

JERSEY / JUDGMENT

JPMO v States and JPEMB

[2002] JRC 140 (22 July 2002)

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judgment

the deputy bailiff: 1. This is an application by the States and by the Jersey Potato Export Marketing Board ("the Board") to lift a stay ordered by consent on 7th March 2002 in respect of certain aspects of the Scheme ("the Scheme") adopted by the States pursuant to the Jersey Potato Marketing Scheme 2001 (Approval) (Jersey) Act 2001 ("the Act"). The application is resisted by Jersey Produce Marketing Organisation Limited ("JPMO").

BACKGROUND TO THE PROCEEDINGS

2. The Jersey Royal potato is the main outdoor crop in the Island. According to the report which accompanied the Scheme when it was presented to the States, there are annual sales of some £25-30 million in the United Kingdom. There are about eighty growers (producers) in the Island producing 35-45,000 tonnes of potatoes each year, most of which are sold in the United Kingdom; about 80% through supermarkets and 20% through wholesale markets. The marketing and export of the crop is handled almost entirely through four Jersey-based marketing organisations. Two of these, JPMO and Top Produce Limited ("TOP") handle at least 80% of the exports.

3. The report pointed out that margins fluctuate significantly from year to year; in recent years, very low margins or losses have occurred about two years in three. The report went on to say that many producers had become increasingly dissatisfied at the returns being achieved. This was said to be because of competition between the marketing organisations and because of the inability of most producers to negotiate or influence the terms under which the marketing organisations sell their crops. There is said to be a lack of transparency with regard to the terms of business offered by the marketing organisations.

4. In 2000, in response to this dissatisfaction, the Agriculture & Fisheries Committee ("the Committee") organised extensive consultation led by a Mr C. Horne from the United Kingdom. Subsequently, in October 2000, a report ("the Horne Report") was prepared. This recommended the formation of a growers association that would take responsibility for marketing the crop but would discharge this responsibility by employing the marketing organisations, under contract, to market the crop. It was recommended that a Scheme under the Agricultural Marketing (Jersey) Law 1953 should be developed. In due course the Committee produced such a Scheme following further consultation. As required by the 1993 Law, the Scheme was put to the States which, on 18th December 2001, approved the Scheme unanimously in accordance with Article 2 (6) of the 1953 Law.

5. The Scheme established the Board. The key provisions of the Scheme were that:- (i) A producer of potatoes in Jersey is

prohibited from "exporting" such potatoes unless he is registered under the Scheme and has entered into a marketing agreement with the Board; and (ii) a marketing organisation is prohibited from receiving potatoes for "export" if it is not a party to a current management agreement with the Board. 6. In this context the term "export" is given a special meaning. It is defined in paragraph 2 of the Scheme as follows:- "..... the sending for sale of potatoes outside of the Island whether directly or via some other place to a destination in the United Kingdom, the Bailiwick of Guernsey or the Isle of Man for consumption there". 7. The 1953 Law provides that, although adopted by the States, a Scheme may not come into effect until one month after a poll at which a specified proportion of registered producers vote in favour of the Scheme. Such a poll was held on the 28 th January 2002 and accordingly the Scheme was due to enter into force on or about 1 st March 2002. 8. On 26 th February 2002 JPMO was given leave to apply for judicial review of the Act and the Scheme. JPMO contends that the Scheme is in contravention of applicable European Community Law ("EC Law") and/or that it infringes the European Convention of Human Rights ("ECHR"). The application sought interim relief in the form of a stay. 9. The application for a stay came before the Court on 7 th March. At that stage the Board had not produced any draft marketing agreement for producers or draft management agreement for marketing organisations. Because the Scheme makes it illegal for a registered producer who is not party to a marketing agreement to export potatoes or offer potatoes for export and for a marketing organisation which is not a party to a management agreement to receive potatoes for export or marketing, this meant that it would have been illegal for any potatoes to be exported. The season had already begun (some potatoes had already been exported) and the main part of the season was imminent (being from March through to June). It would clearly have been disastrous for the Island if no potatoes could lawfully be exported. For that reason the States and the Board agreed to the granting of a stay. By consent, the Court ordered that the application and effect of those parts of the Scheme which would make it unlawful for producers to export or to make any arrangements intended or liable to lead directly or indirectly to the export of any potatoes outside the Island, other than in accordance with the terms of the Scheme, be stayed so as to permit JPMO and those who wished to market potatoes through JPMO to continue to produce and/or to market potatoes outside the terms of the Scheme. 10. The States and the Board made it clear that they were only consenting to the stay because of the need for the 2002 potato season to be able to proceed. They were given liberty to apply to lift the stay on 48 hours notice. 11. On 2 nd March, by consent, TOP and Fairview Farm Limited were given leave to intervene in the judicial review proceedings brought by JPMO. The stay does not apply to TOP but, following the grant of the stay, the Attorney General gave an amnesty to like effect to those producers and marketing organisations who did not benefit from the stay. 12. The hearing of the application for judicial review was fixed for two days beginning 30 th April. However, at that hearing, it became clear that difficult issues of EC law arose which would have a decisive effect upon the outcome of the case. For the reasons given at the time, the Court decided to refer certain issues of EC law to the European Court of Justice for a preliminary ruling under Article 177 of the Treaty. The exact terms of the reference have unfortunately proved incapable of agreement between the parties and accordingly the Court will sit in early August to finalise the terms of the reference. 13. It is agreed by all sides that a reference for a preliminary ruling

usually takes approximately 18 months from the date of the reference to the decision of the European Court of Justice. It follows that the argument on EC law will not be resolved in time for the 2003 season and the decision may be received shortly before or during the 2004 season. In the circumstances the States and the Board apply for a lifting of the stay with effect from 1 st October 2002 so that the Scheme may take effect for the 2003 season. THE APPLICABLE PRINCIPLES FOR INTERIM RELIEF 14. It is clear that the Court does have jurisdiction to grant an injunction restraining enforcement of a statute or other legislation where that legislation may infringe EC law (see R -v- the Secretary of State for Transport ex parte Factortame Limited (No.2)

- (1991) AC 603). The States and the Board accept that this Court has jurisdiction to stay the effect of the Act and the Scheme, as was done on 7 th March. An alternative way of achieving the same end would be to grant an injunction restraining enforcement of the Scheme by way of prosecution, but a stay seems a preferable approach. 15. The principles upon which interim relief will be granted in cases where legislation is called into question were also considered by the House of Lords in Factortame No.2 . The leading speech is that of Lord Goff. In essence he held that the approach remained that set out by Lord Diplock in American Cyanamid -v- Ethicon
- (1975) AC 396 . Thus the Court must consider:- (i) Is there a serious issue to be tried? If not, no question of interim relief arises. (ii) If the plaintiff were to succeed at trial, would he be adequately compensated by an award of damages for the loss he would have suffered between the time of the application and the time of the trial. The availability and adequacy of such a remedy will normally preclude the grant of interim relief. (iii) If that is not so, will there be an adequate remedy in damages for the defendant under the plaintiff's undertaking in damages if interim relief is granted. If so, there will be no reason on this ground to refuse the interim relief. (iv) If there is doubt as to the adequacy of either or both of the respective remedies in damages, then the Court proceeds to consider the balance of convenience and for that purpose will consider all the circumstances of the case. 16. It is at this stage that the fact that the interim relief involves staying or prohibiting the enforcement of legislation will fall to be considered. Furthermore the strength of the argument for invalidity of the legislation may be relevant at this stage. Lord Goff put it this way at 673:- "Turning then to the balance of convenience, it is necessary in cases in which a party is a public authority performing duties to the public that "one must look at the balance of convenience more widely and take into account the interests of the public in general to whom these duties are owed" In this context particular stress should be placed upon the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and the duty placed upon certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience. So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of that law, matters of considerable weight have to put into the balance to outweigh the desirability of enforcing, in the public interest, what is on its face the law, and so to justify the refusal of an interim injunction in

favour of the authority or to render it just or convenient to restrain the authority for the time being from enforcing the law." Later at 674 Lord Goff said this:- "I myself am of the opinion that in these cases as in others, the discretion conferred upon the court cannot be fettered by a rule; I respectfully doubt whether there is any rule that, in cases such as these, a party challenging the validity of a law must - to resist an application for an interim injunction against him, or to obtain an interim injunction restraining the enforcement of the law - show a strong prima facie case that the law is invalid. It is impossible to foresee what cases may yet come before the courts; I cannot dismiss from my mind the possibility (no doubt remote) that such a party may suffer such serious and irreparable harm in the event of the law being enforced against him that it may be just or convenient to restrain its enforcement by an interim injunction even though so heavy a burden has not been discharged by him. In the end, the matter is one for the discretion of the court, taking into account all the circumstances of the case. Even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken." 17. It is true that Lord Jauncey suggested that, in cases of interim relief in respect of legislation, the threshold of "a serious issue to be tried" was to be replaced by "a strong prima facie case" (at 679). However Lord Goff's speech was supported by all the other members of the House of Lords. Furthermore in *R -v- HM Treasury ex. P British Telecommunications plc*

- (1994) 1 CMLR 621, although the Divisional Court seemed to suggest that relief should not be granted unless the prospects of success were better than even in the applicant's favour, the Court of Appeal disavowed this approach and held that Lord Goff's speech set out the applicable principle. The apparent strength of the challenge to the validity of the law was merely one of the matters to be taken into account when considering the balance of convenience. The threshold remained "a serious issue to be tried". 18. In this case it is accepted that there is a serious issue to be tried in relation to the EC law issues. The first threshold is therefore crossed and we must consider whether damages would be an adequate remedy. WOULD DAMAGES BE AN ADEQUATE REMEDY? 19. JPMO argues that, in the event of a stay of the Scheme being refused and its suffering loss as a result, it is by no means certain that it will be able to recover damages to compensate for such loss. This is because EC law does not provide for a remedy in damages in every case where a State has acted in breach of community law. In *Brasserie du Pecheur SA -v- Germany* (case C-46/93 (1996) ECR I - 1029) the European Court of Justice laid down that, in order for a right to damages to be available for a breach of community law, three conditions must be satisfied:- (i) The rule of law infringed must be intended to confer rights on individuals; (ii) the breach must be sufficiently serious; and (iii) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured party. 20. The Solicitor General responded in two ways. First she argued that, on the facts, there was no real likelihood of JPMO in fact suffering loss if the stay were lifted and the Scheme took effect. In our judgment that is a matter which falls more properly to be

reviewed when considering the balance of convenience. Clearly if there is little realistic prospect of loss, that will weigh in the balance. At this stage we are considering merely whether, if JPMO were to suffer loss, damages would afford an adequate remedy. 21. Secondly, she argued that JPMO would be entitled to whatever damages the law allowed it. The fact that the law might not allow recovery of damages for loss suffered by JPMO was not a ground for ordering a stay. Damages would be an adequate remedy because JPMO would be entitled to recover such damages, if any, as the law allowed. 22. We cannot accept this argument. The whole point of the "adequacy of damages" question is to see whether, if loss is suffered by an applicant if interim relief is refused but he is ultimately successful at trial, that loss can be compensated by damages. If it can be, no interim relief is called for; if it cannot be, the Court must then go on to consider the balance of convenience. Indeed in *Factortame No.2* itself, one of the key factors was that, under the law as it then stood, the plaintiffs would not be entitled to damages for breach of EC Law even if they were ultimately successful. Thus any losses which they suffered in the interim period in the event of interim relief being refused would never be compensated. That led the House of Lords to conclude (not surprisingly) that damages would not be an adequate remedy (see Lord Goff at 672). 23. We are satisfied that, if JPMO suffers loss as a result of the lifting of the stay and is ultimately successful in challenging the validity of the Scheme, there is uncertainty as to whether that loss would necessarily fall within the area in which damages are recoverable for breach of community law. There would be room for argument as to whether the breach of community law by the States had been sufficiently "serious". We conclude therefore

- to use Lord Goff's words - that there is doubt as to the adequacy of damages as a remedy for JPMO. 24. JPMO accepts that, as will usually be the case where a public authority is seeking merely to enforce the law, damages would not be an adequate remedy for the States in the event of a stay being granted and the States being ultimately successful. It follows that damages would not be an adequate remedy in either direction and accordingly we must move to consider the balance of convenience. BALANCE OF CONVENIENCE 25. We begin by emphasising our rôle in this matter. We have received voluminous affidavits from both sides. Many of those filed on behalf of JPMO concentrate on attempting to show that the Scheme is thoroughly ill-thought out and, far from benefiting the industry, it will make matters worse. Conversely, those filed on behalf of the States and the Board seek to justify the Scheme and show that it will achieve benefits for the industry, and growers in particular. 26. As we sought to make clear during the course of argument, it is not for the Court, on an application for judicial review, to decide whether the Scheme is a good thing or a bad thing. It is for the States, as the democratically elected legislature, to decide on what it considers to be in the best interests of the industry. The Court's views (even if it had any) on the merits of the Scheme are irrelevant. The Court is concerned only with the legality of the Scheme. At this stage it is concerned with assessing the balance of convenience having regard to the fact that there is a challenge to the legality of the Scheme. 27. The second preliminary issue concerns the question of on whom the burden lies in this application. Mr Le Cocq argues that,

because there is in existence a stay ordered by consent, the burden lies upon the States and the Board to show why the stay should be lifted. In our judgment the States made clear, when consenting to the original stay, that it was doing so because the Board was simply not in a position to give effect to the Scheme for the 2002 season because of a lack of management and marketing agreements. That consideration no longer applies. It is only wished to lift the stay with effect from 1 st October 2002 so that the Scheme can be in place before the 2003 season. There will therefore be time for the relevant agreements to be put in place. The granting of interim relief staying the operation of legislation is clearly a weighty matter. In our judgment the burden lies on an applicant to show that such an exceptional step is necessary. We hold therefore that the burden lies on JPMO to satisfy us that a continuation of the stay is necessary now that the original reason for the imposition of a stay by consent has disappeared. 28. It is clear from the authorities to which we have referred earlier that, when considering the balance of convenience, the Court may have regard to the strength of the case against the validity of the legislation in question. Although there is no rule requiring the applicant to show a strong prima facie case that the law is invalid, it will be the exception for relief to be granted where that it is not the case (see the remarks of Lord Goff cited at paragraph 16 above). In this case we do not need to consider that aspect. The States have formally agreed that, " in the light of the Attorney-General's advice to the States and for the purposes of the present application, they accept that the applicant's case crosses the threshold tests of "strong arguable case" and "strong prima facie case " and that, in the event that the Court is in agreement as to the inadequacy of damages as a remedy and that the balance of convenience is to be determined in favour of the applicant and not in favour of the States, that the applicant's case is sufficiently strongly founded that the stay should be maintained ". We turn therefore to consider the balance of convenience in relation to other matters. On this aspect we have heard detailed arguments from the parties. Time does not permit us to set them out in detail but what follows is a brief summary of the more significant points. 29. The argument on behalf of the States can be simply put. As Lord Goff made clear in the passage to which we have referred at paragraph 16 above, there is a public interest in upholding legislation passed by a democratically elected legislature. The States has concluded that the Scheme will operate for the benefit of the industry. The second affidavit of Mr Griffis, chief executive of the Committee, states that the stay should be lifted so as to remove uncertainty about the Scheme and enable the Board to operate as the Scheme envisages. The prevailing uncertainty is damaging to the industry as a whole because it further weakens the morale of growers (already demoralised by the initial failure to implement the Scheme) and because it allows all the deficiencies of the status quo to continue unchecked. However, implementation of the Scheme will have limited immediate positive effect. He asserts in his affidavit that it will take time, possibly several years of implementation of the Scheme, before the operation of the Scheme will achieve the necessary improvements in the fortunes of the industry. His point therefore is that the longer the delay in implementing the Scheme, the longer the delay in achieving the improvements. The industry no longer has time on its side and it cannot afford further delay. 30. The Board supports the submissions of the States. Furthermore it submits that, as

set out in the third affidavit of Mr John Le Maistre, chairman of the Board, there are four additional reasons for lifting the stay. We do not propose to summarise these in detail. They are set out clearly in Mr Le Maistre's affidavit. The four points are categorised by him as questions of brand management, market development, product development and output control. Mr Scholefield accepts on behalf of the Board that the first three of these are not prohibited by the stay and there is nothing to prevent the Board proceeding with them. Nevertheless, he says, the Scheme is not fully operational and the Board does not therefore have the necessary authority and standing to drive these matters forward in the way that it could if the stay were to be lifted and the Scheme brought fully into effect. 31. JPMO submits that, if the Scheme is brought into effect at this stage, there is a substantial risk that both it and the industry as a whole will suffer damage. First and foremost it refers to the position of the supermarkets. As has been stated already, 80% of the new potato crop is sold to supermarkets in the United Kingdom. JPMO asserts that not one supermarket supports the Scheme. Moreover the supermarkets feel sufficiently strongly about the matter to have intervened in the debate in Jersey notwithstanding a reluctance to become involved in the affairs of another jurisdiction. 32. Thus Mr John Maylam, trading manager of Sainsburys, despite having had a meeting with Mr Stuart Smith, chief executive of the Jersey Growers Association (now the Board) wrote a long letter to JPMO on 23 rd November 2001 indicating unhappiness with what was proposed. He wrote again on 25 th January 2002 to Jersey growers generally urging them not to support the Scheme. Finally, he has sworn an affidavit in these proceedings in which he reiterates Sainsbury's position. Particular passages to which we would refer are as follows:- "13. Sainsburys would not accept that any central body such as the Board could dictate to its freely negotiated agreement with the JPMO. Sainsburys objects strongly to state intervention that carries a risk to its business relationships. Furthermore, Sainsburys objects to any risk that confidential details of their business dealings with JPMO and its growers may be disclosed to third parties such as the Board. "16. Sainsburys have made their position very clear to all parties at all opportunities. There should be no doubt as to the significant repercussions should the Scheme be allowed to remain and the relationships that Sainsburys have built up be upset through this legislation." 33. The fourth affidavit of Mr Binet, a director of TOP, included a letter from Mr Foley of Waitrose expressing serious reservations about the ability of the Scheme to protect the Jersey potato industry and expressing the view that it could well be counter productive. We have also seen a letter dated 10 th December 2001 written on behalf of Morrison's in which they express concern that the introduction of a Scheme under the management of a grower controlled organisation (i.e. the Board) might interfere with the relationship between Morrison's and JPMO. They would take a dim view of any changes in their arrangements and suggested that JPMO should make growers aware of their views. 34. Finally, we refer to an affidavit sworn by Mr Stanley Burns of Tesco. He asserted that, having seen the documents constituting the Scheme, Tesco considered that the Scheme, as promulgated, did interfere with Tesco's business relations with TOP and its growers. It was untrue for anyone to have described its position concerning the Scheme as "neutral". Furthermore Tesco took great exception to certain comments concerning Tesco made in the affidavits of Mr Griffis and Mr

Le Maistre. Mr Burns considered that such statements were not a good auspice for future relations between Tesco and the Jersey authorities. 35. JPMO argues that, with this background, there is a real risk that, if the Scheme is brought into effect against their objections at a time when its legality is very much open to question, the supermarkets will take action which adversely affects the sale of Jersey potatoes and will therefore affect JPMO. It accepts that it is unlikely that supermarkets will simply cease buying Jersey potatoes altogether. There is, after all, a market for them. But the confidence of the supermarkets in Jersey will have suffered. The stability of the present relationships will be at risk. Supermarkets always have a choice as to which potato they buy and there are plenty of rivals to Jersey potatoes. Thus the supermarkets might begin to cut down on some lines. They might look more actively elsewhere and increase their exposure to other potatoes. Essentially, Jersey would have disregarded their views and introduced a Scheme which they perceived as carrying risks to their relationship with the marketing organisations. As Sainsburys had made clear they did not have a happy experience of dealing with grower controlled bodies and did not now have a single relationship with any such body in any other jurisdiction. Once any such steps were taken by a supermarket, it would be extremely difficult for any change to be reversed in the event of the Scheme subsequently being declared unlawful. 36. In support of their contention that there is a real risk of the supermarkets taking some action, and seeking alternative supplies from other countries, JPMO points to paragraph 26 of the fourth affidavit of Mr Binet. After 30 years of trading exclusively with JPMO, Sainburys, the biggest single purchaser of Jersey Royals, has recently started putting some of its business with TOP on a trial basis. According to Mr Binet, this is largely because, despite Sainsbury's making its opposition to the Scheme known to JPMO growers, they voted substantially in favour of the Scheme, whereas TOP's growers have not supported the Scheme and abstained from the crucial poll referred to earlier. In other words, says Mr Le Cocq, this is an example of Sainbury's acting on the assertion in Mr Maylam's letter to the JPMO growers of 25 th January 2002 when he stated that, if Sainsbury's did not have an assurance that their supply was stable and committed to their requirements, then they would " consider whether an alternative supply is in the best interests of Sainburys ". This particular move was confined to a move within the Jersey Royal industry but it showed that Sainburys were willing to reconsider long standing business relationships because of the Scheme. The Jersey industry, it was said, could not therefore feel safe. 37. Secondly, in support of the assertion that the Scheme as promulgated carried certain risks, Mr Le Cocq pointed to the terms of the Horne report itself concerning the need for the marketing organisation to be supportive of the Scheme. Page 16 of the report sets out the various options. Options 5 (which was chosen as the basis of the Scheme) 6 and 7 are as follows:- "5 . Growers Association - employing marketing agents . Although this option would involve a different relationship between growers and marketing organisations, it would have the major advantage that no existing marketing expertise would be lost and existing relationships with supermarkets need not be disturbed. It would be capable of addressing the areas identified as needing change and meeting the criteria for success. The contractual arrangements and incentives for the marketing organisations would need to satisfy their

needs for viability. 6. Growers Association - undertaking marketing, having bought out the existing marketing organisations . This option would be likely to cause major disruption and it is difficult to envisage how it could be afforded or phased in. It meets the desire for one group but much of the existing marketing expertise and contacts would be lost. 7. Growers Association - starting from scratch . This option is more radical than option 6 and likely to be even more disruptive." The conclusions of the report on the three options are as follows:- "[Options 5, 6 and 7] would all be theoretically capable of meeting the criteria over time, but the radical approach of options 6 and 7 could seriously damage relationships with buyers in the short term and would involve high risk of failure. Option 5 appears closest to meeting the growers desire for one organisation. It also provides a structure which meets the criteria and importantly utilises the considerable existing marketing expertise. This option involves least risk, provided that the marketing organisations as well as growers recognise it as the best way forward towards a more secure long term future . Option 5 is therefore the "preferred option" - (emphasis added) 38. None of the marketing organisations support the Scheme (the one exception having recently changed its mind and come out against the Scheme) and therefore the proviso referred to in the conclusions above when recommending option 5 has not been fulfilled. Furthermore JPMO points out that TOP has asserted on affidavit that in no circumstances will it sign a management agreement with the Board. JPMO is more circumspect but leaves open the possibility that it may not sign. There is therefore, says JPMO, a real possibility that, if the Scheme proceeds, the Board will find itself having to market some or all of the produce. The Board does not have the expertise or facilities to undertake this and the Island would therefore find itself in the situation envisaged for options 6 or 7 which, according to the Horne report itself "..... could seriously damage relations with buyers in the short term and would involve high risk of failure ." 39. Thirdly, JPMO points to a number of other matters which underscore the concerns of the supermarkets:- (i) Supermarkets demand very rigorous quality standards. At present the marketing organisations ensure that these standards are met by imposing them upon growers as a condition for accepting produce from a grower. Under the Scheme, it will be for the Board to set quality standards. Mr Smith's affidavit refers on page 14 to setting quality and husbandry standards that "..... are reasonably achievable by the growers ." This suggests a possible dilution of current standards. Furthermore the draft management agreement supplied by the Board to JPMO in respect of the 2002 season provides that the quality standards will be set by the growers. This is a fundamental shift and could well amount to an interference in the relationship between the supermarkets and the marketing organisations (which is what the supermarkets are so concerned about) because it means that the supermarkets and marketing organisations will no longer be free to agree the relevant quality standards entirely between themselves. They will now subject to the decision of the growers. (ii) The draft management agreement supplied to JPMO required it to disclose to the Board information about prices obtained. At present all that is disclosed to the industry by the marketing organisations is the average weekly price from all sales (supermarket and wholesale). The agreements with the supermarkets contain provisions preventing JPMO from disclosing the exact price it has received from the relevant

supermarket on any given day. This is regarded as confidential business information by the relevant supermarket. The management agreement required by the Board is therefore in conflict with the agreements with the supermarkets. If insisted upon in its current form it would require JPMO to break its agreement with supermarkets. This again is a matter of grave concern to the supermarkets. 40. Other matters relied upon by JPMO can be summarised as follows:- (i) At present JPMO is free to choose the growers from whom it accepts produce for marketing and can require them to meet the supermarket protocols regarding quality etc. Under the Scheme and the draft management agreement, the Board will be able to tell JPMO from whom it must accept produce. There is therefore scope for damage to JPMO's business if it has to market potatoes from growers who have not signed up to the protocols. (ii) It is clear that one of the underlying objects of the Scheme is to increase the profit to growers. It is clear that the growers consider that the marketing organisations are too insulated from price fluctuations because much of their charging is not price related. It has been suggested that the element of commission should be increased at the expense of other charges. This would mean that, in the event of the 2003 season being a poor season, JPMO's income would be substantially affected. (iii) Quite apart from the specific point on linking JPMO's charges to the price obtained for the potatoes, it is clear that there is general concern amongst the growers that the profits of the marketing organisations are too high at the expense of the growers. The likely consequence of entering into the management agreement would be a squeeze on JPMO's profits. JPMO is unable to be specific on this because the present draft management agreement relates only to the 2002 season. The Board's proposals for the 2003 season are unknown. If the Scheme were in operation, there could be no real negotiation over these matters as the Board would hold all the cards. If JPMO did not sign up on the Board's terms, it would not be able to market potatoes and would therefore not earn any income from the potato season. (iv) The draft 2002 management agreement requires JPMO to disclose certain confidential information about its business practices etc. That information could not be recalled. Accordingly, even if JPMO were successful in its challenge to the Scheme, it would have disclosed confidential information to a grower controlled organisation and that information would remain within the knowledge of that organisation. JPMO accepts that there is a confidentiality provision imposed on the Board pursuant to the Scheme, but contends that the fact is that this confidential information will be known to all those growers who are members of the Board and they will not be able to remove it from their minds. In argument Mr Scholefield had suggested, in response to this concern, that the Board might constitute a sub-committee consisting exclusively of non-growers, but that was only a suggestion by counsel. There was no specific proposal in that respect. 41. Finally, Mr Le Cocq relied upon the damage which might result in the event of the stay being lifted and the European Court of Justice then finding against the Scheme. Assuming a reference during the course of August 2002 and assuming an eighteen month period, the decision of the European Court of Justice could be expected around February 2004. The eighteen month period is clearly not exact and accordingly there was a real risk that the decision would come through shortly before or in the middle of the 2004 season. At that stage the contracts entered into with the Board

pursuant to the Scheme would fall away. There would be chaos with the contractual position being radically altered immediately prior to or during the season. Furthermore it would be damaging for the industry and its reputation with the supermarkets and other customers. Until 2002 the Island would be operating one system. The 2003 season would be operated under a completely different system. Either immediately before or in the middle of the 2004 season the Island would revert to the old system. Instability was damaging to confidence and confidence was important in ensuring that customers did not change their allegiance to potatoes from another country. DECISION 42. Ultimately the matter is one for the Court's discretion taking into account the balancing considerations on each side. The task facing the Court in these circumstances was helpfully summarised by Hoffman J in *Films Rover International Limited -v- Cannon Film Studios Limited* (1987) 1WLR 670 at 680:- "The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the courts will make a 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense that I have described". This passage was cited with approval by Lord Jauncey in *Factortame No.2* . 43. Applying these principles and having considered all the matters put to us, we are in no doubt that the balance of convenience comes down in favour of maintaining the stay. If a stay is granted but JPMO is ultimately unsuccessful, the damage suffered by the States and the industry as a whole will be a deferral (for one or two seasons) in introducing the reforms contained in the Scheme. As stated earlier in paragraph 29, it is conceded by the States that it will take time before the operation of the Scheme achieves the improvements envisaged. Accordingly, whilst accepting Mr Griffis' point in relation to morale, any effect of the Scheme not being in operation for the 2003 season (and possibly the 2004 season) will be limited in relation to these seasons themselves. The real consequence will be that the benefits, when they eventually come through, will come through one (or perhaps two) seasons later than would have been the case if the stay were refused. Furthermore, if the 2003 season is a good season (in terms of weather, the price of competitive potatoes etc) then, as was the case for the 2001 season, good profits will be earned in any event even under the old system (see paragraph 37 of Mr Griffis' second affidavit). Similarly, of the four reasons given by Mr Le Maistre for lifting the stay (see paragraph 30) three of them are not prohibited by the stay. The fourth falls to be weighed in the balance. 44. Conversely, if JPMO is ultimately successful but is refused a stay in the meantime, we are satisfied that there is a real risk of serious damage being suffered by the industry and by JPMO. Essentially, we accept the arguments put forward by JPMO and summarised above at paragraphs 31 - 41 (save for the suggestion that JPMO would suffer damage if it refused to sign a management agreement (see paragraph 38); in that event, any loss would be entirely due to JPMO's own action.) In particular:- (i) We are of the view that there is a real risk of damage to the industry and to JPMO if the system of marketing Jersey potatoes veers from one system to another and then back again. Thus at present it is the old

system which is in operation, as it has been for many years. If the stay is refused, the new system will come into operation for the 2003 season and possibly the 2004 season. If JPMO is successful at trial, the industry will then have to revert to the old system. Furthermore, there is a real risk of this happening immediately before or during the 2004 season with consequent instability and uncertainty. We are in no doubt that all this chopping and changing would be potentially very damaging to the industry as a whole (and therefore JPMO) particularly bearing in mind the supermarkets' hostility to the Scheme. (ii) Conversely, if the stay is granted but the Scheme is ultimately upheld, there will simply be one change from the old system to the new one. It is true that this change may, depending upon the date of the decision of the European Court of Justice, take place immediately before or during the 2004 season. But, as the experience in relation to the 2002 season shows, the authorities are more than capable of arranging matters (by grant of an amnesty) so that the Scheme is not suddenly brought into effect in the middle of a season thereby causing difficulties in exporting potatoes. We see no reason why the same process should not take place in relation to the 2004 season should that become necessary. (iii) We accept that, given the strong opposition of the supermarkets to the Scheme, and having regard to the evidence on this aspect before us, there is a real risk of their taking action which would be damaging to the long term interests of the industry and very difficult to reverse if taken. We accept that it is unlikely, if the Scheme were introduced, that supermarkets would drop the Jersey Royal overnight from their shelves but we think that less drastic action of the type described by JPMO is quite possible. We therefore reject the argument of the Solicitor General that there is no realistic prospect of JPMO suffering any loss as a result of the lifting of the stay. Furthermore any damage would be extremely difficult to reverse and the long-term consequences for JPMO and the industry would therefore be extremely serious. It is of course true, that, if the Scheme were not subject to challenge, these risks would be faced in any event. But that would be a matter for the States. We are dealing with a temporary situation pending a final decision on the validity of the Scheme. There is a strong prima facie case that the Scheme is unlawful. In those circumstances we think it right and proper that the Court, when carrying out the balance of convenience, should have regard to damage which the industry and JPMO may suffer in the interim. (iv) We accept that, if it has to sign an agreement in the form of the draft management agreement for 2002 or something like it, JPMO is likely to suffer damage of the nature summarised in paragraphs 39

- 40 above. 45. We have included in our balancing operation the public interest in upholding the law of the land and the fact that we are being asked to suspend the operation of the Scheme passed by a democratically elected assembly. (see Lord Goff in the passage cited at paragraph 16 above). But, even allowing for that important factor, we are in no doubt that, for the reasons set out in the preceding two paragraphs and in paragraphs 35 - 41, the "lesser risk of injustice" lies in granting the stay. We therefore refuse the application of the States and the Board. Authorities. R -v- the Secretary of State for Transport ex parte Factortame Limited (No.2)

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