FACTORTAME - A CLIENT'S PERSPECTIVE

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Factortame would not have been the name that I, as one of the directors and shareholders of the company, would have liked to use as the chosen name to carry the now famous litigation into the future. We had actually incorporated a company back in the early 80s and, with tongue in cheek, changed the name to 'Leicester Trawling Limited,' as at that time we were based in Leicester and travelling down to Falmouth to meet vessels for the purposes of transhipping catches and any other services the vessels required. However, the lawyers thought that would be a step too far as was subsequently well illustrated by the media, who failed to spot the intended irony. The fact was that plans were already in place to establish a permanent base in the south-west. As a result, Factortame was chosen as it had a history of owning two long-line fishing vessels, both of which had been built as UK trawlers in the 60s and then converted to long-liners in 1986.

Fishing has always been an emotive subject and it was David Vaughan who, in one of our early conversations said something akin to, "fishing makes logical people do and say illogical things." I can but agree and over twenty years of litigation went on to prove this statement.

The whole problem of the 'Spanish Pirates,' or 'flag of convenience vessels,' etc had not arisen as a result of the creation of the CFP in 1983, (Reg. 170/83). The problems of Spain and fishing went back to the end of the 'Spanish Civil War' in 1939 and the bankrupt state of its economy and its need to feed its population. It needed protein and the best way to obtain it was by fishing. However, if you look at a map of the Sea Floor you will see that the largest consumer of fish in Europe has no, or very little, continental shelf! As a direct consequence of that geography, structures were put in place to allow Spanish fishing companies, (Pescanova being one of the first,) to establish joint venture companies with countries around the world. The idea was simple: the indigenous partner supplied the corporate entity, land-based management and the resource. The Spanish partner supplied the fishing expertise and the market.

It was this policy that was applied in the late 70s when in Europe the fishery limits of member states were increased in the I.C.E.S. conference of 1977 to 200 miles. This meant that Spanish historic fishing grounds such as the ' The Great Sole and Porcupine Banks' in

the Eastern Atlantic, as well as areas in the Western Approaches and Bay of Biscay, became exclusion zones. Faced with this situation, these smaller vessel owners copied their larger freezer vessel cousins and searched out possible countries and partners in which to establish joint venture companies. Suffice it to say, it wasn't long before political pressure was brought to bear in areas where local monopolistic positions wished to be maintained. At that time Hake, Monk and Megrim, the main species wanted by the Spanish market, were not of interest to the UK. As an example, in those days, Monk (or Angler Fish) was used instead of prawns to make 'Scampi!'

Anyhow! (as the great man himself would say on numerous occasions in court), there is not enough room or time in this piece to elaborate on the war of words or attempts to prevent a conflict from taking place during this period. Her Majesty's Government introduced the Fishing Boats Bill in 1983, the purpose of which was ironically to prevent vessels from putting into a UK port if it didn't meet a certain criteria. That is, effectively preventing the increase of any economic link with the country. Something which we were to be accused of not doing when MAFF implemented amendments to its Fishing Licence conditions in 1985. Its main clause being that the vessels had to have a minimum of 75% EEC crew. Again we can leave to another time or place how this was or wasn't achieved and the problems and communication that ensued. It was obvious that this now required legal attention.

Stephen Swabey of Thomas, Cooper & Stibbard and myself consulted with a Mr Englehart of Lambs Buildings and his advice, given the European nature of the matter, would be that we seek the advice of David Vaughan of Brick Court. That was how I first met David Vaughan in his 'Garret,' as described by Gerald Barling, (as he then was). I do not know if there is a stereotypical Barrister, but in my eyes there was and David fitted the bill perfectly. Larger than life, confident and completely at ease as he sat behind, what to me was, an enormous green baize covered table with piles of paper spread over it. He made short change of the nationality point of crewing, "clearly unlawful," and if they, (MAFF) were not going to amend the constitution now that Spain was a member of the EEC then we'd have to bring a judicial review to make them change their minds. The funny thing was that in those first cons I hadn't met Gerald, who I later realised was beavering away in the background supporting David in developing a whole new area of law. There is no need for me to enter into the legalities of the case as they are already fully documented, however, there are a few interesting aspects that have not been reported. For example, we were under the impression, given to us by MAFF, that both sides would apply themselves to the nationality/crewing point and that the economic link aspect of the licence conditions would not be pursued by them. However, at the eleventh hour, when we already had the Agegate

judicial review on its feet, the Ministry informed us that they would pursue the economic link argument which resulted in a very late and fevered night by all the legal team in preparing the Jaderow judicial review at the offices of Thomas, Cooper & Stibbard. These two judicial reviews were finally combined into one case. I do not know what the record is for getting a judicial review on its feet but if there is such a record, I think the team would have broken it!

Another interesting anecdote of the Jaderow proceedings was that due to a forced change in the other side's leader (I think it may have been John Laws QC being required in Australia for the 'Spy Catcher' case that was then unfolding), Lord Irvine of Lairg was brought in. Due to the suddenness of the change Lairg was not up to speed and because of an overload of documents, found himself 'all at sea'. David, whilst in discussion with the judge, was constantly being interrupted by Lairg. He complained of the interruption "by my learned friend, Irvine of *Laing*" to which his opposite number said, "Lairg" and David retorted with, "Oh some builder or other" and continued his discussion with the judge. Notwithstanding the humour of the exchange, on a serious note, it did result in what became known as the 'Jaderow Agreement,' which allowed the vessels to continue fishing until the Merchant Shipping Act of 1988 was applied to them in 1989. However, I am guilty of jumping too far into the future.

I have always classed Factortame as the child with its grandparents, Agegate and Jaderow. It is, however, the father who has almost been forgotten. That was Neptune Limited. Neptune Limited was an application for a Judicial Review brought on the 1st August 1988 whilst the Merchant Shipping Act was still a bill. If I recall the fear was if we didn't bring the application, Her Majesty's Government could have argued that any subsequent application would have been too late. Something that did actually happen when Lord Donaldson, Master of The Rolls, when referring to our appeal on Factortame One stated that we had come too late as the Bill was already an Act. I cannot remember David ever losing his temper in fifteen years of Factortame litigation. However, he came close on this occasion when he asked The Master of The Rolls, "When would your lordship have liked me to come before the court? I tried when it was a bill and was told, I was too early. I have tried now it is an Act, and I'm told I'm too late! What should I have done? Applied just prior to the Act being laid on the table of the House?" Lord Donaldson looking at David, pushed back his wig and was unable to offer a constructive reply. Brilliant!

I have jumped forward again. However, I do not intend for the purposes of this article to go through an A to Z of Factortame. Rather my intention is to illustrate other facts or incidents of the case that do not form part of the legal documents that can be publicly accessed.

There was no doubt that Her Majesty's Government had little faith in both the Fishing Boats Bill and the licence conditions that devolved from it. As a result, we had heard that the Department of Transport was intending to bring in a new Merchant Shipping Act. The main reason had been due to the Zeebrugge disaster. However, one section referred to the new rules to be applied to the registration of fishing vessels onto a new vessels register. It was blatantly clear that the intention was to finish the job that the previous legislation had not managed. So even though the Agegate and Jaderow cases were wending their way to Europe; and the European Commission was also taking its own action, Her Majesty's Government decided to open up another front in an attempt to crush the problem for good.

As a result of the incoming legislation, we received an unannounced visit on the 9th June 1988 by the then new Registrar General, who was charged with managing the new registry in Cardiff, and a Mr Yellowlees, from the Department of Transport. Apparently they were in the area and thought it would be worthwhile to see 'the devil in his lair' (their words!) The meeting was pleasant enough without any probing questions by either side. As a consequence of this meeting I returned the favour, some weeks later, but made an appointment. I received frosty reception from his staff, which Mr Yellowlees put down to typical Department of Transport staff reaction to 'the Couceiros'. I was subsequently introduced to his superior, Mr Bird, who for some unknown reason, was under the impression that any litigation would be against the Ministry of Fisheries and not the Department of Transport as it was a 'fishing matter.' How wrong he was! However, my attempts to prevent new litigation fell on deaf ears. Something I am sure that all the legal team were thankful for.

We needed to find allies and lobby hard and there was David giving orders and directing us as to what was required. One of the persons asked to assist was our local lord, Lord Gordon Parry of Neyland. He put down an amendment in the house, which as we expected, was politely but firmly rejected. However, what happened in their Lordships' bar was memorable. You have to remember I had never been in the Houses of Parliament, let alone their Lordships' Bar. There I was with Stephen Swabey, and like a lamb to the slaughter, I leant across to Gordon and asked, "how does payment work here? As obviously I wasn't a Lord! His reply, "young man, your money is as good as mine." How true that was. For the

next two hours, Lord after Lord came over to congratulate Gordon on such an eloquently delivered speech. His reply was, "thank you so and so, as each lord approached our table, and what would you like to drink?" And whatever it was, I paid. After the above-mentioned time I asked Stephen if he had any money, as I had £250.00 when I entered the bar and I was now down my last pennies. It was time for an honourable retreat and so with warm goodbyes and thanks of appreciation, we left Gordon with his grateful friends.

Luckily, my next visit to their Lordships' house was in the afternoon so I found myself in their Lordships' Tea Room, which was far easier on the pocket! The other benefit was that I was introduced to Earl Grey and so thanks to Factortame, I can say that I have drunk Earl Grey tea with Earl Grey in the House of Lords, though he did admit, he 'disliked it!' In all honesty, Lord Parry did more than I have credited him for in this piece and he went a long way in assisting us in being accepted in Milford Haven.

A great deal of visits and lobbying were carried out in Brussels and Strasbourg. On one memorable visit to Brussels I recall David seeing Lord Cockfield exiting a lift and the next thing I knew, David had gone off like 'a stabbed rat,' to talk to him. I had also made contact with my local MEP, David Morris, he was happy to assist in any way he could to further the development of Milford Haven. He opened many doors as well as speaking on many occasions in the European Parliament. On one visit to the parliament in Strasbourg we were on our way out, having held meetings with various MEPs and commission representatives, when we heard a thunderous voice around the curved wall of the corridor. Getting closer, we were met by a floodlit Reverend Ian Paisley, doing what he did best in front of the cameras. We were taken to a restaurant, the name of which escapes me, but in one corner of the room there was a large party of very happy people who I subsequently discovered were a high-powered delegation of the ANC who had been to Parliament as part of their journey to power in South Africa. David Morris kept up the pressure in both the Commission and the Parliament when required and again was a great friend to the cause and helped enormously in convincing stubborn minds that things were not as they appeared in the media.

It is not hard to appreciate that with all the different litigation in play, the lobbying in the UK, Brussels, Strasbourg and Spain, fees were mounting up and even though the costs were being spread over some one hundred applicants, the money was not arriving fast enough. Nerves were becoming frayed, in fact, at one point I remember that with Stephen Swabey

by my side, I was carpeted by Mr Burley, Senior Clerk at Brick Court, wanting to know what was to be done with the mounting fees.

Due to the financial state of affairs, an off the record meeting between myself and a senior representative at MAFF took place. The lead up to the meeting had been an exchange of communication to explore the possibility of settling the litigation. With the help of Mr J Tovio, Vice-President of the National Association of Joint-Venture Ship Owners (ANASCO), a formula was devised using the EEC's lay-up grant regulation. Basically, if you scrapped your vessel the EEC would pay you so much per tonne/horsepower. The gross figure arrived at was fifteen million pounds. This was presented to the ministry. At the meeting the ministry had also carried out their own calculations which they had based on the fishing vessel's track record and then applied Newlyn fish prices to the vessel's catch. Their figure was five million pounds. I replied that they should have used Spanish quay prices as they would have been more realistic. I left him with the thought to pass on to his superiors that there was a figure screaming to be used. Nothing more was ever heard from the ministry regarding the meeting and subsequently no deal was ever reached. I hasten to add not all the applicants had wanted to be a party to this proposed agreement, however, those that would have been left behind could not, of themselves, finance the litigation. This was one of those, 'if only' moments in time. On a humorous note, should the agreement been agreed the reaction would have been similar to that famous legal cartoon with the caption, *'the client said he wanted to settle*.'

There has been so much written on Factortame worldwide that I shall restrict myself to commenting on those incidents I have found humorous or interesting, not just to the general reader, but hopefully to the legal fraternity as well.

Everyone is aware of how important Factortame now is. However, no-one, and that included David, would have known at the time how huge an effect Factortame was to have on UK law. Most cases have one title and one court room. There were five Factortames! So there was I, having never been into a High Court, commencing a journey which would end after eight appearances in the High Court, three in the Court of Appeal, three in the House of Lords and four to the ECJ. Not bad for a boy from some never heard of village in the North West of Galicia!

I suppose the first time I felt the weight of what David and company were achieving with Factortame was the granting of interim relief by Neill LJ & Hodgson J. This manifested itself at the end of the hearing when the Bench required the parties to prepare an order for the obvious appeal that would follow their judgment. David stated the sides were reaching agreement and was saying as much to Neil when the Solicitor General Lyell, confirmed they were far from being in agreement and furthermore that he could not in fact take part in the preparation of any such order. His suggestion was that the order be drafted by the judges. David being aware of the complexities of the issue, and having his clients' interest at the forefront of his mind, spent the rest of the time ensuring that the judges were aware of what content should be included. Not content with having created what was to be known as a 'Constitutional Enormity,' he was now being helpful to the Bench to ensure the order was correctly drafted.

Never having been at a Judicial Hearing in the House of Lords it was an eye-opener. The security was greater than a normal court and finding a way from the entrance to the committee rooms was confusing to say the least. The amount of bundles required for a House of Lords hearing was astonishing, or at least it was from a client's point of view. I seem to recall that in one of the hearings there was an inordinately long line of files on the floor against the wall and to the best of my knowledge, on this occasion, only one, maximum two, of the bundles were used.

As one would expect of the highest court in the land, words and their definitions, can on occasions, create a very long discussion between the two sides and their Lordships. There was an occasion, but unfortunately I cannot remember the word in question, but the length of the discussion resulted in my boredom threshold being breached. If you have ever attended a House of Lords hearing in one of the committee rooms you will know that there is no place to hide! Therefore, sleep is not an option! In order to maintain an air of riveted interest, I decided to mentally calculate what an hour of verbal word dissection was costing by totalling up the fees being charged by those in front of me. Although I can no longer remember the exact figure - it was high.

There were times during the litigation that work were delegated between David and his colleagues. One such example was what I believed to be known as ‘The National Law’ point. It behove Nicholas Forwood QC, as he then was, to step into the breach, the man was a hero and deserved the legal version of the Victoria Cross! He argued and argued maintaining a constant course while wave after wave of verbal shot from their Lordships came at him from

all sides. The point was lost but in a much later conversation with Sir Nicholas Forwood QC, as he now is, was found to be correct. The final point of irony on this issue was that the arguments took place in front of a 'gigantic' picture of what I was told was 'The Battle of Crecy!'

You also never know who you will run into whilst attending a hearing in the House of Lords. On one occasion I found myself sitting outside a committee room, why I can't remember, but as I turned my head down the passageway, out of another committee room exited Christine and Neil Hamilton. If memory serves I think it was at the time of the Al-Fayed affair. Things must not have gone well for them for Mrs Hamilton was very upset. My initial thought was, well if it goes bad for us, I'll end up in the tower, which luckily I didn't!

Finally turning to the ECJ and the many visits we made to this great institution. Although I do remember seeing the building for the first time from the car park and thinking, why did they let it rust so badly? One of the first impressions I had of the actual court room back in the 80s was how big it was and also how comfortable the chairs were. Without doubt, the chairs are the most comfortable of any chairs in any court room I have ever sat in. Anyway, it was during an early hearing on Agegate and Jaderow that I heard an "anyhow" from David. This usually meant a need for assistance on some fact or other. In this case, I believe it was a question from the Italian judge as I remember a white haired gentleman who always had a smile on his face. His simple question, "was Jaderow a self-employed fisherman or a company?" The answer was simple, it was a company. Now don't ask me why but for some reason David forgot or had a mental block. The result being that David turned to his juniors, who in turn turned to the instructing solicitors, who in turn turned to ME! So there I was, not a minute earlier enjoying the comfort of my chair and the cut and thrust of legal argument, when in an instant I became the focal point in this enormous room being looked at by everyone including the translators. Red-faced and very nervous I said in a loud voice, "a company". Things then returned to normal, as did my heart rate!

The stays at the Auberge De La Gaichel were obligatory. David was in his element, a king amongst this subjects and it was there you saw the insignificance of the client. I had learnt many years ago that a case ceases to be a client's after a very short time. At the Gaichel that was perfectly illustrated with the lawyers sitting in one corner drafting and amending drafts of skeleton arguments whilst the client and solicitor were called upon when required to supply some missing detail or fact. I do, however, recall David's use of his correction pen. The other David (Anderson) would type the drafts created by David and Gerald and that

draft would subsequently be completely re-drafted necessitating in a complete re-type. One had to feel sympathy for the typist. But then I suppose David was one for perfection.

There were many other humorous stories that arose from these sessions but there was a serious side to them and they helped David and the team to be well prepared for the hearings in Luxembourg. One last anecdote I do remember in one of the earlier, if not the first visit to Gaichel it was customary for all to convene in the bar before dinner. However, on one occasion Gerald appeared ready for his Kir when David barked, "sorry I can't have you in jeans." Gerald returned in non denim and the evening progressed as normal. The funny thing was the great man was in his Gucci slippers!

There were many more anecdotes and interesting stories that I haven't touched upon for lack of time to research: Antlers from Dublin; trips to Spain; solicitor's mobile ringing in court; a fee note signed by Mickey Mouse; investigative reporter thrown into the dock in Ondarroa and they are just a few that spring to mind!

The last word, however, has to go to David who led me on this journey. Hopefully you will understand why I have said, "I wouldn't have missed it for the world." I refer to David as a Dickensian character, but he was no Tulkinghorn. Some of his actions were more Rumpolian. However, he never looked down on you or ever made you feel inferior or uncomfortable. He left a huge mark on my life but an even greater one on the law. Even his famous story of how he 'fell into the law' as a third choice at Cambridge, made it sound as if the law, as a career, would not be a successful one. How far from the truth would that assumption have been? He has left his mark firmly on the subject that he 'fell into.' The final words that best describe David and his effect on the law belong to Horace: 'NON OMNIS MORIAR."

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