FACTORTAME

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The Factortame journey began, like most of David Vaughan's triumphs, with a client who thought the world of him. It was in 1985 that John Couceiro, the original "Spanish Fisherman", first sought Vaughan's advice on fisheries licence conditions. The consultation, in the rooms at the top of Middle Temple Lane known in Chambers as "Garden Cottage", was a success. As Couceiro recalls:

> "I felt like a Bleak House character in front of Tulkinghorn, but took to him instantly with his larger than life character. I had no doubt that David was the person to take on the case. He had such a sense of confidence regarding the outcome that you could not help but share in his belief. I came away from the meeting with a feeling of enthusiasm concerning the battle ahead. Not even David could have known, at this stage, what that battle would eventually become."

Three years later, the re-elected Conservative Government raised the stakes by passing into law a General Election pledge to reserve the ownership and management of British fishing vessels to British citizens, resident and domiciled in the United Kingdom. Primary legislation was chosen, as discovery documents later revealed, with a mind to protecting this legally doubtful initiative more effectively from judicial review. But David Vaughan had other ideas. His advice was sought, a positive outcome confidently predicted, a client charmed, and Vaughan's junior – Gerald Barling, recently joined by me – left to puzzle out the details. Holt CJ famously remarked in 1701 (using a turn of phrase reminiscent of Vaughan himself) that "An Act of Parliament may do no wrong, though it may do several things that are pretty odd."[1] That central principle of our constitution, Barling and I explained as we tried to reduce our leader's confidence to writing, had now succumbed to the incoming tide of European Law.

Vaughan knew better than to begin with constitutional theory (though he would later be tickled by the suggestion in an academic paper that our case had "shifted the Grundnorm"). As a proper barrister, his teeth cut on the Western Circuit, he knew that cases were won on the evidence. So shortly before Christmas 1988, Barling was despatched with our solicitors

[1] *City of London v Wood* (1702) 12 Mod. 669, 687; 88 ER 1592.

to a small grass airstrip in Surrey. From there a 4-seater plane took them to Milford Haven, where most of the Spanish-owned vessels were based, and they started talking to the crews. As Barling recalls, "After seeing how they lived, my admiration for those who go out to sea in small boats knew no bounds."

The owners from Galicia and the Basque Country turned out to be pioneers and innovators, led by the forceful and enlightened Margarita Miaxa and taking previously neglected species (hake, monkfish and megrim) in remote fishing grounds of little interest to the indigenously-owned fleet. They sold their catch in Spain, for three times the British price – a welcome contribution to export trade. They had built an ice plant in Milford, trained local boys in the eco-friendly skills of long-lining, and donated to the town theatre. A Welsh Baron testified to their popularity in the Principality. The evidence oozed injured Celtic innocence; and little of it was seriously challenged. It planted our legal arguments in favourable soil, confounded the "Spanish Armada" narrative of the tabloids and – aided by Vaughan's obvious affection for his clients, whom he considered honorary Welshmen – generated the judicial goodwill that sustained us through many years of litigation.

David Vaughan was a skilful reader of judges – and here too, the Welsh connection could be useful. With my seniors tied up, I was entrusted with an application before Tasker Watkins LJ, a giant of Welsh rugby who had won the Victoria Cross in 1944 for leading a bayonet charge before single-handedly taking out a German machine-gun post. Vaughan's advice on how to handle this legendary judicial figure was simple: "Get Milford Haven into the first sentence". Obediently, I opened my application by informing the court that my clients' vessels were tied up in that port. Watkins beamed his approval. "A very beautiful place to be tied up, Mr Anderson. Did you know that Lord Nelson considered Milford Haven the most beautiful harbour in the world?" Vaughan's open sesame had worked its magic, and we never looked back.

The Factortame case went three times to the House of Lords and was referred three times for rulings from the European Court of Justice. But the most notable judicial performance was by the Divisional Court which first heard the application for judicial review in March 1989. The judges, Brian Neill LJ and Derek Hodgson J, did not just refer questions to the Court of Justice relating to the validity of the Merchant Shipping Act 1988: they took the extraordinary step of suspending the operation of the Act as against our clients in the interim, Hodgson remarking as he did so that "the balance of fairness is really all one way".[2] I have clear memories of that hearing: the affidavits being read out (as was still the custom) in all their compelling detail, occasionally by a junior "for a change of voice"; Vaughan

[2] [1989] 2 CMLR 353 (Div Ct), p. 384 para 81.

insisting that it was nothing more than a question of applying the principle established in *Simmenthal*; the Solicitor General Nicholas Lyell QC, resisting with courage and disdain worthy of Sir Francis Drake himself; and finally the historic order that "the operation of Part II of the Merchant Shipping Act 1988 be disapplied …".

Hodgson (whose sense of humour I had first come to appreciate when serving as his Marshal) told me much later that when the Court of Appeal reversed this fearless and remarkable order, he had contemplated retiring from the Bench. He could imagine no greater accolade, he said, than to be accused of a "constitutional enormity" by Tom Bingham.[3] The case went on to the House of Lords, and for the first week of argument, it seemed that the Divisional Court's order might be restored. But the wind changed over the weekend, and when their Lordships reconvened on Monday morning, they inclined to be prudent rather than bold. The question of interim relief was not decided but made the subject of a reference to the Court of Justice;[4] and though the case was given priority in Luxembourg, the answer arrived too late to save our clients from the devastating effects of the Act.[5]

The subsequent claims for compensation – in which the legal teams grew larger as Spanish claimants were joined by Irish – made *Factortame* into the UK's leading case not only on the primacy of EU law but on state liability. The English courts were unanimous in their view that the Government had shown a manifest and grave disregard for its obligations,[6] and a large settlement resulted. The case also contributed to the law on limitation[7] and on champerty,[8] though Vaughan and his juniors had passed on to other things by then.

Stephen Swabey, the partner at Thomas Cooper & Stibbard who managed the litigation throughout its 14-year span, recalls "many bad days, setbacks, wrong turnings", and praises Vaughan for "his wonderful ability to sustain and where necessary raise morale". But Swabey, too, rescued morale at a crucial moment. The payment of lawyers depended on the catching of fish – and with interim relief overturned and fees two years in arrears, our clerks had begun to mutter about refusing further instructions. Swabey's reaction was inspired. He hired a minibus, equipped it lavishly with chilled flagons of gin, and directed it on a warm summer's evening to Le Manoir aux Quat'Saisons in Oxfordshire, where a game of croquet and a stupendous meal were enjoyed by all. Everlasting loyalty was pledged as

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3 [1989] 2 CMLR 353 (CA), p. 408, per Bingham LJ at para 38.
4 [1990] 2 AC 85 (HL).
5 [1991] 1 AC 603 (ECJ, HL).
6 [1998] 1 CMLR 1353 (Div Ct); [1998] 3 CMLR 192 (CA); [2001] 1 AC 524 (HL).
7 [2001] 1 WLR 942 (TCC).
8 [2003] QB 381 (CA).

the team rolled merrily back to London; the mutterings ceased; and soon enough, after a few words in the right place, the fees started to come in again.

Some of the most accomplished advocacy in the *Factortame* saga came from Nicholas Forwood QC, who in a series of memorable cameos used piscatorial metaphor to describe his client Rawlings (Trawling) Ltd. as an unintended "by-catch" of the offending Act. But as striking, if less orthodox, were Vaughan's performances before the Law Lords. His submissions would sometimes assume an enigmatic quality, leaving his listeners curious for more. One by one, their Lordships would show their hands. "I think what you are saying, Mr. Vaughan …" Lord Bridge would begin. "But Mr Vaughan's better point …" would counter Lord Brandon. Each formulation was gratefully stored away by the advocate for use in the well-judged reply that was one of his particular strengths.

The damages claim was advanced on the basis of voluminous discovery, punctiliously provided by the Government and extending even to legal advice in respect of which privilege was waived. That material revealed a nation struggling to make sense of its relationship with Europe, from Cabinet meetings (Mrs Thatcher's strongly-worded harangues audible even through the dry Civil Service prose) to a craftsman grumbling at the unfamiliar Spanish names that he was required to carve on to fishing vessel hulls. In these documents were many small gems, of the sort that Vaughan deployed so effectively in argument: the English-educated Couceiro offering to prove his eligibility by "standing on Nelson's column and singing Rule Britannia", and the dry response of an official who one suspected shared his frustration with the Act: "Your name should be Smith and not Couceiro, then you would be registered."

Lord Lester QC succeeded, many years ago, in persuading the Government by means of a written parliamentary question to place the contents of these files in the public domain. It was hoped that a PhD student might someday make use of them: whether this ever happened, I do not know.

It was my outrageous good fortune to be briefed in *Factortame* so early in my time at the Bar that my previous cases had mostly involved careless driving at roundabouts. No one who was instructed could hope to surpass a case that led Professor Wade to declare a "constitutional revolution",[9] and caused Lord Denning to rework extra-judicially his famous dictum from *Bulmer v Bollinger*,[10] this time in apocalyptic style:

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9 "Sovereignty – Revolution or Evolution" (1996) 112 LQR 568.

10 [1974] Ch 401, 418.

> "No longer is European law an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses – to the dismay of all."[11]

The European tide is now on the ebb, and my most precious memories of *Factortame* are not of its constitutional aspects but of the strategist who led it with mischief and delight, the man without whose boldness and determination it would never have started. The bronze statue of Vaughan in La Coruña, the hem of its gown rubbed to a shine by the ministrations of the devout, was sadly never more than a *jeu d'esprit*. But when John Couceiro credited David Vaughan for leading us on "a journey that I would not have missed for the world", he spoke the truth – for himself, and for all who embarked on that extraordinary adventure.

[11] Introduction to Smith, *The European Court of Justice: Judges or Policymakers*, Bruges Group, 1990.