Neutral Citation Number: [2018] EWHC 2376 (QB)

Claim No: C90BM134

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

The Priory Courts
33 Bull Street
Birmingham B4 6DS

Date: 14 September 2018

Before :

MR JUSTICE SOOLE

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Between :

MICHAEL LEWIS **(a protected party by his Litigation Friend, Janet Lewis)**	**Claimant**
- and -	
(1) DENNIS TINDALE **-and-** **(2) MOTOR INSURERS' BUREAU** **-and-** **(3) SECRETARY OF STATE FOR TRANSPORT**	**Defendants**

Mr Philip Moser QC and Mr David Knifton QC (instructed by **Thompsons Solicitors LLP**) for the **Claimant**
Mr Hugh Mercer QC and Mr Richard Viney (instructed by **Weightmans LLP**) for the **Second Defendant**

Hearing dates: 6-8 June 2018

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Approved Judgment

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

....

THE HON. MR JUSTICE SOOLE

Mr Justice Soole :

1. On 9 June 2013 the Claimant Mr Lewis suffered grievous injuries when walking on private land in Lincolnshire as a result of a collision with an uninsured Nissan Terrano 4 x 4 motor vehicle driven by the First Defendant Mr Tindale. By Order dated 9 June 2017 Mr Tindale has been debarred from defending the claim. The Second Defendant (the MIB) does not dispute Mr Tindale's full liability for the accident but contends that it has no contingent liability to Mr Lewis pursuant to the Uninsured Drivers Agreement 1999 (UDA 1999), because the accident and injuries were not caused by or arising out of the use of the vehicle on a road or other public place : s.145 Road Traffic Act 1988 (the 1988 Act).

2. Further to the Order dated 12 February 2018 for the trial of preliminary issues three outstanding questions fall for decision :
(i) Whether any judgment Mr Lewis may obtain against Mr Tindale is a liability which is required to be insured against pursuant to Part VI of the 1988 Act;
(ii) If any judgment Mr Lewis may obtain against Mr Tindale is a liability which is not required to be insured against pursuant to Part VI of the 1988 Act, whether the MIB is otherwise obliged to satisfy such judgment pursuant to Directive 2009/103/EC (the 2009 Directive);
(iii) Whether the provisions of the relevant Directives have direct effect against the MIB, as set out in paragraph 15 of the Re-Amended Particulars of Claim in the circumstances of this claim.

3. On behalf of Mr Lewis, Mr Philip Moser QC puts his case on the first issue on two alternative bases. First, that Mr Tindale's liability fell within the insurance obligation of s.145 of the 1988 Act, because the injuries were caused by or arose out of his use of the vehicle on a road/public place before he entered the private land/field. Secondly, that in order to comply with the 2009 Directive it is necessary to 'read down' s.145 in such a way that the compulsory insurance obligation extends to private land. I shall call these bases of claim 'Causation' and 'Reading down'.

4. The parties agree that the second and third issues concern the same point, namely whether Articles 3 and/or 10 of the 2009 Directive are directly effective against the State through its emanation the MIB. This raises two questions which I shall call 'Direct effect' and 'Emanation of the State'.

5. All these questions require a particular focus on two recent decisions of the CJEU[1], Vnuk v. Zavarovalnica Triglav dd (Case C-162/13) [2016] RTR 10 and Farrell v. Whitty (No.2) (Case C-413/15) [2018] 3 WLR 285 (hereafter Farrell (No.2)).

6. If unsuccessful against the MIB, Mr Lewis claims 'Francovich' damages (Francovich v. Italian Republic (Joined cases C-6/90 and C-9/90) [1995] ICR 722) against the Third Defendant, the Secretary of State, alleging failure to implement the Directive. That claim is stayed pending resolution of the claim against the MIB.

[1] For simplicity, I will refer to the European Court at every stage by its modern abbreviation.

7. The relevant facts are contained in an agreed statement and can be further abbreviated. On the date in question Mr Tindale drove the uninsured Nissan vehicle on a road or other public places, driving from his home at Village Farm, Marton along the Trent Port Road, then along a footpath at the top of a flood bank, before deliberately driving through a barbed wire fence onto a field. He then drove across the field and around a marshy area into collision with Mr Lewis in the field, causing him serious injury. The field was private land.

8. I have also received the evidence of Mr Paul Ryman-Tubb, the Chief Technical Officer of MIB who has been with the Bureau since July 2000. In his witness statement and oral evidence he elaborated in particular the history, constitution and funding of the MIB and the negotiation and terms of successive Agreements with the Secretary of State.

The 1988 Act, Part VI

9. Section 143 provides as material : *(1) Subject to the provisions of this Part of this Act – (a) a person must not use a motor vehicle on a road [or other public place][2] unless there is in force in relation to the use of the vehicle by that person such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act...'*

10. Section 145 provides as material : *(1) In order to comply with the requirements of this Part of this Act, a policy of insurance must satisfy the following conditions. (2) The policy must be issued by an authorised insurer. (3) Subject to subsection (4) below[3], the policy – (a) must ensure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person or damage to property caused by, or arising out of, the use of the vehicle on a road [or other public place][4] in Great Britain...'*

11. By section 95, *'authorised insurer'* means *'an insurer who is a member of the Motor Insurers Bureau (a company limited by guarantee and incorporated under the Companies Act 1929 on 14th June 1946).'*

MIB

12. By the combined effect of these provisions of the 1988 Act the compulsory policy of motor insurance must be issued by an insurer who is a member of the MIB. The insurers' obligation to fund the MIB is provided by the MIB Articles of Association, which include that an insurer ceases to be a member if it fails to pay the requisite annual levy. The MIB has since 1946 compensated the victims of uninsured drivers under successive agreements (UDA) with the relevant Minister (now the Secretary of State). Since 1969 there have been comparable agreements in respect of untraced drivers (UtDA).

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[2] Bracketed words added by The Motor Vehicles (Compulsory Insurance) Regulations 2000.
[3] which provides various exceptions
[4] See footnote 2

13. The UDA 1999[5] is made between the Secretary of State and the MIB. By its preamble it is expressed to be supplemental to the Principal Agreement made 31 December 1945 between the Minister of War Transport and the insurers transacting compulsory motor insurance business in Great Britain. It came into force on 1 October 1999 in relation to accidents occurring on or after that date and may be determined by either party giving to the other not less than 12 months' notice in writing, but without prejudice to its continued operation in respect of accidents occurring before the date of termination : clause 4.

14. By clause 5, subject to identified exceptions, if a claimant has obtained against any person in a court in Great Britain a judgment which is an unsatisfied judgment then MIB will pay the relevant sum to, or to the satisfaction of, the claimant or will cause the same to be so paid : clause 5(1).

15. By the definition section (clause 1), 'unsatisfied judgment' means *'a judgment or order…in respect of a relevant liability which has not been satisfied in full within seven days from the date upon which the claimant became entitled to enforce it'*. 'Relevant liability' means a liability in respect of which a contract of insurance must be in force to comply with Part VI of the 1988 Act. Thus the MIB's contractual obligation under the UDA 1999 is linked to the prevailing terms of Part VI (and their proper interpretation).

16. By the Objects clause of the MIB's Articles of Association, the first is *'(1)(a) To provide a safety net for innocent victims of identified and uninsured drivers to satisfy…any liability required to be covered by contracts of insurance or security under Part VI of the* [1988 Act] *or by any other statute, statutory instrument, rule, regulation, order, directive or similar measure introduced by any competent authority or at common law or by custom.'*

The 2009 Directive

17. Directive 2009/103/EC consolidates a number of Motor Insurance Directives (MID) relating to compulsory insurance against civil liability in respect of the use of motor vehicles and which date back to Council Directive 72/166/EEC of 24 April 1972. By Article 8 thereof, the latter required Member States to *'…bring into force the measures necessary to comply with this Directive…'* by no later than 31 December 1973. Unless otherwise stated, all references are to the Articles of the 2009 Directive.

18. Article 3 headed 'Compulsory insurance of vehicles' provides as material: *'Each Member State shall, subject to Article 5, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance.*

The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of the measures referred to in the first paragraph.

…

[5] The current UDA (2015) is in materially the same terms, but postdates this accident.

The insurance referred to in the first paragraph shall cover compulsorily both damage to property and personal injuries.'

19. Article 5 allows for derogation by Member States from the Article 3 obligation in respect of certain natural or legal persons and certain types of vehicles.

20. Article 9 provides that '... *each Member State shall require the insurance referred to in Article 3 to be compulsory at least in respect of the following amounts: (a) in the case of personal injury, a minimum amount of cover of EUR 1 000 000 per victim or 5 000 000 per claim, whatever the number of victims...'* By Part VI of the 1988 Act the identified compulsory cover for personal injury is unlimited in amount.

21. By Article 10, under the heading 'Body responsible for compensation', *'1. Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied.'*

Such compensation bodies are sometimes referred to as the 'guarantee fund'[6].

22. In Evans v. Secretary of State and Motor Insurers Bureau (Case C-63/01) [2003] ECR I-14447 the CJEU held that a Member State may implement the Directive through a pre-existing body provided that the full effect of EU law was thereby guaranteed. Thus : *'The fact that the source of the obligation of the body in question lies in an agreement concluded between it and a public authority is immaterial, provided that that agreement is interpreted and applied as obliging that body to provide victims with the compensation guaranteed to them by the Second Directive and as enabling victims to address themselves directly to the body responsible for providing such compensation.'* [34].

23. By Article 12, under the heading 'Special categories of victim', *'1. Without prejudice to the second subparagraph of Article 13(1)*[7]*, the insurance referred to in Article 3 shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle...3. The insurance referred to in Article 3 shall cover personal injuries and damage to property suffered by pedestrians, cyclists and other non-motorised users of the roads who, as a consequence of an accident in which a motor vehicle is involved, are entitled to compensation in accordance with national civil law...'*

Issue (i) : Causation

24. Mr Moser's first submission is that Mr Lewis' injuries were caused by or arose out of Mr Tindale's use of the vehicle on a public road or other public place, i.e. before he entered the field.

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[6] cf. the compensation body to be established under Article 24, responsible for providing compensation pursuant to Article 20 for injured parties following an accident in a Member State other than that of their residence. This need not be the same body as in Article 10.

[7] Article 13 requires Member States to take all appropriate measures to ensure that certain statutory or contractual exclusions shall be deemed void.

25. He relies in particular on the decision of the Court of Appeal in UK Insurance Ltd v. Holden [2017] QB 1357 and its summary of propositions as to the meaning of 'use of the vehicle' in s.145(3)(a) which *'...can be derived from the Directive, the CJEU jurisprudence and the English authorities'* [68]. As to causation, Sir Terence Etherton MR stated : *'Damage or injury may 'arise out of' the use of the car if it is consequential, rather than immediate or approximate, provided that it is, in a relevant causal sense, a contributing factor'.* [68(4)].

26. The English authorities considered by the Court included Dunthorne v Bentley [1996] RTR 428 where Rose LJ said that *"...'arising out of' contemplates more remote consequences than those envisaged by the words 'caused by'; 'caused by' connotes a 'direct' or 'proximate' relationship of cause and effect; 'arising out of' extends this to a result that is less immediate but it still carries a sense of consequence. It excludes cases of bodily injury in which the use of the vehicle is a merely casual (i.e. fortuitous) concomitant, not considered to be, in a relevant causal sense, a contributing factor..."* : as summarised in Holden at [66].

27. In Dunthorne, Mrs Bentley was driving her car and ran out of petrol. She parked by the side of the road and ran across the road, having seen a colleague driving past on the other side. She was struck by the claimant's car and was fatally injured. The claimant suffered serious head injuries and claimed against Mrs Bentley's estate and motor insurers. The issue was whether her injuries were caused by or arising out of the use of the car within s.145(3). The Court of Appeal upheld the decision that they were. The analysis was that the claimant's injuries were caused by Mrs Bentley seeking help to continue her journey. They arose out of her use of the car, as she would not have crossed the road if she had not been out of petrol and seeking help to continue her journey : Holden at [65-66].

28. In Holden the motorist drove his car to private premises in order to carry out a repair and so enable it to pass the MOT which it had just failed. During the repair a fire started inside the car and spread to the adjoining premises. The insurers (Phoenix) of those premises made a subrogated claim against the motorist. The motorist's insurers (UKI) brought a claim for a declaration that the motor insurance policy did not cover the claim because (inter alia) the repair of a vehicle did not fall within the term 'use' for the purposes of s.145(3). The judge agreed and also (amongst other things) rejected Phoenix' alternative arguments that the fire arose out of the use of the car before the repairs began and/or its prospective use.

29. The Court allowed the appeal on the primary ground that, as a matter of construction, the cover afforded by the particular policy was not limited to that which was required by s.145(3). However the Court also held that repair work in order to put the car into a safe and good working condition was a 'use' of the vehicle within the meaning of s.145(3). In doing so it drew on the decision of the CJEU in Vnuk v. Zavarovalnica Triglav dd (Case C-162/13) [2016] RTR 10.

30. This concerned an accident in August 2007 and the Article of an earlier MID[8] in materially the same terms as Article 3. The claimant was injured when the trailer attached to a tractor, reversing in the yard of a farm, struck the ladder on which he was standing. The CJEU was referred the question : *'Must the concept of 'the use of*

[8] Article 3(1) of the First Directive (72/166).

vehicles' within the meaning of Article 3(1) be interpreted as not extending to the circumstances of the present case... on the basis that the incident did not occur in the context of a road traffic accident?'

31. By its judgment dated 4 September 2014 the CJEU held that the concept of 'use of vehicles' in the Article *'covers any use of a vehicle that is consistent with the normal function of that vehicle'* : Vnuk at [59]. Applying this test, the Court of Appeal held that Mr Holden's repair of the car in order to be able to drive it lawfully and safely was a 'use' of the car within s.145(3) *'...being an activity consistent with its normal function for the purpose of that statutory provision'* [69, also 59].

32. In the further alternative, the Court held that injury or damage resulting from the repair arose out of the use of the car for the purposes of s.145 *'...because it is, in a relevant causal sense, a contributing factor.'* [69]. This was necessarily a reference to 'use' of the car other than its repair.

33. Mr Moser submits that the Court of Appeal in Holden identified and applied a new and relatively undemanding test of causation under s.145. That the test was not dependent only on English authority was demonstrated by the opening words of [68] which stated that the identified propositions were derived from the Directive, CJEU jurisprudence and the English authorities. In the application of the test the Court had, at least in its alternative conclusion in [69], held that the damage to the adjoining premises 'arose out of' the use of the car before the repairs began. That was consistent with the test and the result in Dunthorne.

34. Applied to the present case, this all supported the conclusion that the injuries to Mr Lewis 'arose out of' the driving of the car by Mr Tindale along the public road, before entering the field. That previous driving was not a merely casual or fortuitous concomitant of the accident but was a contributing factor.

35. Mr Moser further submitted that Holden had effectively swept away previous authority on the issue of whether an accident on private land was caused by or arising out of the use of a vehicle on a road or other public place : Inman v. Kenny [2001] EWCA Civ 35; Clarke v. Clarke [2012] EWHC 2118 (QB). As he acknowledged, these held that the mere fact that a motorist has used a road or other public place in order to get to the private land where the accident happened was not sufficient to establish that the accident was caused by or arose out of the use of the vehicle on a road or other public place. In order to establish causation within the meaning of s.145 the use of the vehicle on the road or other public place must inevitably have caused the accident on the private land, e.g. where the motorist has lost control of the vehicle on the road causing it unavoidably to veer onto private land and cause injury or damage. Conversely, the causal link was not established where the motorist had deliberately driven off the road and onto the private land.

36. Mr Moser submitted that, if drawn to the Court's attention in Holden, those decisions would have been overruled as inconsistent with the test of causation now identified in [68(4)] and supported by Vnuk. The Court's decision on the facts of Holden, in particular its alternative conclusion that the damage arose out of the 'use' of the car before its repair, was at odds with the approach in Inman and Clarke. Furthermore neither of those decisions referred to the English authorities considered in Holden, in particular Dunthorne.

Conclusion on Causation

37. For the reasons advanced by Mr Hugh Mercer QC on behalf of the MIB, I do not accept these arguments.

38. First, in my judgment the test of causation identified in Holden was based exclusively on domestic authority; and in particular the decision in Dunthorne. True it is that the submissions on causation had included reference to European law (Vnuk) and to Commonwealth authority [35(6)]; and that the opening words of [68] referred to 'CJEU jurisprudence'. However the Commonwealth decisions were not considered helpful by the majority [67, 75], cf. Henderson LJ on the issue of the 'use' of the vehicle [77-81]. As to Vnuk, the absence of reference to that decision by the Court on the issue of causation reflects the fact that it concerns the meaning of 'use of a vehicle' and the issue of geographical limitation, not causation. The Court of Appeal's reliance on domestic authority is also consistent with the principle that the Article 3 reference to 'civil liability' is to the domestic law of the Member State.

39. Secondly, the decision in Holden has the critical factual distinction that the cover provided by the particular policy was not limited to the use of a vehicle 'on a road or other public place' within s.145(3). It had no such geographical limitation : see [26] and [44]. In consequence the Court did not need to consider whether there was a sufficient causal link between its prior use on the road and the subsequent fire when under repair on private land; nor therefore to consider the decisions in Inman and Clarke.

40. Thirdly, and in consequence, I do not accept that those decisions are put in doubt by Holden; nor that they would have been questioned if they had been considered. Whilst Dunthorne was not cited in those decisions, their ratio is consistent with the extended test of causation identified in Dunthorne and as followed and summarised in Holden at [68(4)]. Nor do I accept that the alternative finding at [69] provides any basis to question those decisions.

41. In my judgment Inman and Clarke have direct application to the issue of causation when considering a purely domestic interpretation of s.145(3). Applied to the present case, Mr Tindale's use of the road before taking the deliberate course of entering the field in order to proceed towards Mr Lewis was no more than a merely fortuitous concomitant of the accident and in no way a contributing factor. Accordingly I do not accept this basis of claim.

Issue (i) : Reading down

42. This alternative basis of claim under the first issue starts with the uncontroversial proposition that when a national court interprets a provision of national law it is required 'to do so as far as possible' in the light of the wording and purpose of Community law, in order to achieve the result sought by Community law : see e.g. R (RoadPeace) Ltd v. Secretary of State for Transport [2018] 1 WLR 1293 per Ouseley J at [50], citing Marleasing SA v. La Comercial Internacional de Alimentacion SA (Case C-106/89) [1990] ECR I-4135.

43. The only constraints on the broad and far-reaching nature of that interpretative obligation are that (a) the meaning should 'go with the grain of the legislation' and be 'compatible with the underlying thrust of the legislation being construed'; and (b) the

exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate : RoadPeace at [82], citing Vodafone 2 v. Revenue and Customers Commissioners [2010] Ch 77 per Sir Andrew Morritt C at [38] and cases cited therein.

44. The next stage of the argument returns to the CJEU decision in Vnuk. As already noted, the Article in question was in materially the same terms as Article 3. As noted in Holden [55], it gives authoritative guidance on the first paragraph of Article 3.

45. The CJEU's answer to the referred question was that the Article '... *must be interpreted as meaning that the concept of 'use of vehicles' in that article covers any use of a vehicle that is consistent with the normal function of that vehicle.'* [59].

46. Subsequent decisions of the CJEU have made explicit what was implicit in that conclusion, namely '... *that Article 3(1) of the First Directive must be interpreted as meaning that the concept of 'use of vehicles' in that provision is not limited to road use, that is to say, to travel on public roads, but that that concept covers any use of a vehicle that is consistent with the normal function of that vehicle (see, to that effect, judgment of 4 September 2014,* [Vnuk]...)' : Andrade v. Salvador & ors (Case C-514/16) 28 November 2017 at [34]; also Torreiro v. AIG Europe Ltd (Case C-334/16) 20 December 2017 at [28].

47. In doing so the CJEU has emphasised that the concept of 'use of vehicles' within the meaning of the Article cannot be left to the assessment of each Member State but is an autonomous concept of EU law : Vnuk at [41-42]; Andrade at [31]; Torreiro at [24].

48. Mr Moser submits that the CJEU decision in Vnuk compels a 'Marleasing interpretation' whereby s.145(3)(a) is 'read down' so as to comply with Article 3 of the 2009 Directive; in effect, by excision of the words 'on a road or other public place'. In consequence, by virtue of the UDA 1999 which defines the MIB's obligation by reference to Part VI of the 1988 Act, the MIB would be bound to meet the claim. Such a consequence would be no different than that which followed from the 2000 amendment which inserted the words 'or other public place' into ss.143(1) and 145(3).

49. Mr Mercer's objections to that interpretation are threefold. First, that such an interpretation, i.e. without geographical limitation to roads or other public places, would go against the grain and general thrust of legislation which imposes that very limitation. Secondly, that it entails a range of policy ramifications for which the Court is ill-suited. Thirdly, that its effect would be retrospectively and impermissibly to impose criminal liability on motorists who have used an uninsured motor vehicle on private land. The criminal offence imposed by s.143 is expressly linked to the compulsory cover required by s.145.

50. In support he cited the first instance Judge in Holden (HHJ Waksman QC sitting as a deputy judge of the High Court) who stated that it was impossible so to interpret s.145(3) - in that case, as if the word 'including' appeared before 'on a road' - without going against the grain of the legislation : noted by the Court of Appeal at [29]; and Ouseley J in RoadPeace rejecting an interpretation which '... *goes against the principles enunciated in* [Vodafone 2] : *it would eliminate fundamental and long-standing features of the legislation in relation to the use of vehicles other than on a road or other public*

place, and as to what motor vehicles required insurance. Yet more importantly, such amendment cannot be made without the courts making decisions and assessing practical repercussions which are very much for the defendant' [90].

51. Mr Moser disputes the consequence of retrospective criminal liability, on two bases. First, because the Marleasing interpretation would be confined to excision of the reference to 'road or other public place' in s.145(3), leaving the criminal offence in s.143(2) unaffected. Secondly, because of a principle of EU law that the State cannot rely on the direct effect of an unimplemented Directive so as to create criminal liability against an individual.

52. As to the latter, in Fundo de Garantia Automovel v. Juliana (Case C-80/17) Ms Juliana had ceased driving her car and left it in her yard uninsured. Without her permission her son took the keys and drove it onto public roads where he lost control. He and two passengers were killed. The first question was whether Ms Juliana was obliged to insure the vehicle in circumstances where she had taken it off the road and did not intend to drive it. The Advocate General in an Opinion delivered on 26 April 2018 concluded that Article 3 (of the First Directive) must be interpreted so that the obligation to take out civil liability motor insurance extended to the situation where at the owner's choice the vehicle was immobilised in a private courtyard away from the public road and no administrative formalities had been undertaken to deregister the vehicle officially. However it fell to the Member State to determine under national law who was obliged to insure the vehicle in those circumstances.

53. The Advocate General added that '... *according to established case-law of the Court, even in cases where the provisions of a directive are capable of direct effect, Member States (including emanations thereof) cannot rely directly on those provisions against individuals (absence of 'reverse vertical' direct effect). On the other hand a Member State cannot rely on the provisions of a directive that has not been transposed properly for the purposes of a conform interpretation of national law that has the consequence of imposing obligations on an individual.'* [115], citing Arcaro (C-168/95, para.42); and Kofoed (C-321/05, para.45).[9]

54. Mr Moser submitted that, if the Marleasing interpretation extended to s.143 as well as s.145, this principle would provide a complete 'European law' defence to a charge of criminal liability for driving uninsured on private land.

55. Mr Mercer responded that this was a misstatement of the relevant principle, which was that there could be no Marleasing interpretation if its consequence were the imposition of a criminal liability.

56. Thus in Kolpinghuis Nijmegen BV (Case 80/86) the CJEU stated that the obligation on the national court to refer to the content of a directive when interpreting the relevant rules of its national law '... *is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity. Thus... a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the*

[9] On 4 September 2018 the CJEU gave judgment in Juliana. It did not consider this section of the Advocate General's Opinion.

provisions of that directive.' [13]. The two cases cited by the Advocate General in Juliana (Arcaro at [42] and Kofoed at [45]) followed and cited Kolpinghuis to the same effect.

57. Mr Moser distinguished these decisions on the basis that they were criminal cases involving prosecutions; so that it was unsurprising that the law would not allow this. He reiterated that if the Crown sought to prosecute a motorist in such circumstances the defendant would have a defence under this principle.

Conclusion on reading down

58. In my judgment this basis of claim must fail for the three interrelated reasons identified by Mr Mercer. First, an interpretation which excises the geographical limitation to a 'road or other public place' clearly goes against the grain and thrust of legislation which provides that limitation. The effect would be an amendment, not an interpretation, of s.145(3). Secondly, it raises policy ramifications which are not for the Court. Thirdly, because its effect would be to impose retrospective criminal liability for the use of uninsured vehicles on private land. Ss.143 and 145 are expressly interlinked. Excision of the geographical limitation in the latter would have the necessary and retrospective consequence that use of the vehicle on private land without insurance was an offence.

59. I do not accept that there is a principle of EU law which would provide a defence to a consequent charge under s.143(2). On the contrary, the true principle is that there should be no conforming interpretation if its effect would be to create a retrospective criminal offence.

Issues (ii) and (iii) : Direct effect

60. The principle of direct effect has two essential ingredients, summarised in Farrell v. Whitty (Case C-356/05) [2007] 2 CMLR 1250 (hereafter Farrell (No.1) thus : *'...it has been consistently held that a provision in a directive has a direct effect if it appears, as far as its subject matter is concerned, to be unconditional and sufficiently precise.'* [37]

61. This reflects long-established authority, notably Becker v. Finanzamt Münster-Innenstadt (Case 8/81) [1982] ECR 53 at [23-25] : *'Particularly in cases in which the Community authorities have, by means of a Directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of Community law.*

Consequently, a Member State which has not adopted the implementing measures required by the Directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the Directive entails.

Thus, wherever the provisions of a Directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the Directive or insofar as the provisions define rights which individuals are able to assert against the State.'

62. See also Comitato di Coordinamento v. Regione Lombardia (C-236/92) where the CJEU stated: *'The Court has consistently held... that wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where the State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly. A Community provision is unconditional where it is not subject, in its implementation or effects, to the taking of any measure either by the institutions of the Community or by the Member State... Moreover, a provision is sufficiently precise to be relied on by an individual and applied by the court where the obligation which it imposes is set out in unequivocal terms...'* [8-10].

63. I deal later with Mr Mercer's submission as to a third ingredient.

64. In the judicial review proceedings in RoadPeace, the Secretary of State and the MIB acknowledged that Article 3 of the 2009 Directive had direct effect between an individual and the State or its emanation; but disputed that the MIB was an emanation of the State (para.94). The MIB makes no such concession in the present case.

65. Mr Moser submits that the obligation in Article 3 satisfies both requirements that the directive must be (i) unconditional and (ii) sufficiently precise. This is apparent from its language and supported by the CJEU decisions in Farrell (No.1) and Vnuk.

66. As to Farrell (No.1), in January 1996 Ms Farrell was injured in a road accident in Ireland, when travelling as a passenger in the rear of Mr Whitty's van. As the vehicle was not fitted with seats in the rear, she was sitting on the floor. Mr Whitty had been uninsured, so Ms Farrell sought compensation from the Motor Insurers Bureau of Ireland (MIBI) pursuant to the terms of its agreement with the Minister of the Environment (the MIBI Agreement) whereby it undertook to compensate victims of road accidents involving drivers who had not taken out the compulsory insurance required by Ireland's Road Traffic Act 1961.

67. By s.65(1)(a)(i) thereof the obligation to take out compulsory insurance against civil liability did not extend to *'...any part of a mechanically propelled vehicle, other than a large public service vehicle, unless that part of the vehicle is designed... and constructed with seating accommodation for passengers;...'* The MIBI refused to compensate Ms Farrell, because liability for the injuries she had suffered when in the rear of this vehicle was not a liability in respect of which insurance was required under Irish law; and therefore did not fall within its obligation under the MIBI Agreement.

68. Ms Farrell issued proceedings against (amongst others) the MIBI, claiming that the unqualified terms of Article 1 of the Third Directive had direct effect against the MIBI as an emanation of the State. That Article provided that *'Without prejudice to the second sub- paragraph of Article 2(1) of* [the Second Directive], *the insurance referred to in Article 3(1) of* [the First Directive] *shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle.'* This language is essentially replicated in Article 12 of the 2009 Directive, including its cross-reference to Article 3.

69. On a reference the CJEU held that the Article *'...allows both the obligation of the Member State and the beneficiaries to be identified, and its provisions are*

unconditional and sufficiently precise' [38] and accordingly had direct effect [44]. That left the question of whether the MIBI was an emanation of the State, which the CJEU remitted to the High Court of Ireland.

70. Mr Moser pointed to the express interconnection between the relevant Articles (12 and 3); and submits that the provisions of Article 3 are no less unconditional and precise. He submits that Article 10 is equally of direct effect, but that is unnecessary for his argument.

71. As to Vnuk, as already noted in connection with the 'reading down' issue, this and subsequent decisions of the CJEU had now made it clear that the Article 3 concept of 'use of vehicles' was not limited to use on public roads but extended to private land.

72. In response Mr Mercer first emphasised the distinction between a regulation and a Directive. By Article 288 TFEU[10] *'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.'* In contrast *'A directive shall be binding as to the results to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and method.'*

73. As to the requirement that the relevant provision is unconditional, he submitted that the language of Article 3 was expressly conditional on measures to be taken by the Member State. In particular the United Kingdom must decide upon the nature of the compulsory insurance regime when it is extended to use on private land and in particular : (a) whether and how it is enforced by criminal sanctions; (b) the registration requirements for motor vehicles normally based in the UK (cf. Article 23); (c) what if any derogations are permitted for particular persons or particular types of vehicles (cf. Article 5); (d) the financial limits of insurance cover (cf. Article 9); (e) which body to set up or authorise for the purposes of satisfying Article 10 in relation to the use of vehicles on private land. Such policy choices are for the UK, not the MIB.

74. By way of suggested analogy, Mr Mercer pointed to the CJEU decision in Comitato. That case concerned the Directive on waste disposal (75/442/EEC). Article 4 thereof required that *'Member States shall take the necessary measures to ensure that waste is disposed of without endangering human health and without harming the environment and in particular :*

- *without risk to water, air, soil and plants and animals*
- *without causing a nuisance through noise or odours*
- *without adversely affecting the countryside or places of interest.'*

Articles 5-11 then identified a number of specific measures which Member States were required to adopt.

75. Pursuant to its rules which purported to implement the Directive and which provided for the disposal of waste by tipping, the Lombardy Region approved a plan for a tip for solid urban waste. This was challenged on the basis of incompatibility with the Directive; and in particular Article 4. The CJEU held that Article 4 did not meet the

[10] Treaty on the Functioning of the European Union

two requirements for direct effect. Rather, Article 4 '*...indicates a programme to be followed and sets out the objectives which the Member States must observe in their performance of the more specific obligations imposed on them by Articles 5 to 11 of the directive concerning planning, supervision and monitoring of waste-disposal operations*' [12] and '*...must be regarded as defining the framework for the action to be taken by Member States regarding the treatment of waste and not as requiring, in itself, the adoption of specific measures or a particular method of waste disposal. It is therefore neither unconditional nor sufficiently precise and thus is not capable of conferring rights on which individuals may rely as against the State.*' [14].

76. Mr Mercer submitted that Article 3 of the 2009 MID likewise set out the objectives and defined the framework, rather than obliged the Member State to achieve a particular result, i.e. to ensure cover. Thus Farrell (No.1) provided no support for the argument : the Article 12 obligation to insure all passengers did not entail a wider obligation under Article 3. This was further demonstrated by the very existence and terms of Article 10 which provided for the circumstance in which '*the insurance obligation provided for in Article 3 has not been satisfied*'.

77. As to Article 10, this was not unconditional, since (a) any obligation on the body to provide compensation was conditional on implementation of the insurance obligation under Article 3; (b) the UK had not set up or authorised a body to provide compensation where an accident occurs on private land; (c) the limit of compensation provided by any such guarantee fund had to be determined; (d) by its terms the Member State had to determine (i) whether such compensation was subsidiary or non-subsidiary, and (ii) whether to apply the exclusions permitted by Article 10(2) and (3).[11]

78. As to the limit of compensation, the fact that s.145 imposed no limit on the compulsory cover for injuries caused by or arising out of the use of vehicles on a road or public place did not mean that the same decision must be made in respect of private land. For that purpose the UK would be entitled to limit cover to the Article 9 minimum of EUR 1m per victim.

79. As to the precision of the obligation, prior to the judgment in Vnuk, which postdated Mr Lewis' accident, there was no clarity that Article 3 applied to accidents on private land.

80. On the contrary, in 1988 a unanimous House of Lords was satisfied that Part VI of the 1988 Act complied with the prevailing MID. Thus in holding that a car park was not a 'road' within the meaning of s.145(3)(a) of the 1988 Act, Lord Clyde stated '*I am not persuaded that in respect of the particular question which has arisen in the present cases the Directives require that the word 'road' in section 145 should be construed as including a car park, or indeed as including any place whatsoever where a vehicle might be used. Indeed it might be that while the language of the directives is of 'the use of vehicles' it is with travel and movement between states that they are dealing and that they should be taken to be concerned simply with the use of vehicles on the road, which is the usual place for a vehicle to be used. Thus it may be that the addition of the words*

[11] 10.2 '*Member States may, however, exclude the payment of compensation by that body in respect of persons who voluntarily enter the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured.*'; 10.3 '*Member States may limit or exclude the payment of compensation by the body in the event of damage to property by an unidentified vehicle*' [subject to further qualification set out therein].

'on a road' in section 145(3)(a) could be consistent with the universal intention of the Directives in their application to traffic between member states. Indeed it may be noticed that article 5 of the Third Directive refers expressly to parties involved in 'a road traffic accident'. The context there is the necessity of identifying promptly the insurance company covering the liability. It would be curious if that provision was meant to exclude accidents occurring elsewhere than on roads.' : Clarke v. General Accident Fire and Life Assurance Corporation plc [1998] 1 WLR 1647, p.1659D-F.

81. In consequence of that decision, Parliament amended s.145(3(a) so as to add the words 'or other public place' : The Motor Vehicles (Compulsory Insurance) Regulations 2000. The Explanatory Note to those Regulations stated that the amendment was made for the purpose of complying with the requirement of the prevailing Directives to take all appropriate measures to ensure that civil liability in respect of the use of motor vehicles normally based in its territory is covered by insurance.

82. Then in his Opinion in Vnuk (26 February 2014) the Advocate General noted the divergence between the different language versions of Article 3(1) of Directive 72/166. He described the *'sources of the doubt'* in its meaning as *'the technological imprecision of the EU legislature and the diversity of national practices'*. In particular the French and other versions referred to the *'circulation'* of vehicles, whereas the English and other versions referred to *'the use of'* vehicles : [20-21]. This had led to divergent domestic provision as to whether insurance companies are required to pay compensation only in respect of road traffic accidents : [26]. He concluded that the concept of 'circulation' or 'use' was an independent concept of EU law and must be given an independent and uniform interpretation throughout the EU, having regard to the context of the provision and the objective pursued by the legislation in question [30].

83. In its judgment the CJEU equally noted the differences between the different language versions and the need for independent and uniform interpretation in accordance with EU law [42-44]. It identified the Directive's *'...dual objective of protecting the victims of accidents caused by motor vehicles and of liberalising the movement of persons and goods with a view to achieving the internal market pursued by those Directives.'* [49]. Its implicit decision that 'use' extended to private land was widely received as a 'game changer' : see that phrase in the first paragraph of the Foreword to the Department of Transport consultation document (December 2016).

84. Mr Mercer submitted that the CJEU decisions in Vnuk and the subsequent cases still left the interpretation of Article 3 in doubt. Thus the European Commission 'Regulatory Scrutiny Board Opinion' (version 9 February 2018) noted *'... diverging interpretation and views, among Member States, the motorsport industry, consumer associations and other stakeholders, concerning the actual scope of the Directive'* (p.2). The subsequent Commission 'Impact Assessment' (24 May 2018) noted continuing uncertainty in various respects. However when assessing the possible approaches regarding the scope of the Directive, under the heading 'Take no action' it noted that in the light of the CJEU decisions *'in effect, accidents on private property would remain within the scope of the Directive. On the other hand, accidents where the vehicle was not used as a means of transport (agricultural use, industrial use etc.) would not be covered by the Directive.'* (p.154).

85. He also pointed to the absence of any infringement proceedings against the UK in the 41 years between the date for implementation of the First Directive (31 December 1973) and the Vnuk decision 41 years later; and the reference to 'roads' (*'pedestrians, cyclists and other non-motorised users of the roads'*) in Article 12.3.

86. By reference to the language in Becker, Mr Mercer submitted that there was a further necessary ingredient of direct effect, namely that the relevant Directive must define rights which individuals are able to assert against the State. Article 3 did not make the MIB liable to meet a claim. The basis of the MIB's liability was Article 10 and the UDA 1999 entered with the Secretary of State; but no body had been established to provide a guarantee fund for the victims on private land. However he accepted that if (contrary to his submission) the Article 3 obligation had been delegated in its full measure to the MIB, there was no need to look at Article 10.

87. In reply Mr Moser submitted that the Motor Insurance Directives were a classic example of a directive designed to give rights to individual victims. Thus e.g. in Bernaldez (case C-129/94; judgment 28 March 1996) the CJEU had held that Article 3(1) of the First Directive '*... must be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and personal injuries sustained by them, up to the amounts fixed in Article 1(2) the Second Directive*' [18].

88. As to precision, it was irrelevant that Vnuk postdated this accident. The clarity of a Directive was an objective question, looking at the wording and the purpose of the measure; not an historic question as to how it was understood by different parties at different times. The language of the Article had not changed. Its meaning was clear now; and must therefore be treated as always having been clear.

89. As to whether the Directive was unconditional, the matters raised by the MIB were not conditions of the Article 3 obligation but consequential matters to be determined by the Member State. In contrast to the very different terms of the Directive in Comitato, Article 3 imposed a result to be achieved, not a mere objective or framework.

90. As to the Article 10 body to be set up and authorised in relation to the use of vehicles on private land, this had already occurred and was the MIB. He cited Byrne v. MIB [2009] QB 66 where Flaux J (as he then was) accepted, with support from CJEU authority, that the UK having chosen to designate the MIB as the body through which to implement the relevant MID (untraced drivers), it could not contend that it still needed to take measures to implement the Directive [56]. This applied equally to the designation of the MIB for the purposes of Article 3. He pointed also to the wide terms of the MIB Objects clause, which extended to the satisfaction of liabilities beyond Part VI of the 1988 Act, including those required by '*...directive or similar measure introduced by any competent authority...*'

91. As to the limit of compensation, the effect of Article 9 must in any event entitle Mr Lewis to cover of EUR 1m. However, by a further point taken in the course of his reply, Mr Moser submitted that the European law principle of equivalence compelled the same unlimited guarantee for those injured by the use of vehicles on private land as ss.143/145 required for their use on a road or public place.

92. The Community principles of equivalence and effectiveness have been stated thus : *'It is settled case law that in the absence of Community rules governing the matter it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness)...'* : Evans v. Secretary of State and MIB (Case – 63/01) at [45], cited in Byrne at [14].

93. In Byrne, Flaux J held that on a true construction of the relevant Directive *'and/or by virtue of the Community principle of equivalence'* [37] the limitation period under the UtDA should be no less favourable to children than the period provided to minors by the Limitation Act 1980. The same should apply to require unlimited cover in the in the present case.

94. In brief rejoinder to this new point, Mr Mercer submitted that Article 9 did not oblige the Member State to ensure the same level of cover in all circumstances; nor was there a similar domestic action to which the principle could attach : cf. Evans at [45].

Conclusion on direct effect

95. In my judgment Article 3 satisfies the conditions set out in Becker and the subsequent European authorities that the obligation placed on the State is unconditional and sufficiently precise. The concessions of the Secretary of State and the MIB to that effect in RoadPeace were correctly made.

96. As to precision, the CJEU has made it unequivocal that the obligation of compulsory insurance extends to the use of vehicles on private land. That is implicit in Vnuk and explicit in the subsequent decisions. I readily accept from the domestic and European materials relied on by Mr Mercer that this was not clear at the time of Mr Lewis' accident. However in my judgment that does not assist the MIB. In the absence of any statement in Vnuk or the subsequent decisions that their effect is subject to a temporal limitation, the declaratory theory of judicial decisions applies to the CJEU just as it does to decisions of the common law. Accordingly, as Mr Moser expressed it, the position is to be treated as always having been clear.

97. Nor is there any imprecision from the fact that there may be continuing debate as to the application of the obligation in particular circumstances, e.g. as to the meaning of the 'normal function' of a vehicle, or its application to non-transport use of vehicles. Those fall to be determined on a case-by-case basis. In the present case the only issue is whether the obligation extends to the driving of a motor vehicle on private land; on which the European law is now clear.

98. As to whether the obligation is unconditional, I do not accept that any of the matters relied on by the MIB truly amount to conditions of the core obligation under Article 3 within the meaning identified in Comitato. That governing obligation is to ensure that civil liability in respect of the use of vehicles normally based on its territory is covered by insurance; and for that purpose to take all appropriate measures. In contrast to the

terms of the Directive and the CJEU decision in Comitato, that is not a mere objective or framework, but a result to be achieved.

99. Nor do I accept that the existence of the further obligation under Article 10 in any way diminishes the core obligation of the State under Article 3. As reiterated in Farrell (No.2) '*...the intervention of such a body is designed to remedy the failure of a Member State to fulfil its obligation to ensure that civil liability in respect to the use of motor vehicles normally based in its territory is covered by insurance...*' [39].

100. As to the limit of insurance, Article 9 specifies the minimum in respect of personal injury at EUR 1m per victim. In my judgment there must be direct effect at least to that extent. As to whether the European principle of equivalence requires unlimited cover, this was a point raised late in the hearing. It is not straightforward and would need full argument. In the meantime I conclude that Article 3 has direct effect to the extent of at least the minimum requirement of EUR 1m per victim (Article 9).

101. As to Mr Mercer's submission that there is a further ingredient of direct effect, I accept that the relevant Directive must define rights which individuals are able to assert against the State or its emanation for that purpose. For the reasons already given, Article 3 clearly does so. For the reasons to follow, I am satisfied that the MIB is an emanation of the State for the full measure of the Article 3 obligation.

Emanation of state

102. Present English authority is that the MIB is not an emanation of the state. Flaux J expressly so held in Byrne; and that point was not before the Court of Appeal. Flaux J first noted that the concept of emanation of the state was a matter of Community law. That provided that an entity will normally only be regarded as an emanation of the state if it satisfies three conditions laid down by the CJEU in Foster v. British Gas plc (Case C-188/89) [1991] 1 QB 405. Thus Flaux J stated : '*As a matter of Community law, an entity will normally only be regarded as an emanation of the state if it satisfies the three conditions laid down by the Court of Justice in* [Foster], *namely (i) that it performs a public service (ii) under the control of the state and (iii) it has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.*' [57].

103. He held that the MIB did not satisfy the second and third conditions. As to the third he rejected the argument that s.145 gave the MIB a power to exclude an insurer from membership of the MIB, with the consequence that it could not issue policies of motor insurance. That argument failed for two related reasons. First, the statute could not be so interpreted. Secondly, the relation between the MIB and its members was governed not by the statute but by its Articles of Association, which in any event did not empower the MIB to exclude an authorised insurer from membership.

104. Flaux J then noted the statement of Hobhouse LJ in Mighell v. Reading [1999] Lloyds Rep IR 30 that the MIB was a private law entity and not an emanation of the state : '*The Bureau is not constitutionally an emanation of the state: it is a private law company. It is not functionally an emanation of the state: it acts on its own behalf in the commercial interest of its members not on behalf of the state or as a delegate of the state. It enters into commercial private law contracts with inter alia the Secretary of State... The only capacity in which the Bureau has acted is as a private law entity and the only*

obligations it has assumed have been private law contractual obligations. This cannot be said to be a situation where any public law relationship has come into existence.' (p.42). The other members of the Court did not find it necessary to decide the point, although Schiemann LJ (with whom Swinton Thomas LJ agreed) indicated that it was his current opinion that the MIB was not an emanation of the state (p.37). Accordingly Flaux J accepted that Hobhouse LJ's statement was not binding; but it was persuasive reasoning which fortified his conclusion [63].

105. The Court of Appeal returned to the point in McCall v. Poulton [2009] 1 CMLR 45. Following the reference back by the CJEU in Farrell (No.1), the High Court of Ireland (Birmingham J) had in 2008[12] held that the MIBI was an emanation of the State. In upholding the decision below to refer to the CJEU the question of whether the MIB was an emanation of the State, Waller LJ observed that *'It is difficult to think that a body such as the MIB or its equivalent should be an emanation of the state in one member country and not in another. This furthermore gives cause for concern as to whether the guidance is so clear that it needs no further input from the ECJ. In giving guidance it is often of assistance to have a concrete example on which to opine so as to clarify what the guidance means. Thus although I accept that in strict theory it may be for this court to decide whether the MIB is an emanation of the state, it would certainly be of assistance to have the view of the ECJ on the appropriate guidance and as to whether it would be their view that the MIB is an emanation of the state* [47-48]. I understand that the case settled, so that the reference did not proceed.

106. It is common ground that the obligation to apply the principles of EU law as laid down by the CJEU means that the doctrine of precedent is not applicable : Crehan v. Inntrepreneur Pub Co (CPC) [2004] EuLR 693, cited in Byrne per Flaux J at [56].

107. Mr Moser submits that the status of the MIB as an emanation of the state has been put beyond doubt by the decision of the CJEU in Farrell (No.2). That decision was upon a reference by the Supreme Court of Ireland following an appeal from the decision of Birmingham J.

108. The first question was whether the elements of the test in Foster were conjunctive or disjunctive. In that case the CJEU had stated that it had '*...held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organisations or bodies which were subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals'* [18] and had concluded that '*...a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon'* [20].

109. The CJEU concluded that paragraph 20 must be read in the light of paragraph 18; and that in consequence the conditions were not conjunctive [26-28].

110. The further relevant question was whether provisions of a Directive that are capable of having direct effect may be relied upon against an organisation on which a Member

[12] [2008] IEHC 124

State has conferred the task that is the subject of Article 1(4) of the Second Directive, i.e. the provision now contained in Article 10.

111. The CJEU held that '... *a body or an organisation, even one governed by private law, to which a member state has delegated the performance of a task in the public interest and which possesses for that purpose special powers beyond those which result from the normal rules applicable to relations between individuals is one against which the provisions of a Directive that have direct effect may be relied upon.*' [35].

112. The CJEU then stated that the importance attached by the EU legislature to the protection of victims of motor accidents had led it to supplement those arrangements by requiring Member States '...*under art.1(4) of the Second Directive, to establish a body with the task of providing compensation, at least up to the limits laid down by EU law, for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation under art.1(1) of that directive, which refers to art.3(1) of the First Directive, was not satisfied...*' [37]. It continued: '*Therefore, the task that a compensation body such as MIBI is required by a member state to perform, a task that contributes to the general objective of victim protection pursued by the EU legislation relating to compulsory motor vehicle liability insurance, must be regarded as a task in the public interest that is inherent, in this case, in the obligation imposed on the member states by article 1(4) of the Second Directive* [38]. Furthermore '*the court has held that the intervention of such a body is designed to remedy the failure of a member state to fulfil its obligation to ensure that civil liability in respect to the use of motor vehicles normally based in its territory is covered by insurance...*' [39].

113. Turning to the MIBI, the CJEU noted that under s.78 of the Irish statute, '*the Irish legislature made membership of the organisation compulsory for all insurers who carry on motor vehicle insurance in Ireland. In doing so, the Irish legislature conferred on the MIBI special powers beyond those which result from the normal rules applicable to relations between individuals, in that, on the basis of that statutory provision, that private organisation has the power to require all those insurers to become members of it and to contribute funds for the performance of the task conferred on it by the Irish state. The provisions of a directive that are unconditional and sufficiently precise may consequently be relied upon against an organisation such as the MIBI*' [40-41].

114. The CJEU thus concluded that '... *provisions of a Directive that are capable of having direct effect may be relied on against a private law body on which a member state has conferred a task in the public interest, such as that inherent in the obligation imposed on the member states by article 1(4) of the Second Directive, and which, for that purpose, possesses, by statute, special powers, such as the power to oblige insurers carrying on motor vehicle insurance in the territory of the member state concerned to be members of it and to fund it.*' [42].

115. It is common ground that for the purposes of this issue there is no relevant difference between (i) the structure of the MIBI and MIB[13] (ii) the terms of the respective agreements with their State (iii) the respective statutory provisions. As to the latter, s.78

[13] One example of an (immaterial) distinction is that, contrary to the MIB's position, amendments to the Memorandum and Articles of Association of the MIBI require the consent of the relevant Minister : see Farrell in the High Court of Ireland at para.13.2.

of the Irish statute matches the combined effect of ss.95(2), 143(1)(a) and 145(2) of the 1988 Act which together require that the compulsory policy of motor insurance must be issued by an insurer who is a member of the MIB.

116. Mr Moser submits that Farrell No.2 supplies the missing pieces which defeated the claim against the MIB in Byrne.

First, it has held that the identified elements in Foster are not conjunctive. This means that it is sufficient if (i) the Member State has delegated a task in the public interest and (ii) the delegate possesses 'special powers' for that purpose.

Secondly, it has held that (i) the task that a compensation body *'such as MIBI'* [38] is required by a Member State to perform must be regarded as a task in the public interest and that (ii) by virtue of s.78 the Irish legislature has conferred 'special powers' on the MIBI. In consequence the provisions of a directive which meets the two requirements for direct effect can be relied against an organisation *'such as the MIBI'* [41].

117. In neither respect is there as any reason in law or fact to distinguish the position of the MIBI and MIB. As to special powers, this is an autonomous concept of European law. In any event the MIB has a range of other 'special powers', identified in a schedule supplied to the Court, derived from the 1988 Act, its Articles of Association, the UDA/UDtA and The Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003.

118. In reply, Mr Mercer first emphasised the limits of the role of the CJEU on a reference such as in Farrell No.2. By Article 267 TFEU its jurisdiction was to give preliminary rulings on matters including *'(a) the interpretation of the Treaties'*. Conversely, as the Supreme Court had observed, *'... putting the matter very broadly, the evaluation of the facts of the case, and the application of EU law to those facts, are in general functions of the national courts.'* : HMRC v. Aimia Coalition Loyalty UK Ltd [2013] UKSC 15 per Lord Reed at [54], citing AC-ATEL Electronics Vertriebs GmbH v. Hauptzollamt München-Mitte case C-30/93 [1994] ECR I-2305 at [16-18]; see also [56] citing s.3(1) of the European Communities Act 1972 as amended.

119. Thus, insofar as the CJEU in Farrell No.2 held that the MIBI was an emanation of the state, that was strictly beyond the terms of its reference; and in any event was a matter ultimately to be determined by the domestic court. This was further emphasised in Farrell No.1 where the CJEU had stated that *'Since the national court has not provided sufficient information regarding the MIBI for it to be possible to determine whether the latter can be assimilated to such a body, it is for the national court to ascertain, taking account, on the basis of the above considerations, of the status of the MIBI and its relationship with the Irish State, whether the directive may be relied upon against it.'* [44].

120. Whilst accepting that account should be taken of the CJEU's conclusion that the MIBI was an emanation of the state, it should be rejected in the case of the MIB.

121. As to delegation, the State had not delegated the relevant task to the MIB, namely the responsibility to provide cover for injuries caused by or arising out of the use of vehicles on private land. The absence of delegation was apparent from the terms of the UDA 1999, which limited the MIB's obligations to the compulsory cover identified in Part

VI of the 1988 Act, i.e. in respect of injury or damage caused by or arising out of the use of vehicles on a road or other public place. The MIB had not contracted with the Secretary of State to accept responsibility to provide compensation in respect of uninsured motor accidents on private land. A private body could not be an emanation of the State in respect of responsibilities that had not been delegated.

122. The position in Farrell was distinguishable. That accident was on a public road. By its agreement with the State the MIBI had accepted responsibility to provide compensation for victims of accidents resulting from the uninsured use of vehicles on the road. By the exclusion of responsibility in respect of passengers in a part of the vehicle for which no seats had been designed or constructed, the Article 3 obligation had been implemented defectively. By contrast, in the present case the MIB had undertaken no obligation at all in respect of compensation to victims of motor accidents on private land. In contrast to Farrell, there had been no implementation of the relevant obligation at all.

123. As to special powers, and consistently with the reasoning in Byrne and the statement of Hobhouse LJ in Mighell v. Reading, the MIB had none. Funding activities by a levy on members was no more than a normal arrangement of private law. The MIB had no power to compel membership on motor insurers. Insofar as there was any such power, this was exercised by the State, through the provisions of the 1988 Act.

124. In any event, even if it were considered that a statutory obligation to become a member of MIB gave it some 'special powers', that did not extend to insurers of vehicles on private land. In the absence of any compulsory insurance regime for such use, no insurer dealing in that area was required to be a member of MIB or to fund its liabilities in that area. The MIB's funding was provided by RTA insurers only and was directly linked to that risk element of their premium income. Its funding reflected its road traffic liabilities; and thus did not extend to the task of providing compensation where an accident had been caused by or arose from the use of a vehicle on private land.

125. Nor did the UDA/UtDA give MIB any special powers. They simply provided the terms on which the MIB had agreed to provide compensation where a judgment had been obtained against a driver in relation to a liability that Part VI of the 1988 Act required to be covered by insurance; and to make awards where the driver was untraced and would have been liable. The UDA/UtDA defined the scope of the MIB's liability, rather than provided it with any particular powers.

Conclusions on emanation of the state

126. I am satisfied that the MIB is for these purposes an emanation of the State. In my judgment the effect of the CJEU decision in Farrell No.2 is to supersede the reasoning in Byrne and the observations of Hobhouse LJ in Mighell.

127. First, it has held that the Foster v. British Gas conditions are not conjunctive. Accordingly it is not necessary to establish that the MIB is under the control of the State : cf. Byrne at [57].

128. Secondly, it has held that private law bodies *'such as the MIBI'* may be an emanation of the State for the purpose of obligations of the MID which have direct effect : cf. Hobhouse LJ in Mighell.

129. Thirdly, it has effectively held that the MIBI is an emanation of the State for the purposes of the relevant Article, meeting the requirements of (i) delegation and (ii) special powers.

130. In circumstances where there are no material differences between the position of the MIBI and the MIB, I see no reason to reach a different conclusion in respect of the MIB; and good reason to be in accord : see also Waller LJ in McCall v. Poulton.

131. As to delegation of the task, I do not accept the suggested distinction between Farrell and the present case, namely that the former involved a defective implementation of Article 3 and the latter involved no implementation at all. In each case there has been an incomplete implementation of the obligation placed on Member States by Article 3. In my judgment in each case the effect of European law is to treat the designated compensation body as if the obligation imposed on the State had been delegated to it in full.

132. As to special powers, I acknowledge that the application of the facts to the European law is a matter for the domestic court. However the concept of 'special powers' is one of European law and there is no material distinction between the position of the MIBI and the MIB.

133. In reaching this conclusion, I have kept firmly in mind the MIB's central point that it is a private law body whose contract with the Secretary of State (UDA 1999) requires it only to meet an unsatisfied Part VI liability. However in the light of the developments of European law, I can see no basis to distinguish the position of Ms Farrell and Mr Lewis. In each case the State's unimplemented obligation under the MID must be met by its designated compensation body.

Conclusion

134. The answer to the first question is no. The answer to the second and third questions is yes, at least to the extent of the minimum requisite cover of EUR 1m per victim. I will hear Counsel as necessary on the form of order and any consequential matters.