Neutral Citation Number: [2014] EWHC 490 (Ch)

Case No: I/A 5 OF 2013

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 27/02/2014

Before :

MR JUSTICE BIRSS

- -

Between :

(1) BARCO DE VAPOR B.V.
(2) ONDERWATER AGNEAUX B.V
(3) JOHANNES QUIRINIUS WOUTERIUS MARIA ONDERWATER
(Trading as JOINT CARRIER) **Claimants**
- and -
THANET DISTRICT COUNCIL **Defendant**

- -
- -

Andrew Henshaw QC and **Emily MacKenzie** (instructed by **Thomas Cooper**) for the **Claimants**
Simon Kverndal QC and **Philip Woolfe** (instructed by **the Defendant**) for the **Defendant**

Hearing dates: 11th, 12th, 16th and 17th December 2013

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HON. MR JUSTICE BIRSS

Mr Justice Birss :

Introduction

1. The long-distance transport of live animals for slaughter has been controversial for a long time. It is argued that a more humane approach would be to slaughter livestock at an abattoir relatively close to the farms on which the animals have been raised and that since meat can be transported over long distances without difficulty, the fact that the relevant market for the meat is a long distance away from the farm does not justify long-distance transport of livestock. Nevertheless the position today is that the long-distance transport of live animals for slaughter is lawful provided it complies with various regulations concerning animal welfare. It is a highly regulated area.

2. Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97 provides that a Competent Authority in a member state will have various obligations, including to ensure that appropriate arrangements are made for care and, if necessary, unloading and accommodation of animals and to take necessary emergency measures to safeguard welfare in the event of non-compliance with the Regulation by transporters. The Competent Authority in England is the Secretary of State for the Environment, Food and Rural Affairs, who delegates that authority to an agency of DEFRA called the Animal Health and Veterinary Laboratories Agency or AHVLA.

3. The claimants are engaged in the export of live animals from the United Kingdom to continental Europe. In 2012 they were exporting sheep through the port of Ramsgate in Kent. The port is owned and operated by the defendant, Thanet District Council (TDC). On 12th September 2012 there was an incident at the port. It involved live

animal exporters, the AHVLA, the port staff, certain councillors from TDC, the Police, a BBC camera crew and the RSPCA. Three sheep drowned and about forty sheep had to be humanely killed. The incident attracted considerable publicity.

4. Next day, on 13th September 2012, TDC decided to suspend the shipment of livestock from the port. The claimants applied for judicial review of that decision and sought an interim injunction lifting the ban. On 19th October 2012 Burton J, sitting in the Administrative Court, granted relief which lifted the ban on an interim basis. On 29th November 2012 TDC decided to lift the ban in any case and as a result there was no reason for the judicial review claim to continue. Both parties consented to a discontinuation of the judicial review claim.

5. The claimants also had a claim for damages caused by the ban. Although the ban in fact only lasted for about one month, that time of year was an important time for the claimants because it coincided with the Muslim festival of Eid. The claimants contended the ban had caused them to lose sums of the order of £1.5 million. The parties agreed to transfer the damages claim to the Chancery Division.

6. In December 2012 the RSPCA brought judicial review proceedings against DEFRA relating to the issues arising from this incident. The claim by the RSPCA failed. Permission was refused by Males J on paper in February 2013 and by Ouseley J at an oral hearing on 21st April 2013.

7. A case management conference in this action, now in the Chancery Division, took place on 19th March 2013. The issue of quantum was hived off to be dealt with at a later stage. The present trial concerns the issues of liability only.

8. The claimantsô case in outline is that the ban amounted to a restriction on the exporting of goods within the European Union in breach of Article 35 TFEU and cannot be justified under Article 36 TFEU or otherwise. One reason it cannot be justified is because the relevant legislation is Regulation EC 1/2005. The claimants contend that the ban is contrary to the Regulation and that since the Regulation exhaustively harmonises the law in the relevant area, the ban cannot be justified under Art 36.

9. The claimants go on to argue that TDCôs breach was sufficiently serious to give rise to State liability under the principle set out in Case C-479/93 ***Francovich v Republic of Italy*** [1995] ECR 1995 I-3843. The claimants also allege that the ban was a breach of section 33 of the Harbours Docks and Piers Clauses Act 1847. They argue that this breach is actionable as a breach of statutory duty, relying on the test for determining whether a statutory duty gives rise to a private law cause of action set out in ***X (Minors) v Bedfordshire CC*** [1995] 2 AC 633 at p731.

10. TDC denies liability. It accepts that the ban is a ñmeasure having equivalent effectò to a quantitative restriction on exports prohibited by Art 35 TFEU but it argues that the ban was justified under Art 36 TEFU. Moreover even if the ban could not be justified and was a breach of EU law, the breach was not sufficiently serious to give rise to liability under the ***Francovich*** principle. As regards the 1847 Act, TDC denies it acted in breach of that Act and denies that breach of that act would give rise to a claim for breach of statutory duty in any event.

Witnesses

11. At the trial I heard evidence from the following witnesses. First Mr Onderwater gave evidence. He is the third claimant. He is a Dutch national and owns and operates the first and second claimants, which are Dutch companies. He also operates as a sole trader running a business called Joint Carrier. The Joint Carrier business offers logistics services, transport of goods and animals, trade negotiation and organisation consultancy. The first claimant owns and operates a roll-on/roll-off vessel called the MV Joline. The Joline is a relatively small roll-on/roll-off ferry which was acquired by Mr Onderwater from the Russian military and converted in order to take this trade. The second claimant trades in livestock, meat and associated products.

12. Mr Onderwater was not involved in the incident on 12th September. His trucks had already been loaded onto the Joline on that day without incident. The consignment of sheep which gave rise to the events on 12th September belonged to a French company called SARL Roche. Nevertheless since the ban prevented all live exports from Ramsgate, his businesses were directly affected by it.

13. Mr Onderwater was a good witness.

14. The next witness was Mr Thomas Lomas. He describes himself as acting as a livestock consultant for several importers and exporters, including the claimants. Mr Lomas has worked for many years in the live animal export trade and is clearly very experienced both with the practical aspects of the trade and the various legal issues it has given rise to over the years. A company called Hedley Lomas plays a part in the circumstances of this case. Hedley Lomas was the name of Mr Lomasô father. Mr Lomas is clearly closely involved with the Hedley Lomas company although he denied operating under that name. He does however write on Hedley Lomas notepaper and use a Hedley Lomas email address on occasions.

15. Mr Lomas explained his interactions with TDC in the period up to and including September 2012. The sheep which came to Ramsgate on 12th September had been put onto the trucks at a facility in Northamptonshire run by another company associated with Mr Lomas called Channel Livestock Ltd. Mr Lomas was not present in Ramsgate on 12th September but he was contacted by telephone on that day by Mr Ziolkowski and he sent emails to the AHVLA as the events unfolded.

16. Mr Lomas was a very combative witness and clearly feels very strongly and personally about this case and the wider questions relating to live animal exports. It is not a popular trade. Mr Lomas is firmly convinced that the incident on 12th September was engineered cynically by the RSPCA in order to support its case against live animal exports. Mr Lomas sought to tell the truth as he saw it but the strength of his feelings means that I am wary of placing too much weight on his testimony.

17. Mr Peter Ziolkowski works as an agent and organiser in the live animal export trade. He has many yearsô experience handling live animals. He was present in Ramsgate port on 12th September. He gave evidence about what happened. He said that when the problems first occurred, the AHVLA refused to permit him to put his contingency plans into action and that it appeared to him that the refusal was at the instigation of the RSPCA. A number of detailed points emerged in Mr Ziolkowskiôs cross-

examination which had not been set out in his witness statements but they did not undermine his credibility as a witness or the reliability of his evidence. Mr Ziolkowski was a good witness.

18. Mr Robert Brown is the Harbour Master at the port of Ramsgate. He described the functioning of the port. He was not present on 12th September until he arrived at 17:00. He was a good witness.

19. Mr Mark Seed is the Director of Operations at TDC. He took the decision to impose the ban. He joined the council in 2004 and took on his current role, which included responsibility for the port, in April 2011. He explained the circumstances in which the port came to be used for the shipment of live animals and the history of that use. He explained the decision taken on 13th September to impose the ban. Mr Seed gave his evidence honestly, seeking to explain what happened from his point of view. However he was defensive at times and I am not convinced I can always rely on his testimony.

The law

20. The two key elements of national legislation are section 33 of the 1847 Act and section 40(1) of the Harbours Act 1964. They are as follows

> 1847 Act
>
> **33. Harbour, dock, and pier free to the public on payment of rate.**
>
> Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers.
>
> 1964 Act
>
> **40.— Conditions as to use of harbour services and facilities provided by certain harbour authorities.**
>
> (1) A harbour authority shall have power to make the use of services and facilities provided by them at a harbour which, in the exercise and performance of statutory powers and duties, they are engaged in improving, maintaining or managing subject to such terms and conditions as they think fit except with respect to charges as to which their discretion is limited by a statutory provision (whether by specifying, or providing for specifying, charges to be made, or fixing or providing for fixing charges, or otherwise).

21. It is common ground that TDC is a harbour authority for the purposes of both sections. The special Act referred to in s33 is the Act which applies the 1847 Act to a

particular port (ss1 and 2 of the 1847 Act). In this case it is the Ramsgate Corporation Act of 1934 (as amended by the Ramsgate Harbour Revision Order 1979).

22. In ***R v. Coventry City Council ex parte Phoenix Aviation and other*** [1995] 3 All ER 37, the Divisional Court had to determine the lawfulness of bans on exports of livestock through Coventry Airport, the ports of Dover and Plymouth. One argument was that s.40 of the 1964 Act gave the ports a discretion to refuse to permit the trade. The Court did not agree, finding that s40 was subservient to s33. The Court held that the effect of s33 of the 1847 Act was to ensure that s40 of the 1964 Act could not be invoked inconsistently with the harbour authorityôs overriding duty under s.33. The key passage is in the judgment of the court from p53b to p54j. I will not set it out. The claimants submit that this shows that the harbour authority has no discretion to prohibit any category of exports and cannot rely on s40 to support the ban. Separately the claimants also argue that if, contrary to their primary case on this point, TDC had any discretion under s33, it could not lawfully be exercised in a manner inconsistent with Article 35 TFEU.

23. TDC accepts that ***R v. Coventry City Council*** shows that s40 cannot be used as a backdoor means of closing the port to those who have a right of access under s33, but submits that nevertheless the powers under s40 are conferred to enable the port authority to carry out its public service and to regulate the operation of its port in the light of the duty of care it owes to its users. That duty includes a duty to take reasonable care to ensure that its premises are reasonably fit to receive and hold cargo.

24. TDC argues that (i) s33 is expressly qualified as being subject to certain other provisions and that those provisions provide that the port may make byelaws, for example, concerning dangerous goods and for preventing damage or injury to any goods within the port; (ii) that dangerous goods may include animals which pose a danger to themselves and others in circumstances where facilities are inadequate to deal with them; and (iii) that the use of s40 of the Harbours Act 1964 for purposes similar to the ones for which byelaws may be made is not inconsistent with the duty imposed by s33 of the 1847 Act.

25. TDC also submit that the ban was not inconsistent with s33 insofar as emergency facilities were necessary for the safe and orderly conduct of the port and the welfare of animals being transported. TDC contends that it is a legitimate exercise of the s40 power for a port authority to refuse to make the use of facilities and services at a port available to transporters of a particular category of cargo in circumstances where the port authority reasonably considers that its facilities are not adequate to that purpose.

26. TDC contends that the claimantôs approach to the judgment in ***R v. Coventry City Council*** is over broad. They contend that much of the passage in the judgment which is relied on by the claimants is concerned with findings on the particular facts in that case and that the case is not authority for the proposition that s33 does not permit any port authority any discretion to prohibit any category of exports.

27. The arguments of the claimants and TDC are like ships passing in the night. I agree with TDC that the Divisional Court did not decide that s33 does not permit any port authority any discretion whatsoever to prohibit any conceivable category of shipments. For example in 2011 it was not clear whether Ramsgate was physically

capable of accommodating the Joline. If it had turned out that the vessel could not safely use the port then no doubt the port authority would be entitled to ban shipments using the Joline. But that is not what happened. On the other hand I accept the claimantsô point that such discretion as TDC have under s40 could not lawfully be exercised in a manner inconsistent with s33 or with Article 35 TFEU.

28. The harbour authority has the power to regulate safety at the port but that power cannot be used as a Trojan horse to achieve other purposes. If live animals can be lawfully shipped through a port, in the sense that the relevant legislation concerned with the shipment of live animals is complied with, then I do not accept that s40 gives the port authority power to impose further conditions based on animal welfare which have the effect of prohibiting that category of shipments.

29. To ask whether the port authority reasonably considers that its facilities are not adequate to that purpose involves playing with words. It was legitimate for the port to ask and have verified whether the Joline could safely use the port. But once it was clear that it was safe to do so, given that the trade was lawful, I do not accept the port would have the authority to use s40 to act in a manner inconsistent with either s33 or EU law.

Breach of statutory duty

30. The claimants contend that a party suffering loss caused by a breach of s33 of the 1847 Act is able to bring a damages claim against the authority as a claim for breach of statutory duty. TDC argue to the contrary. The first question is whether a claim for breach of s33 is actionable as a breach of statutory duty at all. I have mentioned ***X (Minors) v Bedfordshire*** above. Both sides agree that that case explains the test to be applied. A private law cause of action for damages will arise if the statutory duty was imposed for the protection of a limited class of the public whom Parliament intended to have a private right of action for breach of the duty.

31. TDC refers to ***Feakins v Dover Harbour Board*** (All England Official Transcripts 1997-2008, QB, 31 July 1998, Turner J). In that case exporters of sheep through Dover sought damages from the port authority because the port resolved that the harbour should not be used for these exports. Turner J decided that s33 did not confer a private right to damages.

32. The claimants submitted that Turner J was wrong. They submitted that ***Peterhead Towage v Peterhead Bay Authority*** [1992] SLT 593, which Turner J had relied on in the context of his decision that the duty was not imposed for the protection of a limited class of persons, in fact supported their case that the duty was imposed for the protection of a limited class. In the ***Peterhead*** case Lord Penrose held that operators of tugs could not take advantage of s33 because they were not making use of the harbour for shipping or unshipping goods or passengers. They were not the primary users of the port. In effect the claimantsô argument is that since the class of persons protected by the legislation excluded tug operators, it is necessarily a limited class.

33. It is true that one can use a label like ñprimary usersò to characterise the persons protected by s33. Or one might say that only people wishing to use the port for shipping goods who have paid the fee are protected. Such labels can create the impression that the legislation protects a limited class of persons however I do not

accept this reasoning. The point of the section is to require the port authority, subject to payment, to permit anyone to use the port for the purposes concerned. The fact that anyone who wants to use the port to ship goods through it and has paid the fee could be called a ñprimary userò or be described in any other way does not make the class a limited one. It is open to all.

34. Turner J relied on a passage from Lord Penroseôs judgment at p595. That passage was also referred to by the Divisional Court in ***R v. Coventry City Council*** at p53e. In it Lord Penrose recognised that by the 1847 Act Parliament created a monopoly in the provision of harbour facilities and accordingly the port operators were obliged to serve the public interest in certain specified ways, one of which was by complying with s33. In my judgment this public interest point runs counter to the existence of a Parliamentary intention to protect a limited class.

35. Two other factors mentioned in argument are these. First, the loss which would be claimed for a breach of the section would be (and is in this case) purely economic loss. Second, the section can always be enforced in judicial review proceedings.

36. It is true that no remedy for breach of s33 is specified in the Act. There was a debate before me about the nature and availability of other remedies in other parts of the Act. However even if I assume that point without deciding it in the claimantôs favour it seems to me not to be strong enough to overcome the other factors I have identified. I reject the claimantsô submission. I conclude that section 33 of the 1847 Act does not confer a private right to a claim for damages for breach of statutory duty. Accordingly there is no need to consider whether the ban was a breach of s33.

37. A further question raised in this connection was the extent to which the breach of statutory duty argument is influenced by the claimantsô case that s33 has been breached by the exercise of a discretion in a manner inconsistent with EU law. TDC characterises this as an attempt by the claimants to avoid the limits on claims for damages for breach of EU law provided for in ***Francovich***. If a claim for damages for breach of statutory duty against a public authority can be maintained when the only thing which makes the activity concerned a breach of national legislation is the finding that the power was exercised in a manner contrary to EU law, then in effect a public authority would be required to pay damages for breach of EU law regardless of whether the breach was sufficiently serious under ***Francovich***. Since I have rejected the case on breach of statutory duty I do not need to decide this issue. I will only say that even if I had held that a private law right to damages existed, I was not convinced such a right could be used to claim damages against a public authority for breach of EU law in a manner which avoided satisfying the conditions in ***Francovich***.

EU law

38. Article 35 TFEU provides:

> ñQuantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.ò

39. TDC accepts that the ban falls within Art 35 but they contend it fell within and is justified by Article 36 TFEU. That article provides a limited exception to Article 35, as follows:

> ñThe provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of ... animals ... . Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.ò

40. However before asking whether the measure in question can be justified under Art 36 one needs to know whether Art 36 may be relied upon at all. It may not be relied on where the relevant objective has been the subject of EU harmonising legislation (Case 35/76 ***Simmenthal v Italian Minister of Finance*** [1976] ECR 1871).

41. The claimants submitted that Council Regulation 1/2005 had exhaustively harmonised the relevant area. Thus the claimants submitted that the only way TDC could avoid breach of Art 35 would be to comply with Regulation 1/2005. If, as the claimants submitted, the ban went beyond Regulation 1/2005 TDC could not rely on Art 36 directly to justify it.

42. TDC accepted that if Regulation 1/2005 exhaustively harmonised the area and if the ban went beyond it then the council could not rely on Art 36, however TDC took two points.

43. First, TDC submitted that the Regulation did not exhaustively harmonise the relevant area. TDC relied on the distinction drawn in Case C-323/93 ***Société Civile Agricole du Centre d'Insémination de la Crespelle v Coopérative d'Elevage et d'Insémination Artificielle du Département de la Mayenne*** [1994] ECR I-5077 (ñ***Crespelle***") at paragraphs 33-35 between directives which did exhaustively harmonise an area and one directive which did not.

44. Second, TDC also submitted that the ban did not go beyond the Regulation in any event.

45. I will consider whether the Regulation amounts to exhaustive harmonisation of the relevant field.

46. The recitals, particularly recitals 1, 6, 10, 11 and 16, support the claimantsô case that the regulation exhaustively harmonises the relevant field. The Regulation has a specific objective, namely the protection of animals during transport (as the title states). It makes provision which on the face of it exhaustively covers that field.

47. Obligations are imposed on transporters in Article 3. These include ensuring that animals are not transported in a way likely to cause harm or undue suffering and to ensure they are fit for the journey. The loading and unloading facilities must be adequate and water, feed and rest must be offered at suitable intervals.

48. Livestock vessel inspection by the competent authority is dealt with in Article 20 (although the definition of a livestock vessel does not include a roll-on/roll-off ferry (Art 2(l)).

49. There is provision in Art 11 for the grant of long journey authorisations to transporters. A long journey is more than 8 hours duration (Art 2(m)). A condition of grant is the submission of contingency plans for emergencies (Art 11(1)(b)(iv)).

50. Delay during transport is addressed in Article 22. Art 22(1) requires the competent authority to take the necessary measures to prevent or reduce to a minimum any delay during transport or suffering by animals when unforeseeable circumstances impede the application of the Regulation. Article 22(2) provides

> ñNo consignment of animals shall be detained during transport unless it is strictly necessary for the welfare of the animals or reasons of public safety. No undue delay shall occur between the completion of the loading and departure. If any consignment of animals has to be detained during transport for more than two hours, the competent authority shall ensure that appropriate arrangements are made for the care of the animals and, where necessary, their feeding, watering, unloading and accommodation.ò

51. In Chapter IV on Enforcement and Exchange of Information, Article 23 deals with emergency measures in the event of non-compliance by transporters. Article 23(1) provides that the competent authority shall take any necessary action required to safeguard the welfare of the animals in the event that it finds that any provision of the Regulation is not being complied with or shall require the person responsible for the animals to take such action. The Article also provides that such action shall not be likely to cause additional suffering to the animals; and that it shall be proportionate to the seriousness of the risks involved. One element of Article 23 is that where it is necessary to transport the animals in breach of some of the provisions of the Regulation, the competent authority shall issue an authorisation for the transport.

52. The claimants submit that nothing in Regulation 1/2005 requires the competent authority, a transporter of animals, or any other person, to provide facilities for the unloading, feeding, watering or rest of animals at the port of departure. I agree. There are provisions referring to the port of destination (Annex I, Chapter V Art 1.7(b)) but their existence simply serves to highlight the absence of similar provisions about the port of departure. I note that this was one of the key reasons why the RSPCAôs application for judicial review against DEFRA failed before Males J and Ouseley J.

53. TDC pointed out that the regulation has detailed provisions relating to specified categories of person (transporters, organisers, keepers and the competent authority) but does not mention others who may have an impact on animal transport. TDC referred to the Police and to a harbour authority.

54. It is true that these entities are not mentioned. TDC argued that since they are not mentioned in the Regulation, it cannot be the case that a harbour authority is simply precluded by Regulation 1/2005 from exercising its powers under s40 at all in respect of the transport of animals. I do not accept it is that simple.

55. To justify the ban under Art 36, the harbour authority would have to contend that the ban furthers one of the objectives in that Article. The only viable candidate objective

which could justify the ban would be the protection of health and life of animals. If the furtherance of that objective has not been exhaustively harmonised by Regulation 1/2005 then the harbour authority may be able to justify the activity even if it does not comply with the Regulation. However if the furtherance of that objective has been exhaustively harmonised by Regulation 1/2005 then the only way which is open to someone to justify such a ban is by complying with the Regulation.

56. The fact that the harbour authority is not mentioned in the Regulation does not prove that the measure is not an exhaustive harmonisation. All it shows is that if the Regulation has exhaustively harmonised the protection of health and life of animals during transport, then the law has given the harbour authority no role relating to the furtherance of that objective in that context and cannot lawfully exercise its powers under s40 to further the objective of the protection of health and life of animals during transport. The fact that in another case it may be able to exercise its powers under s40 for a different purpose is irrelevant.

57. The comparison with the Police is instructive. The Police no doubt have a role to play for the purposes of furthering other objectives in Art 36 such as public security. The fact the Police are not mentioned in the Regulation has no impact on any actions they might take with the objective of furthering public security. The Regulation is clearly not intended to exhaustively harmonise the area of public security during the transport of live animals.

58. Having considered the various parts of the Regulation above, I accept the claimantsô submission and reject TDCôs argument that it does not exhaustively harmonise the relevant field. The relevant field is the protection, welfare and health of animals during transport.

59. Therefore for the ban to be justifiable on animal welfare grounds, it would have to have complied with the Regulation.

60. In order to argue that the ban was not a breach of the Regulation, TDC referred to Article 1(3). Art 1(3) provides that the Regulation *"shall not be an obstacle to any stricter national measures aimed at improving the welfare of animals during transport taking place entirely within the territory of a Member State or during sea transport departing from the territory of a Member State".* TDC argued that this allowed stricter measures during the kind of sea transport which occurred in this case. I disagree. As the claimantsô submitted, although it does not say so in terms, this article must be referring to sea transport departing from the EU altogether. Otherwise it would undercut the regulation itself.

Francovich damages

61. There was no dispute about the law applicable to claims for damages for breach of EU law by the state. The main cases are ***Francovich*** and ***Cases C-46 and 48/93 Brasserie du Pêcheur; Factortame (No.3)*** *("Factortame III")* [1996] ECR I-1029. For liability in damages to arise:

    i) The rule of law infringed must be intended to confer rights on individuals;

    ii) The breach must be sufficiently serious;

iii) There must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.

62. It is clear that Art 35 TFEU has direct effect and confers rights on individuals (***Pigs Marketing Board v Redmond*** Case 83/78, [1978] ECR 2347).

63. On the question of sufficient seriousness the claimants submitted that it was important to distinguish between cases where the Member State has a wide discretion and cases where it does not. If there is little or no discretion, then the mere infringement of EU law may be enough to establish a sufficiently serious breach (***R v Ministry of Agriculture, Fisheries and Food, ex.p. Hedley Lomas (Ireland) Ltd*** Case C-5/94 [1997] QB 139). TDC agreed that the measure of discretion left by the relevant rule of EU law to the national authorities was a relevant factor.

64. At paragraph 56 of the judgment of the CJEU in Factortame III, the court explained that

> ñThe factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.ò

65. The House of Lords gave detailed consideration to these factors in ***R v Secretary of State for Transport ex.p. Factortame Ltd (No.5)*** *("Factortame V")* [2000] 1 AC 524. The test ñcomes eventually to be a matter of fact and circumstance*"* (per Lord Clyde).

66. The claimants submitted that the following are particularly relevant points:

i) The more fundamental the breach, the easier it will be to regard it as sufficiently serious. Thus it is relevant if the rule of EU law breached is *"not to be found in an ambiguous directive but in a clear and fundamental provision of the Treaty."* per Lord Hope at p.550G-H, per Lord Slynn at p.542B. See also Lord Hoffman at p.547 and Lord Clyde at 554

ii) It is highly material that a breach of EU law would *"almost certainly cause loss to those who were affected by it"* and that that loss *"was likely to be both serious and irremediable"* and beyond the limits of ordinary economic risk (per Lord Hope at p.550H-551A. See also Lord Hoffman at p.547 and Lord Slynn at p.542D, citing Case 238/78 ***Ireks-Arkady*** [1979] ECR 2955).

iii) The fact that the authority in question was aware of legal problems and took a calculated risk will make the breach more serious (per Lord Hoffman at p.547H-548A, Lord Slynn at p.542 and Lord Hope at p.552B).

iv) So too will the fact that the Treaty wording is clear and the breach of it deliberate (see Lord Hope at p.551H).

67. The claimants also submitted that it was relevant whether a *"limited and clearly defined group of commercial operators"* was affected by the act complained of (***Ireks-Arkady***, cited by Lord Slynn in *Factortame V* at p.539E).

68. Another useful summary is given by Lord Clyde in *Factortame V* at p.554-556 when he summarised the following as potential factors: (1) the importance of the principle which has been breached; (2) the clarity and precision of the rule breached; (3) the degree of excusability of an error of law; (4) the existence of any relevant judgment on the point; (5) whether the infringer was acting intentionally or involuntarily or whether there was a deliberate intention to infringe as opposed to an inadvertent breach; (6) the behaviour of the infringer after it has become evident that an infringement has occurred; (7) the persons affected by the breach or whether there has been a complete failure to take account of the specific situation of a defined economic group; and (8) the position taken by one of the Community institutions in the matter.

69. TDC put the factors relevant to sufficient seriousness more succinctly than the claimants but there was no dispute about the principles to be applied.

70. As regards direct causal link the claimants submitted that the requirement of a direct causal link under Article 215 (later Article 288 now Article 340) EC, on the contractual liability of the Union, is equally applicable in the case of the liability of a Member State. The Claimant must satisfy the ñbut forò test (e.g. Case Cï 358/90 ***Compagnie Italiana Alcool v. Commission*** [1992] ECR I 2457 at paragraph 47) and prove that the damage was suffered as a ñsufficiently direct consequenceò of the unlawful act complained of (e.g. Joined Cases 64 and 113/66 ***Dumortier Freres v. Council*** [1979] ECR3091 at paragraph 21.) TDC did not suggest otherwise. I accept the claimantsô submission.

Analysis of the events

71. To resolve this dispute it is necessary to start a good time before the events of September 2012.

72. In the period around 2008 and 2009 the ports of Dover and Felixstowe in Kent were being used for shipment of animals for slaughter in continental Europe. In 2008 there was an EU Commission mission to the UK to evaluate measures taken to implement EU animal welfare legislation applicable to animal welfare during transport. One of the factors considered was the adequacy of unloading facilities for animals in the vicinity of Dover and Felixstowe.

73. In April 2009 Mr Lomas approached TDC regarding the use of Ramsgate for the movement of live animals. At that time TDC had a policy prohibiting the movement of animals through the port on account of a byelaw (Byelaw 44) which prohibited animals entering the harbour. The byelaw had been enacted pursuant to a power to make orders in the legislation concerned with the prevention of rabies. Mr Lomas and TDC engaged in a debate in correspondence about whether the byelaw could lawfully prevent this trade. Mr Lomas contended that it could not and at that time TDC contended that it could and did. The correspondence ended in August 2009 with TDC maintaining its policy. No shipments took place through Ramsgate at that time.

74. In correspondence between Mr Lomas and DEFRA the question of animal handling facilities in Kent was discussed.

75. On 16 December 2010 a memorandum from Mr White of TDC (the official at TDC in the role later occupied by Mr Seed) considered the byelaw. It recommended that the byelaw be repealed because the public health risk from rabies had diminished and the reason for the byelaw no longer existed. The Council voted to repeal the byelaw.

Events in 2011

76. By early 2011 the Joline had been using Dover Harbour for livestock shipments but at this point the berth became unavailable. There was no other suitable berth at Dover. Mr Lomas started looking for alternatives. He approached Mr White at TDC and asked for permission to bring the Joline into Ramsgate so as to export livestock. At this stage the byelaw had not been repealed. Mr Lomas argued with TDC that the byelaw could not prohibit shipment of livestock and said that DEFRA supported that position. In a letter dated 31st March Mr White on behalf of TDC refused to permit exports through Ramsgate. The letter stated that the movement of livestock through ports was politically sensitive and stated that since the correspondence in April 2009 the council had received no confirmation from a Government department supporting Mr Lomasô assertion that the byelaw could not prohibit this trade.

77. The reference to the trade being politically sensitive was no doubt prompted in part by the fact that the local elections were due to take place on 5th May. The issue was something which councillors in both main parties were very interested in.

78. Mr Lomas provided TDC a copy of a letter from the AHVLA to him dated 1st April which stated in clear terms that subject to there being a suitable berth available from which the Joline may operate, ñ*there are no animal health or welfare grounds that may otherwise impede or prevent the use of Ramsgate Port from facilitating the transport of domestic farmed livestock from Great Britain.*ò

79. Mr Whiteôs response on 6th April stated that three problems remained from the Councilôs point of view: first the continued existence of the byelaw; second, despite the letter from the AHVLA, Mr White asked Mr Lomas to consider the question of the obligations the Port itself would need to comply with concerning lairage (i.e. animal handling facilities) and the provision of water; and third the Harbour Master had reported that the berths at Ramsgate were not suitable for the Joline and an inspection was to be arranged.

80. It is not a matter to the Councilôs credit that it was prepared at that stage to rely on the byelaw as a ground to refuse the animal shipments when it knew that the basis for the byelaw no longer existed and the councillors had voted to repeal it.

81. On 8th April 2011 the AHVLA confirmed to Mr Lomas that Port Authorities had no statutory obligation to provide facilities regarding accommodation or water for animals transiting a port either as part of their normal operation or resulting from delays and that the lack of such facilities provided by the Port Authority did not prevent the use of the port for this trade. The letter also pointed out that the Regulation requires the transporter to have contingency plans to protect the welfare of

the animals in the event of delays. The letter was copied to Brian White at TDC for information.

82. Further discussion took place between Mr Lomas and Mr White with Mr Lomas arguing that TDC had no basis on which to refuse to accept the trade. On 11th April Mr Lomas threatened legal proceedings.

83. On 12th April Mr White wrote indicating that the council would take legal advice about the byelaw. From that date Mr Seed took over from Mr White at TDC.

84. On 13th April Mr Lomas wrote a fuller letter threatening legal proceedings.

85. On 14th April Mr Seed replied by email indicating that the portôs position was that it had not refused to accept the trade altogether but saw a need for uncertainties to be resolved before such use could be granted. He sent a further email on the same day (at 19:40) which expanded upon the issues TDC wished to be clarified and expressly disavowed reliance on the byelaw to refuse to accept the trade.

86. Some issues mentioned in the email related to the vessel itself and some to the involvement of livestock. As regards the vessel, the important point was whether the Joline could safely use the berth at all.

87. As regards livestock Mr Seedôs email stated that TDC would have to receive, consider and agree the management plans for the handling of this livestock. The email referred to the support of DEFRA and states that the Council ñ*would clearly reserve the right to place reasonable conditions on this management to ensure this dealt with all required aspects. [...] These conditions would need to be based on a specific risk assessment by yourself of the potential consequences of your proposals and your measures to mitigate these. This would of course include aspects in relation to security because of the heightened issues associated with the movement of animals. Again all this would need to be agreed and in place before any animals were loaded or unloaded from your vessel.*ò This message has a bearing on a dispute about access to contingency plans which I will address below.

88. This email led to two responses on 15th April, an email from Mr Lomas to Mr Brown (who had been included in the second 14th April email) and a letter from Mr Lomas to Mr Seed. The email to Mr Brown emphasised that if the vessel is refused further the matter will go to court and also confirmed that the normal paperwork, including contingency plans, are on the vessel and can be made available at the appropriate time. The letter to Mr Seed is another combative letter from Mr Lomas, arguing his case that the port was refusing to give access to the port and had no grounds on which to do so. The letter stated that livestock will not be handled at the port and ñ*there will be no management plans to be received, considered or agreed. Contingency plans are in place and approved by DEFRA for both the vessel and livestock transporters*ò.

89. Shortly after this letter a berthing trial took place to see if the Joline could safely use the berth. It was found that although the Joline is a small vessel, the berth could safely be used.

90. On 17th May a press release announced that TDC would permit live animal shipments through Ramsgate. The first live animal shipment through Ramsgate was on 18th May 2011.

91. The press release quotes Mr Seed as saying that the council had been strongly resisting the use of the port for this trade and that TDC was exceptionally unhappy about the situation. He said ñ*unfortunately there is no legal basis on which we can refuse the use of the port for this purpose*ò. Mr Seed was cross-examined about this press release. He sought to characterise it as a message to the public. So it is but in my judgment, particularly bearing in mind the various other documents from this period including internal emails and letters and a Council resolution in July 2011, the 17th May press release accurately conveyed the position and views of TDC in relation to the shipments. TDC did not wish to permit the trade through the port and had sought every conceivable, lawful basis on which to refuse it.

92. In an email on 18th May 2011 Mr Seed wrote to Cllr Ian Driver about the first shipment. Cllr Driver was a member of KAALE (Kent Action Against Live Exports). The email explained that the council had obtained an opinion some time ago and that the council could not prevent the trade using the port.

93. TDC obtained an opinion from counsel. Counsel was asked to advise generally and in particular about whether the council could rely on Byelaw 44 and whether the Council could lawfully refuse the export of live animals through the port on the basis that they were ñsentient beingsò. The opinion, dated 23rd June 2011, was clear. If TDC refused to permit exporters from exporting livestock from the port on either of these grounds it would be at risk of judicial review and possibly at risk of a claim for damages for failure to comply with its statutory duties under the 1847 Act and under Articles 34-36 TFEU.

94. In July 2011 Cllr Bayford, the Leader of the Council, spoke to a journalist about the fact that the council had been advised that there was no legal way of stopping live animal exports. He is quoted as saying ñ*It's crazy that we have no control over the port that we own and rate payers fund*ò.

95. In this period there was contact between Cllr Bayford, Laura Sandys MP and Roger Gale MP. This led to a letter to Laura Sandys MP from the Minister of State at DEFRA (Rt Hon Jim Paice MP) and also a letter dated 15th July 2011 to Laura Sandys MP from Mike Penning MP, Under Secretary of State at the Department of Transport. The Ministry of Transport letter was provided to TDC in August. It made clear that the Department of Transportôs view was that no local authority had any specific power to prevent live animal exports and that all UK commercial ports were bound under s33 of the 1847 Act to accept any lawful traffic ñ*no matter what pressures are brought to bear by any persons/groups opposed to live animal exports, so long as existing regulations are fully complied with*ò.

96. In an FAQs section of the Councilôs website from this period, the Council explained to the public that the AHVLA bore the responsibility for ensuring the health of animals being exported.

97. One can sympathise with the Council, which was faced with a very unpopular trade through its port. However the claimants submit that TDC knew that the task of

ensuring animal welfare was that of the AHVLA and not TDC and also knew that it had no right to impose any kind of ban on livestock exports. I have not set out all the material the claimants rely on to make this good but have referred to the major elements of it. I accept the claimantsô submission. It is quite clear that by the summer of 2011 TDC knew that the companies exporting animals had to satisfy DEFRA and its agency about the livestock and their treatment but that TDC had no role in this and had no right to ban the livestock trade.

98. The shipments continued in 2011. At the same time there were protests against the shipments at Ramsgate. A protest on 3rd September 2011 prevented the vessel from sailing on that date.

99. On 13 October 2011 the Council passed a motion encouraging local people to sign an e-petition supporting reform of the law regulating trade in live animals.

The monitoring group – early 2012

100. On 24th January 2012 the leader of the Council, Cllr Clive Hart, received a letter from the RSPCA expressing concern about the animal shipments. On 22nd March 2012 TDC organised the first meeting of a monitoring group with the intention of seeking to ensure there was the fullest possible compliance with animal welfare legislation at the port. The group included three councillors who were members of the cabinet, i.e. had executive authority in the Council. The RSPCA were invited to join the group. Also invited to the meeting were a representative of a local pressure group opposed to the trade (Reg Bell of TALE, Thanet Against Live Exports), a representative of the organisation Compassion in World Farming and a person from the office of Peter Skinner, the local MEP. DEFRA were invited to the meeting but said they had nothing to add to what had been dealt with in correspondence and declined to attend.

101. An email from Mr Seed to Mr Brown on 22nd March records the meeting. The prime focus of the meeting is characterised in this email as being ñ*to stop the trade*ò. The RSPCA were asking to come onto the port and inspect shipments of animals as well as observe the AHVLA doing this work and the group wished to allow this to happen. The meeting discussed the adequacy of facilities for animals at the port. The email records that the RSPCA considered that the AHVLA were not doing their job properly and that this may have a bearing on facilities at the port. The email contains the following statement:

> ñTo be fair if the facilities are not suitable then we can probably cease shipments forthwith until the facilities are in place, which of course we wouldnôt do.ò

102. On 23rd March 2012 Mr Seed wrote to Gavin Grant of the RSPCA following up from the meeting and inviting the RSPCA onto the port. This email also records that Mr Brown had spoken to AHVLA again about the adequacy of facilities at the port and been told by AHVLA that the existing arrangements were suitable.

103. Mr Seed refers to assistance from the RSPCA on the issue of AHVLA inspections. Despite it being perfectly clear to TDC that the AHVLA regarded the facilities at the port as adequate, the message shows that Mr Seed was inviting the RSPCA to second guess the AHVLA and to advise on what facilities would be required at the port for

the AHVLA to undertake the inspections. What was being contemplated was that the RSPCA would advise the Council that certain facilities should be provided in the port in order, as he put it, for the AHVLA to undertake these inspections properly. This need for facilities was described as ñ*very helpful to us in ceasing this trade through the Port*ò because ñ*we would be very unlikely to invest if new facilities were required.*ò

104. There is a striking correspondence between the terms of this email and the terms of the ban imposed five months later on 13th September 2012.

105. Taking all that had happened from April 2011 onwards until March 2012, I infer that from March 2012 onwards TDC had a preconceived wish to use its powers to block the trade if it possibly could. Mr Seed was heavily influenced by what he saw as moral and political pressure. To the extent that Mr Seed suggested otherwise in his cross-examination, I was not convinced.

Later in 2012

106. In April and May 2012 TDC and the RSPCA lobbied DEFRA for increased checks on livestock vehicles and for the setting up of a control post in Kent to break up journey times. In June 2012 action points were agreed between TDC and the RSPCA whereby the RSCPA would visit the port and assess the suitability of available facilities. There were two visits on June and the RSCPA wrote two reports. The report on the 13th June visit stated correctly that there were no facilities at the port for handling farm animals and asserted that this is unacceptable, giving reasons. One reason given was based on Art 23 of the Regulation. This relates to emergency situations and contemplates one possibility as being the unloading of animals. The report asserted that since there are no unloading facilities at the port, the Article could not be complied with. In fact, as the author of the report clearly understood, the AHVLA had made arrangements for there to be an unloading facility in Kent, albeit not actually at Ramsgate, which the AHVLA regarded as acceptable. The report described this as a questionable policy. The report set out the facilities which it asserted ought to be available at Ramsgate. The claimants submitted that this assertion was wrong because it was for the AHVLA, as the Competent Authority, to satisfy itself as to the adequacy of facilities and it had done so.

107. The second report was in a similar vein. This visit was on 23rd June and witnessed the inspection of vehicles transporting lambs and calves onto the Joline. In its conclusions the RSCPA report states that ñ*my view is that it would take a massive welfare event to provoke the authorities into taking any action in terms of removing animals from lorries to ensure their welfare.*ò The claimants contend that these reports foreshadowed the events on 12th September.

108. A further meeting of the TDC monitoring group took place on 18th July. The minutes include a note that TDC and the RSPCA were to seek further clarification of the precise animal welfare duties of a port authority in the light of the reports and to assess ability to close the port to animal movements based on a lack of facilities. The minutes also recorded the TDC will approach the AHVLA about the transportersô contingency plans and on 24th July Mr Seed wrote by email to the AHVLA in relation to the suitability of the transportersô contingency plans.

109. The 24th July email started with a statement that the Council were seeking ways to prevent the trade in a manner which was legal and appropriate and which could be defended ñ*if it becomes a court issue*ò. A number of points were raised about the transportersô contingency plans, including asking: whether the AHVLA satisfied with the current contingency plans and what would happen if the animals are taken off the lorries in the port. The message also asked the AHVLA to provide copies of the transportersô plans.

110. The AHVLA replied on 24th August 2012. Counsel for TDC contended that some of Mr Seedôs questions had not been answered. I do not accept that any significance can be attributed to the absence of an express statement by the AHVLA that the contingency plans had been approved or the absence of a detailed answer to the question about what would happen if the animals were taken off the lorries. The AHVLA reply stated that the approval of contingency plans was a matter for the AHVLA and its legal obligation was to act impartially. All transporters were required to submit contingency plans for approval and transporters must have contingencies for emergencies including an inability for the journeys to continue. The competent authorities must not issue authorisations unless they are satisfied with the plans. The AHVLA could not provide copies of the plans as a result of the Data Protection Act.

111. In my judgment the AHVLA had made it clear that it did not consider there was a problem with either the transportersô contingency plans or the portôs facilities and TDC knew or ought to have known that this was the AHVLAôs position. It is true that the reply did not directly and explicitly answer every point raised by Mr Seed but the thrust of the AHVLAôs response was clear. The suggestion that there was any material lack of clarity about this is an attempt after the event to exaggerate the significance of minor matters.

Access to contingency plans

112. At this stage it is convenient to deal with the issue of the extent to which TDC sought and were refused access to the transportersô contingency plans. Mr Seed said in his witness statement (2nd WS, paragraph 30 p780) that he had made several requests for details of the plans but these had been refused on grounds of confidentiality. I do not accept that it is as simple as that. It is true that in the exchange of emails with AHVLA in July/August 2012, Mr Seed asked the agency to provide copies of the contingency plans and the agency refused to do so. However that was not a request directed to the transporters. Mr Lomas maintained in cross-examination that there was no specific request for contingency plans. The only message from TDC directed to the transporters which could be construed as such a request was the email of 14th April 2011 (quoted above). The issue was put to Mr Seed in cross-examination. Based on his testimony I find that Mr Seed seems to have assumed that contingency plans would not be provided if they had been asked for but never pressed the point. Moreover although one response to the 14th April message was combative, the parallel response sent to Mr Brown contained a clear offer of access to whatever plans were held on the MV Joline. I do not accept that TDC can fairly contend that the transporters refused them access to contingency plans.

The 29th August incident

113. A shipment passed through Ramsgate on 29th August. The tyre on one vehicle was found to be badly eroded and the Police decided it was not roadworthy. The vehicle was not allowed to go onto the vessel and had to wait some hours before a new tyre was fitted and it returned to Northampton. Mr Onderwater thought the lorry could in fact have been loaded onto the vessel and if it had been then the tyre could have been replaced easily in Calais. Mr Onderwater was clearly annoyed by what happened on this occasion and he may be right that it would have been in the animalsô best interests for the vehicle to be moved onto the vessel. However whether that is right or not, the decision to halt the vehicle was made by the Police and there is no basis at all on which to doubt the bona fides of that decision.

114. The tyre problem was the most important problem on that occasion but an RSPCA report of this incident refers to other problems including a problem with access to drinking water for the animals. The RSCPA report characterised the events as highlighting the need for facilities at the port for animals to be unloaded.

115. An important point is recorded in an email dated 30th August 2012 from Mr Seed to Councillors Fenner and Poole and Mr Brown. The message records a meeting between Mr Seed and the AHVLA on that day about the incident on 29th August. The AHVLA had told Mr Seed that they had their own contingency plans in place, they had an alternative vehicle and driver and they had a facility in Kent for animals to be taken if it had been necessary (which it was not).

116. It is clear that in the event livestock were to be unloaded in the port, then the port did not have adequate facilities to ensure the welfare of those animals. However from 30th August onwards there can be no doubt that TDC knew that the AHVLA had what the AHVLA regarded as suitable contingency plans and a suitable facility in Kent to take animals from Ramsgate if unloading was necessary.

117. Counsel for TDC invited me to place emphasis on the fact that although the Council had been assured that sheep were not to be unloaded at the Port, the AHVLA had never put this in writing. I agree that the point had not been put in writing but nevertheless TDC, and Mr Seed in particular, knew that that was the AHVLAôs clear position. I also accept, as Counsel for TDC submitted, that as regards the transporters, the point about no unloading in the port had only been put in the context of ordinary operations and not emergencies. However that is not a point of significant weight given that in an emergency the AHVLA would have a key role to play and they had made the position clear.

118. On 7th September Cllrs Hart, Poole and Fenner wrote to the Environment Secretary, Owen Paterson about the shipments through Ramsgate. The letter referred to the incident on 29th August. The letter asked for DEFRAôs support on animal welfare grounds for a decision by TDC to refuse access to the port for the export of live animals until the establishment of a lairage/control post in Kent by DEFRA/AHVLA. It also asked for financial support in case of a legal challenge.

119. No explanation was advanced why the letter also characterised the incident as ñfurther evidence of the need for a lairage facility in Kentò without referring to the fact that AHVLA had told TDC that they had access to a place in Kent for animals to be taken.

120. Counsel for TDC invited me to make various findings about the effect, prior to 12th September, of communications from the AHVLA and DEFRA which were provided directly or indirectly to TDC. I find that these communications:

i) Indicated that TDC had no statutory obligation to provide specific facilities for animals at the port;

ii) Did not in fact provide any risk analysis or detailed description of contingency measures ï although I do not accept the implicit point being advanced that they should have done;

iii) Refused to provide the identity of the location of the AHVLAôs contingency premises in Kent for unloading of livestock (because of a concern about protestors); and

iv) Indicated that the transporters must have contingency plans.

Events on 12th September

121. On 12th September 2012 the Joline was at Ramsgate in order for a number of lorries carrying sheep to be loaded. At the port were some of Mr Onderwaterôs lorries and also a lorry belonging to the French transporter SARL Roche. The claimants emphasised that they are unrelated to SARL Roche. I accept that. On the other hand the sheep were to be loaded onto the first claimantôs vessel; Mr Lomasôs role as a livestock consultant included acting for the claimants and included the SARL Roche lorry within his remit; and Mr Ziokowski was acting as the agent and livestock export manager for the claimants as well as in relation to the sheep on the SARL Roche lorry.

122. Mr Ziokowski was the only witness before me who had been present at the material times on the port on 12th September.

123. At the start of the day the AHVLA were present to carry out inspections. Also present were two RSPCA inspectors and at least one or possibly two TDC Councillors. Over the course of the day a total of eight AHVLA staff were present in Ramsgate.

124. The problem arose in relation to the SARL Roche lorry. It was loaded with 548 sheep in three tiers. At 8.30am the AHVLA inspectors inspected the lorry and found that one sheep had a broken leg and that others had trapped limbs. The AHVLA inspector was also concerned that the lorry had been poorly loaded and may have been overstocked.

125. Mr Ziokowskiôs position was that what he would have done to deal with the injured sheep would have been to humanely dispatch the sheep on the truck and then remove it or remove it from the truck first and then humanely dispatch it. The truck would have then been loaded onto the vessel.

126. Mr Ziolkowski said that he was refused permission to put his contingency plan into action. Loading of the vessel was completed without the SARL Roche lorry. Mr Onderwaterôs lorries were loaded without incident.

127. It is clear why Mr Ziolkowskiôs plan was not permitted to be put into action at this stage. Although it would have dealt with the injured lamb, it did not address the potential overstocking problem.

128. The AHVLA inspectors decided that the lamb with the leg injury had to be euthanised and that due to the stocking density the vehicle could not proceed but that following removal of the injured animal it had to divert to local premises to be unloaded. The local premises were confirmed to be within 45 minutes of Ramsgate. From now on whatever the transportersô contingency plans were was irrelevant because this decision involved the AHVLA implementing their own contingency plans.

129. The last lorry was loaded on the vessel at 9:20 (without the SARL Roche lorry) and the vessel sailed at 9:40am.

130. Mr Ziolkowskiôs evidence was that at about this time there was a huddled conference going on between the RSPCA, AHVLA and TDC. This is essentially borne out by the detailed timeline prepared by the AHVLA in their report into the incident. The timeline records that at 9:30am the AHVLA received a call from the RSPCA Regional Superintendent who said that he was not happy with the AHVLAôs proposals to manage the problems identified and objected to the AHVLAôs intention to transport the sheep to an emergency facility in a vehicle that was not considered suitable and was overstocked. He demanded that any unfit animals should be unloaded at the port. The timeline records that the AHVLA inspector made it clear that this was not appropriate as there were no facilities at the port to unload animals.

131. The AHVLA served a statutory notice on the driver of the lorry requiring the injured lamb to be humanely slaughtered. Both Mr Ziolkowskiôs evidence and the AHVLA timeline record that at about the same time Mr Ziolkowski offered to carry out the euthanasia on the lorry but the RSPCA inspectors objected to this. In cross-examination Mr Ziolkowski made it clear he did not accept the objections. He explained that he could have carried this out safely and that slaughtering an animal in front of other animals, which was the RSPCAôs main objection, was normal practice and was undertaken in abattoirs. I accept Mr Ziolkowskiôs evidence that he could safely have euthanised the injured sheep on the lorry and that slaughtering one animal in front of others is part of normal practice in an abattoir.

132. Further discussion continued, particularly between the AHVLA and the RSPCA, and the decision was made to unload the sheep from the lorry. The purpose at this stage was to allow access to the injured sheep. Accordingly if Mr Ziolkowski had been permitted to euthanise the sheep as he had asked to, there would have been no reason to unload the animals.

133. An area of the port was identified to be used. It was a place to wash lorries. Mr Ziolkowski said that during the unloading:

> ñall hell let loose with nearly 20 people made up of RSPCA, AHVLA, Police and port staff, some with a camera in hand and a paint sprayer in the other chasing over 500 sheep around and apparently trying to find lame ones. In fact it was the chasing on the unsuitable surface that was causing the lameness.

> During the chase six lambs went into water resulting in four being rescued by the RSPCA and two being found deadò

134. Mr Ziolkowski said that ñI had nothing to do with this appalling behaviour and had made my feelings known to AHVLA who took no notice of me.ò

135. I accept this evidence of Mr Ziolkowskiôs about the unloading. Mr Ziolkowski would not have unloaded the sheep in the port.

136. Mr Ziolkowski also explained how he could have dealt with overstocking by moving animals from one pen to another using the loading bay at the back of the truck or by taking surplus animals away on a separate hospital vehicle, which he had procured during the day. I accept that evidence.

137. A number of sheep were found to be lame, the total in the end being recorded by the AHVLA as 41. Two sheep were euthanised by Mr Ziolkowski having been assessed by a private veterinary surgeon (PVS) who had arrived at the request of the RSPCA.

138. After the sheep were unloaded, they remained in the Port all afternoon.

139. During the afternoon there was an attempt to re-load the lorry. The lorry was partially loaded but then unloaded again when the sheep were again trapping their limbs. After the second unloading, what Mr Ziolkowski described as a rodeo took place. A BBC reporter arrived at 13:45. The French lorry drivers had an altercation with Kent Trading Standards and the Police arrested them at 15:35. A BBC news crew arrived at 20:20. Mr Brown, who had not been at the port during the day although he had been in context with the Duty Operations Manager, arrived at 17:00, at which time a passenger ferry was due to arrive from Ostend.

140. The AHVLA and the PVS examined the sheep which had been identified as lame and decided that 37 were not fit to transport. They were euthanised on site. The press used the term ñmassacreò to describe what happened.

141. The sheep remained at the port into the night until they were loaded onto a replacement vehicle from about 1 am and the vehicle left at 2am.

142. It is plain that what happened in Ramsgate port on 12th September 2012 was a disaster. Sheep were unloaded into unsuitable premises and kept there for 13 hours. Two or possibly three sheep drowned and approximately 40 sheep had to be euthanised in premises which were not intended for such procedures. What happened was very unusual indeed. The incident was disruptive to the proper operation of the port. It caused very grave public disquiet and distress. It focused attention on TDC since the incident occurred on TDCôs premises.

143. In my judgment the disaster stems entirely from the decision to unload the animals in the port. This was a serious mistake and had dreadful consequences. It was a decision made by the AHVLA. It is also clear that it was a decision which was heavily influenced as a result of lobbying of the AHVLA personnel by others.

144. Mr Lomas was convinced that the events on 12th September were the ñmassive welfare eventò referred to in the RSPCAôs June report and were deliberately contrived

by that organisation to force an unloading on the portside in order to prove that port facilities were needed so that TDC could ban the trade since TDC was not going to build such facilities. No witnesses from the RSPCA gave evidence before me nor were the RSCPA represented in court. I am not prepared to make such a finding against an organisation which was not before the court. In my judgment the lobbying by the RSPCA was a significant cause of what took place but it is not necessary to consider Mr Lomasôs views in any more depth. I am in no position to consider whether this was some sort of cynical conspiracy by anyone and I will not do so.

145. Counsel for TDC submitted that the events demonstrated the inadequacy of the transporters contingency plans. This submission needs to be treated with care. As part of its defence of this action TDC has focussed heavily on the transportersô contingency plans.

146. It is correct that the contingency plans relevant to SARL Roche are those identified in the bundle of documents for the trial (Bundle D p616-622). However it bears recording that they are not the contingency plans of Mr Onderwaterôs businesses. Thus insofar as the proper identification of contingency plans applicable to lorries present in Ramsgate on 12th September 2012 is important, the SARL Roche plans are not the only ones.

147. Counsel for TDC is right (proposed finding of fact paragraph 3) that in the event of injury to an animal the plans provide for slaughter of the injured animal and further movement of the animals in the existing vehicle. Counsel for TDC is also right that the plans did not provide for the movement of animals in an alternative vehicle, for example if the vehicle containing the animals could not be moved. However it is manifest that the contingency plans cannot expressly provide for every single eventuality. Whether the transportersô plans are adequate is a matter not for TDC but for AHVLA. Furthermore the focus on the transportersô plans ignores the fact that the competent authority is required to take necessary action in an emergency under Art 23 of the Regulation. The awful events on 12th September took place after the AHVLA had assumed responsibility for what was going to happen. I reject the argument that the events showed that the transportersô plans were inadequate.

148. I accept the submission of Counsel for TDC that the incident of 12th September was not averted by the AHVLAôs contingency plans. That is self evident.

The ban on 13th September

149. In the morning on 13th September a meeting was convened in the office of Cllr Hart, the Leader of the Council. At the meeting were Mr Seed, Mr Hart, Cllr Poole the Deputy Leader, who held the cabinet portfolio for the port and councilôs Chief Legal Officer, Mr Patterson. The meeting was not minuted. The decision to suspend the shipments through Ramsgate arose from that meeting.

150. The only person entitled to make the decision was Mr Seed. He maintained it was his decision. I have no reason to doubt that it was Mr Seed who made the decision but I infer that very considerable pressure was placed on him by the councillors at the meeting. Both councillors present (Cllr Hart and Cllr Poole) had made very clear their opposition to the trade. They wanted the trade to be stopped.

151. A letter was prepared setting out the rationale for the decision. It was addressed to Mr Lomas as he had always presented himself as the principal point of contact. At the same time the Council issued a press release explaining its action. The letter and the press release are set out below in full.

The letter:

> **"Re: Export of Live Animals from the Port of Ramsgate – Notice of Suspension**
>
> You may be aware that on 12 September 2012 in the port of Ramsgate the driver of vehicle BR 368 AW/BV 884 YJ was arrested by Kent Police following the detection of a sheep with a broken leg, the destruction of 38 out of 41 sheep found to be lame and the drowning of two sheep and the rescuing of four others, the latter as a result of the necessary unloading of the transporter on to a Port with no proper loading and unloading facilities, no casualty bay for the inspection and, if necessary, emergency destruction of animals, no suitable gates or pens for corralling animals and no available supplies of food and water. In this case unloading was undertaken as the only possible means by which the vet could access and examine injured sheep on the transporter.
>
> Needless to say this caused significant disruption to the operation of the Port as well as considerable distress to the Port staff assisting the AHVLA, RSPCA and Police.
>
> The incident follows hard on another emergency incident on 29 August 2012 when a transporter loaded with sheep waiting at the Port of Ramsgate was found to have a bald tyre which took the whole day to replace, during which time the animals had to wait in the vehicle due to the absence of any suitable facilities at the Port.
>
> In the circumstances it is clear to the Council that the Port of Ramsgate lacks the facilities necessary to properly secure animal welfare in the event of an emergency such as those recounted above. It also highlights the complete failure of the contingency measures you were supposed to have in place to relieve the Council of the need to provide any facilities. Moreover, we have every reason to believe that emergencies such as this are going to occur in the future.
>
> It is therefore the decision of the Council to suspend with immediate effect the movement of all live animals out of the Port of Ramsgate.
>
> It is important to stress that this prohibition is a temporary measure in that it will continue only for so long as the Port of Ramsgate lacks proper loading and unloading facilities, a

casualty bay for the inspection and, if necessary, emergency destruction of animals, suitable gates or pens for corralling animals and available supplies of food and water ï or until like facilities are provided in very close proximity to the Port.

On the assumption that you are going to question the legality of the Councilôs decision, I consider the imposition of a temporary suspension due to the lack of necessary animal welfare facilities constitutes a proper exercise of the Councilôs statutory powers under Section 40 of Harbours Act 1964 and therefore does not contravene the Councilôs general duty to operate the Port of Ramsgate as an open port pursuant to Section 33 of the Harbours, Docks and Piers Clauses Act 1847.

Moreover, the Council takes the view that given what has happened and the very clear need for the provision of suitable animal welfare facilities at, or very close to, the Port of Ramsgate, a temporary suspension does not and will not, amount to arbitrary discrimination or a disguised restriction on trade.ò

The press release:

"Port suspends live animal exports

From Thursday, 13 September, the Port of Ramsgate has suspended any live animal movements through the Port with immediate effect.

This is a temporary suspension, but its lifting will depend on the construction of suitable facilities within the Port. Providing the facilities will depend on the cost of building and running such a facility, and also whether it is a priority of the council in comparison with other issues.

This move follows an incident where staff at the Port of Ramsgate took action overnight (12 September) to support animal health laws when a lorry unfit for transporting live animals failed inspection on its arrival. Despite every effort being made at the port to treat the animals humanely, 40 sheep had to be put down following advice from the RSPCA.

Just last week, leading members of Thanet District Councilôs Cabinet wrote to the environment Secretary calling for the facilities needed to prevent situations like this happening.

Leader of Thanet District Council, Cllr Clive Hart said that ñThanet District Council recognises that live exports are a lawful trade, but we are also conscious of our responsibilities regarding the welfare of animals passing through our port. We are also saddened to see animals arrive at our Port in this

> condition and it underlines the need to implement EU regulations strictly in order to avoid any suffering caused to the animals.
>
> You may also want to read the related news article: Live animal export letter sent to Environment Secretary.ò

152. Aside from the letter and the press release there are no other written records of the decision or the decision making process or of any legal advice received. There was no consultation with either the AHVLA or the transporters or anyone else.

153. The letter and the press release characterise the measure as a temporary one. That description is a charade. The suspension is expressed to be one which will continue as long as the port lacks proper facilities or there are no suitable facilities in very close proximity to the Port. TDC had no intention of putting facilities in place in the port itself. Indeed the press release hints as much. The AHVLA also had made it clear that it regarded its approved facilities, which were not in ñvery close proximityò to the port but were about 45 minutes away, were sufficient. The AHVLA were not going to set up facilities even closer to Ramsgate. Thus the ñtemporaryò ban was going to remain in place indefinitely and TDC knew that.

154. In evidence and in argument TDC and Mr Seed emphasised that the letter refers to contingency plans. However that does not alter the nature of the ban which was imposed. The ban was a ban until facilities were built in or very near the port. It was not a suspension pending the Council being satisfied about the nature of any contingency plans.

155. The letter stated that the event highlighted the complete failure of the contingency measures ñyouò (the transporters) were supposed to have in place. That is not a fair conclusion. The real causes of the problem were decisions made by AHVLA, not deficiencies in the transportersô contingency measures. Moreover since TDC had not consulted at all it was not in a position to reach such a conclusion in any event. The assertion shows that TDC was acting hastily and without full information.

156. TDC did not take any legal advice specifically focussed on this ban. The legal advice which it had had before was negative and TDC was never advised that it had the power to act in this way.

157. Counsel for TDC invited me to find that the Council considered that the incident demonstrated not only that the port facilities were inadequate for animal welfare (which I accept) but also that the incident showed that the contingency plans of the transporters and the AHVLA were not sufficient to ensure that it was possible for the transporters and/or the AHVLA to ensure the welfare of animals moving through the port. I do not accept this latter submission. TDC did not give any consideration to the contingency plans of the AHVLA at this stage. TDC did give consideration to the contingency plans of the transporters but that consideration was flawed as I have explained above. Moreover even if the events did highlight deficiencies in the combination of the contingency arrangements of the transporters and the AHVLA together, that does not give TDC the authority to arrogate to itself the power to act on animal welfare grounds.

After the ban

158. Mr Onderwater explained the impact of the ban on his business, given that in 2012 the festival of Eid was due to fall on 25th October. The claimants undertook one shipment through Ipswich but then Ipswich also decided to refuse to permit the transport of livestock. The RSPCAôs Chief Executive was reported by the BBC as saying that if the exporters attempted to re-open the trade at Ipswich or Ramsgate or somewhere else, ñyouõll find the RSPCA inspectorate waiting for youò. Nevertheless Counsel for TDC is correct in the submission that the inability of the claimants to use other possible ports, including Felixstowe, arose from the decisions of third party operators and the limitations of the MV Joline.

159. The claimants wrote to TDC on 18th and 24th September and through solicitors on 25th September explaining the effect of the ban, drawing attention to the importance of Eid and the effect on the claimantôs economic activity and on 3rd October proposed that TDC permitted shipments pending the application for judicial review.

160. DEFRA communicated with TDC on 5th, 9th and 12th October making it clear that TDCôs approach was incorrect. Amongst other things DEFRA indicated that the 29th August incident did not lead to any animal welfare concerns and confirmed that there were AHVLA approved facilities within 45 miles or an hourôs drive of Ramsgate. As regards the events on 12th September, the 5th October letter stated that AHVLA would be undertaking a review.

161. TDC maintained its position, for example in an email on 11th October. TDC did not regard the assurances provided by DEFRA as adequate. However inherent in TDCôs position was maintenance of its stance that the AHVLA local facilities were not adequate even though the AHVLA regarded them as adequate. That was not a matter for TDC.

162. I reject the submission by Counsel for TDC that neither the AHVLA nor DEFRA had ever stated the view that TDC was precluded from requiring the existence of facilities for unloading at the Port as a condition for movement of livestock. It may be correct that one cannot find such a statement by the AHVLA or DEFRA but TDC knew at all material times that its stance on facilities was not supported by the AHVLA or DEFRA.

163. The claimantsô application for interim relief came before Burton J on 16th October 2012. It was successful and on 19th October live shipments resumed.

164. On 21st November 2012 TDC received a partially redacted copy of the AHVLA review following the incident on 12th September and on 29th November 2012 TDC announced that it was lifting the ban.

165. The letter of 29th November 2012 to the claimantsô solicitors explaining TDCôs decision states that the Councilôs position was that the ban was justified on animal welfare grounds at the time it was taken but that in the light of the AHVLA review the ban was no longer appropriate. It may be noted that the ban was lifted despite the fact that there were to be no facilities at Ramsgate port or very close. Mr Seed contended that the changes in the AHVLAôs procedures described in the review meant that the

risk of a need for unloading at the port had reduced so much that there was no longer a need for facilities at the port.

166. Counsel for TDC submitted that TDC had decided promptly to lift the ban once AHVLA had made clear in its review that it had revised its contingency arrangements and that once the AHVLA had revised its procedures and contingency arrangements and had confirmed that it did not regard facilities in the port or in its immediate vicinity as necessary, TDC did not insist on those facilities as a condition of using the port.

167. I do not accept these characterisations of the lifting of the ban by TDC. In my judgment the letter of 29th November, Mr Seedôs evidence and the submissions are an attempt at rationalisation after the event. What really happened was that TDC knew it could no longer sustain the ban and took the opportunity of the AHVLAôs change in its procedures as a basis for justifying backing down.

Applying the law to the facts

168. I start by addressing the objective of the ban. TDCôs case seeks to portray the safe operation of the port as being a material element in the objective(s) of the ban. The events on 12th September were very disruptive to the operation of Ramsgate port and must have been very distressing for many people, including staff at the port. Equally it is true that the unloading at the port led to the deaths of over 40 sheep. Nevertheless the safe operation of the port was not the reason the ban was imposed. The highest the submissions of Counsel for TDC put the point was that the objective of the ban was to ensure the welfare of animals in the context of the safe operation of the port. However even that elevates the matter of the safe operation of the port too highly.

169. I find that Mr Seedôs true motivation was moral and political. TDC had wanted to ban the trade from Ramsgate port for a long time. TDC were not responsible for what happened on 12th September, but the events created the opportunity to stop the trade on what might have been a justifiable basis. The real objective of the ban was simply to stop the shipment of livestock through the port, effectively on a permanent basis, because of animal welfare concerns. There was no other reason for the ban.

Was the ban a justifiable breach of Art 35 TFEU?

170. It is not in dispute that the ban was contrary to Art 35. The question is whether it can be justified. On the basis of my view of the law, it can only be justified if it is accordance with the Regulation.

171. The claimants submitted that the ban went beyond the Regulation because the Regulation (Art 23) does not require facilities at the port and the AHVLA, acting within its powers under Art 23 had expressed the clear view that the facilities it had available in Kent were sufficient and that there was no need for facilities in the port. They argued that ban was directed at animal welfare but that there is no room in the Regulation for an individual port authority to act for that purpose and impose additional requirements over and above those provided by Art 23, especially when in substance the requirements amount to a complete block on trade.

172. TDC sought to rely on Art 1(3) of the Regulation but I have rejected the defendantôs case on that article.

173. Another key element in TDCôs argument was that the Regulation does not and does not purport to restrict the powers of port authorities to impose conditions on the movement of animals which are necessary for the proper and safe operation of the port. I accept that submission but only up to a point. The Regulation does not restrict the powers to port authorities to act on some grounds, for example to ensure the safety of port staff. However the Regulation does restrict the power of a port authority to act on animal welfare grounds. If it is acting on animal welfare grounds, the port authority has to act within the Regulation and that remains the case even though it can be said that animal welfare and the proper and safe operation of a port overlap. Since I have found the port authority was acting on animal welfare grounds, the Regulation is engaged. It does not give TDC the power to do what it did and accordingly I find that the ban cannot be justified as a breach of Art 35 TFEU.

*Damages under the **Francovich** principle?*

174. I need to decide if the breach was sufficiently serious for liability to damages to arise and whether there is a direct causal link between the breach and damage sustained by the injured parties.

175. The claimantsô main submissions in support of their case that the breach was sufficiently serious to call for an award of damages are the following:

i) The ban was a breach of a fundamental provision of the TFEU. The protection of free trade and the free movement of goods between member states provided for by Art 35 is a core article in the Treaty.

ii) Art 35 is clear and so is the Regulation. The Regulation deals explicitly with the situation which arose in Ramsgate in Art 23. The responsibility for handling emergencies is placed on the competent authority. That was not TDC. There is clearly no requirement for lairage facilities at the port of departure.

iii) Member states have little or no discretion on the point at issue in this case nor does a local authority in a member state.

iv) TDC knew that the view it took about facilities at the port was contrary to the clear view of the competent authority in the UK which was expressed both before and after the ban.

v) TDC knew the law was against it and took a calculated risk.

vi) TDC acted in haste, without a full knowledge of the facts, without the competent authorityôs blessing and without taking independent or any written advice.

vii) TDC failed to give any consideration to less restrictive measures such as a ban on unloading at the port.

viii) TDC set out at the start of 2012 with a preconceived wish to use its powers to block the trade if it possibly could and was heavily influenced by the political motivations of the Council leaders who were vehemently opposed to the trade and by what it saw as moral pressures.

ix) TDC knew the ban would cause loss to a particular group of commercial operators, including the claimants, and took no account of their interests.

x) TDCôs refusal to lift the ban even after DEFRA and T-Sol had reaffirmed their position that TDCôs view was wrong about the need for port lairage facilities was wrong.

176. I have already addressed the bases for points (i) to (iv), (vi), (viii) and (x) above. In my judgment they are well founded. Even without addressing the remaining points (v), (vii) and (ix) below, the submissions present a powerful case in the claimantsô favour.

177. On point (v), Counsel for TDC submitted that a factor in the Councilôs favour was that TDC had been concerned to act within the law at all times. I accept that submission for the period throughout 2011 and in 2012 up to the 12th September. On the day the decision was taken TDC had no basis on which to conclude that the ban was lawful but to say that TDC acted unlawfully deliberately goes too far. TDC ought to have taken advice on the matter and did not. The fairest characterisation is that TDC took a calculated risk.

178. On point (vii) and the question of whether less restrictive measures were feasible, an important point of detail which arose in the cross-examination of Mr Seed was whether the port authority had been forced to allow unloading of the sheep. It was put to Mr Seed that the Council could simply have banned all unloading of animals on the port in the light of what happened on 12th September. His answer why that would not have been worthwhile was to rely on the suggestion that the unloading had been forced on the port and so they could not be certain it would not happen again. He thought they had been assured that there would be no unloading in the port and yet it had happened. The tenor of Mr Seedôs evidence was that the duty port manager had felt that he was asked to provide facilities at the port because the animals were going to be unloaded. I do not accept that unloading at the port was forced on the harbour authority. There was no evidence from the duty port manager. The evidence from Mr Brown and from the AHVLA timeline does not support the submission that TDC were forced to provide premises for unloading. The timeline shows that the AHVLA asked the duty port manager if there was anywhere within the port that might be suitable. The space which was used was then identified. In my judgment the port was not forced to provide unloading facilities. More importantly even if TDC had felt obliged to provide facilities for unloading, the events could not justify a view that a future ban on unloading in the port was unrealistic or pointless.

179. In the same vein, Counsel for TDC submitted that until the AHVLA changed its procedures in November 2012, there was a real risk that animals might again be unloaded at the port. I recognise that the changes to the AHVLA procedures were significant, particularly the decision to inspect 100% of the vehicles passing through the port instead of only inspecting some vehicles as had been the practice before. The other change was to set out detailed contingency plans for the provision of alternative

vehicles. However I do not accept that this undermines the idea that the Council could simply have banned unloading at the port instead of banning the trade.

180. In truth I think it never occurred to Mr Seed or anyone else at TDC on 13th September to ban unloading of animals at the port. Even if it was raised as an option, they would not have been interested in such a measure since it would not actually ban the trade. They were looking for a reason to ban the trade.

181. The idea of the Council suspending the trade until port facilities were built and thereby effectively stopping the trade altogether because no port facilities were going to be built, was an idea which had been discussed months beforehand (c.f. Mr Seedôs emails of 22nd and 23rd March 2012). I infer that those discussions are the place the idea of the ban imposed on 13th September came from.

182. One can also conceive of other measures which might have been taken which would have been less serious even assuming they would have been in breach of Art 35 TFEU. For example since the problem was clearly associated with the SARL Roche lorry, an immediate ban on SARL Roche lorries from Ramsgate port for a short period pending an urgent fact finding review would have stood in a very different light. Although TDC had some legitimate grounds to view the transporters as all linked given the involvement of Mr Lomas, Mr Ziokowski and the MV Joline, the fact remains that the problem on 12th September related to a particular lorry and was not in any sense the fault of the claimants. There was no basis on which to assess the risk posed by the claimants as being the same as the risk posed by SARL Roche. However the ban covered everyone.

183. Accordingly I accept the claimantsô point (vii) above. Putting the point another way, in my judgment the ban which was imposed was a disproportionate response to the problem which had arisen.

184. TDC advanced a number of points to diminish the seriousness of the ban which I have not accepted. They are:

i) TDC submitted that the ban went no further than was necessary to achieve legitimate aims because the events of 12th September (and earlier in 2012) showed that emergency facilities might been needed at the port. Since they were not available, a ban on transport through the port was justifiable. I reject the premise of this submission. It is another way of stating the same argument about a risk of unloading at the port.

ii) TDC submitted the ban was expressly limited in time. I have rejected that as a fair characterisation.

iii) TDC relied on the lifting of the ban, described it as having been lifted promptly and suggested that if the AHVLA had made its position clearer sooner after 12th September then the ban would either not have been imposed or would have been lifted earlier. I do not accept that for the reasons already dealt with.

185. Another point taken by TDC is that the opinion of counsel in June 2011 did not consider the legality of the ban nor did it address the circumstances in which the ban

was imposed. I accept that the opinion, which came over a year before the ban, was not focussed on the factual circumstances in which the ban took place nor was it concerned with a ban couched in the terms in which it came to be. However placing emphasis on this point simply serves to highlight the fact that TDC did not take independent legal advice when the ban was imposed on 13th September 2012.

186. There are some factors advanced by TDC which I accept do mitigate the seriousness of the breach. I accept that the ban was limited to the port and transporters were free to move animals through other ports (inasmuch as they could). The trade has now moved back to Dover.

187. Another relevant point diminishing the seriousness of the matter is that the ban was in fact in place for a relatively short time. Whatever TDCôs reasons were for lifting it, the decision was only in place from 13th September to 29th November 2012.

188. I also accept that TDC did not specifically intend to cause damage to the particular claimants. However since it will have been perfectly obvious that a ban was likely to harm the interests of all the livestock exporters who had been using the port, I think the claimantsô point (ix) puts the matter correctly.

189. One of the debates concerned the position of other EU bodies. There was a debate about whether positions taken by the European Commission have contributed or supported TDCôs position at different times. In my judgment none of the statements by the EU Commission are focussed sufficiently on the particular facts of this case to advance either partyôs case on this topic.

190. Considering the factors as a whole, in my judgment there is really only one conclusion. This was a serious breach of a fundamental element of the EU Treaty.

Causation

191. The question of the amount of any damages due if liability is established is not before the court at this stage. Given that, I am not in a position to say that there is a direct causal link between the breach and all the damages or heads of damage claimed by the claimants. However I am satisfied that there is a sufficient causal link to justify an enquiry. Although I have found that the inability of the claimants to use some other ports once Ramsgate was closed was not something caused by TDC, that finding does not justify a refusal to conduct an enquiry. In my judgment the inability of the claimants to export sheep from the UK across the channel after 13th September was a sufficiently direct consequence of the ban to justify damages on the ***Francovich*** principle. It may be that the claimants will fail to establish that all the damages they claim should be paid by TDC but that is issue for the enquiry. I have to decide the question of liability. In my judgment TDC are liable to pay damages to compensate the claimants for the losses caused by the breach of Art 35 TFEU.

Conclusion

192. The animal export trade is not popular. It involves activities which are highly distasteful to many people. However the law does not exist only to protect the interests of the popular. I have found that Thanet District Council did not have the authority to impose the ban which prevented the claimants from using Ramsgate port

to export livestock. The ban was an unjustifiable breach of Art 35 of the TFEU. It was a disproportionate decision reached in haste without separate legal advice and breached a fundamental element of the rules governing free trade in the EU. In my judgment the council is liable to pay damages to the claimants.