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Neutral Citation Number: [2002] EWHC 195 (Admin)
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IN THE SUPREME COURT OF JUDICATURE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL
Monday 18th February 2002

B e f o r e :

LORD JUSTICE LAWS
and
MR JUSTICE CRANE

STEVE THOBURN — **Appellant**

- and -

SUNDERLAND CITY COUNCIL — **Respondent**

COLIN HUNT	**Appellant**
- and -	
LONDON BOROUGH OF HACKNEY	**Respondent**
(1) JULIAN HARMAN **(2) JOHN DOVE**	**Appellants**
- and -	
CORNWALL COUNTY COUNCIL	**Respondent**
PETER COLLINS	**Appellant**
- and -	
LONDON BOROUGH OF SUTTON	**Respondent**

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Michael Shrimpton instructed by Percy Short & Cuthbert for the 2nd Appellant Hunt; instructed by Sproulls for the 3rd and 4th Appellants Harman and Dove, instructed by McKenzie Bell for the 1st Appellant Thoburn; and leading Helen Jefferson for the 1st,2nd, 3rd & 4th Appellants; Quinton Richards, instructed by Pilgram Heron for the 5th Appellant Collins)
Simon Butler (instructed by Legal Services for London Borough of Hackney and instructed by Legal Services for Cornwall County Council)
Eleanor Sharpston QC and Philip Moser (instructed by Colin G Langley, Director of Administration for Sunderland City Council)
Fiona Darroch (instructed by Legal Services for London Borough of Sutton).

HTML VERSION OF JUDGMENT

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Lord Justice Laws:

INTRODUCTORY

1. These are four appeals by way of case stated. All of them are about the law relating to weights and measures. That may seem a dry enough subject. But the appeals raise issues which have excited much feeling. They concern the municipal legislation giving effect to the policy of the European Union ("EU") to introduce in the Member States compulsory systems of metric weights and measures. So in the United Kingdom our imperial measures, much loved of many, seem to face extinction. Not all at once; there are exceptions and postponements, as I shall show. Mr Shrimpton for the appellants says that the crucial legislation, which is all in the form of subordinate instruments made by ministers, is entirely invalid. He would have us view this litigation as a great constitutional case. However that may be, it has certainly required the court to travel over much constitutional territory, and to consider the relationship between on the one hand the law of the EU - that is, the Treaties themselves, subordinate European legislation, and the jurisprudence of the Court of Justice, and on the other, our domestic law - that is, primary legislation passed by Parliament, subordinate legislation made by ministers, and the

jurisprudence of our higher courts. But this antithesis is in one sense misstated. The law of the EU is itself part of our domestic law, by force of the European Communities Act 1972. The true opposition for Mr Shrimpton's purpose is between the claim of European law to be supreme in each of the Member States and the traditional doctrines of the common law relating to the supremacy of Parliament, and I will explain this in due course.

THE FACTS

Thoburn

2. Steven Thoburn trades as a greengrocer in Sunderland. In the course of his trade he used weighing machines calibrated in pounds and ounces. On 16 February 2000 he was warned by a properly authorised inspector that these machines did not comply with current legislation. He was served with a 28-day notice requiring that the machines be altered so as to yield measurements in metric units. He did not obey the notice. On 31 March 2000 the inspector obliterated the imperial measure stamps on his machines. He continued to use these now unstamped machines to sell loose fruit and vegetables by pound and ounce. He was prosecuted for two offences (there being two relevant machines) under s.11(2) and (3) of the Weights and Measures Act 1985. I will set out these provisions and all the relevant legislation in due course. Mr Thoburn's trial took place before District Judge Morgan in the Sunderland Magistrates Court over five days in January and March 2001. He pleaded not guilty to both charges. He was represented by Mr Shrimpton, and the prosecutor, the Sunderland City Council, by Miss Sharpston QC: as they have been represented before us. There was no dispute about the facts. The case for the defence effectively consisted in the submissions which Mr Shrimpton has addressed to us on these appeals. On 9th April 2001 the District Judge delivered a judgment to whose rigour and fullness I would pay tribute. He rejected Mr Shrimpton's arguments and convicted Mr Thoburn.

Hunt

3. Colin Hunt sold fruit and vegetables from a stall in Hackney. On 22 and 26 September 2000 officers of the Hackney Borough Council's Trading Standards Office visited the stall. On 22 September the officer bought three sweet potatoes and two pieces of plantain. The unit prices for both were displayed by reference to pounds weight, not kilograms. On 26 September officers went to the stall on three separate occasions. On the first, the officer bought two pieces of cassava. On the second and third the officers respectively purchased plantain and sweet potatoes. In every instance the prices were marked by reference to pounds weight. In addition the officers determined that the quantity delivered in each case was less in weight than the amount which would have corresponded with the price. Mr Hunt was charged with six offences of failing to display a unit price per kilogram, contrary to Article 5 of the Price Marking Order 1999 and s.4 of the Prices Act 1974. In addition he was charged with four offences of delivering a lesser quantity than that which corresponded with the price charged, contrary to the same provisions. As regards these latter charges it is important (in light of the argument relating to them) to notice that at some time before September 2000 Mr Hunt was advised by the council to dispose of the imperial scales he had been using, and took the advice. He obtained a set or sets of metric scales in their place. Thus in September 2000 he was advertising his wares with prices marked up by reference to pounds, but had to weigh out the quantities on scales calibrated in metric measures. So for every sale, he had to convert the goods' weight in metric to imperial so as to arrive at the correct price. In these circumstances it is said (and there is no reason to doubt) that the offences of delivering underweight goods were the consequence of innocent mistakes of calculation. The fact of Mr Hunt's having only metric scales in September 2000 is not in the stated case, as it should have been. However it is agreed between the parties.

4. Mr Hunt was tried by District Judge Baldwin at the Thames Magistrates Court on 20 June 2001, when he pleaded not guilty on all charges. Again, there was no dispute as to any of the facts. As I understand it the reasoned decision of District Judge Morgan in Mr Thoburn's case was put before District Judge Baldwin, and also before the magistrates in the two remaining cases whose facts I shall shortly describe. In all of these cases the same constitutional arguments as had been advanced by Mr Shrimpton in Sunderland were relied on. In addition it was submitted in Mr Hunt's case that prosecution of the charges of delivering underweight goods amounted to an abuse of process. District Judge Morgan's judgment was not of course binding on any other court. However District Judge

Baldwin followed it. He also rejected the argument as to abuse of the process of the court, and so convicted Mr Hunt upon all the charges which he faced. He made concurrent orders of conditional discharge for twelve months for each of the offences.

Harman and Dove

5. Julian Harman sells fruit and vegetables at premises in Camelford, Cornwall. On 31 January 2001 he was found to be selling Brussels sprouts and Granny Smith apples with prices marked by reference to pounds weight only. He was charged with two offences contrary to the Price Marking legislation, and two offences of using for trade "a unit of measurement, namely a pound, which was not included in Parts I to V of Schedule 1 to the Weights and Measures Act 1985 as amended by the Units of Measurement Regulations 1994 contrary to s.8(1)(a) and 8(4) of the 1985 Act". John Dove runs a fish shop in the Market Place at Camelford. On 31 January 2001 he was selling pollack and mackerel with prices marked by reference to pounds weight. He too was charged with two offences contrary to the Price Marking legislation, and two offences contrary to s.8(1)(a) and 8(4) of the 1985 Act. He was also charged with an offence of wilfully obstructing an officer of the weights and measures authority on 31 January 2001, by deliberately preventing her from removing price tickets which were required as evidence.

6. Mr Harman and Mr Dove were tried by a bench of lay justices at the Bodmin Magistrates Court. The justices followed District Judge Morgan's decision and on 17 August 2001 convicted both of them of all the offences with which they were charged.

Collins

7. This case is different from the others, because it involves no criminal prosecution. Peter Collins holds a street trading licence issued by the London Borough of Sutton. He trades in fruit and vegetables. On 31 August 2000 the council had imposed certain conditions upon the renewal of his licence, which was due to expire on 31 March 2001. They were as follows.

> "(i) The goods permitted to be sold under the terms of the licence will be fruit (excluding soft fruit) and vegetables.
>
> (ii) The goods sold under the terms of this licence will be sold by reference to number or by net weight. Any goods sold by net weight will be by reference to the metric system only (i.e. by kg or grams).
>
> (iii) Any weighing instrument or weights used in determining the weight of such goods will be calibrated in metric only (i.e. in kg).
>
> (iv) Any reference to the price of the goods will be by reference to the unit cost (e.g. 10p each) or by reference to metric weight (e.g. 99p per kg or 10p per 100g). Price may also be indicated, in addition to the reference to metric weight, by reference to imperial weight (e.g. 22p per kg/10p per lb)."

Mr Collins objected to these conditions and appealed against them, by way of complaint to the magistrates court under s.30(1)(a) of the London Government Act 1990. His appeal was heard at the Sutton Magistrates Court from 9 – 13 July 2001. One of his arguments was based on Article 10 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"). The justices also had before them, as I have said, District Judge Morgan's decision in Mr Thoburn's case. They rejected all the arguments advanced on Mr Collins' behalf and dismissed his appeal.

THE LEGISLATION

8. In order to approach the issues in the case I must give an account of all the relevant legislation. I shall first set out the material provisions of the European Communities Act 1972. Then I will cite or summarise the provisions (European and domestic) which regulate the use of weights and measures. Finally I shall set out or describe the legislation relating to the marking of prices, which is relevant to the prosecutions of Mr Hunt and Messrs. Harman and Dove.

The European Communities Act 1972

9. S.1(2) of the European Communities Act 1972 ("ECA") amongst other things defines the expressions "the Treaties" and "the Community Treaties". I need not go into that, there being no dispute in the case as to what is and what is not a Community Treaty. Miss Sharpston made certain submissions as to the special nature of the Treaty of Rome (and by the same token legislation amending it), and I shall address those in due course. The relevant provisions of the ECA which I should set out are contained in ss.2 and 3, and Schedule 2, as follows.

> "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.
>
> (2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated minister or department may by regulations, make provision:
>
> > (*a*) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or
> >
> > (*b*) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;
>
> and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the Communities and to any such obligation or rights as aforesaid.
>
> …
>
> (4) The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of the section; but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council and regulations.
>
> …
>
> 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 or any court attached thereto).
>
> …
>
> Schedule 2
>
> 1(1) The powers conferred by section 2(2) of this Act to make provision for the purposes mentioned in section 2(2)(*a*) and (*b*) shall not include power:

(*a*) to make any provision imposing or increasing taxation; or

(*b*) to make provision taking effect from a date earlier than that of the making of the instrument containing the provision; or

(*c*) to confer any power to legislate by means of orders, rules, regulations or other subordinate instrument, other than rules of procedure for any court or tribunal; or

(*d*) to create any new criminal offence punishable with imprisonment for more than two years or punishable on summary conviction with imprisonment for more than three months or with a fine of more than [level 5 on the standard scale][1] (if not calculated on a daily basis) or with a fine of more than [£100 a day][2].

(2) Sub-paragraph (1)(*c*) above shall not be taken to preclude the modification of a power to legislate conferred otherwise than under section 2(2), or the extension of any such power to purposes of the like nature as those for which it was conferred; and a power to give directions as to matters of administration is not to be regarded as a power to legislate within the meaning of sub-paragraph (1)(*c*).

2(1) Subject to paragraph 3 below, where a provision contained in any section of this Act confers power to make regulations (otherwise than by modification or extension of an existing power), the power shall be exercisable by statutory instrument.

(2) Any statutory instrument containing an Order in Council or regulations made in the exercise of a power so conferred, if made without a draft having been approved by resolution of each House of Parliament, shall be subject to annulment in pursuance of a resolution of either House."

Weights and Measures

10. The use both of imperial and metric measures has been permitted in the United Kingdom by force of legislation from the 19th century onwards. It is unnecessary to travel farther back than the Weights and Measures Act 1963 ("the 1963 Act"). S.1(1) provided:

"The yard or the metre shall be the unit of measurement of length and the pound or the kilogram shall be the unit of measurement of mass by reference to which any measurement involving a measurement of length or mass shall be made in the United Kingdom; and—

(*a*) the yard shall be 0·9144 metre exactly;

(*b*) the pound shall be 0·453 592 37 kilogram exactly."

S.8(2):

"… the Board [viz. the Board of Trade] may, if they think fit in the case of any recommendation of the commission [viz. the Commission on Units and Measurements established by s.7], by order make such provision as appears to the Board to be necessary to give effect to that recommendation, and any such order may amend, extend or repeal any provision of this Act or any instrument made thereunder; but, without prejudice to section 10(10) of this Act, no order under this subsection shall add or remove any unit of measurement to or from any of Parts I to V of Schedule 1 to this Act."

Schedule 1 to the 1963 Act gives a series of definitions of units of measurement under five headings (Parts I to V): length, area, volume, capacity, and mass or weight. Within each heading both imperial and metric units are defined. Thus for example under Part I a mile is defined as 1760 yards, a yard is defined as 0.9144 metre, and a metre "shall have the meaning from time to time assigned by order by

the Board, being the meaning appearing to the Board to reproduce in English the international definition of the metre in force at the date of the making of the order".

11. Schedule 3 to the 1963 Act is headed "Measures and Weights Lawful for Use in Trade". It contains lists of multiples of measures, again both imperial and metric. Thus the list in Part I ("Linear measure") starts with "100 feet", then "66 feet", "50 feet", followed by other multiples of feet and inches and ending with "1inch". The other lists in all five Parts of the Schedule are in a similar pattern. Since combinations of the multiples set out could yield (taking the imperial measures list in Part I) any measure at all from one inch to an indefinitely high number, I was for my part at first perplexed as to the purpose of this Schedule and its analogue in Schedule 3 to the Weights and Measures Act 1985. However I understood it to be agreed at the Bar that the lists prescribed the specific multiples by reference to which goods were required to be offered for sale and weighed and measured in the course of trade. Thus for example a tradesman's scales would have to be calibrated according to the multiples set out in Part V ("Weights"), where the first two units are "56 pounds" and "50 pounds": so the scales must not (for instance) specify a unit of "52 pounds". The purpose of the Schedule is to ensure a uniform presentation of weights and measures among tradespeople and so to avoid confusion to the customer.

12. S.10(10) of the 1963 Act allowed the Board to amend Schedule 1 or 3 in certain respects, "but the Board shall not so exercise their powers under this subsection as to cause the exclusion from use for trade of imperial in favour of metric units of measurement, weights and measures". Thus imperial measures were at the time protected.

13. It will at once be apparent that the 1963 Act contained provisions, set out in ss.8(2) and 10(10), which conferred power on a subordinate body (the Board of Trade) to amend the statute itself. Such a power, of course, ordinarily belongs to the sovereign legislature, the Queen in Parliament, which passes, amends and repeals primary legislation. But by force of its very sovereignty, Parliament may delegate the power of amendment or repeal. A provision by which it does so is known as a "Henry VIII" clause, as it has been said "in disrespectful commemoration of that monarch's tendency to absolution (*sic*)". I doubt whether this is a just memorial to his late Majesty, who reigned 100 years before the Civil War and longer yet before the establishment of parliamentary legislative supremacy in our constitutional law. But the label is old and convenient. In the last century constitutional lawyers and others expressed a wary suspicion of the use of Henry VIII clauses, because they transfer legislative power to the executive branch of government. As I shall show, it is central to the argument advanced by Mr Shrimpton in this case that the lawful use of such power is subject to very stringent limitations, which have been exceeded. But I must complete this recital of the relevant legislation.

14. I will for the moment postpone any citation of the Prices Act 1974, which comes next in time. Then by Schedule 7 to the Weights and Measures Act 1976 s.10(10) of the 1963 Act was repealed. There remained the Henry VIII power contained in s.8(2), but we were told that that was never exercised. There were some other changes made by the Act of 1976 and by the Weights and Measures Act 1979, but it is unnecessary to travel into the detail.

15. Next comes Council Directive 80/181/EEC, "on the approximation of the laws of the Member States relating to units of measurement", made on 20 December 1979, to which I will refer as the "Metrication Directive". But it is convenient to go first to the Weights and Measures Act 1985 ("the 1985 Act"), which as originally enacted is all-important for Mr Shrimpton's submissions. As its long title makes clear, this was a consolidating statute. That is a relevant consideration in the context of an argument relating to the doctrine of implied repeal, to which I will come. Before any amendments s.1 provided so far as material:

> "(1) The yard or the metre shall be the unit of measurement of length and the pound or the kilogram shall be the unit of measurement of mass by reference to which any measurement involving a measurement of length or mass shall be made in the United Kingdom; and—
>
> (*a*) the yard shall be 0·9144 metre exactly;
>
> (*b*) the pound shall be 0·453 592 37 kilogram exactly.

(2) Schedule 1 to this Act shall have effect for defining for the purposes of measurements falling to be made in the United Kingdom the units of measurement set out in that Schedule; and for the purposes of any measurement of weight falling to be so made, the weight of any thing may be expressed, by reference to the units of measurement set out in Part V of that Schedule, in the same terms as its mass.

(3) Subject to subsection (4) below, the Secretary of State may by order amend Schedule 1 to this Act by adding to or removing from Parts I to VI of that Schedule any unit of measurement of length, of area, of volume, of capacity, or of mass or weight, as the case may be.

(4) An order under subsection (3) above shall not remove -

(a) from Part I of Schedule1, the mile, foot or inch, or

(b) from Part IV of that Schedule, the gallon or pint,

but this subsection is without prejudice to section 8(6)(b) below."

16. Then s.8 in the statute's original form:

"(1) No person shall—

(*a*) use for trade any unit of measurement which is not included in Parts I to V of Schedule 1 to this Act, or

(*b*) use for trade, or have in his possession for use for trade, any linear, square, cubic or capacity measure which is not included in Schedule 3 to this Act, or any weight which is not so included.

(2) No person shall use for trade—

(*a*) The ounce troy, except for the purposes of transactions in, or in articles made from, gold, silver or other precious metals, including transactions in gold or silver thread, lace or fringe, or

(*b*) the carat (metric), except for the purposes of transactions in precious stones or pearls, or

(*c*) a capacity measure of 125, 150 or 175 millilitres, except for the purposes of transactions in intoxicating liquor.

…

(4) A person who contravenes subsection (1) or (2) above shall be guilty of an offence, and any measure or weight used, or in any person's possession for use, in contravention of that subsection shall be liable to be forfeited.

…

(6) The Secretary of State may by order—

(*a*) amend Schedule 3 to this Act by adding to or removing from it any linear, square, cubic or capacity measure, or any weight;

(*b*) add to, vary or remove from subsection (2) above any restriction on the cases or circumstances in which, or the conditions subject to which, a unit of measurement, measure or weight may be used for trade or possessed for use for trade.

(7) An order under subsection (6) above may contain such transitional or other supplemental or incidental provisions as appear to the Secretary of State expedient.

(8) In this section 'unit of measurement' means a unit of measurement of length, area, volume, capacity, mass or weight."

17. So far, then, we may see the original regime by which metric and imperial measures were both permitted apparently preserved by s.1(1), and certain Henry VIII powers conferred by ss.1(3) and 8(6). The power under s.1(3) has never been used. The use (which I will describe) of the s.8(6) power gives rise to one aspect of Mr Shrimpton's submissions. But I must turn to s.11, under which Mr Thoburn was prosecuted:

"11(1) The provisions of this section shall apply to the use for trade of weighing or measuring equipment of such classes or descriptions as may be prescribed.

(2) No person shall use any article for trade as equipment to which this section applies, or have any article in his possession for such use, unless that article, or equipment to which this section applies in which that article is incorporated or to the operation of which the use of that article is incidental—

(*a*) has been passed by an inspector [or approved verifier] as fit for such use; and

(*b*) except as otherwise expressly provided by or under this Act, bears a stamp indicating that it has been so passed which remains undefaced otherwise than by reason of fair wear and tear.

(3) If any person contravenes subsection (2) above, he shall be guilty of an offence and any article in respect of which the offence was committed shall be liable to be forfeited.

…"

Non-automatic weighing machines, such as were used by Mr Thoburn, were prescribed for the purposes of s.11 by the Weighing Equipment (Non-Automatic Weighing Machines) Regulations 1988. These Regulations were subsequently amended notably for the purposes of this case by the Weights and Measures (Metrication Amendments) Regulations 1994, to which I will refer later in this judgment.

18. Schedules 1 and 3 to the 1985 Act are the respective analogues of Schedules 1 and 3 to the 1963 Act.

19. Now I will turn to the Metrication Directive, which was later amended by Council Directive 89/617/EEC made on 27 November 1989, and the amendments are important. But it is first necessary to give the directive's relevant provisions in their original form as follows.

"Article 1

"The legal units of measurement within the meaning of this Directive which must be used for expressing quantities shall be:

(*a*) those listed in Chapter I of the Annex;

(*b*) those listed in Chapter II of the Annex, until a date to be fixed by the Member States; this date may not be later than 31 December 1985;

(c) those listed in Chapter III of the Annex only in those Member States where they were authorized on 21 April 1973 and until a date to be fixed by those Member States; this date may not be later than a date to be set by the Council before 31 December 1989 on the basis of Article 100 of the Treaty.

…

Article 3

> 1. For the purposes of this Directive 'supplementary indication' means one or more indications of quantity expressed in units of measurement not contained in Chapter I of the Annex accompanying an indication of quantity expressed in a unit contained in that Chapter.
>
> 2. The use of supplementary indications shall be authorised until 31 December 1989.
>
> 3. However, Member States may require that measuring instruments bear indications of quantity in a single legal unit of measurement.
>
> 4. The indication expressed in a unit of measurement listed in Chapter I shall predominate. In particular, the indications expressed in units of measurement not listed in Chapter I shall be expressed in characters no larger than those of the corresponding indication in units listed in Chapter I.
>
> 5. The use of supplementary indications may be extended after 31 December 1989."

20. Chapter I of the Annex (amongst other things) gave the metre as the legal unit of measurement of length, and the kilogram as the legal unit of measurement of mass. It made no reference to imperial measures. We are not concerned with Chapter II. Chapter III gave a list of imperial measures, including pounds and ounces as measures of mass. There was a footnote, which was part of the provision:

> "Until the date to be fixed under Article 1(c), the units listed in Chapter III may be combined with each other or with those in Chapter I to form compound units."

21. Now I will describe the relevant amendments of the Metrication Directive by Council Directive 89/617/EEC made on 27 November 1989. Sub-paragraph (a) in Article 1 remained unchanged, but (b) and (c) were substituted by these provisions:

> "(*b*) those listed in Chapter II of the Annex only in those Member States where they were authorised on 21 April 1973 and until a date to be fixed by those States;
>
> (*c*) those listed in Chapter III of the Annex only in those Member States where they were authorized on 21 April 1973 and until a date to be fixed by those States. This date may not be later than 31 December 1994;
>
> (*d*) those listed in Chapter IV of the Annex only in those Member States where they were authorized on 21 April 1973 and until a date to be fixed by those States. This date may not be later than 31 December 1999."

Chapter IV lists "legal units of measurement referred to in Article 1(d). Permitted in specialised fields only". One item in the chapter is stated to be "goods sold loose in bulk", and the legal units of measurement applicable to them are specified as pounds and ounces. We are particularly concerned with Chapter IV, since on the facts all four appeals before us are to do with goods sold in bulk. Appended to Chapter IV was a footnote in like terms to that originally appended to Chapter III, which I have set out above at paragraph 20. In it "Article 1(c)" was replaced by "Article 1(d)" and "Chapter III" was replaced by "this Chapter". Otherwise its words were the same as those of the original footnote.

22. Article 3 of the Metrication Directive was amended by Directive 89/617/EEC so as to substitute "31 December 1999" for "31 December 1989" in paragraph 2, and to delete paragraph 5.

23. So it was that by force of Article 1 of the Metrication Directive as amended in 1989, together with Chapter IV of the Annex, the continued use of imperial measures for trade in goods sold loose in bulk would be permitted in the United Kingdom (being of course a State in which imperial measures had been authorised on 21 April 1973) until 31 December 1999. "Supplementary indications" within the meaning of Article 3 were also permitted until 31 December 1999.

24. That was the state of the European legislation at the time of the first relevant exercise of Henry VIII powers. Before coming to that, I should recall the provision made by Article 249 of the EC Treaty (ex Article 189) to the effect that "[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." Thus the provisions of the Metrication Directive had to be translated into national law; otherwise (subject to the doctrine of direct effect, upon which it is unnecessary to linger) they would not bite.

25. Some provision was made by the Units of Measurement Regulations 1986 for the implementation or partial implementation of the Metrication Directive in its unamended form. However in my judgment what matter for present purposes are the provisions made after 1989, by the use of Henry VIII powers, to amend the 1985 Act so as to give effect to the European measures. In its unamended form, the Act to my mind clearly permitted the continued use of imperial and metric measures for purposes of trade without preference of one over the other. That I think was the implicit effect of s.1(1) read with s.8 and Schedules 1 and 3. I would thus reject the submission made by Mr Moser, junior counsel for the Sunderland City Council (and it is convenient to deal with it at this stage), to the effect that s.1(1) as enacted was no more than a definition provision and did not confer or confirm any concrete rights. He sought to build on the use of the expression "by reference to" in the subsection, but I cannot see that that affects the matter. It is plain in my judgment that the subsection assumes, and therefore confirms, the continuing legality of the use of the yard and the pound alongside that of the metre and kilogram, without predominance of either system. Accordingly the regime of weights and measures under the 1985 Act would by force of the Metrication Directive as amended in 1989 be inconsistent with the European scheme, in relation to goods sold loose in bulk, as after 31 December 1999.

26. The first amendments which I should explain are contained in the Weights and Measures Act 1985 (Metrication) (Amendment) Order 1994 ("the 1994 Amendment Order"). It was made on 6 November 1994, and by paragraph 1 came into force on the following day. Its *vires* was stated by the preamble to consist in s.8(6) of the 1985 Act (and also s.22(1) and (2): but these do not bite on the issues in these appeals). Rather than trawl through the Order for its effect I may cite the Explanatory Note, recognising of course that it forms no part of the Order:

> "Section 8 of the [1985] Act is amended so as to make unlawful the use for trade of the pint, fluid ounce, pound or ounce except as supplementary indications of quantity or where a derogation which is reflected in section 8(2) permits their use as primary units. The pound (lb), for example, may be used either as a supplementary indication or, until 1st January 2000 (see Article 3(2) of this Order), as a primary indication for the sale of goods loose from bulk.
>
> One of the most significant amendments made by this Order to the Act is made by article 4(2), the effect of which will be to prohibit, on and after 1st January 2000, the sale of fruit and vegetables loose from bulk by the pound. Another important amendment, made by article 3(2), preserves the use of the pint for the sale of draught beer and cider and for milk in a returnable bottle beyond that date."
>
> These amendments took effect on 1 October 1995.

27. The Units of Measurement Regulations 1994 ("the 1994 Regulations"), by paragraph 1, came into force immediately after the coming into force of the 1994 Amendment Order, therefore on 6 November 1994. Its *vires* stated in the preamble is "paragraph 2(2) of Schedule 2 to the European Communities Act 1972". That is not strictly accurate. The *vires* in fact relied on is that contained in s.2(2) of the ECA, whose exercise, as I have shown, is made subject to the compulsory procedure provided for by paragraph 2(2) of Schedule 2. But nothing turns on that. Paragraphs 3 and 4 of the 1994 Regulations effect certain amendments to the Units of Measurement Regulations 1986, which I need not set out. Paragraph 5 then sets out certain amendments to s.8 of the 1985 Act to come into force when the 1994 Regulations themselves come into force. It incorporates measures relating to supplementary indications by providing in paragraph 5(2):

> "In section 8 for subsection (5) there shall be substituted the following—

(5) The preceding provisions have effect subject to—

(a) subsection (5A) below…

(5A) Nothing in this section precludes the use for trade of any supplementary indication; and for this purpose any indication of quantity ("the imperial indication") is a supplementary indication if—

(a) it is expressed in a unit of measurement other than a metric unit,

(b) it accompanies an indication of quantity expressed in a metric unit ("the metric indication") and is not itself authorised for use in the circumstances as a primary indication of quantity, and

(c) the metric indication is the more prominent, the imperial indication being, in particular, expressed in characters no larger than those of the metric indication.".

28. Then paragraph 6(2) of the 1994 Regulations amends s.1 of the 1985 Act with effect from 1st October 1995, and paragraph 7(2) makes further amendments to the same section with effect from 1st January 2000. These amendments are central to Mr Shrimpton's case. Rather than give the text of the Regulation, for clarity's sake I will first reproduce s.1, with the October 1995 amendments in square brackets.

"1(1) [Subject to subsection (6) below] the yard or the metre shall be the unit of measurement of length and the pound or the kilogram shall be the unit of measurement of mass by reference to which any measurement involving a measurement of length or mass shall be made in the United Kingdom; and—

(*a*) the yard shall be 0·9144 metre exactly;

(*b*) the pound shall be 0·453 592 37 kilogram exactly.

(2) Schedule 1 to this Act shall have effect for defining for the purposes of measurements falling to be made in the United Kingdom the units of measurement set out in that Schedule; and for the purposes of any measurement of weight falling to be so made, the weight of any thing may be expressed, by reference to the units of measurement set out in Part V of that Schedule, in the same terms as its mass.

(3) Subject to subsection (4) below, the Secretary of State may by order amend Schedule 1 to this Act by adding to or removing from Parts I to VI of that Schedule any unit of measurement of length, of area, of volume, of capacity, or of mass or weight, as the case may be.

[(4) Without prejudice to section 8(6)(*b*) below an order under subsection (3) above shall not remove the pint from Part IV of Schedule 1.]

(5) An order under subsection (3) above may contain such transitional or other supplemental or incidental provisions as appear to the Secretary of State expedient.

[(6) Subsection (1) above shall not have effect so as to authorise the use in the specified circumstances of—

(*a*) the yard as a measurement of length, or

(*b*) the pound as a measurement of mass,

otherwise than in accordance with Regulation 7 of the Units of Measurement Regulations 1986 (supplementary indications) or, in the case of the pound, in accordance with section

> 8(2)(f) below (which permits the pound to be used for the purposes of the sale of goods loose from bulk).
>
> (7) In subsection (6) above 'the specified circumstances' has the same meaning as in the Units of Measurement Regulations 1986; that is to say the circumstances specified in Article 2(*a*) of Council Directive No 80/181/EEC as limited by the provisions of Article 2(*b*) of that Directive.]"

It is unnecessary to trace through the references to "specified circumstances" mentioned in s.1(7). The January 2000 amendment to s.1, effected as I have said by paragraph 7(2) of the 1994 Regulations, omitted the words after "(supplementary indications)" in s.1(6): that is, it omitted the reference to s.8(2)(f) and the use of the pound for the purposes of the sale of goods loose from bulk, which was permitted by s.8(2)(f). S.8(2)(f) itself was inserted into the 1985 Act with effect from 1st October 1995 by paragraph 3(2) of the 1994 Amendment Order, but then repealed with effect from 1st January 2000 by paragraph 4(2) of the same Order, as indicated in the Explanatory Note which I have set out.

29. The relevant effect of these provisions may be summarised thus. On 1st October 1995 the use of imperial measures for the sale of goods loose from bulk was permitted, as a primary or supplementary indicator, until 1st January 2000. This conformed with the Metrication Directive as amended in 1989 where, as will be recalled, the date of 31st December 1999 is given in Article 1(d) (and by cross-reference the footnote to Chapter IV of the Annex) and Article 3(2). But the use of the pound as a primary indicator of weight for the sale of goods loose from bulk was forbidden as from 1st January 2000.

30. Article 1.1 of Directive 1999/103/EEC substituted "31st December 2009" for "31st December 1999" in Article 3(2) of the Metrication Directive; and by the Units of Measurement Regulations 2001, paragraph 7 of the Units of Measurement Regulations 1986 was amended with effect from 8th February 2001 so as to provide:

> "Supplementary indications are authorised to be used in the specified circumstances up to and including 31st December 2009."

Thus while the use of imperial measures as primary indicators for the sale of goods loose in bulk had ceased to be lawful on 1st January 2000, their use as supplementary indicators was now permitted until 1st January 2010; and that remains the position. It will be recalled that the relevant events in these cases all took place in 2000 or 2001.

31. I have referred in passing (paragraph 17) to the Weighing Equipment (Non-Automatic Weighing Machines) Regulations 1988, which prescribed, for the purposes of s.11 of the 1985 Act, weighing machines of the kind used by Mr Thoburn. By force of the Weights and Measures (Metrication Amendments) Regulations 1994 paragraph 16(1) of the 1988 Regulations was amended so as to provide in part:

> "Where units of measurement are marked on non-automatic weighing machines first passed as fit for use for trade –
>
> …
>
> (d) on or after 30 December 1992 they shall be marked in metric units or troy ounces, in full or by means of one of the following abbreviations or symbols only:-
>
> oz tr, t, kg, g, CM, ct, mg."

I should say that troy ounces are a measure used only for precious metals. This amendment to paragraph 16 of the 1988 Regulations took effect on 1st January 2000. Its *vires* is stated in the preamble

to the 1994 amending Regulations to consist in various provisions of the 1985 Act, including s.11(1).

32. The Weights and Measures (Metrication Amendments) Regulations 1994 also introduced paragraph 16A into the 1988 Regulations. This provided:

> "Where a weight indicating device of a non-automatic weighing machine indicates the weight of a load in metric units of measurement that indication may also be given by means of a supplementary indication."

33. In the result, come 31st March 2000, the day when the inspector obliterated the imperial measure stamps on Mr Thoburn's machines (see paragraph 2 above), as I have explained imperial measures were still allowed as a supplementary indicator for goods sold in bulk, until 31st March 2009. Weighing machines of the kind in question had to be marked in metric units (save for precious metals), although they might also be calibrated in imperial measures as a supplementary indication. Regulation 16A, to which I have just referred, was replicated as Regulation 18 in successor Regulations and the words "up to and including 31st December 2009" have been inserted by further Regulations with effect from 8th February 2001.

Price Marking

34. This statutory regime is as I have said relevant to the prosecutions of Mr Hunt and Messrs Harman and Dove. S.4(2)(b) of the Prices Act 1974 provided that the Secretary of State might by statutory instrument (subject to the negative resolution procedure in Parliament: s.4(4)) –

> "…require that the price or charge to be indicated on or in relation to any goods or services shall be, or shall include, a price or charge expressed by reference to such unit or units of measurement as may be specified in the order".

The Price Marking Order 1999 was made under the powers conferred by s.4 of the 1974 Act. Paragraph 1(2) defined "unit price" as –

> "…the final price, including VAT and all other taxes, for one kilogram, one litre, one metre, one square metre or one cubic metre of a product…".

Paragraph 5(1) of the Price Marking Order 1999 read with paragraph 5(2) obliged traders to indicate to their customers the unit price as so defined in relation to any product sold from bulk. Breach of that requirement constituted a criminal offence by virtue of paragraph 5 of the Schedule to the Prices Act.

35. That is a sufficient recital of the material statutory provisions.

THE ARGUMENTS

36. Since the litigation takes the form of appeals by way of case stated, we are dependent on the lower courts' formulation of the questions which this court is asked to answer for a concrete articulation of the issues which it is our duty to decide. In the *Thoburn* case this is not very helpfully done, since the questions which were selected from the parties' suggestions to be included in the case often comprise points of argument – steps on the way to a conclusion – rather than asking whether this or that conclusion is correct. But the essence of the case is clear enough. The appeals variously assert that the following subordinate instruments are unlawful and invalid:

> (1) the 1994 Amendment Order, which I have described in paragraphs 26, 28 and 29;
>
> (2) the 1994 Regulations, which I have described in paragraphs 27, 28 and 29;
>
> (3) the Weights and Measures (Metrication Amendments) Regulations 1994, which I have described in paragraph 31;
>
> (4) the Price Marking Order 1999, which I have described in paragraph 34.

So far as the appeals raise any issues beyond the validity of these measures, I shall deal with them in due course. I turn to the arguments advanced to impugn these four subordinate measures.

(1) Implied Repeal

37. Mr Shrimpton made much of the doctrine of implied repeal. The rule is that if Parliament has enacted successive statutes which on the true construction of each of them make irreducibly inconsistent provisions, the earlier statute is impliedly repealed by the later. The importance of the rule is, on the traditional view, that if it were otherwise the earlier Parliament might bind the later, and this would be repugnant to the principle of Parliamentary sovereignty.

38. On Mr Shrimpton's argument the *repealing* statute is the 1985 Act. But since all the measures said to be invalid post-date that Act's coming into force, one might be forgiven some puzzlement as to how the doctrine of implied repeal enters into the matter at all. In order to see how the argument works, one has first to recall the *vires* of the 1994 Regulations: s.2(2) of the ECA, which confers, when read with s.2(4), a Henry VIII amending power. Next, the effect of the 1994 Regulations: they amended s.1 of the 1985 Act in terms which I have set out in paragraph 28. By force of the amendment, the section no longer permitted the continued use of imperial and metric measures for purposes of trade without preference of one over the other (as I have held, in paragraph 25, was done by the section as originally enacted). The yard and the pound were only permitted to be used subject to the conditions or limitations specified in the new s.1(6). By virtue also of certain amendments to s.8 effected by the 1994 Amendment Order (see paragraphs 26 and 28 above) the use of the pound as a primary indicator of weight for the sale of goods loose from bulk was forbidden as from 1st January 2000.

39. Mr Shrimpton's argument is that s.1 of the 1985 Act, as enacted, impliedly repealed s.2(2) of the ECA to the extent that the latter empowered the making of any provision by way of subordinate legislation, whether so as to amend primary legislation or otherwise, which would be inconsistent with that section. S.1 must be taken to have forbidden any amendment by means of s.2(2) to the 1985 Act which would prohibit the continued use of imperial and metric measures for purposes of trade without preference of one over the other. The amendments taking effect on 1st January 2000 (though not those taking effect in October 1995) did just that; accordingly, they were inconsistent with and repugnant to the terms of s.1 as enacted, and were therefore unlawful. They were not authorised by ECA s.2(2) as impliedly amended.

40. This argument cannot be directly applied, of course, to the amendments to the 1985 Act effected by the 1994 Amendment Order, since the *vires* of that Order was not stated to be s.2(2) of the ECA but provisions contained in the 1985 Act itself. In relation to those amendments Mr Shrimpton deployed other arguments, with which I must deal. I mention one of them at this stage, since it links with his case relating to implied repeal of s.2(2). He submitted that if that case were good, then the amendments to the 1985 Act attributable to the 1994 Amendment Order fell alongside those which depended on the 1994 Regulations because all were part of the same scheme, so that the former could not rationally stand without the latter. I think he would say the same of the provisions made by the Weights and Measures (Metrication Amendments) Regulations 1994 and by the Price Marking Order 1999 though these did not purport to make any amendments to the 1985 Act. I think this argument is a good one. Unless the earlier entitlement to use imperial and metric measures for purposes of trade without preference of one over the other is extinguished in favour a metric system (albeit allowing supplementary indicators), these other measures have no rational basis. But that extinguishment was effected, or purportedly effected, by the 1994 Regulations which are the target of the argument based on implied repeal. That argument is therefore central to these appeals.

41. Mr Shrimpton accepted – or rather contended – that inherent in his argument on implied repeal lay the proposition that a Henry VIII power to amend primary legislation, such as that contained in ECA s.2(2) read with s.2(4), could only lawfully be exercised in relation to Acts already on the statute book at the time when the Henry VIII power is enacted.

42. Mr Shrimpton cited a library's worth of authority on the doctrine of implied repeal. It is no injustice to his clients if I do not refer to all the cases. The essence of the doctrine is very clear and very well known. He placed particular emphasis on two authorities, *Vauxhall Estates Ltd* [1932] 1 KB 733 and

Ellen Street Estates Ltd [1934] 1 KB 590. These both concerned the same slum clearance legislation. S.2 of the Acquisition of Land (Assessment of Compensation) Act 1919 provided for the assessment of compensation in respect of land acquired compulsorily for public purposes according to certain rules. Then by s.7(1):

> "The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect…"

S.46 of the Housing Act 1925 provided for the assessment of compensation for land acquired compulsorily under an improvement or reconstruction scheme made under that Act in a manner which was at variance from that prescribed by the Act of 1919. In *Vauxhall Estates* Avory J (sitting in this court) stated at 743 - 744:

> "… I should certainly hold… that no Act of Parliament can effectively provide that no future Act shall interfere with its provisions… [I]f they [the two statutes] are inconsistent to that extent [viz. so that they cannot stand together], then the earlier Act is impliedly repealed by the later in accordance with the maxim 'Leges posteriores priores contrarias abrogant'."

In *Ellen Street Estates* it was submitted that *Vauxhall Estates* had been wrongly decided. In the Court of Appeal Scrutton LJ addressed the contention that the earlier Act prevailed over the later at 595 – 596:

> "That is absolutely contrary to the constitutional position that Parliament can alter an Act previously passed, and it can do so by repealing in terms the previous Act… and it can do it also in another way – namely, by enacting a provision which is clearly inconsistent with the previous Act."

Maugham LJ said at 597:

> "The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature."

43. Now as I have explained, Mr Shrimpton's case is that s.2(2) of the ECA is only repealed *pro tanto* – to the extent that it empowered legislation which would be inconsistent with s.1 of the 1985 Act as enacted. Authority to the effect that the doctrine of implied repeal may operate in this limited fashion is to be found in *Goodwin v Phillips* [1908] 7 CLR 1, in the High Court of Australia, in which Griffith CJ stated at 7:

> "… if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act."

In my judgment this also represents the law of England; indeed the proposition stated is no more than a necessary concomitant of the implied repeal doctrine.

44. Mr Shrimpton next submitted that the doctrine of implied repeal runs even where the subject-matter of the repealed measure involves or includes the terms of a treaty entered into between the United Kingdom and another sovereign State. For this purpose he relied upon the decision of their Lordships' House in *Collco Dealings Ltd* [1962] AC 1. There the question was whether words in a taxing statute of 1955 in part impliedly repealed provision made in an earlier statute of 1952 which gave continued effect to certain exemption arrangements established by a double taxation agreement between the

United Kingdom and the Republic of Ireland, with which the later measure was inconsistent. It was submitted to their Lordships (I summarise – the argument is fully reported at pp. 8-9) that comity between States required that the earlier provision should prevail. Viscount Simonds said this at 19:

> "But I would answer that neither comity nor rule of international law can be invoked to prevent a sovereign state from taking what steps it thinks fit to protect its own revenue laws from gross abuse, or to save its own citizens from unjust discrimination in favour of foreigners. To demand that the plain words of the statute should be disregarded in order to do that very thing is an extravagance to which this House will not, I hope, give ear."

Perhaps the sentiment in this passage is a little stronger than its reasoning; but I certainly accept that the case is plain authority for the proposition that earlier legislation which incorporates or replicates provisions of an international treaty is by no means thereby immune from repeal by implication. Miss Sharpston submitted that however that may be as a general rule, it has no application to the EC Treaty (or the other Community Treaties). I will come to that, but it is useful at this stage to mention one authority to which Mr Shrimpton referred as supporting the view that later municipal legislation might override provisions of the Treaty of Rome. The case was *Felixstowe Dock and Railway Company* [1976] 2 CMLR 655. One of the questions there was whether an agreement for the promotion of a private Bill to allow the British Transport Docks Board, a nationalised undertaking, to take over the Felixstowe Dock and Railway Company was repugnant to what was then Article 86 of the EEC Treaty. This court held that it was not. Lord Denning added this at paragraph 32:

> "It seems to me that once the Bill is passed by Parliament and becomes a Statute, that will dispose of all this discussion about the Treaty. These courts will then have to abide by the Statute without regard to the Treaty at all."

This *obiter dictum* is not reflected in the judgments of their other Lordships.

45. In light of Lord Denning's observation in *Felixstowe Dock*, it is instructive to notice his approach to European law as it is to be found in *Macarthys Ltd v Smith* [1979] 3 AER 325, three years after *Felixstowe*. *Macarthys* was an equal pay case. But I need go only to the statement of principle. Lord Denning said this at 329c-d:

> "Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of the courts to follow the statute of our Parliament."

46. As I have indicated Mr Shrimpton cited much further learning, including the important case of *Factortame (No 1)* [1990] 2 AC 65 and *(No 2)* [1991] 1 AC 603. I will refer to that in due course. Before turning to what was said against him, I should add that in summarising Mr Shrimpton's arguments on implied repeal I have not sought to give any impression of the passionate rhetoric with which they were delivered. It did not advance his clients' case. They are entitled to dispassionate justice according to law.

47. The points on implied repeal were addressed by Miss Sharpston, who was briefed only for Sunderland and not the other respondents. But if (as I would hold – paragraph 39) the submissions as to the amendments made to s.1 of the 1985 Act by the 1994 Regulations would have, if well-founded, a domino effect on the other metrication measures involved in these cases, her arguments on implied repeal touch all the appeals before us.

48. Though it was not at the front of her argument, Miss Sharpston submitted that s.2(2) is no more than an instance of a legislative device deployed by Parliament from time to time, and in contexts having nothing to do with the law of the EU: it is, simply, a Henry VIII clause, and there is nothing in our law which prohibits the use of such a clause to amend, in the future, statutes not yet passed. Thus no question of implied repeal arises; there is no inconsistency between s.1 of the 1985 Act as enacted and ECA s.2(2). The fact that the former was open to being amended by the latter creates no inconsistency.

49. It will be recalled (paragraph 41 above) that Mr Shrimpton submitted that a Henry VIII clause could only be deployed to amend legislation already on the statute book at the time of the clause's enactment. Miss Sharpston says there is no rule of English law to that effect, and it is plain that Parliament has advisedly enacted such clauses to bite on future statutes. S.2(2) has itself been deployed on many occasions to amend Acts of Parliament passed after the ECA. Miss Sharpston gives instances at paragraph 26 of her skeleton argument. In her oral submissions she furnished an example in another context: s.10(2) and (3) of the Human Rights Act 1998 ("HRA"). S.10 confers power on the Crown to take remedial action where a court has made a declaration of incompatibility under s.4. S.10(2) provides:

> "If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility."

S.10(3) makes like provision for the case where a declaration of incompatibility has been made under s.4(4) in relation to subordinate legislation whose incompatibility with Convention rights cannot be removed because of the terms of the main legislation which furnished the subordinate measure's *vires*. I accept at once that the intended operation of s.10(2) and (3) encompasses statutes yet to be passed; otherwise an essential part of the structure of the HRA is consigned to the correction of historic violations. I understood Mr Shrimpton also to accept that that was so. But whether he did or not, it seems to me that his argument leads to the conclusion that we should be forced to construe s.10(2) and (3) as having effect for past statutes only, or else that any future Act of Parliament which the court is driven to conclude violates Convention rights must be taken to have impliedly repealed those subsections to the extent that they purported to confer power to amend the Act in question.

First Conclusion: No Inconsistency for the Purposes of Implied Repeal

50. I have reached the conclusion that Mr Shrimpton's submission on implied repeal fails on the short ground that there is no inconsistency between s.1 of the 1985 Act and ECA s2(2). Generally, there is no *inconsistency* between a provision conferring a Henry VIII power to amend future legislation, and the terms of any such future legislation. One might hold the conferment of such a power, and its use, to be objectionable on constitutional grounds as giving to the executive what belongs to the legislature (and I shall consider in due course whether in any event there *is* power in s.2(2) to amend a later statute such as the 1985 Act). But points of that kind do not rest on the doctrine of implied repeal.

51. Moreover Mr Shrimpton's submissions, upon a rigorous examination, reveal striking anomalies. First, it seems to me that the implied repeal argument, far from lending stalwart support to what Mr Shrimpton would say is the treasured doctrine of Parliamentary sovereignty, actually undermines it. If it were good, the argument would amount to a rule that Parliament lacks the legal power effectively to enact a Henry VIII clause enabling amendment of future legislation. Such clauses would only be valid if their scope were limited to past legislation. As I have said, Mr Shrimpton expressly avowed as much. Now, the doctrine of implied repeal in a sense implies a restriction of Parliament's sovereignty. Upon the traditional approach, a provision which seeks to entrench an Act against encroachment by future legislation will be ineffective: see the passages in *Vauxhall Estates* and *Ellen Street Estates* on which Mr Shrimpton relies. But the reason is, of course, that Parliament cannot bind its successors, and that is a requirement of legislative sovereignty. By contrast no such rationale can be found for Mr Shrimpton's rule, that Parliament cannot validly enact a Henry VIII clause whose scope extends to future legislation. In making such a clause, Parliament in no sense binds or purports to bind its successors. A future Parliament may legislate as it chooses in face of the clause. It may pass an Act which stipulates that its terms are not to be touched by the Henry VIII power. Such a provision would be perfectly valid. Mr Shrimpton's rule is not required as a condition of legislative sovereignty. Accordingly, since it would inhibit what Parliament may enact, it is a fetter on sovereignty.

52. Secondly, as I have said the 1985 Act was a consolidating statute. One of the respondents' arguments was that no implied repeal can be effected by such an Act since it is presumed not to change the law. I think that is very likely correct; but there is a different point to be made. If Mr Shrimpton is right, the s.2(2) amendment of s.1 of the 1985 Act fails. However had the law not been consolidated, so that s.1 of the 1963 Act remained on the statute-book, *its* amendment by the s.2(2) power would presumably

(subject to other, quite separate arguments about s.2(2)) have been effective. The Henry VIII clause would have been used merely to amend a past statute. The terms of s.1(1) of the 1963 Act are identical with those of s.1(1) of the 1985 Act. I cannot think that the law of our constitution is botched by such random consequences.

Further Arguments on Implied Repeal

53. But I should deal with the other points raised by counsel on the issue of implied repeal: I may be wrong on this question of inconsistency, and Miss Sharpston's principal answer to Mr Shrimpton's case, the centrepiece of her argument, raises issues of great importance. She submitted that the EC Treaty was not like other international treaties. It created a new and so far unique legal order, supreme above the legal systems of the Member States, so that upon accession to the Community by force of the ECA, the United Kingdom bowed its head to this supremacy. One consequence was that while the Parliament of the United Kingdom retained the legal power to repeal the ECA by express legislation, it could not do so impliedly. The reasoning in cases such as *Collco* cannot be applied in relation to the EC Treaty. At paragraph 1.9 in Miss Sharpston's outline written argument it is submitted:

> "So long as the UK remains a Member State, Parliament exercises its sovereign powers within the altered framework that continuing membership entails. So long as the UK remains a Member State, the pre-accession model of Parliamentary sovereignty is of historical, but not actual, significance."
>
> See also paragraph 50.

54. In support of her overall position as to the supremacy of EU law, and therefore the impossibility of implied repeal of the ECA, Miss Sharpston relied in particular on two seminal decisions of the Court of Justice, decided in the relatively early days of the Community. The first was *Van Gend en Loos* [1963] ECR 1. The Court stated (at 12):

> "… the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals."

Miss Sharpston asserted a contrast between this and the reasoning of Lord Templeman in the *Tin Council* case [1990] 2 AC 418, at 476F – 477A, to which Mr Shrimpton had referred:

> "The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a treaty. Parliament may alter the laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a treaty or to award damages against a sovereign state for breach of a treaty or to invent laws or misconstrue legislation in order to enforce a treaty.
>
> A treaty is a contract between the governments of two or more sovereign states. International law regulates the relations between sovereign states and determines the validity, the interpretation and the enforcement of treaties. A treaty to which Her Majesty's Government is a party does not alter the laws of the United Kingdom. A treaty may be incorporated into and alter the laws of the United Kingdom by means of legislation. Except to the extent that a treaty becomes incorporated into the laws of the United Kingdom by statute, the courts of the United Kingdom have no power to enforce treaty rights and obligations at the behest of a sovereign government or at the behest of a private individual."

55. Plainly, any treaty not incorporated into domestic law takes its place on the international plane only, as Lord Templeman explained. So far as a treaty is so incorporated, its effect in domestic law must depend upon the terms of its incorporation. In drawing the contrast she did, I take Miss Sharpston to deny this latter proposition's application in the case of the EC Treaty: or at any rate she would say that is not the whole story. She would submit that the EC Treaty's effect in domestic law does not depend, merely at least, upon the terms of its incorporation by the ECA, but, in part at least (and to a decisive extent), upon principles of EU law itself. That submission is given more concrete form by the

reasoning of the Court of Justice in the second case upon which Miss Sharpston relied: *Costa v ENEL* [1964] ECR 585. This is what the court said (593 – 594):

> "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.
>
> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.
>
> The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of objectives of the Treaty…
>
> The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories. Whenever the Treaty grants the States the right to act unilaterally, it does this by clear and precise provisions…
>
> …
>
> It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.
>
> The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail…"

56. This, says Miss Sharpston, was the state of Community law when the United Kingdom acceded on 1st January 1973. She submits that all this reasoning as to the supremacy of EC law became part of the law of England by force of the ECA, notably ss.2(1) and (4), and 3(1). The effect of her submission is that by the ECA Parliament *entrenched* EC law in the domestic law of the United Kingdom, subject only, as I understood her, to the possibility of withdrawal from the EU by express repeal of the ECA. And if that were to be contemplated, Parliament's hand would not be free. There would have to be consultations and negotiations first: see Miss Sharpston's written argument paragraph 51. And here, I think, is the critical proposition for her purpose: though it was done by means of the ECA, EC law is said to have been *entrenched*, rather than merely *incorporated*, not by virtue of any principle of domestic constitutional law, but by virtue of principles of Community law already established in cases such as *Van Gend en Loos* and *Costa v ENEL*.

57. In the result, on Miss Sharpston's case, (i) everything that is already or will become part of the corpus of EU law *ipso facto* is already or will become part of the corpus of the law of England; (ii) there can be no implied repeal or abrogation of any such law, nor of any of the principal measures contained in the ECA (perhaps it might be different for provisions which were no more than mechanics), and this is by virtue of EU law itself; (iii) any legislative initiative to withdraw, entirely or partially, from the EU would be subject to the fulfilment of compulsory preconditions. Since we are dealing here with the

strict legal position, and not with the *realpolitik* of the thing, I am not entirely sure why Miss Sharpston does not go the further mile and submit that Parliament could not legislate tomorrow to withdraw from the EU *at all*. Such a state of affairs might be said to be vouchsafed by the reasoning in *Costa v ENEL* ("permanent limitation of their sovereign rights") as readily as the more modest propositions which I have enumerated at (i) – (iii). At all events, her argument appears to me to entail the proposition that the legislative and judicial institutions of the EU may set limits to the power of Parliament to make laws which regulate the legal relationship between the EU and the United Kingdom.

Second Conclusion: Community Law Cannot Entrench Itself

58. Thus baldly stated, that proposition is in my judgment false. Miss Sharpston's submissions forget the constitutional place in our law of the rule that Parliament cannot bind its successors, which is the engine of the doctrine of implied repeal. Here is her argument's bare logic. (1) The ECA incorporated the law of the EU into the law of England. (2) The law of the EU includes the entrenchment of its own supremacy as an autonomous legal order, and the prohibition of its abrogation by the Member States: *Van Gend en Loos* and *Costa v ENEL*. Therefore (3) that entrenchment, and that prohibition, are thereby constituted part of the law of England. The flaw is in step (3). It proceeds on the assumption that the incorporation of EU law effected by the ECA (step (1)) must have included not only the whole corpus of European law upon substantive matters such as (by way of example) the free movement of goods and services, but also any jurisprudence of the Court of Justice, or other rule of Community law, which purports to touch the constitutional preconditions upon which the sovereign legislative power belonging to a member State may be exercised.

59. Whatever may be the position elsewhere, the law of England disallows any such assumption. Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the ECA. It cannot stipulate as to the manner and form of any subsequent legislation. .It cannot stipulate against implied repeal any more than it can stipulate against express repeal. Thus there is nothing in the ECA which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty. Accordingly there are no circumstances in which the jurisprudence of the Court of Justice can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself. This is, of course, the traditional doctrine of sovereignty. If is to be modified, it certainly cannot be done by the incorporation of external texts. The conditions of Parliament's legislative supremacy in the United Kingdom necessarily remain in the United Kingdom's hands. But the traditional doctrine has in my judgment been modified. It has been done by the common law, wholly consistently with constitutional principle.

Third Conclusion: the European Communities Act is a Constitutional Statute which by Force of the Common Law Cannot Be Impliedly Repealed

60. The common law has in recent years allowed, or rather created, exceptions to the doctrine of implied repeal: a doctrine which was always the common law's own creature. There are now classes or types of legislative provision which cannot be repealed by mere implication. These instances are given, and can only be given, by our own courts, to which the scope and nature of Parliamentary sovereignty are ultimately confided. The courts may say – have said – that there are certain circumstances in which the legislature may only enact what it desires to enact if it does so by express, or at any rate specific, provision. The courts have in effect so held in the field of European law itself, in the *Factortame* case, and this is critical for the present discussion. By this means, as I shall seek to explain, the courts have found their way through the *impasse* seemingly created by two supremacies, the supremacy of European law and the supremacy of Parliament.

61. The present state of our domestic law is such that substantive Community rights prevail over the express terms of any domestic law, including primary legislation, made or passed after the coming into force of the ECA, even in the face of plain inconsistency between the two. This is the effect of

Factortame (No 1) [1990] 2 AC 85. To understand the critical passage in Lord Bridge's speech it is first convenient to repeat part of ECA s.2(4):

> "The provision that may be made under subsection (2) above includes… any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of the section."

In *Factortame (No 1)* Lord Bridge said this at 140:

> "By virtue of section 2(4) of the Act of 1972 Part II of the [Merchant Shipping] Act of 1988 is to be construed and take effect subject to directly enforceable Community rights... This has precisely the same effect as if a section were incorporated in Part II of the Act of 1988 which in terms enacted that the provisions with respect to registration of British fishing vessels were to be without prejudice to the directly enforceable Community rights of nationals of any member state of the EEC."

So there was no question of an implied *pro tanto* repeal of the ECA of 1972 by the later Act of 1988; on the contrary the Act of 1988 took effect subject to Community rights incorporated into our law by the ECA. In *Factortame* no argument was advanced by the Crown in their Lordships' House to suggest that such an implied repeal might have been effected. It is easy to see what the argument might have been: Parliament in 1972 could not bind Parliament in 1988, and s.2(4) was therefore ineffective to do so. It seems to me that there is no doubt but that in *Factortame (No 1)* the House of Lords effectively accepted that s.2(4) could not be impliedly repealed, albeit the point was not argued.

62. Where does this leave the constitutional position which I have stated? Mr Shrimpton would say that *Factortame (No 1)* was wrongly decided; and since the point was not argued, there is scope, within the limits of our law of precedent, to depart from it and to hold that implied repeal may bite on the ECA as readily as upon any other statute. I think that would be a wrong turning. My reasons are these. In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental: see for example such cases as *Simms* [2000] 2 AC 115 *per* Lord Hoffmann at 131, *Pierson v Secretary of State* [1998] AC 539, *Leech* [1994] QB 198, *Derbyshire County Council v Times Newspapers Ltd.* [1993] AC 534, and *Witham* [1998] QB 575. And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the HRA, the Scotland Act 1998 and the Government of Wales Act 1998. The ECA clearly belongs in this family. It incorporated the whole corpus of substantive Community rights and obligations, and gave overriding domestic effect to the judicial and administrative machinery of Community law. It may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The ECA is, by force of the common law, a constitutional statute.

63. Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's *actual* – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes. I should add that in my judgment general words could not be supplemented, so as to effect a repeal or significant amendment to a constitutional statute, by reference to what was said in Parliament by the minister promoting the Bill pursuant to *Pepper v Hart* [1993] AC 593. A constitutional statute can only be repealed, or amended in a way

which significantly affects its provisions touching fundamental rights or otherwise the relation between citizen and State, by unambiguous words on the face of the later statute.

64. This development of the common law regarding constitutional rights, and as I would say constitutional statutes, is highly beneficial. It gives us most of the benefits of a written constitution, in which fundamental rights are accorded special respect. But it preserves the sovereignty of the legislature and the flexibility of our uncodified constitution. It accepts the relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts (in interpreting statutes, and now, applying the HRA) will pay more or less deference to the legislature, or other public decision-maker, according to the subject in hand. Nothing is plainer than that this benign development involves, as I have said, the recognition of the ECA as a constitutional statute.

65. In dealing with this part of the case I should refer to a passage from the speech of Lord Bridge of Harwich in *Factortame (No 2)* [1991] 1 AC 603, 658 – 659, on which Miss Sharpston relies:

> "Some public comments on the decision of the European Court of Justice, affirming the jurisdiction of the courts of member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the E.E.C. Treaty… it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy."

66. This reasoning does not, I think, touch the conclusions which I have expressed. As Lord Bridge makes crystal clear, its context was the requirement (stated by the Court of Justice on a reference under Article 177) that the courts of member states must posses the power to override national legislation, as necessary, to enable interim relief to be granted in protection of rights under Community law. The "limitation of sovereignty" to which Lord Bridge referred arises only in the context of Community law's substantive provisions. The case is concerned with the primacy of those *substantive* provisions. It has no application where the question is, what is the legal *foundation* within which those substantive provisions enjoy their primacy, and by which the relation between the law and institutions of the EU law and the British State ultimately rests. The foundation is English law.

67. Miss Sharpston relied also on what was said by Lord Keith in *Ex p. Equal Opportunities Commission* [1995] 1 AC 1 at 26G – 27F:

> "It is argued for the Secretary of State that Ord. 53, r. 1(2), which gives the court power to make declarations in judicial review proceedings, is only applicable where one of the prerogative orders would be available under rule 1(1), and that if there is no decision in respect of which one of these writs might be issued a declaration cannot be made. I consider that to be too narrow an interpretation of the court's powers. It would mean that while a declaration that a statutory instrument is incompatible with European Community law could be made, since such an instrument is capable of being set aside by certiorari, no such declaration could be made as regards primary legislation. However, in the Factortame series of cases (*R v Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2

> AC 85; *R v Secretary of State for Transport, Ex parte Factortame Ltd. (No. 2) (Case C 213/89)* [1991] 1 AC 603; *R v Secretary of State for Transport, Ex parte Factortame Ltd. (No. 3) (Case C 221/89)* [1992] QB 680) the applicants for judicial review sought a declaration that the provisions of Part II of the Merchant Shipping Act 1988 should not apply to them on the ground that such application would be contrary to Community law, in particular articles 7 and 52 of the EEC Treaty (principle of non-discrimination on the ground of nationality and right of establishment). The applicants were companies incorporated in England which were controlled by Spanish nationals and owned fishing vessels which on account of such control were denied registration in the register of British vessels by virtue of the restrictive conditions contained in Part II of the Act of 1988. The Divisional Court (*R v Secretary of State for Transport, Ex parte Factortame Ltd.* [1989] 2 C.M.L.R. 353), under article 177 of the Treaty, referred to the European Court of Justice a number of questions, including the question whether these restrictive conditions were compatible with articles 7 and 52 of the Treaty. The European Court… answered that question in the negative, and, although the final result is not reported, no doubt the Divisional Court in due course granted a declaration accordingly. The effect was that certain provisions of United Kingdom primary legislation were held to be invalid in their purported application to nationals of member states of the European Economic Community, but without any prerogative order being available to strike down the legislation in question, which of course remained valid as regards nationals of non-member states. At no stage in the course of the litigation, which included two visits to this House, was it suggested that judicial review was not available for the purpose of obtaining an adjudication upon the validity of the legislation in so far as it affected the applicants.
>
> The *Factortame* case is thus a precedent in favour of the EOC's recourse to judicial review for the purpose of challenging as incompatible with European Community law the relevant provisions of the Act of 1978."

This reasoning also touches, and touches only, our law's treatment of substantive rights arsing under EU law. It does not speak to the presence, absence, or degree of Parliament's power to alter the basis of the UK's legal relationship with Europe. The same is true in my judgment of the decision of their Lordships' House in *Pickstone* [1989] AC 66, cited by Miss Sharpston, a case which illustrates the lengths our courts will go in construing Acts of Parliament to uphold the supremacy of substantive Community rights.

Final Conclusion: Four Propositions

68. On this part of the case, then, I would reject Miss Sharpston's submissions. At the same time I would recognise for reasons I have given that the common law has in effect stipulated that the principal executive measures of the ECA may only be repealed in the United Kingdom by specific provision, and not impliedly. It might be suggested that it matters little whether that result is given by the law of the EU (as Miss Sharpston submits) or by the law of England untouched by Community law (as I would hold). But the difference is vital to a proper understanding of the relationship between EU and domestic law.

69. In my judgment (as will by now be clear) the correct analysis of that relationship involves and requires these following four propositions. (1) All the specific rights and obligations which EU law creates are by the ECA incorporated into our domestic law and rank supreme: that is, anything in our substantive law inconsistent with any of these rights and obligations is abrogated or must be modified to avoid the inconsistency. This is true even where the inconsistent municipal provision is contained in primary legislation. (2) The ECA is a constitutional statute: that is, it cannot be impliedly repealed. (3) The truth of (2) is derived, not from EU law, but purely from the law of England: the common law recognises a category of constitutional statutes. (4) The fundamental legal basis of the United Kingdom's relationship with the EU rests with the domestic, not the European, legal powers. In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the ECA were sufficient to incorporate the measure and give it overriding effect in domestic law. But that is very far from this case.

70. I consider that the balance struck by these four propositions gives full weight both to the proper supremacy of Community law and to the proper supremacy of the United Kingdom Parliament. By the former, I mean the supremacy of *substantive* Community law. By the latter, I mean the supremacy of the legal *foundation* within which those substantive provisions enjoy their primacy. The former is guaranteed by propositions (1) and (2). The latter is guaranteed by propositions (3) and (4). If this balance is understood, it will be seen that these two supremacies are in harmony, and not in conflict. Mr Shrimpton's argument is wrong because it would undermine the first supremacy; Miss Sharpston's because it would undermine the second.

(2) No Vires in ECA s.2(2) in any Event

(a) Duke v Reliance Systems Ltd

71. Now, as I have indicated in paragraph 38, ECA s.2(2) could not confer power to amend main legislation without the supplemental provision made by s.2(4): "[t]he provision that may be made under subsection (2) above includes… any such provision (of any such extent) as might be made by Act of Parliament". In that connection Mr Shrimpton relied upon a statement of Lord Templeman in *Duke v Reliance Systems Ltd* [1988] AC 618 at 639H-640A:

> "Section 2(4) of the European Communities Act 1972 does not in my opinion enable or constrain a British court to distort the meaning of a British statute in order to enforce against an individual a Community directive which has no direct effect between individuals. Section 2(4) applies and only applies where Community provisions are directly applicable."

I understood Mr Shrimpton to submit that since in these cases we are concerned only with the force of directives, and not directly applicable regulations, the effect of Lord Templeman's dictum is that we should hold that ECA s.2(2) did not empower the minister to amend s.1 of the 1985 Act to give effect to the amended Metrication Directive, because in such a context s.2(2) is unsupported by the vital words in s.2(4), "[t]he provision that may be made under subsection (2) above includes… any such provision (of any such extent) as might be made by Act of Parliament". The point was advanced by Mr Shrimpton in the context of his submissions on implied repeal, but it seems to me that it should be treated as a free-standing argument.

72. In my judgment it is a bad argument. It is plain from the context of the case that Lord Templeman was concerned with the further provision made by s.2(4), that is to say, "any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of the section". In the later case of *Pickstone* [1989] AC 66, to which I have already referred in passing, Lord Templeman said of the *Duke* case (123):

> "In *Duke*… this House declined to distort the construction of an Act of Parliament which was not drafted to give effect to a Directive…"

It seems to me that wholly different considerations arise when one is considering the scope of the amending power given by s.2(2) and the opening words of s.2(4). There is a plain cross-reference between those opening words and s.2(2)(a): "[the minister may make provision] for the purpose of implementing any Community obligation of the United Kingdom… or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised". In my judgment these words clearly contemplate provision being made to give effect to a directive; indeed directives are the paradigm case for the use of s.2(2)(a), precisely because regulations are directly applicable.

(b) Henry VIII Clauses are in Principle only to be Used to Effect Minor Changes

73. I understood Mr Shrimpton to submit that, quite aside from his argument on *Duke*'s case, and quite aside from his reliance on what was said in Parliament when the European Communities Bill was debated in 1972 (with which I will deal next) there exists in our law a rule to the effect that Henry VIII powers, if their use *in futuro* is permitted at all, should only so be used to effect minor or modest changes in main legislation. I have acknowledged (paragraph 13) that constitutional lawyers and others

have expressed a wary suspicion of the use of Henry VIII clauses, because they transfer legislative power to the executive branch of government. An example is to be found in one of the extra-judicial writings to which our attention was helpfully drawn by counsel, namely Lord Rippon QC's piece entitled *Henry VIII Clauses* and published at [1989] Statute Law Review 205. And in *Orange Personal Communications Ltd* [2001] EuLR 165 Sullivan J said at 177:

> "Parliament does not lightly take the exceptional course of delegating to the executive the power to amend primary legislation. When it does so the enabling power should be scrutinised, should not receive anything but a narrow and strict construction and any doubts about its scope should be resolved by a restrictive approach…"

But Parliament *may* delegate the power to amend primary legislation, and it is inescapable that by ECA s.2(2) read with s.2(4) it has done so.

(3) Assurances in Parliament: Henry VIII Power Only to be Used to Make Minor Changes

74. Mr Shrimpton referred to passages in the debates in Parliament in 1972 on the then European Communities Bill, and in particular to a statement by the Solicitor General on 13th June 1972:

> "It is therefore sensible, in the interests of Parliament, that consequential amendments of a small, minor and insignificant kind should be capable of being effected by orders made under Clause 2(2)."

And he pointed to many other statements, in both Houses, in which the ultimate sovereignty of Parliament was stoutly asserted.

75. I did not understand Mr Shrimpton to suggest that recourse to what was said in Parliament was justified or required by the rule in *Pepper v Hart* [1993] AC 593, on the footing that s.2(2) is ambiguous and statements of the ministers who promoted the Bill in Parliament might resolve the ambiguity. In any case I would reject such a view without hesitation. S.2(2) read with s.2(4) is perfectly clear, and on its face allows amendments of the kind made here to the Act of 1985. I agree with an observation made by Sullivan J in the course of his judgment in *Orange Personal Communications Ltd*, to which I have already referred, in which he also cited another ministerial statement (179):

> "I do not see any ambiguity or uncertainty… in s.2. Reading the minister's statements in *Hansard* as a whole, it is clear that, while trying to give a measure of reassurance to Parliament, he was keeping open his options for the future. As he explained at one point:
>
> > 'As for the future, our obligations will result in a continuing need to change the law to comply with non-direct provisions, and to supplement directly applicable provisions, and it is not possible in advance to specify the subjects which will have to be covered.'"

The reference to "non-direct provisions" must be to directives.

76. If this is not a *Pepper v Hart* case, as it is not, I question the propriety of any reliance on the parliamentary material. I acknowledge without cavil that there are many circumstances in which such references are perfectly proper, and, in general terms, one sees in modern litigation appeal being made to the text of *Hansard* altogether more frequently than happened not very long ago. I do not criticise Mr Shrimpton for drawing the *Hansard* material to our attention. But absent a *Pepper v Hart* argument the only purpose can have been to invite us to give effect, in deciding the legality of the amendments to the 1985 Act, to statements suggesting that the s.2(2) power would, or perhaps could, only be used to effect minor amendments. Looking at the parliamentary material as a whole, I do not think that is their overall effect. But even if it were so, I would not base an enforceable legitimate expectation (for that is what would be involved) purely on what was said in Parliament. I think that would infringe Article 9 of the Bill of Rights 1689. If a minister gives the House a false impression of the potential effect of a

Bill's provisions (and I do not say that was done here), the cost and the sanction are political. The relationship between Parliament and the courts is one of mutual respect: not only out of habit of mind, but by convention and by law. So long as that is so, I think we should be strict about such matters.

(4) Thoburn – Unlawful Prohibition of Imperial Weighing Machines?

77. After the conclusion of counsel's submissions in court it occurred to me that there might be another point available to Mr Thoburn which had not been argued. In summary, the point was this. As I have explained, the use of imperial measures as supplementary indicators was permissible from 31st December 1999. If, despite this, weighing machines were required to be calibrated in metric only, that might be said to be arbitrary or capricious, and therefore unlawful. Accordingly, with my Lord's concurrence, by letter of 11th December 2001 from my clerk counsel for the parties were invited to offer written submissions on the point, and the letter indicated that upon their receipt we would consider whether to convene a further hearing. Counsel very helpfully submitted further written arguments shortly before the Christmas vacation. It was at once apparent that there was nothing in the point. Miss Sharpston drew our attention to provisions contained in the applicable subordinate legislation whose effect is that in the relevant period while weighing machines must be calibrated in metric, the weight may also be given by way of a supplementary indication. There is, accordingly, no question of Mr Thoburn or anyone else being vexed with an arbitrary or capricious provision. The measure in question, which I need not set out, first saw life as paragraph 16A of the Weighing Equipment (Non-Automatic Weighing Machines) Regulations 1988, added in 1994, and was replicated in successor regulations.

(5) Hunt – Abuse of Process

78. Mr Hunt had done as he was advised, and got rid of his imperial scales. Thus as I have explained, in September 2000 he was advertising his wares with prices marked up by reference to pounds, but had to weigh out the quantities on scales calibrated in metric measures. So for every sale, he had to convert the goods' weight in metric to imperial so as to arrive at the correct price. In these circumstances it is said that the offences of delivering underweight goods were the consequence of innocent mistakes of calculation; and for that reason the prosecution was an abuse of the process of the court.

79. That is a hopeless argument. Mr Hunt's plight after putting away his imperial scales might have been relevant to sentence. It is not relevant to the integrity of the prosecution.

(5) Article 10 of the European Convention on Human Rights

80. It was suggested that the prohibition on the use of imperial measures amounted to a restriction of free expression in the commercial field, and thus a violation of ECHR Article 10. However Mr Richards, who ran this point, felt himself constrained to accept that since as regards the sale of goods loose from bulk imperial measures are permitted as a supplementary indicator up to and including 31st December 2009, there is no present violation of Article 10 rights. This concession is obviously correct. I cannot think it would be right, nor in the end was it suggested, that this court should now consider the position as it might be after 31st January 2009.

Footnote

81. In the course of the hearing I made no secret of my dismay at the way in which the criminal offences relevant to the first three of these appeals had been created. It is a nightmare of a paper chase. I accept that there was no prejudice to these individual appellants, who knew well what the law was because they were concerned to ampaign against it. But in principle, I regard it as lamentable that criminal offences should be created by such a maze of cross-references in subordinate legislation.

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82. If my Lord agrees, these appeals will be dismissed. Counsel will no doubt agree what in those circumstances should be the appropriate answers to the questions asked in the case stated in each appeal.

Mr Justice Crane:

83. I agree.

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