[COURT OF APPEAL]

BOURGOIN S.A. AND OTHERS v. MINISTRY OF AGRICULTURE, FISHERIES AND FOOD

[1982 L. No. 1077]

1984 July 16, 17, 18, 19, 20; Oct. 1 — Mann J.

1985 June 10, 11, 12, 13, 14, 17; July 29 — Oliver, Parker and Nourse L.JJ.

European Economic Community—Free competition—Quantitative restriction—Embargo on importation of turkeys from France—Embargo imposed in contravention of prohibition on quantitative import restrictions—Plaintiffs injured in consequence of embargo—Whether cause of action giving rise to remedy in damages—E.E.C. Treaty (Cmnd. 5179—II), art. 30

Statutory Power—Exercise—Misfeasance—Embargo on imports in contravention of Community law—Whether commission of innominate tort—Misfeasance in public office—Whether necessary to prove malice—Whether knowledge of absence of power and of likelihood of consequent injury sufficient

The plaintiffs, who were variously concerned in the production in France of frozen turkeys and turkey parts and in their sale and distribution within the United Kingdom, imported frozen turkeys and turkey parts into the United Kingdom under a general licence granted by the defendant. On 1 September 1981 the defendant, purporting to act in the interests of preventing the spread of Newcastle disease into the United Kingdom, revoked the licence and replaced it with one which had the effect of prohibiting the importation of turkeys and turkey parts from France. The European Court of Justice subsequently held that the withdrawal of the licence had constituted a contravention of article 30 of the E.E.C. Treaty[1] and had therefore been ultra vires, and in consequence of that decision the defendant issued a licence which permitted the resumption of such importation from November 1982. The plaintiffs claimed damages, alleging (by paragraph 23 of the amended statement of claim) that the withdrawal of the licence and the defendant's refusal subsequently to permit turkeys or turkey parts to be imported into the United Kingdom from France had caused the plaintiffs substantial loss and damage; (by paragraph 24) that such loss and damage had been caused by the defendant's breach of his statutory duty under article 30 and that such a breach sounded in damages; (by paragraph 25) that such loss and damage had been caused by the commission by the defendant of an innominate tort by so breaching article 30, or acting contrary to its provisions, as to cause them injury; and (by paragraph 26) that the withdrawal of the licence had amounted to misfeasance in public office, in that the defendant had exercised its power to withdraw the licence for a purpose which, as it had known, was contrary to article 30 and/or was calculated to, and did, damage unlawfully the plaintiffs and/or was not the purpose for which those powers had been conferred on the defendant.

[1] E.E.C. Treaty, art. 30: see post, p. 724F–G.

On the trial of the preliminary issue whether paragraphs 23 to 26 of the amended statement of claim disclosed any causes of action Mann J. gave judgment for the plaintiffs holding that, since article 30 of the Treaty had direct effect, it conferred on persons injured by a contravention, even though arising from a breach of statutory duty, a cause of action in damages and that the defendant was liable to the plaintiffs for any damage which had flowed from the withdrawal of the licence as pleaded in paragraphs 23 and 24, but, since the commission of an innominate tort as a formulation of a cause of action was obsolete, the claim in paragraphs 23 and 25 did not disclose any cause of action; that in order to establish the tort of misfeasance in public office it was not necessary to prove that the defendant had been actuated by malice towards the plaintiff or had acted in bad faith but it was sufficient to show that the officer knew that he had no power to do that which he did and that his action would injure the plaintiff and subsequently did injure him and that paragraphs 23 and 26 did disclose a cause of action.

On appeal by the defendant:—

Held, allowing the appeal in part (1) (Oliver L.J. dissenting), that article 30 of the E.E.C. Treaty created rights in individuals and obligations on member states but the Treaty had not created any procedures or remedies and had only provided that the national courts should afford no less favourable remedies than those available for the breach of a similar right in national law and should not so adapt procedures as to defeat the enforcement of such rights; that a breach of the article, as a breach under an English statute, would afford in English law a right to judicial review, a declaration as to invalidity of the measure constituting the breach and possibly an order of mandamus but would not give rise to a claim for damages since it was to be regarded as of the nature of making of an invalid order or one in excess of power (post, pp. 784H—785C, 788B–E, 789E—790A, C–F).

Iannelli & Volpi S.p.A. v. Ditta Paolo Meroni (Case 74/76) [1977] E.C.R. 557, E.C.J. and *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130, H.L.(E.) applied.

Belgische Radio en Televisie v. S.V. S.A.B.A.M. (Case 127/73) [1974] E.C.R. 51, E.C.J. and *Defrenne v. Sabena* (Case 43/75) [1976] I.C.R. 547, E.C.J. considered.

(2) That the plaintiffs had to succeed on the basis of breach of statutory duty or they would fail altogether and that the judge was right in concluding that there was no cause of action under the heading of "innominate tort"; and that, accordingly, paragraphs 23 and 25 did not disclose any cause of action; that the tort of misfeasance in public office was established by showing that the Minister was aware that he had no power to do the act complained of and that his action could, and subsequently did, injure the plaintiff; and that, accordingly, the judge was right in concluding that paragraphs 23 and 26 disclosed a cause of action (post, pp. 775D–G, 777G–H, 788H, 790F).

Dunlop v. Woollahra Municipal Council [1982] A.C. 158, P.C. applied.

Dictum of Lord Denning M.R. in *Application des Gaz S.A. v. Falks Veritas Ltd.* [1974] Ch. 381, 396, C.A.; *Cullen v.*

Morris (1819) 2 Stark. 577 and *Farrington v. Thomson and Bridgland* [1959] V.R. 286 considered.

Per Oliver L.J. Once Parliament has accepted as a matter of policy—as it has in the European Communities Act 1972—the principle that the jurisprudence of the Community is to be received and applied by English law it is difficult to see how the enforcement of the rights established in that jurisprudence to the full extent required by it can be withheld on grounds of public policy which conflicts with the essential conditions which the decision of the European Court have demanded from national courts (post, p. 771F–G).

Decision of Mann J. post, p. 723E; [1985] 3 All E.R. 585, 589 varied in part.

The following cases are referred to in the judgments of the Court of Appeal:

Amministrazione delle Finanze dello Stato v. Ariete S.p.A. (Case 811/79) [1980] E.C.R. 2545, E.C.J.

Amministrazione delle Finanze dello Stato v. Denkavit Italiana S.r.l. (Case 61/79) [1980] E.C.R. 1205, E.C.J.

Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A. (Case 106/77) [1978] E.C.R. 629, E.C.J.

Amministrazione delle Finanze dello Stato v. S.p.A. San Giorgio (Case 199/82) [1983] E.C.R. 3595, E.C.J.

An Bord Bainne Co-operative Ltd. (Irish Dairy Board) v. Milk Marketing Board [1984] 1 C.M.L.R. 519, D.C.; [1984] 2 C.M.L.R. 584, C.A.

Application des Gaz S.A. v. Falks Veritas Ltd. [1974] Ch. 381; [1974] 3 W.L.R. 235; [1974] 3 All E.R. 51, C.A.

Bayerische H.N.L. Vermehrungsbetriebe G.m.b.H. & Co. K.G. v. Council and Commission of the European Communities (Cases 83/76, 94/76, 4/77, 15/77, 40/77) [1978] E.C.R. 1209, E.C.J.

Becker v. Finanzamt Münster-Innenstadt (Case 8/81) [1982] E.C.R. 53, E.C.J.

Belgishe Radio en Televisie v. S.V. S.A.B.A.M. (Case 127/73) [1974] E.C.R. 51, E.C.J.

Centrafarm B.V. v. Sterling Drug Inc. (Case 15/74) [1974] E.C.R. 1147, E.C.J.

Comet B.V. v. Produktschap Voor Siergewassen (Case 45/76) [1976] E.C.R. 2043, E.C.J.

Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland (Case 40/82) [1982] E.C.R. 2793, E.C.J.

Criminal proceedings against Jan van de Haar (Case 177/82, 178/82) [1984] E.C.R. 1797, E.C.J.

Cullen v. Morris (1819) 2 Stark. 577

Cutler v. Wandsworth Stadium Ltd. [1949] A.C. 398; [1949] 1 All E.R. 544, H.L. (E.)

Dansk Supermarked A/s v. A/s Imerco (Case 58/80) [1981] E.C.R. 181, E.C.J.

Defrenne v. Sabena (Case 43/75) [1976] I.C.R. 547; [1978] 1 All E.R. 122n, E.C.J.

Dunlop v. Woollahra Municipal Council [1982] A.C. 158; [1981] 2 W.L.R. 693, [1981] 1 All E.R. 1202, P.C.

Farrington v. Thomson and Bridgland [1959] V.R. 286

Garden Cottage Foods Ltd. v. Milk Marketing Board [1984] A.C. 130; [1983] 3 W.L.R. 143; [1983] 1 All E.R. 770, H.L. (E.)

Granaria B.V. v. Hoofdproduktschap voor Akkerbouwprodukten (Case 101/78) [1979] E.C.R. 623, E.C.J.
Hans Just I/S v. Danish Ministry for Fiscal Affairs (Case 68/79) [1980] E.C.R. 501, E.C.J.
Harz v. Deutsche Tradax G.m.b.H. (Case 79/83) [1984] E.C.R. 1921, E.C.J.
Humblet v. Belgian State (Case 6/60) [1960] E.C.R. 559, E.C.J.
Iannelli & Volpi S.p.A. v. Ditta Paolo Meroni (Case 74/76) [1977] E.C.R. 557, E.C.J.
James v. The Commonwealth (1939) 62 C.L.R. 339
Koninklijke Scholten Honig N.V. v. Council and Commission of the European Communities (Case 143/77) [1979] E.C.R. 3583, E.C.J.
N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen (Case 26/62) [1963] E.C.R. 1, E.C.J.
O'Reilly v. Mackman [1983] 2 A.C. 237; [1982] 3 W.L.R. 1096; [1982] 3 All E.R. 1124, H.L. (E.)
Pigs and Bacon Commission v. McCarren & Co. Ltd. (Case 177/78) [1979] E.C.R. 2161, E.C.J.
Reg. v. Wirral Metropolitan Borough Council, Ex parte Wirral Licensed Taxi Owners Association [1983] 3 C.M.L.R. 150
Rewe-Handelsgesellschaft Nord m.b.H. v. Hauptzollamt Kiel (Cases 158/80) [1981] E.C.R 1805, E.C.J.
Russo v. Azienda di Stato per gli Interventi sul Mercato Agricolo (A.I.M.A.) (Case 60/75) [1976] E.C.R. 45, E.C.J.
Van Duyn v. Home Office (Case 41/74) [1975] Ch. 358; [1975] 2 W.L.R. 760; [1975] 3 All E.R. 190, E.C.J.

The following additional cases were cited in argument in the Court of Appeal:

Aktien-Zuckerfabrik Shoppenstedt v. Council of the European Communities (Case 5/71) [1971] E.C.R. 975, E.C.J.
Allen v. Flood [1898] A.C. 1, H.L.(E.)
Apple and Pear Development Council v. K. J. Lewis Ltd. (Case 222/82) [1983] E.C.R. 4083, E.C.J.
Bank voor Handel en Scheepvaart N.V. v. Administrator of Hungarian Property [1954] A.C. 584; [1954] 2 W.L.R. 867; [1954] 1 All E.R. 969. H.L.(E.)
Benjamin v. Storr (1874) L.R. 9 C.P. 400
Boyce v. Paddington Borough Council [1903] 1 Ch. 109
Bowen v. Hall (1881) 6 Q.B.D. 333, C.A.
Bulmer (H.P.) Ltd. v. J. Bollinger S.A. [1974] Ch. 401; [1974] 2 W.L.R. 202; [1974] 2 All E.R. 1226, C.A.
Cocks v. Thanet District Council [1983] 2 A.C. 286; [1982] 3 W.L.R. 1121; [1982] 2 All E.R. 1135, H.L.(E.)
Commission of the European Communities v. French Republic (Cases 24/80, 97/80) [1980] E.C.R. 1319, E.C.J.
Commission of the European Communities v. Italian Republic (Case 39/72) [1973] E.C.R. 101, E.C.J.
Cullen v. Morris (1819) 2 Stark. 577
David v. Abdul Cader [1963] 1 W.L.R. 834; [1963] 3 All E.R. 579, P.C.
Dumortier Frères (P.) S.A. v. Council of the European Communities (Cases 167/78, 239/78, 27/79, 28/79, 45/79) [1979] E.C.R. 3091, E.C.J.

Firma Denkavit Futtermittel G.m.b.H. v. Minister für Ernährung, Landwirtschaft und Forsten Landes Nordrhein-Westfalen (Case 251/78) [1979] E.C.R. 3369, E.C.J.

Gershman v. Manitoba Vegetable Producers' Marketing Board (1976) 69 D.L.R. (3d) 114

Harman v. Tappenden (1801) 1 East 555

Henly v. Lyme Regis Corporation (1828) 5 Bing. 91

Ireks-Arkady G.m.b.H. v. Council and Commission of the European Communities (Case 238/78) [1979] E.C.R. 2955, E.C.J.

International General Electric Co. of New York Ltd. v. Customs and Excise Commissioners [1962] Ch. 784; [1962] 3 W.L.R. 20; [1962] 2 All E.R. 398, C.A.

Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2) [1982] A.C. 173; [1981] 3 W.L.R. 33; [1981] 2 All E.R. 456, H.L.(E.)

McCall v. Abelesz [1976] Q.B. 585; [1976] 2 W.L.R. 151; [1976] 1 All E.R. 727, C.A.

Meiger (C.) B.V. v. Department of Trade [1978] 2 C.M.L.R. 563

Mogul Steamship Co. Ltd. v. McGregor, Gow & Co. (1889) 23 Q.B.D. 598, C.A.

Partridge v. General Council of Medical Education and Registration of the United Kingdom (1890) 25 Q.B.D. 90, C.A.

Pauls Agriculture Ltd. v. Council and Commission of the European Community (Case 256/81) [1983] E.C.R. 1707, E.C.J.

Reg. v. Her Majesty's Treasury, Ex parte Smedley [1985] Q.B. 657; [1985] 2 W.L.R. 576; [1985] 1 All E.R. 589, C.A.

Reg. v. Inland Revenue Commissioners, Ex parte Rossminster Ltd. [1980] A.C. 952; [1980] 2 W.L.R. 1; [1980] 1 All E.R. 80, H.L.(E.)

Reg. v. Secretary of State for the Environment, Ex parte Hackney London Borough Council [1983] 1 W.L.R. 524; [1983] 3 All E.R. 358, D.C.

Rewe-Zentralfinanz e.G. v. Landwirtschaftskammer für das Saarland (Case 33/76) [1976] E.C.R. 1989, E.C.J.

Reyners v. Belgian State (Case 2/74) [1974] E.C.R. 631, E.C.J.

Roberts v. Hopwood [1925] A.C. 578, H.L.(E.)

Roncarelli v. Duplessis (1959) 16 D.L.R. (2d) 689

Simmenthal S.p.A. v. Italian Minister for Finance (Case 35/76) [1976] E.C.R. 1871, E.C.J.

Smith v. East Elloe Rural District Council [1956] A.C. 736; [1956] 2 W.L.R. 888; [1956] 1 All E.R. 855, H.L.(E.)

Solomons v. R. Gertzenstein Ltd. [1954] 2 Q.B. 243; [1954] 3 W.L.R. 317; [1954] 2 All E.R. 625, C.A.

Tamlin v. Hannaford [1950] 1 K.B. 18; [1949] 2 All E.R. 327, C.A.

Thornton v. Kirklees Metropolitan Borough Council [1979] Q.B. 626; [1979] 3 W.L.R. 1; [1979] 2 All E.R. 349, C.A.

Tozer v. Child (1857) 7 El. & Bl. 377

Valor International Ltd. v. Application des Gaz S.A. [1978] 3 C.M.L.R. 87, C.A.

Welbridge Holdings Ltd v. Metropolitan Corporation of Greater Winnipeg (1970) 22 D.L.R. (3d) 470

Whitelegg v. Richards (1823) 2 B. & C. 45

The following cases are referred to in the judgment of Mann J.:

An Bord Bainne Co-operative Ltd. (Irish Dairy Board) v. Milk Marketing Board [1984] 1 C.M.L.R. 519

Application des Gaz S.A. v. Falks Veritas Ltd. [1974] Ch. 381; [1974] 3 W.L.R. 235; [1974] 3 All E.R. 51, C.A.

A *Beaudesert Shire Council v. Smith* (1966) 120 C.L.R. 145
Belgische Radio en Televisie v. S.V. S.A.B.A.M. (Case 127/73) [1974] E.C.R. 51, E.C.J.
Benjamin v. Storr (1874) L.R. 9 C.P. 400
Butler v. Fife Coal Co. Ltd. [1912] A.C. 149, H.L.(Sc.)
Cocks v. Thanet District Council [1983] 2 A.C. 286; [1982] 3 W.L.R. 1121; [1982] 3 All E.R. 1135, H.L.(E.)
B *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* (Case 40/82) [1982] E.C.R. 2793, E.C.J.
Cullen v. Morris (1819) 2 Stark. 577
Cutler v. Wandsworth Stadium Ltd. [1949] A.C. 398; [1949] 1 All E.R. 544. C.A.
David v. Abdul Cader [1963] 1 W.L.R. 834; [1963] 3 All E.R. 579, P.C.
Davis v. Bromley Corporation [1908] 1 K.B. 170, C.A.
C *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158; [1981] 2 W.L.R. 693; [1981] 1 All E.R. 1202, P.C.
Farrington v. Thomson and Bridgland [1959] V.R. 286
Firma Denkavit Futtermittel G.m.b.H. v. Minister für Ernährung, Landwirtschaft und Forsten des Landes Nordrhein-Westfalen (Case 251/78) [1979] E.C.R. 3369, E.C.J.
Garden Cottage Foods Ltd. v. Milk Marketing Board [1984] A.C. 130; [1983] 3 W.L.R. 143; [1983] 2 All E.R. 770, H.L.(E.)
D *Gershman v. Manitoba Vegetable Producers' Marketing Board* (1977) 69 D.L.R. (3d) 114
Hans Just I/S v. Danish Ministry for Fiscal Affairs (Case 68/79) [1980] E.C.R. 501, E.C.J.
Harman v. Tappenden (1801) 1 East 555
Harz v. Deutsche Tradax G.m.b.H. (Case 79/83) [1984] E.C.R. 1921, E.C.J.
E *Henly v. Lyme Corporation* (1828) 5 Bing. 91
Iannelli & Volpi S.p.A. v. Ditta Paolo Meroni (Case 74/76) [1977] E.C.R. 557, E.C.J.
International General Electric Co. of New York Ltd. v. Commissioners of Customs and Excise [1962] Ch. 784; [1962] 3 W.L.R. 20; [1962] 2 All E.R. 398, C.A.
Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2) [1982] A.C. 173; [1981] 3
F W.L.R. 33; [1981] 2 All E.R. 456, H.L.(E.)
N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen (Case 26/62) [1963] E.C.R. 1, E.C.J.
Rewe-Handelsgesellschaft Nord m.b.H. v. Hauptzollamt Kiel (Case 158/80) [1981] E.C.R. 1805, E.C.J.
Roncarelli v. Duplessis (1959) 16 D.L.R.(2d) 689
G *Simmenthal S.p.A. v. Italian Minister of Finance* (Case 35/76) [1976] E.C.R. 1871, E.C.J.
Smith v. East Elloe Rural District Council [1955] 1 W.L.R. 380; [1955] 2 All E.R. 19, C.A.; [1956] A.C. 736; [1956] 2 W.L.R. 888; [1956] 1 All E.R. 855, H.L.(E.)
Smith v. Pywell and Spicer (1959) 173 E.G. 1009; The Times, 28 April 1959
Thornton v. Kirklees Metropolitan Borough Council [1979] Q.B. 626; [1979]
H 3 W.L.R. 1; [1979] 2 All E.R. 349, C.A.
Tozer v. Child (1857) 7 El. & Bl. 377
Whitelegg v. Richards (1823) 2 B. & C. 45
Wood v. Blair (unreported), 4 July 1957; Court of Appeal Transcript No. 209 of 1957, C.A.

The following additional cases were cited in argument before Mann J.: A

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Bauhuis v. The Netherlands State (Case 46/76) [1977] E.C.R. 5, E.C.J.

Bayerische H.N.L. Vermehrungsbetriebe G.m.b.H. & Co. K.G. v. Council and Commission of the European Communities (Cases 83/76, 94/76, 4/77, 15/77 and 18/77) [1978] E.C.R. 1209, E.C.J.

Brommage v. Prosser (1825) 4 B. & C. 247 B

Clarke v. Chadburn [1985] 1 W.L.R. 78; [1985] 1 All E.R. 211

Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch [1942] A.C. 435; [1942] 1 All E.R. 142, H.L.(Sc.)

Humblet v. Belgian State (Case 6/60) [1960] E.C.R. 559, E.C.J.

James v. The Commonwealth (1939) 62 C.L.R. 339

McCall v. Abelesz [1976] Q.B. 585; [1976] 2 W.L.R. 151; [1976] 1 All E.R. 727, C.A.

Mogul Steamship Co. Ltd. v. McGregor, Gow & Co. (1889) 23 Q.B.D. 598, C.A. C

Reg. v. Inland Revenue Commissioners, Ex parte Rossminster Ltd. [1980] A.C. 952; [1980] 2 W.L.R. 1; [1979] 3 All E.R. 385; [1980] 1 All E.R. 80, D.C., C.A. and H.L.(E.)

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Telespeed Services Ltd. v. United Kingdom Post Office [1983] 1 C.M.L.R. 457

Van Duyn v. Home Office (Case 41/74) [1975] Ch. 358; [1975] 2 W.L.R. 760; [1975] 3 All E.R. 190, E.C.J.

Westinghouse Electric Corporation Uranium Contract Litigation M.D.L. Docket 235 (No. 1 and No. 2), In re [1978] A.C. 547; [1978] 2 W.L.R. 81; [1978] 1 All E.R. 434, H.L.(E.) E

ACTION

By a writ and amended statement of claim the plaintiffs, Bourgoin S.A., Les Abattoirs de Bellevue S.A., Lerial S.A., Arrive S.A., Galina S.A.R.L., Malina Foods U.K. Ltd., and Le Comité Interprofessionel de la Dinde, claimed against the defendant, the Ministry of Agriculture, Fisheries and Food, damages in respect of loss and damage caused to them by the withdrawal by the defendant on 1 September 1981 of a licence for the import of turkeys and turkey pieces and other poultry products into England and by the refusal thereafter of the defendant to permit turkeys or turkey pieces or other poultry products to be imported into the United Kingdom from France. By paragraphs 23 to 26 of the amended statement of claim the plaintiffs claimed that the loss and damage had been caused to them by reason of the breach by the defendant of his statutory duty in that the withdrawal of the licence had been in breach of article 30 of the E.E.C. Treaty; further or alternatively, that the defendant owed a duty in law to any person foreseeably likely to be injured by a breach by him of article 30 (including the plaintiffs) not so to breach article 30 or to act contrary to its provisions, and that the loss and damage had been caused to the plaintiffs by the defendant's breach of that duty; and further or in the further alternative, that the F G H

defendant by withdrawing the licence in breach of article 30, and further by withdrawing the licence with the motive of protecting English turkey producers from competition by the plaintiffs, had misconducted itself in the discharge of its public duties and in its public office, in that it had exercised its powers to withdraw the licence for a purpose which, as the defendant knew, was contrary to article 30 and/or was calculated to and did damage unlawfully the plaintiffs in their business and/or was not for the purpose for which the powers had been conferred upon the defendant.

By its amended defence, the defendant claimed, inter alia, that the amended statement of claim and in particular paragraphs 23 to 26 disclosed no cause of action, and denied the existence of the duties alleged in paragraphs 24 and 25.

On 10 November 1983 Sir Neil Lawson, sitting as a judge of the High Court, ordered, inter alia, that the issue whether the amended statement of claim, and in particular paragraphs 23 to 26 thereof, disclosed any cause of action be tried as a preliminary issue before all other questions or issues in the action.

The facts are stated in the judgment.

Richard Buxton Q.C., Christopher Vajda and *Laurence Nebot-Roland* (of the Paris Bar) for the plaintiffs.

Sir Patrick Mayhew Q.C., S.-G., Peter Scott Q.C., Peter Langdon-Davies and *Stephen Aitchison* for the defendant.

Cur. adv. vult.

1 October 1984. MANN J. read the following judgment. On 10 November 1983 Sir Neil Lawson, sitting as a Judge of the High Court, ordered that an issue be tried as a preliminary issue in this action. The issue is whether the amended statement of claim, and in particular paragraphs 23 to 26 thereof, do disclose a cause of action. It is that issue which I have tried.

There are seven plaintiffs. The first five named plaintiffs are companies incorporated under the law of the Republic of France and each of them carries on in France the business of producing frozen turkeys and turkey parts. The sixth named plaintiff, a company incorporated under the Companies Acts 1948 to 1981, is a subsidiary of the second and fifth named plaintiffs, and at the material time acted as their agent in the sale and distribution within the United Kingdom of frozen turkeys and turkey parts. The seventh named plaintiff is an association formed under the law of the Republic of France and its object is to promote the interests of French turkey producers. The first five named plaintiffs are members of the association. There is one defendant, the Ministry of Agriculture, Fisheries and Food. In the circumstances of the case it is the appropriate authorised government department: see section 17 of the Crown Proceedings Act 1947 and *The Supreme Court Practice* (1985), vol. 2, para. 6038. The circumstances of the case are as follows.

(1) The plaintiffs claim damages. The amounts claimed in the particulars of loss and damage served pursuant to R.S.C., Ord. 18, r. 12

when converted from French francs to pounds sterling is about £19,000,000. That amount of loss and damage is alleged to have been suffered in consequence of an embargo imposed by the Minister of Agriculture, Fisheries and Food ("the minister") upon the importation into England of turkeys and turkey parts which had an origin in France. The embargo came into force on 1 September 1981 and continued to have effect until about 18 November 1982.

(2) The landing in England of turkeys and turkey parts from a place outside Great Britain was, at all material times, prohibited unless it was authorised by a licence issued by the minister: see article 4 of the Importation of Animal Products and Poultry Products Order 1980 (S.I. 1980 No. 14). The prohibition was imposed in the exercise of a power conferred by section 24(1) of the Diseases of Animals Act 1950 which granted that power "for the purpose of preventing the introduction of disease into Great Britain." The Act of 1950 was repealed and replaced by the Animal Health Act 1981 but the Order of 1980 continued to have effect as if made under section 10 of the later Act: see section 17(2)(*b*) of the Interpretation Act 1978.

(3) Until 31 August 1981 there was a general licence (TAY/GEN/80/179) issued under article 4 of the Order of 1980 which authorised the landing in England of turkeys and turkey parts originating in, amongst other countries, the Republic of France. The first five named plaintiffs had availed themselves of that authorisation and had established a trade which was successful and which had rapidly grown.

(4) On 27 August 1981 the minister revoked the licence with effect from 1 September 1981. He replaced it by another licence (TAY/81/874) which authorised the landing in England of turkeys and turkey parts, but only if they had an origin in the Kingdom of Denmark or the Republic of Ireland: see "The London Gazette," 1 September 1981. Consequently the first five named plaintiffs' trade into England ceased on 1 September 1981.

(5) In a letter of 11 September 1981, addressed to Her Majesty's Government ("the government"), the Commission of European Communities ("the Commission") claimed that the revocation of the old licence and the issue of the new infringed article 30 of the E.E.C. Treaty. Article 30 provides:

> "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between member states."

On 2 October 1981 the government answered the Commission's claim with the assertion that the minister's action was justifiable on grounds of animal health and was therefore permissible by reason of article 36 of the Treaty. Article 36 provides so far as is material:

> "The provisions [of article 30] shall not preclude prohibitions or restrictions on imports . . . justified on grounds of . . . the protection of health and life of . . . animals . . . . Such prohibitions or restrictions shall not, however, constitute . . . a disguised restriction on trade between member states."

The asserted consideration of animal health was the need to protect the United Kingdom's flock against Newcastle disease which is a contagious disease affecting poultry. The disease is caused by a virus. It can be controlled by slaughter or by vaccination with either inactivated or live vaccine. A vaccinated bird can, after slaughter for the market, carry a virus in any of its parts. On 1 September 1981 the policy of the Government of the Republic of France (but not that of the Governments of the Kingdom of Denmark and of the Republic of Ireland) was to control the disease by vaccination. From a date in 1964 until 1 September 1981 the government relied on vaccination. On 1 September 1981 there was a reversion to the pre-1964 policy of slaughter. Hence—so ran the government's argument—the embargo on the import of turkeys or turkey parts which came from a country where Newcastle disease was controlled by vaccination.

(6) The Commission did not accept the government's response and after further exchanges it brought the question before the European Court of Justice under article 169 of the E.E.C. Treaty. The court gave its decision in *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* (Case 40/82) [1982] E.C.R. 2793 on 15 July 1982. The government's arguments were rejected and the court held that the United Kingdom had failed to fulfil its obligations under article 30 of the Treaty. I should read paragraph 37 of the decision, at p. 2825:

> "Certain established facts suggest that the real aim of the 1981 measures was to block, for commercial and economic reasons, imports of poultry products from other member states, in particular from France. The United Kingdom Government had been subject to pressure from British poulty producers to block these imports. It hurriedly introduced its new policy with the result that French Christmas turkeys were excluded from the British market for the 1981 season. It did not inform the Commission and the member states concerned in good time, as the letter in which the Commission was informed of the new measures—which took effect on 1 September 1981—was dated 27 August 1981. It did not find it necessary to discuss the effects of the new measures on imports with the Community institutions, with the Standing Veterinary Committee or with the member states concerned."

The Solicitor-General on behalf of the defendant accepted that the decision of the European Court is not challengeable in this court and accordingly I proceed upon the basis that in doing what he did the minister caused the United Kingdom to fail to fulfil its obligations under article 30 of the E.E.C. Treaty.

(7) In consequence of the judgment of the European Court a licence was issued by the minister which enabled the first five named plaintiffs to resume their exports to England on or about 18 November 1982.

(8) The plaintiffs issued a writ against the defendant on 6 May 1982. The statement of claim endorsed on that writ was amended on 22 June 1983 pursuant to an order of Sir Neil Lawson, sitting as a judge of the

High Court, dated 15 June 1983. Paragraphs 23 to 26 of the amended statement of claim read:

> "23. The withdrawal by the defendant of licences for the import of turkeys and turkey pieces and other poultry products into England, and the refusal thereafter of the defendant to permit turkeys or turkey pieces and other poultry products to be imported into England, has caused and is continuing to cause the plaintiffs substantial loss and damage. The plaintiffs set out in a separate document served herewith pursuant to R.S.C., Ord. 18, r. 12(2) particulars of the said loss and damage so far as it is possible to state them at the date of this pleading, and reserve the right to supplement their pleading as to damages thereafter.
>
> "24. The said loss and damage was caused to the plaintiffs and continues to be caused to them by reason of the breach by the defendant of his statutory duty in that the said withdrawal of licences was in breach of article 30 of the Treaty of Rome.
>
> "25. Further or alternatively, the defendant owed a duty in law to any person foreseeably likely to be injured by a breach by him of article 30 (including the plaintiffs) not so to breach article 30 or to act contrary to the provisions of article 30. The said loss and damage was caused to the plaintiffs and continues to be caused to them by the defendant's breach of that duty.
>
> "26. Further or in the further alternative, the defendant by withdrawing the said licences in breach of article 30, and further by withdrawing the said licences with the motive of protecting English turkey producers from competition by the plaintiffs (as set out in paragraphs 19–21 hereof), misconducted itself in the discharge of its public duties and in its public office, in that it exercised its powers to withdraw the said licences for a purpose that (as the defendant knew) was contrary to article 30 and/or was calculated to and did unlawful damage to the plaintiffs in their business and/or was not the purpose for which the said powers had been conferred upon the defendant."

Paragraph 41 of the amended defence avers that the four paragraphs disclose no cause of action. Those are the circumstances of the case.

Paragraphs 23 to 26 of the amended statement of claim require me to consider three heads of claim. They are (1) breach of statutory duty; (2) commission of an innominate tort; and (3) misfeasance in public office. In considering each head of claim I must assume that every allegation in the amended statement of claim is true. On that assumption this preliminary issue is tried. Should the action proceed to trial, then to the extent that the amended defence is maintained, the allegations in the amended statement of claim will have to be determined as being either true or untrue.

A necessary preface to consideration of the three heads of claim is sections 2(1) and 3(1) of the European Communities Act 1972. Section 2(1) provides:

> "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all

such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies."

Section 3(1) provides:

"For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court)."

Breach of statutory duty

The claim for breach of statutory duty is formulated as a claim for breach of a right conferred by article 30 of the E.E.C. Treaty which is therefore a right enforceable under section 2(1) of the Act of 1972. The European Court in *NV Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen* (Case 26/62) [1963] E.C.R. 1 decided that the Treaty can grant a right to an individual. A provision of the Treaty which grants a right to an individual is a provision which the court described, at p. 13, as "producing direct effects and creating individual rights which national courts must protect." Article 30 of the Treaty is a provision which the European Court has held to be one which produces direct effects: see *Ianelli & Volpi SpA v. Ditta Paolo Meroni* (Case 74/76) [1977] E.C.R. 557, 575, para. 13. The right created by article 30 must be protected by this court.

The form of protection is for this court to determine but it must be a form available on the same conditions as that on which it is available for the protection of a right of similar character conferred by domestic law and it must be a form of protection which dissuades breaches of the right conferred by article 30. That formulation (which is not in dispute) is to be derived from the decisions of the European Court in *Hans Just I/S v. Danish Ministry for Fiscal Affairs* (Case 68/79) [1980] E.C.R. 501, 523, para. 27; *Rewe-Handelsgesellschaft Nord m.b.H. v. Hauptzollamt Kiel* (Case 158/80) [1981] E.C.R. 1805, 1838, para. 44 and *Harz v. Deutsche Tradex G.m.b.H.* (Case 79/83) [1984] E.C.R. 1921, 1941, para. 23.

The debate before me was whether the form of protection for the right conferred by article 30 is solely a proceeding by way of judicial review for a declaration (as the defendant contended) or whether there is also available an action for damages for breach of statutory duty (as the plaintiffs contended).

The defendant supported its contention with three submissions: (1) a declaration is effective to protect the right conferred by article 30; (2)

Community law does not require that the right conferred by article 30 should be protected by an action for damages; and (3) article 30 does not possess the characteristics which give rise to an action for breach of statutory duty in English law. A

The first submission was elaborated in this way. Article 30 confers an immunity upon all Community citizens against the imposition of quantitative restrictions on imports by, amongst others, the government, and this immunity is sufficiently protected in England by the grant of a declaration because declarations are invariably observed by the Crown against whom an injunction cannot be granted: see section 21(1) of the Crown Proceedings Act 1947. The plaintiffs' response was that a declaration is not sufficient protection because an interim declaration cannot be made (see *International General Electric Co. of New York Ltd. v. Commissioners of Customs and Excise* [1962] Ch. 784) and however speedily the substantive action is brought on for trial loss and damage can be caused before its determination, which may not be for many months if an issue is referred to the European Court under article 177 of the E.E.C. Treaty. In my judgment that is a response to which there is no answer if the submission is one which I have to determine. B C

The second submission was elaborated in this way. The objective of article 30 is to eliminate quantitative restrictions upon the free movement of goods within the Community and the payment of damages cannot achieve that purpose. Perhaps, it was submitted, a right to recover damages would have a dissuasive effect upon a government which was deciding whether or not to breach article 30, but in England the effectiveness of the procedure by way of judicial review provides a sufficient, dissuasive effect when coupled with the ability of the Commission to bring a failure by the United Kingdom to fulfil the obligation imposed by article 30 before the European Court under article 169 of the E.E.C. Treaty. In my judgment the second submission elaborated in the way which it was does not bear upon the question before me. The submission is concerned with the question of what domestic remedy would be sufficiently effective to achieve the objective of article 30. That, however, is not the question before me. I am concerned with the question of what domestic remedy, or remedies, is, or are, effective to protect the right conferred by article 30, being a form of protection which dissuades breaches of that right. In my judgment if the second submission is one which I have to determine I would determine it to be irrelevant. The objective to secure which a right is conferred, and the right so conferred, are different concepts and the method of securing the achievement of the one is not necessarily the same as the method of protecting the other. D E F G

The third submission involved a discussion of well known authorities. Whether or not a domestic statutory provision confers a right of action for damages for breach of statutory duty is a question to be answered upon a consideration of the Act which contains the provision. There are however, in the words of Lord Simonds in *Cutler v. Wandsworth Stadiums Ltd.* [1949] A.C. 398, 407, "indications which point with more or less force to the one answer or the other." An indication which points strongly in favour of the absence of a right of action is the presence in H

the statute of a method of enforcing compliance or of penalising non-compliance: see *Cutler's* case. This indication is subject to two classes of exception. They are, first, where the statutory obligation is imposed for the benefit of a particular class of person see *Butler v. Fife Coal Co. Ltd.* [1912] A.C. 149, 165; and, secondly, where the statutory obligation is imposed for the benefit of all but where a breach causes an individual to suffer "particular, direct and substantial" damage "other and different from that which was common to all the rest of the public": (see *Benjamin v. Storr* (1874) L.R. 9 C.P. 400, 407. The two classes of exception were described by Lord Diplock in *Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2)* [1982] A.C. 173, 185–186. A second indication which may point in favour of the absence of a right of action is an absence of precision in the definition of the statutory right which it is sought to enforce: see the speech of Lord Reid in *Cutler v. Wandsworth Stadium Ltd.* [1949] A.C. 398, 417.

The Solicitor-General accepted that neither the E.E.C. Treaty nor any Community regulation presented a method either of enforcing compliance with article 30 or of penalising non-compliance. I observe, in parenthesis, that a breach of article 86, to which I shall subsequently have occasion to refer, can be the subject of a fine imposed by the Commission under article 15 of Council Regulation (E.E.C.) No. 17/62. The absence of a method of enforcing compliance or of a penalty would seem to point in favour of the availability of an action and renders it unnecessary to consider the two exceptional cases described by Lord Diplock in *Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2)* [1982] A.C. 173. However, the Solicitor-General said that despite the absence of a prescribed method of securing compliance there was available in England the remedy by way of judicial review for a declaration. I have already pointed to a frailty of that remedy as against the Crown; that is the Court's inability to grant an interim declaration. Moreover, I see no reason in principle why the breach of a duty should not be the subject of proceedings both for judicial review and for damages for breach of statutory duty: see *Thornton v. Kirklees Metropolitan Borough Council* [1979] Q.B. 626 and *Cocks v. Thanet District Council* [1983] 2 A.C. 286, 293, *per* Lord Bridge of Harwich. In my judgment the availability of a remedy by way of judicial review should not oust the general proposition applicable in regard to domestic statutory provisions; that is to say, that they are to be regarded as conferring a right of action at the instance of a person injured by the breach where the statute does not prescribe a method of enforcing compliance or of penalising non-compliance: see *Cutler v. Wandsworth Stadium Ltd.* [1949] A.C. 398, 407, *per* Lord Simonds.

The Solicitor-General suggested that there was an absence of precision in the definition of the right conferred by article 30 and hence this indicated the absence of a right of action for breach. This suggestion seems to me to be entirely inconsistent with the consideration that article 30 has direct effects because it could not have such effects unless it was "explicit," which it is: see *Iannelli & Volpi S.p.A. v. Ditta Paolo Meroni* (Case 74/76) [1977] E.C.R. 557, 575, para. 13.

In my judgment, if the third submission is one which I have to determine, then article 30 does possess those characteristics which enable a domestic statutory provision to confer a right of action for damages.

Mr. Buxton argued, on behalf of the plaintiffs, that none of the Solicitor-General's three submissions had to be determined whilst the Solicitor-General saw an obstacle to resolving the debate by reference to one, two or all of his three submissions. Mr. Buxton's submission was founded upon the decision of the House of Lords in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130. That decision is the Solicitor-General's perceived obstacle.

Before I examine that decision I must record another argument on behalf of the defendant. It was to this effect: member states have domestic powers to regulate imports on the ground of protecting animal health and the effect of articles 30 and 36 is to limit the exercise of those powers so that an infringement of the E.E.C. Treaty provisions is a mere ultra vires act which is devoid of any consequence in damages. This argument seems to me to ignore the considerations that if a restriction prohibited by article 30 is not justifiable under article 36 then there is a breach of article 30 which is an article which has direct effects. Whether or not a restriction prohibited by article 30 is justifiable under article 36 is a question which is not within the exclusive jurisdiction of a member state: see *Simmenthal S.p.A. v. Italian Minister of Finance* (Case 35/76) [1976] E.C.R. 1871, 1886, para. 14, and *Firma Denkavit Futtermittel G.m.b.H. v. Minister für Ernährung, Landwirtschaft und Forsten des Landes Nordrhein-Westfalen* (Case 251/78) [1979] E.C.R. 3369, 3393, para. 28. It is also a question determinable by the European Court.

In *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130 the plaintiff alleged that the defendant had contravened article 86 of the Treaty. Article 86 provides:

> "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member states. "Such abuse may, in particular, consist in: (*a*) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (*b*) limiting production, markets or technical development to the prejudice of consumers; (*c*) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (*d*) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

The article has direct effects: see *Belgische Radio en Televisie v. S.V. S.A.B.A.M.* (Case 127/73) [1974] E.C.R. 51. Garden Cottage Foods Ltd. sought an interlocutory injunction to restrain the defendant from continuing a course of action which the company alleged was a course of action which contravened the right conferred upon it by article 86. Parker J. refused to grant an interlocutory injunction because in his

A opinion damages would be an adequate remedy to compensate for loss sustained before the substantive hearing. The decision was reversed by the Court of Appeal on the ground that there was doubt—expressed by the members of the court in varying degrees—as to whether a claim in respect of a breach of article 86 sounded in damages. The House of Lords, by a majority (Lord Wilberforce dissenting) restored the decision of Parker J. Lord Diplock, with whose speech Lord Keith of Kinkel,
B Lord Bridge of Harwich and Lord Brandon of Oakbrook agreed, said, [1984] A.C. 130, 141:

> "This article of the Treaty of Rome (the E.E.C. Treaty) was held by the European Court of Justice in *Belgische Radio en Televisie v. S.V. S.A.B.A.M.* (Case 127/73) [1974] E.C.R. 51, 62, to produce direct effects in relations between individuals and to create direct
> C rights in respect of the individuals concerned which the national courts must protect. This decision of the European Court of Justice as to the effect of article 86 is one which section 3(1) of the European Communities Act 1972 requires your Lordships to follow. The rights which the article confers upon citizens in the United Kingdom accordingly fall within section 2(1) of the Act. They are without further enactment to be given legal effect in the United
> D Kingdom and enforced accordingly. A breach of the duty imposed by article 86 not to abuse a dominant position in the common market or in a substantial part of it, can thus be categorised in English law as a breach of statutory duty that is imposed not only for the purpose of promoting the general economic prosperity of the common market but also for the benefit of private individuals to
> E whom loss or damage is caused by a breach of that duty. If this categorisation be correct, and I can see none other that would be capable of giving rise to a civil cause of action in English private law on the part of a private individual who sustained loss or damage by reason of a breach of a directly applicable provision of the Treaty of Rome, the nature of the cause of action cannot, in my view, be affected by the fact that the legislative provision by which
> F the duty is imposed takes the negative form of a prohibition of particular kinds of conduct rather than the positive form of an obligation to do particular acts. Of the many statutory duties imposed upon employers under successive Factories Acts and regulations made thereunder, which have provided far and away the commonest cases of this kind of action, some take the form of
> G prohibitions, others positive obligations to do something: yet it has never been suggested that it makes any difference to the cause of action whether the breach relied on was a failure to perform a positive duty or the doing of a prohibited act."

In a later passage Lord Diplock said, at p. 144:

> "My Lords, in the light (a) of the uniform jurisprudence of the
> H European Court of Justice, of which it is sufficient to mention *Belgische Radio en Televisie v. S.V. S.A.B.A.M.* (Case 127/73) [1974] 1 E.C.R. 51 (which I have already cited) and the subsequent case of *Rewe-Zentralfinanz e.G. v. Landwirtschaftskammer für das*

Saarland (Case 33/76) [1976] 3 E.C.R. 1989, which was to the same effect as respects the duty of national courts to protect rights conferred on individual citizens by directly applicable provisions of the Treaty; and (b) of sections 2(1) and 3(1) of the European Communities Act 1972, I, for my own part, find it difficult to see how it can ultimately be successfully argued, as the Milk Marketing Board will seek to do, that a contravention of article 86 which causes damage to an individual citizen does not give rise to a cause of action in English law of the nature of a cause of action for breach of statutory duty; but since it cannot be regarded as unarguable that is not a matter for final decision by your Lordships at the interlocutory stage that the instant case has reached. What, with great respect to those who think otherwise, I *do* regard as quite unarguable is the proposition advanced by the Court of Appeal itself but disclaimed by both parties to the action: that if such a contravention of article 86 gives rise to any cause of action at all, it gives rise to a cause of action for which there is no remedy in damages to compensate for loss already caused by that contravention but only a remedy by way of injunction to prevent future loss being caused. A cause of action to which an unlawful act by the defendant causing pecuniary loss to the plaintiff gives rise, if it possessed those characteristics as respects the remedies available, would be one which, so far as my understanding goes, is unknown in English private law, at any rate since 1875 when the jurisdiction conferred upon the Court of Chancery by Lord Cairns' Act passed to the High Court. I leave aside as irrelevant for present purposes injunctions granted in matrimonial causes or wardship proceedings which may have no connection with pecuniary loss. I likewise leave out of account injunctions obtainable as remedies in public law whether upon application for judicial review or in an action brought by the Attorney-General ex officio or ex relatione some private individual. It is private law, not public law, to which the company has had recourse. In its action it claims damages as well as an injunction. No reasons are to be found in any of the judgments of the Court of Appeal and none has been advanced at the hearing before your Lordships, why in law, in logic or in justice, if contravention of article 86 of the Treaty of Rome is capable of giving rise to a cause of action in English private law at all, there is any need to invent a cause of action with characteristics that are wholly novel as respects the remedies that it attracts, in order to deal with breaches of articles of the Treaty of Rome which have in the United Kingdom the same effect as statutes."

It is to be observed that Lord Diplock's speech contains no reference to any of the authorities which assist in determining whether a domestic statutory provision gives an action for breach of statutory duty. Nor is there any discussion which could lend support to the other two of the defendant's submissions before me.

When four members of the House of Lords:

A "find it difficult to see how it can ultimately be successfully argued . . . that a contravention of article 86 which causes damage to an individual citizen does not give rise to a cause of action in English law of the nature of a breach of statutory duty . . . " (p. 144)

then I would regard myself as obliged to adopt that opinion and to hold that a breach of article 86 gave a cause of action for breach of statutory B duty: see also *An Bord Bainne Co-operative Ltd. (Irish Dairy Board) v. Milk Marketing Board* [1984] 1 C.M.L.R. 519, 528, para. 24, *per* Neill J. However, I am concerned not with article 86 but with article 30. Is there a sensible distinction between the two? The defendant argued that there is. Article 30, the Solicitor-General said, is not for the benefit of individuals but it is for the benefit of the economic prosperity of the European Economic Community. As a provision operating so as to C benefit, and having the object of benefiting, all citizens, it is enforceable at the instance of an individual by judicial review seeking declaratory relief, whilst article 86 is concerned with relationships between, and is for the benefit of, individuals and is thus enforceable at the instance of an individual by an action for damages. In short it was said the rights conferred by the two articles are different in nature and each is D adequately protected by the remedy suggested as being appropriate to it. The argument was elaborated but I have sufficiently stated its nature.

On the basis that articles 30 and 86 each have direct effects I am unable to differentiate between them. Each does have direct effects and no European or domestic decision was cited to me which decides or suggests any reason why there can be a differentiation between articles with direct effects so that a remedy appropriate in one case (e.g. article E 86) is inappropriate in another (e.g. article 30). Indeed, the European Court has formulated its conclusion in regard to the direct effects of articles 86 and 30 in remarkably similar terms. In regard to article 86, the court said in *Belgische Radio en Televisie v. S.V. S.A.B.A.M.* (Case 127/73) [1974] E.C.R. 51, 62, para. 16:

F "As the prohibitions of articles 85(1) and 86 tend by their very nature to produce direct effects in relations between individuals, these articles create direct rights in respect of the individuals concerned which the national courts must safeguard."

In regard to article 30, the court said in *Iannelli & Volpi S.p.A. v. Ditta Paolo Meroni* (Case 74/76) [1977] E.C.R. 557, 575, para. 13:

G "The prohibition of quantitative restrictions and measures having equivalent effect laid down in article 30 of the Treaty is mandatory and explicit and its implementation does not require any subsequent intervention of the member states or Community institutions. The prohibition therefore has direct effect and creates individual rights which national courts must protect, . . ."

H Accordingly, I hold that a contravention of article 30 which causes damage to a person gives to that person an action for damages for breach of statutory duty, the duty being one imposed by article 30 (as interpreted by the European Court) and section 2(1) of the Act of 1972 when read in conjunction.

I determine that paragraphs 23 and 24 of the amended statement of claim do disclose a cause of action.

Commission of an innominate tort

Paragraph 25 of the amended statement of claim was drawn before the decision of the House of Lords in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130. Mr. Buxton, who pleaded the paragraph when in a stuff gown, told me that by it he intended to attract the language of Lord Denning M.R. in *Application des Gaz S.A. v. Falks Veritas Ltd.* [1974] Ch. 381, 396:

> "So we reach this important conclusion: articles 85 and 86 are part of our law. They create new torts or wrongs. Their names are 'undue restriction of competition within the common market'; and 'abuse of dominant position within the common market.' Any infringement of those articles can be dealt with by our English courts. It is for our courts to find the facts, to apply the law, and to use the remedies which we have available. If it should turn out, after finding the facts, that it is necessary to seek the opinion of the European Court of Justice—on a point of interpretation of the Treaty—the English courts can refer that point to the European Court of Justice. But the eventual decision of the case is for our English courts. It is for us to give the judgment and to enforce it. It is a task worthy of our mettle."

Mr. Buxton conceded that if paragraphs 23 and 24 of his pleadings failed he could not succeed under paragraphs 23 and 25. The concession must be correct. Mr. Buxton also conceded, and asserted, that his clients' remedy is an action for breach of statutory duty rather than an action for the commission of an innominate tort as suggested by Lord Denning M.R.: see *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130, 141. My conclusion upon paragraphs 23 and 24 and the concession by Mr. Buxton combine to make it unnecessary to discuss paragraph 25 of the amended statement of claim. The formulation is obsolete. Accordingly, I determine that paragraphs 23 and 25 of the amended statement of claim do not disclose a cause of action.

Misfeasance in Public Office

Paragraphs 23 and 26 of the amended statement of claim allege the tort of misfeasance in public office. Lord Diplock has said that this tort is "well-established": see *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158, 172. However, as Professor Wade has observed in *Administrative Law*, 5th ed. (1982), p. 669, "there are remarkably few reported English decisions on this form of malpractice."

For the purpose of the preliminary issue the defendant accepted the plaintiffs' allegations that (1) the minister's purpose in revoking the general licence on 27 August 1981 was to protect English turkey producers against competition from French turkey producers; (2) the minister knew at the time of revocation that his act was one which involved the United Kingdom in a failure to fulfil its obligations under article 30 of the E.E.C. Treaty; (3) the minister knew at the time of

A revocation that his act would and was calculated to injure the plaintiffs in their businesses; and (4) the minister knew at the time of revocation that the protection of English turkey producers was not a purpose for the achievement of which powers were conferred on him by the enabling legislation and the Order of 1980.

The defendant submitted that the four allegations did not combine to constitute the tort of misfeasance in public office in that there is no B allegation that a purpose of the minister was the infliction of harm upon the plaintiffs. Actuation by malice towards the plaintiffs—that is to say, an intent to injure the plaintiff—was said to be an essential ingredient of the tort. The plaintiffs submitted that the four allegations did combine to constitute the tort in that it is sufficient for liability if the defendant knew at the time that its conduct was ultra vires and would injure the C plaintiffs, as it did, albeit the defendant's purpose in acting as it did was not the infliction of that injury.

There is no English authority on the point in issue. In *Farrington v. Thomson and Bridgland* [1959] V.R. 286, Smith J., sitting in the Supreme Court of Victoria, decided the argument in favour of a plaintiff. He said, at p. 293:

D "That an action on the case lay for . . . misfeasance was established at a relatively early period. In *Comyns' Digest,* tit. 'Action on the Case for Misfeasance (A1),' there is the statement: 'an action on the case lies for misfeasance; as, if an officer misdemean himself by any falsity . . . or otherwise misbehave himself in his office.' In the same work, tit. 'Action on the Case for a Deceit (A6),' it is stated that such an action will be 'if an officer, being entrusted by the law, E act deceptive in his office.' In *Bacon's Abridgment,* 'Offices and Officers (N),' it is said that all officers, whether such by the common law or made pursuant to statute, are punishable for oppressive proceedings by an action at the suit of the party injured. Then in *Whitelegg v. Richards* (1823) 2 B. & C. 45, 52, it is stated that an action on the case may be maintained against any officer of a court 'for a falsity or misconduct in his office, whereby a party F sustains a special damage.' In *Henly v. Lyme Corporation* (1828) 5 Bing. 91, at pp. 107–108, it is laid down by Best C.J. as perfectly clear law that 'if a public officer abuses his office' and by the 'act of abuse in his office, any individual sustains an injury, that individual is entitled to redress in a civil action' against the public officer. It was pointed out in *Fitzgerald v. Boyle* (1861) 1 Q.S.C.R. 19, that G this language should not be treated as applying to acts done in the exercise of judicial functions, but subject to this limitation the law as stated by Best C.J., was there approved. See also *Halsbury,* 2nd ed., vol. 26, section 579; *Chaster, Public Officers,* at p. 631.

"Some of the authorities seem to assume that in order to establish a cause of action for misfeasance in a public office it is, or may be, necessary to show that the officer acted maliciously, in the H sense of having an intention to injure: compare *Acland v. Buller* (1848) 1 Exch. 837; 1 Rolle's Abr. p. 93; *Drewe v. Coulton* (1787) 1 East 563 (*n*). It appears to me, however, that this is not so and that it is sufficient to show that he acted with knowledge that what he

did was an abuse of his office: see the other authorities previously cited, and see, too, *Smith v. East Elloe Rural District Council* [1956] A.C. 736, 752; . . . Indeed, in some cases at least, even this is unnecessary, and it is sufficient that the act was a breach of his official duty, even though it is not shown either that he realized this or that he acted maliciously: compare *Brasyer v. Maclean* (1875) L.R. 6 P.C. 398, 406. Proof of damage is, of course, necessary in addition.

"In my view, therefore, the rule should be taken to go this far at least, that if a public officer does an act which, to his knowledge, amounts to an abuse of his office, and he thereby causes damage to another person, then an action in tort for misfeasance in a public office will lie against him at the suit of that person."

I have some difficulty in following how the three English authorities, to which Smith J. referred, assisted him towards his conclusion.

In *Whitelegg v. Richards* (1823) 2 B. & C. 45 the declaration averred that the defendant, being the clerk of the court for relief of insolvent debtors, issued an order "wrongfully and maliciously intending to injure the plaintiff." The Court of King's Bench seems to have accepted that the averment was appropriately formulated, but the issue in the case was whether upon the declaration the order was to be understood to be the act of the court rather than of the clerk. The passage from the judgment of Abbott C.J., at p. 52, cited by Smith J., does not answer the question of what is actionable "falsity or misconduct in . . . office." Lord Tenterden was not concerned with that question. The decision in *Henly v. Lyme Corporation* (1828) 5 Bing. 91 was agreed by the Solicitor-General and Mr. Buxton to be irrelevant to the argument. I endorse that agreement.

Smith v. East Elloe Rural District Council [1956] A.C. 736 concerned complaints by the plaintiff about a compulsory purchase order which had been made by the rural district council and confirmed by the Minister of Health. The complaints were ventilated in three actions. The first was an action in trespass against the council. It was determined against the council and an award of damages was made: see *Smith v. East Elloe Rural District Council* [1955] 1 W.L.R. 380. The second was an action in conspiracy against the clerk of the council, Mr. J. C. Pywell, and an official of the Ministry of Health, Mr. L. E. Spicer. The third gave rise to the appeal to the House of Lords and was against the council and Mr. Pywell. Their Lordships had to decide, amongst other matters, whether a writ, which in so far as it alleged that Mr. Pywell had acted wrongfully and in bad faith in procuring the making and confirmation of the compulsory purchase order, should be struck out. Their Lordships unanimously held that the allegation should not be struck out. Viscount Simonds said, [1956] A.C. 736, 752:

"Here the appellant by her writ claims against the personal defendant a declaration that he knowingly acted wrongfully and in bad faith in procuring the order and its confirmation, and damages, and that is a claim which the court clearly has jurisdiction to entertain."

A The defendant drew my attention to the phrase "and in bad faith" as an addition to the phrase "knowingly acted wrongfully," but Viscount Simonds was doing no more than reciting the endorsement on the writ: see [1956] A.C. 736, 738. What the pleader intended by that endorsement I cannot know. Eventually the third case was consolidated with the second and came for trial before Diplock J. as *Smith v. Pywell and Spicer* (1959) 173 E.G. 1009; The Times, 28 April 1959. The third case B was, according to the report in the Estates Gazette, disposed of on the ground that Diplock J.:

> "was not satisfied on the evidence that the first defendant had in fact known that he had no power to continue the requisition, or that he acted in bad faith. There was no suggestion whatever that he was actuated by motives of personal gain. He was actuated by C excessive zeal for his employers—the council—and by 'bumbledom.'"

The report in "The Times" disposes of the action upon another, and presently immaterial, ground. I suspect that there were two grounds for the decision; one of which attracted one reporter, and the second of which attracted the other. It is to be observed that Mr. Pywell was separately acquitted of knowing that he had no power to continue a D previous requisition of the subject property and of acting in bad faith. The separate acquittals suggest that a finding against Mr. Pywell in either head could have founded a liability, but I think that it would be dangerous to rely overmuch upon the reports of this case.

However, the proposition that either knowledge of lack of power or bad faith is sufficient to establish liability can, in my judgment, find E support in the judgment of the Privy Council in *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158, 172, where Lord Diplock said that their Lordships agreed with the conclusion of the Supreme Court of New South Wales:

> "in the absence of malice, passing without knowledge of its invalidity a resolution which is devoid of any legal effect is not conduct that F of itself is capable of amounting to such 'misfeasance' as is a necessary element in this tort."

Professor Wade in his *Administrative Law,* 5th ed., pp. 672–673 comments that the Privy Council held that the tort "required as a necessary element either malice or knowledge ... of the invalidity" and at p. 673, he cites *Farrington v. Thomson and Bridgland* [1959] V.R. 286 G without adverse comment.

There are a number of English authorities to the effect that the tort of misfeasance in public office is committed where the officer's conduct is actuated by malice towards the plaintiff. I was taken back first to *Harman v. Tappenden* (1801) 1 East 555 (the report of which includes, at pp. 563–566, a note of *Drewe v. Coulton* (1787)). Lord Kenyon C.J. said at pp. 561–562:

H

> "Have you any precedent to show that an action of this sort will lie, without proof of malice in the defendants, or that the act of disfranchisement was done on purpose to deprive the plaintiff of the particular advantage which resulted to him from his corporate

character? I believe this is a case of the first impression where an action of this kind has been brought upon a mere mistake or error in judgment." A

Lawrence J. said, at pp. 562–563:

"There is no instance of an action of this sort maintained for an act arising merely from error of judgment. Perhaps the action might have been maintained, if it had been proved that the defendants contriving and intending to injure and prejudice the plaintiff, and deprive him of the benefit of his profits from the fishery, which as a member of this body he was entitled to according to the custom, had *wilfully and maliciously* procured him to be disfranchised, in consequence of which he was deprived of such profits. But there was no evidence of any wilful and malicious intention to deprive the plaintiff of his profits, or that they had disfranchised him with that intent, which is necessary to maintain the action." B C

It is to be observed that the case was one of mistake and that the defendants did not do that which they did knowing that they had no power to do it.

The second case is *Cullen v. Morris* (1819) 2 Stark. 577, which was an action against a returning officer for refusing a vote at a parliamentary election. Lord Abbott C.J. directed the jury in these terms, at p. 587: D

"On the part of the defendant it has been contended, that an action is not maintainable for merely refusing the vote of a person who appears afterwards to have really had a right to vote, unless it also appears that the refusal resulted from a malicious and improper motive, and that if the party act honestly and uprightly according to the best of his judgment, he is not amenable in an action for damages." E

Again, it is to be observed that there seems to have been no suggestion that the defendant knew that he had no power to do that which he had done. F

The third case is *Tozer v. Child* (1857) 7 El. & Bl. 377, where the remarks in earlier cases are recited in a context similar to that of *Cullen v. Morris,* 2 Stark. 577. Martin B. said, at p. 383: "At any rate the officer cannot be liable for merely drawing a wrong conclusion of law." See also Cresswell J. on p. 383.

The fourth case is the decision of the Privy Council in *David v. Abdul Cader* [1963] 1 W.L.R. 834, where Viscount Radcliffe, in delivering the judgment of their Lordships on an appeal from Ceylon, said, in regard to the decision of the Court of Appeal in *Davis v. Bromley Corporation* [1908] 1 K.B. 170, at pp. 839–840: G

"In their Lordships' opinion it would not be correct today to treat it as establishing any wide general principle in this field; certainly it would not be correct to treat it as sufficient to found the proposition, as asserted here, that an applicant for a statutory licence can in no circumstances have a right to damages if there has been a malicious misuse of the statutory power to grant the licence. Much must turn H

A in such cases on what may prove to be the facts of the alleged misuse and in what the malice is found to consist. The presence of spite or ill-will may be insufficient in itself to render actionable a decision which has been based on unexceptionable grounds of consideration and has not been vitiated by the badness of the motive. But a 'malicious' misuse of authority, such as is pleaded by the appellant in his plaint, may cover a set of circumstances which B go beyond the mere presence of ill-will, and in their Lordships' view it is only after the facts of malice relied upon by a plaintiff have been properly ascertained that it is possible to say in a case of this sort whether or not there has been any actionable breach of duty."

There are three Commonwealth authorities to which I must refer. C The first is *Roncarelli v. Duplessis* (1959) 16 D.L.R. (2d) 689, which is a decision of the Supreme Court of Canada. It was a flagrant case of an officer performing an unlawful act with the object of injuring the plaintiff. Rand J., who was amongst the majority of the court, said, at pp. 705–706:

"To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a D restaurant is equally beyond the scope of the discretion conferred. There was here not only revocation of the existing permit but a declaration of a future definitive disqualification of the appellant to obtain one: it was to be 'forever.' This purports to divest his citizenship status of its incident of membership in the class of those of the public to whom such a privilege could be extended. Under E the statutory language here, that is not competent to the Commission and a fortiori to the government or the respondent: *McGillivray v. Kimber* (1915) 26 D.L.R. 164, 52 S.C.R. 146. There is here an administrative tribunal which, in certain respects, is to act in a judicial manner; and even on the view of the dissenting justices in *McGillivray*, there is liability: what could be more malicious than to punish this licensee for having done what he had an absolute right F to do in a matter utterly irrelevant to the Alcoholic Liquor Act? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry."

G Secondly, there is *Gershman v. Manitoba Vegetable Producers' Marketing Board* (1976) 69 D.L.R. (3d) 114, where the Manitoba Court of Appeal considered that decision. O'Sullivan J.A. said, at p. 123:

"The principle that public bodies must not use their powers for purposes incompatible with the purposes envisaged by the statutes under which they derive such powers cannot be in doubt in Canada since the landmark case of *Roncarelli v. Duplessis* (1959) 16 D.L.R. H (2d) 689, [1959] S.C.R. 121. Since that case, it is clear that a citizen who suffers damages as a result of flagrant abuse of public power aimed at him has the right to an award of damages in a civil action in tort."

The defendant emphasised the words "aimed at him." The words were wholly appropriate in the context of the disgraceful conduct of the respondent in *Roncarelli's* case but they do not preclude another path towards liability; that is to say, knowledge that an act is invalid coupled with foresight that its commission would damage the plaintiff.

Thirdly, there is the decision of the High Court of Australia in *Beaudesert Shire Council v. Smith* (1966) 120 C.L.R. 145, 156, that "a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other." There is apparently a decision of Hallet J. to the same effect: see *Wood v. Blair* (unreported), 4 July 1957, Court of Appeal Transcript No. 209 of 1957, p. 9. The tort described in *Beaudesert Shire Council v. Smith,* 120 C.L.R. 145 was said by Lord Diplock—with whom the other four members of the House agreed—in *Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2)* [1982] A.C. 173, 188, to be "no part of the law of England." The wrong described before me is not the wrong which was described before the High Court of Australia. The wrong described before me is that of an act performed by a public officer with actual knowledge that it is performed without power and is so performed with the known consequence that it would injure the plaintiffs.

I do not read any of the decisions to which I have been referred as precluding the commission of the tort of misfeasance in public office where the officer actually knew that he had no power to do that which he did, and that his act would injure the plaintiff as subsequently it does. I read the judgment in *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158 in the sense that malice and knowledge are alternatives. There is no sensible reason why the common law should not afford a remedy to the injured party in circumstances such as are before me. There is no sensible distinction between the case where an officer performs an act which he has no power to perform with the object of injuring A (which the defendant accepts is actionable at the instance of A) and the case where an officer performs an act which he knows he has no power to perform with the object of conferring a benefit on B but which has the foreseeable and actual consequence of injury to A (which the defendant denies is actionable at the instance of A). In my judgment each case is actionable at the instance of A and, accordingly, I determine that paragraphs 23 and 26 of the amended statement of claim do disclose a cause of action.

I cannot leave this case without acknowledging my indebtedness to the arguments of leading counsel and to those behind them who informed those arguments. I record with pleasure that amongst those behind was Laurence Nebot-Roland of Paris.

Judgment for plaintiffs with costs.
Assessment of quantum of damages adjourned generally, with liberty to apply.
Leave to appeal.

Solicitors: McKenna & Co.; Solicitor, Ministry of Agriculture, Fisheries and Food

[Reported by CLIVE SCOWEN, ESQ., Barrister-at-Law]

APPEAL from Mann J.

The defendant appealed by a notice of appeal dated 7 November 1984 on the grounds, inter alia, that (1) the judge was wrong in holding (i) that breach by member states of article 30 of the E.E.C. Treaty gave rise to an action for damages by individuals adversely affected by that breach, (ii) that because the duties imposed by articles 30 and 36 of the Treaty were sufficiently clearly defined to give them direct effect in member states they were sufficiently clearly defined to give rise to an action for damages for their breach, (iii) that the remedies provided in English law by way of judicial review were in European law ineffective or insufficient to protect such rights as were conferred on individuals by article 30; (2) the judge gave too much weight to the fact that no special remedy was provided by the E.E.C. Treaty for breach by a member state of article 30 and insufficient weight to the fact that, having regard to the remedies available by way of judicial review, there was no question that article 30 "would be but a pious aspiration": see *Cutler v. Wandsworth Stadium Ltd.* [1949] A.C. 398, 407, *per* Lord Simonds; (3) the judge was wrong in holding that because the European court in *Belgische Radio én Televisie v. S.V. S.A.B.A.M.* (Case 127/73) [1974] 1 E.C.R. 51, 62, and *Iannelli & Volpi S.p.A. v. Ditta Paolo Meroni* (Case 74/76) [1977] E.C.R. 557, 575, held in similar terms that articles 86 and 30 of the Treaty respectively had direct effects and created individual rights which national courts must protect, it followed that the remedies by which the English courts must protect those rights were the same in each case; (4) the judge gave no or insufficient weight to the fact that the terms, nature and effect of article 30 were substantially different from those of article 86 and failed to distinguish the present case from that of *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130; (5) the judge should have held that the effect of articles 30 and 36 was merely to limit the power of the defendants to impose import restrictions for the protection of animal health to the imposition of such controls as were justified for that purpose under article 36; (6) the judge was wrong in holding (i) that the allegations made in paragraphs 23 and 26 of the amended statement of claim, if proved, would give the plaintiffs a cause of action for the tort of misfeasance in a public office, (ii) that an intent to injure the plaintiffs was not an essential ingredient of that tort, (iii) that such an action lay where there was no direct connection between the public officer concerned and the plaintiffs.

By a respondents' notice dated 27 November 1984 the plaintiffs sought to contend that the judge's decision should be affirmed on the additional grounds that (1) (notwithstanding the concession made by the plaintiffs' counsel as set out in the judge's judgment, ante p. 734D–F) the judge should have further held that if, contrary to the holding of the judge, article 30 of the Treaty did not possess the characteristics that gave rise to an action for breach of statutory duty in English law, then

the plaintiffs' rights under article 30 were to be protected in English law by the cause of action pleaded in paragraphs 23 and 25 of the amended statement of claim; and (2) the judge should have further held that if and to the extent that malice was an essential ingredient of the tort of misfeasance in a public office, the presence of such malice was established by the allegations, if proved, in paragraphs 21.10 and 26 of the amended statement of claim.

Sir Patrick Mayhew Q.C., S.-G., Peter Scott Q.C. and *R. O. Plender* for the defendant. This appeal raises three separate issues: (i) breach of statutory duty sounding in damages; (ii) commission of innominate tort and (iii) commission of misfeasance in public office. On all the three issues the plaintiffs' case is based on article 30 of the E.E.C. Treaty, given the force of law in the United Kingdom by section 2(1) of the European Communities Act 1972.

Where the duty imposed by article 30 is breached English law does not give a right of action for damages to an individual who has suffered loss by reason of a breach of the article. His right under the article is protected by other remedies in English law, to the extent required by Community law, by way of judicial review. To impose a pecuniary liability of the indeterminate scope inherent in a right of action for damages for loss sustained by breach of article 30 would be inconsistent with authority, would put breaches of Community law in a different class from other Government acts found to be unlawful and cannot have been intended by Parliament. Section 2(1) of the Act of 1972 provides for all directly applicable Community law to take effect as law in the United Kingdom, but it does not enact it. It recognises it as one of the features of the treaties and provides for it to take effect accordingly. Thus, when United Kingdom courts consider a provision of directly applicable Community law they consider not a provision having the character of a United Kingdom enactment but a provision of a separate system of law which, by virtue of a United Kingdom enactment, has become a new source of law in the United Kingdom. Since, according to the jurisprudence of the European Court, directly applicable Community law is a separate system of law applying to all member states, section 2(1) does not proceed to enact the directly applicable Community law as part of the English statute law. It has the result of allowing the directly applicable Community law to operate here in accordance with the jurisprudence of the European Court as a separate system of law prevailing over the national law where there is any conflict.

The Act of 1972 deals with rights and remedies: section 2(1). The primary and obvious meaning of the section is to enable litigants subject to English law to avail themselves of remedies specially created by the treaties, e.g., articles 177, 173(2), 175(2), 178 and 215 of the E.E.C. Treaty. Secondary meaning of the section allows for enforcement in national courts of decisions of competent Community institutions in accordance with the treaty articles 187 and 192. Reference to remedies is to remedies and procedures provided for by or under the treaties and not remedies arising under national law. "Rights" means directly effective rights. The second aspect of section 2(1) is that rights and obligations

arising under treaties, if directly effective, shall be recognised and enforced in English courts. This accommodates within English law directly applicable provisions of Community law: *Iannelli & Volpi S.p.A. v. Ditta Paolo Meroni* (Case 74/76) [1977] E.C.R. 557. The means by which directly effective rights shall be protected are determined by national law. The European Court's judgments establish that it is not a corollary of attribution of direct effect to provision of Community law that it must be remediable in damages. Remedy is for national law: see *Rewe-Zentralfinanz e.G. v. Landwirtschaftskammer für das Saarland* (Case 33/76) [1976] E.C.R. 1989. The proposition was subsequently reiterated in *Granaria B.V. v. Hoofdproduktschap voor akkerbouwprodukten* (Case 101/78) [1979] E.C.R. 623; *Pigs and Bacon Commission v. McCarren & Co. Ltd.* (Case 177/78) [1979] E.C.R. 2161; *Hans Just I/S v. Danish Ministry for Fiscal Affairs* (Case 68/79) [1980] E.C.R. 501 and *Amministrazione delle Finanze dello Stato v. Ariete S.p.A.* (Case 811/79) [1980] E.C.R. 2545. Even where the retention of charges unlawfully made would result in the unjust enrichment of the state, Community law does not require that redress should always be available in national law for their recovery: *Humblet v. Belgian State* (Case 6/60) [1960] E.C.R. 559. A fortiori Community law does not require that redress be available by way of an action for damages where no charges have been improperly levied.

There are, however, conditions with which national law must comply. National legal systems do not enjoy unlimited freedom. Thus the remedy must not be discriminatory on grounds of nationality: article 7 and *Rewe-Handelsgesellschaft Nord m.b.H. v. Hauptzollamt Kiel* (Case 158/80) [1981] E.C.R. 1805. Member states must refrain from measures which could jeopardise achievement of Community's tasks: article 5. Thus, as the European Court has said in *Comet B.V. v. Produktschap voor Siergewassen* (Case 45/76) [1976] E.C.R. 2043, 2053, national remedy must not be so adapted as to make it impossible in practice to exercise rights which national courts must protect, nor may national remedies be "less favourable than those governing the same right of action on an internal matter." [Reference was made to *Harz v. Deutsche Tradax G.m.b.H.* (Case 79/83) [1984] E.C.R. 1921; *Commission of the European Communities v. Italian Republic* (Case 39/72) [1973] E.C.R. 101 and *Firma Denkavit Futtermittel G.m.b.H. v. Minister für Ernährung, Landswirtschaft und Forsten des Landes Nordrhein-Westfalen* (Case 251/78) [1979] E.C.R. 3369.]

In any event English law remedies by way of judicial review are dissuasive of breach of article 30. They are not less favourable than those relating to breaches of statutory provisions binding on the Crown and they are not adapted as to make it impossible in practice for traders in the position of the plaintiffs to exercise those rights. Administrative remedies in English law are certainly effective. Delays, and costs, are the considerations that the courts of first instance take into account in determining whether to make a reference for preliminary ruling: *H. P. Bulmer Ltd. v. J. Bollinger S.A.* [1974] Ch. 401, 420, and *C. Meijer B.V. v. Department of Trade* [1978] 2 C.M.L.R. 563, 565. The court may make orders of various kinds to meet the plaintiffs' objections. It

may grant declarations and leave the Crown to appeal or may indicate that it proposes to hear appeal very promptly unless the Crown gives relief. The court make final order very speedily: see *Reg. v. Her Majesty's Treasury, Ex parte Smedley* [1985] Q.B. 657. The public policy underlying the protection afforded by judicial review was the need for speedy certainty as to whether it has the effect of a decision that is valid in public law: *O'Reilly v. Mackman* [1983] 2 A.C. 237.

The E.E.C. Treaty provides for securing compliance with article 30 even though no means of enforcing such compliance by way of fines on defaulting member states is available. Articles 169–171 provide for judicial method: *Commission of the European Communities v. French Republic* (Cases 24/80, 97/80) [1980] E.C.R. 1319. Remedies provided for by the Treaty should be assessed bearing in mind the whole of the system of legal protection of individuals established by the Treaty: for example, article 215; *Koninklijke Scholten Honig N.V. v. Council and Commission of the European Communities* (Case 143/77) [1979] E.C.R. 3583. Case law of European Court on direct applicability and direct effectiveness began with *N. V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse administraite der belastingen* (Case 26/62) [1963] E.C.R. 1 but damages are not a corollary of direct effectiveness.

Directives addressed to member states may have direct effects; *Van Duyn v. Home Office* (Case 41/74) [1975] Ch. 358 and *Becker v. Finanzamt Münster-Innenstadt* (Case 8/81) [1982] E.C.R. 53, 79. To say that a provision produces direct effects is thus to say that individuals can rely on it, normally against a member state, occasionally against another individual. That does not mean that a plaintiff must be entitled to an action for damages or any particular remedy: *James v. The Commonwealth* (1939) 62 C.L.R. 339.

Mann J. relied on *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130 but that case is distinguishable and the defendant reserves the right to argue that article 86 does not give individuals a right of action for breach of statutory duty. In *Criminal proceedings against Jan van de Haar* (Cases 177/82, 178/82) [1984] E.C.R. 1797 European Court itself drew distinction between articles 30 and 85. The latter article for the present purposes is identical with article 86. The court pointed out that the article belongs to the rules on competition addressed to undertakings and pursues an aim different from that of article 30 which aims at eliminating national measures capable of hindering trade between member states and is addressed to the states: see also *Apple and Pear Development Council v. K. J. Lewis Ltd.* (Case 222/82) [1983] E.C.R. 4083 and, with regard to articles 85 and 86, see *Belgische Radio en Televisie v. S.V. S.A.B.A.M.* (Case 127/73) [1974] E.C.R. 51, 62. Thus rights created by article 30 are rights in public law. Judicial review normally provides the appropriate remedy: *O'Reilly v. Mackman* [1983] 2 A.C. 237, 285. Article 86 created private law rights. For breach of such rights judicial review is not available and an action for damages is normally the appropriate remedy. On breach of article 30 an injured party can complain to his state or to the commission and so secure observance of that article but a person who suffers breach of article 86

A cannot seek relief under the article 170 procedure. Articles 85 and 86 relate to competition law based on the existing competition law and giving rise to relief by way of damages. In respect of article 30 there were no pre-existing laws creating actions for damages and thus there was no need for harmonization by requiring all member states to provide actions for damages. Lord Diplock in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130, 141, characterised article 86 as B an article imposing duty for the purpose of promoting the general economic prosperity of the Common Market and for the benefit of private individuals to whom loss or damage is caused by a breach of that duty.

The plaintiffs' claim and Mann J.'s decision involve the proposition that, having been held by the European Court to have breached article C 30, the defendant is liable in damages to any one showing pecuniary loss consequential upon this breach, being a person entitled within the remoteness rules. That would include all relevant producers, exporters, importers, wholesalers, transporters and retailers and the like. That result is indeterminate in its practical scope and is inhibitive of ministerial decision-making. It would be inimical to public administration, and point away from a Parliamentary intention that section 2(1) of the European D Community Act 1972 should here provide for an action for damages. The absence of precise definition of a right points away from right of action in damages: *Cutler v. Wandsworth Stadium Ltd.* [1949] A.C. 398, 417, *per* Lord Reid; *McCall v. Abelesz* [1976] Q.B. 585; *Allen v. Flood* [1898] A.C. 1; *Bank voor Handel en Scheepvaart N.V. v. Administrator of Hungarian Property* [1954] A.C. 584 and *Bowen v. Hall* (1881) 6 E Q.B.D. 333.

The plaintiffs' argument reaches far beyond the ambit of article 30 in that it would require damages for breach of any directly effective provision of Community law: consider the facts in, for example, *Reyners v. Belgian State* (Case 2/74) [1974] E.C.R. 631, 652, where the court was concerned with article 52. Furthermore, there would be a liability in an indeterminate amount, for an indeterminate time and to an indeterminate F class. That must be inimical to public administration and hence contrary to public policy. Thus while enacting section 2(1) of the Act of 1972 Parliament could not have intended such a result.

The innominate tort relied on by the plaintiffs does not exist. In paragraph 25 of the statement of claim the claim is set out as a breach of article 30 giving rise to a right of action to "any person foreseeably G likely to be injured by a breach" of that article. That claim is based on an observation of Lord Denning M.R. in *Application des Gaz S.A. v. Falks Veritas Ltd.* [1974] Ch. 381, 396. Those words were obiter since in that case article 85 was used as a shield, not a sword. In *Valor International Ltd. v. Application des Gaz S.A.* [1978] 3 C.M.L.R. 87, 100, Roskill L.J. voiced reservations and further doubt was cast on Lord Denning M.R.'s dictum in *Garden Cottage Foods Ltd. v. Milk Marketing* H *Board* [1984] A.C. 130, 144–145, 150–151.

A tort which has come to be known as misconduct or misfeasance in a public office does exist and gives rise to a claim for damages but it would not be established on the facts pleaded by the plaintiffs. The

ambit of the tort is uncertain but it is settled that to establish that tort it is insufficient to demonstrate that the defendant acted ultra vires and that the plaintiff was a person whom the defendant foresaw or ought to have foreseen as likely to suffer in consequence. For a plaintiff to succeed he must show malice in the sense that the defendant's wrongful act was directed against him and that the purpose must have been to inflict some harm on him. Here, this is not alleged: *Tozer v. Child* (1857) 7 El. & Bl. 377; *Smith v. East Elloe Rural District Council* [1956] A.C. 736; *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158, 172, *per* Lord Diplock; *Wade, Administrative Law,* 5th ed. (1982), pp. 672–673. See further, *Farrington v. Thomson and Bridgland* [1959] V.R. 286; *Roncarelli v. Duplessis* (1959) 16 D.L.R. (2d) 689 and *Gershman v. Manitoba Vegetable Producers' Marketing Board* (1976) 69 D.L.R. (3d) 114; *Reg. v. Secretary of State for the Environment, Ex parte Hackney London Borough Council* [1983] 1 W.L.R. 524. [Reference was made to *Harman v. Tappenden* (1801) 1 East. 555; *Cullen v. Morris* (1819) 2 Stark. 577; *Whitelegg v. Richards* (1823) 2 B. & C. 45; *Henly v. Lyme Regis Corporation* (1828) 5 Bing. 91; *Partridge v. General Council of Medical Education and Registration of the United Kingdom* (1890) 25 Q.B.D. 90 and *Solomons v. R. Gertzenstein Ltd.* [1954] 2 Q.B. 243.]

Here, while it is alleged that the Minister knew that he exercised his power to withdraw the licences for a purpose that was contrary to article 30, it is not alleged that he knew that the exercise of his powers was unlawful and he caused damage to the plaintiffs as he could have foreseen that he might. That is not a basis for recovery of damages in English law. There is no liability for legislative or quasi-legislative acts: *Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg* (1970) 22 D.L.R. (3d) 470. [Reference was made to *Tamlin v. Hannaford* [1950] 1 K.B. 18 and *Reg. v. Inland Revenue Commissioners, Ex parte Rossminster Ltd.* [1980] A.C. 952.]

Under article 215 of the E.E.C. Treaty, which provides expressly for liability of Community institutions, the possibility of action for damages against the Council in consequence of unlawful exercise of legislative activites is not ruled out by the European Court (*Aktien-Zuckerfabrik Shoppenstedt v. Council of the European Communities* (Case 5/71) [1971] E.C.R. 975), but it is very restricted: *Bayerische H.N.L. Vermehrungsbetriebe G.m.b.H. & Co. K.G. v. Council and Commission of the European Communities* (Cases 83/76, 94/76, 4/77, 15/77, 40/77) [1978] E.C.R. 1209. Liability would arise only exceptionally and in special circumstances. Under the article the European Court has awarded damages in a few cases: *Ireks-Arkady G.m.b.H. v. Council and Commission of the European Communities* (Case 238/78) [1979] E.C.R. 2955, 2973; *P. Dumortier Frères S.A. v. Council of the European Communities* (Cases 167/78, 239/78, 27/79, 28/79, 45/79) [1979] E.C.R. 3091, 3144, and *Pauls Agriculture Ltd. v. Council and Commission of the European Community* (Case 256/81) [1983] E.C.R. 1707.

Richard Buxton Q.C., Christopher Vajda and *Laurence Nebot-Roland* (of the Paris Bar) for the plaintiffs. The relevant principles of European Community law applicable here are that rights created by Community treaties are part of English law and the questions affecting the meaning

A or effect of the E.E.C. Treaty have to be determined in accordance with the jurisprudence of the European Court of Justice: sections 2(1) and 3(1) of the European Communities Act 1972. A provision of the treaty having direct effect creates individual rights which the national courts must protect: *N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen* (Case 26/62) [1963] E.C.R. 1.

B Article 30 of the Treaty has direct effects. Thus it creates individual rights which must be protected by national courts. The European Court does not provide relief in respect of such rights: *Iannelli & Volpi S.p.A. v. Ditta Paolo Meroni* (Case 74/76) [1977] E.C.R. 557. National courts decide the form such protection takes and the procedure to be followed to enforce those rights.

C The European Court has laid down certain principles which have to be followed by national courts: *Amministrazione delle Finanze dello Stato v. S.p.A. San Giorgio* (Case 199/82) [1983] E.C.R. 3595 and *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* (Case 106/77) [1978] E.C.R. 629. Those principles are: (a) to ensure observance of Community provisions having direct effect every type of action provided for by national law should be available (*Rewe-Handelsgesellschaft*
D *Nord m.b.H. v. Hauptzollamt Kiel* (Case 158/80) [1981] E.C.R. 1805); (b) remedies for the protection of Community rights should be available on the same conditions as are remedies for the protection of rights of a similar character under domestic law (*Hans Just I/S v. Danish Ministry for Fiscal Affairs* (Case 68/79) [1980] E.C.R. 501); (c) the procedural conditions for enforcing Community rights are for national courts to
E decide but such conditions should not be so adapted as to make it impossible in practice to exercise such rights (*Amministrazione delle Finanze dello Stato v. Denkavit Italiana S.r.l.* (Case 61/79) [1980] E.C.R. 1205) and (d) the form of protection must dissuade breaches of Community law (*Harz v. Deutsche Tradax G.m.b.H.* (Case 79/83) [1984] E.C.R. 1921).

It follows from those principles, read in conjunction with the rules of
F English law, that for a breach of article 30 of the Treaty an action for damages for breach of statutory duty must be available in an English court: see also *Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2)* [1982] A.C. 173, 183, *per* Lord Diplock. The availability of such an action must, therefore, depend on the construction of article 30 which as a matter of construction, because it creates individual rights, founds a
G remedy for breach of statutory duty. [Reference was made to *Reg. v. Wirral Metropolitan Borough Council, Ex parte Wirral Licensed Taxi Owners Association* [1983] 3 C.M.L.R. 150 and *Defrenne v. Sabena* (Case 43/75) [1976] I.C.R. 547.] Since the question of the construction of that article is concluded by the jurisprudence of the European Court, it is unnecessary and inappropriate, when considering the article, to look at the English domestic rules of construction determining whether a
H domestic statute founds an action for breach of statutory duty: *Cutler v. Wandsworth Stadium Ltd.* [1949] A.C. 398 and *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130, 141, where it was assumed that availability of an action for breach of statutory duty

followed as of course from a breach of an article of the Treaty having direct effect—in that case, article 86—without any need to consider the English domestic rules of construction. [Reference was made to *McCall v. Abelesz* [1976] Q.B. 585.] However, the availability of an action for breach of statutory duty entails that that action should be an action for damages. The characteristic remedy in English domestic law for breach of a statutory duty owed to an individual is an action for damages. Such an action is not excluded in domestic law by the availability of declaration under R.S.C., Ord. 53: *Thornton v. Kirklees Metropolitan Borough Council* [1979] Q.B. 626, 643–644, *per* Roskill L.J. and *Cocks v. Thanet District Council* [1983] 2 A.C. 280, 293, *per* Lord Bridge of Harwich. If, therefore, an action for damages to assert a domestic right is not excluded by the availability of a declaration granted by judicial review, such an action cannot be excluded in the case of a Community right by the availability of such a declaration.

An action for damages for breach of statutory duty is a type of action provided by English law to remedy breach of an individual right created by a domestic statute. To exclude that type of action in respect of an individual right created by a Community statute would be contrary to principle. If there were no action for damages, the subject would be unable to assert his Community right in respect of the period before final judgment. That outcome would be in contravention of principle. In particular, when the breach of statutory duty is committed by the Crown, the subject is not fully protected and his right is not fully asserted by an action for a declaration because such an action does not afford interim relief: *Reg. v. Inland Revenue Commissioners, Ex parte Rossminster Ltd.* [1980] A.C. 952 and *International General Electric Co. of New York Ltd. v. Customs and Excise Commissioners* [1962] Ch. 784. [Reference was made to *Benjamin v. Storr* (1874) L.R. 9 C.P. 400 and *Boyce v. Paddington Borough Council* [1903] 1 Ch. 109.]

If the English domestic rules of construction were to be applied, here, the result would still be to create liability in damages for breach of statutory duty. The defendants accept that neither the Treaty nor any Community regulation presents a method of enforcing compliance with article 30: *Cutler v. Wandsworth Stadium Ltd.* [1949] A.C. 398, 407. In that case Lord Reid said, at p. 417, that individual rights should be capable of reasonably precise definition. That requirement is fulfilled in the instant case because the European Court has held that article 30 is explicit in its terms and because the right asserted by the plaintiffs is clearly capable of reasonably precise definition and was a right to import goods into the United Kingdom in all the circumstances which are not covered by article 36 of the Treaty. See also *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130 and *An Bord Bainne Co-operative Ltd. (Irish Dairy Board) v. Milk Marketing Board* [1984] 1 C.M.L.R. 519.

Alternatively, the issue of innominate tort only arises if an action for damages for breach of statutory duty is held to be excluded by the rules of construction of English domestic law. But English law is obliged to give some remedy that effectively protects the individual's rights created by article 30. If an action for breach of statutory duty is excluded on

English domestic grounds the subject's right under article 30 must be effectively asserted by other means, i.e., by means of an innominate tort: *Application des Gaz S.A. v. Falks Veritas Ltd.* [1974] Ch. 381.

If English courts were to refuse a remedy in damages for a breach of a directly applicable provision of the Treaty those courts would be in breach of their duty under article 5 of the Treaty: *Humblet v. Belgian State* (Case 6/60) [1960] E.C.R. 559 and also the general principles of Community law in that the remedies provided by English law in respect of a breach of a directly applicable Community provision would make it impossible to exercise and enjoy Community rights: *Russo v. Azienda di Stato per gli Interventi sul Mercato Agricolo (A.I.M.A.)* (Case 60/75) [1976] E.C.R. 45. National courts should protect the rights arising from Community legislation: *Rewe-Zentralfinanz e.G. v. Landwirtschafts-kammer für das Saarland* (Case 33/76) [1976] E.C.R. 1989 and *Simmenthal S.p.A. v. Italian Minister for Finance* (Case 35/76) [1976] E.C.R. 1871.

In *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158 the Privy Council held that the tort of misfeasance in a public office is established if the public authority acts either (a) with knowledge that it is acting ultra vires or (b) in bad faith or with malice. To establish knowledge in that context it was enough to show that the authority knew at the time that it has no power to do what was proposed to be done and that the act would injure the plaintiff. There is no authority for contending that for the tort of misfeasance to exist there must be demonstrated in addition an intent to injure the plaintiff or direct connection between the public office concerned and the plaintiff. Liability based on acting with malice is satisfied by proof that the public authority acted with an improper motive: *David v. Abdul Cader* [1963] 1 W.L.R. 834 and *Cullen v. Morris* (1819) 2 Stark 577. [Reference was made to *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.* (1889) 23 Q.B.D. 598.]

Such improper motive is alleged in the instant case. The defendants' motive was to protect English turkey producers from competition by the plaintiffs. In such circumstances a party can sue in respect of damage caused to him even though the act is not aimed at him: *Cullen v. Morris*, 2 Stark. 577. [Reference was made to *Dansk Supermarked A/s v. A/s Imerco* (Case 58/80) [1981] E.C.R. 181 and *Certrafarm B.V. v. Sterling Drug Inc.* (Case 15/74) [1974] E.C.R. 1147.]

Cur. adv. vult.

29 July 1985. The following judgments were handed down.

OLIVER L.J. This is an appeal from a decision of Mann J. on the hearing of a preliminary issue in an action. The issue, in short, was whether paragraph 23 of the statement of claim in the action, in conjunction with all or any of paragraphs 24, 25 and 26, disclosed any cause of action.

The facts relevant to the hearing of the appeal can be relatively shortly stated. The first five plaintiffs in the action are companies incorporated and carrying on business in France where they are engaged

in the production and sale of frozen turkeys and turkey parts. The sixth plaintiff is an English company whose shares are owned by two of the other plaintiff companies and which acts as agent in England for the distribution of their products. The seventh plaintiff is an association for the promotion of the interests of French turkey producers of which the first five plaintiffs are members. Section 24(1) of the Diseases of Animals Act 1950 authorised the Minister of Agriculture to make orders prohibiting the landing within Great Britain from abroad of animals or animal carcases or any specified kind of animal or carcase "for the purpose of preventing the introduction of disease into Great Britain." That power was exercised in 1980 as regards the importation of poultry by the Importation of Animal Products and Poultry Products Order 1980 (S.I. 1980 No. 14), article 4 of which prohibited the importation from abroad of turkeys and turkey parts unless authorised by a licence issued by the minister. The Act of 1950 was repealed by the Animal Health Act 1981 which replaced it, but the Order of 1980 continued to have effect by virtue of section 10 of the Act of 1981.

It seems that poultry, and in particular turkeys, are prone to contract a contagious virus disease known as Newcastle disease. This can be controlled by vaccination but a vaccinated bird may, after slaughter, carry the virus in any of its parts. The alternative method of control is by slaughter and destruction of affected birds whenever and wherever the disease breaks out, and this was the method of control which was relied upon in Great Britain up to 1964. Thereafter until the end of August 1981 it was controlled by vaccination and that was the method of control which was at all material times followed in France. That it was considered a satisfactory method of control is evidenced by the fact that until 31 August 1981 the importation of turkeys and turkey parts from, among other countries, France was permitted by a general licence issued under article 4 of the Order of 1980. The first five plaintiffs were thus enabled to import birds and to build up a satisfactory and expanding trade in this country.

At the end of August 1981 the defendant abandoned the previous policy of vaccination and reverted to the expedient of slaughter which had prevailed up to 1964. At the same time it adopted a policy of excluding from Great Britain any turkeys or turkey parts having their origin in countries which relied upon vaccination for controlling the disease. As a result, on 27 August 1981, the general licence for the importation of turkeys and turkey parts from France was revoked and it was replaced by a new general licence authorising the landing in Great Britain of turkeys and turkey parts only if they had their origin in Denmark or Ireland. As a result the French turkey producers' trade in England came to an end.

They were, perhaps not unnaturally, aggrieved and suspected that the alteration in policy had been brought about not by any genuine fear that vaccinated birds were likely to spread the disease in Great Britain but in response to pressure by British turkey producers whose business was being severely hit by competition from France. The change of policy by the British Government was notified to the Commission of European Communities on 27 August 1981. Thereafter steps were taken by the

French Government through the Commission to challenge the withdrawal of the licence to import on the ground that it was an infringement of article 30 of the Treaty establishing the European Economic Community which is in the following terms:

> "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between member states."

That claim was unanswerable unless a justification could be found in some other article in the Treaty, but the British Government's answer was that the restriction imposed by the non-grant of a licence was justified under article 36, which provides, so far as material:

> "The provisions of article 30 . . . shall not preclude prohibitions or restrictions on imports . . . justified on grounds of . . . the protection of health and life of . . . animals . . . Such prohibitions or restrictions shall not, however, constitute . . . a disguised restriction on trade between member states."

The matter finally came before the European Court of Justice under article 169 of the Treaty in *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* (Case 40/82) [1982] E.C.R. 2793 and on 15 July 1982 the court rejected the British Government's answer and held that the United Kingdom had failed to fulfil its obligations under article 30 of the Treaty, observing, at p. 2825, para. 37:

> "Certain established facts suggest that the real aim of the 1981 measures was to block, for commercial and economic reasons, imports of poultry products from other member states, in particular from France."

Following that judgment the Minister issued a further licence, and imports by the first five plaintiffs were resumed in the latter part of November 1982. They had, however, suffered the disruption of their trade in the meantime and, in particular, lost the benefit of the Christmas season of 1981. On 6 May 1982 they issued the writ in this action naming the Ministry of Agriculture as defendant and claiming substantial damages. The question in issue in this appeal is whether, in as much as the breach of duty alleged is a breach by a member state of the provisions of article 30 of the Treaty, the individual plaintiffs have any rights in English law to sue for damages. It is the Solicitor-General's contention on the defendant's behalf that the only remedy which the plaintiffs had—and it has, it is contended, now become academic—was to apply for judicial review of the Minister's decision to revoke the previous licence or to refuse a new licence, a right of which in fact they never sought to avail themselves, preferring to rely upon the pursuit of the matter through the Commission of the European Communities and the European Court of Justice.

The amended statement of claim which is indorsed on the writ, after setting out the facts which I have attempted to summarise above, proceeded in paragraphs 23–26:

"23. The withdrawal by the defendant of licences for the import of turkeys and turkey pieces and other poultry products into England, and the refusal thereafter of the defendant to permit turkeys or turkey pieces and other poultry products to be imported into England, had caused and is continuing to cause the plaintiffs substantial loss and damage. The plaintiffs set out in a separate document served herewith pursuant to R.S.C., Ord. 18, r.12(2) particulars of the said loss and damage so far as it is possible to state them at the date of this pleading and reserve the right to supplement their pleading as to damages thereafter.

"24. The said loss and damage was caused to the plaintiffs and continues to be caused to them by reason of the breach of the defendant of [its] statutory duty in that the said withdrawal of licences was in breach of article 30 of the [E.E.C. Treaty].

"25. Further or alternatively, the defendant owed a duty in law to any person foreseeably likely to be injured by a breach by him of article 30 (including the plaintiffs) not so to breach article 30 or to act contrary to the provisions of article 30. The said loss and damage was caused to the plaintiffs and continues to be caused to them by the defendant's breach of that duty.

"26. Further or in the further alternative, the defendant by withdrawing the said licences in breach of article 30, and further by withdrawing the said licences with the motive of protecting English turkey producers from competition by the plaintiffs (as set out in paragraphs 19–21 hereof), misconducted itself in the discharge of its public duties and in its public office, in that it exercised its powers to withdraw the said licences for a purpose that (as the defendant knew) was contrary to article 30 and/or was calculated to and did unlawfully damage the plaintiffs in their business and/or was not the purpose for which the said powers had been conferred upon the defendant."

No attempt was made to strike out the action, but in paragraph 41 of its defence the defendant pleaded that the paragraphs of the statement of claim quoted above disclosed no cause of action and that question was, on 10 November 1983, ordered to be tried as a preliminary issue. That issue was heard by Mann J. who, on 1 October 1984, held that paragraphs 23 and 24 and paragraphs 23 and 26 did, but paragraph 25 did not, disclose a cause of action. The facts in paragraphs 23 and 24 being incontestable, the judge entered judgment for damages to be assessed. From that decision the defendant now appeals and there is a respondent's notice with regard to the judge's holding in relation to paragraph 25.

The appeal thus raises three questions which have been dealt with in argument and can conveniently be dealt with here quite separately. The first is whether, it being accepted that article 30 of the Treaty does, as a matter of the jurisprudence of the European Community, confer on an individual affected by a breach of its terms by a member state the right to proceed in the national courts of the offending member state to have the breach rectified, that right is merely a right to avail himself of whatever procedure may exist in the member state concerned to enforce

a public law right—that is to say, in practice, an application for judicial review under the provisions of R.S.C., Ord. 53—or whether it is a right in private law carrying with it the remedy of damages, in addition to any other appropriate order of injunction in the same way as any other private right under English law.

The plaintiffs' argument, which succeeded before the judge, may be summarised in a series of propositions:

(1) The rights and obligations created by or arising under the Treaty are incorporated into English law by the European Communities Act 1972 which also, by section 3, incorporates the jurisprudence of the Community. (2) Article 30 of the Treaty is an article which, as the jurisprudence of the Community establishes, has direct effect upon individuals within the Community and therefore confers rights upon them as well as upon member states. (3) Correspondingly it imposes on each member state a correlative obligation owed to the individual. (4) Such rights and obligations, incorporated into English law by statute and thus, so far as the obligations are concerned, constituting statutory duties, are private law rights which are enforceable in the same way as any other private law right, including an action for damages for breach of statutory duty.

It is upon proposition (4) that the parties primarily divide, but it is important to an understanding of the arguments relative to that proposition to consider the way in which the arguments to substantiate propositions (1) to (3) have been developed.

Sections 2(1) and 3(1) of the Act of 1972 are in the following terms:

> "2(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies."
>
> "3(1) For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court)."

The terms of article 30 of the Treaty have already been referred to and on the face of them they appear at least to be open to the argument that they refer only to a prohibition or negative obligation as between member states.

There is, however, ample authority in the decisions of the European Court for the proposition that where articles of the Treaty directly affect individuals they confer on the individuals affected a right to have the provisions of such articles observed which the law must protect, subject,

however, to the qualifications that their enforcement by individuals is a matter for the national courts of member states.

The proposition was strikingly and unequivocally expressed in *N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen* (Case 26/62) [1963] E.C.R. 1, a case concerned with article 12 of the Treaty, which prohibits the introduction of member states between themselves of new customs duties. In the course of its judgment the European Court observed, at p.12:

> "In addition to the task assigned to the Court of Justice under article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals . . . Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the Community."

Certain articles of the Treaty are so framed that, by their nature, they cannot create rights in or confer obligations upon individuals—for instance, articles 35, 64 and 71—but it is clear that the mere fact that an article is so worded as to impose, in express terms, a prohibition only upon a member state does not conclude the question whether it does not also confer rights upon an individual who is directly affected by a breach of the prohibition.

Article 12, for instance, contains a prohibition directed to member states in terms certainly no more direct than those of article 30. Nevertheless the court in *N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlande administratie der belastingen* regarded such a clear and unequivocal prohibition as a factor indicative of the creation of individual rights, as appears from the following passage from the judgment, at p. 13:

> "The wording of article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between member states and their subjects . . . The fact that under this article it is the member states who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation . . . The fact that these articles of the Treaty [articles 169 and 170] enable the Commission and the member states to bring before the court a state which has not fulfilled its obligations does not mean that individuals

A cannot plead these obligations, should the occasion arise, before a national court, any more than the fact that the Treaty places at the disposal of the Commission ways of ensuring that obligations imposed upon those subject to the Treaty are observed, precludes the possibility, in actions between individuals before a national court, of pleading infringements of these obligations. A restriction of the guarantees against an infringement of article 12 by member B states to the procedures under [articles] 169 and 170 would remove all direct legal protection of the individual rights of their nationals . . . It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect."

C Now if article 12 is one which confers rights of enforcement in national courts upon individuals directly affected by breaches of its terms, it is difficult to see how it could successfully be argued that article 30 does not likewise confer similar rights. And indeed that has been held as a matter of decision in *Iannelli & Volpi S.p.A. v. Ditta Paolo Meroni* (Case 74/76) [1977] E.C.R. 557, where the court said, at p. 575, D para. 13:

> "The prohibition of quantitative restrictions and measures having equivalent effect laid down in article 30 of the Treaty is mandatory and explicit and its implementation does not require any subsequent intervention of the member states or Community institutions. The prohibition therefore has direct effect and creates individual rights E which national courts must protect; . . ."

It is thus common ground between the parties that article 30 is an article having "direct effect." The difference between them is as to the consequences of that state of affairs, for though the interpretation of the Treaty and the analysis of its scope is determined by Community law, Community law has, subject to one important qualification, nothing to F say about the mode in which individual rights held to be conferred are to be enforced, save that they are to be enforced by the national courts. A series of decisions has established that the procedures for enforcement by the courts of each member state are to be determined by the domestic law of that state.

> "In the absence of any relevant Community rules, it is for the national legal order of each member state to designate the competent G courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing the same right of action on an internal matter"—*Comet B.V. v. Produktschap Voor Siergewassen* (Case 45/76) [1976] E.C.R. 2043, 2053, para. 13.

H Thus periods of limitation, rights of set-off, the extent of rights of reimbursement of improper charges, payment of interest and so on are matters to be regulated by the domestic law of the member state in whose courts the individual right-holder seeks to proceed: see *Comet*

B.V. v. Produktschap voor Siergewassen and *Pigs and Bacon Commission v. McCarren & Co. Ltd.* (Case 177/78) [1979] E.C.R. 2161.

The freedom of national courts from Community control over or interference with the remedies provided by domestic law is well illustrated in the following passage from the judgment of the European Court in *Hans Just I/S v. Danish Ministry for Fiscal Affairs* (Case 68/79) [1980] E.C.R. 501, 523, para. 26:

> "It should be specified in this connection that the protection of rights guaranteed in the matter by Community law does not require an order for the recovery of charges improperly made to be granted in conditions which would involve the unjust enrichment of those entitled. There is nothing therefore, from the point of view of Community law, to prevent national courts from taking account in accordance with their national law of the fact that it has been possible for charges unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to the purchasers. It is equally compatible with the principles of Community law for courts before which claims for recovery of repayments are brought to take into consideration, in accordance with their national law, the damage which an importer may have suffered because the effect of the discriminatory or protective tax provisions was to restrict the volume of imports from other member states."

Thus while the right arises under the Treaty, the remedy and the procedure for enforcing it is a matter for the national court. There is, however, the important qualification expressed in the proviso in the citation from the judgment in *Comet B.V. v. Produktschap voor Siergewassen* (Case 45/76) [1976] E.C.R. 2043 referred to above—namely that the rules applied by the national courts to enforce rights under the Treaty must be not less favourable than those capable of being invoked for the protection of a similar right arising under the domestic law of the court in which the right is sought to be enforced.

This has been variously expressed, but can be summarised in three propositions: (1) individual rights under Community law must be capable of being enforced by any type of action available for the enforcement of similar rights under national law: *Rewe-Handelsgesellschaft Nord m.b.H. v. Hauptzollamt Kiel* (Case 158/80) [1981] E.C.R. 1805, 1838; (2) such remedies must be capable of being resorted to under conditions not less favourable than those applicable to the enforcement of a similar right of a domestic nature; (3) such remedies must not be so adapted as to make it impossible in practice to exercise the rights which the national courts have a duty to protect: *Amministrazione delle Finanze dello Stato v. Ariete S.p.A.* (Case 811/79) [1980] E.C.R. 2545, 2555.

Subject to qualifications as to the degree to which rights of individuals to enforce the obligations or prohibitions of the Treaty assimilate to private rights in domestic law, these propositions are accepted by both sides. From this point onwards, however, the rival arguments display fundamental differences of approach. The plaintiffs' case is very simple. Sections 2(1) and 3(1) of the European Communities Act 1972 have the effect of incorporating as part of English law the rights created by the

Community Treaties and of receiving into English law the determination of questions as to the meaning and effect of the E.E.C. Treaty in accordance with the jurisprudence of the European Court of Justice. Once it has been determined in accordance with that jurisprudence (as it has) that article 30 confers rights upon individuals directly affected—and it is not contested that the plaintiffs are such individuals—one is then only concerned to inquire what is the appropriate categorisation of those rights in domestic law and what remedies the domestic law provides for infringement of rights of the same category. If the answer to that inquiry is that the domestic law protects a right of the same category by an action for damages, it follows inexorably that the Community right will and must be similarly protected. The final and, the plaintiffs say, the conclusive step in the argument is that the categorisation of the individual right conferred by the Treaty has been conclusively determined, in a manner binding upon this court, as a right the infringement of which constitutes the tort of breach of statutory duty for which the appropriate domestic remedy is, among other remedies, an action for damages.

The plaintiffs found their case upon the decision of the House of Lords in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130, in which their Lordships were concerned with the question—admittedly an interlocutory one—whether an interlocutory injunction sought by the plaintiffs to restrain breaches by the defendants of the provision of article 86 of the Treaty had been rightly refused on the ground that damages would be an adequate remedy. The argument raised directly the question whether any remedy in damages lay for such a breach.

The heart of the matter is contained in the following passages from the speech of Lord Diplock, with whom the majority of their Lordships agreed, at pp. 141 and 144:

> "This article [article 86 of the E.E.C. Treaty] was held by the European Court of Justice in *Belgische Radio en Televisie v. S.V. S.A.B.A.M.* (Case 127/73) [1974] E.C.R. 51, 62, to produce direct effects in relations between individuals and to create direct rights in respect of the individuals concerned which the national courts must protect. This decision of the European Court of Justice as to the effect of article 86 is one which section 3(1) of the European Communities Act 1972 requires your Lordships to follow. The rights which the article confers upon citizens in the United Kingdom accordingly fall within section 2(1) of the Act. They are without further enactment to be given legal effect in the United Kingdom and enforced accordingly. A breach of the duty imposed by article 86 not to abuse a dominant position in the common market or in a substantial part of it, can thus be categorised in English law as a breach of statutory duty that is imposed not only for the purpose of promoting the general economic prosperity of the common market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty. If this categorisation be correct, and I can see none other that would be capable of giving rise to a civil cause of action in English private law on the part of a private individual who sustained loss or damage by reason of a

> breach of a directly applicable provision of the Treaty . . . the nature of the cause of action cannot, in my view, be affected by the fact that the legislative provision by which the duty is imposed takes the negative form of a prohibition of particular kinds of conduct rather than the positive form of an obligation to do particular acts . . . I, for my own part, find it difficult to see how it can ultimately be successfully argued, as Milk Marketing Board will seek to do, that a contravention of article 86 which causes damage to an individual citizen does not give rise to a cause of action in English law of the nature of a cause of action for breach of statutory duty; but since it cannot be regarded as unarguable that is not a matter for final decision by your Lordships at the interlocutory stage that the instant case has reached. What, with great respect to those who think otherwise, I *do* regard as quite unarguable is the proposition, advanced by the Court of Appeal itself but disclaimed by both parties to the action: that if such a contravention of article 86 gives rise to any cause of action at all, it gives rise to a cause of action for which there is no remedy in damages to compensate for loss already caused by that contravention but only a remedy by way of injunction to prevent future loss being caused. A cause of action to which an unlawful act by the defendant causing pecuniary loss to the plaintiff gives rise, if it possessed those characteristics as respects the remedies available, would be one which, so far as my understanding goes, is unknown in English private law, at any rate since 1875 when the jurisdiction conferred upon the Court of Chancery by Lord Cairns' Act [the Chancery Amendment Act 1858] passed to the High Court."

Unless, therefore, the instant case can be distinguished in some relevant way from *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130, it is very difficult to see any logical answer to the plaintiffs' submissions. Mann J. was unable to see any, and accordingly held that paragraphs 23 and 24 of the statement of claim did disclose a cause of action for breach of statutory duty.

The grounds upon which the present case can be distinguished are, it is submitted on behalf of the defendant, twofold. First, it is said that, although it has to be accepted that under the jurisprudence of the European Court article 30 is an article having direct effect and thus creating rights in individuals, that jurisprudence tells us nothing about the nature of the rights so created. It does not follow, it is submitted, that because a breach of article 86 has been held to give rise to an action for damages in tort for breach of statutory duty, a breach of article 30 has necessarily to be placed in the same category. That leads on to the second relevant distinction—that is, that the claim in the instant case is a claim against the Crown not in respect of a ministerial act but in respect of a discretionary or legislative act. There is a quite separate point based on the Crown Proceedings Act 1947, but that aside, the consequence of the nature of the claim itself, it is argued, is that the only appropriate remedy is an application for judicial review. This illustrates and underlines the fundamental difference in approach

between the two sides. The defendants' argument starts from the proposition that a decision that article 30 is an article having direct effect does no more than provide the locus standi for enforcement by the individual before the national court. It does not of itself determine whether the right created in the individual is to be categorised by the national law as a private law right to be protected by such remedies as the national law provides for such a right, or as a right to have the public law enforced to which are attached the remedies appropriate for such enforcement. Nothing in the jurisprudence of the European Court lays down in express terms that the rights conferred on individuals by directly effective articles of the Treaty are to be enforced by an award of damages. The mode of enforcement is something which is left to be evolved by the national court, subject only to the provisos summarised above. Thus, it is argued, the remedy by way of judicial review is one which is available in an English court to correct any abuse or misuse of power by a public authority and it is an adequate and effective remedy. That is all that the jurisprudence of the European Court requires the national court to provide and it is the remedy which is provided in domestic cases where the subject seeks the enforcement of statutory duties by public authorities in public law.

The judge rejected this approach for a number of reasons which have been criticised by the Solicitor-General. He accepted, for the purpose of the argument, that it was for the English court to determine the form of protection appropriate to the individual right in question, but subject to the qualification that, in as much as it is for the national court to give effect to the rights created by the Treaty, the remedies offered must be effective. To that the judge added the further qualification that they must be of a nature dissuasive of breaches of the obligations of the Treaty. He was not, however, convinced of the effectiveness of the remedy of judicial review, nor was he persuaded that the right for which protection was sought was one which was properly categorised as a public law right.

It has been argued that, in suggesting that the remedies to be provided by the national courts must be dissuasive of breaches, the judge was going further than the authorities warrant or require. The point is not, I think, of central importance, but although the word "dissuasive" was the judge's own word and not one to be found in the cases to which we have been referred, the concept does, I think, derive support from *Harz v. Deutsche Tradax G.m.b.H.* (Case 79/83) [1984] E.C.R. 1921, which was concerned with the implementation of a directive regarding equal pay for women and in which the court observed, at p. 1941, para. 23:

> "Although . . . full implementation of the directive does not require a specific form of sanction for breach of the prohibition of discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer."

Speaking for myself I am not sure that this is not merely another way of saying that the remedy must be "effective."

Principally, however, the criticism of the judge's judgment is directed to his suggestion that a remedy by way of judicial review is not an effective remedy because there is no way of obtaining an interim declaration and there is thus lacking the provision of any remedy for damage which has accrued or will accrue between the date of the act complained of and the final decision in the proceedings for judicial review. It is said that such proceedings can be very speedily brought to a hearing so that any damage can be kept to a minimum. That is of course true, but the fact remains that in the absence of a remedy in damages or immediate interim relief breaches of the Treaty occurring prior to the decision in those proceedings will remain uncompensated. Thus to that extent the right conferred will have been both unenforced and unenforceable. It is also said that the effectiveness of the remedy has to be looked at in the light of the fact that there are within the framework of the Treaty other concurrently exercisable remedies available in the form of complaint to the Commissioners under article 169 and, as between member states, actions in the European Court under articles 170 and 171.

Now it is true that what is or is not "effective" may be a matter of degree, but, speaking for myself, my principal criticism of this argument is that it starts from the wrong end, by seeking to arrive at the nature of the right by reference to the effectiveness of the remedies which may be provided for its enforcement. What is not in doubt is that the rights conferred by article 30 on individuals must be accorded the same protection as similar rights in domestic law. To say that an application for judicial review would be an effective remedy for breach of article 30 because it is the remedy—and an effective one—provided by English law for enforcing public law rights assumes that the right conferred by article 30 on the individual is in the category of a public law right. If it is not, then whether effective or not, a restriction of the remedy to judicial review would be a breach of the obligation to provide remedies on terms no less favourable than those applicable to comparable domestic rights.

This is, as the Solicitor-General has recognised, the crucial question: accepting, as he must, that under the Community jurisprudence article 30 is an article having direct effect and thus conferring on individuals in the community rights requiring to be enforced in the national courts of the member states, what is the nature of the right conferred? *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130 certainly decides, as a matter of concession in this court (although the Solicitor-General wishes to keep the question open should the case go higher), that if a breach of article 86 gives rise to any action at all at the suit of an individual who suffers damage as a result, the cause of action is one which is based upon the invasion of a private law right giving rise to a claim in damages. But it does not follow, he argues, from that decision that every breach of any article held by the European Court of Justice to have direct effect (i.e., to confer rights of action upon individuals) necessarily involves the invasion of that individual's private law right. Thus his primary argument is that *Garden Cottage Foods Ltd. v. Milk Marketing Board* is distinguishable because the right with which it was concerned is distinguishable from the right conferred by article 30. That

article confers no rights of the nature of private law rights but only a public law right enforceable by the means which are appropriate in the national law of the member state for the protection of such a right. It is perhaps advisable before considering the bases of this argument to seek to define the terms in which it has been expressed. Rights in "private law" and "public law" rights are expressions which have appeared in English jurisprudence only relatively recently. The former is used in the context of the argument in the present appeal to signify the rights which enable an injured individual to seek all or any of the remedies available from the armoury of the law for the breach of a duty owed specifically to him, and is to be distinguished from the "right" (if that is the correct word) to have the law properly and fairly enforced and administered by a public authority in the performance of its duties to the public at large. For the breach of the latter duty, the remedy of judicial review is available to one who can establish a sufficient interest to invoke it. The argument that the right conferred by article 30 is a right only of the latter type, in contradistinction to the rights conferred by article 86, is supported in a number of different ways. First it is argued that whereas article 86, by its very terms, contemplates that individual institutions of a non-public nature will be bound by its provisions, article 30 is addressed to member states and not to individuals. Thus a distinction is sought to be drawn between what are described as "vertical" rights and duties (i.e., those existing between the individual and the organ of the member state) and "horizontal" rights and duties existing between individuals inter se.

Reliance was placed upon the decision of the European Court in *Criminal proceedings against Jan van de Haar* (Cases 177/82, 178/82) [1984] E.C.R. 1797, in which the court remarked upon the differences between article 85 and article 30. At paras. 11, 12 and 14 of its decision the court observed, at pp. 1812, 1813:

> "Article 85 of the Treaty belongs to the rules on competition which are addressed to undertakings and associations of undertakings and which are intended to maintain effective competition in the common market . . . Article 30, on the other hand, belongs to the rules which seek to ensure the free movement of goods and, to that end, to eliminate measures taken by member states which might in any way impede such free movement . . . The reply to the first and second questions must therefore be that article 30 of the Treaty, which seeks to eliminate national measures capable of hindering trade between member states, pursues an aim different from that of article 85, which seeks to maintain effective competition between undertakings."

Thus it is argued that whilst it may be necessary, in order to provide an effective enforcement, to accord to a person injured by breach of article 85 or 86 a right to damages, no such necessity exists in implementing the aim of article 30.

The difficulty that I find about this, however, is first, that it repeats what I believe to be the fallacy of seeking to ascertain the nature of the right by reference to the minimum effective remedy for its enforcement,

and secondly, that it does not overcome the difficulty that other articles, similarly addressed in terms to member states, have been held to create rights both between individuals and between individuals and the organs of member states. For instance article 119 provides:

> "Each member state shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work."

That article has been held to be directly applicable and has to give rise to individual rights which the courts must protect. In *Defrenne v. Sabena* (Case 43/75) [1976] I.C.R. 547 the court observed, at pp. 567, 568:

> "30. It is also impossible to put forward arguments based on the fact that article 119 only refers expressly to 'member states'. 31. Indeed, as the court has already found in other contexts, the fact that certain provisions of the Treaty are formally addressed to the member states does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down . . . 39. In fact, since article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals."

It is true, of course, that article 119 is by its very nature one which necessarily affects the position of individuals in the Community and so may be said to be one which, although addressed in terms to member states, necessarily imports the right of an individual to enforcement not only against the member state but against other individuals. There are, however, a number of other considerations which make the submission based on the member state being either the addressee of, or the only organism capable of, implementing the provisions of a particular article a difficult one to accept.

In the first place, there are clear decisions of the European Court establishing the right of individuals to enforcement as against the organs of member states in the cases, for instance, of breaches of article 12 (*N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen* (Case 26/62) [1963] E.C.R. 1 and *Amministrazione delle Finanze dello Stato v. Ariete S.p.A.* (Case 811/79) [1980] E.C.R. 2545); article 40 (*Pigs and Bacon Commission v. McCarren & Co. Ltd.* (Case 177/78) [1979] E.C.R. 2161 and *Russo v. Azienda di Stato per gli Interventi sul Mercato Agricolo (A.I.M.A.)* (Case 60/75) [1976] E.C.R. 45); and the E.E.C. Agricultural Regulations, (*Amministrazione delle Finanze dello Stato v. S.p.A. San Giorgio* (Case 199/82) [1983] E.C.R. 3595). These cases which concern, inter alia, the right of the individual to repayment of charges unlawfully levied in breach of the provisions of Community law are expressed in terms which appear to me to be only consistent with the individual's right being a private law right. *Russo v. A.I.M.A.* (Case 60/75) [1976] E.C.R. 45 and

Amministrazione delle Finanze dello Stato v. S.p.A. San Giorgio (Case 199/82) [1983] E.C.R. 3595 are particularly striking in this context. Paragraphs (b) and (c) of the court's answer to the question raised in the former case are in the following terms [1976] E.C.R. 45, 57:

> "(b) Under Community rules an individual producer may claim that he should not be prevented from obtaining a price approximating to the target price and in any event not lower than the intervention price. (c) If an individual producer has suffered damage as a result of the intervention of a member state in violation of Community law it will be for the state, as regards the injured party, to take the consequences upon itself in the context of the provisions of national law relating to the liability of the state."

In *Amministrazione delle Finanze dello Stato v. S.p.A. San Giorgio* (Case 199/82) [1983] E.C.R. 3595 the question for decision was whether it was permissible for a member state to make repayment of charges levied unlawfully in breach of Community law conditional on proof that the charges had not been passed on to others. In the course of its decision the court said, at pp. 3595, 3612–3613, paras. 12 and 14:

> "In that connection it must be pointed out in the first place that entitlement to the repayment of charges levied by a member state contrary to the rules of Community law is a consequence of, and an adjunct to, the right conferred on individuals by the Community provisions prohibiting charges having an effect equivalent to customs duties or, as the case may be, the discriminatory application of internal taxes. Whilst it is true that repayment may be sought only within the framework of the conditions as to both substance and form, laid down by various national laws applicable thereto, the fact nevertheless remains, as the court has consistently held, that those conditions may not be less favourable than those relating to similar claims regarding national charges . . . On the other hand, any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law."

Now this, as it seems to me, is only consistent with the right conferred upon the individual by the Community being a private law right. The right to recover overpayment, said to be an "adjunct" to the right to have the provisions of the Treaty observed, is a right personal and peculiar to the individual concerned. It has nothing to do with public law except in the sense that it is exercisable against a public authority.

Moreover, it is clear from *Amministrazione delle Finanze dello Stato v. S.p.A. San Giorgio* (Case 199/82) [1983] E.C.R. 3595 that the right is one which may, on the principle of effectiveness, have to be enforced by the national courts even where a similar domestic right would be denied protection. The court observed in that case, at p. 3614, para. 17:

> "It must be pointed out in that regard that the requirement of non-discrimination laid down by the court cannot be construed as justifying legislative measures intended to render any repayment of

charges levied contrary to Community law virtually impossible, even if the same treatment is extended to taxpayers who have similar claims arising from an infringement of national tax law. The fact that rules of evidence which have been found to be incompatible with the rules of Community law are extended, by law, to a substantial number of national taxes, charges and duties or even to all of them is not therefore a reason for withholding the repayment of charges levied contrary to Community law". A B

It is clear that a similar right to repayment exists equally where charges have been imposed which are unlawful because levied in breach of the provisions of article 30. That appears from *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* (Case 106/77) [1978] E.C.R. 629, where the Pretore di Susa was called upon to adjudicate upon a claim for recovery of fees illegally charged in breach of article 30. The question referred to the court was whether such payment was effectively precluded by a subsequent decree passed by the Italian Government purporting to render the charges legal. The importance of the case in the present context is that the court held the subsequently passed law to be an impairment of the proper application of Community law. The judgment is instructive, at p. 643, paras. 14, 15 and 16: C D

"Direct applicability in such circumstances means that rules of Community law must be fully and uniformly applied in all member states from the date of their entry into force and for so long as they continue in force. These provisions are therefore a direct source of rights and duties for all those affected thereby, whether member states or individuals, who are parties to a legal relationship under Community law. This consequence also concerns any national court whose task it is as an organ of a member state to protect, in a case within its jurisdiction, the rights conferred upon individuals by Community law." E

The answer thus given by the court to the questions raised by the Pretore di Susa was, at pp. 645–646: F

"A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means." G

It is, as I see it, a necessary consequence of the court's decision that the decree impaired the enforcement of the Community right that the court considered that that enforcement involved the repayment of the charges illegally levied, i.e., that it was a private law right.

The same consequence, in my judgment, follows from *Humblet v. Belgian State* (Case 6/60) [1960] E.C.R. 559, which related to the European Coal and Steel Community. Article 86 of the E.C.S.C Treaty was in substantially the same terms as article 5 of the E.E.C. Treaty. In that case the applicant had been assessed to tax in breach of the H

European Coal and Steel Community law and had paid the tax so assessed. In the course of its judgment the court said, at p. 569:

> "In fact if the court rules in a judgment that a legislative or administrative measure adopted by the authorities of a member state is contrary to Community law, that member state is obliged, by virtue of article 86 of the E.C.S.C. Treaty, to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued . . . Consequently if in the present dispute the court were to rule that the tax assessment in question was unlawful, it would necessarily follow that the Belgian Government would be obliged to adopt the requisite measures to cancel it and to reimburse to the applicant any amounts which were wrongfully collected."

These cases, in my judgment, in addition to furnishing useful guidance as to the nature of the rights created by directly effective articles, provide also the answer to the argument that whereas articles 85 and 86 by their nature require that the individual's right be enforced by damages (since the rights and duties necessarily, or almost necessarily, arise between individuals and an individual cannot apply to the court under article 170), no such requirement exists in the case of article 30. A claim for damages for loss sustained is in my judgment essentially no different in kind from a claim for the reimbursement of unlawfully levied moneys which the cases treat as an adjunct to the right created in the individual by the directly effective provision of the Treaty.

Indeed the European Court has recognised that the degree of reimbursement which the payer of an illegal levy is entitled may be directly related to the actual loss sustained as a result of the payment. Although a trader who suffers loss as a result of being compelled to pay an illegal levy has, in principle, a right to repayment of so much of the levy as is devoted to purposes incompatible with Community law, there is, it has been said, nothing in Community law which inhibits the national court from restricting repayment of any unlawfully exacted charges to the amount of loss actually suffered, either by permitting a set-off of benefits (*Pigs and Bacon Commission v. McCarren & Co. Ltd* (Case 177/78) [1979] E.C.R. 2161, 2192) or by excluding from the repayment any amount which has been passed on by the payer to others: *Amministrazione delle Finanze dello Stato v. Ariete S.p.A.* (Case 811/79) [1980] E.C.R. 2545 and *Amministrazione delle Finanze dello Stato v. S.p.A. San Giorgio* (Case 199/82) [1983] E.C.R. 3595.

A second suggested distinction, which is, I think, merely a variant of the first is, it is said, to be found in the limited purpose of article 30. Reliance was placed upon the passage in the speech of Lord Diplock in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130, 141E, in which he observed that the breach of article 86 could be categorised

> "as a breach of a statutory duty that is imposed not only for the purpose of promoting the general economic prosperity of the common market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty."

From this it is argued that, whilst in the case of an article which has the function of promoting the interests of individuals it may be necessary so to construe it as to give rise to a cause of action in the individual, no such construction is necessary in the case of an article such as article 30 whose purpose is simply that of promoting the economic prosperity of the common market. This is used as the foundation for applying to the article the same principles of construction as are applicable in the case of a domestic statute: see particularly the speech of Lord Simonds in *Cutler v. Wandsworth Stadium Ltd.* [1949] A.C. 398, 407–408. Thus it is pointed out that the Treaty, in articles 169–172, provides its own remedies for member states wishing to complain of infringement of its terms. But the difficulties about this approach are (a) that it seeks to apply to a Treaty which contains its own provisions for interpretative rulings (see, e.g. articles 164, 170 and 177) the domestic rules of interpretation and (b) that it ignores the fact that article 30 has already been interpreted authoritatively as an article which also promotes the benefit of individuals. In his opinion in *Becker v. Finanzamt Münster-Innenstadt* (Case 8/81) [1982] E.C.R. 53, 80, Advocate-General Sir Gordon Slynn observed that, in the case of directives directed to member states which a member state failed to observe, "an individual may rely on its terms, if these are unconditional and sufficiently precise, as against the member state." It is I think clear that no different principle applies to provisions of the Treaty itself and *Iannelli & Volpi S.p.A. v. Ditta Paolo Meroni* (Case 74/76) [1977] E.C.R. 557 shows that the terms of article 30, which are, on the face of them, unconditional, are also sufficiently precise.

Nor, for my part, do I regard it as a valid distinction that the "right" conferred by, for instance, article 86 is a right to be protected from abusive acts rather than measures, whereas article 30 is concerned merely with prohibiting, and thus rendering void or ineffective in law, measures producing quantitative restrictions on import.

I have the misfortune, in this, to take a different view from that taken by Parker and Nourse L.JJ. To say that the "right" conferred by article 30 on the individual is merely a right not to be subjected to inoperative measures or regulations, is no doubt a description which incorporates reference to the most usual cause for the "right" being infringed, but as a qualitative definition of the right it appears to me incomplete. It would be equally accurate to say positively that the individual's "right" is a right to carry on the business of importing goods free from quantitative restrictions, whether imposed by legally ineffective measures or imposed without any colour or legal title at all, just as the individual's "right" under article 86 is a right to carry on his business free from illegal abusive measures by those, whether themselves individuals or organs of member states, who are in a dominant position. In the ultimate analysis, the individual's complaint is of the same nature in each case, namely that his business has been interfered with and damaged by that which the Treaty prohibits, whether it be abusive of dominant position or denial or impediment of entry to his goods.

Once one accepts, as it seems to me one is compelled to by authority, that each member state is under an obligation not only itself

to obey the injunctions of the Treaty but also to *protect* the rights conferred on *individuals* by the Treaty, one is compelled to ask what it is that is to be "protected." At risk of becoming too metaphysical, a mere "right" to have the provisions of the law observed, shared as it is by every member of the public whether or not he is likely to suffer by the breach, is, as it seems to me, the antithesis of an "individual" right requiring protection. It is only when the breach of the public duty inflicts loss or damage on the individual that he has, as an individual, a cause of complaint. If the law gives him no remedy for that damage then he would not ordinarily be said to have any "individual right". Thus when one speaks of a statute or a provision of a Treaty conferring a "right" on an individual one is, in my judgment, speaking, by definition, not merely of locus standi to apply to the court as a disinterested member of the public but of the individual's right to avail himself of the provisions of the Treaty in the conduct of his affairs (expressed positively) or not to be damaged by the breach of statute or Treaty (expressed negatively). It is that right which, so the cases establish, it is the duty of the member states to protect in the case of directly effective articles. Hence the view expressed by Neill J. in *An Bord Bainne Co-operative Ltd. (Irish Dairy Board) v. Milk Marketing Board* [1984] 1 C.M.L.R. 519, 528, that the speeches in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130:

> "provide compelling support for the proposition that contraventions of E.E.C. regulations which have 'direct effect' create direct rights in private law which the national courts must protect."

A third suggested distinction and one which, speaking for myself, I have found a more compelling one, is based on public policy. There is, it is said, nothing in the Treaty which compels the enforcement of individual rights by an action for damages as opposed to a remedy which will merely secure the discontinuance or rectification of the breach of Community law for the future and it would be positively harmful. This case is concerned with a decision taken by a Minister of the Crown in the exercise of a statutory discretion and as a matter of policy and, on the hypothesis upon which paragraphs 23 and 24 of the statement of claim are drawn, in good faith and without knowledge that what was being done involved any breach of Community law. The exercise of discretion has, as it turns out, proved to have been mistaken and therefore ultra vires, but it does seem on the face of it, a startling proposition that a mere error should give rise to a claim for damages. The consequences are extremely far reaching and one can readily see the argument that public policy demands that decisions on policy in economic matters should be able to be taken free from the threat of liability in damages if the decisions turn out to be wrong. It was no doubt this sort of consideration that Lord Wilberforce had in mind in delivering his dissenting speech in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130, 147.

It is undoubtedly the case that in the context of a domestic statute, the law considers the individual who has any locus standi to complain at all as sufficiently protected by the remedy of judicial review, and we

have been referred, by way of analogy, to the decision of Dixon J. in *James v. The Commonwealth* (1939) 62 C.L.R. 339, in which he held that the private citizen had no claim for damages for a legislative act that had been found ultimately to be a breach of the Constitution of the Commonwealth of Australia. Now if, it is argued, national law finds the remedy of judicial review adequate for the protection of the individual in the case of breach of a domestic statute of an ultra vires act, is there any good reason why the individual should be better protected against a breach of the provisions of the Treaty or acts which are ultra vires because in conflict with Community law? The argument is, to some extent, a question-begging one, because national law in fact precludes the action in damages at the suit of an individual only in cases where the statute is one which confers no private law rights upon the individual. Nevertheless, the important consideration of public policy remains and we have been referred to a number of cases which show that that consideration is one of which the European Court itself takes cognisance.

Thus in *Defrenne v. Sabena* (Case 43/75) [1976] I.C.R. 547 the court, whilst finding that article 119 was an article which had direct effect and therefore conferred rights upon individuals, nevertheless qualified its judgment, at p. 571:

> "69. The Governments of Ireland and the United Kingdom have drawn the court's attention to the possible economic consequences of attributing direct effect to the provisions of article 119, on the ground that such a decision might, in many branches of economic life, result in the introduction of claims dating back to the time at which such effect came into existence. 70. In view of the large number of people concerned such claims, which undertakings could not have foreseen, might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy. 71. Although the practical consequences of any judicial decision must be carefully taken into account, it would be impossible to go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from such a judicial decision. 72. However, in the light of the conduct of several of the member states and the views adopted by the Commission and repeatedly brought to the notice of the circles concerned, it is appropriate to take exceptionally into account the fact that, over a prolonged period, the parties concerned have been led to continue with practices which were contrary to article 119, although not yet prohibited under their national law . . . 74. In these circumstances, it is appropriate to determine that, as the general level at which pay would have been fixed cannot be known, important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen the question as regards the past. 75. Therefore, the direct effect of article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim."

A The juristic basis for this decision is, I confess, not entirely clear to me, for on the face of it the Treaty either did or did not create individual rights which national courts were required to protect and confining the protection of those rights to particular individuals simply on the basis of whether they have or have not commenced an action is difficult to justify logically. The decision may be said to illustrate that, as Lord Wilberforce observed in *Garden Cottage Foods Ltd. v. Milk* B *Marketing Board* [1984] A.C. 130, 152, Community law is sui generis. Nevertheless it seems clear that what moved the court was purely a policy consideration—that is the seriousness of the consequences if the rights were permitted to be enforced to the full extent which the law would otherwise have required. An even more striking example of the denial of a remedy on the grounds of public policy is to be found in C *Koninklijke Scholten Honig N.V. v. Council and Commission of the European Communities* (Case 143/77) [1979] E.C.R. 3583 which involved the determination of a claim for damages against the Community itself under article 215. That article provides, so far as relevant:

> "In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the member states, make good any damage caused by its institutions or D by its servants in the performance of their duties."

The claim was one for damages suffered as a result of the imposition by the Community of a production levy which was subsequently found to be ultra vires.

The court, following its previous decision in *Bayerische H.N.L.* E *Vermehrungsbetriebe G.m.b.H. & Co. K.G. v. Council and Commission of the European Communities* (Cases 83/76, 94/76, 4/77, 15/77, 40/77) [1978] E.C.R. 1209, held in terms [1979] E.C.R. 3583, 3626, that the mere finding of illegality was insufficient to involve liability for damages. Liability could arise "only exceptionally in cases in which the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers." Any individual rights were considered to be F adequately protected by the individual's right to contest the measure before the national court and thus, through reference from the national court, to have the issue of validity decided by the Court of Justice. That the basis for this restriction on the individual's right to claim damages is to be found in public policy appears clearly from the *Bayerische* case, (Cases 83/76, 94/76, 4/77 15/77, 40/77) [1978] E.C.R. 1209, 1224, paras. G 5 and 6 where it was explained by:

> "the consideration that the legislative authority, even where the validity of its measures is subject to judicial review, cannot always be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interests of individuals." Individuals, it was said, must "accept within reasonable H limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds even if that measure has been declared null and void."

Thus, is is argued, if under Community law the Community is protected against individual claims for damages in respect of acts innocently but illegally performed, why should not the administrative and legislative organs of a member state be equally protected as a matter of policy? Very much the same considerations apply, and it is argued that it cannot have been intended by Parliament in enacting the European Communities Act 1972 to subject the organs of government to an unlimited liability for damage which may be caused by every accidental misinterpretation of the obligations imposed by the Treaty and the regulations made under it. I see the force of this, and speaking for myself, would be tempted to say, were it open to do so, that the individual rights conferred by the Treaty as against the member state itself should be capable of being enforced by a claim for damages only to the extent that the public policy of the member state permits in the interests of proper government.

Having regard, however, to the provisions of the Act of 1972 and to the decisions of the European court, I do not for my part think that this step is open to us. That court has stressed over and over again that when an article of the Treaty has direct effect it is the obligation of the member states, through their national courts, to protect the right of the individual arising from any breach. But whilst the principle that the protection to be afforded is a matter to be regulated in accordance with the national law of the protecting state is one which, on the face of it, leaves room for the application of the public policy of that state, that remains nevertheless, as I understand the decisions, subject to the two qualifications that the protection offered must not be inferior to that offered to similar rights in domestic law and that it must be effective to protect them. A public policy which withheld the remedy of damages in the case of claims against the Crown would, as it seems to me, infringe both these qualifications. The making of a regulation by the Minister under the Diseases of Animals Act 1950 which turned out in the event to be ultra vires would not, I should have thought, have given rise to a claim for damages as a matter purely of domestic law, although an individual with a sufficient interest could no doubt seek successfully to have the regulation declared null and void in proceedings for judicial review. But that would not be because of any public policy which protects the Crown from the obligation of making compensation for the wrongful invasion of an individual's rights but simply because the Act is not one which ordinarily, as a matter of domestic law, would be construed as one giving rise to any individual rights any more than would a domestic statute in the terms of article 30. But once the article has been construed by the Community jurisprudence as one which does in fact give rise to individual rights then it must, as it seems to me, be treated as such by the domestic courts and it must be afforded the same protection that those courts afford to an individual injured by the breach of a domestic statute which does give rise to such rights. To say that the public policy of the member state prevents the granting of the ordinary remedy of damages in the case of breach of an article of the Treaty would be straight away to provide for the individual rights under the Treaty a protection inferior to that provided by domestic law for breach

of a comparable domestic statute (i.e. one conferring similar rights), for the concept of the co-existence of a domestic statute enacted by Parliament to confer rights of enforcement on individuals and a public policy which prevents the enforcement of the very rights which Parliament has conferred involves a contradiction in terms.

Furthermore, to deny any remedy for breaches which have taken place before determination of the illegality of the act complained of would, in my judgment, infringe also the principle of effectiveness. The importance of the enforcement of Community law from the inception has been stressed by the court in a number of cases. For example, in *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* (Case 106/77) [1978] E.C.R. 629, the Pretore of Susa had raised the question whether Community law which conflicted with national legislation ought to be applied before the question of the validity of the national legislation had been determined in accordance with domestic law by the Italian Constitutional Court. Advocate General Reischl in his opinion described, at p. 656, it as "unacceptable" that Community law should remain unapplied for a considerable period

> "with all the attendant disadvantages as far as concerns conditions of competition for undertakings and individuals carrying on business in Italy or for individuals and undertakings from other member states for whom access to the Italian market is made more difficult . . . This would be a basic prerequisite for Community law to prevail as far as possible at least ex post facto and for the necessary compensation for its temporary non-application".

These cases, as it seems to me, recognise that in principle the "protection" of the individual rights under Community law involves, subject to the procedural requirements of the national forum, the payment of compensation in respect of the period between the commission of the wrong and its rectification, and that would seem equally applicable whether the rectification process be by way of judicial review or of any other procedure.

Once Parliament has accepted as a matter of policy—as it has in the European Communities Act 1972—the principle that the jurisprudence of the Community is to be received and applied by English law, I find difficulty in seeing how the enforcement of the rights established in that jurisprudence to the full extent required by it can be withheld on grounds of public policy which conflicts with the essential conditions which the decisions of the European Court have demanded from national courts.

There is also, as it seems to me, this further difficulty that the court itself has in numerous cases—*Pigs and Bacon Commission v. McCarren & Co. Ltd.* (Case 177/78) [1979] E.C.R. 2161 and *Amministrazione delle Finanze dello Stato v. S.p.A. San Giorgio* (Case 199/82) [1983] E.C.R. 3595 to give only two examples—recognised that subject to such procedural provisions and restrictions as the national law imposes, the individual is in principle entitled to reimbursement of the loss suffered by payment of charges imposed in breach of Community law

notwithstanding that they were imposed, as no doubt they were, in the belief that they were justified.

No suggestion appears in the judgments of the court in any of these cases that there was some element of public policy which protected the government concerned from making good loss caused to the individual by payment of the illegal charges because they were legislative acts carried out in good faith and in the belief that they did not infringe Community law. For instance, *Amministrazione delle Finanze dello Stato v. Denkavit Italiana S.r.l.* (Case 61/79) [1980] E.C.R. 1205 was concerned with the liability of the Italian Government to repay charges subsequently held to be contrary to Community law. It is interesting to note that, in the course of its argument the Italian Government specifically raised the public policy consideration of the financial difficulties which would arise from an obligation to repay charges bona fide raised in the belief that they were legal under Community law and claimed that, following the principle of *Defrenne v. Sabena* (Case 43/75) [1976] I.C.R. 547, liability ought to be limited to charges raised after the question of validity had been adversely ruled on by the European Court of Justice. This was unequivocally rejected by the court, which held that the rules of Community law as finally interpreted by the court must be applied equally to legal relationships arising before the date of the judgment in which the interpretation was established. Speaking for myself, I find it difficult to see any valid logical distinction between a liability to make good loss caused by an invalid exaction and a liability to make good loss caused equally directly by an invalid interference with trade or why a public policy based upon inconvenience or difficulty in the process of decision making should protect from liability in the one case and not in the other. The cases which have been referred to—with the possible exception of *Defrenne v. Sabena*—demonstrate at least that there is no *Community* public policy requiring that enforcement of the individual right should be withheld in the case of claims against member states and it is, in my judgment, with the public policy of the Community rather than the domestic public policy of the member state that we are concerned, for it is implicit in accession to the Treaty that in any conflict between the public policy of the Community and the public policy of the member state, the former will prevail. Thus, for instance, article 3(1) of the Directive No. 64/221/EEC of 25 February 1964 limits the discretionary power of the member states to exclude nationals of other member states on grounds of public policy: *Van Duyn v. Home Office* (Case 41/74) [1975] Ch. 358.

One is then brought back full circle to the analysis of the individual right which has been infringed and to the rule of Community law that that right must be protected to the same extent as a domestic right of a similar nature.

It has to be accepted that if this is right, it has potentially very curious results and, as Parker and Nourse L.JJ. stress in the judgments which I have had the advantage of reading in draft, very far-reaching consequences. What, for instance, is the position where the E.E.C. has issued a regulation which is invalid for breach of an article having direct effect and which has been given effect to by a member state but where,

under the decision in *Bayerische H.N.L. Vermehrungsbetriebe G.m.b.H. & Co. K.G. v. Council and Commission of the European Communities* (Cases 83/76, 94/76, 4/77, 15/17, 40/77) [1978] E.C.R. 1209, the individual has no remedy in damages under article 215? *Granaria B.V. v. Hoofproduktschap voor Akkerbouwprodukten* (Case 101/78) [1979] E.C.R. 623 shows that in such circumstances, any compensation payable by the member state to an individual injured is a matter for the national law of the member state. But if the individual's right is one which, were it a domestic right, would carry a right to compensation, it seems to follow that although the public policy of the Community would protect the E.E.C. itself from any claim, no similar protection would exist in favour of the member state which had merely done what the E.E.C. had ordered it to do. Possibly the answer in such a case may be that, inasmuch as both the individual and the member state would be bound by the regulation until it had been authoritatively declared invalid (see the *Granaria* case [1979] E.C.R. 623, 637) no right of the individual as against the member state would have been infringed until that occurred.

For my part, although I recognise the inconvenience of this result and the far reaching consequences of a liability to pay damages for an exercise of discretion which turns out to be an unwitting breach of Community law, I can at the moment see no way in which, consonant with European jurisprudence, such a discretion can be protected as a matter of domestic public policy.

Moreover, it seems to me that if any such consideration did arise, then the question of whether considerations of domestic public policy could legitimately be given precedence over the requirements of Community law as to the protection of individual rights is one which could only be decided by the European Court as a matter of Community jurisprudence.

Applying as we must the decision of their Lordships in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C.130, I can see no logical answer to the arguments which Mr. Buxton has urged upon us.

A further point which was raised in the defendant's argument, though not originally included in the notice of appeal, was that an action for damages in the instant case is precluded by the Crown Proceedings Act 1947, section 2(1) of which subjects the Crown to liability in tort but only "subject to the provisions of this Act". Breaches of statutory duty are dealt with specifically in section 2(2), which provides:

> "Where the Crown is bound by a statutory duty which is binding also upon persons other than the Crown and its officers, then, subject to the provisions of this Act, the Crown shall, in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be so subject if it were a private person of full age and capacity."

The important words in the context of the present appeal are the words "which is binding also upon persons other than the Crown" for it is argued that whatever *rights* may be conferred by article 30 the obligation, and the only obligation, is that of the member state.

There appear to me to be two answers to this. In the first place, it is, I think, not correct to say that the obligations imposed by article 30 bind no one but the Crown, although it is undoubtedly the case that restrictions which infringe the article would normally be likely to be imposed by the Crown. *Dansk Supermarked A/S v. A/S Imerco* (Case 58/80) [1981] E.C.R. 181 and *Centrafarm B.V. v. Sterling Drug Inc.* (Case 15/74) [1974] E.C.R. 1147, demonstrate that the provisions of article 30 prevent the exercise by individuals of industrial property rights in a way which would infringe its prohibitions. Moreover, Mr. Buxton has referred the court to the decision of Glidewell J. in *Reg. v. Wirral Metropolitan Borough Council, Ex parte Wirral Licensed Taxi Owners Association* [1983] 3 C.M.L.R. 150, in which he expressed a clear view that a resolution of the council requiring all licensed taxis in the borough to be of a type manufactured only by a British manufacturer would be a breach of article 30. We have also been referred to Council Directive 77/62 of 21 December 1976, issued to give effect to article 30 in relation to the placing of public works contracts and imposing obligations on a wide variety of public bodies which are not agencies of the Crown.

Secondly, and even if it were correct to say that the article bound the Crown and no one else, it would follow that the Act would operate to deny to the individual the full protection of a private right vested in him by Community law. Startling as it may seem, *Amministrazione delle Finanze dello Stato v. Simmenthal S.A.* (Case 106/77) [1978] E.C.R. 629 seems to lead inevitably to the conclusion that the court would be bound to hold that the Community law must be applied even where its application conflicts with the provisions of a public general statute. In the judgment in that case there is the following statement of principle, at p. 643, paras. 14, 15, 16, 17 and 18:

> "Direct applicability in such circumstances means that rules of Community law must be fully and uniformly applied in all the member states from the date of their entry into force and for so long as they continue in force. These provisions are therefore a direct source of rights and duties for all those affected thereby, whether member states or individuals, who are parties to legal relationships under Community law. This consequence also concerns any national court whose task it is as an organ of a member state to protect, in a case within its jurisdiction, the rights conferred upon individuals by Community law. Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the member states on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but—in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the member states—also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions. Indeed any recognition that national legislative measures which encroach upon the field within which the

A Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by member states pursuant to the Treaty and would thus imperil the very foundation of the Community."

B For these reasons, therefore, the Crown Proceedings Act 1947 does not, in my judgment, assist the defendant.

It follows from what has been said above that so far as the first issue is concerned, I feel bound, albeit with a degree of reluctance, to uphold the decision of the judge and would therefore dismiss the appeal.

Turning now to the second question, raised by the plaintiffs' crossnotice, the judge dealt with this very shortly in his judgment. The C claim made in paragraphs 23 and 25 were based on a passage in the judgment of Lord Denning M.R. in *Application des Gaz S.A. v. Falks Veritas Ltd.* [1974] Ch. 381, 396A, where, in relation to articles 85 and 86, he observed:

> "They create new torts or wrongs. Their names are 'undue restriction of competition within the common market' and 'abuse of dominant D position with the common market'. Any infringement of those articles can be dealt with by our English courts."

Paragraph 25, which raises what has been referred to as an "innominate tort" was drawn before the decision of their Lordships' House in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C.130 and in the court below it appears to have been conceded that if the case failed on E breach of statutory duty, then there was no separate ground upon which it could succeed under the heading of innominate tort—a concession which the judge thought must be correct. The argument has not been pressed strongly before us and Mr. Buxton has expressly disclaimed any reliance upon any extension of the law of negligence.

What is said is that if English law fails to give any remedy in F damages for the breach of Community law, then it follows that this country would be in breach of Community law. Therefore it is said, in effect, that there *must* be such a remedy and if it is not for breach of statutory duty it must be for an innominate tort. There are, however, no separate arguments under this head and the case must, as I see it, either succeed on the basis of breach of statutory duty or it must fail altogether. The allegation of foreseeability of damage carries the matter no further. G The judge determined that paragraphs 23 and 25 taken in conjunction and standing alone did not disclose a cause of action and that, in my judgment, was plainly right.

The third way in which the case is formulated on the pleadings is as a claim for damages against the minister for misfeasance in public office, a tort which was described by Lord Diplock in *Dunlop v. Woollahra* H *Municipal Council* [1982] A.C. 158, 173E, as "well-established." That is not in dispute. The difference between the parties rests only in their respective appreciations of the essential ingredients of the tort. For the purposes only of the preliminary issue, it was accepted that the minister's purpose in revoking the general licence was to protect English turkey

producers, and that he knew at the time (i) that this involved a failure to perform the United Kingdom's obligations under article 30; (ii) that the revocation would cause damage to the plaintiffs in their business; and (iii) that the protection of English producers from foreign competition was not one for the achievement of which powers were conferred on him by the enabling legislation or the Importation of Animal Products and Poultry Products Order 1980. The Solicitor-General's submission, however, was that it was an essential allegation, and one not made on the pleadings, that the Minister acted with the purpose of inflicting harm upon the plaintiffs. This has been referred to conveniently as an allegation of "targeted malice."

The court has been referred to a large number of cases both in this country and in Canada and Australia from which, it is said, the inference can be drawn that in order to constitute the tort it is necessary to show an improper motive specifically aimed at the plaintiff. The authorities were extensively reviewed by the judge and it would, I think, be a work of supererogation to repeat the exercise here. There are in certain of the older cases phrases in the judgments or pleadings which might be taken to suggest that "targeted malice" was regarded as essential. I say "might," because in my judgment they are entirely inconclusive. There are also strong indications in the other direction, particularly in the older election cases. For instance in *Cullen v. Morris* (1819) 2 Stark. 577, 587, Abbott C.J. observed:

> "On the part of the defendant it has been contended, that an action is not maintainable for merely refusing the vote of a person who appears afterwards to have really had a right to vote, unless it also appears that the refusal resulted from a malicious and improper motive, and that if the party act honestly and uprightly according to the best of his judgment, he is not amenable in an action for damages. I am of opinion, that the law, as it has been stated by the counsel for the defendant, is correct."

Again, he said, at p. 589:

> "If a vote be refused with a view to prejudice either the party entitled to vote, or the candidate for whom he tenders his vote, the motive is an improper one, and an action is maintainable."

Coming to more modern times there is the Privy Council case of *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158, where the allegation was one of damage caused to the plaintiff by passing planning resolutions, which were in fact invalid, restricting the height of his proposed building. Paragraph 15A of the pleading was (so far as material) in these terms, at pp. 169–170:

> "the defendant was a public corporate body which occupied office and was incorporated by a public statute . . . and the defendant abused its said office and public duty under the said statute by purporting to pass each of the said resolutions with the consequence that damage was occasioned to the plaintiff."

In delivering the judgment of the Board Lord Diplock said, at p.172:

A "In pleading in paragraph 15A of the statement of claim that the council abused their public office and public duty the plaintiff was relying upon the well-established tort of misfeasance by a public officer in the discharge of his public duties . . . [Their Lordships] agree with [the trial judge's] conclusion that, in the absence of malice, passing without knowledge of its invalidity a resolution which is devoid of any legal effect is not conduct that of itself is B capable of amounting to such 'misfeasance' as is a necessary element in this tort."

Of this case Wade in his book on *Administrative Law*, 5th ed. (1982), pp. 672–673, comments that the Privy Council held that the tort "required as a necessary element either malice or knowledge . . . of the C invalidity" a view which is in line with that expressed by Smith J. in *Farrington v. Thomson and Bridgland* [1959] V.R. 286, which was carefully considered by Mann J. in the course of his judgment in the instant case. Having concluded his review of the authorities, Mann J. concluded, ante, p. 740D–G:

"I do not read any of the decisions to which I have been referred as precluding the commission of the tort of misfeasance in public office D where the officer actually knew that he had no power to do that which he did, and that his act would injure the plaintiff as subsequently it does. I read the judgment in *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158 in the sense that malice and knowledge are alternatives. There is no sensible reason why the common law should not afford a remedy to the injured party in E circumstances such as are before me. There is no sensible distinction between the case where an officer performs an act which he has no power to perform with the object of injuring A (which the defendant accepts is actionable at the instance of A) and the case where an officer performs an act which he knows he has no power to perform with the object of conferring a benefit on B but which has the foreseeable and actual consequence of injury to A (which the F defendant denies is actionable at the instance of A). In my judgment each case is actionable at the instance of A and, accordingly, I determine that paragraphs 23 and 36 of the amended statement of claim do disclose a cause of action".

For my part, I too can see no sensible distinction between the two G cases which the judge mentions.

If it be shown that the minister's motive was to further the interests of English turkey producers by keeping out the produce of French turkey producers—an act which must necessarily injure them—it seems to me entirely immaterial that the one purpose was dominant and the second merely a subsidiary purpose for giving effect to the dominant purpose. If an act is done deliberately and with knowledge of its H consequences, I do not think that the actor can sensibly say that he did not "intend" the consequences or that the act was not "aimed" at the person who, it is known, will suffer them. In my judgment, the judge was right in his conclusion also on this point.

For my part, therefore, I would dismiss the appeal, but since Parker and Nourse L.JJ. take a different view in relation to the first question of whether any cause of action is disclosed by paragraphs 23 and 24, the appeal will be allowed to that extent, with the consequence that the judgment entered for the plaintiffs must be discharged and the matter must proceed to trial on all remaining issues.

PARKER L.J. The question whether paragraphs 23 and 24 of the amended statement of claim disclose, as the judge has held, a cause of action in damages in the courts of this country, is of far-reaching importance. It is also one which I have found to be of considerable difficulty.

Article 30 of the E.E.C. Treaty falls to be read with article 36 for, notwithstanding the unqualified terms of the earlier article, the later article provides that the former shall not preclude prohibitions or restrictions

> "justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property".

The last sentence of the later article then provides:

> "Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member states".

Although the background to this appeal concerns only the exception relating to the protection of health and life of animals I have quoted the whole range of exceptions, for it is of importance to bear in mind that the Treaty, despite the provisions of article 30, recognises that there are a number of fields in which member states remain free to impose prohibition or restrictions albeit that there are limitations on such freedom expressed in the last sentence of article 36. In addition, by virtue of the principle of proportionality, a prohibition or restriction would only be justified if, in effect, it was the minimum necessary for the protection of the life or health of animals or whichever of the other exceptions was relevant in a particular case.

That the Treaty should recognise and allow such limited freedom to member states is hardly surprising. To have denied it would have been to deny the right of a member state to impose a prohibition which did not constitute a means of arbitrary discrimination, was not a disguised restriction on trade and was the minimum necessary e.g. for the protection of the health and life of humans.

Most, if not all, of the excepted matters are matters upon which, when considering whether it can or should impose a prohibition or restriction, a member state could be faced with conflicting evidence of fact and conflicting expert evidence. Even if it were not, there are many matters upon which other experts might hold perfectly honest but different views. Moreover, when one is dealing with a matter such as public morality one is of necessity operating in a field of moral judgment.

As to expert evidence, the problem which may face a member state can be simply illustrated. The member state may be advised by its experts that a particular drug has certain harmful side effects which make prohibition on its import necessary for the protection of the life and health of humans. The exporting state or those desiring to import the drug may, however, produce evidence from equally highly qualified experts either (a) that the drug does not produce the harmful side effects at all; or (b) that although it does, they only occur in certain types of individual and that a prohibition is therefore not necessary: a condition, for example, that every packet should carry a clear warning that it should not be prescribed for individuals of such types would be sufficient.

Suppose that in this situation a member state imposes a complete ban but it is subsequently held by either the European Court or a national court, after hearing a mass of conflicting evidence and perhaps stating that it has had great difficulty in reaching a decision, that the ban was not justified. Suppose also that the court reached its conclusion because, although it rejected the evidence that the drug caused no harmful side effects, it accepted the evidence that such side effects were limited and that import subject to conditions would have sufficed.

In such a situation the member state would have been in breach of article 30; but is it the case that the exporting manufacturer and the importing distributor who have lost profits by reason of the ban—and perhaps others besides—could recover damages from the member state? I pose the question generally although in this appeal we are of course concerned only with the question whether in such circumstances damages could be recovered from the government of this country in the courts of this country. Both in general and in particular, however, it would in my view be surprising if the answer was in the affirmative.

It is nevertheless asserted by the plaintiffs that in such a case the government would be liable. They arrive at this result by a simple route which reduced to its essentials is this: 1. Article 30 has direct effect in Community law, imposes obligations on member states and others and creates rights in individuals both as against member states and against other individuals. 2. Community law requires that the courts of member states must protect the rights so created and must afford remedies and procedures no less favourable than those accorded to its nationals for a breach of domestic law of a similar type. Subject to this and to the further requirement that domestic procedures must not be so adapted as to make enforcement of the rights impossible, it is for domestic law to decide on remedies and procedures. 3. By virtue of 2(1) of the European Communities Act 1972 the obligation imposed on the United Kingdom Government by article 30 is a statutory duty. 4. Since by Community law that duty creates rights in individuals, an action for damages for breach of that duty lies here at the suit of an individual who suffers damage as the result of the breach. 5. This has been decided by, or is the inevitable result of the House of Lords decision in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130 and of this court in *An Bord Bainne Co-operative Ltd. (Irish Dairy Board) v. Milk Marketing Board* [1984] 2 C.M.L.R. 584.

So far as Community law is concerned there is nothing in the decisions of the European Court which positively or specifically requires that for a breach by a member state of article 30, a remedy in damages must be available to an individual who suffers damage by the breach. Indeed the decisions of the European Court point forcefully to the conclusion that a remedy in damages is *not* required by Community law for breach by a member state of an article having direct effect where such breach consists in the imposition of a legislative or quasi-legislative measure involving the exercise of judgment unless the breach is of a particularly serious character.

The origin of the principle that an article of the Treaty having direct effect creates individual rights in the subjects of member states as against such member states themselves and as between individuals was the decision of the European Court in *N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen* (Case 26/62) [1963] E.C.R. 1. The provision of the Treaty concerned was article 12, which provides:

> "Member states shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect . . ."

It was argued that the fact that article 12 was addressed to member states and that under articles 169 and 170 the Commission and member states could bring before the European Court a state which had not fulfilled its obligations meant that individuals had *no* right which could be asserted in a national court in respect of a breach of the negative obligation by a member state. This argument was rejected and it was held, at p. 13:

> "article 12 of the Treaty must be interpreted as producing direct effects and creating individual rights which the national courts must protect."

The decision therefore goes no further than establishing that where an article has direct effect, albeit it creates in express terms only a negative obligation on member states, individual rights are thereby created which must be protected by national courts. The precise nature of the right is not defined any more than the remedy to be afforded.

Since then, however, the European Court has held that many other articles have direct effects and create individual rights both as against member states and as against other individuals and has recognised both that moneys paid under a national provision, invalid by reason of infringement of an article having direct effect, is recoverable and that individuals have rights of monetary recovery inter se.

Amongst the articles held to have direct effect and create such individual rights are article 30 itself: *Iannelli & Volpi S.p.A. v. Ditta Paolo Meroni* (Case 74/76) [1977] E.C.R. 557; articles 85 and 86: *Belgische Radio en Televisie v. S.V. S.A.B.A.M.* (Case 127/72) [1974] E.C.R. 51 and article 119: *Defrenne v. Sabena* (Case 43/75) [1976] I.C.R. 547.

I mention the first of these cases because it is immediately applicable in the present case. The second is of importance because, whereas

A article 30 is addressed to the prohibition of measures and thus by implication to legislative, quasi-legislative or executive action by member states, both articles 85 and 86 prohibit certain agreements between undertakings, decisions by associations of undertakings, concerted practices and abuses by undertakings of a dominant position. The third is significant for three reasons; first because, although article 119, which relates to equal pay for equal work between men and women, is
B addressed to member states, it was held that it enabled an individual to recover from her employers the difference between what she had been paid and what male staff had been paid for identical work; secondly because, although the article was held to have direct effect in the case of original member states from the end of the transitional period, and in the case of new member states from 1 January 1973, it was held that
C only those who had already commenced proceedings or taken equivalent action by the date of the decision were entitled to rely on a breach of the provision in respect of any period prior to the decision; thirdly because, although the economic consequences involved if individuals were able to claim back pay from 1962, or 1973 as the case might be, were much canvassed, no one suggested that such consequences might involve member states in meeting, by way of damages, all underpayments.
D As to the second of the foregoing matters I confess to an inability to understand how an individual right can be a right only if it has been asserted before it has been held to exist, but this inability is of no importance for we are bound to follow the decision of the European Court and that appears to me to demonstrate that the individual right is of a somewhat unusual kind.

E It is also, in my view, clear that the right is one which may vary according to the nature of the obligation from which the right stems. Under article 86, for example, the obligation is upon undertakings not to abuse a dominant position. In such a case, if a dominant position is abused by an undertaking and damage flows, the situation is different from that which prevails in relation to a breach of article 30. Under that article a measure imposing restrictions is automatically void if not
F justified under article 36. The obligation on the member state is therefore an obligation not to impose a wholly ineffective measure. The right not to be subjected to an ineffective measure is however wholly different from a right not to be subjected to abuse of a dominant position; in the one case the subject of complaint is an actual operative abuse. In the other it is an inoperative measure. The result in the latter
G case would be that a customs officer who impounded goods could, on the face of it, be sued in these courts in tort, for the measure, which would be his only defence, would be wholly invalid.

I turn now to two decisions of the European Court relating to claims by individuals under article 215 for damages against the institutions of the Community. The first of such cases is *Bayerische H.N.L. Vermehrungsbetriebe G.m.b.H. & Co. K.G. v. Council and the*
H *Commission of the European Communities* (Cases 83/76, 94/76, 4/77, 15/77, 40/77) [1978] E.C.R. 1209. The Council had made a regulation which had been held to be void by previous preliminary rulings of the court. In its judgment the court said, at p. 1224, paras. 5 and 6:

"In the present case there is no doubt that the prohibition on discrimination laid down in the second sub-paragraph of the third paragraph of article 40 of the Treaty and infringed by regulation No. 563/76 is in fact designed for the protection of the individual, and that it is impossible to disregard the importance of this prohibition in the system of the Treaty. To determine what conditions must be present in addition to such breach for the Community to incur liability in accordance with the criterion laid down in the case-law of the Court of Justice it is necessary to take into consideration the principles in the legal systems of the member states governing the liability of public authorities for damage caused to individuals by legislative measures. Although these principles vary considerably from one member state to another, it is however possible to state that the public authorities can only exceptionally and in special circumstances incur liability for legislative measures which are the result of choices of economic policy. This restrictive view is explained by the consideration that the legislative authority, even where the validity of its measures is subject to judicial review, cannot always be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interests of individuals.

"It follows from these considerations that individuals may be required, in the sectors coming within the economic policy of the Community, to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds even if that measure has been declared null and void. In a legislative field such as the one in question, in which one of the chief features is the exercise of a wide discretion essential for the implementation of the common agricultural policy, the Community does not therefore incur liability unless the institution concerned has manifestly and gravely disregarded the limits of the exercise of its powers."

The second case is *Koninklijke Scholten Honig N.V. v. Council and Commission of European Community* (Case 143/77) [1979] E.C.R. 3583. Again the claim was based on the invalidity of a council regulation. There appears the following passage in the judgment of the court, at pp. 3625–3626, paras. 10, 11 and 12:

"A finding that a legal situation resulting from legislative measures by the Community is illegal is insufficient by itself to involve it in liability. The court has already stated this in its judgment of 25 May 1978 in *Bayerische H.N.L. Vermehrungsbetriebe G.m.b.H. & Co. K.G. v. Council and Commission of the European Communities* (Cases 83/76, 94/76, 4/77, 15/77, 40/77) [1978] E.C.R. 1209. In this connection the court referred to its consistent case-law in accordance with which the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the

A protection of the individual has occurred. Having regard to the principles in the legal systems of the member states, governing the liability of public authorities for damage caused to individuals by legislative measures, the court has stated that in the context of Community legislation in which one of the chief features is the exercise of a wide discretion essential for the implementation of the common agricultural policy, the liability of the Community can arise B only exceptionally in cases in which the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.

"This is confirmed in particular by the fact that, even though an action for damages under articles 178 and 215 of the Treaty constitutes an independent action, it must nevertheless be assessed C having regard to the whole of the system of legal protection of individuals set up by the Treaty. If an individual takes the view that he is injured by a Community legislative measure which he regards as illegal he has the opportunity, when the implementation of the measure is entrusted to national authorities, to contest the validity of the measure, at the time of its implementation, before a national court in an action against the national authority. Such a court may, D or even must, in pursuance of article 177, refer to the Court of Justice a question on the validity of the Community measure in question. The existence of such an action is by itself of such a nature as to ensure the efficient protection of the individuals concerned.

"These considerations are of importance where, as in these cases, E the court, within the framework of a reference for a preliminary ruling, has declared a production levy to be illegal and where the competent institution, following that finding, has abolished the levy concerned with retroactive effect."

In the above cases the specific article of the Treaty concerned was article 40(3), which prohibited discrimination between producers or F consumers with the Community. The article comes within Chapter 2, Title II of the Treaty: "Agriculture."

If the position is that the Council is not liable in damages for a mere breach of an article conferring individual rights, where that breach consists in legislative act, but that the United Kingdom Government is so liable, a strange situation might arise. If that government, acting in G pursuance of an invalid council regulation, sought by legislative action to implement it, it would be liable in damages whilst the Council, despite the express provisions of article 215 and the fact that the United Kingdom Government is obliged to implement regulations, would not. This would be the stranger in that the non-liability of the Council has been arrived at having regard to the principles in the legal systems of member states governing the liability of public authorities for damage H caused to individuals by legislative measures.

In both cases it is true that express mention is made and reliance placed on choices of economic policy but the matter concerned was breach of article 40 which comes within agricultural policy and the basis

of both decisions appears to me to have been the undesirability, in areas in which choices of action depend on judgment, that member states should be hindered in taking legislative action by the prospect of actions for damages if their judgement should ultimately be held to be wrong, unless the action taken constitutes a grave and manifest disregard of the limits on the exercise of its powers, i.e. is an abuse of such powers.

When considering, for example, whether to take a measure which is believed was the least necessary for the protection of human life, it would be manifestly undesirable that the member state should be inhibited by the prospect that it might be exposed to damages if a court subsequently took a different view. If the validity of the measure can at once be challenged in a national court, as it is common ground would be the case in this country, that is, as the European Court said in *Koninklijke Scholten Honig N.V. v. Council and Commission of the European Communities* [1979] E.C.R. 3583, 3626, para. 11, "efficient protection of the individuals concerned."

In both cases it is also true that reference is made to legislative measures, but I can see no difference between, for example, an order under the Diseases of Animals Act 1950 imposing a prohibition on specific imports and a withdrawal by the minister of a licence under a general prohibition order under that Act which has the same effect.

In some cases indeed there may be a greater need to deny a remedy in damages in respect of such an act save in cases of abuse of power. Where an application for a licence to import a drug is made and the minister has evidence that it is dangerous, is he or the member state to be exposed to damages if they act on available evidence but get it wrong? I would not so conclude unless driven. Member states and their ministers and officers may not be under a statutory duty to protect human or animal life or public morality and so on but it is surely their political duty to do so. It is one thing if they knowingly abuse their powers. It is quite another if they make an honest error.

Despite the references to economic policy and legislative measures in the two decisions cited, the reasoning appears to me to point inevitably to the conclusion that the council would not be liable in damages in respect of a regulation requiring certain limitations on imports to be imposed for the purposes allowed by article 36 merely on the ground that it was, owing to the application of the principle of proportionality, subsequently found to be unjustified.

Coming to the domestic position, section 2(1) of the European Communities Act 1972 provides that all such rights and obligations arising by or under the Treaties and all such remedies and procedures provided for by or under the Treaties as in accordance with the Treaties are without further enactment to be given effect in the United Kingdom are to be recognised and available in law and enforced, allowed and followed accordingly.

Article 30 creates rights in individuals and obligations upon the United Kingdom and these must therefore be enforced and allowed. The Treaty, however, does not create procedures or remedies. It provides only, by virtue of decisions of the European Court, that the national courts shall afford no less favourable remedies than those available in

respect of the breach of a similar type in national law and must not so adapt procedures as to make enforcement of the right impossible. The plaintiffs seek to go further and say that the remedies provided must be dissuasive of further breaches. If this means any more than that remedies must effectively protect the individual rights, I do not accept it. If it means merely that the rights must be effectively protected, it is I think plainly right.

In the absence of authority compelling me to reach a different conclusion I would have no hesitation in holding that a breach of article 30 by the imposition of a prohibition or restriction on imports affords in English law a right to judicial review by anyone with sufficient interest, a declaration as to the invalidity of the measure constituting the breach and *possibly* a mandamus to the relevant officials to permit the landing of the goods concerned. Indeed this is common ground, for such rights and remedies would be available for a similar domestic wrong.

Suppose, for example, an English statute provided that a minister might, or even should, by order prohibit the landing of any goods in so far as might be necessary for the protection of animal life and an order was made prohibiting X from importing, for example, certain feeding stuffs from a particular source on the basis of evidence that feeding stuffs from that source were, or were likely to be, bearers of a disease fatal to livestock. The producer and importer could undoubtedly challenge the order and if successful obtain a declaration. They might even, if the goods were detained by customs officers, obtain a mandamus ordering their immediate release.

They would, however, in English law not be able to obtain damages. The foregoing remedies would, as I think, afford them adequate protection. If the power were abused it would, however, be a different matter. If the minister knew perfectly well that there was nothing wrong with the feeding stuffs and had made the order in fact not to protect animal life but to further the interests of a company making feeding stuffs in which he held shares, the position would, or might be, different. There would then be an abuse of power, for which damages would lie. For a similar breach of article 30 damages would therefore also lie.

If the foregoing is correct it should also be the case that for a mere breach of the article, not amounting to an abuse, damages are not available, and I would so hold unless prevented by principle or authority from so doing.

I must therefore examine the two English cases on which the plaintiffs found their claim.

In *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130 the plaintiffs alleged that the defendants had acted in breach of article 86 and applied for an interlocutory injunction. I refused the injunction on the ground, principally, that if the plaintiffs succeed they would be adequately compensated in damages. In the Court of Appeal doubts were expressed as to whether a remedy in damages was available and an injunction was granted. The defendants appealed to the House of Lords who, Lord Wilberforce dissenting, allowed the appeal and discharged the injunction.

In the course of his speech, with which Lord Keith of Kinkel, Lord Bridge of Harwich and Lord Brandon of Oakbrook concurred, Lord Diplock said, at p. 141:

> "The rights which the article confers upon citizens in the United Kingdom accordingly fall within section 2(1) of [the European Communities Act 1972]. They are without further enactment to be given legal effect in the United Kingdom and enforced accordingly. A breach of the duty imposed by article 86 not to abuse a dominant position in the common market or in a substantial part of it, can thus be categorised in English law as a breach of statutory duty that is imposed not only for the purpose of promoting the general economic prosperity of the common market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty. If this categorisation be correct, and I can see none other that would be capable of giving rise to a civil cause of action in English private law on the part of a private individual who sustained loss or damage by reason of a breach of a directly applicable provision of the Treaty of Rome, the nature of the cause of action cannot, in my view, be affected by the fact that the legislative provision by which the duty is imposed takes the negative form of a prohibition of particular kinds of conduct rather than the positive form of an obligation to do particular acts."

As appears from the above passage, Lord Diplock was considering the case of a private individual asserting a civil cause of action in English private law. There was nothing else to be considered. No question of public law arose. Article 86 imposed a negative obligation on undertakings and created a private right. Lord Diplock, dealing further with the matter, said, at p. 144:

> "I, for my own part, find it difficult to see how it can ultimately be successfully argued, as Milk Marketing Board will seek to do, that a contravention of article 86 which causes damage to an individual citizen does not give rise to a cause of action in English law of the nature of a cause of action for breach of statutory duty; but since it cannot be regarded as unarguable that is not a matter for final decision by your Lordships at the interlocutory stage that the instant case has reached. What, with great respect to those who think otherwise, I *do* regard as quite unarguable is the proposition, advanced by the Court of Appeal itself but disclaimed by both parties to the action: that if such a contravention of article 86 gives rise to any cause of action at all, it gives rise to a cause of action for which there is no remedy in damages to compensate for loss already caused by that contravention but only a remedy by way of injunction to prevent future loss being caused. A cause of action to which an unlawful act by the defendant causing pecuniary loss to the plaintiff gives rise, if it possessed those characteristics as respects the remedies available, would be one which, so far as my understanding goes, is unknown in English private law, at any rate since 1875 when the jurisdiction conferred upon the Court of Chancery by Lord Cairns' Act passed to the High Court. I leave aside as

A irrelevant for present purposes injunctions granted in matrimonial causes or wardship proceedings which may have no connection with pecuniary loss. I likewise leave out of account injunctions obtainable as remedies in public law whether upon application for judicial review or in an action brought by the Attorney-General ex officio or ex relatione some private individual. It is private law, not public law, to which the company has had recourse. In its action it claims B damages as well as an injunction. No reasons are to be found in any of the judgments of the Court of Appeal and none has been advanced at the hearing before your Lordships, why in law, in logic or in justice, if contravention of article 86 of the Treaty . . . is capable of giving rise to a cause of action in English private law at all, there is any need to invent a cause of action with characteristics C that are wholly novel as respects the remedies that it attracts, in order to deal with breaches of articles of the Treaty . . . which have in the United Kingdom the same effect as statutes."

That is clear authority that a private law action for breach of article 86 against an undertaking sounds in damages but it should be noted that Lord Diplock emphasises that the plaintiffs were resorting purely to D private law, and that they could resort to nothing else.

It is, however, submitted that, as Lord Diplock categorised the action as one of breach of statutory duty creating rights in individuals, it follows that a breach of article 30 by a member state, which article also creates rights in individuals, also gives rise to an action for breach of statutory duty and that, this being so, it must by virtue of the decision E give a remedy in damages.

I am unable to accept this. I can find nothing in Lord Diplock's speech to suggest that he had in mind for one moment that breach by a member state of a negative obligation in relation to measures could be categorised as, or be of the nature of, a breach of statutory duty giving rise to a civil cause of action in private law. He expressly leaves out of account such matters. The reference to individual rights is in my F judgment without significance. An individual right may be a right in private law or in public law; article 30 in my judgment creates individual rights both in public law and private law. A breach simpliciter of the article sounds only in public law. A breach amounting to abuse of power sounds in private law. Neither can be categorised as, or be regarded as being of the nature of, a breach of statutory duty in any sense known to G English law. Nothing in Lord Diplock's speech leads me to suppose that either he or those who agreed with him would have done so had they had to consider the matter.

The other case on which the plaintiffs principally rely, *An Bord Bainne Co-operative Ltd. (Irish Dairy Board) v. Milk Marketing Board* [1984] 2 C.M.L.R. 584, concerned an alleged breach by the defendants of E.E.C. regulations and of article 86. The defendants contended that H the matters complained of by the plaintiffs with regard to the regulations were public law decisions and that on the basis of *O'Reilly v. Mackman* [1983] 2 A.C. 237 that head of claim should be struck out as an abuse of process and the plaintiffs left to their remedies by way of judicial

review. Neill J. accepted the argument that the decisions complained of were public law decisions but declined to strike out. The plaintiffs appealed and the appeal was dismissed on the basis that the plaintiffs were undoubtedly asserting private law rights and if successful would be entitled to an injunction or damages, the court having no discretion to refuse a remedy. The case does not in my judgment assist the plaintiffs.

Here the plaintiffs are, so far as this part of the case is concerned, asserting that the United Kingdom Government are in breach of an obligation not to impose measures.

I regard this as wholly different from a claim under article 86 and I do not consider that damages are available.

I should perhaps add that although I have used the expressions "public law rights" and "private law rights," I have done so for convenience only. There is in my view no particular merit in the terms and they are in any event imprecise. The essence of the question is whether a breach of article 30 by the United Kingdom Government should be regarded as of the nature of a breach of statutory duty in English law and thus sounding in damages, or as of the nature of the making of an invalid order or a simple excess of power not so sounding.

In my view it should be regarded as the latter. This does not, as I see it, raise any question of community law. It is for the national court to determine what remedies would be available in domestic law for the infringement by the state of a right similar to that created by the direct applicability of article 30. That right is said to be a right not to be subjected to an import restriction, but to stop there is to ignore article 36. In reality the right is a right not to be subjected to a restriction which is not justified under article 36. This right is closely akin to the right of an individual in English domestic law not to be subjected to an ultra vires measure. If he is he can ask the courts to declare the measure invalid and having done so he can safely ignore it. If, but only if, he alleges and establishes that the imposition of the measure constituted misfeasance, has he an ordinary civil action in damages for misfeasance.

Community law, common sense, the matters relied on by the European Court in relation to claims for damages in respect of invalid Council Regulations and Lord Diplock's express exclusion from his reasoning of judicial review cases in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130, 144, all contribute to the conclusion at which I have arrived. I would accordingly allow the appeal as to paragraphs 23 and 24 of the amended statement of claim and set aside the judgment for damages to be assessed.

This conclusion has what I regard as the advantages of being in harmony with European law as applied to the acts of its own institutions, of avoiding the bizarre results which I have mentioned earlier, and of enabling legislative authorities to make decisions free from the hindrance, when making them, of the prospect of applications for damages, a matter which the European Court has recognised as desirable.

With regard to both of the other pairs of paragraphs I agree with the judgment of Oliver L.J., which I have had the opportunity to read in draft, and have nothing to add.

A NOURSE L.J. It is impossible to exaggerate the importance of the first question which arises on this appeal. If a minister of the Crown *in good faith* acts in breach of the duty imposed by article 30 of the E.E.C. Treaty not to place quantitative restrictions on imports, can a private individual who is injured by the breach maintain an action for damages against the Crown? It is axiomatic that if the duty had been imposed by an Act of the United Kingdom Parliament the action would not lie. But B Mann J. has held that the effect of article 30 is to the contrary. If he is right, the consequences under this and perhaps other articles of the Treaty cannot be predicted and may be very grave. I am not ashamed to start from an assumption that that cannot be the law. I believe that a reduction of the question to its essentials will demonstrate that it is not.

Under this question three subsidiary questions arise. What is the C duty? What is the right? How is it to be protected? The third of these is the most important, but it can only be answered after the duty and the right have been correctly defined.

Article 30 is expressed in very general terms. It is not in this case necessary to consider all the different circumstances in which it may operate, nor to enumerate all those on whom duties may be imposed or rights conferred. What is in my view necessary is to identify the D particular duty which it imposes and the particular right which it confers in the circumstances of a particular case. The minister's duty in the present case was not to revoke the general licence issued under article 4 of the Importation of Animal Products and Poultry Products Order 1980. The plaintiffs' right was to require the minister to continue it. Although the right was conferred by article 30, it is of a kind well E known to English law. I see nothing in the European cases which requires it to be invested with some different quality. It is important to emphasise that it was a right against the Crown and not against some private individual.

The jurisprudence of the European Court holds that the right must be protected in this way. It is for the national court to decide the form of the remedies and the procedures for enforcing the right, but they F must not be less favourable than those which are available for the protection and enforcement of rights of a similar character conferred by the national law. Nor of course must the domestic procedures render it impossible to enforce the right. I entirely agree with Parker L.J. that there is no requirement that the remedies must be dissuasive of further breaches of the duty, if by that is meant something more than that they G must effectively protect the right.

The remedies and procedures which are available in England for the protection and enforcement of a right to require a minister of the Crown to continue a licence which he is under a duty not to revoke are those which are available in proceedings for judicial review. They are regarded by English law as providing an effective protection for the right. It is suggested that that view is not shared by Community law, but I have H been unable to see why that should be so. It is, as it seems to me, a suggestion which does less than justice to the wisdom of those who shaped the jurisprudence of the European Court. They have recognised that remedies and procedures are best left to the law which is familiar to

the country in which the right must be enforced. The good sense of that recognition can no doubt be shown in any number of different ways, but here it is enough to state the obvious, namely that the European Community is an economic and not a political community. Political systems and traditions vary, in some cases significantly, from member state to member state. In this country the law has never allowed that a private individual should recover damages against the Crown for an injury caused to him by an ultra vires order made in good faith. Nowadays this rule is grounded not in procedural theory but on the sound acknowledgement that a minister of the Crown should be able to discharge the duties of his office expeditiously and fearlessly, a state of affairs which could hardly be achieved if acts done in good faith, but beyond his powers, were to be actionable in damages. What then can be the interest of Community law in endangering the continuation of this system? On general principles, and bearing in mind the particular decisions of the European Court in *Bayerische H.N.L. Vermehrungsbetriebe G.m.b.H. & Co. K.G. v. Council and Commission of the European Communities* (Cases 83/76, 94/76, 4/77, 15/77, 40/77) [1978] E.C.R. 1209 and *Koninklijke Scholten Honig N.V. v. Council and Commission of the European Communities* (Case 143/77) [1979] E.C.R. 3583, to which Parker L.J. has referred, I do not hesitate to answer that it has none.

As for the English authorities, in particular the decision of the House of Lords in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] A.C. 130, I am in entire agreement with the views which have been expressed by Parker L.J. I only desire to emphasise once more that the right which has to be considered in the present case is a right of private individuals against the Crown in respect of an ultra vires order made in good faith. That is a right of a kind which was not considered in that case.

For these reasons, which are substantially the same as those advanced by Parker L.J., I too would allow this appeal as to paragraphs 23 and 24 of the amended statement of claim, and would set aside the judgment for damages to be assessed. With regard to the second and third questions, I agree with the judgments of Oliver L.J. and Mann J. and have nothing which I wish to add.

Appeal allowed in part with one half costs.
Leave to appeal.

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A. R.