

## [1988–90 Gib LR 26]

## VINET v. CORTES

SUPREME COURT (Kneller, C.J.): January 27th, 1988

*Statutes—subsidiary legislation—ultra vires—if part of subsidiary legislation ultra vires but severable from remainder of provision, remainder still applicable—severance possible where efficacy of measure unaffected by excising offending part—ultra vires applicability of Port Rules, r.117J to territorial waters severable and rule remains applicable to Port Waters*

*Constitutional Law—fundamental rights and freedoms—freedom of movement—restriction on movement of fast launches at night not restriction on freedom of movement of owners and not inconsistent with Constitution, s.13—even if restriction, justified in interest of public order under s.13(3)(d)(i)*

The respondent was charged in the magistrates' court with operating a fast launch between 10 p.m. and 7 a.m. contrary to r.117J(1) of the Port Rules.

He was acquitted by the Stipendiary Magistrate, on the ground that r.117J(1) was invalid as being *ultra vires* the Port Ordinance. The Crown appealed against the acquittal by way of case stated, seeking the opinion of the Supreme Court on the following two questions:

(a) Whether the Stipendiary Magistrate was correct in law in holding that r.117J of the Port Rules was *ultra vires* the Port Ordinance, and, on that basis, dismissing the charge; and

(b) Whether the Port (Amendment) Rules 1986, amending the Port Rules, were *ultra vires* the Port Ordinance, either in whole or in part, and s.19 of the Port Ordinance in particular?

The respondent submitted that (a) rr. 117A–117O of the Port Rules (“the fast launches rules”), added in 1986, were *ultra vires* the Port Ordinance, in that they purported to apply to the entirety of Gibraltar's territorial waters, rather than merely to Port Waters; (b) they purported to authorize the confiscation of fast launches that were the subject of an offence (although this latter provision had since been repealed by the Port (Amendment) Rules 1987); and (c) the sole purpose of the fast launches rules was to restrict the trade in illegal drugs by restricting the operation of fast launches to hours when they could be more easily intercepted, and when there were customs officers on duty in the port. The purported application of the fast launches rules to all of Gibraltar's territorial waters was thus intrinsic to their purpose, and they could not therefore be severed from the rest of the Rules without rendering them devoid of effect.

SUPREME CT.

VINET V. CORTES

The Crown submitted in reply that although the provision extending the operation of the Rules to territorial waters may have been *ultra vires* the Port Ordinance, the aim of the Rules was not limited to restricting traffic in illegal drugs; as was stated in s.19(a) of the Port Ordinance, the Governor had the power to make rules for “the management of the port and the maintenance of order therein,” and (s.19(b)) for “the regulation and control of all vessels entering or leaving the port and their movements in the port.” The fast launches rules, in the absence of a statement to the contrary, should be seen as having been made in furtherance of these purposes of the Port Ordinance. The words “or in the territorial waters of Gibraltar” could therefore be severed from sub-r. 117J(1) and were therefore not fatal to the effect of the provision.

Both parties sought clarification of the constitutionality of the fast launches rules, although this had not been in issue before the Stipendiary Magistrate. The respondent submitted that (a) the rules, in that they restricted the freedom of movement of the owners of fast launches, offended s.13 of the Constitution, which guaranteed this freedom; and (b) in that the Rules deprived individuals of a right—that of operating a fast launch at night—it was unconstitutional for them to be implemented without due legislative process. The Crown submitted in reply that (a) it was not the freedom of movement of the owners of the launches that was being restricted, as their movement in vessels that were not fast launches was unaffected, and that even if such a restriction were being imposed, it could be justified by reference to the public order and public safety provisions of s.19 of the Constitution; and (b) that the owners of fast launches had no positive right provided by statute to operate them at night and that there was thus no constitutional objection to their being prevented from so operating them by a piece of subsidiary legislation.

**Held**, allowing the appeal:

(1) The Stipendiary Magistrate had erred in holding that r.117J of the Port Rules was in its entirety *ultra vires* the Port Ordinance, and, on that basis, dismissing the charge. While the purported right to confiscate vessels involved in a breach of r.117 of the Port Rules and the purported extension of the operation of these rules to the territorial waters of Gibraltar were *ultra vires*, they could be severed from the rest of the Rules, which still applied, as excising the offending parts did not affect the efficacy of the measure as a whole; the court would not go out of its way to sever more of a provision than was necessary to render it *intra vires* (para. 44; para. 63).

(2) The purpose of the fast launches rules was not merely to curb illegal traffic in drugs; they were also designed to maintain order in, and control traffic into and out of, the port (both stated aims of s.19 of the Port Ordinance, which granted authority to the Governor to make rules subsidiary to the Ordinance). The severance of the purported application of the rules to Gibraltar’s territorial waters, as well as to the port, could therefore not be said to remove all effect from the Rules (paras. 63–65).

(3) The fast launches rules did not offend s.13 of the Constitution; they did not restrict the freedom of movement of those owning fast launches, merely the movement of the launches themselves. As no right to operate fast launches was enshrined in statute, the rules could not be said to take away a right. They were in the interests of public order (a justification for placing restrictions on freedom of movement provided in the Constitution, s.13(3)(d)(i)), and validly made under s.19 of the Port Ordinance; they were thus not inconsistent with or in contravention of s.13 of the Constitution (para. 66; para. 69).

**Cases cited:**

- (1) *Att.-Gen. v. Ernest Augustus of Hanover (Prince)*, [1957] A.C. 436; [1957] 1 All E.R. 49, observations of Viscount Simons applied.
- (2) *Att.-Gen. v. Lombard*, 1979 Gib LR 47, observations of Spry, C.J. applied.
- (3) *Att.-Gen. v. Wilts. United Dairies Ltd.* (1922), 91 L.J.K.B. 897; [1922] All E.R. Rep. Ext. 845, applied.
- (4) *Att. Gen. (Canada) v. Hallet & Carey Ltd.*, [1952] A.C. 427; [1952] 1 T.L.R. 1408, referred to.
- (5) *Barber v. Manchester Regional Hosp. Bd.*, [1958] 1 W.L.R. 181; [1958] 1 All E.R. 322, applied.
- (6) *Boaler, In re*, [1915] 1 K.B. 21; [1914–15] All E.R. Rep. 1022; (1914) 83 L.J.K.B. 1629, applied.
- (7) *Carltona Ltd. v. Works Commr.*, [1943] 2 All E.R. 560, applied.
- (8) *Chester v. Bateson*, [1920] 1 K.B. 829; (1920), 122 L.T. 684; 36 T.L.R. 225; 89 L.J.K.B. 387, applied.
- (9) *Customs & Excise Commrs. v. Cure & Deeley Ltd.*, [1962] 1 Q.B. 340; [1961] 3 All E.R. 641, observations of Sachs, J. applied.
- (10) *Daymond v. South West Water Auth.*, [1976] A.C. 609; [1976] 1 All E.R. 39, applied.
- (11) *Dunkley v. Evans*, [1981] 1 W.L.R. 1522; [1981] 3 All E.R. 285; (1981), 125 Sol. Jo. 843, *dictum* of Ormrod, L.J. applied.
- (12) *Fielding v. Thomas*, [1896] A.C. 600; (1896), 65 L.J.P.C. 103; 75 L.T. 216; 12 T.L.R. 548, referred to.
- (13) *Great West Saddlery Co. v. R.*, [1921] 2 A.C. 91; [1921] All E.R. Rep. 605; (1921), 125 L.T. 136; 37 T.L.R. 436, referred to.
- (14) *Initiative & Referendum Act, Re*, [1919] A.C. 935; (1919), 88 L.J.P.C. 143; 121 L.T. 651; 35 T.L.R. 630, referred to.
- (15) *Kruse v. Johnson*, [1898] 2 Q.B. 91; [1895–9] All E.R. Rep. 105; (1898), 67 L.J.Q.B. 782; 78 L.T. 647; 14 T.L.R. 416, referred to.
- (16) *McEldowney v. Forde*, [1969] 3 W.L.R. 179; [1969] 2 All E.R. 1039; [1970] N.I. 11, applied.
- (17) *MacFisheries Ltd. v. Coventry Corp.*, [1957] 1 W.L.R. 1066; [1957] 3 All E.R. 299; (1957), 55 L.G.R. 544, applied.
- (18) *Mwau, Re*, [1985] LRC (Const) 444, referred to.
- (19) *Newcastle Breweries Ltd. v. R.*, [1920] 1 K.B. 854; (1920), 18 L.G.R.

SUPREME CT.

VINET v. CORTES (Kneller, C.J.)

781; 84 J.P. 125; 89 L.J.K.B. 392; 123 L.T. 58; 36 T.L.R. 276, observations of Salter, J. applied.

- (20) *Queen's Representative's Ref.*, [1985] LRC (Const) 56, referred to.
- (21) *R. v. Big M Drug Mart Ltd.*, [1986] LRC (Const) 322, referred to.
- (22) *R. v. Customs & Excise Commrs., ex p. Hedges & Butler Ltd.*, [1986] 2 All E.R. 164, applied.
- (23) *R. v. Halliday*, [1917] A.C. 260; [1916–17] All E.R. Rep. Ext. 1284; (1917), 86 L.J.K.B. 1119; 116 L.T. 417; 33 T.L.R. 336, *dictum* of Lord Shaw and observations of Lord Wrenbury applied.
- (24) *Ross v. Moss*, [1965] 2 Q.B. 396; [1965] 3 W.L.R. 416; [1965] 3 All E.R. 145, applied.
- (25) *Shanahan v. Scott*, [1957] A.L.R. 171; (1957), 96 C.L.R. 245; 31 A.L.J. 94, applied.
- (26) *Sydney Municipal Council v. Campbell*, [1925] A.C. 338; [1924] All E.R. Rep. Ext. 930; (1924), 94 L.J.P.C. 65; 133 L.T. 63, referred to.
- (27) *Utah Constr. & Engr. Pty. Ltd. v. Pataky*, [1966] A.C. 629; [1966] 2 W.L.R. 197; [1965] 3 All E.R. 650, applied.
- (28) *Whitehead v. Haines*, [1965] 1 Q.B. 200; [1964] 3 W.L.R. 197; [1964] 2 All E.R. 530, applied.

**Legislation construed:**

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.11(2): The relevant terms of this sub-section are set out at para. 33.

s.13(1): The relevant terms of this sub-section are set out at para. 32.

Interpretation and General Clauses Ordinance (1984 Edition) s.2: The relevant terms of this section are set out at para. 14.

Port Ordinance (1984 Edition), s.2: The relevant terms of this section are set out at para. 14.

s.19: The relevant terms of this section are set out at para. 17.

Port Rules (1984 Edition), r.2, as amended by Port (Amendment) Rules 1986: The relevant terms of this rule are set out at para. 16

r.117J: The relevant terms of this rule are set out at para. 21.

*K.W. Harris, Senior Crown Counsel*, and *J.M.P. Nuñez, Crown Counsel* for the appellant;

*C. Finch* for the respondent.

1 **KNELLER, C.J.:** The opinion of the Supreme Court was sought by the Crown on these two questions:

(a) Was the Stipendiary Magistrate was correct in law in holding that r.117J of the Port Rules was *ultra vires* the Port Ordinance, and, on that basis, dismissing the charge following the defence submission of no case to answer?

(b) Whether the Port (Amendment) Rules 1986, amending the Port Rules,

## THE GIBRALTAR LAW REPORTS

1988–90 Gib LR

were *ultra vires* the Port Ordinance, either in whole or in part, and s.19 of the Port Ordinance in particular?

2 These questions come before this court in this way. They are at the end of this case stated by the learned Stipendiary Magistrate of the City in respect of his adjudication on them on May 18th, 1987. He was dealing with a charge laid against Jose Manuel Rodriguez Cortes by P.C. No. 145 Louis Vinet.

3 The statement of offence was: “Operating a fast launch between the hours of 10 p.m. and 7 a.m. contrary to rr. 117J(1) and 117O(1) of the Port Rules” and the particulars of that offence alleged that the respondent “. . . on the 1st day of January 1987 operated a fast launch, namely, the *Tiburon* in the Port of Gibraltar at 5.30 hours, that is between the hours of 10 p.m. and 7 a.m.”

4 Cortes pleaded not guilty to this. Mr. Harris, the Senior Crown Counsel, represented the Constable, and Mr. Finch the respondent, just as they have done in this court. The trial lasted four days in the Stipendiary Magistrate’s Court.

5 The prosecution proved beyond any reasonable doubt that the launch *Tiburon* left the marina at about 5.05 p.m. on December 31st, 1986 for the bay with three men on board and that it arrived back at the reporting berth at 5.30 a.m. on January 1st, 1987 with two Gibraltar men on board, one of whom was the respondent, who was steering the launch.

6 Detective-Insp. Rodriguez hailed the two aboard the *Tiburon* and ordered them to stop, and they obeyed him by mooring the *Tiburon* beside the reporting berth. Cortes admitted that he had left Gibraltar on the launch in the afternoon of the day before. He then added: “Tito Palao sent me out with this launch. Any questions should be put to him. He is the owner.”

7 The *Tiburon* is 33.2 ft. overall in length. It is fitted with two Mercury V8 inboard/outboard petrol engines, with a combined power output of 660 b.h.p.

8 So stood the case in the subordinate court. Mr. Finch submitted there was no case to answer because, in summary form:

(a) the evidence did not prove the *Tiburon* was a fast launch;

(b) the particulars disclosed no offence because they alleged that the respondent operated the launch between 10 p.m. on December 31st, 1986 or January 1st, 1987 and the rules were not in force until midnight on December 31st, 1986;

(c) the rules were *ultra vires*; and

(d) the rules were unconstitutional.

SUPREME CT.

VINET V. CORTES (Kneller, C.J.)

9 The Stipendiary Magistrate ruled that:

(a) the particulars (which were proved to the required standard) alleged that the respondent operated the launch at 5.30 a.m. on January 1st, 1987 near the reporting berth which was within the prohibited time and area;

(b) the launch was beyond any reasonable doubt a fast launch according to the definition of a fast launch in the rules;

(c) every rule, including r.117J, of the Port (Amendment) Rules 1986 was *ultra vires*; and

(d) if r.117J were *intra vires* it did not offend s.13 or any other provision of the Constitution.

10 The Magistrate explained shortly why he found r.117J of the Port (Amendment) Rules 1986 *ultra vires*. The limits of the Port of Gibraltar are set out in the Schedule to the Ordinance. The Governor is empowered by s.3 of the Port Ordinance to vary those limits but he has not done so. The port is made up of Port Waters and territorial waters (which are defined in the Interpretation and General Clauses Ordinance) and these are not synonymous. The Port Ordinance does not enable the Governor or the Captain of the Port to legislate in matters concerning territorial waters because they are outside the port. The Magistrate did not give reasons for finding all the other rules in the Port (Amendment) Rules 1986 *ultra vires*.

11 There were two reasons for the promulgation of these rules for fast launches put before the court. The respondent alleged that they were designed to help the Gibraltar and Spanish authorities in their battle against those who run drugs between Morocco, Spain and Gibraltar. The launches are too fast for the craft that the Gibraltar and Spanish authorities have. They are painted black and are unmarked so that they cannot be identified if they are surprised at night in the Straits or in the Bay of Gibraltar. They slink in and out of Gibraltar under cover of darkness, and by day rest up in the port. There had been a "near miss" in the way of international incidents recently when one such launch zoomed into port just ahead of its pursuers in Spanish police launches. None of these allegations was admitted by the respondent, of course, but that was, he claimed, what the rules were all about.

12 What does this curfew do to check that? It was unclear, but if it were effective it would mean, I suppose, that the fast launches would have to leave before 10 p.m., accomplish their mission and wait till daybreak before berthing in the port. This would mean a minimum period of nine hours out of the port which would cause fuel problems if they kept on cruising and give the Spanish authorities greater opportunities of arresting them if they loitered in Spanish or, perhaps, Gibraltar waters.

13 The appellant, however, denied that that was the only ill the fast

launches rules were to cure. In addition to trying to ensure that the port was not used by fast launches taking part in the dangerous drugs run, there was the fact that the Customs, Police and Port Department Officers could not cover adequately all areas of the Port at all hours; the curfew was necessary to help them in their battle against those who use the launches in their nefarious trades.

14 The Port Ordinance is “*An Ordinance to consolidate the law governing the use of the port of Gibraltar and matters connected therewith.*” The “bay of Gibraltar,” “port of Gibraltar,” “port” and “Port Waters” are defined in s.2 of the Ordinance. “Territorial waters” are not defined in the Ordinance, the principal rules, or the rules but they are defined in the Interpretation and General Clauses Ordinance. They are “. . . such part of the sea adjacent to Gibraltar as is subject to the dominion of Her Majesty.”

15 The Port (Amendment) Rules 1986 (“the Rules”) are in Legal Notice No. 114 of 1986 published in the second Supplement to the *Gibraltar Gazette* on November 27th, 1986. They are rules expressed to be made by the Governor in exercise of the powers conferred on him by s.19 of the Port Ordinance “and of all other enabling powers.” They were to come into operation on January 1st, 1987. So, for those who are close readers of Legal Notices, there were 34 days’ advance warning of these new rules.

16 Rule 2 amended r.2 of the Port Rules (“the principal Rules”) by inserting this definition in its appropriate alphabetical position:

“‘fast launch’ means a vessel which:

- (i) does not exceed 50 feet length overall and is fitted with or is intended to be driven by a petrol engine that is, or with petrol engines that together are capable of developing 200 or more brake horse-power . . .”

17 According to s.19 of the Ordinance:

“[T]he Governor may make rules for prescribing anything which may be prescribed under this Ordinance and generally for carrying [it] into effect and in particular but without prejudice to the generality of the foregoing may make rules with respect to any of the following matters:—

- (a) the management of the port and the maintenance of order therein;
- (b) the regulation and control of all vessels entering or leaving the port and their movements in the port . . .
- (e) the registration, inspection and control of vessels other than shops carrying or intended to carry passengers and the fees to

SUPREME CT.

VINET V. CORTES (Kneller, C.J.)

be paid in respect of such registration, licensing and inspection . . .

- (j) providing that any contravention of a rule made under this section shall be a summary offence, and providing for a penalty of imprisonment for a term not exceeding six months or a fine not exceeding £500, or both, on conviction for any such offence;
- (ja) providing for such other matters as are reasonably necessary for or incidental to the due administration of this Ordinance.”

These are very liberal powers.

18 Returning to the principal Rules we discover that they are amended by inserting “Part IVA: Fast Launches” immediately after r.117. The rules in this new Part apply only to fast launches and, as regards fast launches, if there is any conflict between the provisions of this Part and any other provisions in the Rules, the provisions of this Part prevail: I think I detect a certain determination there to make the Part IVA rules stick.

19 The rules of Part IVA of the principal Rules are then numbered 117A to 117O inclusive and the principal Rules are increased by the addition of Schedule 2A. Rules 117A to 117O deal with the licensing of fast launches, the forms and fees for doing so, the revocation of licences, the right of appeal, the authorized use of fast launches, their change of ownership, their identification, and so forth.

20 By the rules of this Part it is the Captain of the Port who grants or refuses to grant the owner of a fast launch a licence to operate it out of the Port of Gibraltar and in the territorial waters of Gibraltar. He has to exercise his discretion in doing so and may grant one, subject to such conditions as he thinks necessary or desirable, or he may revoke one. A person aggrieved by his refusal to grant, or revocation of, a licence may appeal to the Governor whose decision is final (r.117E).

21 But among these rules is r.117J which reads thus:

“117J(1) No person shall operate a fast launch in the port of Gibraltar or in the territorial waters of Gibraltar between the hours of 10 p.m. and 7.00 a.m.

(2) No person shall moor a fast launch at the Auxiliary Camber or at Montagu Basin.”

It is a penal rule because a person guilty of an offence under this Part IVA of the principal Rules is liable on summary conviction to imprisonment for three months and to a fine of £500: see r.117O(3). He will not be deemed guilty of the offence, however, if he proves the launch was taken without his knowledge or consent, or that he took all reasonable steps to



prevent it being taken and told the Captain of the Port of its having been taken as soon as practicable. That is in r.117O(2). Thus it can be seen that the penalties are mild and that the rules provide defences for apparent offenders.

22 Just over six months after the Port (Amendment) Rules 1986 amended the Port Rules by amending r.2 and inserting Part IVA, the Port (Amendment) Rules 1987 amended the 1986 Rules by deleting references to “the territorial waters of Gibraltar” and revoking sub-r.(6) of r.117B which, it will be recalled, empowered the court to call upon the owner or anyone claiming to be interested in a fast launch used in any offence under the principal Rules to show cause why it should not be forfeited or destroyed or dealt with in such other manner as the court might order.

23 Why were these deletions and that revocation made? Mr. Harris answered this conundrum by explaining that the Crown conceded that those were *ultra vires* the Ordinance and, in particular, its s.19. So the learned Stipendiary Magistrate was right when he held on May 18th, 1987 that the Governor could not make rules under s.19 of the Port Ordinance for “the territorial water(s)” of Gibraltar, and that is why the rules were amended in June 1987.

24 Mr. Harris contends, however, that these references to the “territorial waters” before June 1987 in Part IVA of the principal Rules did not affect the remainder of those Part IVA rules nor the statement and particulars of offence to which Cortes pleaded not guilty. I shall return to that later.

25 He and Mr. Finch joined in asking this court to set out its opinion on whether the Port Rules that purport to affect fast launches are contrary to the Constitution despite the fact that this is a point of law that was not greatly canvassed before the magistrate. They agreed that this issue is apparent on the facts of the case and that no further evidence could alter it. They cited *Whitehead v. Haines* (28) and *Ross v. Moss* (24) for the propriety of taking this course and I declared that I would hear their submissions on it and rule if I found that there was sufficient material on which I could base an opinion, and if it was appropriate to do so.

26 So then there were two main issues for them to tackle. First, are the fast launches rules *ultra vires* the Port Ordinance? Secondly, are they contrary to the Constitution?

27 The appellant’s claim is that these rules are for the sake of good order in the port: to achieve that, there is a need to control these fast launches and their use. This would include making sure that they do not illegally transport ammunition, explosives, or drugs in the port, or use the port as a haven before and after doing so outside it. There is no one from the Customs Department on duty in the port between 10 p.m. and 7 a.m., so that is why those hours are chosen.

SUPREME CT.

VINET V. CORTES (Kneller, C.J.)

28 There are in other pieces of legislation from time to time restrictions placed on the use of parts of Gibraltar at night by motorists (the tunnel near the Caleta Palace Hotel), by aircraft (the aerodrome) and, under these rules, anyone propelling a vessel solely by oars in the port (r.106) without permission of the Captain of the Port unless he is entering to take up a berth or leaving the port for a *bona fide* voyage.

29 These rules prohibit absolutely the movement of fast launches between 10 p.m. and 7 a.m. It is, however, for the Governor, under the Ordinance, to make rules that are absolute or qualified for the control and management and good order of the port. The subject can still move during those hours in and out of the port in a ship, yacht or launch that is not a fast one. The rules are supplemental to, incidental to and consequential on the provisions of the Port Ordinance and so are *intra vires* (*Daymond v. South West Water Auth.* (10) ([1976] 1 All E.R. at 40)).

30 The respondent maintains that the rules are *ultra vires* the Ordinance and, broadly put, Mr. Finch's submissions are that:

(a) they deal with the non-use of the port when the Ordinance is a consolidating one to regulate the use of the port;

(b) they cut down the right present for the past 26 years of those in charge of fast launches to use the port;

(c) they discriminate against those in charge of fast launches as opposed to those in charge of any other launch;

(d) they do more than provide machinery for effecting the provisions of the Ordinance;

(e) they debar the subject from appealing to the courts from the decision of the Captain of the Port to refuse or to revoke a licence (*Customs & Excise Commrs. v. Cure & Deeley Ltd.* (9) ([1962] 1 Q.B. at 396, *per Sachs, J.*));

(f) they are a wholly unwarranted arrogation of powers which are in no sense incidental or supplemental to the statutory powers (*R. v. Customs & Excise Commrs., ex p. Hedges & Butler Ltd.* (22));

(g) they are for a purpose differing from those specified in the Ordinance (*Sydney Municipal Council v. Campbell* (26));

(h) their purpose and their effect are unconstitutional and so they are invalid even if they are *intra vires* (*R. v. Big M Drug Mart Ltd.* (21));

(i) they are unreasonable, partial, oppressive and made in bad faith, and are therefore invalid (*Kruse v. Johnson* (15) ([1898] 2 Q.B. at 99–100)); and

(j) deleting the references to territorial waters will not save the rules

because then their purpose is defeated. The term is not severable because it is too interwoven into the scheme (*Re Initiative & Referendum Act* (14)).

31 The next issue is whether or not r.117J(1) offended against the Constitution. The rule is set out at para. 21. In this court, Mr. Harris submitted this was not contrary to the Constitution. Or, if it were, then it was justifiable or justified.

32 The Constitution of Gibraltar is Annex 1 to the Gibraltar Constitution Order 1969 which commenced on May 30th, 1969. One of its provisions (s.13(1)) is that “no person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Gibraltar . . .” This is under its Chapter I which deals with the sections that protect the fundamental rights and freedoms of the individual. It does not create new rights. It prevents interference with existing ones (*Att.-Gen. v. Lombard* (2) (1979 Gib LR at 50, *per Spry, C.J.*)).

33 It is not absolute, however, for in s.11(2) this is found:

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) in the interests of defence, public safety, public order, public morality or public health . . .”

34 The submission that the rules are *ultra vires* the Constitution is based on the fact that:

(a) they are not laid before the House of Assembly to scrutinize, as their equivalent is laid before the House of Commons;

(b) they are devised by unelected people, namely the Governor and Attorney-General;

(c) they are meant to protect the interests of Spain;

(d) they are a restriction on the freedom of movement;

(e) they conflict with the international law of the right of passage in the territorial waters of Gibraltar; and

(f) r.117J is unfair because it is imprecise. It is not clear if it applies to someone in charge of a fast launch who takes it out of the port on December 31st, 1986 after 10 p.m. but before midnight and brings it back after midnight on December 31st/January 1st.

35 The law on these issues was carefully canvassed by Mr. Harris and Mr. Finch. Apart from *Att.-Gen. v. Lombard* (2), the cited authorities are mostly English. They are difficult to summarize and I shall just have to set them out in as clear a pattern as I can.

SUPREME CT.

VINET V. CORTES (Kneller, C.J.)

36 *Ultra vires* is simply the Latin for “beyond the powers of” and in law means beyond the powers or legal authority of a person or body. “Control” is not defined in the Ordinance or Rules but it is an ordinary English word and in this context means to exercise restraint or direction upon the free action of someone or something.

37 The House of Assembly makes the law in Gibraltar and it becomes the law when the Governor assents to it. The legislature by s.19 of this Ordinance leaves the rule-making to a lesser law-making authority, namely the Governor, who makes the rules to carry out the will of the legislature. The court construes subordinate legislation strictly and makes sure it is within the limits of s.19.

38 Suppose the enabling power is widely used? The rule or rules must still be capable of being related to the principles of the Ordinance and the enabling section. Thus a rule that impairs the liberty of the subject or imposes taxation or has retrospective effect would not be readily upheld (see *Chester v. Bateson* (8) and *Att.-Gen. v. Wilts. United Dairies Ltd.* (3)). Equally, if a wide power to make rules is there, the court will not lightly interfere (*McEldowney v. Forde* (16)). It would have to be shown that the rule-making party had gone outside the four corners of the Ordinance or had acted in bad faith. The point is this: the legislature commits to the executive the discretion to make these rules and no court can interfere with that discretion if it is *bona fide* exercised (*Carltona Ltd. v. Works Commr.* (7) ([1943] 2 All E.R. at 564)).

39 Where some provisions are *intra vires* and some *ultra vires*, the court will if possible uphold the *intra vires* ones if they can be separated (*Fielding v. Thomas* (12); *Re Initiative & Referendum Act* (14), and *Great West Saddlery Co. v. R.* (13)).

40 When construing rules, the court does so within the context of the enabling Ordinance so that if the latter provides for rules to be made for a specified purpose and they are said to be made for some other purpose then the rules will be void, but if they are not said to be made for any particular purpose then the court presumes that they are made for the purpose or purposes stated in the Ordinance and construes them accordingly (*MacFisheries Ltd. v. Coventry Corp.* (17)).

41 The court cannot delve into what led the Governor to make these rules. They are those he considers necessary or advisable. Should there be a purpose expressed then that is what they are for (*Att. Gen. (Canada) v. Hallet & Carey Ltd.* (4)).

42 That does not make him the sole judge of what his powers are or the way in which he might exercise them. The nature, objects and scheme of the legislation as a whole and then the area over which powers are given by the relevant section under which he purports to act have to be examined

to see if the rules are *intra vires* (*Customs & Excise Commrs. v. Cure & Deeley Ltd.* (9) ([1962] 1 Q.B. at 366–367, 369, *per Sachs, J.*)).

43 Whoever drafts the rules must avoid extending the scope or general operation of the Act. Rules are strictly ancillary to the Act. They may authorize the provision of subsidiary means of effecting what the statute enacts. They may cover what is incidental to carrying out its specific provisions. Rules that enlarge the purposes of the Act, or add new or different ways of carrying them out, departing from them or varying them are *ultra vires* (*Shanahan v. Scott* (25) (96 C.L.R. at 250); *Utah Constr. & Engr. Pty. Ltd. v. Pataky* (27); *R. v. Customs & Excise Commrs., ex p. Hedges & Butler Ltd.* (22)). The burden of proving that the rules are *ultra vires* is on the person asserting it (*Barber v. Manchester Regional Hosp. Bd.* (5)).

44 If it is possible to sever an invalid part of an order, rule or regulation made in exercise of a power conferred by an Act of Parliament from a valid one, that is to say they are not inextricably interconnected, the court is entitled to disregard the invalid part and leave the rest intact. The court “should not strive officiously to kill to any greater extent than it is compelled,” as Ormrod, L.J. said in *Dunkley v. Evans* (11) ([1981] 3 All E.R. at 287).

45 Outside the terms of the statute there is no limit placed upon the acts that regulations may authorize to achieve the defined object (*R. v. Halliday* (23) ([1917] A.C. at 307, *per Lord Wrenbury*)). The question is whether those rules are within the legislative powers delegated by the Ordinance. Test them by asking if they are rules capable of being rules for controlling the movement of ships in the port. If the answer is “yes,” they are valid. The Governor is the sole judge of their expediency. Should any part of them, however, deprive the subject of the benefit of an established rule (*e.g.* that the Crown may not requisition a subject’s goods without payment), unless precise language employed in the Act authorizes it, it is invalid (*Newcastle Breweries Ltd. v. R.* (19) ([1920] 1 K.B. at 866, *per Salter, J.*); *Chester v. Bateson* (8)).

46 Turning to the authorities on the constitutional point, they would be relevant to whether the rule or rules restricted the subject’s freedom of movement, and, if so, whether they were justifiable and justified. The legislature may contemplate circumstances in which a subject could be deprived of that right and enact appropriate legislation (see *Re Mwau* (18)).

47 The Supreme Court has original jurisdiction to hear and determine any application by someone who alleges that a right is being or is likely to be contravened and to give such directions as are necessary to enforce it (s.15(2) of the Constitution of Gibraltar). The section has to be examined in its widest context, namely, the preamble, the law before it came into

SUPREME CT.

VINET V. CORTES (Kneller, C.J.)

force, any other order or statute *in pari materia* and the mischief that it was intended to remedy (*Att.-Gen. v. Ernest Augustus of Hanover (Prince)* (1) ([1957] A.C. at 461–463, *per* Viscount Simonds); *Queen’s Representative’s Ref.* (20) ([1985] LRC (Const) at 67–74)).

48 The judiciary must not approach this task “in a spirit of compliance rather than of independent scrutiny” (*R. v Halliday* (23) ([1917] A.C. at 287, *per* Lord Shaw)).

49 The test would seem to be:

(a) whether it is a necessary, or even reasonable, way to aid in securing the public defence, safety, order, morality or health to give power to the Governor to forbid any person to operate a fast launch in the port between 10 p.m. and 7 a.m. (*Chester v. Bateson* (8) ([1920] 1 K.B. at 833)); or

(b) whether it is an extreme disability that can be inflicted only by direct enactment of the legislature itself, and that so grave an invasion of the rights of all subjects was not intended by the legislature to be accomplished by rules made by the Governor, *e.g.* do the rules take away the rights of access of the Queen’s subjects to the courts of justice? (*In re Boaler* (6) ([1915] 1 K.B. at 36)).

50 That concludes a review of the authorities that Mr. Harris and Mr. Finch put before the court. It is time now to look more closely at the Ordinance and the Rules.

51 The Port Ordinance was No. 16 in the list of the 1960 Ordinances. It was assented to on July 14th, 1960 and came into force on August 15th of the same year. Its provisions do not apply to any ship belonging to or under charter to Her Majesty or the Government. The Captain of the Port is appointed by the Governor and the Captain of the Port is to have the management and control of the port. All vessels in Port Waters are under his control. A vessel includes every ship or boat and any other description of vessel used in navigation. The Port of Gibraltar includes the water and adjacent foreshore of what is commonly known and recognized as the port, roadstead and anchorage ground of Gibraltar, Port Waters, Waterport, its Wharf and the North Mole.

52 Pilotage is compulsory in any area in which the Governor by notice declares that it shall be so but there are exceptions to that provision, and others may be set out in similar declaratory notices; the Captain of the Port may exempt others generally or specifically.

53 A ship may not embark or disembark passengers or goods at any place other than one authorized by the Captain of the Port save in accordance with such conditions as the Governor may prescribe.

54 An owner of a vessel must give a police officer or member of the Port Department any information which may lead to the identification and

apprehension of any master, engineer or person in charge of a vessel, if he is asked for it.

55 So the Ordinance enjoins those in charge of vessels, ships and boats that are not the property of, or on charter to, Her Majesty or the Government to obey various directions given by the Governor or the Captain of the Port. The Ordinance also stipulates that failure to do so is an offence, and sets out the maximum penalty for such default.

56 Thus it is a fairly comprehensive Ordinance in itself. It concludes, however, in s.19, by declaring that the Governor may make rules for prescribing anything which may be prescribed under this Ordinance. That is one limb. He can make rules which generally carry into effect the Ordinance. That is another limb, which means that he can make rules that carry into effect the Ordinance even if they relate to matters not prescribed in it. The third limb is that, without prejudice to the other two, he can also make rules in particular for matters set out in 13 other paragraphs. Only two need be set out here. They are:

- “(a) the management of the port and the maintenance of order therein;
- (b) the regulation and control of all vessels entering or leaving the port and their movements in port . . .”

There then follow the Port Rules. 173 of them. Among other things they deal with the arrival, report, movement, berthing and licensing of vessels, general port regulations, passenger ship certificates, open motor boats, water boats, hulks and lighters, dangerous goods or explosives, control of port areas and port charges. They are almost all-embracing rules.

57 Thus masters in order to avoid delay or accident must take the way off their ships when the pilot launch is approaching. Pilot ladders must be of modern pattern. No vessel may anchor in the fairway of the port without the consent of the Captain of the Port. Fishing is prohibited in certain areas. When men of war enter or leave the port other vessels may not do so. Some anchorages are prohibited to everyone. All vessels are to proceed at a moderate speed. Due notice must be given of a ship's departure. Any authorized person may board and inspect any vessel at any time. Refuse may not be dumped in the port. Vessels may not be repaired in the port without the permission of the Captain. A vessel may not carry more passengers than it is licensed to carry. The Captain of the Port may by notice prohibit any vehicle or trailer from parking in certain areas of the port.

58 These rules go so far, in fact, as to deal with where people may bathe, smoke, and keep dogs, reptiles and wild animals in the port.

59 Part IVA, rr. 117A and 117O and Schedule 2A deal with fast launches. The Captain of the Port licenses them. The applicant must fill in

SUPREME CT.

VINET V. CORTES (Kneller, C.J.)

Form L/I and reveal his name, age, nationality and telephone numbers. He must also indicate if he has been convicted of an offence against the Imports and Exports Ordinance, the Merchant Shipping Ordinance, the Port Ordinance or the Drugs (Misuse) Ordinance. That suggests that a certain type of fast launch owner may not be granted a Gibraltar licence for one. The Rules provide for his licence to be revoked by the Captain of the Port if the launch is used by the owner or person in charge of it for offences against those Ordinances. The licence holder may authorize someone to take charge of the launch in his absence for a single voyage provided that the latter has not at any time been convicted of an offence against the Imports and Exports Ordinance or the Drugs (Misuse) Ordinance and sentenced to a term of imprisonment.

60 Changes of ownership have to be notified to the Captain of the Port. Identification of a fast launch is to be made easy by clearly marking the launch with her name, port of registry or licence and keeping them clear. Arrivals and departures must be reported.

61 And that is enough to indicate the extent and framework of the Rules. Going back to the particulars of the charge, it will be recalled that they alleged that the respondent “operated a fast launch . . . in the Port of Gibraltar at 5.30 hours, that is between the hours of 10 p.m. and 7 a.m.” It is impossible to operate a fast launch between 10 p.m. and 7 a.m. on any one day, so the phrase “between the hours of 10 p.m. and 7 a.m.” should have been left out or deleted. The respondent did not complain of this: it was clear what the alleged offence was.

62 The submission that such an offence could not be committed before 10 p.m. on January 1st, 1987 is insupportable. These “fast launch” rules came into force just after midnight on January 1st, 1987 so from then until just after 7 a.m. the same day the *Tiburón* could not legally be operated in the port. It could be operated legally there between 10 p.m. and midnight on December 31st, 1986, but not so between the same hours the next night.

63 These Rules were *ultra vires* the Port Ordinance when they purported to provide for the forfeiture of a fast launch operated in such circumstances, but the Port (Amendment) Rules 1987 put that right. And r.117J(1) was, as the learned Stipendiary Magistrate held, *ultra vires* the Ordinance if the phrase “or in the territorial waters of Gibraltar” were not deleted. He was not asked to “blue pencil” it, so to speak, but he could have done, as the cited authorities reveal. And, in my respectful judgment, he should have done. There is no evidence that these Rules were made in bad faith.

64 Although it was not prayed in aid, it is clear from the references to the Imports and Exports Ordinance and the Drugs (Misuse) Ordinance in the application form for a licence for the use of a fast launch, and from the



prohibition of the holder of such a licence authorizing anyone convicted of an offence against either Ordinance to operate his fast launch, that it is not only the drug-running trade which these rules seek to neutralize between 10 p.m. and 7 a.m.

65 When the structure and provisions of the Ordinance and its Port Rules are analysed, as I have endeavoured to do, it is in my judgment clear that r.117, the curfew one, was well within “the law governing the use of the Port of Gibraltar and matters connected therewith” (the preamble), the provisions of the Ordinance itself, and in particular the Captain of the Port’s power to control such vessels in the port (s.5). Rule 117 generally carries the Ordinance into effect and in particular relates to:

- “(a) the management of the port and the maintenance of order therein; [and]
- (b) the regulation and control of all vessels entering or leaving the port and their movements in the port . . .”

as specified in s.19 of the Ordinance.

66 The fast launches rules do not, in my view, restrict the general right of the public to use the foreshore for access to the sea for navigation, fishing or movement in and out of the port in anything but fast launches—and then only their operation in the port between 10 p.m. and 7 a.m.

67 The subject’s right of access to the courts to challenge the decision of the Governor in an appeal from the Captain of the Port’s refusal to grant a licence to operate a fast launch, or from his revocation of such a licence, may be exercised in appropriate cases by asking for judicial review of it.

68 There is not much legislation by rules under enabling powers in ordinances here but as usual the law has to safeguard the rights and interests of the public threatened by the acts of certain persons. There is some weighing to be done in keeping that balance. Once the power of forfeiture and the reference to territorial waters are ignored, the remainder of the fast launches rules are, in my opinion, *intra vires* the Port Ordinance.

69 Are the fast launches rules unconstitutional? I elect to answer this question of law because counsel have asked me to do so and it is clearly raised in the record and no further evidence could alter the answer, or so I think. Basically, they affect the movement of these launches overnight, and not so much that of those who own them. There is no statutory right vested in anyone to operate a fast launch in the port during that period, so it is incorrect to speak of such a right being taken away by these rules. Nevertheless they restrict the freedom of movement of certain people (about 70 to 80) in these launches for those nine hours. Those who wish to go cruising or fishing, or to visit Sotogrande in these launches during

SUPREME CT.

VINET V. CORTES (Kneller, C.J.)

those hours must go in some other type of vessel. Those who wish to test the engines of their fast launches at sea will have to do so before 10 p.m. or after 7 a.m., or do so between those hours and wait until 7 a.m. before returning into the port. These rules must be inconvenient for those who wish to operate fast launches in the port during those hours, but since they are clearly in the interests of public order and come under s.19 of the Ordinance I hold that they are not inconsistent with or in contravention of s.13 of the Constitution.

70 The consequence of all this is that the two questions which increased to three fall to be answered in this way:

(a) the learned Stipendiary Magistrate was incorrect in law in holding that r.117J of the Port (Amendment) Rules 1986 was *ultra vires* the Port Ordinance and erred in dismissing the charge following a defence submission of no case to answer;

(b) the Port (Amendment) Rules 1986, amending the Port Rules, are not *ultra vires* the Port Ordinance either in whole or in part, or s.19 of the Port Ordinance in particular; and

(c) the Port (Amendment) Rules do not offend against the Constitution.

*Questions answered accordingly.*

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