another jurisdiction has already frozen the assets of the bankrupt as the result of a *Mareva* injunction.

7 I dismiss this *ex parte* motion and leave the applicant to proceed in the ordinary way by motion. I would have liked to have reserved my decision to give a more reasoned ruling, but I consider it necessary that the applicant knows where he stands without further delay.

Application dismissed.

[1980–87 Gib LR 313]

FURNITURE CENTRE LIMITED v. STIPENDIARY MAGISTRATE

SUPREME COURT (Alcantara, A.J.): September 23rd, 1985

Administrative Law—judicial review—alternative remedies—court may entertain application for judicial review even if applicant has not exhausted all available remedies if failure could previously have been raised but was not

Trade and Industry—trading licence—refusal of licence—Trade Licensing Authority only to refuse extension of licence on grounds listed under Trade Licensing Ordinance 1978, s.16—no refusal of licence merely because applicant already in possession of one adequate licence

Trade and Industry—trading licence—refusal of licence—needs of community—to assess whether needs of community already adequately provided for, Trade Licensing Authority to consider number of licence holders, not simply number of licences issued

The applicant company sought judicial review of an order made by the Stipendiary Magistrate which refused to extend one of its existing licences.

The applicant, a company owned and controlled by Spanish nationals, had two shops in Gibraltar. Each shop had a separate licence, only one of which entitled it to sell building and construction materials. The applicant sought an extension of its other licence from the Trade Licensing Authority so as to enable it to sell these materials in its other shop. The application was advertised but two traders raised objections and the Trade Licensing Authority required a hearing. Around the same time, there was

an application by a new trader, F. & F., for a licence to sell similar products to those for which the applicant sought to extend its licence. An objection was also raised to this application and the Trade Licensing Authority proposed that the hearing of that application take place on the same day as the applicant's hearing. On the day of the hearings, the objection to F. & F.'s application was withdrawn and its consideration adjourned. The Trade Licensing Authority then proceeded to deal with the applicant's application, rejecting it on the basis that the needs of the local community were already adequately provided for. A short time later, however, F. & F. was granted a new licence. The applicant appealed to the Stipendiary Magistrate on the ground that the reason for the refusal to extend its licence—that the needs of the local community were already adequately provided for—could not have been valid if, only weeks later, F. & F. was granted a licence to sell the same products for which it had itself been refused an extension to its licence. The Stipendiary Magistrate, taking into account the number of licences which had already been issued, also reached the conclusion that the needs of the local community were already adequately provided for and dismissed the appeal.

The applicant sought judicial review of the Stipendiary Magistrate's decision, submitting that (a) he had erred in law in refusing to extend the licence as the goods it wished to offer would not be surplus to the needs of the community; (b) the refusal to extend the licence of a company controlled by Spanish citizens, while simultaneously granting a new licence to Gibraltarians, infringed art. 48 of the Treaty of Rome as it discriminated against the applicant on the ground of nationality; (c) the Trade Licensing Ordinance constituted a quantitative restriction on imports or a measure having equivalent effect contrary to art. 30 of the Treaty of Rome; and (d) the decision of the Trade Licensing Authority was also contrary to art. 85 of the Treaty of Rome as it restricted competition by preventing the applicant from trading in certain goods.

The respondent submitted that (a) art. 30 of the Treaty of Rome did not apply to Gibraltar as Gibraltar was not part of the European Customs Union; (b) the applicant should not have been granted leave to appeal on the ground that the refusal to grant the extension was contrary to EC Law as that matter had not been raised before the Stipendiary Magistrate and therefore could not be reviewed; and (c) the applicant had not exhausted all its available legal remedies, since it should have appealed against the decision of the Stipendiary Magistrate to the Supreme Court before applying for judicial review.

Held, granting the application:

(1) Applying the *Wednesbury* principle, judicial review of the Stipendiary Magistrate's decision would be granted. The magistrate had misdirected himself on two matters but for which he would have allowed the appeal. He should not have used the number of licences issued to satisfy himself that the needs of the community were already adequately provided for as the number of licences issued was not equivalent to the number of

traders trading in those goods. It could be seen, on a closer inspection of the facts, that while 11 licences for the sale of building and construction materials had been issued in total, they were shared amongst only 3 traders. Nor should he have taken into account, as he had done, the fact that the applicant was already in possession of an adequate licence. He could only refuse to extend the licence on the grounds listed under s.16 of the Trade Licensing Ordinance and this was not one of those grounds (paras. 24–26).

(2) The court could rule on the application for judicial review even though the applicant had not previously exhausted all legal remedies before seeking judicial review, as there were exceptional circumstances; while the Chief Justice had erred in law in granting leave to apply for judicial review, there had been previous occasions on which the respondent should have raised the issue but had not. The respondent should either have appealed against the decision to grant leave or raised the matter in a preliminary hearing in chambers but as he had failed to do either of these, the Supreme Court would rule on the application (para. 42).

(3) Although Gibraltar was not part of the European Customs Union, EC legislation did apply to it. While it could not be said that the Trade Licensing Ordinance as a whole was contrary to art. 30 of the Treaty of Rome, it did contain provisions which potentially hindered trade between member states though none that was relevant here. There had, however, been no discrimination against the applicant on the ground of nationality contrary to EC Law. The applicant was not Spanish, but a Gibraltar limited company and hence it was not protected under art. 48 of the Treaty of Rome which applied solely to workers. It was irrelevant that the shareholders and directors of the company were Spanish nationals. The applicant also had no claim under art. 85 of the Treaty of Rome as decisions of the Trade Licensing Authority were not covered by that article (paras. 28–29; paras. 33–35).

Cases cited:

(1) *Associated Provncl. Picture Houses Ltd.* v. *Wednesbury Corp.*, [1948] 1 K.B. 223; [1947] 2 All E.R. 680; (1947), 63 T.L.R. 623, applied.

(2) *Bland* v *Att.-Gen.*, 1995–96 Gib LR 320, considered.

(3) *Bureau National Interprofessionnel du Cognac* v. *Clair*, [1985] E.C.R. 391; [1985] 2 C.M.L.R. 430, distinguished.

(4) *Chief Constable (N. Wales Police)* v. *Evans*, [1982] 1 W.L.R. 1155; [1982] 3 All E.R. 141, considered.

(5) *Marketing of Pharmaceuticals, Re, E.C. Commission* v. *Germany*, [1984] E.C.R. 1111; [1985] 1 C.M.L.R. 640, referred to.

(6) *Openbarr Ministerie (Public Prosecutor)* v. *Van Tiggele*, [1978] E.C.R. 25; [1978] 2 C.M.L.R. 528, referred to.

(7) *Origin Marking of Retail Goods, Re, E.C. Commission* v. *United*

Kingdom, [1985] E.C.R. 1201; [1985] 2 C.M.L.R. 259; [1985] I.C.R. 714, referred to.
(8) *R.* v. *Epping & Harlow Gen. Commr.*, *ex p. Goldstraw*, [1983] 3 All E.R. 257; [1983] S.T.C. 697, considered.
(9) *R.* v. *Trinity House London Pilotage Cttee.*, *ex p. Jensen*, [1985] 2 C.M.L.R. 413, distinguished.
(10) *State* v. *Cornet*, [1965] C.M.L.R. 105, referred to.

Legislation construed:
Trade Licensing Ordinance 1978, s.3(1): The relevant terms of this sub-section are set out at para. 11.
s.16(1): The relevant terms of this sub-section are set out at para. 14.
Schedule 2: The relevant terms of this Schedule are set out at para. 12.

Treaty Establishing the European Community (March 25th, 1957; Treaty Series No. 1 (1973)), art. 30: The relevant terms of this article are set out at para. 29.
art. 48: "(1) Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.
(2) Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. . ."
art. 85: The relevant terms of this article are set out at para. 33.

J.E. Triay, *Q.C.* and *J. Triay* for the applicants;
K.W. Harris, *Senior Crown Counsel*, and *D. Azopardi* for the respondent.

1 **ALCANTARA, A.J.:** This is an application for judicial review asking for an order of certiorari quashing an order made by the Stipendiary Magistrate on February 18th, 1985. Relief is sought on three grounds:

(1) the learned magistrate erred in law in refusing a licence which, on the facts as found by the learned magistrate, was not surplus to the needs of the community, but simply enabled the applicant to carry on an existing business more conveniently;

(2) that the refusal of the licence sought by the applicants, a company controlled by Spanish citizens, on the ground that the needs of the community were adequately provided for, being immediately followed by the grant to Gibraltarians of a licence for the same business, is discriminatory and contrary to law; and

(3) that the Trade Licensing Ordinance is a measure resulting in the quantitative restriction of imports or a measure having an equivalent effect and accordingly a measure contrary to art. 30 of the Treaty of Rome.

2 At the conclusion of the hearing I gave my decision and said:

"I will need some time to deliver a written decision dealing with some of the very interesting arguments which have been addressed to this court. Nonetheless, I have already made up my mind as to the result of this application. The applicant succeeds on Ground 1, on the *Wednesbury* principle. The applicant fails on Ground 2, on the question of discrimination. Insofar as Ground 3 is concerned, I have not been asked by either side to refer this matter to the European Court of Justice, but have been invited to express my views on the impact of EC legislation on Gibraltar. Suffice to say that I am of the view that the type of licence envisaged by the Trade Licensing Ordinance for an importer is contrary to art. 30 of the Treaty of Rome and consequently unenforceable, insofar as the importation of goods from member states of the community is concerned. To Mr. Triay's literary phrase 'Cloud unseen but not unfelt,' I will add 'Rain it will, whether in the form of a drizzle or hurricane remains to be seen.' Certiorari to issue. Decision of Stipendiary Magistrate quashed. Costs reserved, to be argued."

3 I will now proceed to give reasons for this judgment. First, the facts giving rise to this application. The applicants, Furniture Centre Ltd., are a local limited liability company, wholly owned and controlled by Spanish nationals. They have two licences to trade, one in respect of 30/40 Main Street and the other in respect of 84 Irish Town, granted under the Trade Licensing Ordinance. The Main Street licence enables them "to carry on trade in the following goods or class of goods: construction materials, fittings and accessories, domestic and ornaments." The Irish Town licence enables them "to carry on trade in the following goods: importers, exporters and suppliers of domestic and office furniture, fittings and accessories and ornamental household goods, office equipment."

4 In September or October 1984 (this is not clear to me), the applicants applied for an extension of their Irish Town licence. The application was for "an extension in the following goods: trade or business or importers, exporters and suppliers of construction and building materials of any nature for domestic industrial or commercial use." The application was duly advertised. Two traders objected to the extension of the licence and the Trade Licensing Authority decided to hold a hearing on December 13th, 1984, at the John Mackintosh Hall.

5 At about the same time, there was another application from a new trader, Messrs. Frendo & Frendo, in respect of a location in Town Range. They were asking for a licence covering the "importing, wholesale and retailing of furniture, building and decorating materials, hardware and ironmongery, plumbing and electrical equipment, paint, glass and glass-ware, plastic bags and the business of plant-hiring and equipment." This application was also objected to and was going to be considered by the

Trade Licensing Authority at a hearing set down the same day, but an hour after the applicants' application for an extension.

6 On the day of the hearing, the objection against Frendo & Frendo was withdrawn but the objection against Furniture Centre Ltd. was not. The consideration of the application by Frendo & Frendo was adjourned to January 9th, 1985 and the authority proceeded to deal with the application of Furniture Centre Ltd.

7 It so happened that the same firm of solicitors, Messrs. Triay & Triay, were acting for both the applicants and Messrs. Frendo & Frendo. They were somewhat surprised when one of their clients, Frendo & Frendo secured a new licence which included building materials and their other clients, Furniture Centre Ltd., were refused an extension for those same materials. The surprise was even greater when the refusal is dated December 13th, 1984, on the grounds that the needs of the community are adequately provided for, whereas the granting of a new licence to Frendo & Frendo is of a later date, January 22nd, 1985.

8 Under the Trade Licensing Ordinance there is a right of appeal to the Stipendiary Magistrate. The appeal is by way of re-hearing. The applicants appealed against the decision of the Trade Licensing Authority. The appeal was heard on February 1st, 1985, and the learned Stipendiary Magistrate dismissed the appeal on February 18th, giving written reasons for his decision.

9 Next, the law. The relevant Ordinance is the Trade Licensing Ordinance 1978, which has superseded the Trade Licensing Ordinance 1972. The 1972 Ordinance was more or less straightforward. The policy and object of that Ordinance was to licence traders and thus regulate the distribution of business premises in Gibraltar so that no particular area was cluttered with a certain type of shop, *e.g.* oriental bazaars in Main Street, fish and chip shops in Irish Town, or grocery shops in Engineers Lane. The emphasis was on location. Apart from that there were some specified businesses, which were also required to be licensed, which had nothing to do with location or selling, such as hairdressing or services by different types of contractors. In a closed frontier situation, the 1972 Ordinance worked reasonably well.

10 It was replaced by the 1978 Ordinance, which incorporated a number of amendments made necessary by the deficiencies from which the 1972 Ordinance had suffered. It was more or less a consolidating ordinance. However, it has been regularly amended to the extent that it can no longer be said that the primary object and policy of the Ordinance is the location of business premises. Counsel for the applicants argues that it is a protectionist enactment, which protects established businesses against newcomers. I will not comment for or against that view.

11 Let me start with s.3(1) of the Ordinance, the relevant part of which reads:

> " . . . [N]o person shall carry on business of a kind specified in Schedule 2 or trade—
>
> (a) unless he is the holder of a licence;
>
> (b) other than at or (in the case of a person who imports goods into Gibraltar in commercial quantities) from the premises specified in the licence;
>
> (c) other than in the goods specified in the licence or the business specified in the licence; and
>
> (d) otherwise than in accordance with the terms and conditions of such licence."

12 The businesses which must be licensed and which are specified in the Second Schedule are: "Building contracting, Carpentry, Catering, Decorating, Electrical contracting, Hairdressing, Joinery, Manufacturing, Painting, Plumbing, Road transport contracting, Shipping agencies, Welding, Woodwork."

13 We now turn to the definition of "trade" in s.2 of the Ordinance— "'trade' means the buying or selling whether by wholesale or retail, of any goods by way of business and also means the importing of any goods into Gibraltar in commercial quantities." Before you can start one of the specified businesses or trade, you need a licence. That is s.4(1), which states: "The licensing authority may issue licences to trade or to carry on business."

14 I think that "may" means "must" in the context of this Ordinance, as a Licensing Authority can only refuse a licence if it is satisfied, by virtue of s.16(1) of the Ordinance—

> "(a) that the applicant is under the age of eighteen;
>
> (b) that the issue of such licence is likely to cause nuisance or annoyance to persons residing or occupying premises in the neighbourhood of the premises in respect of which the licence is sought;
>
> (c) that the premises on which the applicant intends to conduct his trade or business would not conform to the requirements of any law for the time being in force;
>
> (ca) that there is already in force a licence in respect of the premises, or any part of the premises, on which the applicant intends to conduct his trade or business;

(d) that the issue of such licence would conflict with any town planning scheme approved by the Development and Planning Commission;

(e) that the issue of such licence would operate against the public interest;

(f) that the needs of the community either generally in Gibraltar or in the area thereof where the trade or business is to be carried on are adequately provided for; or

(g) that the issue of the licence would unduly prejudice the implementation of price control under the Price Control Ordinance."

15 I think I have quoted and said enough about the Trade Licensing Ordinance 1978, to enable me to proceed with the grounds on which relief is sought. I will deal with Ground 2 first, where the allegation is that the applicants were discriminated against because they were Spaniards. In support of his contention, counsel put forward a recent English decision, *R.* v. *Trinity House London Pilotage Cttee., ex p. Jensen* (9), the relevant part of the headnote to the case in *The Common Market Law Reports* reads ([1985] 2 C.M.L.R. at 413):

"It is no defence in 1984 to a charge of unlawful discrimination against EEC workers under Article 48 EEC that such discrimination was necessary to ease the problems posed to the relevant sector by UK entry into the EEC.

. . . The refusal of UK pilotage certificates to masters and first mates of EEC vessels constitutes a restriction on the freedom of their employers to provide services in UK waters."

16 The court held that the defendant pilotage authority had wrongfully refused to issue pilotage certificates to the applicant EC nationals (masters and first mates of Danish and German ships plying into Harwich and Sheerness) contrary to art. 48.

17 Mr. Triay sought to argue that, in the same way that the EC pilots had the right to be licensed, the applicants, also EC nationals (by virtue of the European Community Amendment Ordinance, 1985) insofar as Gibraltar is concerned, had the right to be licensed. It is an ingenious argument but, with due respect, fallacious for the following reasons. The pilots were German and Danish (EC nationals). The applicants are not Spanish. The applicant is a Gibraltar limited liability company. The shareholders and directors are Spanish nationals, but that is neither here nor there.

18 The pilots were workers and thus protected by art. 48 of the Treaty of Rome, relating to the free movement of workers. The applicants are a limited company and by no stretch of the imagination can they be called

or described as workers. Traders yes, but not workers. In the *Trinity House* case (9) there was an official policy to protect UK pilots against EC pilots. No evidence has been adduced of any such similar policy insofar as the licensing of traders is concerned.

19 I find that there was no discrimination on the ground of nationality or contrary to EC legislation. The applicants fail on Ground 2. I have already held that the applicants succeed on Ground 1. I will now deal with it. Let me start by saying that I agree with counsel for the respondent that on a judicial review a superior court is not dealing with an appeal, but with a review in the sense of supervising the decision of the lower tribunal. The authority put forward for this is *Chief Constable (N. Wales Police)* v. *Evans* (4), where you find the following passage in the headnote to the report of the case in *The All England Law Reports* ([1982] 3 All E.R. at 142):

> "*Per curiam*. Judicial review is not an appeal from a decision but a review of the manner in which the decision was made, and therefore the court is not entitled on an application for judicial review to consider whether the decision itself was fair and reasonable."

20 The above statement of the law, however, does not in any way affect the *Wednesbury* principle to the effect that a decision of a public authority is liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings if the court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could reach it. This was stated by Lord Greene, M.R. in *Associated Provncl. Picture Houses Ltd.* v. *Wednesbury Corp.* (1), and is still good law.

21 What are the undisputed facts in this case? There were two applicants for somewhat similar licences. One was refused and the other was granted. The one refused was for an extension of an existing licence, the one granted was for a new licence. The one granted was granted after the other had been refused. No reasons were given by the Trade Licensing Authority for the refusal other than that it had been refused on the grounds of s.16(1)(f) of the Ordinance, "that the needs of the community either generally in Gibraltar or in the area thereof where the trade or business is to be carried on are adequately provided for." It is not clear whether Irish Town was adequately provided for or Gibraltar generally was adequately provided for. However, this is not a review of the Trade Licensing Authority but of the decision of the Stipendiary Magistrate who heard the matter *de novo*.

22 The learned Stipendiary Magistrate dismissed the appeal on the same ground that the Trade Licensing Authority had refused the licence, *i.e.* under s.16(1)(f) of the Trade Licensing Ordinance. He stated his conclusion in para. 8 of his decision thus:

> "In so far as this application is concerned, in respect of 84 Irish Town, I have come to the conclusion that as the needs of the community are for the moment amply catered for and the appellant is already in possession of an adequate licence, I will not exercise my residual discretion in favour of the appellant and I dismiss the appeal."

23 In this passage the learned Stipendiary Magistrate was directing his mind to the residuary discretion. It is a residuary discretion, but not an absolute discretion. It is a discretion which must be exercised judicially. He is saying that the needs of the community are amply catered for. That is not exactly what he found as a fact in para. 4 of his decision, where he said:

> "Having heard the evidence of Mr. Rodriguez for the appellant and Mr. A. Olivero for the objectors and on perusal of the list of present licences, it seems to me that in Gibraltar generally and in Irish Town in particular, there are sufficient, in numbers, licences in respect of the business applied for."

24 His finding of fact is that there are sufficient numbers of licences issued. If one looks at the list of licences, which has been exhibited, one finds that one trader has five licences and two others have three licences each for construction materials. I am of the view that the number of licences issued is a guide but not necessarily a foolproof guide to the number of traders actually trading, so as to be satisfied that the needs of the community are actually adequately provided for.

25 In reaching his final conclusion, the learned Stipendiary Magistrate took a factor into account that he was not entitled to take. That was that "the appellant is already in possession of an adequate licence." A licence can be refused on the grounds stated in s.16 of the Ordinance, but not because the applicant already has a licence. It is in my view a wrong exercise of a judicial discretion to take this factor into account, even in the exercise of the residuary discretion. Traders have not only the right to trade but the right to succeed. This was accepted by the learned Stipendiary Magistrate, when he stated in para. 6:

> "I consider that an important element to be borne in mind is that such business ought to be given leeway to succeed. It is in its interest; it is in his customer's interest; it is in the public interest; it is in the interest of competitors that there should be healthy competition."

26 Having thus directed his mind, it is difficult to understand how the learned magistrate dismissed the appeal. I am satisfied that he misdirected himself on two matters. First, that the number of licences issued is equivalent to the number of traders trading and secondly, and more importantly, that he was entitled to take into account the fact that the

appellant already had a licence, which he, the Stipendiary, considered adequate. Applying the *Wednesbury* principle, I rule that had the learned magistrate properly directed himself, he would have allowed the appeal. Consequently, I held that the appellants succeeded on this ground and that certiorari would issue.

27 Now as to Ground 3, which for the sake of clarity I will reproduce: "That the Trade Licensing Ordinance is a measure resulting in quantitative restriction on imports or a measure having an equivalent effect and accordingly a measure contrary to art. 30 of the Treaty of Rome." Whatever I say further can only be *obiter* under our juridical system. Apart from that, I do not want to say too much about EC legislation because this is the first case that has come to our municipal court and there may be more. However, I will accept the invitation and give my views on certain matters.

28 What does art. 30 of the Treaty of Rome say? Its brevity is commendable: "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States." There are two questions to be answered. First, whether art. 30 applies to Gibraltar and secondly, what it means or embraces. Mr. Harris contends that it does not apply as Gibraltar is not part of the Customs Union. It is quite true that Gibraltar is not part of the Customs Union because it has not been specifically included (see art. 1 of Regulation (EEC) No. 1496/68) but that does not mean that Gibraltar is not part and parcel of the European Community. As such, the full force of EC legislation applies to Gibraltar except on two matters on which there has been specific derogation. One is agricultural policy and the other is V.A.T. In the European Communities Act 1972, there is a specific reference to Gibraltar. I reproduce the following from 42A *Halsbury's Statutes of England* (*European Continuation, Vol. 1, 1952–1972*), 3rd ed., at 263, dealing with the Act of Accession:

"Part Two

ADJUSTMENTS TO THE TREATIES

TITLE II—OTHER ADJUSTMENTS

Article 28

Acts of the institutions of the Community relating to the products in Annex II to the EEC Treaty and the products subject, on importation into the Community, to specific rules as a result of the implementation of the common agricultural policy, as well as the acts on the harmonization of legislation of Member States concerning turnover taxes, shall not apply to Gibraltar unless the Council, acting unanimously on a proposal from the Commission, provides otherwise."

29 There is no doubt in my mind that art. 30 of the Treaty of Rome applies to Gibraltar with full force. Not only art. 30, but all the decisions of the European Court of Justice on art. 30, of which there are many. As to the meaning of art. 30, let me refer myself to a number of authorities. I will start with *Openbarr Ministerie (Public Prosecutor)* v. *Van Tiggele* (6) for this proposition ([1978] 2 C.M.L.R. at 528):

> "For the purpose of the prohibition in Article 30 EEC of measures having an effect equivalent to quantitative restrictions on imports it is sufficient that the measures in question are likely to hinder, directly or indirectly, actually or potentially, imports between member-States."

30 As an example of the measures which are likely to hinder trade I will refer to two cases. The first is *Re Marketing of Pharmaceuticals; E.C. Commission* v. *Germany* (5), the headnote to which in *The Common Market Law Reports* ([1985] 1 C.M.L.R. at 640) reads:

> "Imports. Quantitative restrictions. All commercial rules of member-States which are likely to hinder directly or indirectly, actually or potentially, trade within the Community are considered as measures having an effect equivalent to a quantitative restriction within the meaning of Article 30 EEC.
>
> Imports. Pharmaceuticals. Regulation of trade. The requirement by a member-State that pharmaceutical products may only be marketed by a pharmaceutical enterprise which has its headquarters ('seat') in Germany is likely to involve additional costs for exporters into that country. It is therefore likely to hinder trade within the Community, especially parallel imports, and is caught by Article 30 EEC."

31 The next case is *Re Origin Marking of Retail Goods*, *E.C. Commission* v. *United Kingdom* (7), again the headnote in *The Common Market Law Reports* ([1985] 2 C.M.L.R. at 259):

> "Imports. Sale of goods. Labelling. Origin marking. National non-discriminatory legislation requiring goods sold retail to indicate their country of origin, because of its knock-on effect up the distribution line, increases the production costs of the imported foreign goods, thus making it more difficult to sell them on the domestic market, contrary to Article 30 EEC.
>
> Imports. Sale of goods. Consumer protection. Product labelling. Origin marking. National legislation requiring goods sold retail to indicate their origin so as to enable consumers to distinguish between imported and domestic goods is not justified under the rule of reason exception to Article 30 EEC as being in the interests of consumers."

32 Finally, I shall refer to a French decision for its persuasive force on the question of licensing, *State* v. *Cornet* (10) ([1965] C.M.L.R. at 105):

> "Quantitative restrictions. Articles 30 and 31 of the E.E.C. Treaty. An obligation to obtain licences does not constitute a quantitative restriction within the meaning of Articles 30 and 31 of the E.E.C. treaty, if licences are granted automatically."

33 Mr. Triay has argued that the whole of the Trade Licensing Ordinance has the effect of hindering trade. I do not agree. Those provisions which are likely to hinder trade, whether directly or indirectly, actually or potentially, are contrary to art. 30 of the Treaty of Rome, and therefore unenforceable. An example is the requirement of a licence to import goods including those from an EEC country. This provision came into force by virtue of the Trade Licensing (Amendment) (No. 2) Ordinance, 1982. The reason why it is contrary to art. 30 is that it has the effect of hindering trade within the Community. Before you can import it is necessary to have a licensed place of business and it is subject to the needs of the community not being adequately provided for. I do not intend to give my views on the other provisions of the Trade Licensing Ordinance. Another occasion might arise. Mr. Triay has also argued that art. 85 of the Treaty of Rome also applies, and has referred me to a number of decisions. The relevant part of art. 85 reads:

> "The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decision by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . ."

34 Counsel argues that the Trade Licensing Authority is the equivalent of an undertaking, and prays in aid the decision of *Bureau National Interprofessional du Cognac* v. *Clair* (3), where it was decided that a semi-public or public law body could be an undertaking for the purpose of art. 85. That case was decided on its particular facts as can be gathered from part of the headnote to the case in *The Common Market Law Reports* ([1985] 2 C.M.L.R. at 430):

> "Restrictive practices. Associations of undertakings. Public law bodies. The fact that restrictive agreements between enterprises are concluded in the framework of a semi-public or public law body does not affect the application of Article 85."

35 In the case before me, it is accepted that the Trade Licensing Authority is a public law body, but there are no associations and no restrictive agreements between enterprises. There is only a body which issues licences. I find that the Trade Licensing Authority is not an

undertaking for the purpose of art. 85, and that consequently the *Clair* case (3) is of no assistance.

36 Finally, there is a question of procedure which I said I would deal with at the conclusion of the hearing. At the commencement of the hearing, counsel for the respondent raised a preliminary point. He submitted that the Chief Justice should not have given leave to apply for judicial review with regard to Ground 3 concerning the Treaty of Rome. His contention was that, as the matter had not been raised before the Stipendiary Magistrate, there was nothing to review, as this court can only review something which has been considered by a lower tribunal.

37 I gave the following ruling at the time:

> "On this preliminary point, I am not prepared to preclude the applicants from arguing Ground 3 of the relief sought, after leave has been granted. In making this ruling, I am not saying that Ground 3 is a valid ground or that I might not hold later that it is invalid, either substantially or procedurally. I will, of course, be prepared to hear further argument on the procedural point in the course of the hearing of this application."

38 On the fourth day of the hearing, after counsel for the applicants had concluded his address, Mr. Harris raised another point on procedure, but of much more substance. He submitted that there should not be judicial review until the applicants had first exhausted all other available remedies. His authority for this was *R.* v. *Epping & Harlow Gen. Commr., ex p. Goldstraw* (8).

39 He argued that in the present case, the applicant had not exhausted all its available legal remedies. Both Grounds 1 and 3 were matters of law and the Trade Licensing Ordinance gave a right of appeal on matters of law. Section 22(2) of the Trade Licensing Ordinance reads: "Where any appeal is heard by the Stipendiary Magistrate an appeal shall lie on a point of law from the Stipendiary Magistrate to the Supreme Court."

40 What Mr. Harris is now saying is that the Chief Justice had gone wrong in granting leave to apply not only in respect of Ground 3 but also in respect of Ground 1. And although leave had been granted, I should not proceed to hear the application, or proceed to hear it only on Ground 2.

41 Mr. Triay conceded that Mr. Harris was technically right and that everyone must have been misled because in the 1972 Ordinance there was no right to appeal to the Supreme Court. He therefore intended to apply for an extension of time, under O.3, r.5 of the Supreme Court Rules, so as to appeal, out of time, on Grounds 1 and 3, proceed on the judicial review as regards Ground 2, and ask for both actions to be consolidated. He said this procedure had been followed in a previous case before the Supreme Court, *Bland* v. *Att.-Gen.* (2). This would obviate the need for four days'

hearing, and the expense, being wasted. He asked counsel for the respondent whether he was willing to consent to this course of action, and counsel for the respondent said he would require time either to consider the position or take instructions.

42 I intimated that I would not rule on this matter at that stage but at the conclusion of the hearing, and invited counsel to reply on the merits of the case. This he did and I now rule. Although *R.* v. *Epping & Harlow Commr., ex p. Goldstraw* (8) is a strong authority on procedure, Donaldson, M.R., in his judgment, said that it had to be followed "save in exceptional circumstances." I find that there are exceptional circumstances in this case for the following reasons. After leave to apply for judicial review had been granted, the respondent could have appealed against such leave. There was also a preliminary hearing in chambers before me to give directions and the matter was not raised. It was only raised when counsel for the applicants had concluded his address. By counsel not consenting promptly to the suggestion of counsel for the applicants, valuable time would have been wasted. Time was very important as there was more than a possibility that if the matter had to be adjourned, even for a matter of days, I might not be able to continue with the hearing. There would have had to be a hearing *de novo*. That possibility has now been proved wrong.

Application granted.