Neutral Citation Number: [2026] EWCA Civ 645

Case No: CA-2024-001526

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, KING'S BENCH DIVISION
MR JUSTICE EYRE
[2024] EWHC 1443 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2026

Before :

LORD JUSTICE BAKER
LORD JUSTICE GREEN
and
LORD JUSTICE LEWIS

- -

Between :

Mark Wetherell	**Appellant**
- and -	
Student Loans Company Limited	**Respondent**

- -
- -

Mr Tom Carter & Ms Jessica Woodliffe (instructed by **Tilly Bailey & Irvine LLP**) for the **Appellant**
Mr Nicholas Chapman KC & Mr Michael Rapp (instructed by **Mills & Reeve LLP**) for the **Respondent**

Hearing date: Wednesday 18th March 2026

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Approved Judgment

This judgment was handed down remotely at 11.30am on Friday 22nd May 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Green :

A. Introduction – the issue

1. The appeal arises out of a personal injury damages claim brought in the County Court by the appellant against his former employer, the Student Loans Company Limited ("*SLC*"). The appellant worked for SLC as a call handler. He claims to suffer from tinnitus caused by a defective telephone headset provided to him by SLC for his work. It is common ground that a claim for negligence would fail. The appellant does not, however, pursue his claim in negligence. Instead, he claims that the SLC was in breach of a stricter duty imposed upon it by Article 3(1) of Directive 2009/104/EC concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), ("*the Directive*").

2. Article 3, which is under the heading "*General obligation*" provides:

> "1. The employer shall take the measures necessary to ensure that the work equipment made available to workers in the undertaking or establishment is suitable for the work to be carried out or properly adapted for that purpose and may be used by workers without impairment to their safety or health. In selecting the work equipment which he proposes to use, the employer shall pay attention to the specific working conditions and characteristics and to the hazards which exist in the undertaking or establishment, in particular at the workplace, for the safety and health of the workers, and any additional hazards posed by the use of the work equipment in question.
>
> 2. Where it is not possible in this way fully to ensure that work equipment can be used by workers without risk to their safety or health, the employer shall take appropriate measures to minimise the risks."

3. The appellant argues that, as a matter of principle, a "*directly effective*" provision of a directive can be enforced "*vertically*" against the state. It is argued that Article 3(1) is directly effective because it meets the conditions for direct effect in that it imposes a clear and unconditional obligation upon the SLC to "*ensure*" the safety of workers which obligation is specifically designed for the protection of those workers.

4. It is common ground that, assuming it meets the proper test (see below), a provision of a directive may be enforced, vertically, against the state or an emanation thereof; but not, horizontally, against another private body or person. In the present case it is argued that the SLC is an emanation of the state against whom, in principle, a directive may therefore be enforced.

5. The duty in Article 3(1), said to have been breached, is that work equipment supplied: (a) is suitable for the work to be carried out and (b) "…*may be used by workers without impairment to their safety or health*." The appellant says that the audio equipment he was provided with was not suitable for his use and did lead to impairment of his health. As drafted it is irrelevant to the application of Article 3(1) whether the SLC was at fault,

in the sense of having acted unreasonably, because the obligation imposed by Article 3(1) is drafted as a duty of result.

6. Before the County Court SLC advanced a limitation defence (which was determined in the appellant's favour as a preliminary issue). It disputed causation and denied that there had been any breach of duty. In particular the SLC denied that the Directive was directly enforceable against it because it was not an emanation of the state. In its defence it described itself as a private limited company and "*an executive non-departmental public body*".

7. At trial HH Judge Freedman dealt with the question of the enforceability of the Directive as a preliminary issue. He dismissed the claim, concluding that the SLC was not an emanation of the state and that accordingly the Directive was not directly enforceable against it.

8. An appeal was heard before the High Court. The principal issue there was whether the judge was correct in finding that the SLC was not an emanation of the state. A second ground was that the judge erred in failing to conclude that the absence of a civil law remedy in domestic law meant that the Directive had not been properly transposed with the consequence that it was directly effective.

9. The Judge dismissed the appeal on both grounds. In relation to emanation of the state he held that the SLC was not an emanation of the state, applying a two-limbed test as articulated by the House of Lords in *Foster v British Gas plc* [1991] 2 AC 306 ("*Foster v British Gas*") which was based upon paragraph [20] of the Judgment of the CJEU in Case C-188/89 *Foster v British Gas* (12th July 1990, EU:C:1990:313) ("*Foster CJEU*"), which had been a reference from the House of Lords in the same case. Whilst SLC was "*responsible for providing a public service under the control of the state*", it was not possessed of "*special powers*" (judgment paragraphs [36] – [37], [53], [54] – [58]). As to the enforceability of the Directive the judge rejected the submission that the absence of a specific civil law remedy justified the conclusion that the Directive had not been properly implemented (judgment paragraphs [73] – [74]) and was hence of direct effect.

10. Permission to appeal was given by Lady Justice Andrews upon the basis that the judge was arguably incorrect but that in any event all the issues arising were of broader public importance which was a separate reason for granting permission. The facts relating to this appeal occurred before the United Kingdom departed the European Union. Although the issue was faintly mentioned in the lower courts it is not argued by the SLC that, because the UK had departed the EU at the point when the dispute came to be heard in court, the appellant was not entitled to rely upon the law as is stood when the alleged breach occurred, namely in 2014. All parties have proceeded upon the basis that the relevant law is that in force in 2014. We are asked to determine the appeal upon the basis of the law as it then stood; not as it would be had the events giving rise to the litigation occurred following the departure of the UK from the EU.

B. The legislative framework

Article 118a

11. The starting point is Article 118a of the Treaty establishing the European Economic Community. This imposed a duty ("*shall*") upon the Council to adopt, by means of

directives, "*minimum requirements*" for improving the health and safety of workers. It provides:

> "Article 118a
>
> "1. Member States shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of condition in this area, while maintaining the improvements made.
>
> 2. In order to help achieve the objective laid down in the first paragraph, the Council, acting by a qualified majority on a proposal from the Commission, in co-operation with the European Parliament and after consulting the Economic and Social Committee, shall adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.
>
> 3. The provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Treaty."

The Framework Directive

12. Council Directive 89/391/EEC of 12th June 1989, on the introduction of measures to encourage improvements in the safety and health of workers at work ("*the Framework Directive*"), was adopted under Article 118a. This provides the overarching foundation and framework for subordinate legislation in the field of occupational health and safety which fulfil the instruction to the Council in Article 118a to lay down "*minimum standards*".

13. To this end, the recitals make clear that directives adopted pursuant to the measure are to lay down mandatory minimum levels of protection. This was because levels of protection afforded to workers across the EU were too low. Member States were not however precluded from imposing higher levels of protection. The purpose behind the measure was to afford strong protection to workers. This is evident from the use of various phrases set out in the recitals, including: "*minimum requirements*", "*guarantee a better level of protection*", "*guarantee the safety and health of workers*", "*safeguard the safety and health of workers and ensure a higher degree of protection"*, "*improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations", and, "guarantee a better level of protection of workers' health and safety".*

14. The most relevant recitals are as follows:

"Whereas Article 118a of the Treaty provides that the Council shall adopt, by means of Directives, minimum requirements for encouraging improvements, especially in the working environment, to guarantee a better level of protection of the safety and health of workers;

Whereas this Directive does not justify any reduction in levels of protection already achieved in individual Member States, the Member State being committed, under the Treaty, to encouraging improvements in conditions in this area and to harmonizing conditions while maintaining the improvements made;

Whereas it is known that workers can be exposed to the effects of dangerous environmental factors at the work place during the course of their working life;

Whereas, pursuant to Article 118a of the Treaty, such Directives must avoid imposing administrative, financial and legal constraints which would hold back the creation and development of small and medium sized undertakings;

Whereas the communication from the Commission on its programme concerning safety, hygiene and health at work provides for the adoption of Directives designed to guarantee the safety and health of workers;

Whereas the Council, in its resolution of 21 December 1987 on safety, hygiene and health at work (5), took note of the Commission's intention to submit to the Council in the near future a Directive on the organization of the safety and health of workers at the work place;

Whereas in February 1988 the European Parliament adopted four resolutions following the debate on the internal market and worker protection; whereas these resolutions specifically invited the Commission to draw up a framework Directive to serve as a basis for more specific Directives covering all the risks connected with safety and health at the work place;

Whereas Member States have a responsibility to encourage improvements in the safety and health of workers on their territory; whereas taking measures to protect the health and safety of workers at work also helps, in certain cases, to preserve the health and possibly the safety of persons residing with them;

Whereas Member States' legislative systems covering safety and health at the work place differ widely and need to be improved; whereas national provisions on the subject, which often include technical specifications and/ or self-regulatory standards, may

> result in different levels of safety and health protection and allow competition at the expense of safety and health;
>
> Whereas the incidence of accidents at work and occupational diseases is still too high; whereas preventive measures must be introduced or improved without delay in order to safeguard the safety and health of workers and ensure a higher degree of protection;
>
> Whereas, in order to ensure an improved degree of protection, workers and/ or their representatives must be informed of the risks to their safety and health and of the measures required to reduce or eliminate these risks; whereas they must also be in a position to contribute, by means of balanced participation in accordance with national laws and/ or practices, to seeing that the necessary protective measures are taken;
>
> Whereas information, dialogue and balanced participation on safety and health at work must be developed between employers and workers and/ or their representatives by means of appropriate procedures and instruments, in accordance with national laws and/ or practices;
>
> Whereas the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations;
>
> Whereas employers shall be obliged to keep themselves informed of the latest advances in technology and scientific findings concerning workplace design, account being taken of the inherent dangers in their undertaking, and to inform accordingly the workers' representatives exercising participation rights under this Directive, so as to be able to guarantee a better level of protection of workers' health and safety… ."

15. Turning to the substantive provisions, Article 1 is significant because it explains the relationship between the Framework Directive and the subordinate measures to be adopted. The object of the Framework Directive was to lay down "*general principles*":

> "Article 1
>
> Object
>
> 1. The object of this Directive is to introduce measures to encourage improvements in the safety and health of workers at work.
>
> 2. To that end it contains general principles concerning the prevention of occupational risks, the protection of safety and health, the elimination of risk and accident factors, the informing, consultation, balanced participation in accordance

> with national laws and/ or practices and training of workers and their representatives, as well as general guidelines for the implementation of the said principles.
>
> 3. This Directive shall be without prejudice to existing or future national and Community provisions which are more favourable to protection of the safety and health of workers at work."

16. Article 4 reflects the mandatory nature of the legal protection to be afforded. It uses the phrase "*ensure*" twice to describe the nature of the protection to be provide to workers:

> "1. Member States shall take the necessary steps to ensure that employers, workers and workers' representatives are subject to the legal provisions necessary for the implementation of this Directive.
>
> 2. In particular, Member States shall ensure adequate controls and supervision."

17. Article 5 is in similar vein. It imposes an obligation on Member States to impose a non-delegable "*duty*" on employers to "*ensure*" safety and health of workers "*in every aspect related to work*". The duty to ensure was subject to a limited option granted to Member States by Article 5(4) in relation to circumstances beyond an employer's control:

> "Article 5 General provision
>
> 1. The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work.
>
> 2. Where, pursuant to Article 7 (3), an employer enlists competent external services or persons, this shall not discharge him from his responsibilities in this area.
>
> 3. The workers' obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer.
>
> 4. This Directive shall not restrict the option of Member States to provide for the exclusion or the limitation of employers' responsibility where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care. Member States need not exercise the option referred to in the first subparagraph."

18. Article 16 authorised the Council to adopt "*individual Directives*" in the areas specified in the Annex to the directive:

> "Article 16

> Individual Directives — Amendments — General scope of this Directive
>
> 1. The Council, acting on a proposal from the Commission based on Article 118a of the Treaty, shall adopt individual Directives, inter alia, in the areas listed in the Annex.
>
> 2. …
>
> 3. The provisions of this Directive shall apply in full to all the areas covered by the individual Directives, without prejudice to more stringent and/ or specific provisions contained in these individual Directives."

19. One area specified in the Annex to the Framework Directive was "*Work equipment*".

Directive 2009/204/EC the work equipment Directive ("the Directive")

20. The Directive is an example of secondary legislation adopted pursuant to the Framework Directive and Article 118a designed to ensure minimum levels of protection that workers are to receive in relation to work equipment.

21. The recitals spell out the basic policy. Recital 2 makes clear that the Directive lays down a minimum level of protection for workers which are *without prejudice to more stringent or specific provisions contained in this Directive*". Recital 3 reiterates that the Directive is concerned with laying down "… *minimum requirements for encouraging improvements, in particular, of the working environment so as to protect workers' health and safety*". In a similar vein recital 5 clarifies that the protections accorded to workers are a floor level of protection which "*...do not preclude any Member State from maintaining or introducing more stringent measures for the protection of working conditions provided they are compatible with the Treaty*". Recital 6 describes compliance with the minimum requirements as "*essential*":

> "(6) Compliance with the minimum requirements designed to guarantee a better standard of safety and health in the use of work equipment is essential in order to ensure the safety and health of workers."

Recital 7 confirms that such minimum requirements cannot be subordinated to economic considerations:

> "The improvement of occupational safety, hygiene and health is an objective which should not be subordinated to purely economic considerations."

22. Turning to the substantive provisions of the Directive, Article 1, entitled "*Subject Matter*", states that the Directive lays down "*...minimum safety and health requirements for the use of work equipment by workers at work...*".

23. I have set out Article 3 at paragraph [2] above. The obligation to take the necessary measures is cast in mandatory language – "*shall*". It is an obligation of result, i.e. to "*ensure*". The scope of the duty is "*...that the work equipment made available to*

workers in the undertaking or establishment is suitable for the work to be carried out or properly adapted for that purpose and may be used by workers without impairment to their safety or health.". The result is not only that work equipment is "*suitable*" but also that it may be used without "*impairment*" to "*safety or health*". This imperative language is consistent with the objective of the Directive as creating "*essential*" minimum standards.

24. A qualification is found in Article 3(2) which imposes a modified duty on employers to take "*appropriate measures*" to minimise the risks, but only where adherence to the primary obligation is "*not possible*". Otherwise, the duty in Article 3(1) is unqualified.

25. Article 4 is entitled "*Rules concerning work equipment*". It adds flesh to, but is without prejudice to, the obligation set out in Article 3:

> "1. Without prejudice to Article 3, the employer shall obtain and/or use:
>
> (a) work equipment which, if provided to workers in the undertaking or establishment for the first time after 31 December 1992, complies with:
>
> (i) the provisions of any relevant Community directive which is applicable;
>
> (ii) the minimum requirements laid down in Annex I, to the extent that no other Community directive is applicable or is so only partially;
>
> (b) work equipment which, if already provided to workers in the undertaking or establishment by 31 December 1992, complies with the minimum requirements laid down in Annex I no later than 4 years after that date;
>
> (c) without prejudice to point (a)(i), and by way of derogation from point (a)(ii) and point (b), specific work equipment subject to the requirements of point 3 of Annex I, which, if already provided to workers in the undertaking or establishment by 5 December 1998, complies with the minimum requirements laid down in Annex I, no later than 4 years after that date.
>
> 2. The employer shall take the measures necessary to ensure that, throughout its working life, work equipment is kept, by means of adequate maintenance, at a level such that it complies with point (a) or (b) of paragraph 1 as applicable.
>
> 3. Member States shall, after consultation with both sides of industry, and with due allowance for national legislation and/or practice, establish procedures whereby a level of safety may be attained corresponding to the objectives indicated by Annex II."

26. Article 5, entitled "*Inspection of Work Equipment*", imposes supplementary duties upon employers to inspect equipment. Again, the duties are to "*ensure*" the stipulated result.

For instance, the employer is required to "*ensure*" that equipment is correctly installed and operates properly. The same is found in Article 6 concerning work equipment involving specific risks.

27. Under Article 8, employers are required to take measures necessary to, once again, "*ensure*" that workers have at their disposal adequate information and instructions on work equipment used at work. This must contain adequate safety and health information concerning the conditions of use of the equipment in foreseeable abnormal situations, and as to the conclusions to be drawn from experience. Employers are under a duty to make workers aware of relevant dangers in a form that is comprehensible.

28. Pursuant to Article 9, there is an obligation upon employers to, yet again, "*ensure*" that workers using work equipment receive adequate training.

29. Article 10 contains an obligation to "*ensure*" that workers are both consulted and participate, either personally or through their representatives, "*on the matters covered by the directive"*.

National implementation / The Provision and Use of Work Equipment Regulations 1998

30. The scheme of implementation in the UK includes the Health and Safety at Work Act 1974 ("*HASAWA 1974*") which lays down general rule and confers power on the Secretary of State to adopt subordinate measures in the field of health and safety. The Provision and Use of Work Equipment Regulations 1998 ("*the Regulations*") were adopted pursuant to HASAWA 1974 and cover the ground set out in the Directive.

31. Before this court, and the lower courts, attention focused upon the Directive, it being accepted that there was no material difference between the Directive and the Regulations. Mr Carter, for the appellant, referred to settled case law which made clear that even when a national measure fully implemented a directive there was nothing preventing a litigant seeking to refer to, and rely upon, the directive as a source of rights: see discussion at paragraph [46] below. There was no dispute between the parties as to this proposition.

32. In terms of remedies available under domestic law, section 47(2) HASAWA 1974 stated:

> "Breach of a duty imposed by health and safety regulations or agricultural health and safety regulations shall, so far as it causes damage, be actionable except in so far as the regulations provide otherwise."

This created a remedy based upon breach of a statutory duty. However, section 69 Enterprise and Regulatory Reform Act 2013 amended section 47 by removing civil liability for breaches of regulations, which included those which implemented the Directive. This was introduced following a report by Professor Ragnar Lofstedt, "*Reclaiming health and safety for all: An independent review of health and safety legislation*" (November 2011). In Chapter 9, "*The wider perspective*", Professor Lofstedt addressed whether there was a "*compensation culture*", which deterred otherwise beneficial economic activity. He concluded that there was no evidence to support the existence of such a culture, but that there was a "*belief*" in such a culture

which itself had a significant (adverse) impact upon business behaviour and outlook. He recommended that regulatory provisions that imposed strict liability should be reviewed and either qualified by "*reasonable practicability*" where strict liability was not absolutely necessary or amended to prevent civil liability from arising at all. In the event the Government chose the latter course.

33. The above is relevant only in that, because the relevant facts occurred when there was no statutory remedy available under HASAWA 1974, it leads to the proposition, not in dispute in this appeal, that there is daylight between a remedy based upon direct effect under Article 3(1) of the Directive, which imports a form of strict liability, and the remedies which exist (following section 69 Enterprise and Regulatory Reform Act 2013) in domestic law, which are a combination of criminal law and the tortious law of negligence.

C. The issues

34. There are two central issues that fall for determination:

    i) **Issue I – Liability**: Is Article 3 of the Directive capable of giving rise to liability?

    ii) **Issue II – Emanation of the state**: If Article 3 is capable of giving rise to liability may it be enforced against the SLC?

35. There is, formally, a third ground of appeal which focused upon the fact that there was, at the time of the events giving rise to the litigation, no express right of action provided for under domestic measures implementing the Directive (for the reasons set out at paragraph [32] above). It was argued that, because of this, there was a failure in implementation which sufficed to confer direct effect upon Article 3. This argument was addressed and rejected in the County Court and in the High Court (see paragraphs [7] – [9] above). In the event before this Court the point became subsumed into Issue I - whether Article 3(1) met the test for direct effect. If it did, it was not then in dispute that the concomitant duty of the national court was to provide an effective remedy, irrespective of whether national implementing measures expressly provided for appropriate private law remedies. For this reason, the parties did not address us upon this third ground of appeal.

D. Issue I: Liability

What is meant by direct effect

36. I turn to the first issue. Is Article 3 of the Directive capable of giving rise to liability?

37. The broad concept of "*direct effect*" means that a measure of EU law is justiciable in the domestic court. It was coined as an expression in the judgment of the CJEU in Case 26/62 *N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen* [1963] ECR 1 (*"Van Gend en Loos*"). In *Van Gend en Loos* it was held that Article 12 EEC, prohibiting customs duties on imports and exports, had to be interpreted as producing direct effects and creating individual rights which national courts were required to protect. The statement of principle articulated by the Court (at pages [12] and [13]) is seminal. It formed the basis

of the judgment of Lord Hope in *Three Rivers* (see below paragraph [45]) confirming the test for vertical direct effect of directives. It is also important because it is the *locus classicus* of the test for direct effect as being premised upon the existence of an identifiable obligation which is clear and unconditional. The CJEU stated:

> "The first question of the Tariefcommissie is whether Article 12 of the Treaty has direct application in national law in the sense that nationals of Member States may on the basis of this Article lay claim to rights which the national court must protect.
>
> To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.
>
> The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.
>
> In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.
>
> The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

> With regard to the general scheme of the Treaty as it relates to customs duties and charges having equivalent effect it must be emphasized that Article 9, which bases the Community upon a customs union, includes as an essential provision the prohibition of these customs duties and charges. This provision is found at the beginning of the part of the Treaty which defines the 'Foundations of the Community'. It is applied and explained by Article 12.
>
> The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.
>
> The implementation of Article 12 does not require any legislative intervention on the part of the states. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.
>
> …
>
> The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.

38. Following this judgment the test for whether a provision of EU law had direct effect or applicability in the national courts was: (i) whether the provision contained an "*obligation*"; and (ii), whether that obligation was "*clear and unconditional*". Because Article 12 of the Treaty imposed a clear and unconditional obligation then it was by its "*… very nature … ideally adapted to produce direct effects in the legal relationship between Member States and their subjects*".

The Becker formulation of the test in the case of directives

39. The test for direct effect, as it applied to directives, was considered by the CJEU in Case 8/81 *Becker v. Finanzamt Munster-Innenstadt* [1982] ECR 53 ("*Becker*"). In paragraphs [22]-[25] the Court held:

> "22. It would be incompatible with the binding effect which article 189 ascribes to Directives to exclude in principle the possibility of the obligations imposed by them being relied on by persons concerned.
>
> "23. 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.
>
> "24. 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.
>
> "25. 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 in so far as the provisions define rights which individuals are able to assert against the state."

40. It follows that for a provision of a directive to be directly effective there must be a "*duty to adopt a certain course of action*" (paragraph [23]) which was "*unconditional and sufficiently precise*" (paragraph [25]). It also follows that direct effect might be used as both sword and shield. This is substantively the same test as was set out in relation to Treaty obligations in *Van Gend en loos* (*ibid*).

The relationship between Becker claims and Francovich claims

41. In Joined Cases C-6/90 and C-9/90, *Francovich v. Italian Republic* ECLI:EU:C:1991:428; [1991] ECR I-5403 ("*Francovich*"), the CJEU addressed two closely related issues. The first addressed what was meant by a remedy based upon direct effect in the case of an unimplemented directive. The second addressed the conditions that had to be met before an individual could obtain damages against the state for a *general* breach of European law, which applied beyond (but which could still encompass) the narrower issue of failure to implement directives.

42. The jurisprudence on each category of case had evolved differently though, as was recognised, at base they were species of the same underlying question *viz*. when was the state liable for non-observance of European law? On the facts of *Francovich*, which concerned a directive relating to the protection of workers during an insolvency, both scenarios were engaged. The Court had to address the direct effect of Council Directive 80/987/EEC which Italy had failed to implement but also the broader question whether the state was liable, and if so under what conditions, for damage resulting from Italy's wholesale breach of its obligation to implement under Article 189 EEC.

43. The issue in this case was the right of an individual to rely upon a right (in this case a guarantee) in a directive as a shield against the enforcement by the state of an inconsistent provision of national law. In relation to the direct effect (the first issue) the Court observed, citing *Becker* (*ibid*):

> "10. The first part of the first question submitted by the national courts seeks to determine whether the provisions of the directive which determine the rights of employees must be interpreted as meaning that the persons concerned can enforce those rights against the State in the national courts in the absence of implementing measures adopted within the prescribed period.
>
> 11. As the Court has consistently held, a Member State which has not adopted the implementing measures required by a directive within the prescribed period may not, against individuals, plead 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 in so far as the provisions of the directive define rights which individuals are able to assert against the State (judgment in Case 8/81 Becker \ Finanzamt Münster-Innenstadt [1982] ECR 53).
>
> 12 It is therefore necessary to see whether the provisions of Directive 80/987 which determine the rights of employees are unconditional and sufficiently precise. There are three points to be considered: the identity of the persons entitled to the guarantee provided, the content of that guarantee and the identity of the person liable to provide the guarantee. In that regard, the question arises in particular whether a State can be held liable to provide the guarantee on the ground that it did not take the necessary implementing measures within the prescribed period."

It will be seen that the analysis involved the CJEU in, first, determining whether "*rights*" (found in the directive) could be enforced against the state (paragraph [10]). Next, the Court considered whether the right was "*unconditional and sufficiently precise*" (paragraph [11]). The Court answered this question (in paragraphs [12] – [22]) by examining: (i) the identity of the persons entitled to the guarantee provided; (ii) the content of that guarantee; and (iii), the identity of the person liable to provide the guarantee. Again, the approach adopted by the Court was to start by identifying the right in dispute and then asking whether it was sufficiently clear and unconditional. This was, as the Court pointed out in paragraph [11], the approach adopted in *Becker*.

44. In relation to the broader conditions for state liability for failure to comply with Article 189, the European Court stated:

> "39. Where, as in this case, a member state fails to fulfil its obligation under the third paragraph of article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a Directive, the full effectiveness of that rule of Community law requires that that there should be a right to reparation provided that three conditions are fulfilled.

> "40. The first of these conditions is that the result prescribed by the Directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the Directive. Finally, the third condition is the existence of a causal link between the breach of the state's obligation and the loss and damage suffered by the injured parties.
>
> "41. Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law."

Reconciliation of the different tests in Three Rivers

45. The test for direct effect and the relationship between the two formulations of the conditions precedent for state liability were considered at length by the House of Lords in *Three Rivers District Council and others v The Governors and Company of the Bank of England* [2000] UKHL 33 ("*Three Rivers*"). Lord Hope gave the leading judgment. He started his analysis of direct effect by reference to the establishment of the doctrine in *Van Gend en Loos* (*ibid*): see page [199A – D]. He then considered the law as it applied to the direct effect of directives and how that case law enmeshed with the parallel, but broader, case law on the general liability of the state.

46. Reference was made to the judgment of the CJEU in Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Dillenkofer v. Federal Republic of Germany* ("*Dillenkofer*"). Lord Hope explained that in paragraphs [20] – [23] of the judgment in *Dillenkofer* the CJEU had clarified that in substance the two types of liability were the same. The Court held that the test laid down in *Becker* and *Francovich* in relation to directives had been applied to the broader issue of state liability. Lord Hope explained the position in *Dillenkofer* as follows:

> "…the Court restated the conditions for state liability in the light of a number of cases with which it had dealt subsequently to the *Francovich* case. It did so in a manner which, in paragraph 22 of the judgment, applied the tests which *Francovich* had laid down for the direct effect, or *Becker*-type, route to the state liability, or *Francovich*-type, route. The relevant paragraphs are set out in the judgment at pp. I-4878-9:
>
> 20. The court has held that the principle of state liability for loss and damage caused to individuals as a result of breaches of Community law for which the state can be held responsible is inherent in the system of the Treaty: *Francovich v. Italian Republic* (Joined Cases C-6/90 and C-9/90) [1995] ICR 722, 772, para. 35; *Brasserie du Pêcheur S.A. v. Federal Republic of Germany; Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* (No. 4) (Joined Cases C-46/93 and C-48/93) [1996] QB 404, 496, para. 31; *Reg. v. H.M. Treasury, Ex parte British Telecommunications Plc.* (Case C-392/93) [1996] QB 615, 654, para. 38 and *Reg. v. Ministry of Agriculter, Fisheries and Food, Ex parte Hedley Lomas (Ireland) Ltd.* (Case

> C-5/94 [1997] QB 139, 160, para.24. Furthermore, the court has held that the conditions under which state liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage: *Francovich* [1995] ICR 722, 772, para. 38; *Brasserie du Pêcheur* [1996] QB 404, 497, para. 38, and *Hedley Lomas* [1997] QB 139, 160, para. 24.
>
> 21. In *Brasserie du Pêcheur,* at p. 499, paras. 50 and 51; *British Telecommunications* [1996] QB 615, 655, paras. 39 and 40, and *Hedley Lomas,* at p. 160, paras. 25 and 26, the court, having regard to the circumstances of the case, held that individuals who have suffered damage have a right to reparation where three conditions are met: the rule of law infringed must have been intended to confer rights on individuals, the breach must have been sufficiently serious, and there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.
>
> 22. Moreover, it is clear from the *Francovich* case which, like the present cases, concerned non-transposition of a Directive within the prescribed period, that the full effectiveness of the third paragraph of article 189 of the Treaty requires that there should be a right to reparation where the result prescribed by the Directive entails the grant of rights to individuals, the content of those rights is identifiable on the basis of the provisions of the Directive and a causal link exists between the breach of the state's obligation and the loss and damage suffered by the injured parties.
>
> 23. In substance, the conditions laid down in that group of judgments are the same, since the condition that there should be a sufficiently serious breach, although not expressly mentioned in *Francovich*, was nevertheless evident from the circumstances of that case."

Paragraph [22] of *Dillenkofer* purports to summarise the judgment in *Francovich* and makes clear that for liability to arise there must be: (i) a right granted by the directive to individuals; and (ii), whose content is identifiable (as well as causation). Although in (ii) there is no reference to the rubric of the provision being sufficiently "*clear and unconditional*" it seems evident that the Court's reference to "*identifiable*" content is shorthand for that requirement.

47. Lord Hope then went on to consider an issue of some relevance to the present appeal, namely whether once a directive had been transposed into national law it ceased to be a source of rights capable of being relied upon and/or enforced by an individual claimant in the national court, because it then became the national implementing measure which formed the source of any justiciable rights. As to this Lord Hope cited with approval the observations of Lord Justice Auld in the Court of Appeal in *Three Rivers*, who cited an article by Professor Josephine Steiner in "*Coming to Terms with E.E.C. Directives"* ((1990)] 106 L.Q.R. 144, 146):

> "As Josephine Steiner observed in 'Coming to Terms with E.E.C. Directives,' [(1990)] 106 L.Q.R. 144, 146 the question whether a Directive has been correctly implemented can only be assessed by reference to the Directive itself, with the result that it can rarely be disregarded. Clearly, as a result of the court's ready application of the *Francovich* principle, the two approaches can shade into one another. Whichever route is taken, the answer on matters of *Community law* should be the same, with the result that it should prevail over United Kingdom law, including the common law as to misfeasance in public office and section 1(4) of the Act of 1987, where the latter frustrates it: see *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* (Case 106/77) [1978] ECR 629, 643-645, paras. 16-26; the *Brasserie du Pêcheur* case [1996] QB 404, 502, paras. 72-73."

48. Lord Hope then concluded by referring to paragraph [22] of *Dillenkofer* as articulating the relevant test:

> "In the result, although the appellants' case under Community law is put in different ways and is based upon both types of liability, the conditions which the appellants must satisfy in order to establish a right to damages against the Bank under each route are so closely analogous that they can be taken to be, at this stage of case, the same. The critical questions in this appeal, following the language of paragraph 22 of the judgment in the *Dillenkofer* case, are whether the Directive of 1977 entails the grant of rights to individual depositors and potential depositors and whether the content of those rights is identifiable on the basis of the provisions of the Directive."

49. I should add that all parties took the judgment of Lord Hope as expressing a fair summary of the conclusions of the remainder of their Lordships in *Three Rivers*. I think this is fair given that: Lord Steyn agreed with Lord Hope; Lord Hutton gave separate reasons but added that he agreed with Lord Hope; Lord Hobhouse agreed with Lord Hope whilst also giving separate reasons on certain issues; and Lord Millett gave separate reasons for agreeing with Lord Hope.

50. In the light of this the test to be applied on this appeal in determining whether Article 3 of the Directive is sufficiently precise and unconditional to give rise to liability is to determine whether: (i) the provision grants right to individuals such as the Claimant; and (ii), the content of those rights are identifiable upon the basis of the provisions of the Directive. I observe that in paragraph [22] of *Dillenkofer* the CJEU added that there had to be a causal link between the breach of the state's obligation and the loss and damage suffered by the claimant. I do not read Lord Hope's summary of paragraph [22], which does not refer to causation, as reading that requirement out of the equation, and it hence remains a condition of civil liability.

51. As to the reference to the breach being "*sufficiently serious*", it is clear from *Dillenkofer* at paragraphs [20] – [27] that a failure to transpose a directive is treated as a sufficiently serious breach where that leads to an individual losing rights conferred by a directive.

In *Becker* and in *Three Rivers* no reference is made to the breach having to be "*sufficiently serious*", it seemingly having been assumed that in any case where an individual was denied rights under a directive, that failure or breach met the test of sufficient seriousness.

Is Article 3 of the Directive capable of giving rise to liability?

52. I turn to apply the above test to Article 3(1) of the Directive. I consider whether: (i) it imposes an obligation and upon whom; and (ii), whether the content of the obligation is identifiable in the sense of being sufficiently clear and unconditional. The test is cumulative; both (i) and (ii) must be satisfied. In my judgment Article 3(1) meets the test in that it contains a clear and unconditional duty of result imposed upon employers specifically for the benefit of employees. I should make clear, since no other provision has been relied upon in this litigation, that I am expressing no conclusion about any provision other than Article 3(1).

53. The starting point is the language of Article 3 of the Directive.

54. The first question is to determine whether Article 3(1) imposes an obligation and upon whom. As to this the identity of the person to be protected is expressly provided for in the Directive itself. It is the employee. There is no dispute in this case but that the Claimant falls within the category of employee. Equally, the person upon whom the duty is imposed is also beyond question. It is the employer. There is no dispute in this case but that the SLC is an employer. Article 3 is under the heading "*general obligation*" which is imposed upon employers and is a "*duty*" to protect workers. This is also plain from the recitals to the Directive: see paragraph [21] above.

55. Next, the duty is identifiable, clear and unconditional. As is set out above in the description of the relevant legislation the expressions "*guarantee*", "*ensure*", "*duty*" and "*minimum requirements*" reflect the hard-edged nature and character of the duty in Article 3(1) that workers be provided with suitable equipment which may be "*used by workers without impairment to their safety or health*": see paragraph [23] above.

56. It is relevant to note what language is <u>not</u> used by the legislator. The duty is not qualified for example by reference to reasonableness or the taking of all proportionate, appropriate or practicable measures and nor is it a duty subject to economic considerations.

57. The mere fact that in Article 3(2) there is a carve-out does not mean that the duty under Article 3(1), is not identifiable. The exception in Article 3(2) is based upon impossibility and serves to define the outer limit of the basic duty in Article 3(1). Indeed, the fact that the legislator created a single exception based upon impossibility when the duty was then qualified by practicability, reinforces the unqualified nature of the basic duty in Article 3(1). Where impossibility does arise then the duty is one of practicability but otherwise there is no qualification placed upon the duty to ensure safety. In practical terms the exception in Article 3(2) does not materially water down or dilute the primary obligation and would arise as a defence to be adjudicated upon by the Court. If it failed, the duty in Article 3(1) remains unalloyed.

58. It is also significant that Article 3 addresses a relationship between employer and employee and does not, for it to bite, require any further involvement by the state or a national supervisory or regulatory authority. It is freestanding.

59. We are, here, in the field of "*essential*", "*minimum requirements*" for equipment to meet. Recital 6 talks in terms of "*compliance with the minimum requirements*" as being "*essential in order to ensure the safety and health of workers*" and recital 7 makes clear that it cannot be subordinated to economic considerations. A "*minimum*" requirement is, by definition, one below which an employer cannot go. To describe that minimum requirement as "*essential*" underscores its unconditional nature. As to the substance of the minimum requirement under Article 3, it is that the equipment be suitable which means it must safeguard the employee from harm.

60. I turn from the language of the Directive to its wider legislative context, namely the Framework Directive: see paragraphs [12] – [19] above. I consider whether there is anything in the Framework Directive which undermines the conclusion that I have reached in relation to Article 3(1). I conclude that there is not. The Framework Directive does not itself lay down substantive measures of protection but leaves that to implementing directives. It sets out general principles and makes clear what is expected of Member States. But even at this higher, framework, level, the instrument contemplates that obligations to be imposed by subordinate directives are rigorous. Thus Article 4 imposes a duty on Member States to "*take the necessary steps to ensure that employers, workers and workers' representatives are subject to the legal provisions necessary for the implementation of this Directive*." Article 5 is an obligation on the Members States in relation to the duties to be imposed on employers: "*The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work*." Phrases such as "*necessary steps to ensure*", and, "*duty to ensure safety*", are a clear indication of the legislative intent to impose unconditional obligations upon employers.

61. In sum, Article 3(1) meets the test of direct effect. What does this mean? It indicates that (subject to Issue II below) Article 3(1) is capable of conferring *locus* in domestic courts upon an individual to advance a right which the court must protect in an effective manner. As was pointed out in argument by Lord Justice Lewis, once the appellant has *locus* the court will choose from amongst its armoury of remedies that which is most suitable and, in a case such as the present, that would generally be damages. The linkage between the right to bring proceedings and a right to a financial remedy was clearly recognised by the CJEU in *Dillenkofer* at paragraphs [20] ("*loss and damage*") and [22] ("*a right to reparation*"), set out at paragraph [45] above.

62. I turn now to address various arguments made by Mr Chapman KC for SLC. He accepted that the central issue was the language of Article 3. In his helpful and careful submissions, he made clear that there was a good deal of common ground between the parties as to the law. He accepted that the Directive imposed duties on employers which were for the benefit of employees. He accepted that there was some daylight between tortious negligence and a cause of action based on a breach of Article 3(1) of the Directive in terms of the scope of the duty imposed on employers. But he contended that, nonetheless:

    (i) Article 3 was insufficiently clear and precise because of the proviso in Article 3(2) which meant that it was not absolute.

(ii) The Directive conferred upon the UK, as a Member State, a broad discretion to choose how to implement the Directive.

(iii) The UK was not under an obligation to create a strict right not to be injured.

(iv) The legislative and common law scheme which existed, and which comprised a combination of criminal and tortious sanctions and remedies, amounted in the round to an effective and sufficient system of protection for workers.

(v) It followed that Article 3 conferred no independent rights to those existing under domestic law.

63. Mr Chapman KC argued that this analysis was supported by the judgment of the CJEU in Case C-792/22 *MG* (ECLI:EU:C:2004:788, 26th September 2024) ("*MG*"). The case arose out of a reference for a preliminary ruling made by the Court of Appeal, Brasov, Romania. It concerned the interpretation of Article 1(1)(2) and Article 5(1) of the Framework Directive in the light of Article 31(1) of the Charter of Fundamental Rights of the European Union. The request was made in the context of criminal proceedings brought against MG on charges alleging non-compliance with legal measures on safety and health at work and manslaughter. The judgment was relied upon by Mr Chapman to support the proposition that the Framework Directive did not lay down any system of penalties, sanctions or remedies for breach or non-compliance by employers leaving it to the Member State to choose that which, in their discretion, they considered to be appropriate. He drew our attention to paragraph [39] of the Opinion of the Advocate General who observed that although the Directive referred to the principle of the responsibility of the employer and established general obligations relating to protection of the safety and health of workers in every respect, it did not contain specific provisions concerning penalties which may be applied by Member States to employers who failed to comply with those obligations which was because it was for the Member States, in accordance with the principle of procedural autonomy, to choose how to bring about the result set out in the Directive.

64. With respect I do not accept Mr Chapman's submissions, nor that the judgment in *MG* provides support to those arguments. The judgment concerned the Framework Directive (not the Directive). Nothing in paragraph [39] of the Opinion is controversial, but it is incomplete. The Advocate General, in paragraph [46], emphasised that when choosing sanctions to ensure implementation of a directive Member States were required to comply with the principle of effectiveness which required effective and dissuasive penalties to be established. Nothing required those penalties to be of a particular nature and they could therefore be criminal and/or civil but "*…if penalties were not applied to an employer which fails to comply with the [national provisions implementing the directive], the effectiveness and the effective protection of the rights guaranteed by that directive would be called into question…*".

65. The CJEU, when giving judgment, also recognised that the Framework Directive did not lay down either the measures to be adopted by way of implementation or the sanctions or remedies for non-observance by employers. Nonetheless, the procedural autonomy of the Member State to choose how to implement did not extend to failing to make available effective remedies:

"46. Moreover, Article 5(1) of Directive 89/391 states that the employer is to have a duty to ensure the safety and health of workers in every aspect related to the work.

47 As the Court stated in paragraph 41 of the judgment of 14 June 2007, Commission v United Kingdom (C-127/05, EU:C:2007:338), that provision makes the employer subject to the duty to ensure that workers have a safe working environment, a duty the meaning of which is specified in Articles 6 to 12 of that directive and by various individual directives which lay down the preventive measures to be adopted in certain specific industrial sectors.

48 The Court nevertheless held that that provision simply embodies a general duty of safety to which the employer is subject, without specifying any form of liability (judgment of 14 June 2007, Commission v United Kingdom, C-127/05, EU:C:2007:338, paragraph 42).

49 Consequently, as the Advocate General observed in point 39 of his Opinion and as the European Commission maintains, although Directive 89/391 refers to the principle of the responsibility of the employer and establishes general obligations relating to the protection of the safety and health of workers at work in every aspect related to the work, it does not contain any specific provisions concerning the detailed procedural rules for bringing proceedings to hold an employer liable for failure to comply with those obligations.

50 Similarly, although Article 31 of the Charter, to which the referring court makes reference in its first question referred for a preliminary ruling, provides, in paragraph 1 thereof, that 'every worker has the right to working conditions which respect his or her health, safety and dignity', it does not detail any procedural rules for seeking remedies where the protection of the safety and health of workers has not been ensured.

51 Since EU law does not harmonise the procedures applicable to the liability of the employer in the event of non-compliance with the requirements of Article 4(1) and Article 5(1) of Directive 89/391, those procedures fall within the domestic legal system of the Member States, by virtue of the principle of procedural autonomy of those States; nevertheless, those procedures must be no less favourable than those governing similar domestic actions (principle of equivalence) and not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (see, by analogy, judgment of 11 April 2024, Air Europa Líneas Aéreas, C-173/23, EU:C:2024:295, paragraph 31 and the case-law cited).

> …
>
> 53 In particular, when the Member States set out detailed procedural rules for legal actions intended to ensure the protection of rights conferred by Directive 89/391, they must ensure compliance with the right to an effective remedy and to a fair trial, enshrined in Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection. Thus, the Member States must ensure that the practical arrangements for the exercise of the remedies on account of a breach of the duties provided for by that directive do not disproportionately affect the right to an effective remedy before a court or tribunal referred to in Article 47 of the Charter (see, by analogy, judgment of 12 January 2023, Nemzeti Adatvédelmi és Információszabadság Hatóság, C-132/21, EU:C:2023:2, paragraphs 50 and 51)."

66. For present purposes I draw one limited point from the judgment, and in particular from paragraphs [46] – [53] cited above, which is that any remedy that might exist under a directive must be both effective and equivalent to any subsisting comparable action existing under domestic law. To this extent the judgment broadly supports the appellant's submissions.

67. The analysis of the application of the test for liability under Article 3(1) of the Directive set out at paragraphs [52] – [60] above answers SLC's arguments. The long and the short of the point is that Article 3(1) meets the test for liability and as such it is the duty of the national court to make available such remedies as are necessary to render effective the right being enforced. In this regard it is immaterial whether national implementing measures provide specific means of enforcement; whether they do or do not, the courts must ensure an effective remedy.

E. Issue II – Emanation of the state: If Article 3 is capable of having direct effect may it be enforced against the SLC?

Emanations of the state

68. In relation to Issue II the position has become procedurally complex. In many cases where there is a "*vertical*" claim against a public body the status of the defendant is not in doubt; it will be an organ of central or local government. But governments also operate through a range of more arm's length bodies, including those incorporated under private law, which might reflect an array of different features making them, respectively, closer or more remote from governmental control or authority. To decide whether such a body is to be treated as an emanation of the state against whom a vertical action can be pursued can be complex and fact sensitive.

The two-part test for emanation of the state in Foster v British Gas

69. Before the High Court the parties advanced their arguments upon whether the SLC was an emanation of the state by reference to the test described by the House of Lords in *Foster v British Gas.* This seemingly described a two-part test (*ibid* pages [313A and D]) which was whether the defendant was:

> "… 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"

70. This was said to flow out of paragraph 20 of the judgment in *Foster CJEU* (*ibid*) which provided 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"

71. The two limbs said to be cumulative were that: (i) the body must have been made responsible for providing a public service under the control of the state; and (ii) the body must possess special powers going beyond those available as a matter of general law in dealings between private persons.

72. Applying this two-limbed test, the House of Lords in *Foster v British Gas* held that the first limb was satisfied because (page [314B]) the defendant: *"performed its public service of providing a gas supply under the control of the state. The B.G.C. was not independent; its members were appointed by the state; the B.G.C. was responsible to the minister acting on behalf of the state, and the B.G.C. was subject to directions given by the Secretary of State".* The second limb test was also satisfied by reason of section 29 Gas Act 1972 which provided that no person could supply gas to any premises without the consent of the defendant and subject to such conditions as the defendant should impose. That gave British Gas a "*special power beyond those which resulted from the normal rules applicable in relations between individuals*" (page [314D]).

The position before the High Court

73. It is here that the procedural complexities arise because as I explain below it is now common ground that the two-part test was incorrect, and the parties acknowledge that they failed to place before the judge the relevant case law which demonstrates that the test does not have two limbs or parts to it. Accordingly, the test applied by the High Court set the bar for a body to be classified as an emanation of the state too high. In relation to the two-part test the Judge below observed that the parties (and in particular the appellant) had not placed before the Court sufficient evidence to enable him to come to a conclusion about the application of the second part of the test (which is now recognised as not being a necessary hurdle to overcome). The appellant had invited the Court to take judicial notice of various facts upon the basis that the nature of SLC was a matter of public record. There were three factual propositions the Court was invited to take judicial notice of: (i) that there was a scheme for higher education finance governed by statute and taking the form of loans made to students; (ii) that the scheme was administered only by the SLC; and (iii) that the provision of loans under the student loan scheme was different from other forms of financial provision in that repayment

was by way of payments through the tax system, whether by way of PAYE or self-assessment, with repayment only being due after the debtor's income has crossed a relevant threshold.

74. The SLC accepted the first proposition, and the second to the extent of agreeing that it was the sole body administering the government student loan scheme. However, it argued that this did not mean that it had a monopoly in law on making loans to students and it did not accept that it even had a *de facto* monopoly. As to the third proposition, this conflated the role of SLC with that of HMRC, which was responsible for recovery of student loans for the benefit of the Treasury. The SLC was only a vehicle for the administration of the making of student loans; recoupment of payment was a matter for the Treasury and HMRC.

75. The Judge, having considered the law on judicial notice, stated that the first and second propositions were not "*substantially controversial*" and subject to the qualification made to the second by the SLC, were matters of judicial notice. The third proposition could be accepted as a matter of judicial notice, with qualification. The Judge held:

> "48… It is a matter of judicial notice that the repayment of student loans is made through the tax system. That system is administered by HMRC and to that extent the repayment of student loans is different from the repayment of other loans."

76. The Judge did not however have evidence on the arrangements for triggering repayment; by whom and how repayment was enforced; the destination of the recovered funds; or under whose control they were held. Such matters were "*... readily capable of clear demonstration by reference to sources of indisputable accuracy*" (paragraph [48]). But nothing of that kind had been put before the County Court nor provided to the High Court. He added:

> "There appears to be considerable force in the Respondent's contention that the recoupment of the loans is for the benefit of the Treasury. If that is so then the position on a proper analysis would appear to be that the Respondent administers the making of the loans with their recovery being effected by and for the benefit of the Treasury."

77. In paragraphs [53] – [58] the Judge endeavoured, on the material before him, to come to a conclusion applying the two-part test laid down in *Foster v British Gas.*

78. By way of context the Judge cited the analysis of the Supreme Court, which had considered the nature of student loans administered by the SLC, in *R(Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57 ("*Tigere*"). The issue was the lawfulness of regulations restricting loans to those who had been lawfully and ordinarily resident in the UK for the three years prior the start of the relevant course and who were settled in this country as of that date. The nature and status of the SLC was not in issue but reference was made to the system when addressing the context of the regulations. At paragraph [1] Lady Hale (with whom Lord Kerr agreed) said:

> "As is common knowledge, the whole system of funding higher education was reformed, broadly in accordance with the

> recommendations of Lord Browne's report, Securing a Sustainable Future for Higher Education (October 2010), in 2011... The fees which universities were allowed to charge their students would increase to something closer to what it cost to educate them; the fees paid by the students, and a sum for their maintenance, would be financed by loans from Government (through an arms-length entity); these loans would only be repaid when the students could afford to do so and at a rate which they could afford..."

79. At paragraph [4] Lady Hale referred to Student Finance England as being "*the trading name of the Student Loans Company Ltd which administers the scheme*". At paragraph [75] Lords Sumption and Reed said: "*Student loans are provided out of public funds on terms which are much more advantageous to students than any commercial alternative. They are a form of state benefit...*".

80. In paragraph [53] of the judgment, the Judge held that the first limb of the *Foster v British Gas* test was satisfied. Mr Carter, for the appellant, observes that there was no respondent's notice served by the SLC challenging this finding so that, for the purposes of this appeal, it should be treated as correct. Paragraph [53] provides:

> "53. The first limb of the test set out in *Foster v British Gas* is satisfied here. The Respondent is wholly owned by the government and it is responsible for the administration of the student loans scheme which, as noted in *Tigere*, is a form of state benefit paid out of public funds. As the judge noted Mr Brennan gave no explanation of what it meant for the Respondent to be an executive non-departmental public body. Nonetheless, it is clear that the Respondent was under the control of the state."

81. The difficulty with the appellant's argument, held the Judge, lay in the second part of the test which was not satisfied:

> "54. The difficulty for the Appellant lies in the second limb of the test. The Respondent was the sole body administering the scheme for student loans funded by the government. However, that did not give it a monopoly on the provision of loans to students. In *Foster v British Gas* the relevant special power lay in the fact that it was unlawful for others to supply gas to premises without the consent of British Gas. That corporation could prevent others from supplying gas and could impose conditions on such supply as it did authorise. The Respondent has no equivalent power. Any commercial lender can make loans to students on such terms as it chooses and without reference to the Respondent. It may well be the case that for most of the time and for most students the loans provided through the student loans scheme will be more attractive than those offered by commercial lenders and potentially markedly more attractive. That will depend on the terms of the competing loans including matters such as the rate of interest, the arrangements for repayment, and the amount being lent. Those are considerations

> which will vary from time to time and from lender to lender. Moreover, no student is required to take a loan from the student loans scheme. The action of the Respondent in administering the loan scheme on behalf of the government did not, without more, amount to the exercise of a special power going beyond that available between private individuals.
>
> 55. An enforceable monopoly is not the only potential kind of special power for these purposes but the Appellant has not shown that the Respondent had any other special power.
>
> 56. At [18] the judge explained that he had no information as to whether and if so to what extent the Respondent had a discretion about the advancing of loans nor as to its decision-making powers if any. That is correct but beside the point for current purposes because the existence of a discretion as to the making of student loans would not of itself be a special power.
>
> 57. The key points were those made at the end of [17] and [20] of the judgment, namely that there was no evidence that the Respondent had any power of enforcement and that being the only body engaged to perform a role did not give it a special power. That conclusion was unimpeachable. In that regard the contrast which the judge made at [21] between the Respondent and local authorities and health authorities is a cogent one.
>
> 58. It follows that the second limb of the test explained in *Foster v British Gas* is not satisfied. The judge was entirely right to find that the Respondent does not have a relevant special power and that it is not to be seen as an emanation of the state for these purposes. The judge was, accordingly, right to conclude that there was no scope for the direct enforcement of the Directives. As a consequence ground 1 fails."

The correct test - The judgment of the CJEU in Farrell v Whitty

82. The problem with the judgment below, as already explained above, is that the parties did not place before the Judge the relevant case law which made clear that the test was <u>not</u> dual limbed, and he therefore proceeded to apply an incorrect test.

83. In Case C-413/15 *Farrell v Whitty* (10th October 2017) ("*Farrell*") a Grand Chamber of the CJEU addressed whether the test for an emanation of the state was a two-limbed test or whether, correctly analysed, the two limbs were disjunctive, i.e. alternative. The CJEU held that they were alternative. In a nutshell the issue in that case was whether the provisions of the Second Council Directive 84/5/EEC of 30th December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, were "*capable of having direct effect*" and could "*... be relied upon against a private law body on which a Member State has conferred the task that is the subject of Article 1(4) of the Second Directive.*" (judgment paragraph [1]).

84. The first question posed by the national court sought, in essence, to ascertain whether the provisions of a directive that were, otherwise, capable of having direct effect could be relied upon against a body which did not display all the characteristics listed in paragraph [20] of the judgment in *Foster CJEU.*

85. The relevant paragraphs of the CJEU judgment are [24] – [29], where the Court explains that the key paragraph of its judgment in *Foster CJEU* was not paragraph [20], but was paragraph [18]. This set out two alternative tests which were that the defendant: (i) was subject to the authority or control of the State; or (ii) had special powers beyond those which result from the normal rules applicable to relations between individuals. Paragraphs [24] – [29] explain the Court's analysis:

> "24. In that context, the Court stated in paragraph 18 of that judgment 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'.
>
> 25 The Court concluded, in paragraph 20 of that judgment, 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'.
>
> 26 As the Advocate General stated in point 50 of her Opinion, the fact that the Court chose in paragraph 20 of the judgment of 12 July 1990, Foster and Others (C-188/89, EU:C:1990:313) to use the words 'is included in any event among the bodies' confirms that the Court was not attempting to formulate a general test designed to cover all situations in which a body might be one against which the provisions of a directive capable of having direct effect might be relied upon, but rather was holding that a body such as that concerned in the case that gave rise to that judgment must, in any event, be considered to be such a body, since it displays all the characteristics listed in paragraph 20.
>
> 27 Paragraph 20 of that judgment must be read in the light of paragraph 18 of the same judgment, where the Court stated that such provisions can be relied on by an individual against organisations or bodies which are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable to relations between individuals.

> 28 Accordingly, as stated, in essence, by the Advocate General in points 53 and 77 of her Opinion, the conditions that the organisation concerned must, respectively, be subject to the authority or control of the State, and must possess special powers beyond those which result from the normal rules applicable to relations between individuals cannot be conjunctive (see, to that effect, judgments of 4 December 1997, Kampelmann and Others, C-253/96 to C-258/96, EU:C:1997:585, paragraphs 46 and 47, and of 7 September 2006, Vassallo, C-180/04, EU:C:2006:518, paragraph 26).
>
> 29 In the light of the foregoing, the answer to the first question is that Article 288 TFEU must be interpreted as meaning that it does not, in itself, preclude the possibility that provisions of a directive that are capable of having direct effect may be relied on against a body that does not display all the characteristics listed in paragraph 20 of the judgment of 12 July 1990, Foster and Others (C-188/89, EU:C:1990:313), read together with those mentioned in paragraph 18 of that judgment."

86. The Court of Appeal in *MIB v Lewis* [2019] EWCA Civ 909 at paragraph [18] confirmed that the test was an either/or formulation, not a cumulative test:

> "In *Farrell v Whitty No 2* the first question for the Court was whether the elements of the test in *Foster* were conjunctive or disjunctive. The CJEU had noted at [24] and following, the tension between [18] of *Foster* and [20] of the same judgment, on which I had relied in *Byrne.* The judge noted at [109] of his judgment that, at [26] to [28], the CJEU concluded that [20] of *Foster* must be read in the light of [18], with the consequence that the conditions were not conjunctive."

87. It follows that when the High Court treated the test as involving two cumulative limbs, it set the bar for the SLC to be sued upon the basis of a directive at materially too high a level. The test that the Judge should have applied was to see whether the SLC was either: (i) subject to the authority or control of the State; or (ii) had special powers beyond those which result from the normal rules applicable to relations between individuals. It will be seen that even under (i) there are two alternatives based upon "*authority*" or "*control*".

What approach should this Court take?

88. On the facts which are available, and as found by the Judge below, the appellant makes a persuasive case that the test for emanation of the state is met in the case of the SLC. The Judge found that limb 1 of the test was met which, as formulated, was whether the SLC was "*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*"? This is very similar to the test in paragraph [18] of *Foster CJEU* endorsed by the CJEU in *Farrell* which was whether the SLC was "*subject to the authority or control of the State*"?

89. This Court did not receive detailed submission on how this test would or might apply to the SLC. It might well be said that even on the facts now available the SLC was under the "*authority*" of the state and that such could be inferred from the observations of the Supreme Court in *Tigere* (see paragraphs [78] and [79] above) and/or from the facts that were found by the County Court and recorded and treated as correct in the Judgment. The same might be said of whether the SLC is under the "*control*" of the state by virtue of the way in which Parliament had set up the SLC and its interrelationship with HMRC and HMT. Indeed, encapsulated in the High Court's conclusion that limb 1 was met was a conclusion (Judgment paragraph [53], set out above) that SLC did operate under the "*control*" of the state. And as the appellant points out there is no respondent's notice challenging this.

90. As to whether the SLC "*had special powers beyond those which result from the normal rules applicable to relations between individuals*", it seems beyond dispute that the SLC did not have a monopoly over the power to make loans to students in the sense of it being the *only* person entitled in law to make such loans. But the existence of a statutory monopoly is merely one example of where a body would meet the test; it is not "*the*" test, as the Judge rightly observed (judgment paragraph [55]). The Judge added that beyond the issue of monopoly, in the strict sense, there was no or no sufficient evidence before the Court to enable the second limb of the test to be applied. This might not be correct. When granting permission to appeal, Lady Justice Andrews observed, I consider with some force, on the basis of facts which are not in dispute:

> "The Respondent had a monopoly on providing student finance from public funds with repayment administered by HMRC; the special power was "not as extreme" as in Foster but it was still a special power.
>
> …it is arguable that, unlike commercial lenders, the Respondent has the power to make loans to students out of public funds. Those powers derive from regulations and not from "the normal rules applicable in relations between individuals". It arguably makes no difference that its role may be described as administrative in nature; it is exercising its powers on behalf of the state. If that is the correct analysis then the judge arguably fell into error in para 54 in saying there was no special power because other lenders could also lend to students and the Respondent could not preclude them from doing so."

91. The difficulty with all of the above is that because the Judge was led to apply a false test there is no detailed analysis of the alternatives in the judgment and we have not received full submissions of law on the issue. It is (just about) possible that there might be additional evidence that is relevant to one or more of the components of the various tests. Conversely, it might be that sufficient evidence already exists on the table. But in the absence of a full case having been advanced to the High Court or to this Court I cannot be entirely certain of this.

92. In view of the conclusion that I have reached in relation to liability and given that it is common ground that because the judge did not have placed before him the relevant case law, he erred in relation to the test to be applied to the issue of emanation of the state, this case must now, *in any event*, be remitted to the County Court. It therefore seems a

fair and practicable solution to add the application of the proper test for emanation of the state to the facts, to the remission "*to do*" list. To be clear the Court on the remittal might take the position that the High Court Judgment, in its conclusion on limb 1, is sufficient. Nothing in this judgment precludes that possibility.

93. In so far as there are gaps in the evidence the relevant material is peculiarly in the knowledge and possession of the SLC. It is either statutory in nature or concerns matters such as the administrative arrangements between HMRC, HMT and SLC. This is capable of being accurately and comprehensively set out by SLC in a statement which should then be capable, following discussion with the appellant, of agreement. Such a statement should then form the basis upon which legal submissions can be made and legal inferences drawn. This is a question of law; not one about which an employee of SLC can express an opinion or view (as was the case before the County Court). The responsibility for setting out the facts lies, in the first instance, squarely with the SLC.[1]

F. Conclusion and disposition

94. In conclusion I would allow the appeal and remit the matter to the County Court.

Lord Justice Lewis:

95. This appeal concerns a claim for damages for breach of Article 3 of Directive 2009/204/EC ("*the Directive*"). The claim was dismissed by the court below as the respondent, the Student Loans Company, was not considered to be an emanation of the state and the provisions of the Directive could not be enforced against it. It was further held that the appellant had not established that the absence of a civil remedy in damages meant that the provisions of the Directive had not been fully implemented.

96. There are three grounds of appeal. The first is that the judge erred in finding that the respondent was not an emanation of the state. I agree that the appeal on this ground should be allowed for the reasons given by Green LJ at paragraphs [67] – [92] of his judgment.

97. Ground 2 concerns the circumstances in which an individual may bring a claim for damages for breach of the provision of a directive. I agree that the appeal should be allowed on this ground. I would, however, prefer to express my reasons briefly in my words. Further, I would restrict any ruling to the effect of a breach of Article 3 of the Directive.

98. The issue concerns the conditions under which an individual may be able to bring a claim for damages in respect of obligations arising out of a directive. There are, broadly, three conditions that need to be satisfied. First, the aim of the provision of the relevant directive must, on a proper interpretation, have been intended to confer specific rights

[1] The principle that there is an evidential burden on the party with control over the relevant evidence is well established. In *Fairchild v Glenhaven* [2002] UKHL 22 at paragraph [13] Lord Bingham endorsed the common law principle articulated by Lord Mansfield in *Blatch v Archer* (1774) 1 Cowp 63 at 65 who observed: "*It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted*." Lord Bingham described this rule of evidence as "*salutary*" and added: "… *it would seem to me contrary to principle to insist on application of a rule which appeared, if it did, to yield unfair results. And I think it salutary to bear in mind Lord Mansfield's aphorism in [Blatch]…".*

on particular individuals. Secondly, the content of those rights must be ascertainable from the provisions of the directive, that is the relevant provisions of the directive must be clear, precise and unconditional such that the provisions are capable of enforcement in a national court. Thirdly, there must be a causal link between the breach of the directive and the loss or damage suffered. The appropriate remedy is, in principle, a matter for national law to determine provided that the remedy is effective and is equivalent to the remedies available in respect of a claim for breach of a similar right derived from domestic law. The precise words used to describe those conditions differ from case to case, and, on occasions, further, or differently worded, conditions are referred to. Analytically, in my view, if use is to be made of the term "*direct effect*", then it is more accurate, or appropriate, to use that term in relation to the second condition, namely whether the rights conferred are sufficiently clear, precise and unconditional to be enforceable in a national court. The first question concerns the proper interpretation of the relevant provisions of a directive and whether or not they were intended to result in individuals having rights of a particular nature. In the event, a decision on whether to allow this appeal or not is unlikely to turn on the precise analysis but other cases may do so.

99. That analysis is reflected in the case law as appears from the decision in *Three Rivers District Council and others v Governor and the Company of the Bank of England (No 3)* [2023] 2 AC 1. That case concerned a situation where the Bank of England granted a licence to another bank to carry on business as a deposit-taker. It involved a claim for damages alleging that the Bank of England was in breach of various provisions of a directive to exercise regulatory authority over the bank. It was said that it owed duties to the depositors in that bank so that it was liable in damages for loss caused to the depositors. I accept that the speech of Lord Hope fairly summarises the reasoning of the House as a whole for the reasons given by Green LJ at paragraph [49] of his judgment.

100. Lord Hope recognised two routes by which an individual could seek damages. First, there were situations where the individual sought to enforce a claim for breach of a provision of a directive against an emanation of the state. The second concerned situations where the state was liable for a failure to implement a directive. Lord Hope observed at page [203A – B] that:

> "In the result, although the appellants' case under Community law is put in different ways and is based upon both types of liability, the conditions which the plaintiffs must satisfy in order to establish a right to damages against the Bank under each route are so closely analogous that they can be taken to be, at this stage of case, the same. The critical questions in this appeal, following the language of paragraph 22 of the judgment in the *Dillenkofer* case, are whether the Directive of 1977 entails the grant of rights to individual depositors and potential depositors and whether the content of those rights is identifiable on the basis of the provisions of the Directive.

101. Paragraph 22 of *Dillenkofer* to which Lord Hope referred says:

> "22. Moreover, it is clear from the Francovich case which, like the present cases, concerned non-transposition of a Directive within the prescribed period, that the full effectiveness of the third paragraph of article 189 of the Treaty requires that there should be a right to reparation where the result prescribed by the Directive entails the grant of rights to individuals, the content of those rights is identifiable on the basis of the provisions of the Directive and a causal link exists between the breach of the state's obligation and the loss and damage suffered by the injured parties."

102. In other words, the first question is whether, as a matter of the interpretation of the directive in question, its purpose was to ensure that specific rights were conferred on particular individuals or groups of individuals. The second question is whether the content of those rights is identifiable from the provisions of the directive itself. Lord Hope then examined the purpose, and the terms of the directive in that case in order to determine whether the directive "*granted rights to individual depositors and potential depositors*" (see page [207G]). Having undertaken that exercise, Lord Hope concluded at page [218B – G] that:

> "Conclusion
>
> Looking back at the Directive as a whole, the key to a proper understanding of its purpose and effect seems to me to lie in the fact that it was the first step in a process of harmonisation of provisions for the regulation of credit institutions carrying on business within the Community. It was about the removal of barriers to the right of establishment under article 52 of the EEC Treaty (now article 43 EC). It confined itself to imposing a number of minimum conditions and prohibitions on member states as to the authorisation and supervision of credit institutions having their head offices in another member state or having their head offices outside the Community. It was based upon an appreciation of the fact that credit institutions require regulation in order to protect savings. So any measures of harmonisation had to meet the twin requirements of protecting savings on the one hand and creating conditions of equal competition between credit institutions operating in more than one member state on the other. It placed duties of co-operation on the competent authorities where a credit institution was operating in one or more member state other than that in which its head office was situated. But it stopped short of prescribing any duties of supervision to be performed by the competent authority within each member state. It is not possible to discover provisions which entail the granting of rights to individuals, as the granting of rights to individuals was not necessary to achieve the results which were intended to be achieved by the Directive.
>
> For these reasons I am unable, with great respect, to agree with Auld LJ's conclusions, ante, pp 95e-96a, that the Directive of 1977 imposed clearly defined obligations on member states and

> on their regulatory bodies and that in doing so it gave rise to corresponding Community law rights in depositors to enforce those obligations by an action of damages. I prefer the views of Clarke J [1996] 3 All ER 558, 616, where he said:
>
> "The true position, as it seems to me, is that the Directive was not intended to require the imposition of a duty to supervise upon the supervisory authority because, whatever the underlying purpose of the system of supervision, the immediate purpose of the Directive, rather like that in R v International Stock Exchange of the UK and the Republic of Ireland Ltd, Ex p Else (1982) Ltd, R v International Stock Exchange of the UK and the Republic of Ireland Ltd, Ex p Roberts [1993] QB 534 , was a first step towards harmonisation of the systems in the member states, which were assumed to and no doubt did exist. Its purpose was not to lay down the duty to supervise or radically to alter existing systems, but, even if was, it was not (as I see it) to confer rights upon either savers or other creditors."

103. A similar approach results from a consideration of the nature of directives. As Article 288 of the Treaty on the Functioning of the European Union provides:

> "A directive shall be binding, as to the result 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".

104. In other words, the question may be framed as whether the result that a particular directive required a Member State to achieve was the conferment of rights on particular individuals, or categories of individuals. Or, as is often the case, did the directive set out general principles as to what should be achieved, but leave Member States to adapt their national laws to achieve that result?

105. It is in that context that cases have arisen as to the methods chosen to implement Council Directive 89/391 on the introduction of measures to encourage an improvement in the safety and health of workers ("*the Framework Directive*"). In case C-127/05 *Commission of the European Communities v United Kingdom* [2007] ICR 1393, the Court of Justice of the European Union held that Article 5(1) of the Framework Directive did not intend to impose on Member States a duty to prescribe a non-fault regime in respect of employers (see paragraphs [42] and [49] – [51]). In case C-792/22 *MG (Parchetul de pe Langa Judecatoria Rupea and others)*, the Court of Justice considered that a national rule that provided that a decision of an administrative body (there, that an accident took place outside working hours) was binding in subsequent criminal proceedings would be incompatible with the obligation not to make it impossible in practice or excessively difficult to exercise rights conferred by European Union law if it prevented parties in the criminal proceedings (which also determined civil liability) to challenge that finding (see paragraphs [51] – [59]). The Court of Justice was not dealing with the question of whether the provisions of the Framework Directive, and of Article 5 in particular, was intended to confer rights on individuals to claim damages from employers who caused them harm by a failure to comply with the requirements of the Framework Directive. The Advocate General considered that Member States were free to adopt penalties which could be criminal or civil (see

paragraph [48] of his opinion). The Court of Justice did not deal with the issue in this way and simply considered whether the national rule at issue was contrary to the principle of effectiveness. I would not wish to express a view, still less a concluded view, on whether any of the provisions of the Framework Directive were intended to require Member States to confer rights on individual employees enforceable against employers.

106. In the present case, therefore, the first issue is whether Article 3 of the Directive, properly interpreted, was intended to confer rights on individual employees or workers which were to be enforceable against employers? Was that the result that the Directive required Member States to achieve? In my judgment Article 3 was intended to confer such rights. I reach that conclusion for the following reasons, taken together.

107. First, the purpose of the Directive was to protect workers by ensuring minimum requirements in the use of work equipment. That appears from recital 6 to the Directive which says that compliance with "*minimum requirements designed to guarantee a better standard of health and safety in the use of work equipment is essential to ensure the safety and health of workers*".

108. Secondly, Article 1 of the Directive provides that it lays down "minimum safety and health requirements for the use of work equipment by workers".

109. Thirdly, that is reflected by the wording of Article 3. The obligation is for the employer to take the measures necessary "*to ensure that the work equipment made available to workers…is suitable for the work to be carried out or properly adopted for that purpose and may be used by workers without impairment to their safety or health*". That is subject to an exception where it is not possible fully to ensure that work equipment can be used by workers without risk. The wording of the provision indicates that it is concerned with ensuring that employers owe an obligation to their workers to provide them with equipment that it is safe for them to use. The natural inference is that workers are intended to be able to rely on that obligation.

110. Fourthly, Article 12 of the Directive imposes on the Member State an obligation to communicate to the Commission "*the text of the provisions of national law which they have already adopted or adopt in the field governed by the Directive*". That is more consistent with the Directive contemplating that a Member State has to take steps to achieve what the Directive requires, i.e. that workers are provided with equipment which is safe to use. The language differs from that the obligation often found in directives (including in Article 18 of the Framework Directive) whereby Member States are to bring into force the laws, regulations, and administrative measures necessary to comply with the directive. The latter form of words is more consistent with there being a range of measures that a Member State may adopt to give effect to the directive. The words in Article 12 do not suggest there is any scope for choice or discretion on the part of the Member State in relation to Article 3 of the Directive. The Member State must simply inform the Commission of the text of the laws adopted to give effect to the obligation on employers to provide work equipment that is safe to use.

111. Taken together, those factors indicate that the aim or intention underlying Article 3 of the Directive was to impose an obligation on employers to provide workers with work equipment that was safe to use and to enable workers to rely on that obligation. In other words, the result that the Directive sought to achieve was that workers would have a

right enforceable against an employer (correlative with the duty imposed on that employer) to be provided with work equipment that was safe to use. Article 3 of the Directive is, therefore, intended to result in the conferment of a right on individual workers.

112. Dealing with the second condition for liability, the provisions of Article 3 are clear, precise and unconditional. Article 3 identifies the beneficiary of the right: the worker concerned. It identifies the person subject to the obligation: the employer. It identifies the content of the right: the provision of suitable work equipment which it is safe to use. As such, it satisfies the requirements for direct effect, that is it may be enforced in a national court against an emanation of the state.

113. Although not the subject of argument before us, the usual remedy in domestic law where an obligation is imposed on one individual or body for the benefit of another is a civil remedy in damages. The appropriate vehicle, when no remedy is specified in any domestic law implementing the directive, is seen as, or as akin or equivalent to, a breach of statutory duty (see, for example, the discussion in *R v Secretary of State for Transport ex p. Factortame (No 7)* [2001] 1 WLR 942 at paragraphs [143] – [148]). That necessarily requires that the loss be caused by the breach of the relevant provision of the directive (as required by the third condition for liability by Lord Hope in *Three Rivers* and paragraph [22] of the judgment of the Court of Justice in *Dillenkofer*). Although not argued before us, that is likely to be the proper vehicle for giving effect to obligations imposed by Article 3 of the Directive.

114. For those reasons, I would allow this appeal on grounds 1 and 2. Ground 3 does not appear to arise on this appeal.

Lord Justice Baker:

115. I agree with both judgments.