A

Queen's Bench Division

Thoburn *v* Sunderland City Council

Hunt *v* Hackney London Borough Council

B

Harman and another *v* Cornwall County Council

Collins *v* Sutton London Borough Council

[2002] EWHC 195 (Admin)

2001 Nov 20, 21, 22; 2002 Feb 18 — Laws LJ and Crane J

C

Statute — Repeal — Implied repeal — Statute incorporating European Community rights and obligations into United Kingdom law — Whether constitutional statute — Whether susceptible to implied repeal — Statute conferring power to amend primary legislation by means of subordinate legislation — Whether power impliedly partially repealed by later statute — Subordinate legislation amending later statute pursuant to power — Whether ultra vires — European Communities D *Act 1972 (c 68), s 2(2)(4) — Weights and Measures Act 1985 (c 72), ss 1, 8 — Weights and Measures (Metrication Amendments) Regulations 1994 (SI 1994/1851) — Weights and Measures Act 1985 (Metrication) (Amendment) Order 1994 (SI 1994/2866) — Units of Measurement Regulations 1994 (SI 1994/2867) — Price Marking Order 1999 (SI 1999/3042)*

The Units of Measurement Regulations 1994, which were stated to be made in E the exercise of powers conferred by section 2(2) and (4) of the European Communities Act 1972[1], amended section 1 of the Weights and Measures Act 1985[2] so as no longer to permit the use of imperial units of measurement for purposes of trade other than as supplementary indications to metric units. The Weights and Measures Act 1985 (Metrication) (Amendment) Order 1994, which was stated to be made in the exercise of powers conferred by section 8(6) of the 1985 Act, amended section 8 of that Act so as to forbid the use of the pound as a primary indicator of F weight for the sale of goods loose from bulk after 1 January 2000. The Weights and Measures (Metrication Amendments) Regulations 1994 amended paragraph 16(1) of the Weighing Equipment (Non-automatic Weighing Machines) Regulations 1988 so as to provide that units of measurement marked on non-automatic machines first passed as fit for use for trade on or after 30 December 1992 should be marked in metric units, although imperial units could be given as a supplementary indication. Paragraph 5(1) and (2) of the Price Marking Order 1999, which was stated to be G made in the exercise of powers conferred by section 4 of the Prices Act 1974, obliged traders to indicate to their customers the unit price in relation to any product sold from bulk, "unit price" being defined by paragraph 1(2) in metric terms. The various Orders and regulations were intended to implement the amendments made by Council Directive 89/617/EEC to Directive 80/181/EEC[3] relating to the use of units of measurement. The defendants in the first three cases and the claimant in the fourth case were food traders. The defendant in the first case was charged with two offences H of having in his possession for use for trade non-automatic weighing machines which were not calibrated in metric units. The defendants in the second and third cases

[1] European Communities Act 1972, s 2: see post, para 9.
[2] Weights and Measures Act 1985, as amended, s 1: see post, para 28.
S 8: see post, paras 16, 27.
[3] Council Directive 80/181/EEC, as amended: see post, paras 19, 21–22.

were charged with offences of failing to indicate a unit price per kilogram for various goods. All the defendants pleaded not guilty to the charges. The claimant in the fourth case appealed against conditions imposed upon the renewal of his street trading licence requiring him to sell and weigh goods by reference to the metric system. The facts in all of the cases were undisputed. However, the defendants in the first three cases denied that any offences had been committed and the claimant in the fourth case contended that the local authority had acted unlawfully in imposing the conditions, on the ground that the laws which authorised the relevant offences and gave the power to the local authority to make the relevant conditions were unlawful and invalid since section 1 of the 1985 Act as originally enacted, which permitted the continued use of imperial units of measurement, had impliedly repealed section 2(2) of the 1972 Act to the extent that it empowered the making of subordinate legislation which would be inconsistent with that section. The defendants in the first three cases were convicted of all charges and the claimant's appeal in the fourth case was dismissed.

On appeals by way of case stated—

Held, dismissing the appeals, that in determining whether the repeal of a constitutional statute, i e a statute which conditioned the legal relationship between citizen and state in some general, overarching manner or enlarged or diminished the scope of what were regarded as fundamental constitutional rights, or whether the abrogation of a fundamental right had been effected by statute the court would ask whether it had been shown that the legislature's actual intention, and not its imputed, constructive or presumed intention, was to effect the repeal or abrogation; that that test could only be met by express words in a later statute or by words so specific that the inference of an actual determination to effect the result was irresistible; that the ordinary rule of implied repeal did not satisfy that test, and therefore had no application to constitutional statutes; that the 1972 Act was clearly a constitutional statute since 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; that, therefore, section 1 of the 1985 Act did not by implication partially repeal section 2(2) of the 1972 Act; that Parliament could delegate the power to amend primary legislation, and it was inescapable that by section 2(2) of the 1972 Act read with section 2(4) it had done so and clearly contemplated provision being made to give effect to Community directives; and that, accordingly, the various Orders and regulations validly amended the 1985 Act (post, paras 62, 63, 64, 68, 69, 72, 73, 83).

Per curiam. General words in a statute cannot 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 (post, paras 63, 83).

The following cases are referred to in the judgment of Laws LJ:

Costa v ENEL (Case 6/64) [1964] ECR 585, ECJ
Derbyshire County Council v Times Newspapers Ltd [1993] AC 534; [1993] 2 WLR 449; [1993] 1 All ER 1011, HL(E)
Duke v Reliance Systems Ltd [1988] AC 618; [1988] 2 WLR 359; [1988] 1 All ER 626, HL(E)
Ellen Street Estates Ltd v Minister of Health [1934] 1 KB 590, CA
Felixstowe Dock and Railway Co v British Transport Docks Board [1976] 2 Lloyd's Rep 656, CA
Goodwin v Phillips (1908) 7 CLR 1
Inland Revenue Comrs v Collco Dealings Ltd [1962] AC 1; [1961] 2 WLR 401; [1961] 1 All ER 762, HL(E)
Macarthys Ltd v Smith [1979] 1 WLR 1189n; [1979] ICR 785; [1979] 3 All ER 325, CA
NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse administratie der belastingen (Case 26/62) [1963] ECR 1, ECJ

A *Pepper v Hart* [1993] AC 593; [1992] 3 WLR 1032; [1993] 1 All ER 42, HL(E)
Pickstone v Freemans plc [1989] AC 66; [1988] 3 WLR 265; [1988] 2 All ER 803, HL(E)
R v Lord Chancellor, Ex p Witham [1998] QB 575; [1998] 2 WLR 849; [1997] 2 All ER 779, DC
R v Secretary of State for Employment, Ex p Equal Opportunities Commission [1995] 1 AC 1; [1994] 2 WLR 409; [1994] 1 All ER 910, HL(E)
B *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349; [2000] 3 WLR 141; [2000] 1 All ER 884, CA; [2001] 2 AC 349; [2001] 2 WLR 15; [2001] 1 All ER 195, HL(E)
R v Secretary of State for the Home Department, Ex p Leech [1994] QB 198; [1993] 3 WLR 1125; [1993] 4 All ER 539, CA
R v Secretary of State for the Home Department, Ex p Pierson [1998] AC 539; [1997] 3 WLR 492; [1997] 3 All ER 577, HL(E)
C *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115; [1999] 3 WLR 328; [1999] 3 All ER 400, HL(E)
R v Secretary of State for Transport, Ex p Factortame Ltd [1990] 2 AC 85; [1989] 2 WLR 997; [1989] 2 All ER 692, HL(E)
R v Secretary of State for Transport, Ex p Factortame Ltd (No 2) (Case C-213/89) [1991] 1 AC 603; [1990] 3 WLR 818; [1990] ECR I-2433; [1991] 1 All ER 70, ECJ and HL(E)
D *R (Orange Personal Communications Ltd) v Secretary of State for Trade and Industry* [2001] 3 CMLR 781
Rayner (J H) (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418; [1989] 3 WLR 969; [1989] 3 All ER 523, HL(E)
Vauxhall Estates Ltd v Liverpool Corpn [1932] 1 KB 733, DC

The following additional cases were cited in argument:

E *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (Case 106/77) [1978] ECR 629, ECJ
Farrall v Department of Transport [1983] RTR 279
Minister of Health v The King (on the Prosecution of Yaffe) [1931] AC 494, HL(E)
R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Rees-Mogg [1994] QB 552; [1994] 2 WLR 115; [1994] 1 All ER 457, DC
R v Secretary of State for Social Security, Ex p Britnell [1991] 1 WLR 198; [1991]
F 2 All ER 726, HL(E)
R v Secretary of State for Trade and Industry, Ex p UNISON [1996] ICR 1003, DC
R v Pora [2001] 2 NZLR 37
Soering v United Kingdom (1989) 11 EHRR 439
Webb v Emo Air Cargo (UK) Ltd [1993] 1 WLR 49; [1992] 4 All ER 929, HL(E)

The following additional cases, although not cited, were referred to in the skeleton
G arguments:

Ashby v White (1703) 2 Ld Raym 938
B v Secretary of State for the Home Department [2000] 2 CMLR 1086, CA
Baker v The Queen [1975] AC 774; [1975] 3 WLR 113; [1975] 3 All ER 55, PC
Barrs v Bethell [1982] Ch 294; [1981] 3 WLR 874; [1982] 1 All ER 106
Barthold v Germany (1985) 7 EHRR 383
Blackburn v Attorney General [1971] 1 WLR 1037; [1971] 2 All ER 1380, CA
H *Bourne v Keane* [1919] AC 815, HL(E)
Brunner v European Union Treaty [1994] 1 CMLR 57
Carlsen v Rasmussen [1999] 3 CMLR 854
Central Hudson Gas and Electricity Corpn v Public Service Commission of New York (1980) 447 US 557
Cheney v Conn [1968] 1 WLR 242; [1968] 1 All ER 779

Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Case 61/81) [1982] ICR 578; [1982] ECR 2601, ECJ
Commission of the European Communities v United Kingdom (Case C-382/92) [1994] ICR 664; [1994] ECR I-2435, ECJ
Dart, The [1893] P 33, CA
Davis v Johnson [1979] AC 264; [1978] 2 WLR 553; [1978] 1 All ER 1132, HL(E)
Effort Shipping Co Ltd v Linden Management SA [1998] AC 605; [1998] 2 WLR 206; [1998] 1 All ER 495, HL(E)
Ellerman Lines Ltd v Murray [1931] AC 126, HL(E)
Ford v Quebec [1988] 2 SCR 712
44 Liquormart Inc v Rhode Island (1996) 517 US 484
Foto-Frost v Hauptzollamt Lübeck-Ost (Case 314/85) [1987] ECR 4199, ECJ
Gordon (Maloney) v The Queen (1969) 15 WIR 359, PC
Granaria BV v Hoofdproduktschap voor Akkerbouwprodukten (Case 101/78) [1979] ECR 623, ECJ
Groppera Radio AG v Switzerland (1990) 12 EHRR 321
Hertfordshire Investments Ltd v Bubb [2000] 1 WLR 2318, CA
Hetherington, decd, In re [1990] Ch 1; [1989] 2 WLR 1094; [1989] 2 All ER 129
Hyde Park Residence Ltd v Secretary of State for the Environment, Transport and the Regions (2000) 80 P & CR 419, CA
Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Case 11/70) [1970] ECR 1125, ECJ
Ladd v Marshall [1954] 1 WLR 1489; [1954] 3 All ER 745, CA
M v Home Office [1994] 1 AC 377; [1993] 3 WLR 433; [1993] 3 All ER 537, HL(E)
Manuel v Attorney General [1983] Ch 77; [1982] 3 WLR 821; [1982] 3 All ER 822, Sir Robert Megarry V-C and CA; (pet dis) [1983] 1 WLR 1, HL(E)
Markt Intern and Beerman v Germany (1989) 12 EHRR 161
Marr (Pauline) (A Bankrupt), In re [1990] Ch 773; [1990] 2 WLR 1264; [1990] 2 All ER 880, CA
Mortensen v Peters (1906) 8 F(J) 93
National Enterprises Ltd v Racal Communications Ltd [1975] Ch 397; [1975] 2 WLR 222; [1974] 3 All ER 1010, CA
Norman v Golder [1945] 1 All ER 352; 26 TC 293, CA
Parlement Belge, The (1879) 4 PD 129
R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3) [2000] 1 AC 147; [1999] 2 WLR 827; [1999] 2 All ER 97, HL(E)
R v Davis (1783) 1 Leach 271
R v Gillyard (1848) 12 QB 527
R v Halpert (1984) 15 CCC(3d) 292
R v Her Majesty's Treasury, Ex p Smedley [1985] QB 657; [1985] 2 WLR 576; [1985] 1 All ER 589, CA
R v Immigration Officer, Ex p Chan [1992] 1 WLR 541; [1992] 2 All ER 738, CA
R v Jordan [1967] Crim LR 483, DC
R v Lord Chancellor, Ex p Child Poverty Action Group [1999] 1 WLR 347; [1998] 2 All ER 755
R v Recorder of Leicester, Ex p Wood [1947] KB 726; [1947] 1 All ER 928, DC
R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696; [1991] 2 WLR 588; [1991] 1 All ER 720, HL(E)
R v Secretary of State for the Home Department, Ex p Ku [1995] QB 364; [1995] 2 WLR 589; [1995] 2 All ER 891, CA
R v Secretary of State for Transport, Ex p Factortame Ltd (No 5) [1999] 2 All ER 640n, CA; [2000] 1 AC 524; [1999] 3 WLR 1062; [1999] 4 All ER 906, HL(E)
R v Warner (1661) 1 Keb 66
R v West Sussex Quarter Sessions, Ex p Albert & Maud Johnson Trust Ltd [1974] QB 24; [1973] 3 WLR 149; [1973] 3 All ER 289, CA

A *R (Burns) v County Court Judge of Tyrone* [1961] NI 167
R (Isiko) v Secretary of State for the Home Department [2001] Imm AR 291, CA
R (Kadhim) v Brent London Borough Council Housing Benefit Review Board [2001] QB 955; [2001] 2 WLR 1674, CA
R (Samaroo) v Secretary of State for the Home Department [2001] Imm AR 324
RJR-MacDonald Inc v Canada [1995] 3 SCR 199
Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd [1920] 2 KB 487, CA; [1921] 2 AC 465, HL(E)
B *Read v J Lyons & Co Ltd* [1947] AC 156; [1946] 2 All ER 471, HL(E)
Salomon v Customs and Excise Comrs [1967] 2 QB 116; [1966] 3 WLR 1223; [1966] 3 All ER 871, CA
Selwyn (Canon), Ex p (1872) 36 JP 54
Slaughter v Sunderland Corpn (1891) 65 LT 250, DC
Thamesdown Borough Council v Goonery (unreported) 13 February 1995; Court of Appeal (Civil Division) Transcript No 147 of 1995, CA
C *Tomlinson v Bullock* (1879) 4 QBD 230, DC
Virginia State Pharmacy Board v Virginia Citizens Consumer Council (1976) 425 US 748
Warburton v Loveland (1832) 2 Dow & Cl 480, HL(I)
West Midland Baptist (Trust) Association (Inc) v Birmingham Corpn [1970] AC 874; [1969] 3 WLR 389; [1969] 3 All ER 172, HL(E)
D *Wood v Riley* (1867) LR 3 CP 26
Young v Bristol Aeroplane Co Ltd [1944] KB 718; [1944] 2 All ER 293, CA
Zana v Turkey (1997) 27 EHRR 667

Thoburn v Sunderland City Council

CASE STATED by District Judge Bruce Morgan sitting at Sunderland Magistrates' Court

E On 29 September 2000 two informations were laid by Sunderland City Council alleging that on 4 July 2000 the defendant, Steven Thoburn, committed two offences contrary to section 11(2) of the Weights and Measures Act 1985 by having in his possession for use for trade a non-automatic weighing machine which did not bear a stamp indicating that it had been passed by an inspector or approved verifier as fit for such use which F was not defaced otherwise than by reason of fair wear and tear. The two summonses were framed in identical language but related to different weighing machines.

The district judge heard the informations on 15, 16 and 17 January and 1 and 2 March 2001, and gave judgment on 9 April 2001. No evidence was called. The parties agreed the facts and the defendant filed an admission G under section 10 of the Criminal Justice Act 1967.

It was agreed that the defendant was a greengrocer who possessed scales with which to weigh his customers' purchases. On 16 February 2000 he was visited and warned by a principal trading standards officer of the City of Sunderland that his scales were not correctly calibrated in that they did not measure in metric units. On 31 March he was visited by another or the same representative of the City of Sunderland who obliterated the stamps on his H scales because they were still not calibrated to measure in metric units. Because of that act of obliteration he informed the defendant that the scales were no longer fit for use for trade. On 2 June an inspector from the City of Sunderland visited the premises and warned the defendant of the legal consequences of using unstamped weighing machines. From 16 February to

4 July 2000 the defendant continued to use his scales, which were only calibrated to measure by the imperial pound and ounces. On 4 July a consumer protection officer purchased a bunch of bananas for 34p which were priced at 25p per imperial pound and were weighed upon one of the scales which had had its stamp obliterated on 31 March 2000. The two sets of scales were seized later that day, when a representative of the City of Sunderland visited the premises accompanied by two police officers.

The district judge was of the opinion that the matters were proved. The defendant applied to the district judge to state a case for the opinion of the High Court. It was agreed between the parties that the full written judgment prepared by the district judge would take the place of the case stated. Since the parties were unable to agree between themselves the questions to be asked of the High Court, the district judge indicated which of the draft questions submitted by the parties he found to be relevant. In view of the Divisional Court's comments with regard to those questions (see post, para 36), they are not set out herein.

Hunt v Hackney London Borough Council

CASE STATED by District Judge Alan Baldwin sitting at Thames Magistrates' Court

By informations laid by Hackney London Borough Council the defendant, Colin Hunt, was charged with six offences of failure to indicate a unit price per kilogram for certain goods contrary to article 5 of the Price Marking Order 1999 and section 4 of the Prices Act 1974, and four offences of selling certain goods by weight and delivering a lesser quantity than that which corresponded with the price charged contrary to section 28(1) of the Weights and Measures Act 1985.

The district judge heard the informations on 20 June 2001. The defendant entered not guilty pleas to all the informations.

The facts were undisputed. On 22 September 2000 Ms Josile Munro, one of the council's principal trading standards officers, instructed Theo Lamptey, one of the council's commercial standards officers, to attend at the defendant's fruit and vegetable stall at 29 Ridley Road, London and conduct a test purchase. Mr Lamptey did so and purchased three sweet potatoes displayed for sale at 90p per pound. He was informed that the purchase price was £2·45 and paid for the products. He also purchased two pieces of plantain displayed for sale at 39p per pound. He was informed that the purchase price was 65p and paid for the products. Having purchased the products he returned to the office and weighed the sweet potatoes and plantain on a weighing scale. The weight of the plantain was determined at 644·2 g and the weight of the sweet potatoes was determined at 110·1 g. The weight purported to be sold was deficient by 8%. On 26 September 2000 Ms Munro went to the stall accompanied by Mr Lamptey and Mr Dhakshinamurthy Balakrishnan. On arriving at the stall, she purchased two pieces of cassava displayed for sale at 40p per pound. She was informed by the assistant that the purchase price was 80p and paid for the products. She then weighed the cassava, which was determined at 741·7 g. The weight purported to be sold was deficient by 22·35%. On 26 September Mr Balakrishnan, a trading standards officer, attended at the defendant's stall and purchased plantain displayed for sale at 39p per pound. He was

A informed that the purchase price was 80p and paid for the products. He then weighed the plantain, which was determined at 790·5 g. The weight purported to be sold was deficient by 17·7%. On 26 September 2000 Mr Lamptey returned to the stall accompanied Ms Munro and Mr Balakrishnan. On arrival he purchased sweet potatoes which were displayed for sale at 75p per pound. The defendant weighed the products and then informed him the price was £1·46. Mr Lamptey then weighed the B sweet potatoes which were determined at 773·8 g. The weight purported to be sold was deficient by 14%.

The district judge was of the opinion that, as far as the unit price charges were concerned, he did not accept the constitutional and other arguments put forward by the defence. As far as the short weight charges were concerned, he found that there had been no abuse of process; he was of the C opinion that the prosecution had been properly brought by the local authority. Accordingly, he convicted the defendant on each of the informations.

The defendant challenged the validity of the secondary legislation under which he had been convicted and requested the district judge to state a case for the opinion of the High Court. The questions for the opinion of the court D were (a) whether the Units of Measurement Regulations 1994 were valid, (b) whether the Weights and Measures Act 1985 (Metrication) (Amendment) Order 1994 was valid, (c) whether the Price Marking Order 1999 was intra vires the Price Marking Act 1974, (d) whether it was unlawful for the defendant to display for sale produce indicating only a unit price per imperial pound, (e) whether it was open for the district judge to convict the defendant of the unit price offences and (f) whether it was open to him to E convict the defendant of the short weight offences.

Harman and another v Cornwall County Council

CASE STATED by Bodmin justices

On 30 April 2001 informations were preferred by Cornwall County Council against the defendants, Julian Lawrence Harman and John F Frederick Dove. The informations preferred against the defendant Harman alleged that he (i) on 31 January 2001 at A1 Fruiterers, Market Place, Camelford in the County of Cornwall did as a trader by displaying a sign marked "Brussels sprouts 39p per pound" indicate that a product, namely Brussels sprouts, was or might be for sale to a consumer without there being indicated for the product a unit price as defined by article 1 to the Price G Marking Order 1999 and as required by article 5(1) of that Order in that the price indicated for the product was not indicated by reference to a kilogram contrary to paragraph 5(1) of the Schedule to the Prices Act 1974, (ii) on 31 January 2001 at A1 Fruiterers, Market Place, Camelford did as a trader by displaying a sign marked "Granny Smith apples 45p per pound" indicate that a product, namely Granny Smith apples, was or might be for sale to a consumer without there being indicated for the product a unit price as H defined by article 1 of the 1999 Order and as required by article 5(1) of that Order in that the price indicated for the product was not indicated by reference to a kilogram contrary to paragraph 5(1) of the Schedule to the 1974 Act, (iii) on 31 January 2001 in the course of business at Camelford did use for trade for the sale of Brussels sprouts by weight 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 section 8(1)(a) and(4) of the Act, (iv) on 31 January 2001 in the course of business at Camelford did use for trade for the sale of Granny Smith apples by weight a unit of measurement, namely a pound, which was not included in Parts I to V of Schedule 1 to the 1985 Act as amended by the 1994 Regulations contrary to section 8(1)(a) and (4) of the Act, and (v) on 31 January 2001 did wilfully obstruct Sharon Foster of Cornwall County Council, a duly authorised officer of the local weights and measures authority, in the course of her duty by deliberately preventing her removing price tickets which were required as evidence of an alleged offence under the 1974 Act contrary to paragraph 9(3)(a) of the Schedule to that Act. The informations preferred against the defendant Dove alleged that he (i) on 31 January 2001 at The Fish Shop, Market Place, Camelford in the County of Cornwall did as a trader by displaying a sign marked "pollack £3·28 per lb" indicate that a product, namely pollack, was or might be for sale to a consumer without there being indicated for the produce a unit price as defined by article 1 to the Price Marking Order 1999 and as required by article 5(1) of that Order in that the price indicated for the product was not indicated by reference to a kilogram contrary to paragraph 5(1) of the Schedule to the Prices Act 1974, (ii) on 31 January 2001 at The Fish Shop, Market Place, Camelford did as a trader by displaying a sign marked "mackerel £1·54 per lb" indicate that a product, namely mackerel, was or might be for sale to a consumer without there being indicated for the produce a unit price as defined by article 1 of the 1999 Order and as required by article 5(1) of that Order in that the price indicated for the product was not indicated by reference to a kilogram contrary to paragraph 5(1) of the Schedule to the 1974 Act, (iii) on 31 January 2001 in the course of business at Camelford did use for trade for the sale of pollack by weight 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 section 8(1)(a) and(4) of that Act, (iv) on 31 January 2001 in the course of business at Camelford did use for trade for the sale of mackerel by weight a unit of measurement, namely a pound, which was not included in Parts I to V of Schedule 1 to the 1985 Act as amended by the 1994 Regulations contrary to section 8(1)(a) and (4) of that Act, and (v) on 31 January 2001 did wilfully obstruct Sharon Foster of Cornwall County Council, a duly authorised officer of the local weights and measures authority, in the course of her duty by deliberately preventing her removing price tickets which were required as evidence of an alleged offence under the 1974 Act contrary to paragraph 9(3)(a) of the Schedule to that Act.

The justices heard the informations on 17 August 2001. The following agreed facts were submitted to the justices by way of admissions under section 10 to the Criminal Justice Act 1967 and were not in dispute. The defendant Harman admitted that at all material times and in particular on 31 January 2001 he sold fruit and vegetables including Granny Smith apples and Brussels sprouts by the imperial pound, and priced the apples and sprouts by the imperial pound. He also admitted that he refused to hand over price tickets marked in imperial to trading standards officers when requested to do so. The defendant Dove admitted that at all material times

A and in particular on 31 January 2001 he both priced and sold mackerel and pollack by the imperial pound and that he refused to hand over price tickets marked in imperial when requested to do so by trading standards officers. For the avoidance of doubt each and every element of the actus reus of each offence alleged by the prosecution was admitted by each defendant. The case proceeded by way of submissions of law.

B The justices, having been referred to the judgment given by District Judge Bruce Morgan in *Thoburn v Sunderland City Council*, were of the opinion that they should follow that decision. In their view the relevant statutory provisions empowered ministers to implement secondary legislation to amend the way in which produce was to be weighed, sold and displayed and Parliament permitted such powers to exist. They agreed with the prosecution that the legislation by which the defendants had been C prosecuted had to be complied with and was enforceable and accordingly convicted the defendants upon every information.

The questions for the opinion of the High Court were (a) it being common ground before the justices that Parliament provided by the Weights and Measures Act 1985 for both the imperial and the metric systems to continue to operate side by side, were they right to apply that Act as purportedly D amended by ministers in 1994? (b) In particular, were the Units of Measurement Regulations 1994 and the Weights and Measures Act 1985 (Metrication) (Amendment) Order 1994 intra vires the alleged enabling powers in section 2 of the European Communities Act 1972 and section 8(6) of the Weights and Measures Act 1985 and valid? (c) Was the Price Marking Order 1999 intra vires section 4 of the Prices Act 1974, which made no E mention of metrication and on ordinary principles was subject to the 1985 Act? (d) Were the trading standards officers acting in execution of their duty in seeking to seize imperial price tickets in the absence of any dishonesty or improper marking of the tickets other than the fact that they were marked in imperial? (e) Was it lawful to sell Brussels sprouts, mackerel and other such items by the pound?

F

Collins v Sutton London Borough Council

CASE STATED by Sutton justices

On 29 September 2000 the appellant, Peter Collins, applied for a summons to be issued under section 30(1)(a) of the London Local Authorities Act 1990 (c vii) against the respondent, the trading standards G department of Sutton London Borough Council, in respect of its decision on 31 August 2000 to impose special conditions on the renewal of the street trading licence of the appellant, which was due to expire on 31 March 2001. The special conditions imposed on the licence were that (i) the goods permitted to be sold under the terms of the licence would be fruit (excluding soft fruit) and vegetables, (ii) the goods sold under the terms of the licence would be sold by reference to number or by net weight; any goods sold by H net weight would be by reference to the metric system only (i e by kilogram or grams), (iii) any weighing instrument or weights used in determining the weight of such goods would be calibrated in metric only (i e in kilogram), (iv) any reference to the price of the goods would 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

100 g); prices might also be indicated, in addition to the reference to metric weight, by reference to imperial weight (e g 22p per kg/10p per lb).

The justices heard the appeal on 9–13 July 2001. None of the facts of the case were in dispute, the appellant contending, inter alia, that the Weights and Measures Act 1985 (Metrication) (Amendment) Order 1994, the Units of Measurements Regulations 1994 and the Weights and Measures (Metrication Amendments) Regulations 2001 (SI 2001/85), on which the council relied in imposing the conditions for the renewal of his licence, were ultra vires. The justices, who were referred to the judgment given by District Judge Bruce Morgan in *Thoburn v Sunderland City Council*, were of the opinion that the legislation was properly drafted and intra vires and that the appellant had made no attempt to meet with the various requirements imposed on him and accordingly dismissed the appeal.

The justices stated a case for the opinion of the High Court. The questions of law on which the opinion of the court was sought were: (a) were the justices correct in deciding that the appellant's rights under article 10 of the Human Rights Act 1998 had not been infringed? and (b) were they correct in deciding that the 1994 Order and the 1994 Regulations were valid and therefore the council was not acting ultra vires by imposing the special conditions on the appellant's street trading licence that he sold fruit and vegetables in metric?

Michael Shrimpton and *Helen Jefferson* for Thoburn, Hunt, Harman and Dove; and *Michael Shrimpton* and *Quinton Richards* for Collins. Section 1of the Weights and Measures Act 1985 impliedly repealed section 2(2) of the European Communities Act 1972 so far as the latter empowered the making of any provision, by way of subordinate legislation or otherwise, which would be inconsistent with that section. A consolidation Act is as much capable of working an implied repeal as any other primary legislation: see *Vauxhall Estates Ltd v Liverpool Corpn* [1932] 1 KB 733; *Ellen Street Estates Ltd v Minister of* Health [1934] 1 KB 590; *Goodwin v Phillips* (1908) 7 CLR 1; *R v Pora* [2001] 2 NZLR 37 and *Minister of Health v The King (on the Prosecution of Yaffe)* [1931] AC 494. Section 1 must be taken to forbid any amendment by means of section 2(2) of the 1972 Act which prohibits the continued use of imperial and metric measures for purposes of trade without preference of one over the other. The amendments of the 1985 Act attributable to the Weights and Measures Act 1985 (Metrication) (Amendment) Order 1994 and those which depended on the 1994 Regulations all were part of the same scheme, so that the former could not rationally stand without the latter.

The United Kingdom is a dualist jurisdiction so 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: see *Inland Revenue Comrs v Collco Dealings Ltd* [1962] AC 1; *Rayner (J H) (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418; *R v Secretary of State for Employment, Ex p Equal Opportunities Commission* [1995] 1 AC 1; *Webb v Emo Air Cargo (UK) Ltd* [1993] 1 WLR 49; *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Rees-Mogg* [1994] QB 552; *R v Pora* [2001] 2 NZLR 37; *R v Secretary of State for the Home Department, Ex p Burke* (unreported) 8 March 1999; *Felixstowe Dock and Railway Co v*

A *British Transport Docks Board* [1976] 2 Lloyd's Rep 656 and *Farrall v Department of Transport* [1983] RTR 279.

R v Secretary of State for Transport, Ex p Factortame Ltd [1990] 2 AC 85 and *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* (Case C-213/89) [1991] 1 AC 603 were wrongly decided and do not bind this court as implied repeal was not argued in those cases.

B A power to amend primary legislation, such as that contained in section 2(2) of the 1972 Act, can only lawfully be exercised in relation to Acts already on the statute book at the time when that power is enacted. Parliament cannot project its power into the future, because it cannot bind its successors. In any event, such powers to amend should only be applied to effect minor and consequential changes: see *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] C 2 AC 349 and *R v Secretary of State for Social Security, Ex p Britnell* [1991] 1 WLR 198.

Eleanor Sharpston QC and *Philip Moser* for Sunderland City Council. There can have been no implied repeal of the European Community Act 1972 because there is no inconsistency, implied or express, between the 1985 D Act and the Community law obligations at the time of its passing. The Weights and Measures Act 1985 is a pure consolidation Act and it did not change the pre-existing law. Parliament in enacting the 1985 Act merely permitted the parallel use of imperial and metric units which was at that time permitted under European Community law.

There is nothing which prohibits the use of a power to amend, in the future, statutes not yet passed. The courts are willing to construe such a E power purposively: see *R v Secretary of State for Trade and Industry, Ex p UNISON* [1996] ICR 1003 and *R v Secretary of State for Social Security, Ex p Britnell* [1991] 1 WLR 198. The power to make delegated legislation pursuant to section 2(2) of the European Communities Act 1972 may be exercised wherever the Secretary of State deems it appropriate: see *R (Orange Personal Communications Ltd) v Secretary of Sttae for Trade and* F *Industry* [2001] 3 CMLR 781. That is a fortiori in the case of the power of amendment within the 1985 Act itself.

The doctrine of implied repeal retains no force, or in any event does not apply to the present case due to the overriding principles of primacy and supremacy of Community law. The EC Treaty is not like other international treaties. It created a new and unique legal order, supreme above the legal G systems of the member states, so that upon accession to the Community by force of the 1972 Act the United Kingdom bowed its head to this supremacy. Consequently, while the Parliament of the United Kingdom retains the legal power to repeal the 1972 Act by express legislation, it cannot do so impliedly: see *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* (Case C-213/89) [1991] 1 AC 603; *R v Secretary of State for Employment, Ex p Equal Opportunities Commission* [1995] 1 AC 1; *NV* H *Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse administratie der belastingen* (Case 26/62) [1963] ECR 1; *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418; *Costa v ENEL* (Case 6/64) [1964] ECR 585 and *Amministrazione delle Finanze dello State v Simmenthal SpA* (Case 106/77) [1978] ECR 629.

Simon Butler for Hackney London Borough Council and Cornwall County Council and *Fiona Darroch* for Sutton London Borough Council adopted the submissions made on behalf of Sunderland City Council. A

Shrimpton replied.

Cur adv vult

18 February 2002. The following judgments were handed down. B

LAWS LJ

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 mis-stated. 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. C D E F

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 section 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 G H

A 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, 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 9 April 2001 the district judge delivered a judgment to whose B 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 London Borough C 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 D 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 section 4 of the Prices Act 1974. In addition he was charged with four offences of delivering a lesser quantity than that which corresponded with E 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 F 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 G 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 H 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 12 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 section 8(1)(a) and (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 section 8(1)(a) and (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 Sutton London Borough Council. 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:

> "(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 100 g). 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 section 30(1)(a) of the London Local Authorities Act 1990. His appeal was heard at the Sutton Magistrates' Court from 9 to 13 July 2001. One of his arguments was based on article 10 of the European Convention for the Protection of Human

A Rights and Fundamental Freedoms. 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's behalf and dismissed his appeal.

The legislation

B 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.

C

The European Communities Act 1972

9 Section 1(2) of the European Communities Act 1972 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 D as to the special nature of the EEC Treaty (and by the same token legislation amending it), and I shall address those in due course. The relevant provisions of the 1972 Act which I should set out are contained in sections 2 and 3, and Schedule 2:

"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 E 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.

F "(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 G 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 H 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 this 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 any 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 (if not calculated on a daily basis) or with a fine of more than £100 a day.

"(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. Section 1(1) provided:

"The yard or the metre shall be the unit of measurement of length and the pound or the kilogramme shall be the unit of measurement of mass by reference to which any measurement involving a measurement of length

A 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 kilogramme exactly."

Section 8(2):

"the Board"—viz the Board of Trade—"may, if they think fit in the case B of any recommendation of the commission,"—viz the Commission on Units and Standards of Measurement established by section 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 C 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 1,760 yards, a yard is defined as 0·9144 metre, and a metre "shall have the meaning D 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 E "100 feet", then "66 feet", "50 feet", followed by other multiples of feet and inches and ending with "1 inch". 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 F 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 G ensure a uniform presentation of weights and measures among tradespeople and so to avoid confusion to the customer.

12 Section 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.

H 13 It will at once be apparent that the 1963 Act contained provisions, set out in sections 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 Henry VIII's tendency to absolutism". 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 &c Act 1976, section 10(10) of the 1963 Act was repealed. There remained the Henry VIII power contained in section 8(2), but we were told that that was never exercised. There were some other changes made by the 1976 Act 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, 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 section 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 Schedule 1, 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."

A

16 Then section 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.

B

"(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."

C

"(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.

D

"(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.

E

"(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 section 1(1), and certain Henry VIII powers conferred by sections 1(3) and 8(6). The power under section 1(3) has never been used. The use (which I will describe) of the section 8(6) power gives rise to one aspect of Mr Shrimpton's submissions. But I must turn to section 11, under which Mr Thoburn was prosecuted:

F

"(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.

G

"(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 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.

H

"(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 section 11 by the Weighing Equipment (Non-automatic Weighing Machines) Regulations 1988 (SI 1988/876). 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:

"*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 authorised 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."

A **21** Now I will describe the relevant amendments of the Metrication Directive by Council Directive 89/617/EEC made on 27 November 1989. 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 B by those states; (c) those listed in Chapter III 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. 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 authorised on 21 April 1973 and until a date to be fixed by those states. This date may not be later than 31 December 1999."

C

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 D 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 E 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 F 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 G 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 (SI 1986/1082) for the implementation or partial implementation of the Metrication Directive in its unamended form. However in my judgment H 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 section 1(1) read with section 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 section 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 section 8(6) of the 1985 Act (and also section 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 1 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 1 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, 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 section 2(2) of the 1972 Act, 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 section 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):

A "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 B 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 C indication.' "

28 Then paragraph 6(2) of the 1994 Regulations amends section 1 of the 1985 Act with effect from 1 October 1995, and paragraph 7(2) makes further amendments to the same section with effect from 1 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 section 1, with D 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 E 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 F 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.]

G "(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 H 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 section 1(7). The January 2000 amendment to section 1, effected as I have said by paragraph 7(2) of the 1994 Regulations, omitted the words after "(supplementary indications)" in section 1(6): that is, it omitted the reference to section 8(2)(f) and the use of the pound for the purposes of the sale of goods loose from bulk, which was permitted by section 8(2)(f). Section 8(2)(f) itself was inserted into the 1985 Act with effect from 1 October 1995 by paragraph 3(2) of the 1994 Amendment Order, but then repealed with effect from 1 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 1 October 1995 the use of imperial measures for the sale of goods loose from bulk was permitted, as a primary or supplementary indicator, until 1 January 2000. This conformed with the Metrication Directive as amended in 1989 where, as will be recalled, the date of 31 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 1 January 2000.

30 Article 1(1) of Directive 99/103/EC substituted "31 December 2009" for "31 December 1999" in article 3(2) of the Metrication Directive; and by the Units of Measurement Regulations 2001 (SI 2001/55), regulation 7 of the Units of Measurement Regulations 1986 was amended with effect from 8 February 2001 so as to provide: "Supplementary indications are authorised to be used in the specified circumstances up to and including 31 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 1 January 2000, their use as supplementary indicators was now permitted until 1 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 section 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 . . . 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 1 January 2000. Its vires is stated in the preamble to the 1994 amending Regulations to consist in various provisions of the 1985 Act, including section 11(1).

A 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 31 March 2000, the day when the inspector B 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 31 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 C the words "up to and including 31 December 2009" have been inserted by further Regulations with effect from 8 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. Section 4(2)(b) of the Prices Act D 1974 provided that the Secretary of State might by statutory instrument (subject to the negative resolution procedure in Parliament: section 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".

E The Price Marking Order 1999 was made under the powers conferred by section 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 1999 Order read with paragraph 5(2) obliged traders to indicate to their customers the unit price as so defined in relation to any product sold F from bulk. Breach of that requirement constituted a criminal offence by virtue of paragraph 5 of the Schedule to the 1974 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, G 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 *Thoburn v Sunderland City Council* 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 H 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 postdate 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: section 2(2) of the 1972 Act, which confers, when read with section 2(4), a Henry VIII amending power. Next, the effect of the 1994 Regulations: they amended section 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 section 1(6). By virtue also of certain amendments to section 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 1 January 2000.

39 Mr Shrimpton's argument is that section 1 of the 1985 Act, as enacted, impliedly repealed section 2(2) of the 1972 Act 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. Section 1 must be taken to have forbidden any amendment by means of section 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 1 January 2000 (though not those taking effect in October 1995) did just that; accordingly, they were inconsistent with and repugnant to the terms of section 1 as enacted, and were therefore unlawful. They were not authorised by section 2(2) of the 1972 Act 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 section 2(2) of the 1972 Act 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 section 2(2). He submitted that, if that case were good, then the amendments to the 1985 Act attributable to the 1994 Amendment Order fell

A 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. B 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.

C **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 section 2(2) of the 1972 Act read with section 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.

D **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 v Liverpool Corpn* [1932] 1 KB 733 and *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590. These both concerned the same slum clearance legislation. Section 2 of the Acquisition of Land (Assessment of Compensation) Act E 1919 provided for the assessment of compensation in respect of land acquired compulsorily for public purposes according to certain rules. Then by section 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 F inconsistent with this Act those provisions shall cease to have or shall not have effect . . ."

Section 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 1919 Act. In the *Vauxhall Estates* case G [1932] 1 KB 733, 743–744 Avory J (sitting in this court) stated:

> ". . . I should certainly hold . . . that no Act of Parliament can effectively provide that no future Act shall interfere with its provisions . . . if [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 H abrogant'."

In the *Ellen Street Estates* case [1934] 1 KB 590 it was submitted that the *Vauxhall Estates* case had been wrongly decided. In the Court of Appeal Scrutton LJ addressed the contention that the earlier Act prevailed over the later, at pp 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 p 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 section 2(2) of the 1972 Act is only repealed pro tanto—to the extent that it empowered legislation which would be inconsistent with section 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 p 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 *Inland Revenue Comrs v Collco Dealings Ltd* [1962] AC 1. There the question was whether words in a 1955 taxing statute 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, at p 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."

A 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 B authority to which Mr Shrimpton referred as supporting the view that later municipal legislation might override provisions of the EEC Treaty. The case was *Felixstowe Dock and Railway Co v British Transport Docks Board* [1976] 2 Lloyd's Rep 656. 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 C and Railway Co was repugnant to what was then article 86 of the EEC Treaty. This court held that it was not. Lord Denning MR added, at p 663:

> "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 D at all."

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

45 In light of Lord Denning MR's observation in the *Felixstowe Dock* case, it is instructive to notice his approach to European law as it is to be found in *Macarthys Ltd v Smith* [1979] ICR 785, three years after the *Felixstowe Dock* case. *Macarthys's* case was an equal pay case. But I need E go only to the statement of principle. Lord Denning MR said, at p 789:

> "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 F terms—then I should have thought that it would be the duty of our courts to follow the statute of our Parliament."

46 As I have indicated Mr Shrimpton cited much further learning, including the important cases of *R v Secretary of State for Transport, Ex p Factortame Ltd* [1990] 2 AC 85 and *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* (Case C-213/89) [1991] 1 AC 603. G 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, H who was briefed only for Sunderland and not the other respondents. But if (as I would hold: see paragraph 39 above) the submissions as to the amendments made to section 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 section 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 section 1 of the 1985 Act as enacted and section 2(2) of the 1972 Act. 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. Section 2(2) has itself been deployed on many occasions to amend Acts of Parliament passed after the 1972 Act. Miss Sharpston gives instances in her skeleton argument. In her oral submissions she furnished an example in another context: section 10(2) and (3) of the Human Rights Act 1998. Section 10 confers power on the Crown to take remedial action where a court has made a declaration of incompatibility under section 4. Section 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."

Section 10(3) makes like provision for the case where a declaration of incompatibility has been made under section 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 section 10(2) and (3) encompasses statutes yet to be passed; otherwise an essential part of the structure of the 1998 Act 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 section 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 section 1 of the 1985 Act and section 2(2) of the 1972 Act. 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

A event there *is* power in section 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 B 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 C by future legislation will be ineffective: see the passages in *Vauxhall Estates Ltd v Liverpool Corpn* [1932] 1 KB 733 and *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590 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 D 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 E 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 section 2(2) amendment of section 1 of the 1985 Act fails. However had the law not been consolidated, so that section 1 of F the 1963 Act remained on the statute book, *its* amendment by the section 2(2) power would presumably (subject to other, quite separate arguments about section 2(2)) have been effective. The Henry VIII clause would have been used merely to amend a past statute. The terms of section 1(1) of the 1963 Act are identical with those of section 1(1) of the 1985 Act. I cannot think that the law of our constitution is botched by such G 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 H 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 1972 Act 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 1972 Act by express legislation, it could not do so impliedly. The reasoning in cases such as *Inland Revenue Comrs v Collco Dealings Ltd* [1962] AC 1 cannot be applied in relation to the EC Treaty. In Miss Sharpston's outline written argument it is submitted, at paragraph 1.9:

> "So long as the United Kingdom 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 above.

54 In support of her overall position as to the supremacy of EU law, and therefore the impossibility of implied repeal of the 1972 Act, 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 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse administratie der belastingen* (Case 26/62) [1963] ECR 1. The court stated, at p 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 *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 476–477, 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 1972 Act, but, in

A 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* (Case 6/64) [1964] ECR 585. This is what the court said, at pp 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, B 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 C 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 D 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 jeopardising 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 E 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 F 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 G United Kingdom acceded on 1 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 1972 Act, notably sections 2(1) and (4) and 3(1). The effect of her submission is that by the 1972 Act 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 1972 Act. And, if that were to be contemplated, Parliament's hand would not be H 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 1972 Act, 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 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse administratie der belastingen* (Case 26/62) [1963] ECR 1 and *Costa v ENEL* (Case 6/64) [1964] ECR 585.

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 1972 Act (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) to (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 1972 Act 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: *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse administratie der belastingen* (Case 26/62) [1963] ECR 1 and *Costa v ENEL* (Case 6/64) [1964] ECR 585. 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 1972 Act (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 1972 Act. 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 1972 Act 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.

A 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 B 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 C constitutional principle.

Third conclusion: the European Communities Act 1972 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, D 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, E or at any rate specific, provision. The courts have in effect so held in the field of European law itself in *R v Secretary of State for Transport, Ex p Factortame Ltd* [1990] 2 AC 85 ("*Factortame (No 1)*"), 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 F 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 1972 Act, even in the face of plain inconsistency between the two. This is the effect of *Factortame (No 1)*. To understand the critical passage in Lord Bridge of Harwich's speech it is first convenient to repeat part of section 2(4) G of the 1972 Act:

> "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 . . ."

H

In *Factortame (No 1)* Lord Bridge of Harwich said, at p 140:

> "By virtue of section 2(4) of the 1972 Act Part II of the [Merchant Shipping Act 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 1988 Act 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 1972 Act by the later 1988 Act; on the contrary the 1988 Act took effect subject to Community rights incorporated into our law by the 1972 Act. In *Factortame (No 1)* 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 section 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 section 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 1972 Act 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 *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131 per Lord Hoffmann, *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539, *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198, *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 and *R v Lord Chancellor, Ex p 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 Magna Carta 1297 (25 Edw 1), the Bill of Rights 1689 (1 Will & Mary sess 2 c 2), the Union with Scotland Act 1706 (6 Anne c 11), the Reform Acts which distributed and enlarged the franchise (Representation of the People Acts 1832 (2 & 3 Will 4 c 45), 1867 (30 & 31 Vict c 102) and 1884 (48 & 49 Vict c 3)), the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998. The 1972 Act 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 1972 Act 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

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. B 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 C 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 D relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts (in interpreting statutes and, now, applying the Human Rights Act 1998) 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 1972 Act as a constitutional statute.

65 In dealing with this part of the case I should refer to a passage from E the speech of Lord Bridge of Harwich in *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* (Case C-213/89) [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 F 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 EEC Treaty it was certainly well G 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 1972 Act 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 H 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 of Harwich 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 of Harwich 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 of Kinkel in *R v Secretary of State for Employment, Ex p Equal Opportunities Commission* [1995] 1 AC 1, 26–27:

"It is argued for the Secretary of State that RSC 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 p Factortame Ltd* [1990] 2 AC 85, *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* (Case C-213/89) [1991] 1 AC 603, *R v Secretary of State for Transport, Ex p 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 1988 Act. The Divisional Court (*R v Secretary of State for Transport, Ex p Factortame Ltd* [1989] 2 CMLR 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 [1992] QB 680 answered that question in the negative, and, although the

A 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 B 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 [Equal Opportunities Commission's] recourse to judicial review for the purpose of challenging as incompatible with European Community C law the relevant provisions of the 1978 Act."

This reasoning also touches, and touches only, our law's treatment of substantive rights arising 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 v Freemans plc* [1989] AC 66, cited by D 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 E 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 1972 Act 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 F 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 1972 Act incorporated into our domestic law and rank supreme: that is, anything in G 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 1972 Act 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 H 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 1972 Act 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 section 2(2) of the 1972 Act in any event

(a) Duke v Reliance Systems Ltd

71 Now, as I have indicated in paragraph 38, section 2(2) of the 1972 Act could not confer power to amend main legislation without the supplemental provision made by section 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 . . ." In that connection Mr Shrimpton relied upon a statement of Lord Templeman in *Duke v Reliance Systems Ltd* [1988] AC 618, 639–640:

> "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 section 2(2) of the 1972 Act did not empower the minister to amend section 1 of the 1985 Act to give effect to the amended Metrication Directive, because in such a context section 2(2) is unsupported by the vital words in section 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 . . ." 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 section 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 this section". In the later case of *Pickstone v Freemans plc* [1989] AC 66, to which I have already referred in passing, Lord Templeman said, at p 123, of *Duke v Reliance Systems Ltd* [1988] AC 618: "In *Duke* this House declined to distort the construction of an Act of Parliament which was not drafted to give effect to a Directive . . ."

A It seems to me that wholly different considerations arise when one is considering the scope of the amending power given by section 2(2) and the opening words of section 2(4). There is a plain cross-reference between those opening words and section 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 B 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 section 2(2)(a), precisely because regulations are directly applicable.

(b) Henry VIII clauses are in principle only to be used to effect minor changes

C 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 D acknowledged (paragraph 13 above) 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 extrajudicial writings to which our attention was helpfully drawn by counsel, namely Lord Rippon QC's piece entitled "Henry VIII Clauses" [1989] Statute Law Review 205. And in *R (Orange Personal Communications Ltd) v Secretary of State for Trade and* E *Industry* [2001] 3 CMLR 781, 793, para 32 Sullivan J quoted from the judgment of the Court of Appeal in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 362–363, para 35:

> "Parliament does not lightly take the exceptional course of delegating to the executive the power to amend primary legislation. When it does so F 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 section 2(2) of the 1972 Act read with section 2(4) it G 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 (Hansard (HC Debates), 13 June 1972, H col 1313): "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 section 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. Section 2(2) read with section 2(4) is perfectly clear, and on its face allows amendments of the kind made here to the 1985 Act. I agree with an observation made by Sullivan J in the course of his judgment in *R (Orange Personal Communications Ltd) v Secretary of State for Trade and Industry* [2001] 3 CMLR 781, to which I have already referred, in which he also cited another ministerial statement, at p 795–796, para 39:

> "I do not see any ambiguity or uncertainty . . . in section 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* [1993] AC 593 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 section 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 31 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 Crane J's concurrence, by letter of 11 December 2001 from my clerk, counsel for the parties were invited to

A 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 B 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.

C

(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 D 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 E imperial scales might have been relevant to sentence. It is not relevant to the integrity of the prosecution.

(6) 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 F a violation of article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. 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 31 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 G court should now consider the position as it might be after 31 December 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 H 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 campaign 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.

82 If Crane J 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.

A

CRANE J

83 I agree.

B

Appeals dismissed with costs.
Certificate under section 1(2) of the Administration of Justice Act 1960 that a point of law of general public importance was involved in the decision, namely: "Whether the European Communities Act 1972 or any part of it, and if so which part, is capable if being impliedly repealed by way of later legislation."
Permission to appeal refused.

C

15 July. The Appeal Committee of the House of Lords (Lord Bingham of Cornhill, Lord Steyn and Lord Scott of Foscote) dismissed a petition by the defendant Thoburn for leave to appeal.

D

Solicitors: McKenzie Bell, Sunderland; Percy Short & Cuthbert; Sproulls, Bodmin; Pegram Heron, Heathfield; Director of Administration, Sunderland City Council, Sunderland; Director of Legal Services, Hackney London Borough Council; County Solicitor, Cornwall County Council, Truro; Head of Legal Services, Sutton London Borough Council, Sutton.

E

Reported by BENJAMIN URDANG ESQ, Barrister

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