*757 R v Coventry Airport

Queen's Bench Division (Divisional Court)

12 April 1995

[1995] C.L.C. 757

Simon Brown LJ and Popplewell J.

Judgment delivered 12 April 1995

Judicial review—Public administration of ports and airports—Export of livestock—Public protests disrupted operations at ports and airports—Port and airport authorities refused to accept livestock for export—Whether authorities had discretion to refuse lawful trade—Whether ban on livestock exports contravened EC law—Harbours, Docks and Piers Clauses Act 1847, s. 33; Harbours Act 1964, s. 40(1); Transport Act 1981, s. 9; Civil Aviation Act 1982, S. 78(6).—EC Treaty, art. 90(2).

These were three applications for judicial review. Two were brought by exporters of live animals seeking to compel Coventry Airport and Dover Harbour to accept their trade. The third was brought by Plymouth City Council against its own harbour authority to require it to ban livestock exports.

As a result of public protests at the export Of live animals for slaughter considerable disruption occurred at ports and airports through Which livestock were transported. In response to the actual and threatened activities of protesters the public authorities responsible for Coventry Airport and Dover Harbour sought to ban live animal exports.

Livestock exporters, who were permitted to operate two trial flights from Coventry Airport in November 1994, applied for and were granted an interlocutory injunction restraining the council from suspending the flights. The airport authority's application to discharge the injunction was refused. The exporters applied for judicial review of the authority's decision to ban the livestock trade, subject to the court lifting the injunction. Transporters of livestock seeking to export live animals via Dover sought judicial review of the harbour board's refusal to permit a proposed cross-channel service carrying live animals to dock at Dover. The refusal was on disruption and capacity grounds on the basis of a 1992 appropriation, by which the board appropriated the use of the part of the docks for operators of regular cross-channel services. Plymouth City Council, having failed to persuade the city's harbour board that it had a discretion to refuse to allow the port to be used for livestock exports, sought judicial review of the harbour board's refusal to ban the trade.

The applications raised three central questions. First, each port operated under a statutory regime, in the context of which it fell to be determined whether the port authorities had any discretion to refuse to accept the lawful trade of the animal exporters. Secondly, assuming the authorities had a discretion to refuse trade which was within their physical capacity to handle, whether they could properly refuse it in order to avoid the disruptive consequences of threatened illegality. Thirdly, whether a refusal to accept livestock exports contravened EC law.

Held , granting the exporters' applications for judicial review in relation to Coventry Airport and Dover Harbour Board, and refusing the application of Plymouth City Council:

1 The requirement in s. 78(6) of the Civil Aviation Act 1982 that an airport licensed for public use should be ‘available to all persons on equal terms and conditions’ obliged Coventry Airport to accept all lawful trade within its capacity, and precluded it from refusing any given trade. Similarly s. 33 of the Harbours, Docks and Piers Clauses Act 1847 gave a right of access to the docks ‘to all persons for the shipping and unshipping of goods’. Section 40 of the Harbours Act 1964, which entitled Dover Harbour Board to make the use of the harbour services and facilities subject to terms and conditions they saw lit, could not be invoked inconsistently with the board's overriding duty under s. 33 of the 1847 Act, so as to *758 deny access to those who had a legitimate right to it. Sections 33 of the 1847 Act and 40 of the 1964 Act applied likewise to Plymouth Docks. Further, s. 9 of the Transport Act 1981 imposed on the port authority a non-justiciable duty to provide port facilities, the nature and extent of that provision being within its discretion, but not a discretion to withhold those facilities from particular users so as to destroy their ability to use the port and thereby derogate from their s. 33 rights.

2 All existing or intending operators of a regular cross-channel service at Dover were to be treated equally in accordance with s. 33 of the 1847 Act. The proposed operation of a regular cross-channel service at Dover fell squarely within the 1992 appropriation, required approval by the board of the applicant company by reference to its financial standing and status rather than its service, and accordingly the board was not entitled to refuse approval of the proposed service on the ground of disruption or, on the evidence adduced, incapacity.

3 Port and airport authorities had no general discretion to discriminate between those seeking to use their facilities for the purposes of lawful trade. Even if such a discretion existed, it could not be properly exercised to ban trade in livestock to avoid disruption. Although the authorities were entitled to respond to unlawful threats and might properly vary or suspend services on occasion, they were not justified in surrendering to the dictates of unlawful pressure groups since the rule of law had to prevail.

4 Article 90(2) of the EC Treaty, which applied to Dover Harbour Board as an undertaking entrusted with the operation of services of general economic interest, did not empower the board to refuse to allow the transport of live animals for slaughter through Dover to promote free trade and competition for the vast majority of its customers, but on the contrary stipulated that the board was required to be open to the rules on competition so long as that would not obstruct its operation. It followed that Community law did not entitled the board to bah the livestock trade.

The following cases were referred to in the judgment:

Aiton v Stephen (1876) 1 App Cas 456.

Almelo (Gemeente) & Ors v Energiebedriff Ijsselmij NV (Case C-393/92) [1994] 2 CEC 281; [1994] ECR I-1445.

Apple and Pear Development Council v KJ Lewis Ltd (Case 222/82) [1983] ECR 4083.

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223.

British Trawlers Federation Ltd v LNER [1933] 2 KB 14 (CA); *[1934] AC 279 (HL)*.

Cullet & Anor v Centre Leclerc Toulouse & Anor (Case 231/83) [1985] ECR 305.

Duncan v Jones [1936] 1 KB 218.

EC Commission v Belgium (Case C-80/92) [1994] ECR I-1019.

EC Commission v France (Case 42/82) [1983] ECR 1013.

Fairfax (John) Ltd v Australian Postal Commission [1977] 2 NSWLR 124.

Foster v British Gas plc (Case C-188/89) [1991] 2 AC 306.

Garland & Flexman v Wisbech Corp [1962] 1 QB 151.

Groenveld (P B) BV v Produktschapvoor Vee en Vlees (Case 15/79) [1979] ECR 3409.

Holdijck & Ors, Re (Joined Cases 141–143/81) [1982] ECR 1299.

Jongeneel Kaas, B V & Ors v Netherlands & Anor (Case 237/82) [1984] ECR 483.

Meade v Haringey London Borough Council [1979] 1 WLR 637.

Oebel, Re (Case 155/80) [1981] ECR 1993.

Peterhead Towage Services Ltd v Peterhead Bay Authority 1992 SLT 593.

Pigott (J H) & Son v Docks and Inland Waterways Executive [1953] 1 QB 338.

Pigs & Bacon Commission v McCarren & Co Ltd (Case 177/78) [1979] ECR 2161.

Pigs Marketing Board v Redmond (Case 83/78) [1978] ECR 2347.

Procureur du la Republique, Besancon v Bouhelier & Ors (Case 53/76) [1977] ECR 197.

Procureur du Roi v Dassonville & Anor (Case 8/74) [1974] ECR 837.

R v Caird (1970) 54 Cr App R 499. ***759**

R v Chief Constable of Devon and Cornwall, ex parte Central Electricity Generating Board [1982] QB 458.

Rv Horseferry Road Magistrates' Court, ex parte Bennett [1994] 1 AC 42.

R v Immigration Appeal Tribunal, ex parte Singh [1986] 1 WLR 910.

R v. International Stock Exchange of the United Kingdom and Republic of Ireland Ltd, ex parte Else (1982) Ltd & Anor [1993] BCC 11; [1993] QB 534.

R v Metropolitan Police Commissioner, ex parte Blackburn [1968] 2 QB 1.18.

R v Ministry of Agriculture, Fisheries & Food, ex parte Jaderow Ltd (Case 216/87) [1989] ECR 4509.

R v Royal Pharmaceutical Society of Great Britain [1989] 2 CMLR 751.

R v Somerset County Council, ex parte Fewings [1995] 1 WLR 1037.

R v University of Liverpool, ex parte Caesar-Gordon [1991] 1 QB 124.

Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein ('Cassis de Dijon') (Case 120/78) [1979] ECR 649.

Thoresen Car Ferries Ltd v Weymouth Portland Borough Council [1977] 2 Ll Rep 614.

Webster v Southwark London Borough Council [1983] 1 QB 698.

Wheeler v Leicester City Council [1985] 1 AC 1054.

Representation

Lord Kingsland QC and Karen McHugh (instructed by Beachcroft Stanleys for Clarke Willmott & Clarke, Taunton) for Phoenix Aviation.

Stuart Isaacs QC, Clive Lewis and Paul Brown (instructed by Sharpe Pritchard for Andrew H Pitts, Coventry) for Coventry City Council.

David Pannick QC and David Anderson (instructed by Mowll & Mowll, Dover) for Dover Harbour Board.

David Vaughan QC, David Lloyd-Jones and Philip Moser (instructed by Cole & Cole, Oxford) for Peter Gilder & Sons.

Richard Gordon QC and Nicholas Green (instructed by Michael J H Bownes, Plymouth) for Plymouth City Council.

Richard Field QC, Nigel Giffin and Nigel Porter (instructed by Reginald V pearce) for Associated British Ports.

Charles Haddon-Cave (instructed by Richard Vidal, National Farmers Union) for the National Farmers Union, intervener.

QC and Peter Duffy (instructed by Bindman & Partners) for Compassion in World Farming, intervener.

Mr Hockman QC (instructed by R A Crabb, Maidstone) for the Chief Constable of Cent, intervener.

JUDGMENT

Simon Brown LJ:

I. Introduction

The export of live animals for slaughter is lawful. But many think it immoral. They object in particular to the shipment of live calves for rearing in veal crates, a practice banned in this country since 1990. The result is that for some months past the trade has attracted wide-spread concern and a great deal of highly publicised protest. Some of that protest is lawful; some alas is not. The precise point at which the right of public demonstration ends and the criminal offence of public nuisance begins may be difficult o detect. But not only is all violent conduct unlawful; so too is any activity which substantiaily inconveniences the public at large and disrupts the rights of others to go about their lawful business.

It is the actual and threatened unlawful activity of animal rights protesters which underlies these three judicial review challenges. Two are brought by those wishing to ***760*** export live animals, respectively through Coventry Airport and Dover Harbour; they seek to compel the port authorities to accept their trade. The third, by contrast, is brought by Plymouth City Council against its own harbour authority in an attempt to ban the trade. It is the fear of unlawful disruption which has prompted Coventry and Dover to refuse the trade (Coventry's ban being subject to the court first lifting the injunction requiring it at present to accept the trade); and which prompts Plymouth City Council to seek a similar ban. All three authorities, let it be clear at once, expressly now disavow animal welfare considerations as any part of their motivation (although earlier it was otherwise with both Coventry and Plymouth City Councils).

The central questions raised by all three applications are these:

(1) Given that their trade is lawful, what if any rights are enjoyed by animal exporters to have it accepted by the public authorities administering the respective (air and sea) ports here under consideration? Or, putting it the other way round, what, if any, discretion have the authorities to refuse it? This question falls to be decided by reference to the respective statutory regimes under which each of these authorities operates.

(2) Assuming the authorities have a discretion to refuse trade which it would be within their physical capacity to handle, can they properly refuse it so as to avoid the disruptive consequences of threatened illegality? When, if ever, can a public authority properly bar lawful activity in response to unlawful protest? How absolute is the principle that the rule of law must prevail?

(3) If it be lawful under national law for these authorities to refuse this trade so as to avoid the disruptive consequences of accepting it, does such refusal nevertheless contravene European Community law?

With that brief introduction let us turn at once to indicate something of the facts of these cases. These are before the court in the greatest detail. So as not to overburden this judgment, however, the barest summaries must suffice.

II. Coventry—the facts

The first applicant is an air transport company, based in Coventry, engaged in the business of transporting cargo including livestock by air. The other applicants are a consortium of exporters of cattle, including veal calves, by air to the Continent. Coventry Airport deals substantially in freight transport and has all the facilities required for the export of livestock.

In October 1994 Phoenix approached the respondents with a view to commencing regular flights from their airport. There is deep dispute between the parties as to whether in early November agreement was reached whereby the respondents gave their unqualified consent to the applicants' use of the airfields The applicants so contend but that question has been put over for decision if necessary in later proceedings—as a private law claim in contract. It is sufficient for present purposes to note merely the following. The applicants were permitted to operate trial flights on 5 and 6 November 1994. Despite the apparent success of these, however, the council, following the intervention of Compassion in World Farming (CWF), an animal rights group, decided to suspend them. The applicants' initial judicial review challenge was directed to this decision, taken, it was said, on impermissible animal welfare grounds—see *R v Somerset County Council, ex parte Fewings [1995] 1 WLR 1037*-and also in breach of con tract. That, however, for present purposes is history. On 11 November 1994 Wright J granted the applicants an interlocutory injunction restraining the respondent council from: ***761**

‘suspending or continuing to suspend the first applicants from operating by aircraft the business of the carriage of veal calves from Coventry Airport to … Holland, Belgium or France.’

On 15 November 1994 Tucker J granted leave to move for judicial review and continued the interlocutory injunction.

On 21 December 1994 an Air Algeria aircraft chartered by the applicants crashed on coming in to land at Coventry Airport, killing all five people on board. The applicants themselves then suspended flights until 26 January 1995, when a replacement aircraft flew to Amsterdam.

Meanwhile, on 23 January 1995, Mr Brewer, the Assistant Chief Constable of Warwickshire, had written to the airport manager, expressing his concerns should the applicants' flights resume:

‘Should the flights restart I would anticipate the return of demonstrators, probably in greater numbers than we have previously experienced. My clear responsibility is to ensure the free passage of the vehicles into your airport, whilst at the same time accommodating protest within the law. My concerns at this time, however, relate not to that aspect of the situation, but the possible outcome of a police operation which, if

> successful, allows vehicles to gain entry to the airport. In fact I have very grave concerns for the integrity of airside safety and security should vehicles carrying animals actually gain access.'

Mr Brewer, then explained that his concerns were based upon, intelligence reports, incidents which had already occurred within the perimeter of the airport, a recognition that the underlying issue of animal welfare was causing 'an intensity of emotion … leading many reasonable people to behave in a direct and confrontational way', the ineffectiveness of the existing perimeter fence, the virtual total absence of security staff, and his recognition that 'incursion by even a few demonstrators … would … seriously compromise both ground and air safety conditions'

The letter concludes thus:

> 'Despite my acknowledged responsibilities in relation to the free passage of vehicles arriving at the airport and the effective management of any protests by demonstrators, the constabulary does not have a responsibility to protect the security of the airport from trespass. In the circumstances I must ask you to undertake, as a matter of urgency, a comprehensive review of your security arrangements and to take whatever steps are necessary to enhance them accordingly.'

In the light of that letter and the possible resumption of flights, Mr Wood, the respondents' City Secretary, arranged a meeting of the City Development and Employment Policy Co-ordinating Committee, the committee responsible for the airport, to take place on 27 January 1995. The committee considered a report prepared by Mr Wood himself together with Mr Brewer's letter and other documents. Under the heading 'Matters of public interest that need to be considered' the report summarised the effect of the Assistant Chief Constable's letter and continued thus:

> '4.1 The City Engineer considers that to make the airport more appropriately secure in the present circumstances would require enhanced fencing around the entire perimeter of the airport and the provision of security patrols and barriers at each access. He estimates that the costs of such work could be in the region of £400,000 and would take at least 2–3 months to install. As members are aware, the—City Council does not have the resources to provide these enhanced security arrangements and in addition-and more importantly—it is not physically possible to provide, these enhanced security arrangements within the immediate future.
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> 4.2 During the period in which any works for improving security as referred to in para. 4.1 were being carried out, and possibly even after the completion of such work, the airport may have to be closed from time to time if the activities of animal rights' protesters make that necessary in order to safeguard airport security and personal safety of staff and users.'

Amongst other matters considered by the committee were details of criminal incidents and arrests at the airport since November 1994 (including five incursions onto the airfield itself), a recently reported bomb threat against Phoenix's replacement aircraft, the financial implications respectively of permitting and barring Phoenix's use of the airport, and the likely effects of future disruptions upon the airport's other main customers and the respondent's proposed joint venture agreement with AMI, the present airport managers.

After one and half hours, so Mr Wood deposes, 'the committee unanimously considered that the issue of public security and safety was of such importance and significance as to outweigh the other factors'. It thereupon resolved

> 'as a matter of urgency, on grounds of public interest:
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> 1. The City Secretary be authorised to make an immediate application for the discharge

> of the interim injunction which effectively allows Phoenix Aviation to use the airport for the export of veal calves;
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> 2. That, subject to such an application being successful, permission to allow Phoenix Aviation to use the airport for the export of veal calves be refused …'

Shortly after the meeting ended, Mr Brewer communicated to Mr Wood his latest intelligence briefing that hard-core animal rights activists were currently travelling to the airport with experience of demonstrations at Shoreham and Brightlingsea, that now apparently they intended to make Coventry Airport the national focal point for this issue, and that he accordingly 'considered the potential for violent disorder had increased considerably'.

The respondents' application to discharge the injunction came before Turner J on 30 January 1995, when it was refused.

The decision under challenge remains, of course, the resolution of 27 January. It is, however, clearly necessary to consider also subsequent events in so far as they bear upon the respondents' continuing proposal to ban Phoenix's trade if they are permitted to do so.

With regard to events since 27 January, the respondents rely principally upon an affidavit from Police Superintendent Lyttle dated 15 March, with its exhibited record of incidents at the airport. He deposes that Phoenix's operations have given rise to almost constant protests by animal rights demonstrators whose numbers have varied from about 15 to, on one occasion, 800, and states that a major police operation is being maintained to keep a balance between lawful protest and free passage along the public highway. Since November Mr Lyttle records a total of 169 arrests for various offences: breach of the peace, public order, assault, criminal damage, aggravated trespass, and affray. Since 27 January there have been some ten occasions when demonstrators have penetrated the perimeter onto the airfield itself. Far and away the most serious of these occasions was on 3 February, when 45 people were arrested and all airport operations had to be stopped for some three-and-a-half hours. One protester chained himself to the wheel of an aircraft as it was about to start taxiing for take-off. Mr Lyttle says that the six-and-a-half mile perimeter fence is 'not in particularly good condition' and that 'even if it were, it could easily be breached by any animal rights protester intent on gaining access to the airport grounds'. Overall he states that: ***763**

> 'Given the physical layout of the airport, I doubt in my judgment that any security presence would be able to prevent all demonstrators getting access to the airport. If they did penetrate the airport perimeter, then they can cause criminal damage. There is also a serious risk that they may inflict injury to police officers, staff at the airport and staff of the users of the airport. Such acts could render the airport unsafe for aircraft to land and take off until order was restored. I regret, however, flights have continued.'

The respondents argue that events subsequent to 27 January have borne out the wisdom and necessity of their decision. The applicants contend the contrary.

III. Dover—the facts

The Dover Harbour Board was established by Royal Charter in 1606. It is a statutory corporation without shareholders whose duties are to administer, maintain and improve Dover Harbour.

The first applicants are transport contractors principally involved in the export of livestock by road to the continent. They are the UK's biggest livestock exporters with an annual turnover of some £6,500,000. They own 25 specialist lorries designed for longdistance travel abroad carrying some 100–200 loads of live animals a week, mostly for slaughter, although some for breeding.

The second applicants too are owned by Mr Peter Gilder. In November 1994 they became the exclusive livestock agents for the vessel 'Gap Canaille', then chartered to MT Shipping Ltd, but since 17 February 1995, they have chartered it themselves.

Until the autumn of 1994 the applicants exported their lorry loads of livestock from Dover by

using the cross-channel roll-on roll-off ferry services of the regular operators. In response to the growing pressures from demonstrators, however, these ferry operators successively embargoed the trade: P & O in July, Stena Sealink in September, and Brittany Ferries (from Plymouth and Poole) in November, 1994.

Since some 90 per cent of the applicants' trade had passed through Dover, it thereupon became necessary for them to make alternative arrangements and it was then that the Cap Canaille was chartered with a view to its operation between Dover and Dunkirk. Having received the approval of the Dunkirk authorities, the applicants on 14 November 1994 telephoned the Dover Harbour board. The board's faxed response was that any potential new operator would have to satisfy the board of four matters: its financial standing, the nature of any backing or subsidy it enjoyed whether the proposed services ‘can be safely accommodated at the times required’, and ‘whether overall the proposals are in the port's long-medium-short term interests, taking into account all the wider economic, legal and commercial factors’. The board did not at that stage appreciate that the applicants' proposed new freight service involved the shipment of livestock. On 21 November 1994 the Cap Canaille began to operate between Plymouth and Cherbourg and that service continues to this day (Associated British Ports' acceptance of it being, of course, the subject of the third challenge). It was in fact interrupted between 24 February and 9 March because of the high fees charged by ABP some £13,000 per day (albeit presently under statutory appeal to the Secretary of State), in contrast to Dover's charge of some £1,000 per day (or half that for regular operators). Dover has, of course, because of its situation, many operational and commercial advantages over Plymouth, the latter involving substantially longer journeys both by land and by sea (and rougher sea, crossings), journeys which inevitably subject the livestock itself to greater hardship.

On 29 November 1994 Mr Gilder first indicated to the Dover Harbour Board that the applicants' proposed new service involved the shipment of livestock. On 1 December there followed a board meeting, part of which was minuted as follows: ***764***

> **‘Potential new services**
>
> *(a) Livestock*
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> Mr Sloggett reports that a number of inquiries have been received in connection with the commencement of services transporting livestock for slaughter. Management's response has been actively to discourage rather than say no. Members note that as a high profile port, Dover would receive much attention from animal rights organisations in the event that the traffic was carried through Dover and that this would be highly detrimental to the port's other business. They confirm that the board should, for the time being, deploy every power at its disposal to prevent the passage of such traffic through Dover.
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> *(b) Contract Marine Carriers Ltd*
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> Mr. Sloggett reports that this Jersey-based company has made a formal but inadequate application. It is believed that the backers of the company are a group of hauliers. He confirms that he has advised the company that the board would be prepared to consider an application.’

The significance of this second paragraph will later emerge.

On 5 January 1995 the applicants wrote to the board's general manager, Mr Krayenbrink, answering the board's questions of 14 November and seeking permission to berth the Cap Canaille on 6 January to load livestock vehicles for a test run with a view to instituting a regular service. Mr Krayenbrink's faxed response the same day candidly reflected the board's decision of 1 December.

> ‘Quite apart from a range of commercial and operational matters that would need to be cleared prior to any vessel providing a service at the port of Dover, my board has

> recently concluded that it will not currently facilitate the carriage of livestock (other than for breeding purposes etc.) from this port. My board is of the view that the resulting disruption from handling such traffic would be highly detrimental to the port's other business. For the time being my board will be deploying every power at its disposal to prevent the passage of such traffic through the harbour.'

On 6 January the board's Marine Operations Manager confirmed that it was possible for the Cap Canaille to berth at EDI (a ro-ro berth at Eastern Docks not ordinarily used by the regular operators), but the applicants' livestock cargo was refused.

Also on 6 January 1995 the board resolved—purportedly pursuant to statutory powers to which we shall return-that:

> '1. Dover Harbour and all lands of the Harbour Board are hereby appropriated for the shipping and unshipping of live animals but restricted to animals which are intended for breeding or other purposes than slaughter.
>
> 2. Nothing in this appropriation is to prejudice the existing policies of the board with regard to the other traffic of the board.'

In ensuing correspondence the board at first relied upon that appropriation (the 1995 appropriation). Then, on 30 January, their solicitors for the first time referred to an earlier appropriation made on 4 November 1992 (the 1992 appropriation) by which the board had resolved so far as material that the Eastern Docks (including EDI):

> '… be set aside and appropriated for the exclusive use of shipping operators from time to time approved by the board and operating regular cross-channel services from or to the port of Dover for the conveyance and temporary accommodation of passengers, vehicles and goods but subject to the following condition:
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> That notwithstanding the foregoing, other operators and classes of traffic not constituting cross— channel services may be permitted at the discretion of the ***765*** managing director and register to-use the facilities hereby appropriated, upon such terms and conditions and at such times as shall not disrupt any such class of cross-channel traffic as aforesaid.'

On 1 February 1995 the applicants were granted leave to move for judicial review at an inter partes hearing before Dyson J, the board at that stage referring to the January 1995 appropriation as a 'knockout point'.

On 2 February 1995, however, that appropriation was superseded by a fresh decision of the board which I should set out in full:

> '1. No change is made to the 1992 resolution [the 1992 appropriation] which remains in force.
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> 2. The temporary appropriation dated 6 January 1995 (amplified 18 January 1995 [as to the meaning of 'for slaughter']) is not renewed, but the emergency committee is granted power to make further appropriations ensuring that livestock admitted within the harbour is intended for purposes other than slaughter, should such appropriations become necessary for the good management of the harbour.
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> 3. The board resolves in accordance with s. 40 of the Harbours Act 1964 that the use of the harbour for loading, unloading, and shipping (whether by way of import, export, or coastal trade) of livestock at the harbour shall continue to be subject to the condition that the animals in question are intended for breeding or purposes other than slaughter. In this context an animal intended for slaughter is an animal destined for immediate slaughter or short term fattening prior to slaughter and includes calves intended for veal

production.

4. The emergency committee has power to revoke resolution (3) if any court of competent Jurisdiction declares it to be a nullity or the emergency committee considers it safe to do so, having regard to the need for free flow of the traffic and the need to ensure that lives and property are not put at risk.

5. If the emergency committee decides that livestock of all descriptions may be accepted, the committee may make approval subject to appropriate lawful indemnities being provided from operator(s).'

That resolution was not in fact sent to the applicants until 14 February. Meanwhile, on 6 February, the applicants sought the board's approval for a regular cross-channel ro-ro service between Dover and Dunkirk, pursuant to the 1992 appropriation. Following further unsatisfactory correspondence, that request was repeated on 7 March 1995. The board's answer on 8 March was, first that they were likely to defer consideration of any application for new services until after the conclusion of these proceedings, and second that; as their managing director, Mr Sloggett, had deposed in an affidavit sworn the previous day, 'he has come to the conclusion that EDI is not only unsuitable for scheduled services of any kind, but is in fact essential to be retained as a permanent back-up facility for the scheduled operators'. That was the very first suggestion of any possible berthing problem, with regard to the proposed Cap Canaille service; Mr Sloggett's first affidavit of 31 January had on the contrary referred only, to 'the need to protect the operations of the Port of Dover from potentially large scale disruption'. In Mr Sloggett's second affidavit of.7 March, however, appears this:

'The eastern docks ro-ro berths are so intensively scheduled that it is essential to provide a berth on hot standby [explained in argument to mean for unforeseen emergency use] at all times.'

Mr Sloggett returns to this in his third affidavit of 19 March and deposes:

'I have concluded that, in my opinion, No. 1 Berth is required for the time being with all its capacity as a back-up for the main scheduled ferry berths subject ***766*** consequently only to very limited exceptions. This advice has been accepted by my board.'

In short, it has now become clear that even were the board not entitled to refuse the applicants' trade on disruption grounds—the basis of their refusals thus far—they would be minded to do so on capacity grounds. The applicants accordingly seek not only to quash the board's past decisions, in particular that of 2 February, but also an injunction or at the very least declaratory relief so as to preclude the board now refusing on capacity grounds.

There is before the court an enormous amount of evidence directed to the capacity issue. We shall have to return to it later. Meanwhile we should indicate something of the board's stated concerns as to the disruption to be expected from accepting the applicants' trade. Mr Sloggett deposes that the port of Dover in general and eastern docks in particular handles large quantities of international traffic in a time-critical operation on a small site Which he suggests is readily susceptible to disruption. Acceptance of this trade would, he suggests, lead to,

'frequent, indeed perhaps continual, demonstrations which may at times become violent. Demonstrations, even of a peaceful nature, will disrupt port operations; substantial demonstrations will effectively bring the eastern docks to a standstill.'

He envisages disruption to the operation of the port both seaward and landside. Overall he suggests that the applicants' trade would be very damaging to the port's efficient and economic operation, to the detriment of all its users. Some of its usual traffic would go elsewhere because of fears of delay or attack, some through sympathy with the demonstrators and in protest against the trade. The loss of trade, Mr Sloggett says, would have substantial adverse economic effects on the port of Dover.

In support of Mr Sloggett's dire forebodings he exhibits a collection of press reports to demonstrate the likely extent of the problem. One such reads thus:

> ‘Clare Baumberg, Secretary of East Kent Animal Welfare, said: “If the Harbour board loses its case, we will be down at the docks straight away. We would want large scale demonstrating, but also peaceful. The trouble we have seen elsewhere in the country does not do the animal rights cause any good.”
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> John Callaghan, education director for Compassion in World Farming, said: “We will certainly not sit back and let animals flood through Dover again. We would want large numbers there, but we don't want people getting carried away, lying on the road.’”

With regard to these and similar articles the board have secured signed confirmation from those quoted (in this instance Ms Baumberg and Mr Callaghan) that such statements were accurate and representative of their organisation's views.

The board also exhibit letters from the Kent County Constabulary, respectively from Superintendent Lofthouse dated 3 March 1995 and Inspector Heritage (Forward Planning) dated 9 March 1995, setting out in considerable detail the history of past demonstrations and the risks which resumption of the trade would bring of future disruption to the free flow of traffic in the vicinity of the eastern docks. With regard to this as to other aspects of the board's evidence, our account must necessarily be highly selective: its own bundle numbers over 500 pages.

IV. Plymouth—the facts

Associated British Ports (ABP) are a body corporate created by the Transport Act 1981 as the statutory successors to the British Transport Docks Board. They are responsible for operating 22 ports in the UK including Millbay Docks at Plymouth

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Plymouth City Council bring this challenge pursuant to a resolution under s. 222 of the Local Government Act 1972; they ‘consider it expedient for the promotion or protection of the interests of the inhabitants of their area’. A number of objections to the challenge have been raised by the respondents and by Peter Gilder &=Sons Ltd (who are interveners in this application, as is Plymouth City Council in the Dover application) on grounds of delay, non-disclosure and the suggested invalidity of the s. 222 resolution. These, however, we have not found it necessary to consider.

The concerns now said to underlie the council's s. 222 resolution are these/First, that the increased policing required at the docks has strained police resources in other areas of the city, which may accordingly become more susceptible to crime. Second, that the economy of the city and its reputation for tourism is being damaged by the adverse publicity attracted by this trade so that its inhabitants are suffering direct or indirect financial detriment. Third, that the protests subject those living near the docks to noise, nuisance and disturbance and also attract,

> ‘an undesirable element of protesters who have used the protests as a vehicle to confront the various authorities as opposed to the vast majority of peaceful protesters which, again, serves to tarnish the reputation of the city as a result of the adverse publicity through the press, local and national television coverage.’

I quote from the City's solicitor's affidavit.

A letter dated 8 March 1995 from the Assistant Chief Constable of the Devon and Cornwall Constabulary is adduced in support of these concerns. It records that since the beginning of the operation there have been a total of 29 sailings from Millbay Docks. Fifty-five people have been arrested for offences including obstruction and public order. On 2 February a chief inspector suffered a head injury requiring sutures and a constable required hospital treatment for a serious arm injury. Over 20,000 police man-hours have been engaged in policing the docks protest; this has left the police ‘hard-pressed to meet our charter response times in relation to emergency

calls and on many occasions [we] have had to decline to attend routine or non-emergency requests for help'. Violent infiltrators are said to use the cover of the demonstrations to attack the police. 'The majority of protesters are now breaking the law by sitting on and obstructing the highway.'

Against that developing background the council wrote to ABP on 10 January 1995, referring to s. 9 of the Transport Act 1981 and questioning ABP's decision to allow the docks to be used for this trade. On 23 January ABP replied that by virtue of s. 33 of the Harbours, Docks and-Piers Clauses Act 1847 they had 'no option but to allow the port to be used for any lawful trade, including the export of food animals'. ABP.-they said, 'cannot make a decision not to handle food animals either on commercial grounds or bowing to public pressure'. On 14 February 1995 the council wrote again, suggesting that ABP had a discretion to withdraw port facilities in the circumstances then prevailing and referring also to s. 40 of the Harbours Act 1964. The substantial police presence, they said, 'has resulted in diminishing standards of policing for the rest of the city and, indeed, the two counties, with consequent implications for public safety and security'. They threatened judicial review if ABP continued to deny having a discretion to ban the trade. The last of this series of letters was ABP's response dated 15 February reasserting that s. 33 'obliges the harbour undertakings to allow the harbour to be used, subject to payment of the rates, provided that the harbour is physically able to handle the ship'. They expressed surprise that the council 'should consider judicial review of ABP's decision to comply with the law'.

We turn now to the respective statutory regimes under which each port authority operates. This is said in each case-to be relevant to the question whether the authority ***768** enjoys any discretion to refuse to accept lawful trade in Dover it also goes to the board's entitlement to maintain reserve capacity.

V. Coventry—the law

Coventry City Council maintains Coventry Airport. Section 30(1) of the Civil Aviation Act 1982 provides:

> 'A local authority … may …
>
> (a) with the consent of the Secretary of State and subject to such conditions as he may impose, establish and maintain aerodromes …'

Section 60 of the 1982 Act empowers Her Majesty by Order in Council to implement the Chicago Convention by providing inter alia 'for the licensing, inspection and regulation of aerodromes [and] for access to aerodromes'—see s. 60(3)(c).

The order currently in force is the Air Navigation Order 1989. Under the surtitle 'Licensing of aerodromes', art. 78 provides so far as material:

> '(1) The authority shall grant to any person applying therefor a licence in respect of any aerodrome in the United Kingdom if it is satisfied that:
>
> (a) that person is competent, having regard to his previous conduct and experience, his equipment, organisation, staff, maintenance and other arrangements, to secure that the aerodrome … [is] safe for use by aircraft;
>
> (b) the aerodrome is safe for use by aircraft, having regard in particular, to the physical characteristics of the aerodrome and of its surroundings …
>
> (3) …if the applicant so requests or if the authority considers that an aerodrome should be available for the take-off or landing of aircraft to all persons on equal terms and

> conditions, it may grant a licence (in this Order referred to as ‘a licence for public use’) which shall be subject to the condition that the aerodrome shall at all times when it is available for the take-off or landing of aircraft be so available to all persons on equal terms and conditions …
>
> (6) An aerodrome licence holder shall take all reasonable steps to secure that the aerodrome … [is] safe at all times for use by aircraft …’

By licence dated 28 May 1993—which is provided to remain in force until it is varied, suspended or revoked the Civil Aviation Authority in the exercise of its art. 78 power has licensed Coventry Airport:

> ‘as an aerodrome to be used as a place of take-off and landing of aircraft engaged in flights for the purpose of the public transport of passengers or for the purpose of instruction in flying subject to the following conditions:
>
> 1. The aerodrome is licensed for public use and shall at all times when it is available for the take-off or landing of aircraft be so available to all persons on equal terms and conditions …
>
> …
>
> 8. Without prejudice to condition 1, nothing in this licence shall be taken to confer on any person the right to use the aerodrome without the consent of the licensee.’

The reference in the licence to ‘the public transport of passengers or for the purpose of instruction in flying’ appears to be mistaken; inappropriately it echoes the surtitle not to art. 78 but to art. 76, ‘Aerodromes—public transport of passengers and instruction in flying’. The City Council accept, however, that the licence is an art. 78(3) ‘licence for public use’, and that it covers cargo transport as well as passenger transport.

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The requirement that the airport, when available, is ‘available to all persons on equal terms and conditions’ precludes the respondents, so the applicants contend, from discriminating against them: the airport must accept all lawful trade within its capacity. Not so, argue the respondents: discrimination is, only barred as-between customers engaged in similar businesses. Where, as here, the council would refuse their consent to any customer wishing to carry live animals, there is, they submit, no breach of the licence conditions. In the result, they contend, they are entitled to refuse consent provided only and always that their decision is reasonable in the public law sense and not, therefore, vulnerable to *Wednesbury* challenge. Mr Plender QC for CWF (who intervene in Coventry and Dover under the provisions of O.53, r. 9(1) as persons desiring to be heard in opposition to the application), supports Mr Isaacs QC for the respondent council in that argument.

For reasons to which we will come, we would hold the respondents' decision unlawful even if Mr Isaacs and Mr Plender were right in their contention that the council enjoy a general discretion to refuse a given trade even, that is, if the licence conditionsplaced them under no particular constraint in this regard.

In our judgment, however, the respondents' argument is unsustainable. The reference to ‘all persons on equal terms and conditions’ means what it says: it cannot be construed as ‘all persons who do not carry live animals’, nor as ‘all persons on condition that they do not carry live animals’. So to construe a public use licence would, in our judgment, destroy its plainly intended effect. Condition 8 cannot avail the respondents: clearly there needs to be provision for the licensee's consent but that does not qualify condition 1. Nor are We moved by the consideration that a public use licence can be granted to a private body, as apparently at Prestwick Airport; if such a body cannot meet its responsibilities, then its licence should be revoked.

We readily accept Mr Plender's argument that there could be ho requirement on an airport to extend its facilities to accommodate a particular trade—for example lairage to allow the. carriage

of live animals. The argument has, however, no application in the present case: there is no doubting Coventry's capacity and facilities—and clearly the respondents cannot in this connection invoke the inadequacies of their existing perimeter fencing.

VI. Dover—the law

Section 33 of the Harbours, Docks and Piers Clauses Act 1847 (hereafter s. 33) provides:

> 'Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers.'

Section 33 is applied to the Port of Dover by s. 3(2) of the Dover Harbour Consolidation Act 1954. Section 40(1) of the Harbours Act 1964 (hereafter s. 40) provides:

> 'A harbour authority shall have power to make the use of services and facilities provided by them at a harbour (which, in the exercise and performance of statutory powers and duties, they are engaged in improving, maintaining or managing) subject to such terms and conditions as they think fit except with respect to charges as to which their discretion is limited by a statutory provision …'(Brackets added for ease of understanding)

Section 14 of the Harbours Act 1964 provides that:

> '… there may, in relation to a harbour which is being improved, maintained or managed by a harbour authority in the exercise and performance of statutory ***770*** powers and duties, be made by the appropriate Minister an order (in this Act referred to as a "harbour revision order") for achieving all or any of the objects specified in Schedule 2 to this Act.'

Paragraph 17 of Sch. 2 includes amongst the specified objects to be achieved anything 'which will conduce to the efficient functioning of the harbour'.

The Dover Harbour Revision Order 1969 was made under s. 14. Article 3 provides:

> '(1) Notwithstanding anything in any statutory provision of local application the board may from time to time for the purpose of or in connection with the management of the Harbour set apart and appropriate any lands, works, buildings, machinery, equipment or other property of the board for the exclusive, partial or preferential use and accommodation of any particular trade, person, vessel or class of vessels, or goods, subject to the payment of such charges and subject to such terms, conditions and regulations as the board may think fit.
>
> (2) No person or vessel shall make use of any lands, works, buildings, machinery, equipment or other property so set apart or appropriated without the consent of the harbour master or other duly authorised officer of the board …'

As stated, the board first sought to justify their refusal of the applicants' trade by reference to the 1995 appropriation and then in reliance on para. 3 of the resolution of 2 February 1995—purportedly in accordance with s. 40.

Mr Pannick QC for the board now concedes—rightly in our judgment that the 1995 appropriation was invalid: a naked exclusion of that character is plainly outside the scope of the power conferred by art. 3 of the 1969 revision order. And he concedes too that were the board in future

to accept the applicants' trade it could not lawfully require indemnities from them—the proposal in para. 5 of the resolution of 2 February 1995. Furthermore, whilst not actually abandoning reliance on s. 40, Mr Pannick's argument in justification of a continuing ban now fixes instead almost entirely upon the 1992 appropriation. This, of course, unlike the s. 40 decision, can arguably be invoked to support the board's present intention to ban the applicants' trade on two grounds rather than just one: insufficient capacity as well as disruption.

As foreshadowed by what we have already said in *Coventry* , in our judgment the board's decision to bar the applicants' trade on disruption grounds would be unlawful even assuming a general discretion in the board to discriminate between those seeking to use the docks. But we must nevertheless deal briefly with the s. 40 argument (which arises also in Plymouth) before turning to the 1992 appropriation—which requires fuller consideration not least because of its relevance to the capacity issue. Both, however, first require some reference to the scope of s. 33, which in our judgment is central to a proper understanding of the port authorities' responsibilities at both Dover and Plymouth.

Section 33

This section has been considered in a great number of cases—amongst them Alton v Stephen (1876) 1 App Cas 456, *British Trawlers Federation v LNER [1933] 2 KB 14 (CA)*; *[1934] AC 279 (HL)*, *J H Pigott & Son v Docks and Inland Waterways Executive [1953] 1 QB 338*, *Garland & Flexman v Wisbech Corporation [1962] 1 QB 151*, Thoresen Car Ferries Ltd v Weymouth Portland Borough Council [1977] 2 Ll Rep 614 and *Peterhead Towage Services Ltd v Peterhead Bay Authority 1992 SLT 593*. For present purposes let just these three short citations suffice:

> ‘The “shipper” of goods has a right to bring them on to the dock premises, and through those premises to the ship on which they are shipped … the dock company can reasonably regulate the order and place of shipping so long as they do not destroy or unreasonably limit the shipper's right to ship.’

Per Scrutton LJ in British Trawlers Federation Ltd v LNER [1933] 2 QB 14 at p. 30. ***771**

> ‘That section [s. 33] imposes a duty to keep the harbour open. Any operator is entitled to inquire whether a berth will in fact be free at a particular time in the future. If the harbour authority truly states that the berth will be occupied, there is no breach of the duty which is to keep the harbour open subject to the rights of others to use it.’

Per Donaldson J in Thoresen Car Ferries Ltd [1977] 2 Ll Rep 614 at p. 620.

> ‘in essence the provision of harbour facilities was of the nature of a monopoly created by Parliament and under takers benefiting from the powers conferred were obliged to serve the public interest in certain specified ways.’

Per Lord Penrose in the Outer House in *Peterhead Towage Services 1992 SLT 593* at p. 595.

Section 40

Mr Pannick's argument in reliance upon s. 40 is essentially this. Section 33 is concerned only with access to the harbour rather than the provision there of services and facilities. The applicants' trade necessarily requires the use of such services and facilities as well as access. Section 40 it is which governs the use of harbour services and facilities and which entitles the harbour authority to make that use subject to whatever terms and conditions they think fit (except as to charges). The board are accordingly entitled to refuse the use of the required services and facilities to those engaged in a particular trade.

In our judgment this argument is misconceived. Section 40 is subservient to s. 33 and may not be invoked inconsistently with the harbour authority's overriding duty under s. 33. It cannot be used as a backdoor means of closing the harbour to those who have a right of access under s. 33. That would be to exercise the s. 40 discretion for a clearly improper purpose.

The 1992 appropriation

There can be no doubt that an appropriation properly made under art. 3(1) of the 1969 harbour order enables the board to derogate from the full width of its obligation under s. 33: it can, as art. 3 provides, appropriate some or all of its harbour for the exclusive (or preferential) use of inter alia 'any particular trade'.

Mr Pannick contends that the 1992 appropriation did just that: it appropriated the eastern docks for the exclusive use of shipping operators who:

(1) operate regular cross-channel services, and

(2) are approved by the board, subject to the board retaining a residual discretion to allow other operators to use the docks 'at such times as shall not disrupt' the regular operators.

The board accordingly now enjoy a wide discretion as to who shall be allowed to use their docks—a discretion both as to the regular operators who wish to do so and who need the board's approval, and under their managing director's residual discretionary power.

Mr Vaughan QC for the applicants and Mr Haddon-Cave for the National Farmers Union (NFU) (who intervene in Dover and Plymouth under the provisions of O. 53, r. 5(3) as persons directly affected) advance two main arguments in response.

First is that the applicants' proposed operation of the Cap Canaille would fall squarely within the 1992 appropriation as a regular cross-channel service. The appropriation does not stipulate that the service shall be scheduled—merely regular: And the requirement for the board's approval must refer to the applicant company rather than its service; it must, in other words, be confined to consideration of its financial standing and status (the first two matters raised by the board in their fax of 14 November 1994), rather than ***772*** its proposed trade. The appropriation must be narrowly construed to derogate as little as possible from the freedom enshrined in s. 33. Where, therefore, the docks are appropriated to the use of regular operators (the 'particular trade' within art. 3(1)), all such operators, whether existing or intending, must then be treated equally.

The applicants' second argument is that if that is not so—if, in short, the board are right in their contentions—then the appropriation is ultra vires art. 3 for the very reason that it confers on the board and its managing director a wide continuing discretion as to who may be allowed to use their port. Article 3(1) clearly requires the 'particular trade' being favoured to be specified in the appropriation. That is inconsistent with the board's reserving to itself a general discretion in the matter. And equally clearly the board cannot impose 'terms, conditions and regulations' so as to qualify the nature of the particular trade specified.

We prefer the first of the applicants' arguments (although the second would equally suit their purpose). It follows that in our judgment, albeit the 1992 appropriation may properly be regarded as valid, the board are not entitled to invoke it to exclude the applicants' proposed regular cross-channel service to Dunkirk. Rather the applicants, and indeed any other person proposing a similar regular operation, are entitled (subject only to approval as to status) to be treated similarly to the existing ferry operators.

There is, in short, in our judgment no discretion in the board to refuse the applicants' trade on any ground whatever—neither that of disruption (assuming, contrary to what we shall hold, that the fear of unlawful disruption could in any event properly found a lawful exercise of discretion to refuse the applicants' trade), nor that of insufficient capacity; if a berth is in fact free when the applicants seek it, then the board must allow them to use it: s. 33 so dictates.

VII. Dover — capacity

Lest, however, we are wrong in that conclusion, or lest indeed the board—who do not hide their intent to bar this trade if they can—propose now a fresh appropriation designed more specifically

to favour the existing scheduled ferry operators to the exclusion of others like these applicants, we should briefly state our conclusions both as to the propriety of an appropriation intended to create a reserve capacity in the port, and also as to the present need for EDI to be maintained as a ‘hot standby’.

In general terms we see no reason why the board should not make an appropriation intended to create a reserve capacity, provided always that this is genuinely calculated to ‘conduce to the efficient functioning of the harbour’ (para. 17 of Sch. 2 to the 1964 Act) and consistent with what Mr Sloggett deposes: that the board's ‘principal aim is to process as efficiently and helpfully as possible the maximum amount of traffic now and for as long as possible in the future’. We would add only that if it were intended to allow some substantial rather than exceptional use of the docks by others than the specified ‘particular trade’, then rather than appropriating the docks exclusively to that trade and reserving a residual discretion as to use by others, it would be more correct to appropriate merely for ‘preferential use’.

As to the suggested present need to maintain EDI as a ‘hot standby’, we feel bound to express our profound scepticism of the board's case. We said we would return to the evidence upon this issue and we now do so.

On 16 September 1992 the board decided that EDI should be retained for standby use for the ferry services scheduled to use the other berths. They depose to a subsequent policy of not scheduling services into No. 1 berth so as to ensure adequate spare capacity if one of the five major berths (No. 4 having been taken permanently out of service as unsuitable) sustains serious damage or mechanical breakdown or to assist when schedules are disrupted.

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Mr Sloggett deposes that between 3 October 1992 and 13 February 1995 there were 220 occasions when EDI was used for ferries (including 3.6 occasions in respect of non-Dover-based ferries). The exhibited documents show, however, that only 30 of those occasions were in 1994 and 4 in January 1995. We note too the board's minute of 6 October 1994 recording that:

> ‘There must be significant likelihood that following the 1995 summer season (and assuming that Eurotunnel has properly entered the market by that time) there will be a reduction in scheduled services.’

There is, moreover, evidence from Mr Price, chief executive of Contract Marine Carriers Ltd (CMC) (applicants in a similar judicial review application against the board presently awaiting the outcome of these applications) which plainly casts some doubt on the board's good faith. On 15 November 1994 Mr Price had a meeting with Mr Sloggett and Mr Krayenbrink to discuss CMC's request to commence a scheduled ferry service from Dover to Boulogne. It is Mr Price's evidence that Mr Sloggett accepted that the port had capacity to handle such a service. That, moreover, appears to be confirmed by para. (b) of the minute of the board's meeting on I December, already quoted but part of which for convenience we now repeat:

> ‘[Mr. Sloggett] confirms that he has advised [CMC] that the board would be prepared to consider an application’.

Following that, indeed, Mr Sloggett went so far as to introduce CMC to the Boulogne Chamber of Commerce. It was only when Mr Sloggett discovered that CMC too were intent on carrying livestock that the board's attitude changed dramatically. Mr Sloggett's letter to Mr Price dated 9 January 1995 ended thus:

> ‘Your letter is all about livestock. Unless you can assure us that your proposed service is not based upon an assumption that livestock for slaughter may be carried, there is little point in continuing our discussions at this time.’

Against that background, Mr Sloggett's response to Mr Price's evidence makes decidedly

unpersuasive reading:

> 'We agreed with CMC that No. 1 berth was likely to. be the only practicable berth for the service it had in mind. However, whether the board would be prepared to make it available was then, and is, a completely different question from the carriage of livestock for slaughter which, in respect of all potential applicants, remains unresolved.'

It is, in short, difficult to accept Mr Sloggett's contention that EDI 'is required with all its capacity as a back-up for the main scheduled ferry, berths' and that this policy has nothing to do with,

> 'the board's fears (or mine) concerning the likely effects on the port's business of accepting certain categories of livestock at this time. It derives directly from existing ferries' berthing demands…'

It was, we repeat, not until 7 March 1995 that any suggestion arose that the applicants' proposed service needing, we should note, a berth for at most an hour or two a day (or night)—must in any event be refused on capacity grounds, and that despite the boards's having by then deployed every legal stratagem in their attempts to refuse the trade on disruption grounds. We are conscious of not having heard Mr Sloggett or Mr Krayenbrink cross-examined upon their lengthy affidavits (any more than the applicants have had the advantage of discovery).

We nevertheless think it right to say-this, that it is difficult to resist the conclusion that the board's present attitude towards capacity, whether consciously or not, owes something to their continuing anxiety to refuse this trade. Be that as it may we reject the ***774*** board's contention that there is no present capacity to handle the livestock trade. Even had we not concluded that under the existing appropriation the board remain subject to s. 33 with regard to these applicants, so as to be unable to follow a policy of allocating EDI to spare capacity to defeat their claim to a berth, we would accordingly in any event have been prepared to grant declaratory or even injunctive relief to pre-empt any continuing refusal on that basis.

VIII. Plymouth — the law

Section 33 is applied to Millbay Docks by s. 56 of the Great Western Railway Act 1892.

The City Council contend, however, that ABP have a discretion as to which trades to accept at the docks which arises under three other statutory provisions.

One is s. 40 of the Harbours Act 1964 applied to ABP by Sch. 4, Pt. 1, para. 1(2)(a) of the Transport Act 1981. That argument we have already rejected in Dover.

The second is s. 9 of the 1981 Act which so far as material provides:

> '(1) It is the duty of Associated British Ports to provide port facilities at its harbours to such extent as it may think expedient.
>
> (4) This section does not impose any form of duty or liability enforceable, either directly or indirectly, by proceedings before any court.'

Mr Gordon QC contends that s. 9 entitles ABP to decline facilities which it does not think it expedient to provide. In our judgment this argument too is misconceived. Section 9 imposes on ABP a (non-justiciable) duty to provide port facilities, the nature and extent of that provision being within its discretion. It does *not* confer upon the authority a discretion to withhold those facilities from particular users so as to destroy their ability to use the port and thereby derogate from their s. 33 rights. It could, indeed, hardly be less aptly drawn for such purpose.

In so holding, we overlook neither the width of the definition of 'port facilities' contained in s. 14(3) of the 1981 Act, nor Mr Gordon's elaborate submissions (whether right or wrong to our mind

matters not) that the 1981 Act is a 'Special Act' within the meaning of the 1847 Act or, indeed, a *lex specialis* .

It would, as Mr Field QC for ABP submits, be a remarkable thing if by enacting s. 9, Parliament intended suddenly in 1981 to release ABP's ports (handling some 25 per cent of all UK traffic) from the effect of s. 33. In our judgment s. 9 does no such thing.

The third statutory provision which Mr Gordon contends gives rise to a discretion in ABP to ban the livestock trade from their docks is s. 50 of the British Transport Docks Act 1966—an argument first canvassed some days into the hearing. Section 50 provides:

> '(1) … the board may from time to time set apart and appropriate any lands, docks, quays, wharves, jetties, piers, berths, floats, slipways, yards, warehouses, buildings, sheds, landing stages, tips, staithes, cranes, pipeways, machinery, equipment; works and conveniences forming part of any of the board's harbours for the exclusive, partial or preferential use and accommodation of any particular trade, authority, body, company, person, vessel or class of vessels or goods subject to the payment of such rents and subject to such terms, conditions and regulations as the board may think fit.'

Its similarity to art. 3(1) of the Dover Harbour Revision Order 1969 is obvious.

ABP have never in fact exercised this power of appropriation under s. 50. It is, however, Mr Gordon's contention first that they could do so in such a way as to achieve a ban against the livestock trade, and second that they must accordingly recognise and exercise their discretion whether or not to do so. Asked to suggest a form of appropriation ***775*** apt to achieve the proposed ban, Mr Gordon produced two alternative drafts, one virtually indistinguishable from Dover's 1995 appropriation that which Mr Pannick conceded to be invalid—the other essentially its mirror image, setting aside Millbay Docks,

> 'for any lawful trade subject to the conditions that such trade shall not, in the opinion of the harbourmaster, cause or be likely to Cause disruption either in the docks, or in the environs, thereof including in the City of Plymouth.'

That second draft is to our mind yet more objectionable than the first, introducing into the appropriation a wholly unacceptable element of subjectivity and uncertainty. Nor can we accept Mr Gordon's submission that ABP could properly meet that difficulty by listing all the lawful trades (save for livestock) which they presently handle—in our view as transparent an exclusionary device as the first variant.

Clearly s. 50, like art. 3 in Dover, affords the port authority its best (indeed only) opportunity to derogate from s. 33. As stated, however, it could never properly be deployed solely to ban one particular lawful trade, least of all on the ground that handling that trade is likely to cause unlawful disruption.

IX. The rule of law

English law is unsurprisingly replete with examples of ringing judicial dicta vindicating the rule of law Amongst them are these:

> 'The law must be sensibly interpreted so as to give effect to the intentions of Parliament; and the police must see that it is enforced. The rule of law must prevail.'

Per Lord Denning MR in *R v Metropolitan Police Commissioner, ex parte Blackburn [1968] 2 QB 118* at p. 138.

> 'Any suggestion that a section of the community strongly holding one set of views is justified in banding together to disrupt the lawful activities of a section that does not hold

> the same views so strongly or which holds different views cannot be tolerated and must unhesitatingly be rejected by the courts.'

Per Sachs LJ in R v Caird (1970) 54 Grim App R 499 at p. 506.

> 'There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself.'

Per Lord Bridge in R v Horseferry Road Magistrates' Court, ex parte Bennett [1994] 1 AC 42 at p.67.

Those cases, however, were all decided in very different contexts to the present. So too was *R v Immigration Appeal Tribunal, ex parte Bakhtaur Singh [1986] 1 WLR 910* where at p. 919 Lord Bridge said:

> 'Extraneous threats to instigate industrial action could only exert an improper pressure on the Secretary of State and if he allowed himself to be influenced by them, He would be taking into account wholly irrelevant considerations.'

Nor, despite the submissions of Sir Christopher Prout QC, have we found *Wheeler v Leicester City Council [1985] 1 AC 1054* a helpful case. It was there held that the Leicester Football Club 'could not be punished because the Club had done nothing wrong' (per Lord Templeman at p. 1079). But Coventry City Council here, unlike Leicester City Council there, are not intent on punishing Phoenix. That is not their purpose and different considerations accordingly apply.

Coventry and Plymouth City Councils and Dover Harbour board argue against any absolute principle that the rule of law must prevail. Unlawful disruptive activity cannot simply be ignored. Rather it will on occasion justify or even require the suspension of ****776*** lawful pursuits. An obvious illustration is the closure of an airport following a bomb threat. The question therefore becomes: what are the permissible limits within which a public authority may properly respond to unlawful action? We have been shown six authorities which in their different ways touch on aspects of this question.

The facts in *Duncan v Jones [1936] 1 KB 218* were that Mrs Duncan was about to address a number of people in the street when Inspector Jones, reasonably apprehending that this would cause a breach of the peace, forbade her to do so. She persisted in trying to hold the meeting and obstructed the officer in his attempts to prevent it. The divisional court upheld her conviction for wilfully obstructing the officer in the execution of his duty.

Duncan v Jones was the only authority cited in *R v University of Liverpool, ex parte Caesar-Gordon [1991] 1 QB 124*. The divisional court there held that the University, pursuant to its duty under s. 43(1) of the Education (No. 2) Act 1986 to 'take such steps as are reasonably practicable to ensure freedom of speech', were not entitled to take into account threats of public disorder outside the University precincts by persons not within its control although 'it may be that no objection could have been taken' had they banned meetings solely because of the risk of disorder on university premises and among university members. Both sides seek to draw support from this decision. As it seems to us, however, neither it nor *Duncan v Jones* involved any very penetrating analysis of the legal principles in play and both may be regarded as dealing essentially with short-term public order problems.

Webster v Southwark London Borough Council [1983] 1 QB 698 concerned a local authority's duty to keep a list of meeting rooms available for the holding of election meetings and a candidate's entitlement to use them pursuant to s. 82(1) of the Representation of the People Act 1949:

> 'A candidate at a Parliamentary Election shall be entitled for the purpose of holding public meetings in furtherance of his candidature to the use … of …
>
> (b) any [such] meeting room …'

At p. 702 Forbes J said:

> ‘This makes it clear that the duty to make such rooms available is mandatory and that there is no discretion in the local authority to refuse to do so. They may believe that a meeting held by the candidate [there National Front] may provoke a breach of the peace, or destruction of council property, or they may merely dislike intensely the policies which they believe the candidate will put forward. They may feel that a particular political party should not be allowed to exist. But until Parliament proscribes that party it is not for a local authority to do so, or attempt to do so, not even, I may say, if a high proportion of the population might agree with them. Whether they are tempted to refuse for good or bad reasons makes no difference: they are simply not entitled to refuse. If a candidate in fact breaks any of the constraints on free speech or a breach of the peace is threatened, then other agencies are there to deal with those matters. The local authority has no discretion to refuse.’

Although *Duncan v Jones* was not cited to the judge, its effect is perhaps reflected in that latter passage.

In John Fairfax Ltd v Australian Postal Commission [1977] 2 NSWLR 124 the Supreme Court of New South Wales was concerned with the Postal Commission's breach of its statutory obligation to deliver post to the Fairfax group of companies. The commission's refusal was in response to an unlawful threat by unions engaged in industrial dispute with the companies that they would otherwise bring the whole New South Wales mail ***777*** service to a standstill. Expressing the court's majority view that the companies were in those circumstances entitled to injunctive relief, Moffitt P at p. 136C said:

> ‘If it were not so, the will of Parliament, by its statutes, would be varied or nullified by the dictates of external pressure groups. The occasion for the court to interfere is subject of course to its discretion, where declarations and injunctive: relief is involved.
>
> It may well be that a quite different question arises where there is not a termination of services, but some interruption of a temporary nature. Different questions may arise, if it is sought to enforce provision or continuation of a service in a particular way, or by a particular time, for example despite some emergencies such as natural causes such as a flood, or due to conduct, even criminal conduct of persons. While a court might appropriately interfere where there is … a complete denial of service, arguably a considerable discretion in relation to the manner and time of performance of the duty to provide postal service beyond court interference should be accorded.’

Dissenting, Mahoney JA at p. 148F put the issue thus:

> ‘The question is not whether, as matter of policy, a public authority should permit itself generally to be influenced and coerced in the manner of performing its public functions by threats of strikes, boycotts, lockouts, or the like. This court is neither required nor permitted to express an opinion upon such questions. The question is whether, given that the defendant has a duty in respect of the delivery of postal articles, that duty is qualified, or the non-performance of it is excused, by reference to industrial factors such as are here in question.’

Then, at p. 150A, before reaching his conclusion that the commission were not in breach of duty, Mahoney JA said:

> ‘What, short of physical impossibility, will excuse non performance of a statutory duty cannot be stated in general terms; it will be affected, inter alia, by the nature of the duty to be performed and the circumstances and extent of the nonperformance. In relation to the delivery of mail, ‘there are, I do not doubt, grounds upon which delivery may at least be suspended, even in a case such as the present, A threat by a lunatic or a terrorist could be sufficient,’ though it would not necessarily be so. The credibility of the threat,

> its immediacy, and the effect of it, would be relevant, but I do not think that it would be beyond the defendant's power to suspend delivery of mail to the plaintiffs in the event that, for example, a lunatic, with the desire of injuring the plaintiffs, threatened to blow up the General Post Office, unless there were such suspension. Nor, if this be accepted, do I doubt that suspension or refusal of performance could, in some circumstances, be justified by actual or threatened industrial action.'

The English authority perhaps most closely in point is *Meade v Haringey London Borough Council [1979] 1 WLR 637*. Haringey Council had closed their schools in response to pressure from trade unions. The question arose as to whether they were thereby in breach of their statutory duty under s. 8 of the Education Act 1944 to provide (and impliedly to keep open) such schools. Lord Denning MR said (at p. 648C):

> 'The trade unions had no right whatever to ask the borough council to close the schools. The borough council had no business whatever to agree to it. Instead they should have kept the schools open—and risked the consequences of the dispute escalating.'

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Eveleigh LJ, however, expressed this different view (at p. 650C):

> 'Provided the grounds which [the council) genuinely have for their action can be regarded as such a state of emergency—in other words, as just and reasonable excuse for the closure—the council would not be in breach of duty.'

-and then a little later (at p. 650H):

> 'In my opinion, it is a tenable view that the council were genuinely trying to do their best to see that the educational system would continue to function efficiently and in the best interests of the children in the manner most consistent with their achieving their duties under s. 8 of the Act by closing the schools for a while so as not to provoke a situation that might result in greater detriment to the children's education.'

Sir Stanley Rees at p. 654F said:

> 'That clear duty [to keep the schools open] is, of course, subject to the gloss that the defendants would not be guilty of a breach of their statutory duty if they could show that they had reasonable grounds for failing to keep the schools open and the court were objectively satisfied that the grounds were compelling and reasonable.'

The majority (Eveleigh LJ and Sir Stanley Rees) accordingly held that the question whether the council had breached their duty could only be determined at trial, although in the event there was hot to be such a trial since the schools were already open by the date of the interlocutory appeal.

The sixth and final case is *R v Chief Constable of Devon and Cornwall, ex parte Central Electricity Generating Board [1982] QB 458*. The Court of Appeal there was concerned with the board's attempt to survey land in Cornwall with a view to constructing a nuclear power station, a survey which was being impeded by the non-violent activities of protesting demonstrators. The police had thought themselves powerless to act. The Court of Appeal disagreed. Lord Denning MR said (at p. 470):

> '… I cannot share the view taken by the police. English law upholds to the full the right of people to demonstrate and to make their views known so long all is done peaceably and in good order: see *Hubbard v. Pitt [1976] Q.B. 142*. But the conduct of these

> demonstrators is not peaceful or in good order. By wilfully obstructing the operations of the board, they are deliberately breaking the law I go further. I think that the conduct of these people, their criminal obstruction, is itself a breach of the peace. There is a breach of the peace whenever a person who is lawfully carrying out his work is unlawfully and physically prevented by another from doing it. He is entitled by law peacefully to go on with his work on his lawful occasions …
>
> If I were wrong on this point, if this was here no breach of the peace nor apprehension of it, it would give a licence to every obstructor and every passive resister in the land. He would be able to cock a snook at the law as these groups have done. Public works of the greatest national importance could be held up indefinitely. This cannot be. The rule of law must prevail.'

Lawton LJ asked (at p. 472H):

> 'can those who disapprove of the exercise by a statutory body of statutory powers frustrate their exercise on private property by adopting unlawful means, not involving violence, such as lying down in front of moving vehicles, chaining themselves to equipment and sitting down where work has to be done. Such means are sometimes referred to as passive resistance. The answer is an emphatic "No". If it were otherwise, there would be no rule of law. Parliament decides who shall ***779*** have statutory powers and under what conditions and for what purpose they shall be used. Those who do not like what Parliament has done can protest, but they must do so in a lawful manner. What cannot be tolerated, and certainly not by the police, are protests which are not made in a lawful manner.'

Templeman LJ agreed, adding (at p. 48IB):

> 'The powers of the police and the board are adequate to ensure that the law prevails.
>
> But it is for the police and the board to cooperate and to decide upon and implement the most effective method of dealing with the obstructors.'

In the result the court refused, the board's application for an order of mandamus requiring the Chief Constable to instruct his officers to remove the objectors. No one contemplated, however, that the protesters should have their way. On the contrary, the case stands as another trenchant endorsement of the imperative requirements of the rule of law.

In our judgment, that body of authority, taken as a whole, provides singularly little support for the contentions advanced by those now seeking to bar the livestock trade from their ports.

If we are right in holding in each case that the port authority enjoys no discretion in the matter, then plainly there presently exists no such emergency as could begin to justify non-compliance with their duty to accept this lawful trade; they would have no defence of necessity. We speak of 'enjoying' a discretion but it is right to record ABP's cogent view that in truth any discretion here would be unwelcome: they have no desire to make judgments between legal trades (or shippers) according to whatever popular protest they may attract. Still less do they relish being dragged into court to justify their judgment.

Even, however, if the port authorities are to be regarded as having a discretion to determine which legal trades to handle, then in our judgment they could not properly exercise it here in favour of this ban. One thread runs consistently throughout all the case law: the recognition that public authorities must beware of surrendering to the dictates of unlawful pressure groups. The implications of such surrender for the rule of law can hardly be exaggerated. Of course, on occasion, a variation or even short-term suspension of services may be justified. As suggested in certain of the authorities, that may be a lawful response. But it is one thing to respond to unlawful threat's, quite another to submit to them—the difference, although perhaps difficult to define, will generally be easy to recognise. Tempting though it may sometimes be for public authorities to yield too readily to threats of disruption, they must expect the courts to review any such decision

with particular rigour—this is not an area where they can be permitted a wide measure of discretion. As when fundamental human rights are in play, the courts will adopt a more interventionist role.

Turning briefly to the present cases, all of them to our mind have one thing in common, a consideration that brings small credit to any of the three authorities concerned to bar this trade. None of them, it appears, gave the least thought to the awesome implications for the rule of law of doing what they propose. None considered the inevitable impact upon the future conduct of the protesters—that their ever more enthusiastic activities would concentrate upon an ever smaller number of outlets. None seems even to have considered the legitimate interests of all those whose livelihood depends upon this lawful trade. Rather each authority appears to have focused exclusively upon its own narrow self interest. Of course there are security and safety implications involved in handling this trade. But so too are there in refusing it, for the protests will not cease, rather they will intensify elsewhere.

Whilst not wishing to dwell long upon the interests of those presently suffering from the ban we should indicate something at least of the evidence put before us by the NFU. ***780** The only outlets for the livestock at present, apart from Coventry and Plymouth, are Brightlingsea and Shoreham. Dover's ban has been particularly damaging: calf exports, normally producing an income of £95m per annum, having fallen by 50 per cent; lamb exports, normally producing £80m per annum, by some 70 per cent. The effect on beef and lamb prices is for many (and not least Welsh hill-farmers) devastating. In short, unless the regular ports, including Dover in particular, are speedily opened to the livestock trade the farming community of England and Wales face major economic crisis with a large number of the country's 20,000 dairy farmers and 60,000 sheep and beef farmers eventually likely to go out of business.

We should now make one or two brief comments upon each of the three cases.

Coventry

In our judgment the council's resolution of 27 January to bar Phoenix was wholly disproportionate to the security risk presented at that time. Such a ban, be it noted, was not what the police were suggesting; rather they were urging the council to review and improve its own airside's security arrangements. Conspicuously absent from the public interest section of Mr Wood's report to the committee was any reference to the undesirability of surrendering to the protesters, i.e. to the rule of law implications. Nor are we persuaded that subsequent events have borne out the council's fear. We repeat, there could be no justification for this ban. Rather the injunctions were rightly granted.

Dover

The board's evidence is designed to emphasise the vulnerability of its site and operation, and the likelihood of uncontrollable future protest were the livestock trade to be resumed. The law, submits Mr Pannick, does not require the board to be heroic. No more it does. But having regard to its historic role as the dominant, if not near-monopoly port for livestock, it seems to us to have adopted a surprisingly narrow and short term view of its responsibilities; We repeat, even had the board a discretion as to what trades to handle, it could certainly not justify this present ban.

Plymouth

The City Council here, we have to say, are open to grave criticism. Indeed, we regard their challenge as barely respectable. Included in their original claim for relief was an order for mandamus requiring ABP to close Millbank Docks for the export of food animals; that, it was said, was ‘the only reasonable conduct open to the respondents’. Although that contention is no longer maintained and Mr Gordon seeks instead an altogether more modest declaration that ABP have a discretion in the matter which they should now be required to exercise, the original claim indicates something of their general attitude. It is indeed a remarkable and regrettable thing that a City Council are asking the court to order their own port authority in effect to surrender to mob rule.

X. The future

Given that this court is ordering these port authorities to accept the livestock trade, it seems appropriate to stress certain matters.

First, that the police have ample powers to control unlawful protest and ensure that the general public including other port users—are not intolerably affected by it. Certain of those powers were considered by the Court of Appeal in R v Chief Constable of Devon and Cornwall, ex parte CEGB. Others have since been added, notably by the Public Order Act 1986 and the Criminal Justice and Public Order Act 1994. If necessary, moreover, one police force may seek assistance from others. During the course of the hearing we allowed Mr Hockman QC to place before us a statement on behalf of the Chief Constable of the Kent Constabulary. It includes this: ***781***

> 'The Chief Constable wishes to assure the court (if indeed any such assurance is necessary) that (subject of course to the resources at his command) he will exercise all necessary powers to seek to prevent the commission of offences and to maintain the peace. By way of example … in order to ensure the free passage of vehicles containing live animals, circumstances may dictate that one or other or both of the approach roads to the port be temporarily closed, with other traffic being appropriately diverted. The Chief Constable has and must exercise the responsibility to decide upon the measures which are necessary in the prevailing , circumstances, and he expresses the hope that nothing in [the court's] decision will preclude him from doing so. He expects also to receive cooperation from those concerned in his efforts and hopes [the court] may feel able to endorse that expectation,'

We confirm that it will indeed be for the Chief Constable to decide upon the measures necessary and that all concerned should cooperate fully with him. Given the obvious importance of Dover to the national economy, both the police and the board may now be expected to use all their extensive powers to ensure that the port is not too severely disrupted in future.

We note with approval too this statement from the Commander of the Plymouth Police quoted in one of the many newspaper articles exhibited by the City Council:

> 'It is our legal obligation to make sure this lawful trade can continue while allowing those who want to demonstrate in a law abiding way to do so.'

That rightly recognises the importance also of the right of lawful demonstration which nothing in this judgment must be taken to qualify.

Secondly we would record this comment from Mr Plender on behalf of CWF;

> 'They make no apology for those who exercise, in conformity with the law, their right to protest against a trade which they regard as immoral; but yield to no one in their condemnation of violence.'

That puts it admirably. The statement already quoted from CWF's Education Officer, Mr Callaghan, that they would 'not sit back and let animals flood through Dover again' clearly overlooked the true legal position, that they cannot properly impede this trade. But overall we have no reason to doubt the entire respectability of this body and its intention to act solely within the law; we do indeed applaud its concern for animal welfare.

Thirdly, we would expect all those concerned in these demonstrations now to recognise both the limitations Upon their lawful right of protest and also the ultimate pointlessness of exceeding them: it is, as we have indicated, impossible for the various port authorities to submit to unlawful protest even if they wished to do so. It may, indeed, be doubted whether there remains any logic in protesting at the ports: the only body properly able to ban this lawful trade is Parliament itself unless indeed the Secretary of State is rightly advised that even that would be unlawful under Community law, in which event the only solution lies across the channel. Pending any change in the law, however, nothing surely could be more calculated to disaffect the wider public whose broad support all animal welfare bodies need, than that they should severely disrupt ordinary port

operations in future.

XI. Community law

Having regard to the conclusions we have reached under national law it is strictly unnecessary (with one exception) to say anything at all upon the many issues raised under Community law. But having heard extensive argument on this part of the case from several counsel expert in the field, and recognising that these issues may assume some ***782*** importance hereafter, in particular upon the damages claims which we understand the applicants in Coventry and Dover are intent upon pursuing, it may be helpful at least to identify the central questions arising (the distillation of which itself proved a difficult and time-consuming process), whilst making it plain that almost without exception we regard these as difficult questions, very far from acte claire, and questions which accordingly, consistently with R v Stock Exchange, ex parte Else [1993] BCC 11; [1993] QB 534, we would have regarded as appropriate for reference to the European Court of Justice had these challenges turned upon them.

The sole question of Community law which it *is* now necessary to decide is whether Mr Pannick is right in his contention that, whatever be the position under national law, art. 90(2) empowers the board to refuse to allow the transport of live animals for slaughter through Dover in order to promote free trade and competition for the vast majority of its customers and thereby enable it to continue to perform its primary functions. Article 90(2) of the Treaty provides:

> 'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.'

Mr Pannick submits that the Harbour Board is undoubtedly an undertaking entrusted with the operation of services of general economic interest. So be it. It by no means follows, however, that under this provision the board may take any step designed to protect it against obstructions to the performance of its task. On the contrary, what art. 90(2) stipulates is that the board must be open in particular to the rules on competition so long as that would not obstruct its operation. The case cited by Mr Pannick in support of his argument *Gemeente Almelo [1994] 2 CEC 281; [1994] ECRI-1445*—in our judgment helps him not at all.

Before indicating the other questions which were debated at length before us it is convenient first to set out the relevant parts of art. 34 and 36:

> ' 34
>
> (1) Quantitative restriction on exports, and all measures having equivalent effect, shall be prohibited between member states.
>
> 36 The provisions of articles 34 to 36 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; [or] the protection of health and life of … animals.'

The following questions arise:

> (1) Are the various port authorities liable in Community law outside the scope of art. 34 and 36 on the basis that their bans are measures taken in a field totally occupied by the common organisations—here the market in beef, sheep and pigs? If so, is such liability accorded a stricter test than that provided for under art. 34 and do authorities lose such protection as would otherwise be afforded to them under art. 36? Sir Christopher Prout and Mr Vaughan contend that this is indeed a totally 'occupied field' so that no restrictions of whatever character may be imposed against the free movement of goods save under the

Community system itself. Intra-Community trade is, they submit, governed exclusively by the base regulation and the supplemental directives which have harmonised the rules—see for example *Pigs Marketing Board v Redmond [1978] ECR 2347* and *Pigs & Bacon Commission [1979] ECR 2161*. The contrary argument is that even within an occupied field any liability must nevertheless be established under art. 34 subject to any defence available under art. 36. ***783**

(2) Are the port authorities, or any of them caught by art. 34 or are they subject only to the more favourable regime under art. 86 which requires proof of abuse of the dominant position? (Article 86 we should note, although initially invoked in Coventry and Dover, is not now pursued in these proceedings but rather reserved for future private law claims in damages.) Whether they are caught by art. 34 depends in part on whether they can properly be considered as emanations of the state—see *Foster v British Gas [1991] 2 AC 306* although in part too on the effect of the measures they take (which Mr Vaughan submits is more important even than the nature, of the body taking them) see Apple and Pear Development Council v Lewis [1983] ECR 4083 and *R v Royal Pharmaceutical Society of Great Britain [1989] 2 CMLR 751*.

(3) If all or any of the port authorities are caught by art. 34, have they breached it? More particularly is the test of such breach that set out in the line of cases represented by *Groenveld [1979] ECR 3409*, *Oebel [1981] ECR 1993*, Holdijck [1982] ECR 1299, and Commission v Belgium [1994] ECR 1-1019 (in which event the respondents powerfully contend that they are not in breach because their measures provide no particular advantage for national production or for the domestic market at the expense of the production or trade of another member state), or is the test to be applied rather that enshrined in *Bouhelier [1977] ECR 197*, Kass [1984] ECR 483 and *Jaderow [1989] ECR 4509*—essentially the *Dassonville [1974] ECR 837* test applicable under art. 30—in which case these measures probably breach it. Sir Christopher Prout and Mr Vaughan contend that the *Dassonville* approach applies because these bans are ‘distinctly applicable’ measures i.e. ones affecting exports only.; The contrary argument is that distinctly applicable measures or not, the *Groenveld* test applies and that in any event the measures are properly to be regarded as only indistinctly applicable, i.e. as affecting internal transits also.

(4) Even assuming the port authorities or any of them are both (a) caught by, and (b) in breach of, art. 34, have they:

(i) An art. 36 defence based on public order grounds—‘public security’ and ‘the protection of health and life of humans’, or

(ii) A free-standing, *Cassis de Dijon* defence under the mandatory requirements doctrine in the present instance their interest in securing the freedom to trade for the great majority of their customers?

This is the one other question besides art. 90(2) which in our judgment is acte claire in Community law. The argument for an art. 36 defence on public order grounds in the circumstances of these cases is founded on Cullet [1985] ECR 305. There the French government defended national rules fixing retail selling prices for fuel on grounds of public order

and security represented by the violent reactions to be anticipated on the part of retailers affected by unrestricted competition. The court dealt with the issue thus (atp.324):

> 'In that regard, it is sufficient to state that the French government has not shown that it would be unable, using the means at its disposal, to deal with the consequences which an amendment of the rules in question in accordance with the principles set out above would have upon public order and security.'.

We reject the argument that inferentially the court was there accepting that, had such evidence been available, the defence would have been made good. We prefer rather the view expressed by Wyatt & Dashwood's *European Community Law* (3rd edn) at p. 229 that 'the court [thereby] rejected this argument summarily'. The Advocate-General's opinion on the point is worth noting: ***784**

> 'the acceptance of civil disturbances as justification for encroachments on the free movement of goods would, as is apparent from experiences of the last year (and before, during the Franco-Italian "wine war") have unacceptably drastic—consequences. If road-blocks and other effective weapons of interest groups which feel threatened by the importation and sale at competitive prices of certain cheap products or services, or by immigrant workers or foreign businesses, were accepted as justification, the existence of the four fundamental freedoms of the Treaty could no longer be relied upon. Private interest groups would then, in the place of the Treaty and Community (and, within the limits laid down in the Treaty, national) institutions, determine the scope of those freedoms. In such cases, the concept of public policy requires, rather, effective action on the part of the authorities to deal with such disturbances.'

The reference there to the Franco-Italian wine war prompts a glance at the only other authority to our minds relevant to this issue, *Commission v France [1983] ECR 1013*. The Commission claimed that France had infringed its obligations by subjecting Italian wine at the frontier to delays considerably longer than necessary in order to impede the imports of bulk wine from Italy. The French government maintained that its measures were adopted to protect the health of consumers, but the court found those measures disproportionate and thus outside Article 36. Although the judgment records 'violent demonstrations against the importation … [and that] lorries loaded with wine were pillaged by wine-growers upon entering France', the public order defence under art. 36 was plainly not even thought worth advancing.

In short, we have not the least doubt that the self-same public policy/rule of law considerations which underlie the domestic law governing these cases must equally inform Community law so as to defeat any art. 36 defence. Nor in our judgment is there any room here for a *Cassis de Dijon* defence: that in reality is no more than a disguised reiteration of the impermissible public order defence under art. 36.

As stated, no animal welfare defence has been argued under art. 36. We express no view as to whether it could have succeeded.

Before leaving this part of the case we would just note that in Plymouth the City Council originally sought to rely on Community law to assert against ABP a freestanding obligation under art. 36 to close the docks on public order grounds. So far from persisting in that, the City Council now join with ABP in contending (rightly or wrongly) that the port authority are not, after all, amenable to Community law. In Coventry by contrast no Community law argument was initially advanced, being added only in emulation of the Dover challenge.

XII. Summary

It is perhaps convenient to end with a short summary of our conclusions:

> (1) None of these port authorities have any general discretion under their respective statutory regimes to distinguish between different lawful trades.

(2) Even if they had, they could not properly exercise it to ban the livestock trade on grounds that it will generate unlawful disruption.

(3) Those proposing a regular cross-channel service for the shipment of livestock come within Dover's 1992 appropriation and must accordingly be treated similarly to those already operating such services.

(4) Those three conclusions notwithstanding, each port authority is entitled to the exporter's fullest cooperation to minimise such disruption, and could properly in an emergency close its port on security grounds. ***785**

(5) On the evidence before this court Dover would not now be entitled to bar the livestock trade on capacity grounds.

(6) In these circumstances it is unnecessary to decide the position under Comniunity law—save only to the extent of rejecting as acte claire Dover's free-standing argument under art. 90(2).

(7) If ever there were cases demanding the court's intervention in support of the rule of law, these are they.

In the result, the applications in Coventry and Dover succeed, that in Plymouth fails. The airport and both docks must remain open to livestock trade.

(Order accordingly)

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