Guernsey) Order 1989. The British fishery limits adjacent to Guernsey were defined as not exceeding 12 miles from the baselines (in contrast to the limit of 200 miles in the 1976 Act).

40. Also in 1989 by the Sea Fish (Conservation) (Channel Islands) (Amendment) Order 1989 ("the 1989 Order") revised provision (in place of the 1981 Order) was made for extending the 1967 Act (as amended by the 1981 Act) to Guernsey and to the 12 mile British fishery limits adjacent to Guernsey. Section 4 as so amended was applied to as to give to Ministers the power by order to provide

> "(a) that in any specified area within British fishery limits adjacent to Guernsey fishing by fishing boats (whether British or Foreign) is prohibited unless authorised by a licence granted by the States of Guernsey Sea Fisheries Committee (hereafter in this Act called "the Committee") and for the time being in force;
>
> (b) that in any area specified in the order (being outside the waters referred to in paragraph (a) above) fishing by British fishing boats registered in Guernsey is prohibited unless so authorised.".

As I have noted above, these powers have apparently not been exercised since the 1981 Order was made 24 years ago. I contrast with this long period of inaction on the part of the UK government the making of the Sea Fish (Specified Manx Waters) Licensing Order 1990 by which licensing by the relevant department of the Manx government of fishing within the 12 mile limit round the Isle of Man by British fishing boats was imposed.

41. It appears that from the coming into force of the 1989 Orders referred to in paragraphs 39 and 40 it was anticipated that a further Ministerial Order would be made bringing into force appropriate provisions for the licensing of British fishing boats (whether registered in the United Kingdom, Jersey or Guernsey) for the purpose of fishing within the 12 mile limit of the Guernsey waters. In anticipation of this a "shadow" licensing system came into effect in practice, though not in law, in Guernsey operated by the relevant States Committee, including a reference period of one year (for assessment of which fishing boats had established a track record of fishing in Guernsey waters). This "shadow" system was made known to Guernsey fishermen in September 1992 with a one year track reference period ending on 30 September 1992. (This shadowed a similar track reference period for the United Kingdom waters ending on 27 February 1992.) In the event, as will appear, the UK Ministers did not provide for the licensing of boats for fishing in Guernsey waters.

42. In 1992 another major Community regulation, Council Regulation (EEC) 3760/92, was made. This carried forward the establishment of the common fisheries policy in succession to Council Regulation 170/83. Member states were required to operate national systems of licensing fishing vessels (each of which would be required to carry a licence) with effect from 1 January 1995 (Articles 5). Member states were authorised to retain until 31 December 2002 the special restrictions within 6 miles from their baselines first put in place by the Act of Accession and to increase this to 12 miles (Article 6). The areas within British fishery limits within which, and the descriptions of sea fish for which, fishing boats registered in each member state may fish are specified in the Fishing Boats (European Economic

Community) Designation Order 1983 (SI 1983/253, SI 1986/382) and the Variation Order 1992 (SI 1992/3108). The Community Regulations lay down TACs and conservation measures generally for fishing in the waters over which member states have sovereignty, or jurisdiction, by fishing vessels flying the flag of a member state and registered in the Community.

43. Council Regulation (EEC) no. 2847/93 laid down lengthy rules for the monitoring and inspection of fishing boats in the waters subject to the sovereignty or jurisdiction of Member states (to the 200 mile limit) subject naturally to rights of innocent passage and freedom of navigation (see eg Article 1.2). This Regulation has on many occasions been amended or added to.

44. Council Regulation (EC) no. 3690/93 of 20 December 1993 was designed to establish a Community system laying down rules for the minimum information to be contained in fishing licences, with effect from 1 January 1995 (subject to the derogations in Article 10 until 1 January 1996). This is the first of the Community Regulations which the States of Guernsey stated they were seeking to implement by the Ordinance in 2003. This Regulation is expressed to be "binding in its entirety and directly applicable in all Member States". It provides (inter alia):

"Article 1

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.
2. All Community fishing vessels shall be required to have a fishing licence for the vessel.
3. The licence must be kept on board the vessel.
4. Fishing vessels shall be forbidden to catch, retain on board, transfer or land fish where a fishing licence has not been granted or where the fishing licence has been withdrawn or suspended.

Article 2

For the purposes of this Regulation 'fishing licence for Community vessels' shall contain at least a certification by the flag Member State of the information regarding the identification, technical characteristics, and equipment of the Community fishing vessel, as set out in the Annex.

Article 3

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."

"Article 7

1. Flag Member States shall appoint the competent authorities for issuing fishing licences and shall take the appropriate measures to ensure that the system in effective.
2. Flag Member States shall inform the other Member States and the Commission of the name and address of the competent authorities referred to in paragraph 1. They shall inform the Commission of the measures taken at national level not later than six months after this Regulation has come into force and, if any changes occur, as soon as possible."

45. Such a system of fishing licences had been established well before 2003 for all British fishing waters, including those round Jersey, with the sole exception of the waters round Guernsey. It is the

submission of the States that it was expedient to bring in such a system of licensing by the Ordinance in 2003 in implementation of Council Regulation 3690/93.

46. The States Advisory and Finance Committee, in a Report to the States dated 16th April 1993 (published in Billet d'Etat VIII of 1993), recommended the making of a Law for the purpose of implementing Community Regulations and Directives. Since this Report led to the making of the 1994 Law (on which as one limb the States relied when making the Ordinance) I quote at some length from the report:

> "1. The relationship of the Bailiwick of Guernsey with the European Community is a special relationship set out in Protocol 3 to the Treaty of Accession of the United Kingdom to the European Community. Consequently the Bailiwick is neither a Member State nor an Associate Member of the European Community.
>
> …….
>
> 3. The practical effect of the Protocol is that the Bailiwick is within the Common Customs Area and the Common External Tariff. The Bailiwick enjoys access to EC countries of physical exports without tariff barriers. However, this means that unless EC Regulations or directives fall within the specific areas defined in the Protocol, the Bailiwick is not obliged to implement them. But this also means that all EC Directives and Regulations which fall within the specific area defined in the Protocol are applicable to the Bailiwick.
>
> 4. One area that is specifically defined in the Protocol relates to the movement and conditions for competition in trade in agricultural products. The period leading up to, and the introduction of the single market on the 1 January, 1993, has resulted in the issue of many Directives and Regulations on trade in agricultural products, and this shows no sign of abating. The EC define agricultural products as including animal, plant, fish and fishery products. Although local legislation exists covering many of the requirements of the EC rules, nevertheless in some areas, notably trade in fish and fishery products, there is no suitable local legislation. (*my emphasis*)
>
> 5. At this point it may be helpful to outline the distinction between Regulations and Directives which are the two principal types of Community rules which may be binding on the Bailiwick by virtue of Protocol 3.
>
> 6. Firstly, Regulations are made either by the Council of Ministers or by the Commission. Under the provisions of Article 189 of the EC Treaty, Regulations are directly applicable in Member States. This means that insofar as they are binding on the Bailiwick under Protocol 3, Regulations have immediate legal effect here and form part of Bailiwick law without the enactment of local legislation.
>
> 7. EC Regulations are dealt with in the Bailiwick by section 2(1) of the European Communities (Bailiwick of Guernsey) Law, 1973, the effect of which is that the Regulations form part of the corpus of local law and must be recognised and enforced by our Courts accordingly. However, even in relation to EC Regulations, it will usually be necessary to enact some form of local legislation to provide for penalties and enforcement. It should also be noted that in relation to Regulations (but not Directives), under section 2(3) of the 1973 Law, the Secretary of State is able conclusively to state whether or not a particular Regulation does or does not apply to the Bailiwick.
>
> 8. Secondly, Directives are also made either by the Council of Ministers or by the Commission. Under the provisions of Article 189 of the EC Treaty, Directives are binding on Member

States as to the result to be achieved, but it is for the National authorities to decide the form and methods of implementing them.

9. This means that insofar as they are binding on the Bailiwick by virtue of Protocol 3, EC Directives (unlike Regulations) do not have immediate effect in the Bailiwick and do not form part of our law until local legislation is enacted to implement them. Until implementing legislation is enacted, an EC Directive will not be recognised or enforced by our Courts.

10. It can be readily appreciated, therefore, that if an EC Regulation or Directive is binding on the Bailiwick by virtue of the provisions of Protocol 3 it will invariably be necessary, if the Bailiwick is not to be in breach of its international obligations (a breach for which the United Kingdom would be answerable), to enact local legislation.

11. As the law stands at the moment such local legislation will (except in those rare cases where the necessary powers exist to legislate by ordinance) have to be in the form of a Projet de Loi which of course requires Royal Sanction. As such Projets will invariably be applicable throughout the whole Bailiwick the sanction of three insular legislatures will also be required. The enactment of such legislation, therefore, is extremely time consuming.

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

13. HM 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 when 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.

…….

16. The Committee accordingly recommends the States to direct the preparation of legislation similar to section 2(2) of the United Kingdom European Communities Act, 1972, to provide for the States of Deliberation, the States of Alderney, and the Chief Pleas of Sark, to implement European Community rules by Ordinance."

47. Following acceptance of this Report by the States the 1994 Law was made. Because much of the arguments before this Court turned on the interpretation of the 1994 Law, I quote the wording of the 1994 Law at length:

"**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.

Power to amend European Communities Law.

2. The States of Deliberation may by Ordinance amend the definition of "the Treaties" and "the Community Treaties" set out in section 1(1) of the European Communities (Bailiwick of Guernsey) Law, 1973.

Interpretation.

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 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 of 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 case or class of case for different purposes;

(iii) any such provision either unconditionally or subject to any prescribed conditions.

(3) …….

(a) …….

(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 to which the Ordinance applies with such exceptions, adaptations and modifications as may be specified in the Ordinance;

(c) without prejudice to the provisions of paragraph (b), may make provision by reference to, and may adopt or incorporate (by reference, annexation or otherwise), any provision

described in paragraph (b), which provision shall (subject to any exceptions, adaptations and modifications specified in the Ordinance) thereupon have the same force and effect as an Ordinance under this Law;

(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."

48. There were cited to this Court 16 Ordinances made pursuant to the powers given by the 1994 Law, including the Ordinance of 2003. In my judgment these other Ordinances provide limited guidance as to the extent of those powers, and would anyway not be relevant to the interpretation of the 1994 Law.

49. The Sea Fisheries (Jersey) Law 1994 was made in order to enable the States of Jersey to have general powers to regulate sea fisheries within the seas round Jersey, and specific powers to control the mesh of nets, size limits for sea fish, restrictions on fishing by foreign fishing boats, and in particular the licensing of all fishing boats for fishing in any specified area of the territorial sea and in any specified area outside the territorial sea by Jersey fishing boats (Articles 11-13). This Law was expressed to be in addition to the relevant UK Statutes including the 1967, 1968 and 1976 Acts. The relevant Jersey Regulations implementing these provisions were the Sea Fisheries (Licensing of Fishing Boats) (Jersey) Regulations 1996. In conjunction with the making of these Regulations a Fisheries Management Agreement of 3 December 1996 was made between the UK government departments and the Jersey States Committee. This referred to the extension of the territorial sea round Jersey effected by the Territorial Sea Act 1987 (Jersey) Order 1997 (SI 1997 no. 278), which extended such territorial sea to 12 miles or the median line with France. By this Agreement the Jersey Committee agreed to regulate fishing in the "Extended Territorial Sea" in consistency with European Community law. As regards licensing of fishing boats, the Jersey Committee agreed to operate a restrictive licensing scheme for British fishing boats. Owners of fishing boats registered and licensed in Jersey were normally to be granted an equivalent licence to fish in UK waters outside Jersey's extended territorial sea, and vice versa.

50. Guernsey has not been able to obtain similar legislation to the Sea Fisheries (Jersey) Law 1994 or the Territorial Sea Act 1987 (Jersey) Order 1997. If this had occurred, the continuing lacuna (which otherwise has arisen from the failure of UK Ministers to exercise their powers under section 4 of the 1967 Act, as amended and applied to Guernsey by the 1989 Order, to enable the Guernsey States Committee to impose a fishing boat licensing regime) would have been filled the more effectively. From the submissions made to this Court, it appears that inaction on the part of the UK government may have resulted from its imposition of conditions which have proved unacceptable to the States of Guernsey. The distinction between the respective positions of Guernsey and Jersey can be seen to be reflected in subsequent statutory instruments.

51. The States Sea Fisheries Committee, in its Report to the States dated 7th August 1996 (published in Billet d'Etat XXIV of 1996), recommended the making of a new Fishing Ordinance in place of the

Fishing Ordinance 1988. It is unnecessary for me to deal at length with either the Report or the Fishing Ordinance 1997. But as Counsel have relied on the Introduction to the Report I quote this here in full:

> "1. **Introduction**
> The Sea Fisheries Committee has reviewed the Fishing Ordinance of 1988, which sets out specific and detailed provisions which apply to fishing activities within the Island's Territorial Waters, which extend to 3 miles from the shoreline.
>
> Certain provisions of this Ordinance have become redundant following the introduction of the Fishing (Bailiwick of Guernsey) Law, 1989 as amended and should now be repealed. In addition, the Sea Fisheries Committee is recommending changes to some of the detailed provisions of the Ordinance and the introduction of new provisions. The Committee is also proposing that future changes to specific details of the local legislation, such as individual fish minimum sizes will be better achieved by the creation of powers to prescribe such details by Order, rather than returning to the States with a policy letter to amend the body of the Ordinance. The flexibility of the proposed revised Ordinance will also allow smooth and efficient development of management initiatives for the local fishery which may arise from the current review of the industry by Nautilus Consultants Limited. Any Order made by the Committee would be placed before the States for consideration in the normal manner.
>
> **Her Majesty's Government is progressing an Order under the Sea Fish (Conservation) (Channel Islands) (Amendment) Order, 1989 giving the Island authorities jurisdiction to licence fisheries effort 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 license 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 emphasis)*
>
> Although the Committee believes that the bulk of the provision of the Fishing Ordinance of 1988 should remain unchanged, having taken advice from H M Procureur, the Committee is recommending that the present Ordinance should be repealed and replaced by a new one."

52. In July 2000 an agreement referred to as "the Bay of Granville Agreement" was made between the United Kingdom and France as to the boundary between the Jersey and French waters, particularly in the Bay of Granville. This came into force on 1 January 2004. It is not necessary to deal with the detailed provisions of this agreement. It suffices to mention in this connection, and in connection with the Jersey fishing licence regulations, that as yet no Guernsey boats have received Jersey licences. They have been permitted to continue fishing if they have applied for and been eligible for a Jersey licence. But the Jersey Committee has withheld licences from Guernsey boats pending Guernsey implementing its own licensing regime and inter-Island agreement: see for example the letter of 22 September 1998 from the Jersey Department of Agriculture and Fisheries to Mr L Trott. We have been shown an article about the agreement with France in the Jersey Law Review by Mr Michael Birt, the Attorney General and now the Deputy Bailiff of Jersey (see (2000) 4 JLR 290): this article has been helpful in explaining the background to the 2000 agreement with France. I observe only that Mr Birt referred to the territorial sea round Jersey as being merely 3 miles, whereas as I have noted above it was extended to 12 miles by the Territorial Sea Act 1987 (Jersey) Order 1997.

53. I should mention here the Human Rights (Bailiwick of Guernsey) Law 2000 (on which Mr Dawes relied) which has not yet been brought into force.

54. The 1981 Order (paragraph 27 above) was amended by the Sea Fish (Conservation) (Channel Islands) (Amendment) Order 2001 ("the 2001 Order"). The significant points so far as concerns the application of the 1967 Act to Guernsey are

(1) British fishery limits adjacent to Guernsey were to be construed as a reference to the limits not exceeding 12 miles or the median line with Jersey, but (with some exceptions) excluding territorial waters;

(2) The power of Ministers under section 4 of the 1967 Act to provide for licensing by the Guernsey Committee was amended in minor respects.

55. By April 2000 the States of Guernsey had been waiting for a Ministerial Order for several years and were still expecting such Order in the middle or end of the summer of 2000. This was referred to in a letter of 26 April 2000 from the President of the Guernsey Sea Fisheries Committee to the Chairman of the Jersey Sea Fisheries Panel, in which he also explained the concerns of Guernsey as to the recent agreement with France, the problems that Guernsey boats might encounter in seeking to continue to fish in the Bay of Granville waters, and the need to ensure a fair division of fishing between Guernsey and Jersey boats. Such concerns were elaborated in an open letter to Jersey States Members from Deputy Trott of Guernsey of 15 June 2000.

56. By 2001 a draft Ministerial Order to be entitled "the Sea Fish (Guernsey) Licensing Order 2001" was in existence. Such Order would have been made under sections 4 and 15(3) of the 1967 Act, as amended and extended to Guernsey. Under paragraph 3(1) fishing for sea fish within British fishery limits adjacent to Guernsey (including territorial waters) would have been prohibited unless authorised by a licence granted by the Guernsey Sea Fisheries Committee. Exceptions to this prohibition would have included boats fishing for pleasure and boats less than 10 metres long and without an engine. Such an Order has not yet been made, nor has an order equivalent to the Territorial Sea Act 1987 (Jersey) Order 1997 been made.

57. Meetings were held in July 2001 between representatives of the United Kingdom, Guernsey and Jersey governments. Both Guernsey and Jersey expressed concerns about the respective licensing of each other's fishing boats. In a draft UK/Guernsey Fisheries Management Agreement it was proposed that Jersey boats with UK licences should receive Guernsey licences, but not those with Jersey only licences. Suggestions were made for the possible pooling of Guernsey and Jersey licences limited to 30 boats from each Island: this would not have been acceptable to Guernsey unless the automatic issue of Guernsey

licences to those with UK licences was removed. Other suggestions were canvassed but no agreement was reached. In a letter of 24 July 2001 from DEFRA to Guernsey it was indicated that no Ministerial Order was likely to be made until agreement had been reached between Guernsey and Jersey on reciprocal access (even though no entirely similar conditions appear to have been placed on Jersey when the licensing system for Jersey had been put in place).

58. In February 2002 the territorial sea round Jersey was amended to accord with the Bay of Granville Agreement by the Territorial Sea Act 1987 (Jersey) (Amendment) Order 2002. No Order was made in respect of the territorial sea round Guernsey. The reasons for this different treatment of Jersey and Guernsey do not appear from the documents before this Court.

59. On 20 December 2002 Council Regulation (EC) no. 2371/2002 was made to deal with the implementation of the common fisheries policy for the conservation and sustainable exploitation of fisheries' resources. Regulation 2371/2002 is lengthy. Its particular relevance is that this Regulation together with Regulation 3690/93 (paragraph 42 above) was stated to be implemented by the Ordinance. The recitals to Regulation 2371/2002 emphasised the need to ensure the long-term viability of the fisheries sector and sustainable exploitation of living aquatic resources, and stated (inter alia) that in their 12 mile zones member states would be allowed to adopt conservation and management measures applicable to all fishing vessels if non-discriminatory and subject to prior consultation, and accordingly the Community had not dealt specifically with conservation and management in this area. In the Regulation Article 3 defined "Community fishing vessel" as meaning a fishing vessel flying the flag of a Member state and registered in the Community, and "fishing capacity" as meaning (subject to some exceptions) a vessel's tonnage in GT and its power in kW as defined in Articles 4 and 5 of Council Regulation (EEC) no. 2930/86. Under Article 9 member states might take non-discriminatory measures for the conservation and management of fisheries resources within the 12 mile limit, provided that the Community had not adopted measures covering the same waters. Under Article 11 member states were to adjust the fishing capacity of their fleets in order to achieve a stable balance between such fishing capacity and their fishing opportunities, ensuring that the reference levels expressed in GT and kW for fishing capacity referred to in that Article and Article 12 were not exceeded. Article 17 (general rules on access to waters and resources) provided (inter alia)

> "1. Community fishing vessels shall have equal access to waters and resources in all Community waters other than those referred to in paragraph 2, subject to the measures adopted under Chapter II.
>
> 2. In the waters up to 12 nautical miles from baselines under their sovereignty or jurisdiction, Member States shall be authorised from 1 January 2003 to 31 December 2012 to restrict fishing to fishing vessels that traditionally fish in those waters from ports on the adjacent coast, without prejudice to the arrangements for Community fishing vessels flying the flag of other Member States under existing neighbourhood relations between Member States and the arrangements contained in Annex I, fixing for each Member State the geographical zones within the coastal bands of other Member States where fishing activities are pursued and the species concerned."

Under Article 22.1 activities within the scope of the common fisheries policy were to be prohibited, unless various requirements were met including (inter alia)

> "(a) a fishing vessel shall carry on board its licence and, where provided for, its authorisations for fishing".

Under Article 23.2 member states were (inter alia) to control the activities carried out within the scope of the common fisheries policy on their territory or in the waters subject to their sovereignty or jurisdiction.

60. It is apparent that by 2003 the States of Guernsey felt unable to continue to wait indefinitely for an agreement to be reached with Jersey and for a Ministerial Order to be made in the form of the 2001 draft (paragraph 56 above). The Guernsey States Sea Fisheries Committee made a lengthy Report to the States of Guernsey, accompanied by a draft of a Sea Fish Licensing (Guernsey) Ordinance 2003. A copy of this Report, dated 7th February 2003 (published in Billet d'Etat IV of 2003) is annexed to this judgment. Much of it was quoted in the judgment of the Lieutenant Bailiff. I summarise it briefly in this way:

(1) The Committee was proposing to introduce a licensing regime by Ordinance solely because it had not yet been able to secure a Ministerial Order, though it had worked for this since 1992.

(2) The United Kingdom, Jersey and the Isle of Man were able to license and were licensing their fishing fleets, and Guernsey was the only jurisdiction as yet unable to do this.

(3) The 12 mile limit round the Bailiwick covered about 1,500 square miles and provided sales of fish by British vessels alone of over £10 million a year.

(4) Council Regulation 3690/93 required all Community fishing boats to have a licence (see paragraph 42 above), and pursuant to the 1989 Law Guernsey was "obliged to implement a restrictive fishing vessel licensing scheme".

(5) Licensing was essential to conserve the fishable stock in these waters in accordance within the common fisheries policy and simple common sense.

(6) On 6 August 2003 the Lord Chancellor's Department told Guernsey that a Ministerial Order would not be enacted until reciprocal arrangements had been agreed between Guernsey and Jersey on the following basis:

(i) Guernsey would allow any boat with a full UK licence to fish in the Guernsey 12 mile limit;

(ii) Guernsey and Jersey would agree how many of their non-UK licensed boats would have access to the other's waters on a one-for-one basis:

(iii) Pending agreement on (ii), both Islands would allow boats with a recent track record of fishing in the other's waters to continue to do so.

(I observe that no such pre-condition requiring a reciprocal agreement appeared to have been imposed on Jersey.)

(7) No agreement could be reached with Jersey which had no incentive to reach such an agreement.

(8) The Bay of Granville Agreement had proved a further impediment to reaching such an agreement.

(9) The Jersey licensing system with a track reference period of the year to 5 November 1996 was out of step with the UK system and the "shadow" Guernsey system which each had a much earlier track reference period. Both Guernsey and Jersey had concerns about this.

(10) Accordingly the Committee proposed legislating by Ordinance which would enable Guernsey to meet the Community obligations and put Guernsey and Jersey on an even footing. Discussions would nevertheless continue with Jersey and the United Kingdom.

61. The report and draft Ordinance were debated in the States of Guernsey on 26 March 2003. A transcript of the debate was placed before the Court. Deputy Trott summarised the report, explaining the problems which had resulted in there not yet being a Ministerial order. He expressed concerns over the different track reference period in Jersey, the effects on Guernsey fishermen of the Bay of Granville Agreement, and the fact that because the UK government would not move until Jersey and Guernsey reached agreement, Jersey had been given an effective veto over the making of a Ministerial Order for Guernsey. He emphasised that the Guernsey Committee was committed to continuing the discussions with Jersey and the UK government. Other speakers (and Mr Trott in reply) spoke about the problems caused to Guernsey fishermen by the Bay of Granville Agreement, the need for a level playing field between Guernsey and Jersey fishermen, the exposure of Guernsey through alone having no licensing system as yet, and the commitment to continue "meaningful negotiations with our Jersey colleagues".

62. The Ordinance was then passed by the States and came into force on 1 April 2003 except for Section 1 which was to come into force not earlier than 1 October 2003. The preamble records that the Ordinance was made

(1) in exercise of the powers conferred on the States by sections 1 and 4 of the 1994 Law "and all other powers enabling them in that behalf";

(2) for the purpose of implementing Regulation 3690/93 and Regulation 2371/02.

Section 1 of the Ordinance prohibiting fishing by British fishing boats within British fishery limits adjacent to Guernsey unless authorised by a current licence is the same as Article 3 of the draft Order of 2001, including the excepted categories of fishing for which no licence is required. Section 2 contains general provisions as to licences, including powers to limit the permitted areas, periods, types of fish and methods of fishing, powers to impose conditions, and powers to limit the number of fishing boats or class of boats in any area or fishing for any type of fish. Section 3 sets out factors which may be taken into account in deciding whether or not to license, including (a) the record of the applicant in fishing in Guernsey waters in the year ending 30 September 1992 (the track reference period I have already mentioned); (b) registration under the Merchant Shipping Acts 1894 or 1995; (c) the terms of any fisheries management agreement between the Guernsey Committee and DEFRA, or the authorities of Jersey or the Isle of Man. Section 5 provides the Committee with powers to make provision by regulation as to applying for or granting licences, and as to charges for licences. Part II contains provisions as to the powers of British sea-fishery officers which reflect the draft provisions of 2001, in this regard. Part III deals with criminal proceedings in respect of offences under the Ordinance, and Part IV with appeals to the Royal Court.

63. Discussions continued between Guernsey and DEFRA, and between Guernsey and Jersey. On 17 June 2003 the Chairman of the Guernsey States Fisheries Committee wrote to owners of registered British fishing vessels (sending a copy to Mr Barry Edwards of DEFRA). She pointed out that the Guernsey scheme would affect such owners, but because the Guernsey scheme (unlike the Jersey scheme) was reciprocal, such owners would be eligible for a Guernsey licence, subject to limitations of 17 metres registered overall length and a registered engine power of 373 kW (500 hp), introduced on conservation grounds and by analogy with controls exercised by many sea fisheries committees round the UK coast. The commencing date was to be 1 October 2003.

64. On 4 July 2003 Mr Barry Edwards of DEFRA wrote to all holders of over 10 metre fishing vessel licences in England and Wales, owners of under 10 metre fishing vessel licences issued by certain DEFRA Fisheries Offices, and all holders of licence entitlements issued in England and Wales, together

with other interested parties, informing them of the need to apply for Guernsey licences before 1 October 2003. Similar information was given in a DEFRA Fisheries Newsletter of July 2003.

65. Initial applications for licences in July 2003 were in some instances returned because of the lack of evidence of fishing activity in Guernsey waters. Subsequent applications were in some instances refused on the basis of the vessel's track record, the lack of a UK or Guernsey licence, or the 17 metre/373 kW (500 hp) restriction on the maximum size of vessel or engine. A September 2003 analysis of applications from Jersey showed that a majority had been refused on one or more of the grounds set out above. If the Ordinance is held to be lawful, then any dispute about the refusal of any licence will be able to be the subject of an appeal to the Royal Court. On this appeal the Court of Appeal is not concerned with any such decision of refusal.

66. In October 2003 H M Procureur agreed not to prosecute any United Kingdom or Jersey vessel fishing in Guernsey waters until 31 October 2003 provided that a licence had been applied for and refused.

67. It appears that the Department of Constitutional Affairs sent a letter of 1 October 2003 (which is not before this Court) to the Jersey authorities inviting comments on a draft Guernsey/UK Fisheries Management Agreement. The response from Jersey dated 10 October 2003 was to state (inter alia) that the Ordinance was outside the powers of the States of Guernsey and invalid, primarily because the States had sought to legislate in respect of seas beyond the three mile limit of Guernsey's territorial seas (a limit which had not yet been extended, unlike the limit for Jersey, as I have already observed). The final version of the draft Guernsey/UK agreement was sent to Guernsey by DEFRA on 14 October 2003.

68. I have set out the timetable of these proceedings in paragraph 2 above.

69. Some of the significant points for the purposes of the present appeal, arising from the history as I have summarised it, are these:

(1) Though the wording of Protocol 3 to the Act of Accession to the European Treaties is unclear in relation to the common fisheries policy, the Guernsey authorities (and presumably also the British government) seem to have been advised that the conservation measures under this policy are binding on Guernsey: see the Billet d'Etat preceding the 1989 Law (paragraph 35 above), and compare the Billet d'Etat preceding the 1994 Law (paragraph 46 above) and the Billet d'Etat preceding the Ordinance (paragraph 60 above). Both Counsel submitted that the Community conservation measures are **not** binding on Guernsey by virtue of Protocol 3. It seems to me to be rather strongly arguable that such measures are binding, and that the advice given at the time of the Billet d'Etat preceding the

1989 Law may have been correct. I am content to accept Counsel's submissions for the purposes of this appeal only; but the Island authorities and the British government may now consider it essential to obtain definitive advice on this question of no little importance for Guernsey.

(2) The extent of potential control of the waters round the whole of the British Islands has been increased very considerably in the 40 years since the London Convention and the 1964 Act. At that time there were the inner belt up to 6 miles and the outer belt between 6 and 12 miles. Since then the territorial sea limit has been extended to 12 miles by the 1987 Act and this has been applied to all of the British Islands except Guernsey: the material placed before this Court has afforded no explanation as to why Guernsey has been made the exception by the British government. By the 1976 Act and the 1989 Order British fishery limits round Guernsey have been extended to 12 miles.

(3) Specific provision has been made for Ministers to empower the Guernsey Committee to license British fishing boats by section 4 of the 1967 Act as amended by (inter alia) the 1981 Act, the 1981 Order, the 1989 Order and the 2001 Order.

(4) The licensing by member states of the Community of fishing boats appears first to have been dealt with in detail by Council Regulation (EEC) 3760/92. This was added to by Council Regulation 3690/93, and has subsequently been modified and added to by a number of subsequent Regulations of the Council and the Commission. Assuming that Counsel are right in their submission that these Regulations are not binding on Guernsey, it is nevertheless striking that Guernsey waters appear to be the only part of all the coastal waters round Western Europe where there has been no effective licensing regime (until the Ordinance, if valid) and no fully effective system of policing of fishing. For my part I find it surprising that as late as 2005 it should be thought appropriate for the waters round Guernsey to be in this uncontrolled state (assuming the Ordinance is invalid).

The Issues

70. The claims in the Plaintiffs' Causes, are for

(1) judicial review of the lawfulness of the Ordinance;

(2) a declaration that the Ordinance is unlawful and of no effect, alternatively (if severance is permissible) that it is lawful and effective only for the purposes of regulating fishing within the 3 miles territorial waters limit;

(3) an order prohibiting the Committee from implementing a fishing licence scheme under the Ordinance;

(4) orders quashing the Committee's decisions under the Ordinance in respect of the Plaintiff's fishing boats;

(5) damages for unlawful interference with the Plaintiffs' right to fish within the 12 mile limit around Guernsey;

(6) alternatively in the event that the Ordinance is held to be lawful, the Plaintiffs appeal to the Royal Court under the Ordinance against the Committee's decisions to refuse the Plaintiffs' applications for licences in respect of their fishing boats.

71. Talbot LB in the Royal Court considered only the two preliminary issues set out in paragraph 2 above.

72. In relation to the first preliminary issue, it appears to have been accepted on behalf of the States that judicial review of the exercise by the States of their power to make ordinances is available in the Courts of Guernsey, following the decision of the Court of Appeal in *Bassington v H M Procureur* (1998) 26 GLJ 105. So this issue has not been a live issue in the present appeal.

73. As to the second preliminary issue, this was the matter to which the Royal Court judgment was primarily directed. In contending that the Ordinance was outside the powers of the States, the Plaintiffs relied in their Causes on these main grounds:

(1) the States have no power to make ordinances in respect of any area outside the territory of Guernsey which ends at the 3 mile territorial sea limit;

(2) in so far as the States rely on their powers under the 1994 Law, the Ordinance does not implement any Community provision: in any event only the United Kingdom as a member state can implement any Community provision in respect of any area outside the territory of Guernsey;

(3) in so far as the States rely on their customary powers as the parliament of Guernsey to make ordinances, such powers do not and cannot extend to taking control over an area outside the territory of Guernsey;

(4) the making of the Ordinance was irrational, or unreasonable, or an abuse of power, or made in bad faith:

(5) in any event the Ordinance amounts to a quantitative restriction on the free movement of goods contrary to Article 28 of the EU Treaty as applied to Guernsey by Article 1 of Protocol 3;

(6) further, the Ordinance amounts to a violation of the right of the Plaintiff fishermen to fish in the waters off Guernsey under Article 1 of the First Protocol to the European Convention for the protection of Human Rights and Fundamental Freedoms ("the ECHR").

74. The States of Guernsey relied in response to the contentions of the Plaintiffs on these main grounds:

(1) though the States are amenable to judicial review, the Plaintiffs' claim should be rejected in limine because of their delay in seeking judicial review;

(2) the making of the Ordinance is within the powers granted by the 1994 Law, and does implement Community provisions whether or not they are provisions which Guernsey has an obligation to implement, taken with the States' customary powers;

(3) the customary powers and the powers under the 1994 Law are not limited to the territory of Guernsey, but extend to the areas of sea over which Guernsey is entitled to exercise a regulatory jurisdiction up to the 12 mile limit;

(4) the contentions in paragraph 73 (4) – (6) above were denied;

(5) in any event the Ordinance is severable and can be upheld in so far as it deals with the territorial sea up to the 3 mile limit.

75. **Delay** I deal first with the question of delay. In my judgment there is a simple answer to the States' contention that the applications for judicial review were made too late. If the Ordinance is a lawful exercise of the States' powers, then fishing within the 12 miles off Guernsey without a licence would potentially be a criminal offence. A master, owner or charterer of a British fishing boat charged with such an offence, however long after the date when the Ordinance came into force, would be entitled to raise the defence that he had committed no offence because the Ordinance is unlawful. These circumstances have to be distinguished from those in which an administrative decision is made the subject of an application for judicial review, and a requirement for such application to be brought within

a short time is necessary so as to avoid administrative problems. Where an Ordinance creates a criminal offence, and the defence of unlawfulness can be raised at any time (compare *Boddington v British Transport Police* [1999] 2 AC 143), a different approach may be needed. I do not say that delay could never be a ground for rejecting an application for judicial review in such cases, not least because, as the House of Lords recognised in *Boddington*, it may be more appropriate for the issue to be decided in criminal proceedings when brought. But here the alleged delay was relatively short, and it is in the interests of the States and of all Jersey, Guernsey and UK fishermen who might wish to fish in the waters off Guernsey that this fundamental issue of general importance should be decided now, and not left until criminal proceedings for an offence under the Ordinance are brought.

76. Leave A subsidiary question is whether leave to apply for judicial review ought first to have been sought by the Plaintiffs. In my judgment there was no basis for this contention. At the time there was no rule of the Royal Court requiring leave to be sought by an applicant for judicial review. The decision to the contrary by the Royal Court in *Old Government House Hotel Ltd v President of the Island Development Committee* (unreported, 9 December 2003) was in my judgment incorrect. It was, however, open to respondents to apply for a summary dismissal of a misconceived application for judicial review or one which had been too long delayed (compare the decision of the Jersey Court of Appeal in *States Greffier v Les Pas Holdings Ltd* 1998 JLR 196 at pp. 206-207).

77. I turn next to the central question whether the making of the Ordinance was within the powers of the States.

The Position of the States

78. It is necessary to start with some general observations as to the position of the States, not least because in his submissions Advocate Dawes seemed to equate the States of Guernsey (and Jersey) to a local authority in England. Guernsey is in my judgment a dependency of the Crown through the Sovereign's title as Duke of Normandy (I doubt the correctness of the views of Mr Matthews at (1999) 3 JLR 177). It is not a colony and is expressly excluded from the ambit of the Colonial Laws Validity Act 1865. Though the UK Parliament can make statutes affecting Guernsey, this is by constitutional convention always after consultation with Guernsey (and usually by agreement with Guernsey). This is achieved sometimes by an Act directly and expressly affecting Guernsey, which is registered in Guernsey, and sometimes (as in many of the Acts cited above) by express provision for a Ministerial Order extending the Act to Guernsey with appropriate, and agreed, modifications.

79. The States of Guernsey is not the equivalent of an English local authority. As a democratically elected parliament, though not a sovereign one, it has power to make provision by statute for the good government of Guernsey. This power can be exercised in one of four ways:

(1) A Report proposing a Projet de Loi is published in a Billet d'Etat and brought before the States. If approved, the Loi or Law is drafted, and in the form approved by the States it passes to the Privy Council for approval. If approved by Order in Council, the Law is registered in the Royal Court and so becomes effective as a statute.

(2) A Law may provide powers to make either Ordinances (see the 1994 Law) or secondary legislation within the field specified in the Law.

(3) A Report proposing the making of an Ordinance is brought before the States. Usually once the Report is approved, the Ordinance is drafted and then brought back to the States for approval. Once approved it becomes effective as a statute. Sometimes the Report is accompanied by a draft Ordinance (as was the case with the Ordinance), in which case the States may approve both the Report and the terms of the Ordinance which then becomes effective as a statute.

(4) An Ordinance may provide powers to make secondary legislation within the field specified in the Ordinance.

80. I emphasise that the States is neither a sovereign parliament nor a parliament circumscribed by a written constitution or other fundamental law. The customary powers of the States have developed by evolution, and in some respects by statutory development. Thus by Part VI of the Reform (Guernsey) Law 1948 ("the Reform Law") there were transferred to the States of Deliberation the legislative powers previously exercised by the Royal Court, including powers to make Ordinances. The States Legislation Committee was established by sections 65 and 66 of the Reform Law with particular powers as to the making of any law and any ordinance.

81. The extent of the powers of the Royal Court to make Ordinances was considered by the Chuter Ede Committee of the Privy Council in its Report of March 1947 at pages 29-32. The Chuter Ede Committee said that ordinances were of a provisional nature, and without States approval could not be made operative for longer than twelve months, but after approval by the States could be made permanent. The power to make ordinances of temporary duration was given to the States Legislation Committee by section 66(3) of the 1948 Reform Law: this provides that where "the Committee is of the opinion that the immediate or early enactment [of a draft ordinance] is necessary or expedient in the public interest", the Committee can make the ordinance immediately effective, but it will not have longer duration if the States votes to annul the ordinance. The Chuter Ede Report went on to state (pages 29-30):

> "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."

It went on at page 31 to note the then Bailiff's view "that it would be possible for the Court to issue, without the authority of any Statute, a command or prohibition to be enforced by penalties. Any person wishing to challenge the authority of the Ordinance would have to plead before the Royal Court, which is in effect the same body as that which passed the Ordinance." (I note that in 1947 the power of the Royal Court to carry out judicial review of an Ordinance was already recognised.) The Chuter Ede Report then recommended the transfer to the States of the ordinance-making power. It is reasonably clear, from the material placed before this Court, that the increasing complexity of Island affairs has gone in parallel with a widening scope of ordinance-making by the States, whether under express powers granted by a Law or under their customary powers, though there is no precise or clear boundary to the ordinance-making power except perhaps in the field of taxation and in customary law, eg land law or succession. The power to alter existing "written law" by Ordinance could only relate to earlier ordinances (or secondary legislation made under ordinances), and could not relate to Laws (or secondary legislation made under Laws) unless the Laws in question made express provision for this.

82. Mr Frank Gahan QC, a Lieutenant Bailiff and Magistrate in Guernsey, wrote a detailed and learned article on Criminal Law in Guernsey. He dealt with ordinances at pages 3 to 5. He referred to the 1848 Report to the Privy Council of the Commissioners enquiring into the Criminal Law of Guernsey. At pages 4-5 he said this:

> "The States now pass Ordinances by virtue of the transfer to them of the former legislative power of the Royal Court sitting three times a year as a Court of Chief Pleas. As the Report of the Commissioners (pp. xi and xii) shows, a formidable case can be made for the power to legislate by ordinance being a very wide power. An Order in Council of 1568 provides in respect of Guernsey that all grants and confirmation of privileges from the Queen's Majesty and her Progenitors shall be always inviolably observed, maintained and kept in force with the credit of the Bailiff and Jurats, to be obeyed in all their ordinances made and to be made for the good government, surety and quietness of the said Isle. These words are very like the words later used by Parliament to confer the fullest powers of self-government on any territory by authorising the local legislature to make laws for "the peace, order and good government" of the territory. In other British territories, however, the Crown through its local representative is a party to the legislation; but in Guernsey the Lieutenant-Governor's assent is not required. In 1727 the Jurats disclaimed any pretence to powers extending beyond the making of regulations and prescribing rules and methods for enforcing the law. But the Commissioners found that the practice from long before the reign of Elizabeth the First had greatly exceeded the limits suggested by the 18th century Jurats, and that in 1848: "The received opinion, at present, as to the limit of the legislative power of the Court in Chefs Plaids, 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." "

83. This appeal involves the question whether by virtue of either the 1994 Law or the States' customary powers the States could by ordinance (rather than by Law with the approval of the Privy Council) provide for the licensing of boats fishing within the twelve mile fishing limits round Guernsey

but outside the three mile territorial sea limit. This involves consideration of the so-called doctrine of "colonial extraterritorial legislative incompetence": see the 1959 article in 75 LQR 318-332 by the late Professor D P O'Connell under that title, to which reference was made in *Bassington*. This was a doctrine elaborated by the British Colonial Office as applying to British colonies and other overseas territories (among which Guernsey and Jersey are not included). The modern view of the potential limitations on extraterritorial legislation of a colony or similar territory is stated in Halsbury's Laws of England, Volume 6 4th edition 2003 reissue, at 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, circumstance, event or thing which is relevantly connected, to a sufficient degree, with the territory concerned."

84. It can be seen that this doctrine or rule was distinctly uncertain in its application to particular circumstances. Whether legislation having some extraterritorial effect bears "a substantial relationship to the peace, order and good government of the territory concerned" cannot easily be determined. Over the last 150 years the Courts have lowered the threshold and endeavoured as far as possible to uphold such legislation. In *In re Adam* (1837) 1 Moore's Privy Council Cases 460 at 472-6 it was recognised that Mauritius as a colony was entitled to detain an alien while on the high seas for the purpose of expelling him from Mauritius: a similar decision was reached in *Attorney General for Canada v Cain* [1906] AC 542.

85. In *Croft v Dunphy* [1933] AC 156 (in which Mr Gahan appeared as junior counsel) the Judicial Committee had to consider Canadian legislation of 1927-28 empowering customs officers to examine the cargo of any Canadian registered vessel within twelve miles of the Canadian coast, bring the vessel into port, and seize any prohibited cargo, and to decide whether such legislation was within the powers of the Canadian legislature. The Judicial Committee held that the Canadian legislature had under the British North American Act 1867 full power to enact customs laws for Canada, and was entitled by virtue of such power to make customs laws with as wide scope as any full sovereign state might make. The customs legislation of the Imperial Parliament had long contained anti-smuggling provisions authorising the seizure of vessels having dutiable goods on board when found "hovering" off the coast within distances substantially in excess of the ordinary territorial limits. The Judicial Committee held that the Canadian legislature had similar power to authorise the seizure of Canadian vessels outside the ordinary territorial limit of three miles. The Judicial Committee did **not** rely on the Statute of Westminster 1931 (section 3 enacted that "the Parliament of a Dominion has full power to make laws having extra-territorial operation") which had been made after the Canadian customs laws in question. Thus, as has been pointed out in the Australian cases considered below, the decision in *Croft v Dunphy* is applicable to all colonies

and other overseas territories, and did not depend on the fact that by 1933 Canada had become a Dominion.

86. In *Croft v Dunphy* Lord Macmillan said at p.162

> "But 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."

He applied this to the position of Canada. Canada had power to make customs laws: these might be as wide in scope as those which a fully sovereign state could make under international law, and therefore have the extra-territorial reach for which Canada had contended.

87. Because of the rapid disappearance of the British Empire, there has been little discussion of this doctrine in the courts in England since *Croft v Dunphy*. But there is a substantial body of case-law in the High Court of Australia, because the relationship between the Commonwealth of Australia and the Australian States has developed, in law, on the lines of the relationship between the imperial parliament and the legislatures of the colonies and other similar territories. I will not burden this judgment with citation of many of the cases. But it is necessary to refer at least to some of the recent cases dealing with the rights of the States legislatures to pass legislation having effect over the seas adjacent to the States.

88. In *New South Wales v the Commonwealth* (1976) 135 CLR 337 the High Court held that the States had no territorial waters beyond the low-water mark: any territorial seas beyond that point were waters belonging to the Commonwealth, not the States. There followed cases in which the essential question was how far a State could legislate in respect of waters off their coast which formed no part of the State's territory. In *Pearce v Florenca* (1976) 135 CLR 507 the High Court considered a case in which a man had been charged in Western Australia with having in his boat in the waters off Western Australia undersized rock lobsters in contravention of Western Australian (and not Commonwealth) legislation expressly applying to the three mile belt round the coast. The High Court therefore considered the applicability of the doctrine of extraterritorial incompetence. Gibbs J pointed out the illogicality of the doctrine having regard to the provisions of the Colonial Laws Validity Act 1865, but regarded the doctrine as still extant, though in a diminished form. At paragraph 4 of his judgment Gibbs J said:

> "4. The doctrine as to the limitation on the power of colonial legislatures to legislate with extra-territorial effect, as originally enunciated, proved to be too widely stated. It is misleading to refer to it as a "doctrine forbidding extra-territorial legislation"; in *British Coal Corporation v The King* (1935) AC 500, at p.520, their Lordships so described it but went on immediately to say that it is "a doctrine of somewhat obscure extent". The power of a subordinate legislature (as colonial, State and Dominion legislatures have sometimes been called) to enact legislation that takes effect beyond territorial limits was firmly established by the decision in *Croft v Dunphy* (1933) AC 156. In that case the Judicial Committee affirmed the power of the Canadian Parliament to enact anti-

> smuggling provisions operating beyond the territorial limits of Canada. It has been pointed out on a number of occasions in this Court that the decision in no way depended on the effect of s.3 of the Statute of Westminster and is just as much applicable to the legislation of a colony or a State as to that of a Dominion. That case has constantly been followed. This Court, in *O'Sullivan v Dejneko* (1964) 110 CLR 498, upheld the validity of a New South Wales statute which imposed liabilities on a person resident in South Australia who had never been in New South Wales. In that case also the operation of the legislation held to be valid was clearly not confined within the territory of New South Wales. It is in my opinion now right to say, as Lord Uthwatt said in *Wallace Brothers and Co Ltd v Commissioner of Income Tax, Bombay* (1948) LR 75 Ind App 86, at p 98: "There is no rule of law that the territorial limits of a subordinate legislature define the possible scope of its legislative enactments or mark the field open to its vision." (at p.516)"

In paragraph 5 Gibbs J said this

> "However, the test whether a law is one for the peace, order and good government of the State is, as so stated, exceedingly vague and imprecise, and a rather more specific test has been adopted; it has become settled that a law is valid if it is connected, not too remotely, with the State which enacted it, or, in other words, if it operates on some circumstance which really appertains to the State."

In paragraph 7 he accepted the view expressed by Mason J in the *New South Wales* case

> "that the power to make laws for the peace, order and good government of the colony was large enough to enable the colonial legislatures to enact legislation which applied to the off-shore waters. The same is true now of State legislatures. The very fact that the waters are the off-shore waters of the State provides the nexus necessary to render valid a law operating within those waters. There is an intimate connexion between the land territory of a State and its off-shore waters. Those waters have been popularly regarded as the waters of the State, and as vital to its trade."

The High Court held that the Western Australia legislation was constitutionally valid in its application to the waters of the Commonwealth.

89. A similar decision was reached by the High Court in *Robinson v Western Australian Museum* (1977) 138 CLR 283. Under Western Australia legislation the Museum Board was authorised to take possession of historic wrecks in the seas off that State and to control and preserve such wrecks and their contents. Robinson was a diver who had recovered objects from a wreck and contended that the State legislation was invalid because of its extraterritorial application. The reach of the legislation extended to wrecks lying outside the territorial waters of Australia, though the wreck searched by Robinson was within them. Gibbs J referred again to the doctrine of extraterritorial incompetence in these terms (paragraph 11):

> "The doctrine limiting the power of State legislatures to enact legislation having extra-territorial effect is colonial in its origins, vague and uncertain in its nature and often inconvenient in its operation. The only possible justification in principle for the doctrine is as a means of preventing or mitigating conflicts between the laws of two legislatures, when both sets of laws operate within the same territorial area – in other words, as a rule of international law or, within a federation, as a rule controlling the operation of the laws of one state within the territory of another. Even in such cases the doctrine should not be allowed to have an unduly narrow and restrictive effect. But when the challenged law operates within a territorial area over which no other legislature, or

> another but paramount legislature, has power, the application of the doctrine can achieve no useful purpose – it is then a pointlessly frustrating fetter on the exercise of a legislative power that ought to be plenary. If no other law can operate there is no possibility of conflict. Where the only other law than can operate in the area will, in the event of inconsistency, prevail, there is no reason to limit the power of the subordinate legislature, since any conflict between the two laws will, by its very existence, be resolved in favour of the law enacted by the paramount legislature."

The High Court held that the legislation was valid and effective despite its extraterritorial reach.

90. I add to these citations one from *The Queen v Bull* (1974) 131 CLR 203 in which the High Court was considering a case in which a boat approaching Darwin and suspected of carrying cannabis was stopped and seized in the seas off Darwin. This case was decided before the *New South Wales* case. I cite it only for the adoption by Stephen J of passages from judgments in the earlier case of *Bonser v La Macchia* (1969) 122 CLR 177. Stephen J said this:

> "In *Trustees Executors & Agency Co Ltd v Federal Commissioner of Taxation* (1933) 49 CLR 220, at p 235, Evatt J concluded that following *Croft v Dunphy* (1933) AC 156 the supposed territorial restrictions upon the legislative powers of the seven Parliaments of Australia should thenceforth be confined "to a very small compass indeed". It suffices to refer, in conclusion, to two passages from the judgments in *Bonser v La Macchia* (1969) 122 CLR 177. There the Chief Justice said (1969) 122 CLR at p.189:
>
> > "Of course, the colonies were competent to make laws which operated extra-territorially – that is to say beyond their land margins and in and on the high seas, not limited to the three mile belt of the territorial sea. But this legislative power of the colonies was derived, in my opinion, from the plenary nature of the power to make laws for the peace, order and good government of the territory assigned to the colony."
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> 21. Windeyer J said that he did not question that State law might regulate off-shore fisheries not, "because of any right either of sovereignty or property in the open seas or the bed of the sea. It is simply that the State legislature is empowered to make laws for the peace, order and good government of the State; and State here means not merely a territory, but a territory inhabited by people as a political community." (1969) 122 CLR, at pp 224-225.
>
> 22. Thus the legislatures of Australia might validly legislate for the safeguarding of their customs revenues and might do so by attaching to conduct in their off-shore waters the element of criminality. With this legislative power necessarily went curial jurisdiction."

91. Taking account of these Australian cases, it seems to me that the central question as regards the extra-territorial reach of the Ordinance, whether that question is raised in connection with the 1994 Law, or with the customary powers of the States, is whether there is a sufficiently substantial relationship between the Ordinance and the peace, order and good government of Guernsey, or, as Gibbs J put the test in *Pearce v Florenca*, whether the Ordinance is connected, not too remotely, with Guernsey or operates on some circumstance which really appertains to Guernsey.

The 1994 Law

92. It is the States' primary case that the power to make the Ordinance is to be found in the 1994 Law (see paragraph 47 above). The 1994 Law, section 1, empowers the States by Ordinance to "make such provision as they may consider necessary or expedient for the purpose of the implementation of any Community provision". The definition of "Community provision" is set out in section 3. The Community provisions relied on by the States are Council Regulations 3690/93 and 2371/02 (see paragraphs 44 and 59 above).

93. Mr Dawes contends that the Ordinance does not in any event "implement" these Regulations. His case, simply put, is that the States would implement any such community provision either by reproducing the wording of the Regulation (suitably altered to apply to Guernsey circumstances) in an Ordinance, or by providing in the Ordinance that the Regulation is to be treated and enforced as part of the law of Guernsey, or by some combination of these methods. In the present instance, Mr Dawes submits, the States has laid down a licensing regime which has as its only common feature with the Regulations said to be implemented the fact that it is a licensing regime: the details of the licensing regime sought to be imposed by the Ordinance do not equate to the licensing regime imposed by the Council Regulations. In my judgment this point, though it has some merit at first sight, does not afford a basis for quashing the Ordinance. Section 4(3) (b) and (c) of the 1994 Law empower the States to make exceptions, adaptations and modifications to any Community provision sought to be implemented. In my judgment this section is wide enough to enable the States to implement the Council Regulations in respect of the licensing of British fishing boats in ways which are appropriate to the particular circumstances of Guernsey. It is not necessary for the States to reproduce the provisions of the Regulations as regards licensing in detail. Mr Dawes has since the hearing supplied copies of Oakley Inc v Animal Limited [2005] EWHC 210 in which a Deputy Judge (Peter Prescott QC) considered the power of a Minister in the United Kingdom to implement EU directives by regulation. In my judgment that case is not of direct relevance to the present case, though the judgment contains interesting conclusions as to ministerial powers, which may or may not survive an appeal to the English Court of Appeal.

94. The next question is whether the provisions of the Ordinance are such as the States were entitled to "consider necessary or expedient for the purpose of implementation". Mr McMahon did not rely on any "necessity" to implement the Community provisions, because (as I have indicated) he and Mr Dawes are agreed that the Community common fishing policy does not apply to Guernsey so as to require the United Kingdom and Guernsey to implement the many Regulations under that policy, despite what was said in the Billets d'Etat before the 1989 Law, the 1994 Law and the Ordinance (see paragraph 69(1) above). Mr McMahon therefore relies only on "expediency". He submits that the 1994 Law was intended to and does enable the States to implement Community provisions, which the United Kingdom and Guernsey are not bound to implement, when the States consider that to be "expedient" for the purposes of the 1994 Law. It seems to me that Mr McMahon is right in this respect. Mr Dawes attacks the States' decision on

expediency on a number of other grounds (including bad faith and abuse of power) to which I will come later.

95. Mr McMahon relies particularly on section 4(3) (d) of the 1994 Law. He submits that the Ordinance could have been made by a Projet de Loi which received the sanction of an Order in Council and registration in the Royal Court. In my judgment the Ordinance could have been made by such other means, provided that it was designed to implement a Community provision. Mr Dawes' submission, that section 4(3)(d) refers only to a Projet de Loi and not to a Law sanctioned by Order in Council and therefore section 4(3) (d) could not avail the States, is one which I do not accept. It is clear that the reference to a "Projet de Loi" is intended to refer generally to the method by which Guernsey makes the superior level of statute contained in a Law sanctioned by the Privy Council. The importance of Mr McMahon's reliance on section 4(3) (d) seems to me to lie in its potential relevance to the next and main point raised by Mr Dawes, that in any event the States could not legislate in respect of an area outside the territory of Guernsey by and of itself and without Privy Council sanction. To this point I now turn.

Extra-territoriality of the Ordinance

96. I have tried to set this part of the argument in its proper context above, by reference to the case-law and principles applied to colonies and other similar territories. Guernsey is not a colony and never has been. But for convenience I will treat Guernsey as if it were a colony, and apply those cases and principles accordingly.

97. Mr Dawes submits that in the absence of a specific conferral on the States of power to legislate for the waters outside Guernsey's territorial sea of three miles and up to the fishery limits at twelve miles, the States cannot have power to legislate in respect of those waters and of the control by licensing of British fishing boats which fish in those waters. He submits that section 4(3) (d) of the 1994 Law does not avail the States because there is nothing in that Law which extends the jurisdiction of the States beyond the territorial waters.

98. As I have indicated, that is in my judgment the wrong way to approach this issue. The issue is not whether express words in the 1994 Law or elsewhere (or necessary implication) have conferred the required power on the States of Guernsey; but rather whether in relation to the policing of the seas round Guernsey to the twelve mile limit the Ordinance, as made by virtue of the 1994 Law, bears a sufficiently substantial relationship to the peace, order or good government of Guernsey, or is relevantly connected to a sufficient degree with Guernsey. It seemed to me that Mr Dawes' submissions at this point ignored the impact of *Croft v Dunphy* (and the Australian cases, which have been found since the hearing of the appeal) in restating the proper test in the way set out in Halsbury's Laws.

99. Relevant factors seem to me to include the following:

(1) The position as regards fishing in the 3-12 mile belt off Guernsey in 2003 was an unfortunate one. The neighbouring states, as well as the United Kingdom and Jersey, had extended their territorial seas to twelve miles. Such states including the United Kingdom had extended their fishery limits to 200 miles. Guernsey was given the express power to deal with breaches of "enforceable Community restrictions" within the twelve mile belt by the 1989 Law, which was proposed on the basis that Guernsey is obliged by Protocol 3 to comply with the Community fishing conservation regime. By section 8(1) of the 1989 Law the States of Guernsey were empowered to make by ordinance any provision needed to enforce "enforceable Community restrictions". This presumably might have justified a licensing ordinance for that purpose. In the absence of the Ordinance Guernsey waters between 3 and 12 miles were without licensing controls so far as concerns United Kingdom, Jersey and Guernsey fishing boats. In the absence of such controls conservation of fish stocks could not effectively be achieved.

(2) It seemed likely that there would be indefinite delay before the territorial sea of Guernsey would be extended to twelve miles, or an order on the lines of the draft order of 2001 made, by UK Ministers.

(3) One point which, it seems to me, had weighed not inconsiderably in the judgment of Talbot LB was his assumption that the making of the Ordinance was disapproved of by HM government. It was the case the Ministers had declined to put the draft order of 2001 into effect until agreement between Guernsey and Jersey was reached; but there was no indication why they had not long ago extended Guernsey's territorial sea. There is no evidence before us that since the Ordinance was made there has been any expression of view by Ministers either way. The positive involvement of the relevant DEFRA official (see paragraphs 63 and 64 above) cannot be attributed to Ministers. As the Presiding Judge I caused a communication to be sent to HM Procureur inviting submissions on behalf of the Crown, so that this Court might be informed of the views of Ministers, but no views were expressed. It seems to me, therefore, that the stand of HM Government must be taken to be entirely neutral on the issue now before the Court.

(4) The States and the Guernsey Committee have continued to pursue negotiations with the UK and Jersey with a view to reaching agreement and having one of the steps (or both) in (2) above taken by HM Government. So the Ordinance is in reality a stop-gap measure intended to fill on a temporary basis what is otherwise a long-standing vacuum.

(5) Even if Guernsey were treated as no more than a colony, it is my view that the relationship and connection is plainly a close relationship and connection, and indeed as close as the relationship or connection in the Australian cases or *Croft v Dunphy*.

(6) If Guernsey is looked at as the special kind of semi-dependent territory which it has always been, the 1848 Report of the Commissioners (see paragraph 82 above) shows that over 150 years ago the powers of the Royal Court to make ordinances were regarded as wide powers, provided that such ordinances were not inconsistent with Laws sanctioned by Order in Council, or Acts of the UK Parliament expressed or ordered by Ministerial Order to extend to Guernsey.

(7) I do not read the wording of the 1994 Law as necessarily confining the making of ordinances to the territory of Guernsey. Apart from section 4(3) (d) the implementation of a Community provision might require an extension of powers beyond the territorial sea: for example, a power to seize boats outside the territorial sea in respect of offences committed within that sea. Section 4(3) (d), in enabling the States to implement Community provisions in circumstances in which a Projet de Loi could be made and sanctioned by the Privy Council, is prima facie directed to situations in which the States need to provide powers effective outside Guernsey territory: otherwise it seems that section 4(3) (d) would not be needed, for within Guernsey territory there would be no problem in doing by ordinance what could otherwise anyway be done by ordinance. In my judgment the interpretation of section 4(3) (d) which Mr Dawes asks this Court to adopt (and which the Lieutenant Bailiff appears to have adopted) would wholly (or mainly) deprive section 4(3) (d) of meaning and effect.

100. In the light of these factors, and applying what is in my judgment the correct test as to the extra-territorial effect of the Ordinance, I reach the conclusion that the Ordinance was lawfully made under the 1994 Law, and that the Royal Court erred in reaching the opposite conclusion.

Customary Powers of the States

101. Mr McMahon did not place any strong reliance on such powers apart from the 1994 Law. I therefore deal with this part of the appeal briefly. The history of legislation in Guernsey shows that definition of the customary legislative powers of the Royal Court, and after 1948 the States of Deliberation, has never been clear. The views of the 1848 Commissioners, reviewing relevant statements as far back as the 16th century, indicate that the customary powers are certainly wider than indicated in the Chuter Ede Report of 1947. If it were necessary to do so, I would be 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.

Conclusion on the States' Powers

102. I conclude, therefore, that the Ordinance was within the powers of the States.

103. I add that if (as seems to me probable) Protocol 3 makes the Community fishing conservation measures binding so far as concerns Guernsey (which was the advice recorded in the Billet d'Etat for the 1989 Law), then I would have had no doubt that the Ordinance could be made validly not only under the 1994 Law and the States' customary powers, but probably also under the 1989 Law.

104. Finally, under this head, I wish to express the urgent need for the UK government and the governments of Guernsey and Jersey to meet in conference, and to continue to meet until a sensible agreement, satisfying the overwhelming need for conservation of fish in all the waters near the Channel Islands, has been finally and conclusively agreed.

105. Since I have reached a conclusion contrary to that of the Royal Court, it is right to mention that this court has had the benefit of citation of a body of legislation and authorities which were not cited to the Lieutenant Bailiff, in particular, the authorities relating to the effect of the so-called doctrine of extraterritorial incompetence, and the benefit of much more detailed submissions concerning the legislative history summarised above, and concerning the interpretation of the provisions of the 1994 Law including (but not limited to) section 4(3) (d).

106. I now turn to consider Mr Dawes' other grounds of attack, which he (like Mr McMahon) has helpfully (and trenchantly) summarised in written submissions provided since the hearing.

Abuse of Power

107. Mr Dawes' submission is that, at a time when Guernsey was awaiting a Ministerial Order under the 1967 Act, and Ministers had imposed pre-conditions (including agreement between Jersey and Guernsey) to the making of such an order, it was an abuse of power on the part of the States of Guernsey to seek to circumvent those pre-conditions by using the 1994 Law route.

108. If I am right in the view already expressed as to the powers of the States, there cannot be any question of the exercise of those powers having been abused. If I were wrong in that view, the absence of power would render arguments as to abuse otiose. In any event I take the view that the States were plainly doing no more than fill the vacuum pending agreement as to a Ministerial Order, as already indicated: that was not an abuse of power.

Bad Faith

109. This allegation was raised by the Plaintiffs in paragraph 21 of their Causes. It was addressed in their skeleton arguments in reply in the Royal Court, being based on the contention that the States had made the Ordinance in order to improve their negotiating position vis à vis the UK government and Jersey. In the Plaintiffs' final written submissions in the Royal Court the Plaintiffs relied also on the contention that the "true purpose" behind the making of the Ordinance "was to erect a protectionist regime in revenge for [the Bay of Granville Agreement] and contrary to the DCA conditions" (paragraph 4). It is puzzling that the only reference to bad faith in the judgment of Talbot LB was in paragraph 55 in the words "There is no suggestion of bad faith on the part of the Committee……". In the Plaintiffs' written case as respondents in the Court of Appeal bad faith was raised in paragraphs 30-31. Reliance was placed on the affidavits of Mr Taylor and Mr Oliver on behalf of the Plaintiffs, and in particular on

(1) the letter of 26 April 2000 from the former President of the Guernsey Committee to the Chairman of the Jersey Sea Fisheries Panel (see paragraph 55 above);

(3) statements by Guernsey Deputy Trott dated 14 June 2000 and in the debate on 26 March 2003.

The point was the same as mentioned above, ie keeping Jersey fishermen out of Guernsey waters because Jersey had taken the lead in keeping Guernsey fishermen out of Jersey waters. In the course of his oral submissions to this Court Advocate Dawes initially did not deal with bad faith. It was only after he had been pressed by me on three occasions to confirm whether or not he was relying on bad faith, that he did confirm that he was relying on bad faith. He referred to the following:

(1) the States' change of mind from seeking a Ministerial Order to making the Ordinance;

(2) the States being told in the Report which led to the making of the Ordinance that Guernsey was obliged to establish a licensing system;

(3) using the 1994 Law to circumvent the intentions of the Ministers as to the making of an Order once agreement had been reached with Jersey;

(4) the true motive for making the Ordinance being animosity to Jersey due to the Bay of Granville Agreement (Mr Trott's statements being relied on in this regard);

(5) the aim of bringing pressure to bear on Jersey to reach an agreement;

(6) statements made in the debate in the States on the Billet.

In his final written submissions he relied briefly on these points, and added

(7) that few Jersey vessels have yet been licensed;

(8) the limit on length and horsepower of vessels;

(9) a tracking period too long ago to be able to prove activity in that period;

(10) that the tracking period and shadow licence scheme had been made known only to Guernsey fishermen.

110. I propose to deal with each of these numbered points in turn.

(1) It is clear on the evidence that the government of Guernsey is continuing to seek a Ministerial Order, and that the Ordinance has been made to fill the lack of control of fishing within the twelve mile limit pending agreement on an Order.

(2) As I have indicated, the advice about being obliged to establish a licensing system was in line with advice previously given to the States, and in my judgment that advice may well have been correct.

(3) See (1) above.

(4) Mr Trott and others expressed disappointment at what they saw as the failure of the UK and Jersey governments to consult Guernsey about the negotiation and drafting of the Bay of Granville Agreement. The evidence before the Court shows no more than this. In so far as Mr Dawes relies on the few statements by the few speakers in the States debate, I will deal with this point separately below.

(5) It is clear that on the part of Guernsey there was and is a desire to achieve the best agreement reasonably attainable with the UK and Jersey governments. In my view the statements made amount to no more than this.

(6) See (4) above.

(7) What has been done in relation to the exercise of the licensing power is not evidence of bad faith in the creation of the licensing power. The simple answer is that Jersey or UK boat owners have a right of appeal to the Royal Court if they have wrongly been denied licences.

(8) The limit on length and horsepower appears to have been introduced so as to conserve fish stocks. This is not evidence of bad faith in passing the Ordinance.

(9) The Guernsey tracking period is nearly in line with the UK tracking period, and seems to me, therefore, to be no more than a reasonable exercise of discretion, given that it is the same as the "shadow" tracking period.

(10) Whether Jersey or UK fishermen knew or did not know of the "shadow" tracking period and licence scheme in 1992 or between then and 2003 provides no support to the alleged bad faith in making the Ordinance.

111. Mr Dawes seeks to rely on what was said by a few speakers in the States debate in support of the allegation of bad faith. The States is a democratically elected parliament. The motives of each of the members of the States who voted to approve the Billet and the Ordinance no doubt vary greatly. It is not for the Court to consider individual motives of individual States members, but rather the motive shown by the votes on the relevant resolutions. This was a matter considered by the Jersey Court of Appeal in the *Les Pas Holdings* case at 1998 JLR p 210, and I adhere to what I then said.

112. In my judgment no case of bad faith has been made out. It cannot be stated too strongly that it is not acceptable for charges of bad faith or dishonesty to be bandied about without any proper basis for the making of such serious charges. The making of such misconceived charges reflects adversely on those who make them, rather than those against whom they have been incorrectly made.

The Right to Fish

113. Mr Dawes contends that his clients, both Jersey and UK fishermen, have a right to fish in the seas off Guernsey which cannot, he says, be "legislated away by domestic ordinance". I note that he did not include as part of his contention a right of Guernsey fishermen to fish in the waters off Jersey. He relied for this right on extracts from Halsbury's Laws and from Basnage's commentaries on the Coutûme of Normandy. I will assume for present purposes that such a general right exists. It is, I would have thought, elementary that the regulation of the exercise of such a right by licensing, in the public interest of the maintenance of stocks, is and has always been permissible. Such a right can more readily exist in fishing for salmon and sea and brown trout in rivers and lakes. But for generations that right, which in many cases is a valuable right capable of being sold at a high price, has been regulated by appropriate

licensing in the interests of the public, and in particular of other fishermen and women. Mr Dawes' contention, that the alleged right cannot be regulated by a licensing system adopted by the States of Guernsey, however necessary or appropriate the States may consider it to be in the interests of the public, is in my judgment without merit.

Human Rights

114. Mr Dawes contended that the alleged right to fish is protected by Article 1 of Protocol 1 to the ECHR. There seem to me to be at least two answers to this point. The first is that the Human Rights (Bailiwick of Guernsey) Law 2000 is not yet in force. The second is that the European Court of Human Rights has recognised that property rights falling within Protocol One, Article One, may be subjected to regulation in the public interest. If Mr Dawes had a good point under this head, it would be one to be taken to Strasbourg. But in my judgment the point is not well-founded; and in any event the existence of the right except perhaps in the people of Guernsey is a doubtful one.

Irrationality

115. Mr Dawes contends that, if the States of Guernsey adopted the 1994 Law route and this would otherwise be lawful, the adoption of that route was ultra vires for irrationality. He relies in this connection on the contention that the States took into account matters which they ought not to have taken into account:

(1) the incorrect advice that Guernsey was obliged as a matter of European law to impose a licensing regime;

(2) the incorrect advice that without a system of licensing, Guernsey fishermen could not land their catches;

(3) the improper consideration of the Bay of Granville Agreement.

As to (1) and (2), I have already indicated my view that the advice as to the impact of European law was arguably correct, and in any event in line with the similar advice previously given, particularly when the proposal for the 1989 Law was being considered. As to (3) I have already dealt with this in the context of alleged bad faith, and do not need to deal with it further.

Doomed in any Event

116. Mr Dawes submits that the licensing regime is doomed in any event. I do not understand this point to add anything to his other contentions.

Article 28 of the Treaty

117. This point was dealt with in the judgment of the Lieutenant Bailiff in paragraph 62. I agree with his judgment on this point. The Ordinance is not a measure equivalent to a quantitative restriction on the free movement of goods which would be prohibited by Article 28.

Severance

118. If I am wrong on the basic question whether the States had power to make the Ordinance, then Mr McMahon submits that the Ordinance can properly be severed, and upheld to the extent that it is lawful. He put this by reference to the three mile limit of the Guernsey territorial sea, and perhaps in deference to the Court's exploration of the different possible answers, in the alternative by reference to the exclusive six mile fishery limit.

119. Severance was rejected by the Lieutenant Bailiff in paragraph 71 of his judgment, but without consideration of the applicable principles or the cited authorities, which however did not include the most relevant ones cited to this Court.

120. The principal relevant authority is the *Director of Public Prosecutions v Hutchinson* [1990] 2 AC 783 HL(E). The question arose in connection with byelaws made by the Secretary of State for Defence in respect of common land appropriated for military purposes at RAF Greenham Common. The House of Lords held that the byelaws were in substantial part outside the relevant statutory powers and could not be saved by severance. Lord Bridge (with whom Lords Griffiths, Oliver and Goff agreed) stated the tests in relation to severance in these passages at pages 811-812 and 813:

> "The test of textual severability has the great merit of simplicity and certainty. When it is satisfied the court can readily see whether the omission from the legislative text of so much as exceeds the law-maker's power leaves in place a valid text which is capable of operating and was evidently intended to operate independently of the invalid text. But I have reached the conclusion, though not without hesitation, that a rigid insistence that the test of textual severability must always be satisfied if a provision is to be upheld and enforced as partially valid will in some cases, of which *Dunkley v Evans* [1981] 1 WLR 1522 and *Daymond v Plymouth City Council* [1976] AC 609 are good examples, have the unreasonable consequence of defeating subordinate legislation of which the substantial purpose and effect was clearly within the law-maker's power when, by some oversight or misapprehension of the scope of that power, the text, as written, has a range of application which exceeds that scope. It is important, however, that in all cases an appropriate test of substantial severability should be applied. When textual severance is possible, the test of substantial severability will be satisfied when the valid text is unaffected by, and independent of, the invalid. The law which the court may then uphold and enforce is the very law which the legislator has enacted, not a different law. But 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. Thus, in *Dunkley v Evans*, the legislative purpose and effect of the prohibition of fishing in the large area of the sea in relation to which the minister was authorised to legislate was unaffected by the obviously inadvertent inclusion of the small area of sea to which his power did not extend. In *Daymond v Plymouth City Council* the draftsman of the Order had evidently construed the enabling provision as authorising the imposition of charges for sewerage services upon occupiers of property irrespective of whether or not they were connected to sewers. In this error he was in the good company of two members of your Lordships House. But this extension of the scope of the charging power, which, as the majority held, exceeded its proper limit, in no way affected the legislative purpose and effect of the charging power as applied to occupiers of properties which were connected to sewers."
>
> "I think the proper test to be applied when textual severance is impossible, following in this respect the Australian authorities, is to 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 and to ask whether the legislative instrument
>
> > "with the invalid portions omitted would be substantially a different law as to the subject matter dealt with by what remains from what it would be with the omitted portions forming part of it:" *Rex v Commonwealth Court of Conciliation and Arbitration, Ex parte Whybrow & Co, 11 CLR 1, 27.*
>
> In applying this test the purpose of the legislation can only be inferred from the text as applied to the factual situation to which its provisions relate."

121. In my judgment the Ordinance would readily be severable in the way in which it was severed by the Court of Appeal in its judgment and order of 8 July 2004: see paragraphs 12-15 of the judgment, and the schedule of deletions annexed to the judgment. As the Court of Appeal stated in paragraph 15, such deletions would be all that would be required so as to ensure that the Ordinance applied only to the three mile territorial sea round Guernsey. If it were necessary to consider severance because the Ordinance as made in respect of the seas up to the twelve mile limit would be unlawful (contrary to the conclusions I have already set out), then the Ordinance could and should be upheld in this form in relation to the territorial sea.

Conclusion

122. I would allow the appeals and declare that the Ordinance was and is within the powers of the States and lawful. I would remit the cases to the Royal Court to consider any appeals against refusals of licences.

Mr Smith: I agree.

Mr Vaughan: I agree.

EXTRACT FROM BILLET D'ETAT IV, 2003

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STATES SEA FISHERIES COMMITTEE

IMPLEMENTING A FISHING VESSEL LICENSING REGIME FOR THE BAILIWICK OF GUERNSEY

The President
States of Guernsey
Royal Court House
St Peter Port
Guernsey
GY1 2PB

7th February 2003

Dear Sir

IMPLEMENTING A FISHING VESSEL LICENSING REGIME FOR THE BAILIWICK OF GUERNSEY

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 Sea Fisheries 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 Sea Fish Licensing (Guernsey) Ordinance 2003.

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 a fishing vessel licence 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 1500 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* .

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, indeed 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 a species that may be retained at any time of the year, and controlling the types of fishing gear that may be used.

***** 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.

3.4 Worldwide, many fish stocks are known to be at the lowest level ever, hence

the much publicised dramatic cuts in available cod, whiting and haddock quotas throughout Europe introduced earlier this year. The need to feed ever increasing populations, coupled with advances in gear technology and catching efficiency mean that pressure on the fishable resource 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 Holders of Bailiwick of Guernsey fishing licences will be entitled to apply for a Department for the Environment, Food and Rural Affairs (DEFRA) licence, if they wish to target fisheries beyond the Bailiwick 12 mile sea area. In such circumstances it will be possible for a vessel to hold two licences, i.e. a Bailiwick licence and a MAFF licence. However, these licences will be indivisible, and it will not be possible to sell one licence and retain the other.

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

4.1 The Committee was approached early in 1992, by the Ministry of Agriculture Fisheries and Food (MAFF), now the Department for the Environment, Food and Rural Affairs (DEFRA), who were concerned that while Guernsey fishing vessels were regarded as part of the UK fleet, UK licensing legislation did not cover those vessels fishing within Bailiwick waters. Consequently, discussions commenced on how best to implement a licensing scheme to cover all British fishing vessels fishing in the Bailiwick.

4.2 As a result of early meetings with MAFF, and in anticipation of a promised early draft of a Ministerial Order to enact powers for the Committee to licence fishing vessels, the Committee announced publicly in September 1992 that licensing was to be introduced locally.

4.3 The Committee then invited applications from locally registered vessels that could provide evidence of fishing for profit between 30th September 1991 and 30th September 1992. Of the applications received 213 applications were approved.

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4.4 The inevitable trade in fishing vessels, not only within the Islands but also between the Islands and the United Kingdom and Jersey, resulted in the Committee deciding, in early 1993, to issue "letters of entitlement" to a licence. This was to enable qualified owners of such vessels to sell them with the guarantee that those vessels, providing the entitlement accompanied them, could continue to fish commercially and would be granted a full licence once a

scheme had been introduced. In issuing "letters of entitlement" the Committee mirrored the temporary arrangements introduced by MAFF in the early stages of implementing licensing within the UK.

4.5 The Committee has continued to administer this scheme in good faith, since 1993 in accordance with the controls and procedures applicable to UK licensing.

4.6 Successful implementation of licensing to the Guernsey 12-mile sea area by means of a Ministerial Order has proven to be a lengthy and complicated process involving amendment to UK primary legislation. However, until recently considerable progress had been achieved towards implementing a licensing regime by this route.

4.7 Specifically, **The Sea Fish (Conservation) (Channel Islands) (Amendment) Order, 2001** was passed by Her Majesty the Queen on 14th March 2001. This amendment to primary legislation extends the powers of UK Ministers to make an Order prohibiting fishing without a licence in British fishery limits adjacent to the Bailiwick of Guernsey including the territorial seas of Alderney, Sark and Guernsey. This legislation came into force on 3rd April 2001.

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 laid 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 Chancellors 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 have been part of the package of measures associated with the Ministerial Order. The stumbling block has been the implications for Guernsey of 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 interisland 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 form the basis for the Guernsey entitlement system and the Jersey licensing arrangements;

6.0 Bay of Granville Agreement

6.1 A new Bay of Granville Agreement covering fishing activity in the waters between Jersey and France was signed in 2000. Guernsey was not party to the discussions that led to this new Agreement and only became involved in the closing stages at which point it was vigorously opposed to its introduction. Included in the "Exchange of Notes" attached to the Agreement was an arbitrary 30-vessel cap on Guernsey vessels able to access territorial waters around Jersey. Guernsey protested at the time and warned that such a cap severely limited the potential for an equitable agreement on inter-island licensing in future.

6.2 Although there is a 30-vessel cap and although Guernsey vessels have applied to access Jersey waters under their licensing arrangements, no licences have yet been granted.

6.3 Furthermore, in discussions so far with the Jersey authorities it has become clear that although they believe that the 30-vessel cap must remain in place as far as their waters are concerned, they would wish a far greater number of Jersey vessels to access Guernsey waters.

7.0 Lack of incentive for Jersey to negotiate

7.1 Inter-island licensing is recognised as an important issue that must be resolved for the benefit of fishermen from both Bailiwicks. However, there is currently no incentive for Jersey to agree an equitable licensing arrangement with Guernsey over access since at present all Jersey vessels may fish within the waters surrounding the Bailiwick of Guernsey without restriction. In contrast,

neither Guernsey vessels nor British vessels (other than Jersey registered boats) have been granted a licence to target fisheries within the Jersey 12-mile area.

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 Jersey 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 invites 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 but are unable to obtain a Guernsey licence because of our different starting point.

8.3 In order to fully appreciate this point, a brief description of the separate licensing regimes within the UK, Guernsey and Jersey and how they have evolved over the years, is set out below.

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(i) <u>The UK licensing system</u>

The UK introduced fishing vessel licensing in 1983 following agreement of the Common Fisheries Policy (CFP). In accordance with this first licensing regime all vessels over 40 feet registered length were required to obtain a licence before fishing for Pressure or Non-Pressure Stocks. Licences were issued to fishermen **(including Guernsey fishermen)** who could demonstrate a track record of such fishing prior to 3rd February 1984.

In February 1990 the definition of vessel length was changed to include vessels over 10 metres overall length, and licences were issued to fishermen with a record of fishing in the 12-month period prior to May 1990. At the same time a policy whereby Non-Pressure Stock licences were freely available to vessels between 10 metres overall length and 40 feet registered length was terminated.

At this final stage in the evolution of the UK restrictive licensing scheme for vessels over 10 metres the size of this sector of the fleet, both in terms of number and capacity was capped.
On the 1st May 1993 the UK licensing scheme was further extended to include vessels of 10 metres overall length and under and fishing licences were issued to all UK 10 metre and under vessels with a proven history of fishing in the period **28th February 1991 to 27th February 1992.**

(ii) The Jersey licensing system

Jersey introduced a closed licensing scheme independent of the UK in 1997, based on a track record reference period of **5th November 1995 to 5th November 1996**. 21 Guernsey and 5 UK vessels applied for Jersey licences, however, to date none of these applicants have received licences.

In addition, the Jersey licensing scheme differs markedly from that operated by DEFRA and the shadow Guernsey scheme. Of fundamental importance is the fact that the Jersey scheme is closed to reciprocal access with the United Kingdom.

A Jersey fishing boat licence entitles the holder to fish within the territorial waters of Jersey only; it does not permit the holder to apply for a licence for UK waters and a Jersey license holder wishing to target fisheries in UK waters must purchase a DEFRA licence or forfeit his Jersey licence in exchange for a DEFRA licence (or vice versa).

(iii) Fishing vessel licensing in Guernsey

In contrast, Guernsey has administered a system of transferable licence entitlements since 1993, this based on a track record reference period

30th September 1991 to 30th September 1992. Unlike the Jersey scheme, Guernsey licensing is operated on a fully reciprocal basis with the UK and incorporates all controls and procedures applicable to the UK licensing scheme.

Guernsey vessel owners in possession of valid licence entitlements are eligible to receive an equivalent UK licence for their vessel from DEFRA, to be held in tandem with their domestic licence. A number of Guernsey fishermen enjoy this arrangement which permits them to access fisheries in UK waters beyond the 12 mile Guernsey fishery limit without having to purchase an additional licence.

8.4 Jersey has expressed concern to the UK that a number of its fishermen who currently fish in the Guernsey area and who possess Jersey fishing boat licences but no UK licence, will not be able to access fisheries within Guernsey waters once a formal licensing system is introduced.

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. It must be remembered that a significant number of GU registered fishing vessels that do not posses entitlements to a licence are in exactly the same position.

8.6 Indeed, up to 117 GU registered vessel owners do not currently posses suitable licence entitlements for their vessels and so will be faced with the choice of purchasing a licence or ceasing to fish commercially.

8.7 Furthermore, many of these fishermen can prove they were fishing for profit during the Jersey track record reference period (1995-1996), or more recently. These fishermen would have very good reason to be aggrieved if Guernsey

were to issue fishing licences to J registered vessel owners on the strength of a more recent track record in Guernsey waters, when the Committee has refused time and again to provide entitlements for GU registered vessels fishing within Bailiwick waters unless they can demonstrate a track record prior to September 1992. If on the other hand the Committee were to issue licences to GU vessels with a more recent track record that would undermine the investment that many Guernsey fishermen have made in purchasing an entitlement.

8.8 In addition, Jersey has expressed concern to the UK that Guernsey did not invite Jersey registered vessels to apply for a Guernsey fishing licence when the Guernsey fleet was capped in1992. Jersey feels unfairly treated as Guernsey and UK vessels were invited to apply for Jersey licences in 1997. In 1992 Guernsey invited applications from GU registered fishing vessels. The Committee did not consider it necessary or appropriate to invite applications from UK or Jersey registered vessels at that time, since it was anticipated that all British licensing schemes would be fully reciprocal. Indeed, the UK did not invite Jersey or Guernsey to apply for a UK licence either. It could not have been foreseen that Jersey would introduce a closed licensing scheme in 1997 that was not reciprocal with the UK.

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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 12 mile area unrestricted.

- Access to Jersey Territorial water has been severely restricted through their licensing scheme and the Bay of Granville Agreement and no British vessels other than J registered vessels have been granted a licence.

- The concept of deciding which vessels 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 others fisheries may be the best solution for the long term for Jersey and Guernsey.

- Guernsey is committed to further discussions with Jersey on interisland licensing for the benefit of fishermen from all islands, but cannot accept UK preconditions 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 under the powers conferred upon the States by The European Communities (Implementation) (Bailiwick of Guernsey) Law, 1994.

9.2 When this option was first discussed some years ago it was decided to try and 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 this to be a naive belief.

9.3 As a result of the indefinite delay in progressing a Ministerial Order by H M Government, the Committee revisited the option of implementing licensing via domestic legislation and has been working with Crown Officers on the preparation of appropriate local legislation. The Sea Fish Licensing (Guernsey) Ordinance 2003 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 those 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 European Communities (Implementation) (Bailiwick of Guernsey)

Law, 1994, 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 restrictive system of fishing vessel licensing within the 12-mile area at the earliest opportunity, to enable the regulation of fishing on an equal basis to all other British jurisdictions.

9.7 Approval by the States of the Guernsey Licensing 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 regime.

9.8 The Guernsey Licensing Ordinance contains the power for a written statement made by a British Sea Fisheries Officer to be admissible as evidence to the like extent as oral evidence.

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 Sea Fisheries Committee can familiarise the industry with the licensing procedures and the issue of licences can take place;

- Fishermen without a licence 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; and

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

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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-term conservation of fish stocks through the ability to manage the effort in our waters better than in the past. Finally, the Committee is confident that it will be able to cope with the administration of the new licensing scheme within its existing staff and financial resources.

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 1500 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 stocks 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 a fishing vessel 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 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 H M 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 Sea Fish Licensing (Guernsey) Ordinance 2003 has been approved by the States Legislation Committee.

13.0 Recommendation

13.1 The Committee therefore recommends the States to:
(a) Approve the Sea Fish Licensing (Guernsey) Ordinance 2003; and
(b) Agree that the prohibition of fishing within the Bailiwick's 12-mile waters without a licence set out in section 1 of the Sea Fish Licensing (Guernsey) Ordinance 2003 shall be brought into force on the 1st October 2003.

I am grateful to you for allowing the Ordinance to be placed before the States at the same time as this policy letter and I would ask that you be good enough to lay these matters before the States with appropriate propositions.

Yours faithfully

L. S. TROTT

Vice-President
States Sea Fisheries Committee

(NB The States Advisory and Finance Committee supports the proposals)

The States are asked to decide:-

II.- Whether, after consideration of the Report dated the 7th February, 2003, of the States Sea Fisheries Committee, they are of opinion:-

1. To approve the draft Ordinance entitled "The Sea Fish (Licensing) Ordinance, 2003", and to direct that the same shall have effect as an Ordinance of the States.

2. That the prohibition of fishing within the Bailiwick's 12-mile waters without a licence set out in section 1 of the Sea Fish Licensing (Guernsey) Ordinance 2003 shall be brought into force on the 1st October 2003.