Neutral Citation Number: [2018] EWHC 3122 (Admin)

Case No: CO/1305/2018 and CO/1306/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Birmingham Civil Justice Centre
Priory Courts
33 Bull Street
Birmingham B4 6DS

Date: 16/11/2018

Before:

LORD JUSTICE HICKINBOTTOM
MR JUSTICE JAY

- -

Between:

In the Matter of an Appeal by Way of Case Stated

HIGHBURY POULTRY FARM PRODUCE LTD	**Appellant**
- and –	
CROWN PROSECUTION SERVICE	**Respondent**

In the Matter of an Application for Judicial Review

THE QUEEN (oao HIGHBURY POULTRY FARM PRODUCE LTD)	**Claimant**
- and –	
TELFORD MAGISTRATES COURT	**Defendant**
- and –	
CROWN PROSECUTION SERVICE	**Interested Party**

- -
- -

Stephen Hockman QC and David Hercock (instructed by **SAS Daniels LLP**) for the **Appellant/Applicant**
Richard Wright QC and Howard Shaw (instructed by **CPS**) for the **Respondent/Interested Party**

Hearing date: 2nd November 2018

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Judgment Approved

MR JUSTICE JAY:

Synopsis

1. Highbury Poultry Farm Produce Ltd ("HPFPL") operates a poultry slaughterhouse at Whitchurch in Shropshire under the approval of the Food Standards Agency. The average throughput is 75,000 chickens per day, equating to 19,500,000 or so chickens per annum. The birds have their legs shackled to a moving line and are then submitted to a number of sequential processes, namely (insofar as is material for these purposes) stunning, bleeding and scalding. On each of 31st August, 12th September and 5th October 2016 a chicken went into the scalding tank whilst still alive because its neck was not properly cut by a certificated operative.

2. HPFPL was charged with two offences in respect of each incident, namely:

> "1. The Defendant … being the business operator of a slaughterhouse, failed to comply with a specified EU provision, namely Article 3(1) of Regulation (EC) No 1099/2009 [on the protection of animals at the time of killing] ("the EU Regulation"), which required that animals should be spared avoidable pain, distress or suffering during their killing and related operations, in that a bird that had been subject to simple stunning was not stuck and bled out before being processed, contrary to Regulation 30(1)(g) of the Welfare of Animals at the Time of Killing Regulations 2015 (2015 S.I. No. 1782) ["the 2015 Regulations"].
>
> 2. The Defendant … being a business operator, failed to comply with a specified EU provision, namely Article 15(1) of [the EU Regulation], which required you to comply with the operational rules for slaughterhouses laid down in Annex III of the said Regulation, including point 3.2 setting out requirements for the bleeding of animals, in that, following the simple stunning of a chicken, there was a failure to systematically sever the carotid arteries or the vessels from which they arise and the animals entered the scalding tank without the visible signs of life [sic] having been verified, contrary to Regulation 30(1)(g) …." [the words "absence of" should have appeared before "the visible signs"]

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

4. Following a hearing which took place before District Judge (Magistrates Court) Cadbury sitting at Kidderminster on 23rd November 2017, a ruling was handed down at Telford Magistrates Court on 9th January 2018. In essence, District Judge Cadbury held

that these offences did not require proof of *mens rea*, and that consequently there was no need to prove culpability on the part of HPFPL.

5. On 19th March 2018 District Judge Cadbury stated a case seeking the opinion of this Court on the following two questions, viz.:

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

6. Given concerns as to the applicability of the case stated appellate procedure to a situation where the Magistrates Court has not made a final determination of guilt, HPFPL also brought judicial review proceedings against District Judge Cadbury's ruling. On 3rd May 2018 Sir Wyn Williams ordered that this Court should decide whether it has jurisdiction to determine the appeal by way of case stated; and, in the event that it should rule that jurisdiction is lacking, then proceed to determine whether to grant permission to apply for judicial review and decide the merits of that claim.

The Legislative Framework

7. The EU Regulation is directly applicable in all Member States and is enforced in the UK by or through the mechanism of the 2015 Regulations. Thus, the relevant criminal offences arise under the latter, although Regulation 30(1)(g) makes direct reference to EU provisions. It is clear law that the EU Regulations should be interpreted purposively, in line with standard EU principles (see, for example, *Omejc v Republika Slovenija* [C-536/09, paragraph 20]), and that any specific provision must be interpreted having regard to other provisions in the same legal instrument and in a manner which ensures that the effect of these other provisions is not undermined (see, for example, *Albrecht v Landeshautmann von Wien* [C-382/10, at paragraphs 18 and 21]). Moreover, national provisions cannot alter, modify or add to the scope of an EU Regulation (see, for example, *Hauptzollamt Hamburg-Oberelbe v Firma Paul G. Bollman* [1970] CMLR 141, at paragraph 4), and national law must be interpreted in conformity with EU law, including the latter's purposes, in order to secure full effectiveness (see, for example, *Pfieffer v Deutsches Rotes Kreuz* [2005] 1 CMLR 44, at paragraphs 113ff). Although no direct authority was cited for this proposition, it was common ground at the Bar that the operative provisions of the EU Regulation should be interpreted in the light of its recitals.

8. It is unnecessary to set out all the relevant operative provisions of the EU Regulation. It is not in dispute that HPFPL is a "business operator" (being a legal person "having under its control an undertaking carrying out the killing of animals") and runs a "slaughterhouse" within the meaning of Article 2. It is also agreed that the servants or agents of HPFPL, characterised in the skeleton argument of Mr Richard Wright QC as "operatives" but not described in this Regulation as such, held relevant certificates of

competence for the purposes of Article 7. I intend to focus on a limited number of key provisions.

9. The second recital provides:

> "Killing animals may induce pain, distress, fear or other forms of suffering to the animals even in the best available technical conditions. … Business operators or any person involved in the killing of animals should take the necessary measures to avoid pain and minimise the distress and suffering of animals during the slaughtering or killing process, taking into account the best practices in the field and the methods permitted under this Regulation. Therefore, pain, distress or suffering should be considered as avoidable when business operators or any person involved in the killing of animals breach one of the requirements of this Regulation or use permitted practices without reflecting the state of the art, **thereby inducing by negligence or intention pain, distress or suffering to the animals.**" [emphasis supplied]

10. Elsewhere, the preamble to the EU Regulation makes clear, to the extent that this ever needed to be spelled out, that the protection of animals at the time of killing is a matter of public concern affecting consumer attitudes. Furthermore, as the preamble also provides, improving animal protection impacts on meat quality, occupational safety and competition within the internal market.

11. Article 1 provides that the EU Regulation lays down rules *inter alia* for the killing of animals bred or kept for the production of food.

12. Chapter II introduces various "General Requirements". Article 3 provides insofar as is material as follows:

> "**General requirements for killing and related operations**
>
> 1. Animals shall be spared any avoidable pain, distress or suffering during their killing or related operations.
>
> 2. For the purposes of paragraph 1, business operators shall, in particular, take the necessary measures to ensure that animals:
>
> …
>
> (b) are protected from injury;
>
> …
>
> (d) do not show signs of avoidable pain or fear or exhibit abnormal behaviour.
>
> …

> 3. Facilities used for killing and related operations shall be designed, constructed, maintained and operated so as to ensure compliance with the obligations set out in paragraphs 1 and 2 under the expected conditions of activity of the facility throughout the year."

13. By Article 4, there is an obligation to stun animals only in accordance with the methods and specific requirements laid down in Annex I; and, by Article 5, there is a further obligation, specifically on business operators, to ensure that regular checks on stunned animals are carried out to ensure that they do not present any signs of consciousness or sensibility. By Article 6, there is a further obligation on business operators to ensure that animals are killed in accordance with standard operation procedures which have been planned in advance. There are additional obligations in Chapter II, bearing on the use of restraining and stunning equipment, which are expressed in similarly prescriptive terms: the verbs used are "shall" and "ensure".

14. Chapter III introduces various "Additional Requirements Applicable to Slaughterhouses". It may be inferred that Chapter II applies more generally, in other words to buildings which may or may not be slaughterhouses. By Article 15(1):

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

15. By Article 16:

> "1. For the purposes of Article 5, business operators shall put in place and implement appropriate monitoring procedures in slaughterhouses.
>
> [the remainder of this Article describes these procedures in detail]"

16. By Article 17:

> "1. Business operators shall designate an animal welfare officer for each slaughterhouse to assist them in ensuring compliance with the rules laid down in this Regulation.
>
> 2. The animal welfare officer shall be under the direct authority of the business operator and shall report directly to him or her on matters relating to the welfare of the animals. He or she shall be in a position to require that the slaughterhouse personnel carry out any remedial actions necessary to ensure compliance with the rules laid down in this Regulation."

17. Annex III contains a series of rules governing the operation of slaughterhouses. Point 3 is relevant for present purposes:

> "*Bleeding of animals*
>
> …

> 3.2 In case of simple stunning [i.e. stunning which does not result in instantaneous death: see Article 4] … the two carotid arteries or the vessels from which they arise shall be systematically severed. Electrical stimulation shall only be performed once the unconsciousness of the animal has been verified. Further dressing or scalding [the latter being for the purpose of removing the feathers of poultry] shall only be performed once the absence of signs of life of the animal has been verified.
>
> 3.3 Birds shall not be slaughtered by means of automatic neck cutters unless it can be ascertained whether or not the neck cutters have effectively severed both blood vessels. When neck cutters have not be effective the bird shall be slaughtered immediately."

18. Finally, by Article 23:

> "The Member States shall lay down the rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive …"

19. As has already been made clear, the relevant criminal offences are set out under Regulation 30(1)(g) of the 2015 Regulations, which provides:

> "(1) It is an offence to contravene, or cause or permit a person to contravene –
>
> …
>
> (g) a provision of the EU Regulation specified in Schedule 5, except … [not applicable]"

Schedule 5 specifies both Article 3(1) and Article 15(1) taken in conjunction with Annex III. Although it does not directly arise for consideration in this case, Article 3(2) is separately specified.

20. To complete the picture, Regulation 31(a)-(c) specifies offences which clearly require *mens rea* of some sort. Regulation 32 is a familiarly worded provision which fixes officers of companies with criminal responsibility in the event that the company itself is guilty of an offence, but only if that offence was committed with their consent or connivance, or was attributable to their neglect. Regulation 33 provides that the maximum penalty for an offence under Regulation 30(1)(g) is generally speaking a fine, save that in relation to a contravention of Article 3 it is a fine or imprisonment for a term not exceeding three months. Given that a company cannot be imprisoned, the only sanction applicable to HPFPL is a fine. However, it is clear from this that Parliament regards a violation of Article 3 as the most serious offence in the context of Regulation 30(1)(g).

21. I should add that in the present case no criminal proceedings have been brought against any individual operative under Regulation 30(1)(g), or against any officer of HPFPL under Regulation 32.

The Judgment of District Judge Cadbury

22. District Judge Cadbury was ably assisted by the detailed skeleton arguments submitted by junior counsel appearing before this Court. His chain of reasoning, in the main reflecting the submissions of Mr Howard Shaw, was as follows:

(1) Article 3(1) is silent as to *mens rea*, and the verb "spared" does not presuppose or predicate knowledge on the part of anyone. This provision therefore mandates the avoidance of a state of affairs.

(2) Articles 6ff go on to impose further duties on business operators to draw up standard operating procedures and so forth.

(3) Regulation 30(1)(g) creates two offences – "contravening" and "causing or permitting" – and *mens rea* is required in relation to the second but not the first.

(4) Regulations 31 and 32, in contrast to Regulation 30(1)(g), contain wording which expressly indicates the need to prove *mens rea*. It follows that "the necessary implication of the Regulations is to displace the presumption".

(5) These Regulations are not "truly criminal" but operate in the realm of animal protection and social concern. They are designed to enhance "greater vigilance to prevent the commission of the prohibited act".

(6) Overall, these considerations should lead to the conclusion that "the presumption of strict liability displaced the ordinary presumption of *mens rea*".

(7) Given that these were offences of strict liability, the prosecution did not need to prove culpability on the part of HPFPL.

HPFPL's Submissions

23. In clear and well-presented written and oral submissions, Mr Stephen Hockman QC for HPFPL pointed out that it is not the prosecutor's case that anybody within the directing mind and will of the company committed these offences, still less had knowledge of any salient facts. It follows, he submitted, that if *mens rea* is an essential component of the Regulation 30(1)(g) offence, HPFPL cannot be held vicariously liable for any negligence on the part of those who cut these birds on the three days in question. He also submitted by way of introductory observation that it is not being said against HPFPL that there have been any systems failures on its part in the sense in which he was deploying that term: namely, a negligent failure to create or implement a proper, EU Regulation compliant framework for the carrying on of its undertaking.

24. Mr Hockman submitted that this Court has jurisdiction to hear this appeal under section 111 of the Magistrates' Courts Act 1980 (the terms of which I set out under paragraph 45 below), relying on the decision of the Divisional Court in *Donnachie v Cardiff Magistrates' Court* [2007] EWHC 1846 (Admin). He submitted in the alternative that the issues of legal substance he has raised could be addressed within the scope of an application for judicial review.

25. Mr Hockman submitted that a sensible, purposive construction of the EU Regulation should not lead to the conclusion that HPFPL as business operator owed a strict duty to secure the avoidance of pain, suffering and distress in relation to these birds; and, on the contrary, should only be held to be in breach if intention or negligence were proved.

26. In developing these submissions, he relied on the following cumulative considerations.

27. First, the wording of recital (2) to the EU Regulation makes clear that intention or negligence is required even in connection with a breach of any substantive regulatory provision. In particular, the concept of that which is "avoidable" carries with it, as a matter of language and common sense, the notion of some sort of mental element or culpability.

28. Secondly, it was submitted that Article 23 of the EU Regulation makes clear that any penalties imposed by the criminal systems of Member States must be proportionate and dissuasive. These objectives are not enhanced, indeed they are contradicted, by the absence of any requirement of fault. Mr Hockman also relied on the fact that the definition of "business operator" in Article 2 limits HPFPL's responsibility to the control of the undertaking, rather than to anything or everything that may take place in the slaughterhouse.

29. Thirdly, Mr Hockman developed a series of submissions as to the meaning and application of Article 3 of the EU Regulation. He said that there can only be a direct breach of the obligation conferred by Article 3(1) by the person carrying out the killing. Additionally, it was said that the use of the verb "spared" indicated that there had to be fault on the part of the person not doing the sparing. He submitted that, in relation to business operators, the extent of the Article 3(1) duty was explicated or "unpacked" (my language, not his) by what is expressly set out in Article 3(2); and that these provisions contain classic systems obligations – in the sense in which Mr Hockman was using that term. Further, in addition to Article 3(1) "branching out" into Article 3(2), it also did so into Article 6 (which equally created a systems obligation) and into Article 15 (ditto). In short, the obligation on HPFPL *qua* business operator was, no more and no less, than to take "necessary measures" in the context of implementing and effectuating a system.

30. Fourthly, Mr Hockman developed a series of submissions on the interaction between Articles 5(1) and 16. He submitted that it was clear, at least in relation to stunning, that the obligation on the business operator was not an absolute one to avoid the state of affairs proscribed by Article 4 and Annex I. He submitted that similar considerations applied by parity of reasoning to Article 15 and Annex III.

31. By way of further and separate argument, Mr Hockman advanced four core submissions in support of his case that, in any event and regardless of whether the obligations in the EU Regulation are strict, Regulation 30(1)(g) requires *mens rea*.

32. First, he submitted that the language and characteristics of the legislative scheme pointed to the need to prove *mens rea*. In particular, the use of the terminology "cause or permit" in Regulation 30(1)(g) indicated that *mens rea* is required, and no sensible distinction could be drawn between that part of the sub-regulation and the antecedent part with its use of the verb "contravene". Overall, Mr Hockman submitted, this textual analysis demonstrates that "knowledge of the circumstances is an essential unexpressed ingredient of Regulation 30(1)(g)".

33. Secondly, Mr Hockman submitted that, in an instance (as here) of legislative silence, the presumption at common law is that proof of intention or knowledge is required to found guilt. Reference was made to the well-known line of cases supporting this proposition. It was submitted that the threshold for displacing the presumption is high, that the only circumstances in which the presumption may be displaced are where the statute addresses an issue of social concern, and that the mere fact that other sections of the legislation in point expressly require *mens rea* is not in itself sufficient to rebut the presumption in relation to a provision which is silent on this topic.

34. Thirdly, Mr Hockman drew strong parallels between the instant case and the decision of this Court in *Riley v CPS* [2017] 1 WLR 505, where it was held that analogous provisions under the Animal Welfare Act 2006 require proof of *mens rea*.

35. Fourthly, Mr Hockman submitted that the approach he was advocating was fortified by the law regarding secondary liability (see *R v Jogee* [2017] AC 387, paragraph 99) which requires proof of knowledge in a secondary offender (here, HPFPL) where the relevant principal offenders are the operatives who bled the birds. It is said that there is no suitable justification as to why in this case the law should put HPFPL in a worse position than a secondary party.

36. A further point which featured more in Mr Hockman's skeleton argument than in his oral submissions to the Court was that, regardless of whether he is right about the need to prove *mens rea*, a proper interpretation of the legislative scheme demonstrates that the prosecutor must prove a culpable act and/or omission on the part of the business operator. Put another way, in the absence of such culpability, vicarious liability cannot properly arise. Mr Hockman deployed a number of arguments in support of this submission, but in my view it does not raise a point separate from his primary contention that proof of *mens rea* is required. The reasons for this appear in paragraphs 89-94 below.

The Submissions on Behalf of the Prosecutor

37. Mr Wright submitted that it is clear that the offence of contravening a relevant provision of the EU Regulation contrary to Regulation 30(1)(g) does not import a mental element, and in the alternative the common law presumption of *mens rea* falls to be displaced.

38. He submitted that the EU Regulation has as its unequivocal purpose the protection of the welfare of animals at the time of slaughter, and Article 3(1) lies at the heart of the regulatory scheme. This core provision declares an outcome that is mandatory.

39. On my understanding of his oral argument, Mr Wright's analysis of recital (2) is that the main body of the EU Regulation - aside from the core provision of Article 3(1) - contains a series of "bare minimum" requirements, on the basis that some pain and suffering by animals may be inevitable; and that there is a further requirement to avoid the negligent or intentional infliction of such pain etc. as indicated by the final clause to recital (2). As for the core provision, there is an obligation placed on the relevant person to ensure that an animal is not subjected to avoidable pain. On this approach, the series of obligations under Article 3(2) are not intended to be exhaustive of the primary duty placed on a business operator under Article 3(1).

40. It therefore followed, submitted Mr Wright, that the Regulation 30(1)(g) offence, at least in an Article 3 case, is committed when an animal is subjected to avoidable suffering; and for these purposes the focus is not just on the person doing the killing. If the position were otherwise, enforcement would be unworkable because it is usually impossible to identify that person, and in any event the slaughtering process is very often entirely mechanised.

41. Mr Wright submitted that this should not be envisaged as just a systems requirement (in the sense in which Mr Hockman was deploying that term). His submission was that the system was required to achieve, or avoid the occurrence, of specific outcomes.

42. In relation to Article 15 read in conjunction with Annex III, Mr Wright strongly submitted that this is couched in strict or absolute terms: the business operator must ensure that a bird is killed exactly in accordance with the requirements of point 3.2. Such an interpretation chimes with the overall objective of the EU Regulation, which is to safeguard animal welfare, and is also consistent with the role and functions of a business operator within that regime. That entity has control of, and therefore responsibility for, the relevant undertaking; it is not a requirement that it has control of everything that might happen within a slaughterhouse.

43. As for Regulation 30(1)(g) and the displacement of the presumption of *mens rea*, Mr Wright's skeleton argument advanced a number of helpful submissions which it is unnecessary for me to set out.

Jurisdiction

44. Mr Wright agreed with Mr Hockman that District Judge Cadbury had power to state a case for the opinion of this Court, thereby founding our jurisdiction to consider the two questions the latter has posed. Given that HPFPL has instituted a timeous application for judicial review, the point is somewhat academic (explaining why neither Counsel was concerned to make oral submissions), but it is right that I address it briefly.

45. The jurisdiction to state a case is founded on the familiar wording of section 111 of the Magistrates' Courts Act 1980, which provides:

> "(1) Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess

> of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court in the question of law or jurisdiction involved; …"

46. In *Atkinson v USA* [1971] AC 197 the House of Lords held that examining magistrates deciding whether there is sufficient evidence to justify committing the accused for trial have no power to state a case because committal proceedings did not lead to any final adjudication of rights but merely to whether there is an arguable case on the evidence. This conclusion was arrived at with regard to the legislative history (see in particular the speeches of Lords Reid and Morris), decisions of the Divisional Court such as *Card v Salmon* [1953] 1 QB 392, and a textual analysis of the then governing statute, section 87 of the Magistrates' Courts Act 1952 (see Lord Upjohn at 248C-249D). The narrow *ratio* of *Atkinson* was confined to determinations of examining magistrates, although Lord Reid pointed out (at 235C) that the same conclusion should apply in relation, for example, to decisions regarding the admissibility of evidence – these, by parity of reasoning, were not "final".

47. In *Streames v Copping* [1985] 1 QB 920, this Court (May LJ and Taylor J) applied the reasoning of *Atkinson* to a decision by magistrates that an information was not bad for duplicity: unless and until a "final determination on the matter before them" was reached, the Divisional Court had no power to consider or determine the case.

48. Mr Hockman submitted that the Divisional Court in *Streames* misconstrued the ratio of *Atkinson*, which was only that examining justices had no power to state a case. I think that there is some force in that submission, but *Streames* was decided by a court of co-ordinate jurisdiction and I am far from convinced that it was wrongly decided (see, for the relevant test on this point of *stare decisis*, the decision of the Divisional Court in *R v Greater Manchester Coroner, ex parte Tal* [1985] 1 QB 67). On the facts of *Streames*, the determination that the information was not bad for duplicity did not finally decide the case: cf. the situation which would have obtained had the determination gone the other way.

49. In *R (oao Donnachie) v Cardiff Magistrates' Court* [2007] 1 WLR 3085, this Court (Sedley LJ and Nelson J) held that a district judge had wrongly declined to state a case in circumstances where he had decided that various informations had been laid in time. At paragraph 6 of his judgment Nelson J observed:

> "I am satisfied that this court has jurisdiction to deal with the claimant's applications and that the magistrates' court could have stated a case. It is, as the district judge ruled, correct to say that examining magistrates do not come to a final decision when committing a defendant for trial and hence no case can be stated in respect of the decision to commit: see *Atkinson's* case and *Dewing's* case. Where, however, the magistrate is acting not as examining magistrate, but deciding a preliminary issue as to jurisdiction, his ruling upon that is final and can properly be challenged by way of case stated or judicial review: see *R v Clerkenwell Metropolitan Stipendiary Magistrate, ex parte DPP* [1984] QB 821. The contrary has not been argued by the parties before this court. However, the more expeditious procedure now

> is to determine by way of judicial review the questions on which the case would have been stated."

50. Mr Hockman relied heavily on this authority, but a number of points may be made about it. First, the contrary position was not argued. Secondly, these were judicial review proceedings, and paragraph 6 of Nelson J's judgment was *obiter* to the extent that it touched on the case stated procedure. In any event, as the final sentence indicates, judicial review is preferable and more expeditious. Thirdly, *Streames* was not cited to the Divisional Court. Fourthly, *Clerkenwell Metropolitan Stipendiary Magistrate* was a case where jurisdiction had been declined, such that the proceedings were at an end, whereas on the facts of *Donnachie* jurisdiction was accepted, such that the proceedings remained extant. The concept of finality more obviously applies to the former rather than to the latter. In my view, *Donnachie* does not remotely bear the weight that Mr Hockman suggests.

51. In *Platinum Crown Investments Ltd v North East Essex Magistrates' Court* [2018] 4 WLR 11 this Court (Treacy LJ and Dove J) converted an appeal by way of case stated into a claim for judicial review in circumstances which were described as an interlocutory appeal from the magistrates' court whose effect was to confer jurisdiction. Treacy LJ explained that the general rule that the High Court had no jurisdiction should yield in exceptional circumstances where a degree of flexibility would save time and cost. Although this Court adopted the "pragmatic approach" described by Mr Hockman in his speaking note, in my view this case is not authority for the proposition that appeal by way of case stated is a possible or permissible route in these particular circumstances; indeed, it suggests that judicial review is the appropriate avenue for redress.

52. Finally, in *Downes v RSPCA* [2018] 2 Cr. App. R. 3 the issue before this Court (Holroyde LJ and Julian Knowles J) on an appeal by way of case stated was whether this was the appropriate avenue to pursue in a situation where the district judge had made a preliminary ruling to the effect that the charges were laid in time, and the magistrates' court therefore had jurisdiction to consider them. After a thorough examination of the relevant jurisprudence, the Divisional Court drew a distinction between cases where jurisdiction was declined, and the decision was therefore "final", and where it was not. As Julian Knowles J explained at paragraph 23 of his judgment:

> "It seems to me that the relevant principles to be drawn from these cases are as follows: (a) where a jurisdictional point is taken before the magistrates' court, then if the court declines jurisdiction that decision can be challenged either by judicial review or by way of case stated (see *Clerkenwell Metropolitan Stipendiary Magistrate*, supra); (b) where such a point is taken and a court accepts that it has jurisdiction then there is nothing in *Streames* to suggest that the magistrates' court has the power to state a case. The only remedy is for the aggrieved party to seek judicial review, and the magistrates in such an event should not adjourn unless there are particularly good reasons to do so. It will very usually be better to carry on and complete the case, allowing for all matters to be raised on appeal at the conclusion of the case in the normal way; and (c) in all other cases there is no power to state a case in relation to an interlocutory ruling. A magistrate

> should proceed to determine the case finally and then to state a case if appropriate to do so. In a "special case" (the words used in *Streames*) and if the defendant has obtained leave to seek judicial review then the magistrates might consider adjourning."

53. Further, at paragraph 37 Holroyde LJ considered that *Donnachie* should be regarded as decided *per incuriam*, and at paragraph 38 he said this:

> "*Streames v Copping* draws a clear distinction between on the one hand a decision declining jurisdiction, which is a final decision because in the absence of any appeal it brings proceedings to an end, and on the other hand a decision affirming jurisdiction, which is not a final decision because the proceedings will thereafter continue, whether as a contested trial or as a guilty plea as the case may be."

54. In the present case, District Judge Cadbury ruled on preliminary issues rather than made a determination that went to his jurisdiction. The practical effect of his ruling, if upheld by this Court, may be that HPFPL has no defence to these charges; or, if HPFPL is right and Regulation 30(1)(g) requires proof of *mens rea*, the prosecution will be discontinued. In that sense, therefore, the rulings on the preliminary issues may be dispositive, whatever the outcome; but that is not the test. As Holroyde LJ has pointed out, if the effect of the ruling in question is that the proceedings remain extant, irrespective of whether they are contested on the issue of guilt or finally determined on a guilty plea, the case stated procedure is inappropriate.

55. In my judgment, item (c) of paragraph 23 of *Downes v RSPCA* is precisely in point. Further, the reasoning of the Divisional Court in that case is highly persuasive, and I have no hesitation in applying it to the instant case. It follows that this Court should proceed by way of application for judicial review rather than appeal by way of case stated. In the light of paragraph 3 of Sir Wyn Williams' Order dated 3rd May 2018, I would grant permission to apply for judicial review and proceed to determine the merits of HPFPL's claim within that procedural ambit. In practice, this makes no difference because the issues of law posed by District Judge Cadbury will still be answered.

Regulation 30(1)(g): offences of strict liability or mens rea?

56. It is necessary to formulate the question in this manner because the EU Regulation does not create any criminal offences. These are created by Member States in line with their own legislative techniques and established approaches to the criminal law whilst at the same time adhering at all material times to the language, principles and policies of the EU Regulation, including Article 23. Ultimately, the analysis must come down to Regulation 30(1)(g) of our domestic legislation, but Mr Hockman was fully entitled to attempt two bites of the cherry: first of all, to seek to persuade us that the obligations on business operators under EU law are not absolute; and, secondly, that in any event domestic law does not create offences of strict liability in this regard.

57. Taking the issues in the order suggested by Mr Hockman, I confess that I find the construction of Article 3(1) curious. The draftsperson has used the passive voice and

has not identified on whom this "General Requirement" (being the first, and presumably the foremost, of the "General Requirements" set out in Chapter II) falls. Moreover, recital (2) is somewhat discursive and imprecise in its terms, rendering the necessary purposive construction more problematic.

58. However, what recital (2) does make clear is that the obligation to take "necessary measures" (a term which appears frequently in the EU Regulations) rests on business operators as well as on operatives, and it is an obligation to avoid pain and minimise distress and suffering. The obligation is not reserved to those who directly carry out relevant processes. From this it may be deduced that the concept of "necessary measures" is not inextricably bound up with the implementation of systems. Further, these deleterious consequences are deemed to be "avoidable" if business operators and operatives breach any one of the requirements of the EU Regulation, "or use permitted practices without reflecting the state of the art, thereby inducing by negligence or intention pain etc." I would read the subordinate clause "thereby inducing …" as qualifying this second limb rather than the first. In any event, I certainly would not read this subordinate clause as setting forth an essential component of all regulatory breaches.

59. I cannot accept Mr Wright's submission that the main part of recital (2) and/or the majority of the substantive regulatory obligations are about "bare minimum standards", and that what I am calling the subordinate clause at the end of the recital creates an additional tier of obligation. Even if this clause does not merely cover the second limb of the final sentence of the recital, all that it is doing is saying that a breach of the regulations will usually entail fault. Or, turning this round, if there *is* negligence or intentional infliction of harm, it would be difficult to see how at least one regulatory provision has not been breached.

60. Article 3(1), despite the passive voice, clearly places an overarching general requirement or duty on a person. This is implicit in its wording – a good synonym for "shall be spared" would be "shall not be subjected to", and subjection connotes a specific activity by somebody – and I note that the draftsperson of Schedule 5 to the 2015 Regulations thinks the same. I would reject Mr Hockman's subordinate submission that "spared" connotes an element of knowledge by the person doing the sparing: I think that it is neutral. It is clear from Article 3(2) and (3) that the Article 3(1) duty is imposed on business operators. It is not in dispute that, depending on the context, it also rests on operatives. Further, I would not necessarily construe Article 3(2) as exhaustive of the circumstances in which the relevant obligation will fall on business operators (see, "in particular"); nor would I be inclined to interpret Article 3 as a whole as applying solely to instances where there have been breaches of other regulations within this regime. If the position were otherwise, Article 3 would serve no independent purpose. It is designed to set out some general, high-level requirements which are less specific than the requirements which start at Article 4.

61. However, it is unnecessary to reach a definitive conclusion as to exactly how Article 3(1) is intended to operate in all conceivable situations, for this straightforward reason.

62. The informations in this case allege that HPFPL breached Article 3(1) in failing to stick and bleed out these three birds, and breached Article 15(1), read in conjunction with Annex III, in failing to ensure that their arteries were systematically cut. In essence, therefore, the facts giving rise to each breach are identical. Put another way, the only

basis for a finding of guilt in relation to Article 3(1) is that HPFPL is guilty of a violation of Article 15(1). Thus, even if the ambit of Article 3(1) is not entirely clear in all theoretical circumstances, in my view it clearly does apply to situations where some other regulatory breach has been established. This is made clear by Article 3(2)(d) read in conjunction with recital (2), and the express obligation on business operators to take the necessary measures to ensure that animals do not show signs of avoidable pain. Article 3(2)(d) applies for the purposes of Article 3(1), and a breach of the overarching provision will occur if business operators fail to take such necessary measures to ensure the avoidance of this particular result. It follows that, in the particular circumstances of this case, the issue of whether the Article 3(1) duty on business operators is a strict one is both extremely narrow and focussed.

63. In these circumstances, I consider that it is more convenient to examine the nature of the obligation on business operators under Article 15(1) read in conjunction with point 3.2 before reaching any conclusions as to the position under Article 3(1).

64. In my judgment, the language of Article 15(1) is plain, and the obligation that it confers is absolute. There is a duty on business operators (and not, *pace* Mr Wright, on operatives) to ensure that the Annex 3 code – the operational rules set out thereunder – is complied with. It follows that there is a strict duty to ensure that point 3.2 of Annex III is complied with and that the carotid arteries of birds are severed. I would have no particular difficulty in characterising this as a "systems duty" provided that I am not misunderstood. It is not limited to a duty to secure that a system is in place such that only certificated operatives work on these lines, are properly trained and supervised, and so forth; it is a duty to ensure that a system is in place whereby on each occasion that a bird is killed its arteries are cut.

65. Mr Hockman invited comparison with other provisions in both Chapters II and III which suggest that the obligation is limited to emplacing either "necessary measures" or, by implication, appropriate systems. I would agree with him that this is certainly true of Article 6, which requires business operators to draw up and implement standard operating procedures "to ensure that killing and related operations are carried out in accordance with Article 3(1)". A failure by an individual operative to perform a particular killing operation in conformity with these procedures would not automatically render the business operator in breach of Article 6.

66. A similar analysis applies to "stunning methods" and Articles 4, 5 and 16, with a number of refinements. Article 5 obliges business operators to ensure that the persons responsible for stunning carry out regular checks, and Article 16 imposes further monitoring obligations. If regular checks are not carried out, the business operator will be in breach for failing to ensure that they are. The same applies to monitoring. Nonetheless, Mr Hockman is correct in submitting that, provided that regular checks are carried out, a business operator's obligations under Article 5 are discharged even if an animal is not stunned properly in an individual case.

67. The way in which Article 4 is worded, despite the same use of the passive voice as in Article 3(1), is that the killing of an animal after a failure to stun it in accordance with the methods and specific requirements set out in Annex I may well place the business operator as well as the operative in breach. Annex 1, Chapter II, point 1 makes clear that business operators are obliged to "pay attention" when a particular stunning technique is used. It is also to be noted that paragraph 23(1) of Schedule 1 to the 2015

Regulations places a number of "general requirements" in relation to stunning on both business operators and operatives.

68. In my view, a comparison between the wording of Article 15 and of other provisions in Chapters II and III of the EU Regulation does not really advance Mr Hockman's case. There are important linguistic differences which I have mentioned. In any event, the wording of Article 15 (and, I would add, Article 14) is much more precise than that of Articles 4, 5 and 16. In particular, the whole of Article 15 is expressed in mandatory terms ("shall ensure that the operational rules … are complied with"); and, where Annex III does not create strict duties, it does so expressly: see, for example, points 1.3 and 1.4, and the obvious contrast with points 3.2 and 3.3. Furthermore, although the point does not arise for direct consideration in this case, the strict prohibitions contained with Article 15(3) are clearly intended to apply to business operators.

69. As Mr Wright points out, it is also of some relevance that Article 17 obliges business operators to designate an animal welfare officer "to assist them in ensuring compliance with the rules laid down in this Regulation". This individual, pursuant to Article 17(2), works under the direct authority of the business operator and must be authorised to require that slaughterhouse personnel "carry out any remedial actions necessary to ensure compliance with the rules laid down in the Regulations". The language is of ensuring compliance with the rules; it is not limited to ensuring that systems are implemented and operated in such a manner that in the usual course of things the rules are highly likely to be complied with.

70. Even if the term "necessary measures" were somehow imported into Article 15, either by necessary implication or by analogy with other provisions, the result would be the same. This concept first appears in recital (2) and it is expressly mentioned in Article 3(2). Given that "any person involved in the killing of animals shall take the necessary measures to avoid pain etc.", and that this duty applies equally to the operatives, it is difficult to see how a requirement to take such measures somehow lessens the strictness of the duty. An operative who subjects an animal to avoidable pain has, by definition, failed to take the necessary measures to avoid pain. The same logic must apply to business operators. The obligation is not to take "all reasonable measures" or even "all reasonably necessary measures". Thus, even though my favoured approach to Article 15(1) is that it does not leave open the possibility of importing the concept of "necessary measures", I would interpret such a requirement as being strict rather than as imposing some form of lesser duty.

71. For all these reasons, I would reject Mr Hockman's submissions directed to the meaning and application of Article 15(1) (read in conjunction with point 3.2 of Annex III) of the EU Regulation.

72. This leaves the question of how Article 3(1) should be interpreted and applied on the facts of this case. I have already concluded that this overarching provision, by necessary implication, applies to business operators – despite the use of the passive voice and the slightly uncomfortable choice of the verb "spared". I would read Article 3(1) as providing that animals are not to be subjected to avoidable pain by business operators; that avoidable pain includes pain which has resulted from a breach of a provision of the EU Regulation (here, Article 15(1)); and, that on these facts HPFPL as business operator is in breach of Article 3(2)(d), and therefore of Article 3(1), by failing to take

the necessary measures to ensure that these birds did not show signs of avoidable pain. It follows, in my view, that on the facts of this case the Article 3(1) duty is strict.

73. Although an important step towards the overall conclusion in this case, my rejection of Mr Hockman's first group of submissions cannot be regarded as conclusive. He has, as has been pointed out, a second bite of the cherry. Ultimately, the answer to this case hinges on whether Regulation 30(1)(g) requires proof of *mens rea*. It is to this issue that I now turn.

74. The wording of the Regulation is silent as to the need to prove any mental element. It cannot be said that the regulatory wording in itself clearly shows an intention to create an absolute offence. It follows that the present case is governed by the general principles set out by Lord Reid in *Sweet v Parsley* [1970] AC 132, at 148-149D:

> "Where it is contended that an absolute offence has been created, the words of Alderson B. in *Attorney-General v. Lockwood (1842) 9 M. & W. 378* , 398 have often been quoted:
>
> "The rule of law, I take it, upon the construction of all statutes, and therefore applicable to the construction of this, is, whether they be penal or remedial, to construe them according to the plain, literal, and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evident absurdity."
>
> That is perfectly right as a general rule and where there is no legal presumption. But what about the multitude of criminal enactments where the words of the Act simply make it an offence to do certain things but where everyone agrees that there cannot be a conviction without proof of mens rea in some form? This passage, if applied to the present problem, would mean that there is no need to prove mens rea unless it would be "a plain and clear contradiction of the apparent purpose of the Act" to convict without proof of mens rea. But that would be putting the presumption the wrong way round: for it is firmly established by a host of authorities that mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary.
>
> It is also firmly established that the fact that other sections of the Act expressly require mens rea, for example because they contain the word "knowingly," is not in itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. I say "must have been" because it is a universal principle that if a penal provision is reasonably capable

> of two interpretations, that interpretation which is most favourable to the accused must be adopted."

75. At paragraph 48 of the case stated District Judge Cadbury referred to the presumption of strict liability displacing the ordinary presumption of *mens rea*. In my view, strict liability should not be conceptualised in these terms. The correct analysis is that strict liability only arises if the general or ordinary presumption is displaced, and the noun "presumption" in the context of strict liability is something of a misnomer. Further, as Lord Reid has explained the threshold for rebutting the presumption of *mens rea* is a high one and regard must be had to all the relevant circumstances in divining the intention of Parliament. This mandates consideration being given to the purposes, policies and objects of the legislation in point, whether the offences in question are truly or only quasi-criminal (see further below), and an analysis of the statutory language directly and indirectly in play.

76. There are of course numerous authorities which address the application of the presumption and its displacement. Many of these were drawn to our attention. For present purposes it is necessarily expressly to refer only to two well-known citations:

> "Where penal provisions are of general application to the conduct of ordinary citizens in the course of their every day life the presumption is that the standard of care required of them in informing themselves of facts which would make their conduct unlawful, is that of the familiar common law duty of care. But where the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose by penal sanctions a higher duty of care on those who choose to participate and to place upon them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care. But such an inference is not lightly to be drawn, nor is there any room for it unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation (see *Lim Chin Aik v. The Queen [1963] A.C. 160*, 174)." [per Lord Diplock in *Sweet v Parsley*, *ibid.*, at 163D-G]
>
> and
>
> "In their Lordships' opinion, the law relevant to this appeal may be stated in the following propositions (the formulation of which follows closely the written submission of the appellants' counsel, which their Lordships gratefully acknowledge): (1) there is a presumption of law that mens rea is required before a person can

> be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is "truly criminal" in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act." [per Lord Scarman in *Gammon (Hong Kong) Ltd v AG of Hong Kong* [1985] AC 1 (PC) at 14B-D]

77. The highest authority for Lord Scarman's fifth proposition is also to be found in the *Tesco Supermarkets Ltd* case (*ibid.*): per Lord Diplock at 194B-195A.

78. In my judgment, the principal objective of the 2015 Regulations read in conjunction with the EU Regulation is to promote the welfare of animals during the slaughtering process by obliging both business operators and those employed by them to take all necessary measures to avoid pain and minimise distress. Recital (4) to the preamble to the EU Regulations recognises that this is a matter of public concern, and by necessary implication that high standards should be applied in this domain. Item (4) in *Gammon (Hong Kong) Ltd* is directly in point because there can be no sensible distinction between public and social concern, or indeed between public and animal safety. These are factors which indicate strongly that the presumption should be displaced, but they are not determinative.

79. Mr Hockman submits that there is no basis to suggest that strict liability is required to be imposed to promote the objects of the legislation by encouraging greater vigilance. He links this aspect of the matter with the language of Article 23 of the EU Regulation, in particular the use of the adjective "dissuasive". I would agree with him that business operators are indubitably required to carry out regular checks on stunning methods, to draw up and implement standard operating procedures, and that to some significant extent adherence to these duties will lead to the running of a slaughterhouse which is Article 3(1) compliant. But it does not follow, in my opinion, that these systems obligations should be regarded as exhaustive of the duties of the business operator, or that greater vigilance is encouraged solely with reference to them. In my judgment, the objects of this legislation are furthered, and greater vigilance engendered, by insisting on strict compliance with, for example, the Annex III requirements referenced in Article 15, not least because the greater the assiduity and efforts of the business operator in this regard, the more probable it will be that animals are spared avoidable suffering.

80. It was also suggested that the lapses which occurred on these three occasions in August to September 2016 were the result of understandable human error which could exist in even the best-run system, and that in this respect "greater vigilance" on the part of HPFPL could make no difference: the business operator has already been vigilant enough. However, District Judge Cadbury made no finding about this, and he was not asked to. This Court has received no evidence as to what happened on these three occasions, as to how and why these mistakes occurred, and as to how they came to be

discovered. The concept of human error includes the possibility of negligent mistake. In any event, even if it be the case that mistakes like this will inevitably be made from time to time, it does not follow that greater vigilance by the business operator, in terms of training, supervision, monitoring or whatever, could not have an impact on the number of such cases arising.

81. Mr Wright relies on the fact that other provisions in the 2015 Regulations clearly do require *mens rea*, and he submits that this lends support to the contention that the presumption has been displaced. I have referred to Regulations 31 and 32. In *Sweet v Parsley* Lord Reid stated that a comparative textual analysis of this sort cannot be the sole reason for displacing the presumption. Furthermore, in *R v St Regis Paper Co Ltd* [2012] PTSR 871 the contrast which the Court of Appeal Criminal Division drew between the different wording of various sub-paragraphs, some said to create strict liability offences, others not, was in the context of a *single* regulation, namely Regulation 32(1) of the Pollution Prevention and Control (England and Wales) Regulations 2000. In my view, this sort of textual comparison carries less weight in the present case where the provision directly under scrutiny does not, save in one respect, differentiate between ordinary and absolute offences.

82. The one respect in which Regulation 30 does – at least on its face – appear to draw a distinction between these types of offences is in the opening words of sub-regulation (1), viz. "[i]t is an offence to contravene, or to cause or permit a person to contravene – etc.". Mr Hockman submits that there can be no sensible distinction between these two "limbs" of the sub-regulation, such that "contravene" means "knowingly contravene" (or, perhaps more precisely, that the presumption is not displaced in relation to the first limb). Mr Wright turns this argument round 180 degrees and submits that the regulatory language points to there being a clear distinction, with *mens rea* being a pre-requisite only for the second limb.

83. In my judgment, Mr Wright's submissions on this particular point are to be preferred. It is commonplace to see statutes creating criminal offences which contain discrete elements. The first element has verbs such as "uses", "creates", "carries out" or "contravenes"; the second element has "causes or permits". In such situations, subject always to other countervailing considerations, *mens rea* may not be required for the former but it always is for the latter: see, for example, the decision of the Divisional Court in *James v Smee* [1955] 1 QB 78.

84. Furthermore, in the circumstances of the present case an approach to "contravenes" that insists on the importation of a mental element by operation of the presumption seems to me to be disloyal to the express terminology of, in particular, Article 15(1) of the EU Regulation read in conjunction with point 3.2 of Annex III. Although no submissions were made on this point, it is also inconsistent with much of the express terminology of Schedule 1 to the 2015 Regulations, to which Regulation 30(1)(c) refers.

85. Finally, it seems to me that the recent decision of the Divisional Court in *Riley v DPP* [2017] 1 WLR 505, relied on by Mr Hockman, does not assist his argument at all. In that case the provision under consideration was section 4(2) of the Animal Welfare Act 2006, which provides:

> "(2) A person commits an offence if—

> (a) he is responsible for an animal,
>
> (b) an act, or failure to act, of another person causes the animal to suffer,
>
> (c) he permitted that to happen or failed to take such steps (whether by way of supervising the other person or otherwise) as were reasonable in all the circumstances to prevent that happening, and
>
> (d) the suffering is unnecessary."

86. The issue in *Riley* was whether an offence charged under the second limb of section 4(2)(c) ("failed to take such steps … as were reasonable in all the circumstances") required proof of *mens rea*. The Divisional Court (Gross LJ and Andrew J) had little difficulty in holding that it did, because there was no sensible basis for distinguishing between it and the first limb of the very same provision ("permitted that to happen"). The whole tenor of paragraph 4(2), taken as a whole, is indicative of an offence requiring *mens rea* whichever limb of subparagraph (c) is applicable. Furthermore, and as Mr Hockman pointed out elsewhere in his submissions, the verb "permitted" usually connotes fault.

87. I do not consider that Mr Hockman's point about secondary liability and *R v Jogee* has any real bearing on the issues which fall to be resolved, not least because the operatives are not primary parties for the purposes of Article 15(1).

88. Overall, in my judgment the EU Regulation, in particular Chapter III, should be seen as setting forth a comprehensive code or rule-book which must be complied with by the business operator at all material times. On the facts of the present case, there was a strict obligation to sever the main arteries systematically, and a concomitant strict obligation to spare these birds avoidable pain.

Culpability?

89. District Judge Cadbury struggled with the idea that HPFPL might not be culpable even if these were offences of strict liability, and I have the same difficulty. At the hearing below it was not suggested by the prosecutor that HPFPL could be held criminally liable on the basis that anyone constituting its directing mind and will possessed knowledge of any relevant facts and/or was culpable. The case was advanced on the basis that HPFPL is vicariously liable for the acts and/or omissions of the operatives who had bled these birds (see paragraphs 90ff of the skeleton argument deployed before the District Judge), and that this was so regardless of any fault on their part.

90. In his skeleton argument Mr Wright reminded us of the well-known line of late Victorian and early twentieth century cases vouching the proposition that there can be no vicarious liability for other than offences of strict liability. He mentioned *Coppen v Moore (No. 2)* [1898] 2 QB 306, *Pearks, Gunston and Tee Ltd v Ward* [1902] 2 KB 1 and *Mousel Brothers Ltd v London & North Western Railway Co* [1917] 2 KB 836.

However, the most authoritative statement of this principle is to be found in Lord Diplock's speech in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, at 199B-C:

> "But there are some civil liabilities imposed by statute which, exceptionally, exclude the concept of vicarious liability of a principal for the physical acts and state of mind of his agent; and the concept has no general application in the field of criminal law. To constitute a criminal offence, a physical act done by any person must generally be done by him in some reprehensible state of mind. Save in cases of strict liability where a criminal statute, exceptionally, makes the doing of an act a crime irrespective of the state of mind in which it is done, criminal law regards a person as responsible for his own crimes only. It does not recognise the liability of a principal for the criminal acts of his agent: because it does not ascribe to him his agent's state of mind. Qui peccat per alium peccat per se is not a maxim of criminal law."

91. Mr Wright also drew attention in his written submissions to a more recent example of a case where vicarious liability was made out in the context of a provision conferring a strict liability; or, as he put it, the act of the servant was attributed to the principal: see *Harrow LBC v Shah & Shah* [2000] 1 WLR 83.

92. It follows that if the correct analysis, in line with the prosecutor's stance before District Judge Cadbury, is that HPFPL is guilty of contravening Regulation 30(1)(g) because it must be fixed with the acts or omissions of its operatives, the resolution of the first question – is *mens rea* required? – necessarily answers the second question – is culpability required? In reality, these questions collapse into one.

93. However, in oral argument it appeared to me that the prosecutor's analysis subtly changed. Rather than rely on the concept of vicarious liability, Mr Wright's submission was that the obligations conferred by Article 3(1) and 15 (the latter read in conjunction with Annex III) rested on the business operator – implicitly in the context of the former, and expressly in the context of the latter. It followed that, for the purposes of Regulation 30(1)(g), the liability was not vicarious but direct.

94. Ultimately, I do not think that it really matters whether the conceptual route to corporate liability under the governing provision is seen as being vicarious or direct. What is entirely clear is that in many cases a business operator is likely to be a company, and that the EU Regulation contemplates both natural and legal persons. Following the hearing, taking my steer from paragraph 24 of Mr Hockman's speaking note, I have re-read the decision of the House of Lords in *Director General of Fair Trading v Pioneer Concrete UK Ltd* [1995] 1 AC 456 and of the Privy *Council in Meridian Global Funds Management Ltd v Securities Commission* [1995] 2 AC 500. For Lord Hoffmann in *Meridian* and Lord Templeman in *Pioneer Concrete*, the question should be envisaged in terms of fashioning a rule of attribution to reflect the language and purpose of the statutory scheme; for Lord Nolan in *Pioneer Concrete*, the issue was more about the application of principles of vicarious liability to a particular statutory context. Either way, the intention of the 2015 Regulations into which the EU Regulation directly feeds is that HPFPL *qua* business operator should be liable if the necessary facts are

established and without the need to prove *mens rea*. There is no separate and additional requirement to prove culpability.

Conclusion

95. It follows that the offences set forth in these charges are offences of strict liability, that proof neither of knowledge or culpability on the part of HPFPL as business operator is required, and that the two questions posed by District Judge Cadbury must be answered in the negative. This application for judicial review must therefore be dismissed, and the criminal proceedings must now proceed before District Judge Cadbury to be finally determined on the basis of whatever further evidence the parties wish to adduce.

96. Stripped to its essential ingredients, the present case is precisely covered by the following dictum of Lord Bingham CJ in *R v Milford Haven Port Authority* [2000] 2 Cr App R(S) 423, at 432:

> "Parliament creates an offence of strict liability because it regards the doing or not doing of a particular thing as itself so undesirable as to merit the imposition of a criminal punishment on anyone who does or does not do that thing irrespective of that party's knowledge, state of mind, belief or intention. This involves a departure from the prevailing canons of the criminal law because of the importance which is attached to achieving the result which Parliament seeks to achieve."

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97. There are, of course, shades of "strict liability". Recital (2) of the EU Regulation refers to a requirement that "business operators", such as HPFPL, take "the necessary measures to avoid pain and minimise the distress and suffering of animals during the slaughtering or killing process…"; but Article 3 does not require that animals suffer *no* pain, distress or suffering etc during the killing or related operations, only that they be spared any *avoidable* pain etc. Paragraph 3.2 of Annex 3 (read with Article 15(1)) contains an absolute requirement that, in the circumstances of this case, in the process after stunning, both carotid arteries are severed. When that does not occur, as it did not in this case, in addition to being a breach of that specific provision, it is also a breach of Article 3 in that there is an irrebuttable presumption – a deeming provision – that avoidable pain is caused to the bird. That is why in this case, as described by my Lord, Jay J, the two offences with which HPFPL are charged under Regulation 30(1)(g) of the 2015 Regulations, are strict liability offences that do not require *mens rea*.

98. For the reasons given by Jay J, I agree that the issues raised are properly raised by way of judicial review; and that the claim for judicial review be dismissed.