Michaelmas Term
[2020] UKSC 39
On appeal from: [2018] EWHC 3122 (Admin)

JUDGMENT

R (on the application of Highbury Poultry Farm Produce Ltd) (Appellant) *v* Crown Prosecution Service (Respondent)

before

Lord Reed, President
Lord Lloyd-Jones
Lord Kitchin
Lord Hamblen
Lord Burrows

JUDGMENT GIVEN ON

16 October 2020

Heard on 25 June 2020

Appellant
Stephen Hockman QC
David Hercock
(Instructed by Roythornes Ltd (Nottingham))

Respondent
David Perry QC
Victoria Ailes
(Instructed by Crown Prosecution Service Appeals and Review Unit (Westminster))

LORD BURROWS: (with whom Lord Reed, Lord Lloyd-Jones, Lord Kitchin and Lord Hamblen agree)

1. Introduction

1. Highbury Poultry Farm Produce Ltd ("HPFPL") operates a poultry slaughterhouse in Shropshire under the approval of the Food Standards Agency. The average throughput is 75,000 chickens per day, equating to 19.5m or so chickens per annum. The birds have their legs shackled to a moving line and are then submitted to a number of sequential processes, including stunning, bleeding and scalding. On each of 31 August, 12 September and 5 October 2016 a chicken went into the scalding tank (where its feathers would be removed) while still alive because, after stunning, its neck had not been properly cut by a certificated operative.

2. HPFPL was charged with two offences in respect of each of the three incidents. The two offences were particularised as follows:

> "1. Highbury Poultry Farm Produce Ltd … being the business operator of the slaughterhouse, failed to comply with a specified EU provision, namely article 3 of Regulation (EC) No 1099/2009, which required that animals should be spared avoidable pain, distress or suffering during their killing and related operations, in that a bird that had been subject to simple stunning was not stuck and bled out before being processed, contrary to regulation 30(1)(g) of the Welfare of Animals at the Time of Killing (England) Regulations 2015.
>
> 2. Highbury Poultry Farm Produce Ltd … being the business operator of a slaughterhouse, failed to comply with a specified EU provision, namely article 15(1) of Regulation (EC) No 1099/2009, which required you to comply with the operational rules for slaughterhouses laid down in Annex III of the said Regulation, including point 3.2 setting down requirements for the bleeding of animals, in that, following the simple stunning of a chicken, there was a failure to systematically sever the carotid arteries or the vessels from which they arise and the animals entered the scalding tank without the absence of signs of life having been verified,

> contrary to regulation 30(1)(g) of the Welfare of Animals at the Time of Killing (England) Regulations 2015."

3. HPFPL raised a preliminary point of law which became sub-divided into two related issues: (1) whether the offences under regulation 30(1)(g) require proof of mens rea (ie proof that the defendant had knowledge of the factual circumstances constituting the alleged offence) and (2) whether the prosecution must prove a culpable act or omission on the part of the defendant.

4. Having heard the case in November 2017, District Judge Cadbury, sitting at Telford Magistrates' Court, handed down his ruling on 9 January 2018. He held that these offences did not require proof of mens rea or culpability on the part of HPFPL. Rather they were offences of strict liability.

5. On 19 March 2018 District Judge Cadbury stated a case seeking the opinion of the Divisional Court of the Queen's Bench Division of the High Court on the following two questions:

> "1. Did I err in ruling that proof of an offence contrary to regulation 30(1)(g) of the Welfare of Animals at the Time of Killing (England) Regulations 2015 did not require the prosecution to prove mens rea on the part of the business operator?
>
> 2. Did I err in ruling that the prosecution was not required to prove a culpable act and/or omission on the part of the business operator when prosecuted for offences alleged to be contrary to [regulation 30(1)(g) of the] Welfare of Animals at the Time of Killing (England) Regulations 2015?"

6. Given concerns as to the applicability of the "case stated" procedure to a situation where the Magistrates' Court had not made a final determination of guilt, HPFPL also brought judicial review proceedings in the Divisional Court against District Judge Cadbury's ruling. In its judgment, [2018] EWHC 3122 (Admin), the Divisional Court (Hickinbottom LJ and Jay J) decided that the correct way to proceed was via judicial review. On the substantive matter, it dismissed HPFPL's application for judicial review because the District Judge was correct to have decided the preliminary issue of law in favour of the Crown Prosecution Service. It decided that the offences are ones of strict liability and do not require proof of mens rea or culpability by the business operator. HPFPL now appeals to the Supreme

Court against that decision of the Divisional Court dismissing its application for judicial review.

7. While recognising that the same questions would be answered in the same way whichever of the two procedures was used, the Divisional Court decided that the "case stated" procedure could not here be used because the Magistrates' Court had not made a final determination whether HPFPL was guilty or not. There has been no appeal against that decision on procedure and it is therefore unnecessary to say anything more about it.

8. What this court has to determine is whether the Divisional Court and District Judge Cadbury were correct to decide that the two offences charged under regulation 30(1)(g) of the Welfare of Animals at the Time of Killing (England) Regulations 2015 (SI 2015/1782) ("WATOK Regulations 2015") - namely the breach by HPFPL, as a business operator, of, first, article 3(1) and, secondly, article 15(1), Annex III, point 3.2, of Regulation (EC) No 1099/2009 on the protection of animals at the time of killing ("the EU Regulation") - are offences of strict liability so that negligence by the business operator does not have to be proved.

9. It is helpful to set out immediately the precise provisions that create the two offences with which we are concerned. Regulation 30(1)(g) of the WATOK Regulations 2015 reads:

> "It is an offence to contravene, or to cause or permit a person to contravene - […]
>
> > (g) a provision of the EU Regulation specified in Schedule 5 ..."

Schedule 5 specifies, inter alia: article 3(1) of the EU Regulation; and article 15(1), Annex III, point 3.2, of the EU Regulation. The first offence refers to article 3(1) of the EU Regulation which reads:

> "Animals shall be spared any avoidable pain, distress or suffering during their killing and related operations."

The second offence refers to article 15(1), Annex III, point 3.2 of the EU Regulation. Article 15(1) reads:

> "Business operators shall ensure that the operational rules for slaughterhouses set out in Annex III are complied with."

By Annex III, point 3.2:

> "In case of simple stunning … the two carotid arteries or the vessels from which they arise shall be systematically severed … Further dressing or scalding shall only be performed once the absence of signs of life of the animal has been verified."

10. This judgment will proceed from the general to the particular. That is, before moving to look in detail at the correct interpretation of the two offences, one needs to clarify whether the relevant principles for the interpretation of legislation are those of EU law or domestic law or both. The judgment therefore starts by examining, in some depth, the relationship between the EU Regulation and the WATOK Regulations 2015. It will then look briefly at whether the imposition of strict liability in the context of criminal law is contrary to EU law before turning to examine the two offences.

2. The relationship between the EU Regulation and the WATOK Regulations 2015

(1) "One bite of the cherry"

11. Stephen Hockman QC for HPFPL submitted that, even if he failed to show that negligence is required under the EU Regulation, he could still succeed in arguing that negligence is required under the domestic regulation; and that, in interpreting a legislative provision under domestic law, it is well-established that there is a presumption that a crime requires mens rea or culpability (see, for example, *Sweet v Parsley* [1970] AC 132, *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1985] AC 1, and *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428). The Divisional Court accepted that that "two bites of the cherry" approach is correct. Jay J said, at para 56:

> "[T]he EU Regulation does not create any criminal offences. These are created by member states in line with their own legislative techniques and established approaches to the criminal law whilst at the same time adhering at all material times to the language, principles and policies of the EU Regulation … Ultimately, the analysis must come down to regulation 30(1)(g) of our domestic legislation, but Mr

> Hockman was fully entitled to attempt two bites of the cherry: first of all, to seek to persuade us that the obligations on business operators under EU law are not absolute; and, secondly, that in any event domestic law does not create offences of strict liability in this regard."

And later, at para 73, having rejected Mr Hockman's submissions that the EU Regulation required negligence, Jay J said:

> "[M]y rejection of Mr Hockman's first group of submissions cannot be regarded as conclusive. He has, as has been pointed out, a second bite of the cherry. Ultimately, the answer to this case hinges on whether regulation 30(1)(g) requires proof of mens rea."

12. David Perry QC for the Crown Prosecution Service submitted that that was not the correct approach. The interpretation of the EU Regulation should be the beginning and the end of the enquiry. According to Mr Perry, the correct way to think about the relationship between the EU Regulation and the domestic regulations in this case is that the domestic regulations are merely the mechanism whereby the EU Regulation is given effect in this jurisdiction. It is therefore the interpretation of the EU Regulation that matters. The cases in domestic law on the presumption that a crime requires mens rea or culpability are not directly relevant. HPFPL has only "one bite of the cherry".

13. I agree with those submissions of Mr Perry for reasons which will now be set out in some detail.

14. It is trite law that an EU Regulation has direct effect in a member state without the need for domestic enactment. Nevertheless, the combination of EU Regulation and domestic regulations is commonplace where detailed rules are being imposed and the only discretion being left to the member state is in relation to the penalties to be imposed for contravention of those rules. Looked at another way, in general (subject to the exceptions in article 83 of the Treaty on the Functioning of the EU) the EU does not have competence to impose criminal penalties (see, for example, *Commission of the European Communities v Council of the European Union* (Case C-176/03) [2005] ECR I-7879, para 47). In line with this, it would appear that an EU Regulation in the area of animal welfare could not have created a free-standing crime in a member state. The EU Regulation therefore laid down the detail of the duties imposed while leaving the member states with the discretion to decide whether to create criminal offences, by imposing criminal penalties, in their

domestic legislation. The relevant discretion is provided for in article 23. This reads as follows:

> "The member states shall lay down the rules on penalties applicable to infringements of this Regulation … The penalties provided for must be effective, proportionate and dissuasive."

In principle, it would have been possible for a member state to implement this EU Regulation by imposing only civil or administrative penalties, provided such penalties were "effective, proportionate and dissuasive". However, the implementation of the EU Regulation in England by the WATOK Regulations 2015 - perhaps not least so as to ensure effectiveness - has been by imposing criminal penalties thereby making infringements of the rules criminal offences. Of course, it is the UK, not England, that is the member state, but animal welfare is a devolved area within the UK legislative arrangements so that each of England, Wales, Scotland and Northern Ireland has its own regulations (which are materially identical so far as the provisions relevant to this appeal are concerned).

15. It is of central importance that, while the member states have a discretion as regards penalties, they have no discretion to lower the standards required by the EU Regulation. We regard it as untenable to interpret article 23 as allowing member states to lower the standards imposed in so far as they have decided to implement the EU Regulation through criminal, rather than non-criminal, penalties. It follows that, if the EU Regulation imposes strict liability, the domestic regulation must (as a matter of EU law) do the same; and certainly, without a clear indication in the domestic regulation that the EU Regulation is being departed from, the best interpretation of the domestic legislation must be that it is merely the mechanism for implementing what has been laid down in the EU Regulation. Indeed, applying the "*Marleasing* principle" (set out in *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135), even if there are words in a domestic regulation that, on their face, depart from what an EU Regulation requires, the courts of a member state are required, if at all possible, to interpret the words of the domestic regulation so as to conform with that EU Regulation. In any event, in this case, the words of the relevant domestic regulation make clear that it is implementing whatever standards are imposed by Schedule 5 to the EU Regulation: ie regulation 30(1)(g) precisely specifies that "It is an offence to contravene … a provision of the EU Regulation specified in Schedule 5".

16. In my view, therefore, if HPFPL fails to establish that negligence is required under the EU Regulation (ie if, contrary to Mr Hockman's submissions, the EU Regulation imposes strict liability), HPFPL cannot then succeed on the basis that, in any event, the domestic regulation requires negligence and does not impose strict liability. There can be no question of the domestic regulation imposing a lower

standard (ie negligence rather than strict liability) than that laid down by the EU Regulation because to do so would contravene the requirement of EU law for proper implementation of the EU Regulation.

17. Mr Hockman prayed in aid *Criminal Proceedings against Vandevenne* (Case C-7/90) [1993] 3 CMLR 608. That case dealt with Council Regulation (EEC) No 3820/85 which imposed maximum driving times for lorry drivers. The European Court of Justice ("the ECJ") held that article 15, which imposed a duty on employers to use best endeavours to ensure that their drivers took the required rest breaks, left member states free to enact domestic legislation imposing strict criminal liability on employers. In other words, member states were held to be free to impose a stricter standard in domestic criminal law than that laid down in Regulation No 3820/85. But that decision does not help Mr Hockman because it recognises only the reverse of what he is arguing for. The ECJ held that the domestic legislation validly imposed a stricter, not a lower, standard than Regulation No 3820/85.

18. Therefore, the correct approach in this case, as submitted by Mr Perry, is that HPFPL has only "one bite of the cherry". It needs to establish that on the correct interpretation of the EU Regulation, as implemented through the domestic regulations, the offences require negligence and are not offences of strict liability.

(2) EU law principles of legislative interpretation

19. It follows from the acceptance of Mr Perry's submissions (set out in para 12 above) that the relevant principles of legislative interpretation to be applied here are the principles of legislative interpretation established by the ECJ or the Court of Justice of the European Union ("the CJEU") - which I shall refer to as the "EU law principles of legislative interpretation" - not the English law principles of statutory interpretation.

20. In *R v Henn* [1981] AC 850, 905, Lord Diplock referred to:

> "the danger of an English court applying English canons of statutory construction to the interpretation of the Treaty or, for that matter, of Regulations or Directives."

This was said in the context of the Court of Appeal's not having been referred to relevant decisions of the ECJ on the meaning of article 30 (concerned with quantitative restrictions on imports) in the Treaty establishing the European Economic Community (also known as the Treaty of Rome).

21. Similarly, in the Scottish case of *Westwater v Thomson* 1993 SLT 703, 709-710, Lord Justice General Hope (as he then was), sitting in the High Court of Justiciary (Appeal), said the following:

> "Counsel for the respondent's last point was that we should construe these rules strictly in the respondent's favour in view of their penal consequences. But that submission is inconsistent with Community law which leaves it to the member state to take whatever steps it thinks appropriate, whether penal or otherwise, to give effect to Community legislation. Community legislation as such is not penal in character and it must be applied uniformly throughout the Community. For us to attempt to construe it by reference to domestic rules about the construction of penal legislation would be to apply rules of construction which have no part to play in the construction of regulations issued either by the Council or the Commission. In *R v Henn* [1981] AC 850, 904H Lord Diplock issued a warning against the danger of an English court applying English canons of statutory construction to the interpretation of the treaty or for that matter of Community regulations or directives."

22. More recently, in *Assange v Swedish Prosecution Authority (Nos 1 and 2)* [2012] UKSC 22; [2012] 2 AC 471, in the context of interpreting an EU Framework Decision, Lord Phillips of Worth Matravers at para 15 said:

> "The approach to interpretation must be one that would be acceptable to all the member states who have to strive to identify a uniform meaning of the Decision. … [O]ne cannot simply apply the canons for construction or even the principles that apply to interpreting domestic legislation."

23. It is clear, therefore, that, in so far as they are different (and it is unnecessary in this case to try to pinpoint what the precise differences might be), the domestic rules of statutory interpretation are here displaced by the EU law principles of legislative interpretation. Although one is interpreting domestic criminal regulations, those regulations, because they implement the EU Regulation, must be interpreted by applying the principles laid down in EU law. A contrary approach would undermine the objective of harmonisation (which involves, among other things, ensuring that an "autonomous" meaning is applied to terms used in EU law so as to impose uniform standards across the EU). It is therefore the court's task in this case to apply EU law principles of legislative interpretation. What then are those principles?

24. In the context of it being permissible, under EU principles of legislative interpretation, to consider the recitals, which expressly set out the objectives of the EU Regulation, Mr Hockman referred us to *Omejc v Republika Slovenija* (Case C-536/09) [2011] ECR I-5367. In what has now become a commonly cited formulation, the CJEU said the following at para 21:

> "according to the Court's settled case law, in interpreting a provision of European Union law, it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it is part ..."

25. In *R v V* [2011] EWCA Crim 2342, which concerned UK regulations implementing an EU Regulation by imposing strict criminal liability in relation to the transportation of waste, Cranston J giving the judgment of the Court of Appeal (Criminal Division) said at para 19:

> "When interpreting European Union legislative instruments, an English court does not deploy the ordinary principles of statutory construction but rather those so-called principles of teleological construction established by the jurisprudence of the Court of Justice of the European Union. ... One aspect of that is that the substantive provisions of an instrument are to be interpreted in the light of its objectives, which are most readily available in the recitals."

26. Lord Phillips in *Assange v Swedish Prosecution Authority (Nos 1 and 2)*, at para 15, helpfully pointed out that relevant factors to consider, in interpreting European legislation, are: the terms of the instrument, including its preamble; the usual meaning of the expressions used with a comparison of the different languages of the instrument; the purpose and general scheme of the instrument; and the preparatory materials.

27. It would appear that the most important point to have in mind is that the teleological approach to legislative interpretation adopted by the ECJ and CJEU means that there is a heavy stress on seeking to ensure that the interpretation of the words fulfils the purpose of the legislative provision and, more generally, the purposes of the EU. For helpful discussions see, for example, T Koopmans, "The Theory of Interpretation and the Court of Justice", in *Judicial Review in European Union Law*, eds D O'Keeffe and A Bavasso (2000), p 45, especially at p 54; and Professor John Bell, writing the section headed "European teleological approaches", in *English Private Law*, 3rd ed (2013), ed A Burrows, paras 1.36-1.39.

3. EU law and strict liability in the context of criminal law

28. Before I move on to consider the application of the EU law principles of legislative interpretation to the two offences in issue, it is important to clarify, lest there be any doubt about this, that, just as one can have strict liability in domestic criminal law (despite there being a presumption that a crime requires mens rea or culpability) so the imposition of strict liability in the context of criminal law is not contrary to EU law (even though a principle of nulla poena sine culpa or "no punishment without fault" may be applicable: see the reference to this principle in, for example, *Käserei Champignon Hofmeister GmbH & Co KG v Hauptzollamt Hamburg-Jonas* (Case C-210/00) [2002] ECR I-6453, paras 35, 44, 49 and 52).

29. I have already indicated that, in general, the EU does not have competence in relation to creating crimes. But the fact that EU law is not averse to strict liability in the context of criminal law is well-illustrated by *Public Prosecutor v Hansen & Son I/S* (Case C-326/88) [1992] ICR 277.

30. In that case, the ECJ considered whether the imposition by a member state of strict criminal liability for breach of a provision of Community law was compatible with the EU principle of proportionality. The case concerned Council Regulation (EEC) No 543/69, which imposed maximum driving limits for lorry drivers (and was the predecessor of the Regulation considered in the *Vandevenne* case, referred to above at para 17). Denmark enacted legislation holding employers strictly liable in criminal law for the breach by their employees of those limits. A Danish court referred the question whether the Regulation precluded national legislation imposing strict criminal liability. The ECJ concluded that member states had a discretion to include provisions imposing such liability. At paras 19-20 the court said the following:

> "19. … it is necessary to bear in mind, first, that a system of strict liability may prompt the employer to organise the work of his employees in such a way as to ensure compliance with the Regulation and, secondly, that road safety, which, according to the third and ninth recitals in the preamble to Regulation No 543/69, is one of the objectives of that Regulation, is a matter of public interest which may justify the imposition of a fine on the employer for infringements committed by his employees and a system of strict criminal liability. Hence the imposition of a fine, which is consistent with the duty of co-operation referred to in article 5 of the EEC Treaty, is not disproportionate to the objective pursued. The application of the principle of proportionality to the amount of the fine has not been called in question in this case.

> 20. It follows from all the foregoing considerations … that neither [Regulation 543/69] nor the general principles of Community law preclude the application of national provisions under which an employer whose drivers infringe articles 7(2) and 11 of the Regulation may be the subject of a criminal penalty notwithstanding the fact that the infringement cannot be imputed to an intentional wrongful act or to negligence on the employer's part, on condition that the penalty provided for is similar to those imposed in the event of infringement of provisions of national law of similar nature and importance and is proportionate to the seriousness of the infringement committed."

4. The two relevant offences

31. Having established that the court must apply EU law principles of legislative interpretation - with their heavy emphasis on effecting the purpose of the relevant provisions - and that the imposition of strict liability in the context of criminal law is not contrary to EU law, I can now turn to the interpretation of the two offences in this case. The two offences charged under regulation 30(1)(g) of the WATOK Regulations 2015 are the breach by HPFPL as a business operator of, first, article 3(1) of the EU Regulation ("the first offence") and, secondly, article 15(1), Annex III, point 3.2, of the EU Regulation ("the second offence"). I have set out in para 9 above the precise provisions that create the two offences.

32. I should make clear as a prelude to what follows that, although there have been decisions of the CJEU on the EU Regulation (and by the ECJ on the predecessors of the EU Regulation), none of those decisions is relevant to the questions that this court has to decide. I have also derived no assistance from either the preparatory materials to the EU Regulation or other language versions of the EU Regulation.

(1) The second offence

33. For reasons that will become apparent, it is convenient to consider the second offence first. On the face of it, the relevant words of article 15(1), Annex III, point 3.2 impose strict liability. By article 15(1), business operators "shall ensure" that the operational rules are complied with. And the operational rules are specified in Annex III, point 3.2 in very clear and precise terms: "the two carotid arteries or the vessels … shall be systematically severed". There is no hint that business operators shall be liable only if the operational rules are intentionally or negligently infringed. If strict liability were not being imposed, words importing culpability could have easily been

included; but they have not been. Nor is there anything in the context of the EU Regulation as a whole (and see para 43 below for what I say about recital (2)) that would indicate that intention or negligence is required in relation to this offence. True it is that some of the provisions are concerned to impose monitoring and system checking and, in that sense, may be said to be concerned with imposing due diligence. But that is in no sense inconsistent with recognising that other provisions (including those creating the second offence) go beyond requiring due diligence.

34. That the best interpretation is that strict liability is being imposed is reinforced when, in accordance with the heavy emphasis placed on this by EU law principles of legislative interpretation, one concentrates on the purpose of the provision. Strict liability imposes a clear and easily enforceable standard and is therefore in line with a principal goal of uniformity across the EU. In contrast, enforcing a negligence standard would potentially be prone to difficulty. Indeed, it is not even clear what would here be meant by a negligence standard. In particular, would one be requiring negligence by an operative and then attaching blame vicariously on the business operator? If so, there may be a serious difficulty in identifying the relevant operative, not least where the operations are mechanical. I tend to agree with the main point made by Karl Laird in his short commentary on the decision of the Divisional Court in this case at [2019] Crim LR 528, 530. Albeit apparently viewing the issue as one of domestic statutory interpretation, he wrote that if strict liability were rejected the

> "aim in enacting [the offence] would have been fatally undermined, given the difficulty in pinpointing the individual upon whom the requisite state of mind must be attributed."

35. Moreover, although one might argue this both ways - and without empirical evidence one cannot be confident which side of the argument is to be preferred - it is at least plausible that imposing strict liability (rather than negligence) acts as an incentive to improve standards. For a helpful consideration of the arguments both ways, in the context of a decision that accepted the merits of a "half-way house" whereby a defendant would be permitted a defence of due diligence to what would otherwise be a strict liability offence, see the judgment of Dickson J, giving the judgment of the Supreme Court of Canada, in *R v City of Sault Ste Marie* [1978] 2 SCR 1299, especially at pp 1310-1312.

36. If one were to reason by analogy from domestic statutory interpretation, it is noteworthy that one is not here concerned with traditional core criminal offences but rather with what have sometimes been termed, in the context of domestic criminal law, "regulatory offences". These are offences created by statute and, in modern times, primarily enforced by regulators (in this case the Food Standards Agency) either alone or in combination with the Crown Prosecution Service. In

domestic law, strict liability has often been regarded as less problematic in relation to such regulatory offences: see, for example, *Blackstone's Criminal Practice*, 2020 ed, para A2.22 citing *Parker v Alder* [1899] 1 QB 20.

37. Looking at the words used in the EU Regulation, in their context and especially in the light of the purpose of the Regulation, it is therefore my view that, applying EU law principles of legislative interpretation and bearing in mind that imposing strict criminal liability is not contrary to EU law, the second offence is correctly interpreted as imposing strict liability.

(2) The first offence

38. To put this offence in context, it is helpful to set out some parts of article 3(2) and the whole of article 3(3) as well as article 3(1).

> "**General requirements for killing and related operations**
>
> 1. Animals shall be spared any avoidable pain, distress or suffering during their killing and related operations.
>
> 2. For the purposes of paragraph 1, business operators shall, in particular, take the necessary measures to ensure that animals … (b) are protected from injury … (d) do not show signs of avoidable pain or fear or exhibit abnormal behaviour …
>
> 3. Facilities used for killing and related operations shall be designed, constructed, maintained and operated so as to ensure compliance with the obligations set out in paragraphs 1 and 2 under the expected conditions of activity of the facility throughout the year."

39. On the face of it, the relevant words of article 3(1) impose strict liability: animals "shall be spared" avoidable pain, distress or suffering. This use of the passive voice leaves no obvious room for a requirement of intention or negligence. And the requirement that the pain, distress or suffering is "avoidable" would be met where the business operator has contravened a specific operational rule (as here) which is designed to ensure the avoidance of pain, distress or suffering. That the words of article 3(1) are imposing strict liability gains strong support from the rest of article 3 which in article 3(2) and 3(3) uses the verb "to ensure". So the relevant

words of article 3(2) are "shall … take the necessary measures to ensure that"; and the relevant words of article 3(3) are "shall be … operated so as to ensure compliance with …".

40. The reasoning in paras 34-36 above, there put forward to support the view that the second offence imposes strict liability, is equally relevant and forceful in relation to the first offence. Leaving aside recital (2), it is therefore clear, in my view, that article 3(1) imposes strict liability.

41. Before looking at recital (2), one point should be clarified. In his short judgment in the Divisional Court agreeing with Jay J, Hickinbottom LJ, at para 97, appeared to suggest that, for the purposes of article 3(1), there is an "irrebuttable presumption - a deeming provision" that where the second offence has been committed (ie where the two carotid arteries or the vessels from which they arise were not systematically severed) the bird, despite being stunned, has inevitably been caused avoidable pain, distress or suffering. It may be that Hickinbottom LJ was here focussing solely on whether the pain, distress or suffering was avoidable rather than on whether pain, distress or suffering was experienced. But in so far as his words might be interpreted as referring to the experiencing of the pain, distress or suffering, I do not agree with what he said. If there is any doubt (in relation to the first offence) about the bird experiencing pain, distress or suffering, that will be a matter for the prosecution to prove in the normal way. There is no reason to interpret article 3(1) as laying down that pain, distress or suffering has inevitably been experienced. Note also that, while the phrase "irrebuttable presumption" is commonly used by lawyers in various contexts, I would suggest that it is best avoided because, as Hickinbottom LJ indicated by his immediate reference to "a deeming provision", it has nothing to do with presumptions in the true sense and simply means that there is a legal rule to that effect.

42. Turning now to recital (2), this reads:

> "Whereas: …
>
> Killing animals may induce pain, distress, fear or other forms of suffering to the animals even under the best available technical conditions. Certain operations related to the killing may be stressful and any stunning technique presents certain drawbacks. Business operators or any person involved in the killing of animals should take the necessary measures to avoid pain and minimise the distress and suffering of animals during the slaughtering or killing process, taking into account the best practices in the field and the methods permitted under this

> Regulation. Therefore, pain, distress or suffering should be considered as avoidable when business operators or any person involved in the killing of animals breach one of the requirements of this Regulation or use permitted practices without reflecting the state of the art, thereby inducing by negligence or intention pain, distress or suffering to the animals." (Emphasis added)

43. Mr Hockman submitted that recital (2) provides a definition of what is meant by "avoidable" pain, distress or suffering in article 3(1) and that that definition requires "negligence or intention" because those are the express words used in recital (2). Indeed, Mr Hockman went further and submitted that this recital is of general relevance to the whole of the EU Regulation so that one should treat it as being relevant to the second offence and not just the first. While it is clear that recital (2) is seeking to explain the purpose of article 3, I accept that article 3 lays down a general requirement, not least because it is headed "general requirements for killing and related operations". However, even if that general requirement does impose a standard of negligence or intention, rather than strict liability, that is not inconsistent with the imposition of strict liability by other specific provisions (including those creating the second offence). Irrespective of the detailed arguments analysed below, I therefore see no good reason to read recital (2) as affecting my reasoning, set out above, on the second offence.

44. But what about the central submission of Mr Hockman that recital (2) expressly requires one to read into article 3(1) a requirement of negligence or intention? In the Divisional Court Jay J rejected this submission by preferring two alternative interpretations of recital (2).

45. First, Jay J said, at para 58:

> "I would read the subordinate clause 'thereby inducing' as qualifying [the] second limb rather than the first."

Jay J was therefore interpreting the clauses as saying the following:

> "Pain, distress or suffering should be considered as avoidable when business operators or any person involved in the killing of animals
>
> (i) breach one of the requirements of this Regulation

or

> (ii) use permitted practices without reflecting the state of the art, thereby inducing by negligence or intention, pain, distress or suffering to the animals."

46. The problem with this first interpretation is that it is clear that the breach of one of the requirements of the EU Regulation has to be causally linked to the pain, distress or suffering to the animals. Without such a causal link a breach of the Regulation might have nothing to do with any such pain, suffering or distress. For example, a breach of the provision of the EU Regulation requiring there to be an animal welfare officer or requiring operatives to be certified cannot, in the abstract, without any causal link, mean that there has been relevant pain, distress or suffering. It follows that the phrase "thereby inducing … pain, distress or suffering to the animals" has to qualify the first limb as well as the second.

47. Jay J gave a second, alternative, interpretation at paras 58-59:

> "In any event, I certainly would not read this subordinate clause as setting forth an essential component of all regulatory breaches … Even if this clause does not merely cover the second limb of the final sentence of the recital, all that it is doing is saying that a breach of the Regulation will usually entail fault."

48. That second interpretation is compelling. The words are making clear that a breach of article 3(1) will usually entail fault but they are not laying down that fault is an essential element. An equally persuasive and slightly different way of putting this is that negligence or intention are being provided as examples of the ways, and not as an exhaustive list of the ways, in which a breach of the Regulation, or a failure to use permitted practices reflecting the state of the art, induces pain, distress or suffering that should have been avoided.

49. It is also important to stress that the words "negligence or intention" are in a recital and are not in the operative provisions of the EU Regulation. It is clear that under EU law principles of legislative interpretation, one can take a recital into account in interpreting a relevant provision of the Regulation: see, for example, *Omejc v Republika Slovenija* (Case C-536/09) [2011] ECR I-5367, para 26. There is also no doubt that, under EU law principles of legislative interpretation, the recitals are of considerable importance. As one is applying the teleological approach, the express setting out of the purposes is bound to be highly significant. However,

what one has here is a clear provision of the EU Regulation, imposing strict liability, and a somewhat ambiguous provision in the recital referring to "negligence or intention". In that situation, it appears to be well-established that the recital should be interpreted in such a way as not to contradict the Regulation. For example, in *Criminal Proceedings against Caronna* (Case C-7/11) EU:C:2012:396, the CJEU stated as follows at para 40:

> "the preamble to a European Union act … cannot be relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting them in a manner clearly contrary to their wording (Case C-308/97 *Manfredi* [1998] ECR I-7685, para 30; Case C-136/04 *Deutsche Milch-Kontor* [2005] ECR I-10095, para 32; and Case C-134/08 *Tyson Parketthandel* [2009] ECR I-2875, para 16)."

50. *R (International Air Transport Association) v Department of Transport* (Case C-344/04) [2006] 2 CMLR 20 is a particularly clear illustration of this approach to recitals. The case concerned Regulation (EC) No 261/2004. Articles 5, 6 and 7 established rules on the immediate compensation and assistance to be given by airlines to passengers who were denied boarding or whose flights had been cancelled or delayed. Recital (14) of the Regulation read as follows:

> "(14) As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier."

The claimant airline associations sought judicial review of the UK Department of Transport's implementation of articles 5, 6 and 7. They claimed, among other things, that those articles infringed the principle of legal certainty. One of their arguments, summarised by the ECJ at para 75, was that Regulation No 261/2004

> "envisages, in an inconsistent manner in the 14th and 15th recitals in its preamble, that extraordinary circumstances may limit or exclude an operating air carrier's liability in the event of cancellation of, or long delays to, flights whereas articles 5

> and 6 of the regulation, which govern its obligations in such a case, do not accept such a defence to liability except with regard to the obligation to pay compensation."

The ECJ rejected this argument on the basis that the operative provisions were clear. It stated as follows in para 76:

> "while the preamble to a Community measure may explain the latter's content (see *Alliance for Natural Health* [*(R (Alliance for Natural Health) v Secretary of State for Health* (Cases C-154/04 and C-155/04) [2005] 2 CMLR 61)], para 91), it cannot be relied upon as a ground for derogating from the actual provisions of the measure in question (Case C-162/97 *Nilsson and Others* [1998] ECR I-7477, para 54; and Case C-136/04 *Deutsches Milch-Kontor* [2005] ECR I-10095, para 32). … [T]he wording of those recitals indeed gives the impression that, generally, operating air carriers should be released from all their obligations in the event of extraordinary circumstances, and it accordingly gives rise to a certain ambiguity between the intention thus expressed by the Community legislature and the actual content of articles 5 and 6 of Regulation No 261/2004 which do not make this defence to liability so general in character. However, such an ambiguity does not extend so far as to render incoherent the system set up by those two articles, which are themselves entirely unambiguous."

51. Applying EU law principles of legislative interpretation, therefore, the unclear recital (2) does not override the clear article 3(1).

52. Finally, there is a further background (or contextual) consideration that supports the interpretation of the first offence as imposing strict liability. Article 28 of the EU Regulation repealed Directive 93/119/EC. That Directive set out the previous EU law on the protection of animals at the time of slaughter or killing. Article 3 of that Directive read:

> "Animals shall be spared any avoidable excitement, pain or suffering during movement, lairaging, restraint, stunning, slaughter or killing."

By article 5(1):

> "Solipeds, ruminants, pigs, rabbits and poultry brought into slaughterhouses for slaughter shall be …
>
> (d) bled in accordance with the provisions of Annex D."

Under Annex D, para 2:

> "All animals which have been stunned must be bled by incising at least one of the carotid arteries or the vessels from which they arise."

The recital relevant to article 3 read simply as follows:

> "Whereas at the time of slaughter or killing animals should be spared any avoidable pain or suffering."

The important point for present purposes is that that relevant recital - the forerunner of recital (2) in the EU Regulation with which we are concerned - did not include the words "negligence or intention" in relation to the "avoidable pain or suffering". There was also no other hint in that Directive that it was an essential element of avoidable pain or suffering that it was caused by negligence or intention. It would therefore appear that that previous Directive required member states to impose strict liability. As it is highly unlikely that the EU would have made its animal welfare requirements less stringent under the EU Regulation than under the Directive it replaced, this adds further support to the strict liability interpretation of article 3(1).

53. Looking at the words used in the EU Regulation, in their context and especially in the light of the purpose of the Regulation, it is therefore my view that, applying EU law principles of legislative interpretation and bearing in mind that imposing strict criminal liability is not contrary to EU law, the first offence, like the second offence, is correctly interpreted as imposing strict liability.

5. Final observations and conclusion

54. I agree with what Jay J said at para 88 of his judgment in the Divisional Court:

> "[T]he EU Regulation … should be seen as setting forth a comprehensive code or rule-book which must be complied with by the business operator at all material times. On the facts of the present case, there was a strict obligation to sever the main arteries systematically, and a concomitant strict obligation to spare these birds avoidable pain."

55. The Divisional Court went on to reach the same "strict liability" conclusion applying domestic law. Although that "two bites of the cherry" approach was incorrect I add, by way of footnote, that had it been correct to apply domestic law, I would have agreed with the Divisional Court's view that the presumption of mens rea or culpability was here rebutted.

56. Neither counsel asked the court to make a reference to the CJEU on the questions raised. Such a reference is neither required nor appropriate because the matter is acte clair. For the reasons I have given, the two offences in issue are offences imposing strict liability on the business operator. There is no requirement to prove negligence. Although my reasoning differs in some respects from that of the Divisional Court, the appeal of HPFPL is dismissed. The criminal proceedings must now proceed before District Judge Cadbury to be finally determined on the basis of whatever further evidence the parties wish to adduce.