IN THE HOUSE OF LORDS
ON APPEAL FROM THE DIVISIONAL COURT
QUEEN'S BENCH DIVISION
HIGH COURT OF JUSTICE

ATTENTION OF: JOHN GARDNER

B E T W E E N :

FROM: SUE (MMDF)

STEVEN THOBURN
- and -
SUNDERLAND CITY COUNCIL

COLIN HUNT
- and -
LONDON BOROUGH OF HACKNEY
---
(1) JULIAN HARMAN
(2) JOHN DOVE
- and -
CORNWALL COUNTY COUNCIL

SUNDERLAND CITY COUNCIL'S
OBJECTIONS TO LEAVE

Counsel for Sunderland:
E.V.E.SHARPSTON QC
P.C.H.MOSER

Colin G. Langley
Director of Administration
Sunderland City Council
PO Box 100
Civic Centre
Sunderland SR2 7DN

Ref: LB/AG/59851/A

Tel.: 0191 553 1000

IN THE HOUSE OF LORDS

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ATTENTION OF JOHN GARDNER

BETWEEN:

FROM: **SUE (MMDF)** STEVEN THOBURN

(TEL/FAX 0191 565 7143)

and -

SUNDERLAND CITY COUNCIL

FAX NUMBER: **020 8649 8579**

COLIN HUNT

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- and -

STRICTLY PRIVATE AND CONFIDENTIAL

LONDON BOROUGH OF HACKNEY

PLEASE FIND ATTACHED SHARPSTON'S OBJECTIONS.

(1) JULIAN HARMAN

SUE

(2) JOHN DOVE

- and -

CORNWALL COUNTY COUNCIL

SUNDERLAND CITY COUNCIL'S OBJECTIONS TO LEAVE

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1. Sunderland City Council (the Respondent in the first appeal, hereinafter "the Respondents") set out these brief objections pursuant to the Appeal Committee's Order of 29th April 2002 inviting the Respondents to lodge objections. The Respondents humbly submit that leave should not be given to Mr. Thoburn, hereinafter "the Petitioner" (or indeed in any of the joined cases).

2. The Order under appeal, made by the Divisional Court on the 18th February 2002, held that certain statutory instruments made by the Secretary of State to regulate weights and measures to be used for trade had been made *intra vires* and were thus valid and lawful (para. 2 of the Order). Those statutory instruments are the ones listed in paragraph 36 of the

Divisional Court's judgment.

3. Permission for leave to appeal was sought by the Petitioner from the Divisional Court and refused, effectively on the basis that (despite the many interesting questions raised in legal argument) such an appeal **lacked all utility**, since the case had to fail on a simple point of legislative construction. Thus whilst the Divisional Court felt that one single point of general public importance could be certified (para. 9 of the Order), it held that an appeal was not warranted. In so doing, the Divisional Court rejected a long list of appeal points submitted by the Petitioner.[1]

No basis for Petitioner's central argument

4. One simple point derails any petition for leave by the Petitioner: *there is no legislative inconsistency for the purposes of the Petitioner's 'implied repeal' argument* (judgment, paras.50 to 52).

5. The Petitioner relies upon s.1(1) of the Weights and Measures Act 1985 as having *impliedly repealed* the European Communities Act 1972 (under which Act one of the two relevant statutory instruments was made) insofar as that Act would otherwise (i) constrain the Secretary of State to comply with the EC metrication directives, and (ii) enable the Secretary of State to use the *vires* conferred by s.2(2) of the ECA1972 to make secondary legislation in the field of weights and measures.[2] For ease of reference, the two statutory sections are set out in the judgment, at paras. 9 and 15 respectively.

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[1]Paragraph 13 of the Petition lists a number of points which the Petitioner describes as having been *not* certified in favour of Sunderland. For the avoidance of doubt, the successful Respondents did not seek leave to appeal nor certification of these (or of any other) points, so that such "non-certification" is not surprising.

[2]In fact, the Petitioner's full argument is that *any* amendments to post-1972 legislation made by statutory instrument under s.2(2) ECA1972 powers are *ultra vires* and void, because in enacting post-1972 legislation which is inconsistent (whether deliberately or through inadvertence) with EC law obligations, Parliament has, through the doctrine of implied repeal, removed the subject-matter of that legislation from the field of application of EC law and s.2(2) *vires* are therefore no longer available to the minister.

6. Self-evidently, in order for there to have been an implied repeal of an earlier statutory provision by a later statutory provision, there has to be *inconsistency* between the later and the earlier provision. The Divisional Court found, with respect correctly, at para. 50, that "there is no *inconsistency* between a provision [s.2(2) ECA1972] conferring a Henry VIII power to amend future legislation, and the terms of any such future legislation". One might add, by analogy, that the s.2(2) ECA1972 provision can no more be impliedly inconsistent with later statutes affected by it than - say - the Interpretation Act is "impliedly inconsistent" with later statutes upon which it bears.

7. In amplification of the reasons given by the Divisional Court at paras.50-52, it should be emphasised that the WMA1985 is purely a consolidating statute.[3] It did not change the existing law, because a consolidation act is presumed *not* to change the law. *Erskine May*[4] cites the Joint Committee of both Houses of Parliament when it stated that (apart from tidying up errors of the past, removing ambiguities and generally introducing common sense) a consolidation act was:

> "...not to introduce any substantial change in the law or one that might be controversial - indeed, nothing that Parliament as a whole would wish to reserve for its consideration."

"Not changing the law" includes not impliedly repealing earlier general statutes (e.g. the ECA1972). The "implied repeal" of the ECA1972 which the Petitioner asserts operated by virtue of the WMA1985 would self-evidently constitute a highly controversial change and would assuredly have been a matter that Parliament as a whole would have wished to reserve for its consideration.

8. Thus, despite a possible note of caution sounded by the Divisional Court at paragraph 53 of the judgment, it is respectfully submitted that the reasoning in paragraphs 50 to 52 is pellucidly clear and leads inevitably to the conclusion that the Petitioner's case must fail.

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[3] The Weights and Measures Act 1963, as amended by the Units of Measurement Regulations 1976-1985, was consolidated with the Weights and Measures (etc) Act 1976 and the Weights and Measures Act 1979 as the Weights and Measures Act 1985 (the WMA1985).

[4] 22nd ed., Butterworths, 1997, at page 730

9. Finally, in addition to the grounds given by the Divisional Court, there was also no legislative inconsistency between s.1(1) WMA1985 and s.2(2) ECA1972 because at the time of its passing and entry into force in 1985 *Section 1 of the WMA1985 was not in conflict with Community law.* The use of the pound avoirdupois for trade finally became unlawful, as a matter of Community law, only on 1 January 2000. In fact, it appears to the Respondents that the intention of Parliament and of the Secretary of State, making proper use of delegated powers, has at all times been to comply with EC requirements.

10. Nor is s.1(1) WMA1985 in conflict with Community law *today. Of course* it is legal to use the pound *as a measurement of mass* in the United Kingdom. It is only illegal to use the pound where the specific provisions of the WMA1985 themselves proscribe its use, e.g. "for trade" (otherwise than as a supplementary indication): see section 8 and Schedule 3, Part V in the current version of the WMA1985.

11. Thus, by enacting the WMA1985 Parliament was not "choosing" to enact legislation "contrary" to the law of the European Communities; but merely permitting the parallel use of imperial and metric units, as was *at that time* permitted under EC law. For that reason also, the issue of repeal (express or implied) of the ECA1972 Act by the enactment of the WMA1985 therefore simply does not arise.

12. In summary therefore, the Respondents submit that Petition falls at the first hurdle, as it depends totally on the 'implied repeal' argument, which fails because:

(1) there is no inconsistency between the general power of amendment in s.2(2) ECA1972 and the later provision providing for the use of certain weights and measures in s.1(1) WMA1985; and/or

(2) the WMA1985 is a consolidation act that is presumed not to change the law (and did not do so); and/or

(3) s.1(1) WMA1985 was not inconsistent with Community law (and thus s.2(2) ECA1972) when it was passed (nor, for the avoidance of doubt, is it inconsistent with it today).

"The Constitutional Point"

13. The bulk of the Petition dwells on 'constitutional' issues. These issues could only arise if (contrary to the above) it were somehow shown that s.1(1) WMA1985 had the effect for which the Petitioner contends. The Divisional Court's discussion of "constitutional statutes" only touches peripherally on the lawfulness or otherwise of the statutory instruments in issue in these proceedings. For present purposes the Respondents will restrict their remarks to the status of the ECA1972, and whether it can be impliedly repealed.

14. The Respondents respectfully submit that the answer to the question certified is "no, the ECA1972 cannot be impliedly repealed". Thus it is submitted that the result achieved by the answer given by the Divisional Court at para.69 of the judgment below is undeniably correct.

15. The *ratio* of the judgment of the learned judge giving the judgment, Lord Justice Laws, is to be found in paragraph 61. This *ratio* is in fact a straightforward application of consistent rulings of the House of Lords on how English statutes are to be interpreted in the field of Community law, as explained by Lord Bridge the first time the *Factortame* case came before the House of Lords in *R v Secretary of State for Transport, ex parte Factortame* [1990] 2 AC 85, at 140,[5] and as set out and followed by Laws LJ in paragraph 61 of the judgment below.

16. Thus it is respectfully submitted that the purpose and effect of the ruling below is simply an exercise in construing two statutes consistently with each other. The ECA1972 and the WMA1985 can and must be so construed. Implied repeal has no place in this context, as (in the absence of express words to the contrary) the later statute is treated as though it incorporates the relevant Community law provision. Whatever the academic import of the subsequent comments as to the "constitutional" nature of the ECA1972 as a "development of the common law" (judgment paras.62 to 64) balancing fundamental rights and the supremacy of Parliament, those comments are an elaboration of the underlying *ratio* rather

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[5]As followed and applied, e.g., in the unanimous ruling of the House of Lords in *ICI v Colmer* [1999] 1 WLR 2035 at 2041.

than the actual cornerstone of the judgment of Laws LJ.

17. In fact, Laws LJ reached his conclusion by a route only slightly different from that advanced by the Respondents, and which had found favour at first instance. The Respondents relied on the speech of Lord Bridge the second time that *Factortame* came before the House of Lords, having been to the European Court of Justice: *Factortame (No.2)* [1991] 1 AC 603 at 658 G-H (set out at para. 65 of the judgment below).[6] The argument runs that, for as long as the ECA1972 remains on the statute book, the primacy of Community law dictates that substantive provisions of Community law must in any event take precedence over any potentially conflicting national laws (such as, on the Petitioner's case, s.1(1) WMA1985). Thus implied repeal does not work in the context of European law because of the doctrine of primacy and supremacy (see the judgment at first instance herein, reported as *R v Thoburn* [2001] EuLR 587 at 610).

18. There are two competing theories of the relationship between Community law and the sovereignty of Parliament at play here[7], and each approach has in turn found favour at first instance and on appeal in this case. Whatever the correct approach however, this is of academic interest only. The outcome in each case remains the same: the statutory instruments which are the subject of the Order under appeal remain *intra vires* and valid.

19. The further questions raised in the Petition whether certain statutes (including the ECA1972) should or should not be classed as "constitutional" are, with respect, irrelevant to the correctness of the Order below.

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[6]It is stated in the Petition at para.12 that it was "conceded" by counsel for the Respondents that the *Factortame* cases were "not binding". For the avoidance of doubt it was conceded only that *implied repeal* had not been argued in those cases, so that the cases were not expressly binding on that point. It was however argued that the House of Lords had impliedly accepted that the ECA1972 could not be impliedly repealed, and Laws LJ expressly so held at para.61 of the judgment.

[7]For commentaries on the rival approaches, see: P. Craig, "Sovereignty of the United Kingdom Parliament after *Factortame*" (1991) 11 YEL 221, and D. Anderson, "Shifting the Grundnorm" in *Judicial Review in European Law* (O'Keeffe, ed., Kluwer Law International, 2000).

20. In summary therefore:

(1) the judgment of the Divisional Court follows a consistent line of jurisprudence of the House of Lords on the interpretation of statutes in a European law context;

(2) even if that approach were wrong, the alternative approach would lead to the same result.

Conclusion

21. Appeals to the Appellate Committee being against Orders, not judgments, it is humbly submitted that this application for permission must fail in any event, as it lacks utility:

(1) Since the matter was decided on the question of *no legislative inconsistency*, which issue has not itself given rise to any questions certified as being of general public importance.

(2) Since the "constitutional point" arises peripherally as an expression of an application of House of Lords authority on statutory interpretation in Community law cases, which on any view must lead to the outcome that the statutory instruments concerned are *intra vires*.

ELEANOR SHARPSTON QC

PHILIP MOSER

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European Law Group
at 4 Paper Buildings
Temple
EC4Y 7EX
020 7643 5000