Neutral Citation Number: [2019] EWCA Civ 909

Case No: B3/2018/2411

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
SOOLE J
[2018] EWHC 2376 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/06/2019

Before:

LORD JUSTICE HENDERSON
LORD JUSTICE FLAUX
and
SIR STEPHEN RICHARDS

- -

Between:

MOTOR INSURERS' BUREAU	**Appellant**
- and -	
MICHAEL LEWIS (A protected party, by his litigation friend JANET LEWIS)	**Respondent**

- -
- -

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

Hearing date: 15 May 2019

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Approved Judgment

Lord Justice Flaux:

Introduction and background

1. The appellant, the Motor Insurers' Bureau (to which I will refer as "the MIB") appeals with the permission of the judge against the Order of Soole J dated 14 September 2018 on the trial of preliminary issues by which, so far as relevant to the appeal, the judge determined that EU Directive 2009/103/EC ("the 2009 Directive") relating to compulsory motor insurance had direct effect against the MIB as an emanation of the state, so that the MIB was liable to indemnify the respondent claimant (to whom I will refer as "the claimant") in respect of the injury he suffered in the incident described below.

2. On 9 June 2013 the claimant, then aged 67, was walking on private land in Lincolnshire. Dennis Tindale (who was the first defendant in the proceedings before Soole J, the MIB being the second defendant and the Secretary of State for Transport the third defendant) was a local farmer. He erroneously assumed that the claimant had been up to no good in the vicinity of his farm premises. He pursued the claimant and his friends, driving a 4x4 Nissan Terrano, which was not insured. He drove the vehicle along a public road before accessing a public footpath along which the claimant and his friends had walked, driving down an embankment on which one of the footpaths was situated, through a barbed wire fence, into a field. He drove across the field around a marshy area and then into collision with the claimant, causing him serious injury. At the appeal hearing, we were informed that Mr Tindale was subsequently prosecuted for causing grievous bodily harm with intent contrary to section 18 of the Offences against the Person Act 1861, but acquitted at trial.

3. By Order dated 9 June 2017, Mr Tindale was debarred from defending the claim. The MIB did not dispute that Mr Tindale was liable for the accident, but contended that it had no contingent liability to the claimant pursuant to the Uninsured Drivers Agreement ("UDA") 1999 because the accident and injuries were not caused by or arising out of the use of the vehicle on a road or other public place under section 145 of the Road Traffic Act 1988 (hereafter "the RTA").

4. Pursuant to an Order dated 12 February 2018, there were three preliminary issues before the judge:

   (1) Whether any judgment the claimant obtains against Mr Tindale is a liability which is required to be insured against pursuant to Part VI of the 1988 Act;

   (2) If any judgment the claimant may obtain against Mr Tindale is a liability which is not required to be insured against pursuant to Part VI of the 1988 Act, whether the MIB is otherwise obliged to satisfy such judgment pursuant to the 2009 Directive;

   (3) Whether the provisions of the relevant Directives have direct effect against the MIB in the circumstances of this claim.

5. Before considering the judgment in relation to these issues, it is necessary to set out some of the domestic and European legislative background. Sections 143 and 145 in Part VI of the RTA, as amended by The Motor Vehicles (Compulsory Insurance) Regulations 2000, provide, so far as material, as follows:

> "143 (1) Subject to the provisions of this Part of this Act – (a) a person must not use a motor vehicle on a road or other public place unless there is in force in relation to the use of the vehicle by that person such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act…
>
> 145 (1) In order to comply with the requirements of this Part of this Act, a policy of insurance must satisfy the following conditions. (2) The policy must be issued by an authorised insurer. (3) Subject to subsection (4) [which contains exceptions not relevant for present purposes] below, the policy – (a) must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person or damage to property caused by, or arising out of, the use of the vehicle on a road or other public place in Great Britain…"

6. Section 144 contains exceptions from the requirement of third party insurance in the case of vehicles owned by central or local government, police cars and ambulances and the like, where the relevant public bodies can self-insure, although in practice many such bodies do take out third party insurance with an authorised insurer.

7. Section 95 provides that an "authorised insurer" means "an insurer who is a member of the Motor Insurers Bureau (a company limited by guarantee and incorporated under the Companies Act 1929 on 14th June 1946)." Thus, the combined effect of these statutory provisions is that the compulsory policy of motor insurance must be issued by an insurer which is a member of the MIB. The insurers' obligation to fund the MIB is provided by the MIB Articles of Association, which include that an insurer ceases to be a member if it fails to pay the requisite annual levy. The MIB has since 1946 compensated the victims of uninsured drivers under successive Uninsured Drivers Agreements ("UDAs") with the relevant Minister (now the Secretary of State) for Transport. There have been equivalent agreements in respect of untraced drivers since 1969.

8. The relevant UDA between the MIB and the Secretary of State is dated 13 August 1999. The terms relevant to the issues in the present case are set out by the judge at [13] to [15] of the judgment. At [16] the judge also notes that the first object of the MIB in the Objects Clause of its Articles of Association is: "To provide a safety net for innocent victims of identified and uninsured drivers to satisfy…any liability required to be covered by contracts of insurance or security under Part VI of the [RTA] or by any other statute, statutory instrument, rule, regulation, order, directive or similar measure introduced by any competent authority or at common law or by custom."

9. As the judge noted at [17], the 2009 Directive consolidated a number of previous Motor Insurance Directives which related to compulsory insurance against civil liability in respect of motor vehicles dating back to Council Directive 72/166/EEC. The 2009 Directive provides so far as relevant as follows:

"CHAPTER 1

GENERAL PROVISIONS

Article 3

Compulsory insurance of vehicles

Each Member State shall, subject to Article 5, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance.

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

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

…

CHAPTER 3

MINIMUM AMOUNTS COVERED BY COMPULSORY INSURANCE

Article 9

Minimum amounts

1. Without prejudice to any higher guarantees which Member States may prescribe, each Member State shall require the insurance referred to in Article 3 to be compulsory at least in respect of the following amounts:

(a) in the case of personal injury, a minimum amount of cover of EUR 1 000 000 per victim or EUR 5 000 000 per claim, whatever the number of victims…

CHAPTER 4

COMPENSATION FOR DAMAGE CAUSED BY AN UNIDENTIFIED VEHICLE OR A VEHICLE FOR WHICH THE INSURANCE OBLIGATION PROVIDED FOR IN ARTICLE 3 HAS NOT BEEN SATISFIED

Article 10

> Body responsible for compensation
>
> 1. Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied.
>
> …
>
> CHAPTER 5
>
> **SPECIAL CATEGORIES OF VICTIM, EXCLUSION CLAUSES, SINGLE PREMIUM, VEHICLES DISPATCHED FROM ONE MEMBER STATE TO ANOTHER**
>
> Article 12
>
> Special categories of victim
>
> 1. Without prejudice to the second subparagraph of Article 13(1), the insurance referred to in Article 3 shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle.
>
> 2. The members of the family of the policyholder, driver or any other person who is liable under civil law in the event of an accident, and whose liability is covered by the insurance referred to in Article 3, shall not be excluded from insurance in respect of their personal injuries by virtue of that relationship.
>
> 3. The insurance referred to in Article 3 shall cover personal injuries and damage to property suffered by pedestrians, cyclists and other non-motorised users of the roads who, as a consequence of an accident in which a motor vehicle is involved, are entitled to compensation in accordance with national civil law.
>
> This Article shall be without prejudice either to civil liability or to the quantum of damages."

10. Article 5 permits derogation by Member States from the obligation under Article 3 in respect of certain natural or legal persons and certain types of vehicle, but also provides for notification to the Commission.

The judgment below

11. In relation to the first preliminary issue, the judge held that the claimant's injuries were not caused by and did not arise out of Mr Tindale's use of the vehicle on a road or other public place before he entered the field. His use of the road before

deliberately entering the field was: "no more than a merely fortuitous concomitant of the accident and in no way a contributing factor" ([41] of the judgment). The judge went on to conclude at [42] to [59] that section 145(3) could not be read down to comply with the jurisprudence of the CJEU[1] by excising the limitation to a "road or other public place" as this would go against the grain and thrust of the legislation, would raise policy ramifications which were not for the Court and would necessarily impose retrospective criminal liability under section 143. His approach was approved by the Supreme Court in *UK Insurance v Holden* [2019] UKSC 16; [2019] 2 WLR 1015: see per Lord Hodge JSC at [40]. There is no Respondents' Notice seeking to challenge the judge's conclusions on the first issue, so that it does not need to be considered further.

12. The judge considered the second and third issues together under the heading "Direct Effect". He noted at [60] that the principle had two central ingredients as summarised by the CJEU in *Farrell v Whitty (No. 1)* (Case C-356/05) [2007] 2 CMLR 1250 at [37]: "it has been consistently held that a provision in a directive has direct effect if it appears, as far as its subject matter is concerned, to be unconditional and sufficiently precise." As the judge said this reflected long-established authority, notably *Becker v Finanzamt Münster-Innenstadt* (Case 8/81) [1982] ECR 53 and *Comitato di Coordinamento v Regione Lombardia* (Case C-236/92) which he cited. He also noted at [64] that in the judicial review proceedings in *R (RoadPeace Ltd) v Secretary of State for Transport* [2017] EWHC 2725 (Admin); [2018] 1 WLR 1293 the Secretary of State and the MIB had accepted that Article 3 of the 2009 Directive had direct effect between the individual and the State or its emanation, whilst disputing that the MIB was an emanation of the State: see [94] of the judgment of Ouseley J. No such concession was made in these proceedings.

13. The judge went on to deal with the submissions of the parties before reaching his conclusion on direct effect at [95] to [101]. He found that Article 3 satisfies the conditions set out in *Becker* and subsequent CJEU jurisprudence that the obligation on the State is unconditional and sufficiently precise and that the concession in *RoadPeace* had been correctly made. As to precision, the CJEU had made it unequivocal that the obligation of compulsory insurance extended to the use of vehicles on private land. This was implicit in *Vnuk v Zavarovalnica Triglav dd* (Case C-162/13) [2016] RTR 10 and explicit in later authorities.

14. As to whether the obligation was unconditional, the judge rejected the submissions of Mr Hugh Mercer QC for the MIB as to the "measures" which the State could decide to take in implementing a compulsory insurance regime rendering Article 3 expressly conditional. He concluded that, unlike in *Comitato di Coordinamento*, the core obligation of the State under Article 3 was not conditional, it was not a mere objective or framework but a result to be achieved.

15. He then concluded that the existence of the further obligation under Article 10 to set up a body responsible for compensation did not in any way diminish the core obligation of the State under Article 3, citing [39] of the judgment of the CJEU in *Farrell v Whitty No. 2* (Case C-413/15) [2018] QB 1179 (a case concerned with the status and obligations of the Motor Insurers' Bureau of Ireland ("MIBI"), a materially

[1] Like the judge I will refer to the European Court of Justice and the Court of Justice of the European Union throughout my judgment as "the CJEU".

identical organisation to the MIB): "…the intervention of such a body is designed to remedy the failure of a Member State to fulfil its obligation to ensure that civil liability in respect to the use of motor vehicles normally based in its territory is covered by insurance…"

16. The judge went on to conclude that Article 3 had direct effect to the extent of at least the minimum requirement of €1 million per victim in Article 9 of the 2009 Directive. In relation to Mr Mercer QC's submission that there was a third necessary ingredient of direct effect, that the relevant Directive must define rights which individuals are able to assert against the State, the judge accepted that requirement but concluded that Article 3 clearly did define those rights for the reasons he had already given.

17. He went on to consider the issue of whether the MIB was an emanation of the State. He noted that, on existing domestic authority, the MIB was not an emanation of the State by reference to my judgment in *Byrne v MIB* [2007] EWHC 1268 (QB); [2009] QB 66, following what I regarded as the persuasive reasoning to that effect of Hobhouse LJ in *Mighell v Reading* [1999] Lloyd's Rep IR 30. In *Byrne* I determined that, under European law, an entity would only be an emanation of the State if it satisfied three conditions laid down by the CJEU in *Foster v British Gas plc* (Case C-188/89] [1991] 1 QB 405.

18. The judge referred to the debate thereafter once the CJEU in *Farrell v Whitty No 1* had referred that case back to the High Court of Ireland and Birmingham J found the MIBI was an emanation of the Irish State. As the judge said, that case went on appeal to the Supreme Court of Ireland which made a further reference to the CJEU. 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.

19. The further question in *Farrell v Whitty No 2* which was relevant for present purposes was, as the judge noted, whether the provisions of a Directive that are capable of having direct effect may be relied upon against the body upon which the Member State has conferred the task that is the subject of what is now Article 10 in the 2009 Directive. The judge then cited extensively from [35] to [42] of the CJEU judgment (to which I will return in more detail below) and set out the parties' rival submissions. Since those submissions essentially reflect those made to this Court, which I summarise below, I will not repeat them here.

20. The judge then set out his conclusion on emanation of the State at [126] to [133]. He concluded that the effect of the judgment of the CJEU in *Farrell v Whitty No 2* was to supersede my reasoning in *Byrne* and that of Hobhouse LJ in *Mighell*. The CJEU had decided that the *Foster* conditions were not conjunctive, so that, contrary to my conclusion at [57] of *Byrne*, it is not necessary to establish that the MIB is under the control of the State. It had also decided that private law bodies "such as the MIBI" may be an emanation of the State for the purpose of the obligations of the Motor Insurance Directives which have direct effect, and then held that the MIBI was an emanation of the State for the purposes of what is now Article 10, meeting the requirements of delegation and special powers.

21. The judge held that there were no material differences between the position of the MIBI and the MIB, so that there was good reason to reach the same conclusion. He rejected the distinction which Mr Mercer QC sought to draw between *Farrell v Whitty* and the present case as regards delegation of the task, that *Farrell v Whitty* involved a defective implementation of Article 3 whereas the present case involved no implementation at all. He concluded at [131] that in each case there had been an incomplete implementation of the obligation placed on Member states by Article 3 and, in each case, the effect of European law was to treat the designated compensation body under Article 10 as if the obligation imposed upon the State had been delegated to it in full.

22. As regards "special powers", whilst the application of the facts to the European law is for the domestic court, the concept is one of European law and the judge said there was no material distinction between the position of the MIBI and that of the MIB. The judge could see no basis to distinguish the position of Ms Farrell and that of the claimant and concluded that, in each case, the State's unimplemented obligation under the Directive must be met by its designated compensation body.

Consideration of *Farrell v Whitty*

23. Before considering the submissions of the parties, I propose to consider the judgments of the CJEU in *Farrell v Whitty* in more detail, since they are of critical importance to this appeal. Indeed, it was accepted by Mr Mercer QC that, if he could not distinguish that case as he seeks to do, the appeal must fail.

24. The underlying facts were as follows. Ms Farrell was the victim of a road traffic accident when she was a passenger in a van owned and driven by Mr Whitty. The van was not designed or constructed to carry passengers in the rear and she was seated on the floor, normally used to carry goods. He lost control of the vehicle, which hit a wall and she was injured. He was in fact uninsured and so she sought compensation from the MIBI under the terms of the 1988 agreement between the MIBI and the Minister for the Environment, under which the MIBI undertook to compensate victims of road accidents involving drivers who had not taken out the compulsory motor insurance required by the Road Traffic Act 1961. Under section 65(1) of that Act as amended, there was no compulsory insurance obligation in respect of civil liability to passengers travelling in a part of a vehicle, unless that part was designed and constructed with seating and accommodation for passengers. Accordingly, the MIBI refused to compensate her because the liability for the injuries she had suffered was not a liability in respect of which insurance was compulsory under the 1961 Act, so that the agreement with the Minister did not apply.

25. Ms Farrell commenced proceedings against Mr Whitty, the MIBI and the Minister. She obtained judgment in default against Mr Whitty. As between Ms Farrell and the MIBI/the Minister preliminary issues were agreed to be tried: (i) whether section 65(1) of the 1961 Act implemented the Motor Insurance Directives in a proper and permissible manner; (ii) if not, whether the relevant parts of the Directives were of direct effect so that Ms Farrell could rely upon them; (iii) if the answer to that question was yes, whether she could make recovery from the MIBI pursuant to the 1988 agreement.

26. The Irish High Court decided to stay the proceedings and refer two questions to the CJEU for a preliminary ruling:

> (1) Under Article 1 of [the Third] Directive ..., is Ireland obliged, as of 31 December 1995 - the date by which Ireland was obliged to implement the provisions of the Third Directive in respect of passengers on vehicles other than motorcycles - to render insurance compulsory in respect of civil liability for injury to individuals travelling in a part of a motor vehicle not designed and constructed with seating accommodation for passengers?
>
> (2) If the answer to Question 1 is in the positive, does Article 1 of the Third Directive confer rights on individuals that may be relied upon directly before the national courts?'

Article 1 of the Third Directive corresponds with Article 12.1 of the 2009 Directive.

27. Before the CJEU, Ireland and the MIBI argued that, as there was no definition of "passenger" in the Third Directive, it was for the Member States to define which persons travelling in vehicles are to be considered passengers for the purpose of the Directive and that the Directive did not require Member States to ensure that compulsory insurance was in place in respect of personal injuries suffered by persons travelling in any part of a vehicle which had not been designed with seating accommodation.

28. The First Chamber of the CJEU rejected those contentions, pointing out that what is now Article 12.1 of the 2009 Directive[2] provides for compulsory insurance to cover liability for personal injury to all passengers other than the driver. At [29] of its judgment ([2007] ECR I-3067), the Court held:

> "Given that, first, the right to derogate from the obligation to protect accident victims is defined and circumscribed by Community law and, secondly, the realisation of the objectives referred to above requires a uniform approach to the insurance cover in respect of passengers at Community level, the Member States are not entitled to introduce additional restrictions to the level of compulsory insurance cover to be accorded to passengers."

29. In relation to the question whether what is now Article 12.1 has direct effect, the CJEU referred to the test in *Becker*, that a provision has direct effect if it appears, so far as its subject-matter is concerned, to be unconditional and sufficiently precise. At [38] of its judgment, it held that the provision was unconditional and precise, enabling both the obligation of the Member State and the beneficiaries to be identified, so it could be relied upon to set aside the provisions of the national law that excluded from the benefit of the guarantee of compulsory insurance cover persons travelling in a part of the vehicle which had not been designed with seating accommodation for passengers.

[2] So far as possible I will refer to the equivalent provisions in the 2009 Directive to avoid confusion.

30. The CJEU considered that it was for the Irish High Court to determine whether that provision could be relied upon against a body such as the MIBI. When the matter was remitted to the High Court, Birmingham J concluded that the MIBI was an emanation of the State, taking a broader approach than I had in *Byrne*. On appeal from that decision, the Irish Supreme Court made a further reference to the CJEU.

31. The first question asked by the national court concerned whether the test in *Foster* on the question of what constitutes an emanation of the State, was to be read on the basis that the elements of the test are to be applied conjunctively or disjunctively. In her Opinion the Advocate-General, Eleanor Sharpston, was firmly of the view that the test was to be found in [18] of the judgment in *Foster*, not [20]. Having analysed the European jurisprudence, she said at [53]:

> "It follows that the answer to the first question is that the test in Foster as to what constitutes an emanation of the State for the purposes of vertical direct effect of directives is to be found in paragraph 18, not paragraph 20, of the judgment in that case. The test there formulated is to be read neither conjunctively nor disjunctively. Rather, it contains a non-exhaustive listing of the elements that may be relevant to such an assessment."

32. Her opinion was adopted by the Grand Chamber at [28] of its judgment. It concluded at [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."

33. The Court considered the second and third questions referred together, saying at [30] that the referring court was seeking in essence to ascertain whether there was a fundamental principle which should guide it when considering whether provisions of a Directive capable of having direct effect may be relied upon against an organisation on which a Member State has conferred the task that is the subject of what is now Article 10.1 of the 2009 Directive.

34. The Court noted that, under settled European case law, a Directive cannot be relied upon against an individual, but only against the State, including, following on from its answer to the first question, bodies which are subject to the authority or control of the State or which possess special powers beyond those resulting from normal rules applicable to individuals: [33]. At [34] the Court explained the rationale for this principle:

> "Such organisations or bodies can be distinguished from individuals and must be treated as comparable to the State, either because they are legal persons governed by public law that are part of the State in the broad sense, or because they are

> subject to the authority or control of a public body, or because they have been required, by such a body, to perform a task in the public interest and have been given, for that purpose, such special powers."

35. The decision and reasoning of the CJEU on this issue is of sufficient significance to the present appeal that it is necessary to cite [35] to [42] of the judgment in full:

> "35 Accordingly, a body or an organisation, even one governed by private law, to which a Member State has delegated the performance of a task in the public interest and which possesses for that purpose special powers beyond those which result from the normal rules applicable to relations between individuals is one against which the provisions of a directive that have direct effect may be relied upon.
>
> 36 In this case, it must be noted that, under Article 3(1) of the First Directive, the Member States were obliged to take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory was covered by insurance.
>
> 37 The importance attached by the EU legislature to the protection of victims led it to supplement those arrangements by requiring Member States, under Article 1(4) of the Second Directive, to establish a body with the task of providing compensation, at least up to the limits laid down by EU law, for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation under Article 1(1) of that directive, which refers to Article 3(1) of the First Directive, was not satisfied (*Csonka v Magyar Allam*, (Case C-409/11), [2014] 1 CMLR 14, paragraph 29).
>
> 38 Therefore, the task that a compensation body such as MIBI is required by a Member State to perform, a task that contributes to the general objective of victim protection pursued by the EU legislation relating to compulsory motor vehicle liability insurance, must be regarded as a task in the public interest that is inherent, in this case, in the obligation imposed on the Member States by Article 1(4) of the Second Directive.
>
> 39 In that regard, it must be borne in mind that, in case of damage to property or personal injuries caused by a motor vehicle for which the insurance obligation provided for in Article 3(1) of the First Directive has not been satisfied, the Court has held that the intervention of such a body is designed to remedy the failure of a Member State to fulfil its obligation to ensure that civil liability in respect to the use of motor

> vehicles normally based in its territory is covered by insurance (see, to that effect, *Csonka's* case paragraph 31).
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> 40 As regards the MIBI, it must be added that, under Section 78 of the 1961 Act, the Irish legislature made membership of that organisation compulsory for all insurers who carry on motor vehicle insurance in Ireland. In doing so, the Irish legislature conferred on the MIBI special powers beyond those which result from the normal rules applicable to relations between individuals, in that, on the basis of that statutory provision, that private organisation has the power to require all those insurers to become members of it and to contribute funds for the performance of the task conferred on it by the Irish State.
>
> 41 The provisions of a directive that are unconditional and sufficiently precise may consequently be relied upon against an organisation such as the MIBI.
>
> 42 In the light of the foregoing, the answer to the second and third questions is that provisions of a directive that are capable of having direct effect may be relied on against a private law body on which a Member State has conferred a task in the public interest, such as that inherent in the obligation imposed on the Member States by Article 1(4) of the Second Directive, and which, for that purpose, possesses, by statute, special powers, such as the power to oblige insurers carrying on motor vehicle insurance in the territory of the Member State concerned to be members of it and to fund it."

36. On the basis of this reasoning, there can be no principled distinction between the MIBI and the MIB in relation to the question whether the organisation is an emanation of the State. In particular, if the obligation in section 78 of the Irish 1961 Act making membership of the MIBI compulsory for all motor insurers constitutes the relevant "special powers", the provisions of the RTA (particularly sections 95 and 145) cited above, requiring all authorised insurers to be members of the MIB, must have the same effect and constitute "special powers", so that the MIB is an emanation of the State.

37. Indeed, it is not disputed by Mr Mercer QC that in relation to the tasks which have been delegated to it, the MIB is an emanation of the State. His case, to which I now turn, is that the task delegated to the MIB is the RTA liability, not the broader obligation on the State to comply with the 2009 Directive.

The parties' submissions

38. In relation to the question whether Article 3 of the 2009 Directive has direct effect, Mr Mercer QC does not challenge the judge's conclusion at [96] of his judgment that the Article 3 obligation is sufficiently precise, on the basis that the jurisprudence of the CJEU in *Vnuk* and the subsequent cases establishes clearly that the obligation

under the Article covers the use of vehicles on private land as well as on the road or in a public place.

39. However, he disputes that the obligation is unconditional. He submits that, because the Article expressly requires measures to be taken by the State, it is conditional. He sought to distinguish three situations: (i) where no appropriate measures have been taken by the State; (ii) where partially appropriate measures have been taken and (iii) where the State's discretion as to what measures to take has been fully exercised.

40. In relation to the first situation, Mr Mercer QC cited as an example the decision of the CJEU in *Francovich v Italian Republic* (Case C-6/90) [1991] ECR I-5357, a case concerned with Directive 80/987, which is intended to guarantee employees a minimum level of protection under European law in the event of insolvency of their employer. Article 11 required the Member States to bring into force laws, regulations and administrative provisions necessary to comply with the Directive by a certain date. Italy had completely failed to fulfil that obligation. However, the CJEU decided that the provisions of the Directive were not sufficiently precise and unconditional in relation to the identity of the person liable to provide the guarantee, because the Member State was given a complete discretion under the Directive as to the organisation, operation and financing of the guarantee institutions. The provisions of the Directive thus did not identify the person liable to provide the guarantee and the State could not be held liable directly under the guarantee merely because it had not exercised its discretion.

41. The second situation was illustrated by the decision of the CJEU in *Wagner Miret v Fondo de Garantia* (Case C-334/92) [1993] ECR I-6911, which concerned the same Directive 80/987. Spain had set up a guarantee fund before the Directive came into effect which protected certain categories of employee but not higher management staff, so the obligations under the Directive had been partially implemented. The CJEU held that higher management staff could not rely upon the Directive as having direct effect because the Directive left to the Member State whether to set up one or more guarantee institutions to protect different categories of employee (see [18] and [19] of the judgment). Mr Mercer QC submitted that there was an analogy with Article 10 of the 2009 Directive. So far as concerns motor liability insurance for accidents on private land, which were not covered by the compulsory insurance under the RTA and thus outside the MIB agreements, it would be open to the United Kingdom government to seek to comply with its obligations under Articles 3 and 10 of the Directive through some other body than the MIB or by some other means than the MIB agreements.

42. In relation to *Riksskatteverket v Gharehveran* (Case C-441/99) [2001] ECR I-7687, another case under the same Directive 80/987 upon which Mr Philip Moser QC for the claimant particularly relied, Mr Mercer QC submitted that it was distinguishable from *Francovich* and *Wagner Miret* as a case where, although the effect of the exclusion from protection under Swedish law of employees with shareholdings meant that the Directive had not been correctly implemented by Sweden, the relevant discretion had been fully exercised, as the Swedish State had designated itself as the person liable to meet claims for pay guaranteed by the Directive (see [39], [41] and [44] of the judgment).

43. Mr Mercer QC submitted that the obligation on the Member State under Article 3 of the 2009 Directive to take all appropriate measures was not to compensate victims of motor accidents but to provide a system of insurance, which involved a discretion as to how that was to be achieved. He submitted that driving vehicles off-road on private land was different from driving on the road or in a public place. It involved a different balance between the rights of the individual and the rights of the State, as compared with driving on the road. It could involve different types of vehicle: fork-lift trucks, tractors, ride-on lawnmowers, golf buggies and dodgems were examples Mr Mercer QC gave. It could involve a different class of conduct, for example in motor sport where there was a conscious decision to take risks.

44. He submitted that there was an issue as to the distribution of financial liability arising out of policy decisions, for example should the authorised motor insurers be entitled to increase premiums to cover off-road use or should there be a separate levy or fund. These were matters which needed to be considered by the Department of Transport. At the time of the implementation of Article 3 no-one had considered that the compulsory motor insurance extended to vehicles on private land. Mr Mercer QC referred to the decision of the House of Lords in *Clarke v General Accident* [1998] 1 WLR 1647 that a car park was not a "road" within section 145 of the RTA, which led to the subsequent amendment to extend the section to "or other public place" in order to comply with the Motor Insurance Directives.

45. Mr Mercer QC submitted that Article 3 gave the Member State a discretion to require third parties, here authorised motor insurers, to do something, namely provide compulsory motor insurance. However, in relation to private land, that obligation had not been implemented. Unless it was, the effect of making the MIB liable in a case such as the present would be that the MIB became a primary compensator, when the essence of the Article 10 scheme was the setting up of a body which was to have a residual function, which only arose if there was a compulsory insurance obligation. Mr Mercer QC sought to distinguish *Farrell v Whitty* on the basis that, in that case, Mr Whitty was required to have a contract of insurance covering his vehicle on the road where the accident occurred, but did not have a contract, whereas in the present case, Mr Tindale was not required to have a contract of insurance covering his vehicle when he was driving it on private land.

46. In relation to the question whether Article 10 had direct effect, Mr Mercer QC pointed out that the judge had not made a finding about this, because although Mr Moser QC had contended that Article 10 was of direct effect, it was not necessary for his argument (see [70] of the judgment). Mr Mercer QC submitted that Article 10 was co-extensive with Article 3, so that if his argument was correct that Article 3 was conditional on implementation by the Member State and so not of direct effect, the same would be the case in relation to Article 10.

47. Mr Mercer QC relied upon the judgment of the CJEU in *Csonka v Magyar Allam* (Case C-409/11) [2014] 1 CMLR 14. In that case, the applicants had effected compulsory motor insurance with an insurance company which had become insolvent in circumstances where the applicants were liable in respect of accidents which occurred before the date of insolvency. They sued the Hungarian State claiming it had incorrectly transposed the First Directive into Hungarian law. By not taking measures to ensure that they were paid compensation by a body responsible for providing

compensation when an insurer was insolvent, the State was in breach of its obligations under Article 3, thus incurring liability itself.

48. In relation to a series of questions posed by the national court, the CJEU held, unsurprisingly, that the State's Article 3 obligation did not extend to establishing a compensation body to provide compensation where the person responsible for the damage had taken out compulsory motor insurance, but the insurer had become insolvent.

49. At [29] of its judgment the CJEU noted that the obligation under what is now Article 10 was to establish a body with the task of providing compensation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation under the Directive has not been satisfied. At [30] the Court said that the payment of compensation by such a body was thus a measure of last resort. At [31]-[32] the Court continued:

> "31 As regards the determination of the actual circumstances in which the insurance obligation laid down in Article 3(1) of the First Directive may be regarded as not having been satisfied, it is significant – as the Advocate General stated in point 32 of his Opinion – that the European Union legislature did not confine itself to providing that the body must pay compensation in the event of damage caused by a vehicle for which the insurance obligation has not been satisfied in general, but made it clear that that was to be the case only in relation to damage caused by a vehicle for which the insurance obligation provided for in Article 3(1) of the First Directive has not been satisfied, that is to say, a vehicle in respect of which no insurance policy exists. Such a restriction is explained by the fact that Article 3(1) of the First Directive – as has been pointed out in paragraph 28 above – requires each Member State, subject to the derogations allowed under Article 4 of that directive, to ensure that every owner or keeper of a vehicle normally based in its territory takes out a policy with an insurance company for the purpose of covering, up to the limits established by European Union law, his civil liability arising as a result of that vehicle. Viewed in that light, the very fact that damage has been caused by an uninsured vehicle attests to a breakdown in the system which the Member State was required to establish and justifies the payment of compensation by a national body providing compensation.
>
> 32 It follows from the foregoing that, contrary to the line of argument put forward by the applicants in the main proceedings, the payment of compensation by such a national body, as provided for under the First and Second Directives, cannot be regarded as the implementation of a guarantee scheme in respect of insurance against civil liability relating to the use of motor vehicles; rather, it is intended to take effect only in specific, clearly identified, sets of circumstances."

50. Mr Mercer QC placed particular reliance on [31] as demonstrating that the compensation body provided for in Article 10 will only respond in circumstances where there has been a breakdown in the system established, not where there is no system at all. The present case fell into the latter category because there was no system of compulsory motor insurance for vehicles being driven on private land.

51. Reliance was also placed on *Fundo de Garantia Automovel v Juliana* (Case C-80/17) [2018] 1 WLR 5798, where Mrs Juliana had stopped driving due to a medical condition. She left her car immobilised in her yard and uninsured. Her son made the car work, drove it and lost control of the vehicle, killing himself and his two passengers. The national compensation body paid compensation which it sought to recover from Mrs Juliana, who argued that she had been under no obligation to insure the vehicle. The national court sought a preliminary ruling from the CJEU as to whether there was an obligation to insure in these circumstances.

52. The CJEU held that, as the vehicle was registered and capable of being driven, albeit immobilised on private land, it was a "vehicle" within Article 1 and did not cease to be subject to the insurance obligation under Article 3. The Court rejected the argument advanced by the UK Government, amongst others, that Article 3 could be given a narrow interpretation because the compensation body provided for in what is now Article 10 could pay compensation in such circumstances. The Court referred to *Csonka* in saying that the payment of compensation by such a body was designed to be a measure of last resort, not a guarantee scheme in respect of insurance. Mr Mercer QC relied upon [46] of the judgment which states:

> "As the Advocate General states in point 34 of his Opinion, the scope of obligatory intervention of the compensation body referred to in Article 1(4) of the Second Directive [i.e. Article 10 of the 2009 Directive] is therefore, as regards the damage or injuries caused by an identified vehicle, coextensive with the scope of the general insurance obligation laid down in Article 3(1) of the First Directive. The obligatory intervention of that body in such a situation cannot therefore extend to situations in which the vehicle involved in an accident was not covered by the insurance obligation."

He submitted that that paragraph not only demonstrated that Articles 3 and 10 of the 2009 Directive were co-extensive with each other, but that Article 10 did not extend to provide compensation in situations where the national legislation did not provide for compulsory motor insurance, such as in the present case.

53. He submitted that nothing in *Farrell v Whitty* was inconsistent with that approach. The first judgment in that case was concerned only with whether what is now Article 12.1 of the 2009 Directive was of direct effect. Just because Article 12.1 was of direct effect, it did not follow that Article 3 was of direct effect, where the relevant part of the obligation on the Member State, to ensure that compulsory insurance was in place for vehicles used on private land, had not been implemented. In relation to *Farrell v Whitty (No 2)*, Mr Mercer QC submitted that it was to be distinguished from the present case. In particular, it was a case where the Member state had implemented compulsory insurance. Mr Whitty was under an obligation to have such insurance to drive his van on the road, but did not have it. Since the Irish government had

delegated the Article 10 responsibility to the MIBI, it would have had to provide compensation, for example if he had hit a pedestrian. Furthermore, the case was one where the Article 10 obligation on the MIBI was being funded by the motor insurers who benefited from the general obligation to have compulsory insurance. That was not the case with use of vehicles on private land.

54. Mr Philip Moser QC on behalf of the claimant submitted that, as the MIB acknowledged, unless *Farrell v Whitty* could be distinguished, the appeal must fail. He submitted that that case could not be distinguished. In both cases, the circumstances fell outside the compulsory insurance scheme enacted by the national legislation, which was accordingly defective. The Irish 1961 Act did not impose any obligation to insure in respect of passengers in unseated parts of a vehicle. Likewise, the RTA did not impose any obligation to insure in respect of the use of vehicles on private land. In both cases, the Motor Insurance Directives required a compulsory insurance scheme to be in place in those circumstances.

55. Whilst *Farrell v Whitty (No 1)* was concerned with the direct effect of what is now Article 12, that provision expressly referred to Article 3, so that it was implicit in the decision that Article 3 also had direct effect and, since Article 3 and Article 10 were co-extensive, Article 10 likewise had direct effect. In relation to the argument of Mr Mercer QC that Article 3 remained conditional because the UK government retained a discretion as to whether to set up a separate body to compensate victims of accidents caused by uninsured vehicles on private land and his reliance in that context on *Francovich* and *Wagner Miret*, Mr Moser QC pointed out that the same argument had been advanced by the MIB in *Byrne* and rejected by me at [54]-[56] of my judgment in that case. In particular, at [56] I had accepted the argument for the claimant that the relevant discretion under what is now Article 10 had been fully used by the designation of the MIB as the compensation body.

56. Mr Moser QC emphasised that, whereas the Directive under consideration in *Francovich* and *Wagner Miret* expressly contemplated, by using the plural "guarantee institutions", that the Member State might delegate the relevant obligations to one or more guarantee funds, thus retaining a discretion as to which fund to delegate responsibility in respect of parts of the Directive which had not been implemented, Article 10 of the 2009 Directive referred to a "body" in the singular. Accordingly, having delegated the Article 10 obligation to the pre-existing MIB, the UK government had fully used the relevant discretion.

57. From the perspective of European law, the delegation to the MIB was of the entirety of the obligation on the Member State under Article 10. Mr Moser QC relied upon what Advocate General Sharpston had said at [126] of her Opinion in *Farrell v Whitty (No 2)*:

> "Here, the directly effective right that Ms Farrell seeks to assert (compensation for injuries received as a passenger travelling in a motor vehicle) under Article 1 of the Third Motor Insurance Directive is precisely the type of right for which Ireland had already conferred residual liability, where the driver is unidentified or uninsured, upon the MIBI."

58. By parity of reasoning, the directly effective right asserted by the claimant was precisely the type of right for which the United Kingdom had already conferred residual liability, where the driver was uninsured as in the present case, upon the MIB. There was no question of the Article 3 and 10 obligations being conditional as the MIB suggested and accordingly they had direct effect.

59. In relation to Mr Mercer QC's point about off-road vehicles encompassing many different types of vehicle, such as ride-on lawnmowers or dodgems, Mr Moser QC emphasised that he was only advocating that the Directive had direct effect on the facts of this case not some other hypothetical case. Here Mr Tindale had been driving the car on the road uninsured immediately prior to driving it onto the private land. It was completely artificial to suggest that the United Kingdom government would delegate the Article 10 liability in respect of a pedestrian knocked down in the field to a different compensation body than that which would have assumed the liability if Mr Tindale had swerved off the road and knocked down a pedestrian, namely the MIB.

60. Mr Moser QC submitted that the reasoning of the Grand Chamber in *Farrell v Whitty (No 2)* at [35]-[42] which I quoted at [35] above was equally applicable to the MIB. [39] in particular was the clearest possible statement as to the scope of responsibility of the MIBI and thus of the MIB. The true import of the co-extensive nature of the obligations under Articles 3 and 10 and the true nature of the task for which the compensation body was responsible emerged from that paragraph.

61. He also relied upon subsequent judgments of the CJEU which demonstrated the scope and width of the Article 3 obligation. In *Nunez Torreiro v AIG Europe Ltd* [2017] EUECJ C-334/16 at [24] the CJEU held that the "very concept" of Article 3 of the 2009 Directive could not be left to the discretion of the Member State "but constitutes an autonomous concept of EU law, which must, in accordance with the Court's settled case-law, be interpreted in the light, in particular, of the context of that provision and the objectives pursued by the rules of which it is part". At [25] the Court went on to emphasise that the Motor Insurance directives had the objective of guaranteeing that the victims of accidents caused by motor vehicles received comparable treatment irrespective of where in the European Union the accident occurred.

62. Mr Moser QC also relied upon [46] of the judgment in *Juliana* to which I have already referred as demonstrating the co-extensive nature of the obligations under Article 3 and Article 10. He submitted that in every case the obligation on the Member State to set up a compulsory insurance regime and the obligation to set up a compensation system are co-extensive.

Analysis and conclusions

63. The UK government has failed to fulfil its obligation under Article 3 of the 2009 Directive to ensure that civil liability in respect of the use of motor vehicles on private land is the subject of a scheme of compulsory motor insurance. That the government is under that obligation in respect of the use of vehicles on private land cannot be doubted in view of the judgment of the CJEU in *Vnuk* and the subsequent CJEU judgments in *Andrade v Proença Salvador* (Case C-514/16) [2018] 4 WLR 75 at [36] and *Nunez Torreiro* at [28] and [30]. The government has also failed to comply with its co-extensive obligation under Article 10 to assign responsibility for meeting that

liability to the compensation body contemplated by that Article, just as the Irish government had failed in *Farrell v Whitty*.

64. Contrary to the arguments advanced by Mr Mercer QC, I do not consider that the UK government has retained a discretion to delegate to some other compensation body than the MIB the residual liability to compensate those injured by uninsured vehicles on private land. The argument that the government retained such a discretion where it had failed to transpose all its EU law obligations under the Directive correctly into national law was run in *Byrne* by reference to *Francovich* and *Wagner Miret* and rejected by me at [56] of my judgment. I concluded that the relevant discretion had been fully used in circumstances where the UK had chosen to designate the MIB as the body through which it sought to implement the Motor Insurance Directives. That conclusion was not challenged on appeal. I see no reason to reach a different conclusion in the present case.

65. I also consider that there is force in Mr Moser QC's submission that, unlike the Directive being considered in *Francovich* and *Wagner Miret*, Article 10 of the 2009 Directive expressly contemplates the Member State setting up a compensation "body" in the singular, not a whole series of bodies. In any event, it seems to me that the reasoning of the CJEU in *Gharehveran* at [39] to [44] is applicable here. In that case, by designating itself as the guarantee institution, the Member State made full use of the relevant discretion. By parity of reasoning, the UK government has made full use of any discretion by delegating the Article 10 task to the MIB. I am strengthened in that conclusion by the analysis of the Advocate General in *Farrell v Whitty (No 2)* particularly at [126] and by the judgment of the CJEU in *Nunez Torreiro*, which recognises that compliance with Article 3 is not a matter for the discretion of the Member State.

66. Accordingly, in my judgment and contrary to the arguments advanced on behalf of the MIB, Article 3 of the 2009 Directive is unconditional and precise, so that it is capable of having direct effect. Since it is common ground that Article 3 and Article 10 are co-extensive, it must follow that Article 10 is also capable of having direct effect. I also agree with Mr Moser QC that, although the conclusion of the CJEU in [41]-[42] of *Farrell v Whitty (No 2)* is expressed in a somewhat abstract way, the Court was saying that these Articles were sufficiently unconditional and precise to be of direct effect.

67. It is accepted by the MIB that in relation to the task delegated to it under Article 10 it is to be regarded as an emanation of the State, as I have already recorded at [37] above. Its contention that the task delegated to it is limited to the RTA liability stands or falls with the attempt by Mr Mercer QC to distinguish the analysis and reasoning of the CJEU in relation to the MIBI in *Farrell v Whitty (No 2)*. I consider that that analysis and reasoning is indistinguishable.

68. The distinction which Mr Mercer QC sought to draw between cases where there had been a breakdown of the system and cases, such as he categorised the present case, where there was no system at all, is a wholly artificial one which will not bear scrutiny. In both cases, in the words of the CJEU in [39] of *Farrell v Whitty (No 2)*, the Member State has failed "to fulfil its obligation to ensure that civil liability in respect to the use of motor vehicles…is covered by insurance". Mr Mercer QC sought to argue that because the CJEU then cited [31] of *Csonka*, this analysis was intended

to be confined to cases where a system had been put in place but it had broken down. I reject that argument. [39] of *Farrell v Whitty (No 2)* is in broad general terms, not limited to cases where the failure of the Member State is partial as opposed to total. Furthermore, the fact that the UK government has failed to legislate for compulsory insurance in respect of the use of motor vehicles on private land and then specifically to delegate to the MIB the residual liability where the relevant vehicle is uninsured, can legitimately be described as a breakdown in the system put in place by the government.

69. Both in *Farrell v Whitty (No 2)* and the present case, the effect of the failure is the same: a gap in the insurance cover compulsorily required by the domestic legislation and a corresponding gap in the protection of the victims of motor accidents, which, as is clear from all the CJEU jurisprudence, is the very mischief that the Motor Insurance Directives are designed to avoid. The suggested distinction between the use of a motor vehicle on a road or other public place and the use of a motor vehicle on private land is, at least on the facts of the present case, a wholly artificial one, given that immediately before he drove his car onto the private land, Mr Tindale was driving it uninsured on the public road. The distinction is also inimical to the CJEU jurisprudence, which in my judgment does not support any part of Mr Mercer QC's argument.

70. On a proper analysis, *Csonka* cannot be regarded as a case where the Member State had failed to implement its obligations under Articles 3 and 10 of the Directive. There was simply no obligation on the State under the Motor Insurance Directives to implement a compensation scheme in respect of insurance cover formerly provided by insurers who had become insolvent. This interpretation of *Csonka* is borne out by the judgment of Richards LJ in *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172; [2015] 1 WLR 5177 at [33]. Nothing in the CJEU judgment has any impact on the issues for determination in the present appeal.

71. Contrary to the submissions of Mr Mercer QC, the reference in the last sentence of [46] of the judgment of the CJEU in *Juliana* to "the insurance obligation" is not to the relevant national legislation but to the obligation on the Member State under Article 3 of the Directive, as is clear from the preceding sentence and from the next paragraph of the judgment, [47], which provides:

> "Moreover, the interpretation set out in paragraphs 38 to 42 of the present judgment makes it possible to ensure the attainment of the objective of protecting the victims of accidents caused by motor vehicles, laid down by the directives concerning insurance against civil liability in respect of the use of vehicles, which has consistently been pursued and reinforced by the EU legislature (*Rodrigues de Andrade*, (Case C-514/16), [2018] 4 WLR 75, paragraphs 32 and 33 and the case-law cited). That interpretation guarantees that those victims are, in any case, compensated, either by the insurer, under a contract entered into for that purpose, or by the body referred to in Article 1(4) of the Second Directive, in the event that the obligation to insure the vehicle involved in the accident has not been satisfied or where that vehicle has not been identified."

72. Thus, contrary to Mr Mercer QC's submissions, *Juliana* is not authority for the proposition that Article 10 does not extend to provide compensation in situations where the national legislation did not provide for compulsory motor insurance. On the contrary, the judgment of the CJEU recognises and applies the broader objective of the Motor Insurance Directives of protecting the victims of motor accidents, by requiring Member states to ensure that motor insurance is compulsory, so that the victims are compensated by the insurer or, in cases where the obligation to insure the vehicle has not been satisfied, by the compensation body to which that task has been delegated under Article 10. In my judgment, the last sentence of [46] is sufficiently widely phrased to encompass both the case where the State has not fully implemented its insurance obligation under Article 3 of the 2009 Directive (as in the present case) and the case where, although the State has implemented the obligation, the driver or owner of the vehicle has not taken out the compulsory insurance required.

73. However, even if I were wrong about that, it is quite clear from the broad terms of [39] of the judgment of the CJEU in *Farrell v Whitty (No 2)* that the compensation body is intended to protect and compensate victims by remedying the failure of the Member State to fulfil its obligation under Article 3 to ensure that civil liability in respect of the use of motor vehicles is covered by insurance. As the CJEU jurisprudence makes clear, that obligation includes the use of vehicles on private land.

74. Accordingly in my judgment, the MIB, albeit a private law body, has had conferred on it by the UK government the task under Article 10, which as [39] of *Farrell v Whitty (No 2)* makes clear, includes remedying the failure of the government to institute in full a compulsory insurance regime, in the present case in respect of the use of vehicles on private land. As the CJEU held in [42] of *Farrell v Whitty (No 2)*, it is inherent in that task that it is in the public interest. Like the MIBI, the MIB possesses special powers by virtue of the provisions of the RTA which oblige all authorised motor insurers to be members of the MIB and to contribute to its funding. The short answer to Mr Mercer QC's point that the MIB levy does not oblige insurers providing off-road cover to contribute to the levy is that any issue can be addressed by amendment to the RTA and/or the MIB Articles of Association, but, in any event, that point does not provide an arguable point of distinction between the present case and *Farrell v Whitty (No 2)*.

75. Accordingly, like the MIBI, the MIB is an emanation of the State against which Article 10 of the 2009 Directive can be enforced by the claimant, as it has direct effect. In my judgment, this does not have the effect of making the MIB a primary compensator as Mr Mercer QC contended. The MIB may well have rights of contribution over against the Department of Transport. Indeed, we were informed by Mr Moser QC that the MIB has issued a Contribution Notice against the Department in the present proceedings. In any event, on the basis that the MIB is an emanation of the State, it is no answer to its liability to compensate the claimant that this liability has only arisen through the fault of the UK government: see [62]-[63] of *Konle v Austrian Republic* (Case C-302/97) [1999] ECR I-3099.

76. During the course of argument the question arose as to the source of the obligation which therefore rests on the MIB. In my judgment, Mr Moser QC was correct that the answer is the 2009 Directive as applied against the MIB as an emanation of the State and it is no answer to say that the source of the obligation cannot be found in national

law. That simply replicates the fallacious argument of the MIB that its obligation to compensate is limited by the RTA liability.

77. It follows that the judge's conclusions on direct effect and emanation of the State were correct and that the appeal of the MIB must be dismissed.

Sir Stephen Richards

78. I agree.

Lord Justice Henderson

79. I also agree.