

## FACTORTAME: REPORT

**Factortame transformed the legal relationship between the European Union and its Member States. By granting to individuals the right to sue their governments for breaching EU law, even if the breach embodied in privacy legislation, the European Court of Justice has placed a highly effective weapon in the hands of European citizens.**

### ABOUT FACTORTAME

Factortame was unquestionably the most important constitutional case of the 20th century and Her Majesty's government argued that it was not just a "constitutional enormity" but the most significant legal development since the Bill of Rights in 1689. It will be studied by English Law students for generations to come.

We were instructed by 97 British companies who owned fishing vessels registered in the United Kingdom and flying the British flag. The shareholders and directors were mainly Spanish and EC citizens. The UK Government introduced the Merchant Shipping Act 1988 on 1st December 1988 with the clear and deliberate intention to disallow British fishing vessels to be owned or operated by companies unless the shareholders and directors were 75% British with residence and domicile in the United Kingdom.

We argued successfully that this was a clear breach of EC law in that it discriminated against EC citizens on grounds of nationality, residence and domicile. The difficulty was that the Merchant Shipping Act 1988 was a piece of primary legislation and constitutionally parliament is supposed to be supreme. Not any longer. The case lasted ten years largely due to the hard line adopted by the government who refused to agree anything and took every point to the highest court. There were four separate substantive points determined in the case, as outlined below.

We obtained an injunction effectively against the legislature in bringing the act into effect. This was a first. This was reversed on appeal but the House of Lords referred this point to the ECJ who agreed that injunctive relief was available in these circumstances.

Secondly, the House of Lords referred the substantive point to the ECJ who held that the act was unlawful and the offending sections should be struck out. This was also a first.

Thirdly, we applied for damages (as the injunction didn't take effect until 18 months after the act was introduced), and again the case was referred to the ECJ who agreed that in certain circumstances damages were available. We then had to persuade the courts in England that on the evidence of this case damages were available. The House of Lords agreed with us. Damages were to be assessed by the Technology and Construction court but eventually the government settled the claims for in excess of US\$ 55 million, much to the relief of our long suffering clients.

This was the first time damages had been awarded against the state in such circumstances without proving misfeasance.

Finally the government refused to pay our clients' legal costs relying on the antiquated principle of champerty, although they lost that case too in the Court of Appeal. In all, the government made our clients go to court on countless occasions and lost every time except once, in the Court of Appeal on the injunction, and even that decision was overturned by the House of Lords.

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## JUDGEMENTS

The Factortame litigation (“R v. Secretary of State for Transport ex parte Factortame Limited and others”) comprises five distinct cases:

### Factortame

Factortame I which concerned interim measures and exercised the minds of five different tribunals – The Divisional Court (now called the Administrative Court); [1989] 2 CMLR 353 the Court of Appeal; the House of Lords [1990] 2 AC85; the European Court of Justice (“ECJ”) [1990] ECR-12433 and, for second time the House of Lords [1991] I.A.C. 603.

### Factortame II

The decision of the ECJ in answer to the substantive question asked by the Divisional Court – “Is the Merchant Shipping Act compatible with European Law” [1991] ECR 1-4586.

### Factortame III

The decision of the ECJ on state liability for primary legislation passed in breach of European law [1996] ECR 1-1034.

### Factortame IV

The series of decisions by English courts relating to whether the actions of the United Kingdom were sufficiently serious to justify an award of compensation – Divisional Court [1997] EULR 475, Court of Appeal [1998] EULR 456 and House of Lords [2000] EULR 40.

### Factortame V

Deals with limitation issues. In all there were 11 major judgments in addition to innumerable ancillary matters, the European Commission’s own action against the United Kingdom Government and two important judgments (Costs Judge and Court of Appeal on costs).

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## POST FACTORTAME

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Perhaps the two most important aspects of Factortame are (1) the creation of effective interim measures to protect the position during the period between the legislation coming into force and the courts deciding that the legislation contravenes European Law and (2) the availability of damages where the breach is manifest and grave.

MADRID

There do not appear to have been any reported instances of courts making either interim protection or compensation orders since Factortame but it is rumoured that there have been claims which have settled out of court. Moreover the principles of Factortame have been used in the reasoning of a number of cases and will undoubtedly form the foundations of much development of European, and perhaps even English, law.

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FACTORTAME LINKS

[www.lawreports.co.uk](http://www.lawreports.co.uk)

[www.hrothgar.co.uk/YAWS/frmreps/932.htm](http://www.hrothgar.co.uk/YAWS/frmreps/932.htm)

[www.hrothgar.co.uk/YAWS/reps/932.htm](http://www.hrothgar.co.uk/YAWS/reps/932.htm)

[www.ejcl.org/72/abs72-1.html](http://www.ejcl.org/72/abs72-1.html)

[www.masterliness.com/a/Factortame.case.htm](http://www.masterliness.com/a/Factortame.case.htm)

If there are any questions arising from the case please contact Stephen Swabey, Senior Partner at [stephen.swabey@thomascooperlaw.com](mailto:stephen.swabey@thomascooperlaw.com) or telephone +44 (0)20 7390 2234.

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