Neutral Citation Number: [2015] EWCA Civ 172

Case No: B3/2014/2031

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Jay
[2014] EWHC 1785 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/03/2015

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE KITCHIN
and
LORD JUSTICE SALES

- -

Between :

Sean Robert Delaney	**Respondent**
- and -	
Secretary of State for Transport	**Appellant**

- -
- -

Brian Kennelly (instructed by **The Treasury Solicitor**) for the **Appellant**
Philip Moser QC and **Eric Metcalfe** (instructed by **Bakers Personal Injury Solicitors**) for the **Respondent**

Hearing date : 11 February 2015

- -

Approved Judgment

Lord Justice Richards :

Introduction

1. Motor insurance is the subject of European Union directives aimed at partial harmonisation of national laws. One of the obligations imposed on Member States is to set up or authorise a body with the task of providing compensation to the victims of unidentified or uninsured drivers. The relevant body in the United Kingdom is the Motor Insurers' Bureau ("the MIB"). Its obligations are governed by an agreement made in 1999 between the Secretary of State and the MIB ("the Uninsured Drivers' Agreement"). By clause 6.1(e) of that agreement, the MIB's obligation to meet a claim against an uninsured driver is subject to an exception in respect of:

> "a claimant who, at the time of the use giving rise to the relevant liability was voluntarily allowing himself to be carried in the vehicle and, either before the commencement of his journey in the vehicle or after such commencement if he could reasonably be expected to have alighted from it, knew or ought to have known that –
>
> …
>
> (iii) the vehicle was being used in the course or furtherance of a crime."

2. That clause was relied on to exclude liability to Mr Delaney, the respondent to the present appeal, in earlier proceedings which culminated in the judgment of this court in *Delaney v Pickett* [2011] EWCA Civ 1532, [2012] 1 WLR 2149. The circumstances are described fully in that judgment. In summary, on 25 November 2006 Mr Delaney was the passenger in a car driven by Mr Pickett and was seriously injured in an accident caused by Mr Pickett's negligence. A substantial quantity of cannabis was found in the car at the time of the accident. Mr Pickett had a policy of insurance with Tradewise Insurance Services Limited ("Tradewise") but Tradewise obtained an order of the court that it was entitled to avoid the policy pursuant to section 152(2) of the Road Traffic Act 1952 on the ground of non-disclosure of material facts, namely that Mr Pickett suffered from diabetes and depression and was a habitual user of cannabis. The situation therefore fell within the scope of the MIB Agreement. For reasons it is unnecessary to go into, Tradewise stood in the shoes of the MIB in defending the claim brought by Mr Delaney. It successfully invoked clause 6.1(e)(iii) against him on the ground that he knew or ought to have known that the car was being used in the course or furtherance of crime, namely to transport cannabis for the purpose of drug-dealing. The claim therefore failed.

3. The judgment in *Delaney v Pickett* noted that no reliance had been placed on the EU directives in those proceedings. A belated attempt was made by Mr Delaney to rely on them in an application for permission to appeal to the Supreme Court but permission was refused.

4. Mr Delaney subsequently brought a claim against the Secretary of State for Transport, contending that (1) the exclusion in clause 6.1(e)(iii) was incompatible with the EU directives, and the United Kingdom was thereby in breach of EU law, and (2) the

breach was sufficiently serious to give rise to liability to damages on the principles in Case C-6/90, *Francovich v Italy* [1991] ECR I-537, as developed in the case-law considered later in this judgment.

5. On the trial of preliminary issues, Jay J found in Mr Delaney's favour on both aspects of the claim. The judge himself gave permission to appeal to this court.

The EU directives on motor insurance

6. The relevant EU legislation concerning motor insurance has now been consolidated into Directive 2009/103/EC but because of the date of Mr Delaney's accident this appeal is concerned with three predecessor directives:

   i) Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability ("the First Directive");

   ii) Directive 84/5/EEC of 30 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 ("the Second Directive"); and

   iii) Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles ("the Third Directive").

7. The *First Directive* established the basic obligation of Member States to ensure the existence of insurance cover. Article 3(1) provided:

> "Each Member State shall … 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 these measures."

8. The *Second Directive* extended that obligation in various ways, for reasons explained in the recitals. Having referred to Article 3(1) of the First Directive, the recitals continued:

> "Whereas, however, major disparities continue to exist between the laws of the different Member States concerning the extent of this obligation of insurance cover; whereas these disparities have a direct effect upon the establishment and operation of the common market;
>
> Whereas, in particular, the extension of the obligation of insurance cover to include liability incurred in respect of damage to property is justified;
>
> …

> Whereas it is necessary to make provision for a body to guarantee that the victim will not remain without compensation where the vehicle which caused the accident is uninsured or unidentified; whereas it is important … to provide that the victim of such an accident should be able to apply directly to that body as a first point of contact; *whereas, however, Member States should be given the possibility of applying certain limited exclusions as regards the payment of compensation by that body* and of providing that compensation for damage to property caused by an unidentified vehicle may be limited or excluded in the view of the danger of fraud;
>
> Whereas it is in the interest of victims that the effects of certain exclusion clauses shall be limited to the relationship between the insurer and the person responsible for the accident; whereas, however, in the case of vehicles stolen or obtained by violence, Member States may specify that compensation will be payable by the aforementioned body;
>
> Whereas in order to alleviate the financial burden on that body, Member States may make provision for the application of certain excesses where the body provides compensation for damage to property caused by uninsured vehicles or, where appropriate, vehicles stolen or obtained by violence ….” (emphasis added).

9. In line with those recitals, Article 1(1) of the Second Directive provided that the basic obligation in Article 3(1) of the First Directive was to apply in respect of property damage as well as personal injuries, whilst Article 1(4) of the Second Directive imposed an obligation on Member States to set up or authorise a body with the task of providing compensation to the victims of unidentified or uninsured drivers:

> “*Article 1*
>
> 1. The insurance referred to in Article 3(1) of [the First Directive] shall cover compulsorily both damage to property and personal injuries.
>
> …
>
> 4. Each Member State shall set up or authorize 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 paragraph 1 has not been satisfied. …
>
> The victim may in any case apply directly to the body which, on the basis of information provided at its request by the victim, shall be obliged to give him a reasoned reply regarding the payment of any compensation.

> However, Member States may exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured.
>
> Member States may limit or exclude the payment of compensation by that body in the event of damage to property by an unidentified vehicle.
>
> They may also authorize, in the case of damage to property caused by an insured vehicle an excess of not more than 500 ECU for which the victim may be responsible.
>
> Furthermore, each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by this body, without prejudice to any other practice which is more favourable to the victim."

10. Article 1(4) is the central provision in the present case. The first main issue is whether the exclusion in clause 6.1(e)(iii) of the Uninsured Drivers' Agreement is compatible with it.

11. Article 2(1) of the Second Directive is also relevant. It limited the circumstances in which insurance cover could be excluded:

> "Each Member State shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3(1) of [the First Directive], which excludes from insurance the use or driving of vehicles by:
>
> - persons who do not have express or implied authorisation thereto, or
>
> - persons who do not hold a licence permitting them to drive the vehicle concerned, or
>
> - persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned,
>
> shall, for the purposes of Article 3(1) of [the First Directive], be deemed to be void in respect of claims by third parties who have been victims of an accident.
>
> However the provision or clause referred to in the first indent may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen."

12. Article 5 of the Second Directive required Member States to amend their national provisions to comply with the directive not later than 31 December 1987 and required the amended provisions to be applied not later than 31 December 1988. It is pertinent to note that a previous version of the Uninsured Drivers' Agreement, entered into on 21 December 1988, just before the final date for implementation of the directive, did not contain clause 6.1(e)(iii) or its equivalent: the clause was first introduced into the agreement in 1999.

13. The *Third Directive* plugged gaps in the protection of passengers. Article 1(1) read:

> "Without prejudice to the second subparagraph of Article 2(1) of [the Second Directive], the insurance referred to in Article 3(1) of [the First Directive] shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle."

The case-law on the directives

14. In Case C-129/94, *Ruiz Bernaldez* [1996] ECR I-1847 the principal question was in substance whether it was compatible with the directives for an insurance contract to exclude liability to pay compensation for property damage caused by an intoxicated driver. The Court of Justice answered that question emphatically in the negative. It stated:

> "13. The preambles to the directives show that their aim is firstly to ensure the free movement of vehicles normally based on Community territory and of persons travelling in those vehicles, and secondly of guaranteeing that the victims of accidents caused by those vehicles receive comparable treatment irrespective of where in the Community the accident has occurred.
>
> 14. For that purpose the First Directive … established a system based on the presumption that vehicles normally based on Community territory are covered by insurance. Article 3(1|) of the First Directive thus provides ….
>
> 15. The original version of that article left it to the Member States, however, to determine the damage covered and the terms and conditions of compulsory insurance.
>
> 16. In order to reduce the disparities which continued to exist between the laws of the Member States with respect to the extent of the obligation of insurance cover … Article 1 of the Second Directive required compulsory cover, as regards civil liability, for both damage to property and personal injuries, up to specified sums. Article 1 of the Third Directive extended that obligation to cover for personal injuries to passengers other than the driver.

> 17. Article 1(4) of the Second Directive also improved the protection of victims by requiring the Member States to set up or authorise bodies responsible for providing compensation for damage to property or personal injuries caused by unidentified or uninsured vehicles.
>
> 18. In view of the aim of ensuring protection, stated repeatedly in the directives, Article 3(1) of the First Directive, as developed and supplemented by the Second and Third Directives, must be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and injuries sustained by them, up to the amounts fixed in Article 1(2) of the Second Directive.
>
> 19. Any other interpretation would have the effect of allowing Member States to limit payment of compensation to third-party victims of a road-traffic accident to certain types of damage, thus bringing about disparities in the treatment of victims depending on where the accident occurred, which is precisely what the directives are intended to avoid. Article 3(1) of the First Directive would then be deprived of its effectiveness.
>
> 20. That being so, Article 3(1) of the First Directive precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle."

15. Thus, the Court adopted a restrictive approach towards exclusions from liability, having regard *inter alia* to the aims of ensuring the protection of victims and avoiding disparities in their treatment. It is true that the Court's focus was on the primary obligation in Article 3(1) of the First Directive concerning the provision of insurance cover, not on the obligation in Article 1(4) of the Second Directive to set up or authorise a national body with the task of providing compensation for damage or injury caused by unidentified or uninsured vehicles: the Court's conclusion on Article 3(1) made it unnecessary for it to consider a further question on Article 1(4). The improved protection conferred by Article 1(4) did, however, form part of the Court's reasoning; and, as explained below, the Advocate General did address the further question on Article 1(4).

16. In his opinion, Advocate General Lenz said that the protection of victims was already of fundamental importance under the First Directive and that in any case the purpose of the later directives was to remedy certain inadequacies in the system. He continued:

> "24. Consequently, the directives create the legal framework for ensuring that persons injured by a motor vehicle, wherever registered in the Community, can be certain of compensation. The guarantee of compensation for damage caused by vehicles normally based in another Member State, which the national insurers' bureau of the host country must assume, and the

> creation of a body which must provide compensation for damage to property or personal injuries caused by an unidentified or uninsured vehicle [footnote reference to Article 1(4) of the Second Directive] are both part of that context."

17. He went on to give separate consideration to each of the specific questions asked by the national court, the first four of which had been addressed together by the Court. His proposed answer to the third question was that "[e]xclusions from liability that are basically possible and permissible but go beyond the exclusions from insurance cover referred to in Article 2(1) of [the Second Directive] may not be relied upon as against the victim" (paragraph 40). This fed in to his proposed answer to the fourth question, which was that "[i]f a contractual clause excluding cover where the driver responsible for the damage is intoxicated … may be relied upon as against a third party who has suffered harm, this is incompatible with the principles of [the First, Second and Third Directives]" (paragraph 42).

18. It can be seen that the Advocate General's reasoning was reflected in the judgment of the Court on the questions the Court answered. Unlike the Court, however, the Advocate General went on to consider the fifth question referred by the national court, which was whether the body provided for by Article 1(4) was liable to pay compensation if, on account of the driver's intoxication, an exclusion of insurance cover was valid as against the person suffering harm. He observed that the question was predicated on a hypothesis which in his view could not arise, but on that hypothesis he considered that the body would be so liable. His analysis included the following:

> "45. It should, first, be emphasised again that the premise on which the question is based is a most unlikely one. Under the system established by the directive, a defence as against the person who has suffered harm appears to be conceivable only if it can be proved that he was himself guilty of misconduct. That tends to be indicated, for example, by the second subparagraph of Article 2(1) of [the Second Directive], which states:
>
> > 'However, the provision or clause referred to in the first indent may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury when the insurer can prove that they knew the vehicle was stolen.'
>
> 46. Apart from those highly exceptional cases of the victim's own blameworthy conduct, it must be assumed that there is a need to ensure that there are no gaps in the duty to compensate the victim. That principle can be seen to be the guiding principle of the directives. To that effect, the national guarantee body must be regarded as covering accident victims who would otherwise be unprotected. The reason for requiring such a body to be established is the concern to protect victims.
>
> …

> 51. … *Only* if, for whatever reason, [the victim] has no claim for compensation against the insurer, would the 'body' have to pay compensation in the interest of the extensive protection of victims. Furthermore, the Member States are free to extend the competence of the body by statute, provided complete protection is ensured for victims."

19. Case C-537/03, *Candolin v Vahinkovakuutusosakeyhtio Pohjola* [2005] 3 CMLR 17 ("*Candolin*") related to the payment of compensation for injury suffered in a road traffic accident in circumstances where the negligent driver was drunk and the victims, his passengers, were also drunk and must have known of his condition. The judgment of the Court of Justice summarised the relevant question as being "whether the second subparagraph of Art.2(1) of the Second Directive and Art.1 of the Third Directive preclude a national law according to which compensation paid under compulsory motor vehicle insurance may be refused or limited on the basis of the passenger's contribution to the injury he has suffered …" (paragraph 16). Referring back to its judgment in *Ruiz Bernaldez*, the Court stated:

> "18. In view of the aim of protecting victims, the Court has held that Art.3(1) of the First Directive precludes an insurer from relying on statutory provisions or contractual clauses in order to refuse to compensate third-party victims of an accident caused by the insured vehicle.
>
> 19. The court has also held that the first subparagraph of Art.2(1) of the Second Directive simply repeats that obligation with respect to provisions or clauses in a policy excluding from insurance the use or driving of vehicles in particular cases ….
>
> 20. By way of derogation from that obligation, the second subparagraph of Art.2(1) provides that certain persons may be excluded from compensation by the insurer, having regard to the situation they have themselves brought about (persons entering a vehicle which they know to have been stolen).
>
> 21. However, as it is a provision which establishes a derogation from a general rule, the second subparagraph of Art.2(1) of the Second Directive must be interpreted strictly.
>
> 22. As the Advocate General rightly stated, at point 42 of his Opinion, any other interpretation would allow Member States to limit payment of compensation to third-party victims of road accident to certain circumstances, which is precisely what the directives are intended to avoid.
>
> 23. It follows that the second subparagraph of Art.2(1) of the Second Directive must be interpreted as meaning that a statutory provision or a contractual clause in an insurance policy which excludes the use or driving of vehicles from the insurance may be relied on against third parties who are victims of a road accident only where the insurer can prove that the

> persons who voluntarily entered the vehicle which caused the injury knew that it was stolen."

20. The Court went on to consider the power of Member States to limit the right to compensation on account of the fact that the victim contributed to the injury, noting that as Community law stood at present the Member States were free to determine the rules of civil liability applicable to road accidents. However:

> "27. The Member States must exercise their powers in compliance with Community law and, in particular, with Art.3(1) of the First Directive, Art.2(1) of the Second Directive and Art.1 of the Third Directive, whose aim is to ensure that compulsory motor vehicle insurance allows all passengers who are victims of an accident caused by a motor vehicle to be compensated for the injury or loss they have suffered."

21. The opinion of Advocate General Geelhoed was in relevant part to the same effect. Paragraph 42 of the opinion, to which the Court's judgment expressly referred, stated in relation to the second subparagraph of Article 2(1) of the Second Directive (allowing an exception in the case of persons who voluntarily entered the vehicle knowing that it was stolen):

> "42. … This exception must be interpreted narrowly and as being exhaustive since it forms a departure from the general rule. Any other interpretation would have the effect of allowing Member States to limit payment of compensation to third-party victims of a road accident to certain types of damage, thus bringing about the disparities in the treatment of victims depending on where the accident occurred, which is precisely what the directives are intended to avoid."

22. In Case C-356/05, *Farrell v Whitty* [2007] CMLR 46 ("*Farrell*") the Irish equivalent of the MIB had refused to compensate a victim on the ground that she was travelling in a part of the vehicle that was not designed and constructed with seating accommodation for passengers. The Court of Justice held that this was incompatible with Article 1 of the Third Directive. The Court's reasoning included the following:

> "27. In addition, Community legislation expressly lays down exceptions to the obligation to protect victims of accidents. Those exceptions are referred to in the third sub-paragraph of Art.1(4) and in Art. 2(1) of the Second Directive.
>
> 28. However, the Community legislature did not provide any derogation with respect to a separate category of persons who may be victims of a road traffic accident, namely those who were on board a part of the vehicle which is not designed for their carriage and equipped for that purpose. That being so, those persons cannot be excluded from the concept of 'passenger' and, accordingly, from the insurance cover which the Community legislation guarantees.

> 29. 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."

23. In Case C-409/11, *Csonka v Magyar Allam* [2014] 1 CMLR 14 ("*Csonka*"), the Court of Justice was considering a situation in which the applicants had been covered by insurance policies for damage caused by their vehicles but had been unable to recover compensation under the policies because the insurer had become insolvent. The relevant question was whether Article 3(1) of the First Directive, read with Article 1(4) of the Second Directive, required the establishment of a national body to ensure that such compensation was provided. The Court answered that question in the negative. Having referred to the arrangements required by Article 3(1) of the First Directive, the Court continued:

> "29. The importance attached by the EU legislature to the protection of victims moved it to supplement those arrangements by requiring Member States, under art.1(4) of the Second Directive, to establish a body with the task of providing compensation, at least up to the limits laid down by EU law, for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation under art.1(1) of the Second Directive, which refers to art.3(1) of the First Directive, has not been satisfied. In order to alleviate the financial burden to be borne by that body, Member States were free to exclude the payment of compensation by it in certain cases or to provide for excesses.
>
> 30. The payment of compensation by such a body was therefore considered to be a measure of last resort, envisaged only for cases in which the vehicle that caused the injury or damage is uninsured or unidentified or has not satisfied the insurance requirements referred to in art.3(1) of the First Directive ….
>
> 33. As regards the determination of the actual circumstances in which the insurance obligation laid down in art.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 EU 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 had 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 art.3(1) of the First Directive has not been satisfied, that is to say, a vehicle in respect of which no insurance policy exists ….

> 34. It follows from the foregoing that … 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."

24. That reasoning reflected the opinion of Advocate General Mengozzi, to which the Court referred in the judgment. For example, the Advocate General said this in relation to the body provided for by Article 1(4) of the Second Directive:

> "28. … The payment of compensation by that body was not intended to be automatic – being confined to two sets of circumstances – and the legislature had to some extent sought to limit the financial burden likely to be represented by the payment of compensation by that body, leaving it open to the Member States to implement more favourable measures relating specifically to the conditions governing the payment of compensation by that body.
>
> 29. Consequently, if it can be inferred from art.1 of [the Second Directive] that the appropriate measures referred to in art.3 of [the First Directive] include the setting up of a body 'with the task of providing compensation … for damage to property or personal injuries', it follows that the payment of compensation by that body was expressly limited to damage 'caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied', without prejudice to the right of the Member States 'to regard compensation by that body as subsidiary or non-subsidiary."

25. Having stated in paragraph 32 that the legislature had made clear that the body was required to pay compensation only in relation to damage caused by vehicles for which the insurance obligation provided for in Article 1(1) of the Second Directive was not satisfied, he went on to distinguish that from the case before the Court:

> "34. The situation in which the person responsible for the damage did take out an insurance policy, but with an insolvent insurer, is quite different. Essentially, the case before the referring court highlights the fundamental difference between, on the one hand, the general rules governing insurance against civil liability in respect of the use of motor vehicles as progressively harmonised at EU level and, on the other hand, the rules under which civil liability insurance is guaranteed, which, to mind, have largely yet to be developed.
>
> 35. In those circumstances, I find it difficult to agree with an interpretation of art.3 of [the First Directive] along the lines argued for by the applicants in the main proceedings. That

> provision requires the Member States to 'take all appropriate measures to ensure that civil liability … is covered by insurance', not to take all appropriate measures to guarantee the civil liability covered by insurance ….
>
> …
>
> 44. Lastly, I should also like to emphasise the important difference that exists, in my view, between a vehicle in respect of which the insurance obligation as described in art.3 of [the First Directive] has not been satisfied and a vehicle insured with an insolvent insurer. After all, a vehicle for which the insurance obligation has not been satisfied is an uninsured vehicle. A vehicle which was insured with an insolvent insurer *has* satisfied the obligation to secure insurance against civil liability in respect of the use of vehicles. The risk cover is genuine but the compensation is delayed by the financial situation of the insurer."

The first issue: whether clause 6.1(e)(iii) is incompatible with the directives

The judgment of Jay J

26. Because of the way the case was pleaded and argued before him, the judge considered the question of compatibility with the directives by reference to three separate issues. The first issue related to a contention by the Secretary of State, which is no longer pursued, that Article 1(4) of the Second Directive did not impose obligations on Member States in respect of damage caused by vehicles in relation to which a valid policy of insurance had been taken out but where (as in this case) the policy was subsequently avoided by the insurer. The second issue, which is directly relevant to the appeal, was "whether Articles 1.4 and 2.1 of the Second Council Directive require Member States to ensure that compensation is paid in all circumstances save those expressly set out as exclusions within the text of these provisions", i.e. whether the exclusions expressly set out in Article 1(4), in particular, are exhaustive. Much of the judge's analysis was carried out under the first issue and was then applied across to the second issue.

27. The judge began by reviewing the relevant case-law of the Court of Justice. At paragraphs 35-41 of the judgment he considered *Ruiz Bernaldez*, paying particular attention to the opinion of the Advocate General because it appeared to him "to contain a flawlessly coherent, logical and principled guide to the scheme of the Second Directive". From the Advocate General's answer to the fifth question he derived a number of points. The first was that "the victim cannot be permitted to fall between two metaphorical stools: the principal obligation under Article 2.1 of the Second Directive rests on the insurer, but if that is not satisfied then the national body must step up to the plate". The second point was that "this general rule is subject to 'those highly exceptional cases of the victim's own blameworthy conduct'", as to which he said that on any fair reading of paragraph 46 of the opinion the Advocate General "was not suggesting that there might be an ability in Member States to create specific exceptions which were not expressly mentioned in the Second Directive or were not otherwise justifiable on public policy grounds according to established

principles of domestic law". A little later he referred to the first sentence of paragraph 46 of the opinion as the one matter where there might be "a scintilla of uncertainty" about the Advocate General's answer to the fifth question, but it was answered by an accurate reading of the directive itself ("it sets out a number of exclusions and derogations, and it is an established principle of Community law that these must be read restrictively") and subsequent Court of Justice jurisprudence.

28. In relation to *Candolin* the judge said the following, at paragraph 48 of his judgment:

> "*Candolin* is instructive in at least two ways. In my view, this was the first occasion on which the ECJ made crystal clear that exclusion clauses relating to the conduct of the victim, as opposed to that of the insured, could not be relied on beyond the extent expressly mandated by the Directive. To my mind, the Advocate General had said almost as much in *Ruiz Bernaldez*, although there the conduct of the victim was simply not in issue. I have also examined what the ECJ said at paragraphs 20 and 21 of its Judgment in that case. Putting public policy considerations to one side, I would add that it is not possible to discern any reason based on logic or principle for treating exclusion clauses relating to the conduct of the victim differently from those relating to the conduct of the insured: if the Directives are to be interpreted as imposing strict constraints in relation to the latter, that must apply equally to the former. Secondly, although the Defendant may be entitled to point out that *Candolin* does not bear on Article 1.4 of the Second Council Directive, the reason for that must be plain and obvious: no issue under that provision arises if the insurer is unable to avoid liability. However, if, by dint of some vagary of domestic law, an insurer *is* entitled to avoid liability and Article 1.4 comes into play, the logic of *Candolin* must surely be that the ability of the national body to avoid paying the victim is constrained to exactly the same extent."

29. In relation to *Farrell*, the judge quoted paragraphs 27 and 28 of the judgment of the Court and said that to his mind, save in the separate context of insolvency (a reference to *Csonka*), this was "a complete answer" to the Secretary of State's case as to compatibility of clause 6.1(e)(iii) with the directives. He added, at paragraph 50 of his judgment:

> "What we also see in *Farrell* is the taking of the final short step – the express application of the comprehensive code principle to Article 1.4 cases – left untaken in *Candolin*."

30. As regards *Csonka*, the judge considered the principle of Community law vouchsafed by the case to be clear:

> "An Article 1.4 compliant regime does not have to guarantee the satisfaction of the insurance obligation in some general way: the national body is not a long-stop to meet the obligations of insolvent insurers. The guarantee which Article

> 1.4 mandates is limited to cases where there is no insurance policy in existence at all.
>
> In my judgment, *Csonka* has no relevance to the situation where an insurer seeks to avoid liability to the victim, either on the basis of misrepresentation or non-disclosure by the insured, or on the basis of some misconduct by the victim which is not expressly catered for in the exceptions to the Directive …."

31. Having considered those and other authorities, the judge concluded that the Secretary of State's case in relation to the first issue was wholly without merit and that the relevant articles of the directives imposed obligations on Member States in respect of damage caused by vehicles in relation to which a valid policy of insurance was taken out but where the policy was subsequently avoided by the insurer. Turning to the second issue, as to whether the exclusions expressly set out in Article 1(4) are exhaustive, the judge gave brief reasons for answering the issue in the affirmative:

> "64. My review of the ECJ jurisprudence has already provided a clear and conclusive answer to this: see *Ruiz Bernaldez*, *Candolin* and *Farrell*.
>
> 65. Undaunted, Mr Kennelly urged me to adopt a different approach, having regard to the terminology of the subordinate clause to the sixth recital to the Second Directive. Mr Kennelly invited me to note the plural ('certain limited exclusions') and to carry out some basic arithmetic. The sole exclusion expressly mentioned in Article 1.4 which is not referred to in some other recital is the knowledge of no insurance exception in the second subparagraph. Specifically, property damage is dealt with in the second part of the subordinate clause to the sixth recital, stolen vehicles in the seventh recital, and excesses in the eighth recital. It follows that the subordinate clause to the sixth recital must be contemplating further limited exclusions. These are permissible provided that they are strictly defined.
>
> 66. I simply cannot accept that submission. The recitals do not bear this overly punctilious textual approach, nor can they be permitted to override the express provisions of the Directive, which must be pre-eminent. Furthermore, I accept the force of Mr Moser's submission that, if the Defendant were right, we could in fact have an unlimited number of exceptions each of which was tightly worded. But Mr Kennelly's greatest problem is that ECJ case law is against him."

The challenge to the judge's conclusion

32. On behalf of the Secretary of State, Mr Kennelly submits that (1) nothing in the text of the Second Directive provides that the exclusions set out in Article 1(4) are exhaustive, and there are indications to the contrary (in particular, the statement in the recitals that "Member States should be given the possibility of applying certain limited exclusions"); (2) none of the case-law supports the proposition that the

exclusions are exhaustive; and (3) the case-law shows that a national body such as the MIB is not required to provide a guarantee scheme and that further exclusions are permissible. He says that the judge's key error was to apply the case-law relating to the *insurance cover* obligation under the directives to the obligation under Article 1(4) to set up or authorise a body with the task of providing compensation for damage or injury caused by unidentified or uninsured drivers. Whilst the sole exception to the *insurance cover* obligation is that set out in Article 2(1) of the Second Directive and is to be strictly construed, the scope of the Article 1(4) obligation is different and *additional* exceptions are permitted. In the case of Article 1(4), unlike the insurance cover obligation, there are conflicting aims: on the one hand, the protection of victims and, on the other hand, the limitation of the financial burden on the national body. The aim of limiting the financial burden is referred to in the recitals to the Second Directive, is inherent in the exceptions set out in Article 1(4) and is spelled out in the judgment of the Court in *Csonka*. No consideration was given to it in previous judgments. When construed in the light of it, Article 1(4) is to be read as admitting of the possibility of "certain limited exclusions" (the language of the recital) additional to those set out in the text.

33. I have no hesitation in rejecting those submissions. I agree with the judge's reading of the directives and, like him, I take the view that it is strongly supported by the case-law. Whilst my reasons for agreeing with the judge's conclusion are in substance much the same as his, I would structure and express my reasons a little differently, as follows:

i) On the natural reading of Article 1(4) of the Second Directive, the only permitted exclusions from the obligation laid down are those set out expressly in the article itself, namely that Member States (a) may exclude the payment of compensation by the national body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured, (b) may limit or exclude the payment of compensation by that body in the event of damage to property by an unidentified vehicle, and (c) may authorise, in the case of damage to property caused by an insured vehicle, an excess of not more than 500 ECU for which the victim may be responsible. There is *nothing* in the text of the article to suggest that other exclusions are permitted.

ii) Mr Kennelly's argument based on the wording of the recitals, to which the judge referred at paragraphs 65-66 of his judgment, strikes me as weak in the extreme and was in my view rightly rejected by the judge. It reads far too much into the recitals to say that, because two out of the three exclusions listed in Article 1(4) are mentioned specifically in the recitals, the "certain limited exclusions" referred to must contemplate not only the one exclusion not so mentioned but other, unspecified exclusions as well. In any event, a reference in the recitals to "certain limited exclusions" is not a sound basis for interpreting Article 1(4) as authorising an uncertain number of additional exclusions, said to be "limited" but with no indication of what those limits are.

iii) It is a general principle of EU law, specifically applied in the context of these directives by the Court of Justice at paragraph 21 of its judgment in *Candolin* (to take the most obvious example), that derogations from a general rule are to be strictly construed. A strict construction leaves no room in Article 1(4) for

exclusions beyond those expressly listed and runs counter to the use that Mr Kennelly seeks to make of the reference to "certain limited exclusions" in the recitals.

iv) The construction of Article 1(4) contended for by Mr Kennelly also runs counter to the aim of protecting victims which is stated repeatedly in the directives and suffuses the reasoning of the Court of Justice in the case-law. That aim is just as valid and important in the Article 1(4) context as it is in the other contexts considered in the cases. As the Court said in *Ruiz Bernaldez*, at paragraphs 17-18 of its judgment, Article 1(4) was one of the measures by which the aim of protection of victims was developed and supplemented. A related point concerns the aim of avoiding disparities of treatment according to where the accident occurs (see paragraph 13 of the judgment in *Ruiz Bernaldez*). To allow Member States to introduce exclusions additional to those specified would clearly undermine that aim.

v) It is true that, in order to alleviate the financial burden on the body provided for by Article 1(4), a Member State is permitted "to exclude the payment of compensation by it in certain cases or to provide for excesses" (paragraph 29 of the judgment in *Csonka*). But the extent of that permission is expressly defined in the article itself, and the alleviation of the financial burden cannot sensibly be treated as a conflicting aim that is capable of being weighed against the aim of protection of victims so as to justify exclusions additional to those listed.

vi) Although the cases from *Ruiz Bernaldez* to *Farrell* were concerned specifically with the obligation to provide *insurance cover*, not with the obligation under Article 1(4) to set up or authorise a body with the task of providing compensation for damage or injuries caused by unidentified or uninsured vehicles, the reasoning in them has a direct bearing on the interpretation of Article 1(4), for the reasons already given. I do not accept that the judge fell into error in deriving the support he did from the case-law.

vii) I accept that Article 1(4) does not require the national body to provide a guarantee scheme. *Csonka* shows that the obligation of that body to pay compensation is expressly limited by the terms of Article 1(4) to damage or injury "caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied". In those cases, however, the payment obligation is subject only to the exclusions and limitations specified in Article 1(4). *Csonka* itself concerned a situation falling outside Article 1(4) and is of no assistance to the Secretary of State's argument.

viii) The present case falls within Article 1(4) rather than under the general provisions concerning insurance cover only because, fortuitously and as a result of particular provisions of national law, the driver's insurer succeeded in avoiding the policy *ab initio* on the ground of non-disclosure of material facts (see paragraph 2 above), which had the consequence that the vehicle fell to be treated as an uninsured vehicle. It is common ground that, if the policy had not been avoided, the insurer would not have been able to rely on any equivalent to clause 6.1(e)(iii) to defeat Mr Delaney's claim: such an

exclusion is not permitted by Article 2(1) of the Second Directive. Having regard to the aims of the directives, it would be very surprising if such an exclusion were nonetheless available to the body provided for by Article 1(4).

34. For those reasons I am satisfied that the judge was right to find that clause 6.1(e)(iii) of the Uninsured Drivers' Agreement is incompatible with Article 1(4) of the Second Directive and that the United Kingdom is thereby in breach of its obligations under EU law.

The second issue: is the breach sufficiently serious to give rise to liability?

The relevant case-law

35. I turn to consider the question whether the breach gives rise to liability on *Francovich* principles. The conditions of liability are that (1) the rule of law infringed is intended to confer rights on individuals, (2) the breach is sufficiently serious, and (3) there is a direct causal link between the breach of the obligation and the damage sustained by the injured party: see, for example, the judgment of the Court of Justice in Case C-278/05, *Robins v Secretary of State for Work and Pensions* [2007] 2 CMLR 13 at paragraph 69, referring to settled case law. There is no longer any dispute that the first and third conditions are satisfied. The Secretary of State contends, however, that the judge was wrong to find the second condition satisfied.

36. The judge applied the multifactorial approach described by Lord Clyde in *R v Secretary of State for Transport, ex p. Factortame Ltd (No.5)* [1993] 3 CMLR 597, [2000] 1 AC 524, at pp. 554-556. Lord Clyde identified the following factors, though the list was not exhaustive: (1) the importance of the principle which has been breached; (2) the clarity and precision of the rule breached; (3) the degree of excusability of an error of law; (4) the existence of any relevant judgment on the point; (5) the state of the mind of the infringer, and in particular whether the infringer was acting intentionally or involuntarily (i.e. whether there was a deliberate intention to infringe as opposed to an inadvertent breach); (6) the behaviour of the infringer after it has become evident that an infringement has occurred; (7) the persons affected by the breach, including whether there has been a complete failure to take account of the specific situation of a defined economic group; and (8) the position taken by one of the Community institutions in the matter. He said that the application of the "sufficiently serious" test "comes eventually to be a matter of fact and circumstance"; no single factor is necessarily decisive; but one factor by itself might, particularly where there was little or nothing to put in the scales on the other side, be sufficient to justify a conclusion of liability.

37. It is accepted that the judge was correct to follow that approach but our attention has been drawn to a number of authorities relevant to its practical application. The second factor, relating to the clarity and precision of the rule breached, brings in the important question of the extent of discretion enjoyed by the Member State. As the Court explained in *Robins*:

> "70. The condition requiring a sufficiently serious breach of Community law implies manifest and grave disregard by the Member State for the limits set on its discretion, the factors to be taken into consideration in this connection being, inter alia,

> the degree of clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities ….
>
> 71. If, however, the Member State was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach ….
>
> 72. The discretion enjoyed by the Member State thus constitutes an important criterion in determining whether there has been a sufficiently serious breach of Community law.
>
> 73. That discretion is broadly dependent on the degree of clarity and precision of the rule infringed."

38. The clarity and precision of the rule breached is also relevant to the excusability of the breach. In Case C-392/93, *R v Her Majesty's Treasury, ex parte British Telecommunications Plc* [1996] QB 615 the Court of Justice held that the United Kingdom, in implementing a directive on procurement procedures, had failed to implement correctly a particular provision of the directive (Article 8(1)). One of the matters taken into account in finding that the breach was not sufficiently serious to give rise to a liability in damages was this:

> "43. In the present case, article 8(1) is imprecisely worded and was reasonably capable of bearing, as well as the construction applied to it by the court in this judgment, the interpretation given to it by the United Kingdom in good faith and *on the basis of arguments which are not entirely devoid of substance* …. That interpretation, which was also shared by other member states, was *not manifestly contrary to the wording of the Directive or to the objective pursued by it*" (emphasis added).

39. *R (Negassi) v Secretary of State for the Home Department* [2013] EWCA Civ 151, [2013] 2 CMLR 45 involved a claim for damages based on the incorrect transposition of a directive relating to access to the labour market by applicants for asylum. The implementing provisions excluded "fresh claim" applicants from the scope of the protection, an exclusion which the Supreme Court had eventually held to be erroneous. On the proper interpretation of the directive, it gave the Member States no discretion to exclude such applicants. The Court of Appeal, however, rejected a contention that the failure to transpose the directive correctly gave rise to an automatic entitlement to reparation. The court stated that the claim must be assessed by reference to the multifactorial test. Matters taken into account in applying the test included the absence of any judicial decision by the Court of Justice or (until after the date relevant to the claim) in this jurisdiction which demonstrated the breach; and the fact that there had been no earlier hint of infringement proceedings by the European Commission and that the Commission had not identified any breach in a report dealing with transposition. The fact that the point had become "indisputably clear" after two days of argument in the Supreme Court did not necessarily mean that it

should have been manifestly obvious to the Secretary of State several years earlier. Maurice Kay LJ, with whom the other members of the court agreed, described the evaluation of seriousness of the breach as "quite finely balanced" but found in the Secretary of State's favour:

> "20. … I have come to the conclusion that, notwithstanding the points in Mr Negassi's favour (the most striking of which was the total exclusion of the subset of applicants for asylum of which he was one), the breach was not of sufficient seriousness to satisfy the test. It was not deliberate. It was the result of a misunderstanding of new provisions in an area of recent EU concern. It was not a cynical or egregious misunderstanding. It was not confined to the Secretary of State. It was shared, as a matter of first impression, by a number of judges. Whilst now all is clear, I do not think that it can be said to have been self-evidently so before the conclusion of [the case in the Supreme Court] …."

What that decision underlines is the importance of avoiding hindsight when asking whether a breach was sufficiently serious for the purposes of liability on *Francovich* principles.

The judgment of Jay J

40. In examining this issue, the judge dealt first with the relevant legal principles (paragraphs 73-88) and then examined the evidence (paragraphs 89-102) before turning to apply the legal principles to the facts (paragraphs 104-116).

41. I need say nothing about his exposition of the legal principles themselves, the correctness of which is not challenged.

42. As regards the evidence, the judge said that there was a conspicuous paucity of it; there were no documents bearing on the decision to introduce the crime exception into the Uninsured Drivers' Agreement. I have already mentioned that the 1999 version of the Uninsured Drivers' Agreement was preceded by a version dated 21 December 1988 which did not contain clause 6.1(e)(iii) or any equivalent. The clause was introduced for the first time into the 1999 version. The decision to introduce it was undocumented. There was a November 1996 letter referring to a draft of the revised agreement but throwing no light on the decision to add the clause. A memorandum dated 21 January 1998 showed that the department was concerned about the possibility of infraction proceedings at the instance of the Commission but this was in a specific context far removed from the present facts. The Commission was sent a draft of the proposed revised agreement, and the judge was prepared to draw the inference that the draft the Commission saw included the new clause, which had found its way into the agreement by spring 1998 at the latest. There was correspondence between the department and the MIB in 1998 and early 1999 concerning the draft agreement but no available document threw any light on the clause.

43. The judge was very concerned about the absence of any relevant documents but was satisfied that the Treasury Solicitor had done his best to comply with the Crown's

disclosure obligations and to locate possible witnesses. He concluded that there was no evidence of bad faith on the part of the department in relation to implementation of the clause, that is to say he could not conclude that it went ahead in the knowledge that it was violating Community law. He drew the inference that the matter must have been discussed at departmental and ministerial level (though he drew no inferences as to the content of those discussions). He was not prepared to draw an inference either way as to whether the department took legal advice. Counsel for the Secretary of State accepted before the judge that the absence of evidence rendered it impossible for him to advance a positive case that the breach of EU law was excusable.

44. Turning to the application of the legal principles to the facts, the judge said that the correct approach was to apply the multifactorial test outlined by Lord Clyde in *Factortame (No.5)* against the contextual backdrop that this was not the sort of situation where the Secretary of State had a wide margin of discretion. Rather, by introducing the crime exception the Secretary of State had removed from scope a category of victim previously within the ambit of the agreement, and in that sense could not be taken to have made any relevant legislative choice in relation to the implementation of a directive.

45. As to the first of the factors identified by Lord Clyde, namely the importance of the principle of Community law breached, the judge said the protection of victims of road traffic accidents was not a general and superior principle of Community law but was "a principle of second-order importance which is worthy of recognition": Mr Delaney had a substantial claim for damages which clause 6.1(e)(iii) had precluded.

46. He said that the second factor brought in a range of sub-factors, including the margin of discretion open to the Member State and the clarity of the provisions in issue. He had already concluded that the present case was "a paradigm of a little or no margin of discretion type of case". The issue was how clear and obvious it was in 1999 that the permissible exclusions were confined to those expressly set out in the Second Directive. In his judgment, the language of the Second Directive was clear and obvious. Any fair reading of the opinion of the Advocate General and the judgment of the Court of Justice in *Ruiz Bernaldez* would or should have led to the conclusion that as between insurer and victim the former could not rely on an exclusion clause which was not within the express derogations set out in Article 2(1). Although it was not until the decision of the Court of Justice in *Farrell*, promulgated after Mr Delaney's accident, that there was unequivocal case-law to the effect that the same line of reasoning applied to the Article 1(4) national body, the point was close to being self-evident. The judge considered that the arguments advanced on behalf of the Secretary of State were plainly wrong.

47. As to the third factor, the degree of excusability of the error, he said that the Secretary of State had not advanced a positive case as to the degree of excusability of the breach beyond the submissions already addressed.

48. In relation to the fourth factor, the existence of any relevant judgment on the point, he said that his approach had been that "the language of the Second Directive – even unadorned by authority – was and is clear enough, and that the case of *Ruiz Bernaldez*, coupled with a basic understanding of Community law principles, ought to have led any reasonable official acting with the resources of the department to

conclude that the insertion of clause 6(1)(e)(iii) could not lawfully have been achieved".

49. In relation to the fifth factor, he said that the state of mind of the infringer was difficult to evaluate. He had not concluded that the department knew that it was acting in breach of Community law, but he was not prepared to accept that this was a case of inadvertent breach. His favoured approach, in line with the inferences fairly and properly to be drawn, was that the department "must be taken to have decided deliberately to run the risk". If the department took legal advice, the most favourable gloss that could be placed on the facts was that a deliberate decision was taken to run the risk: it could not be inferred that the advice might have given the green light. If the department did not take legal advice, that did not avail it one iota. The judge rejected the argument that there was no prompt or spur to the taking of such advice. He said that any department of State acting responsibly should have take legal advice on an issue "of this obvious sensitivity and potential controversy".

50. He said that the remainder of Lord Clyde's factors did not weigh heavily in the scales. I need only mention the eighth factor, as to which the judge said that the inaction of the Commission weighed slightly in the balance in the department's favour but he took the point of counsel for Mr Delaney that "a close reading of the Uninsured Drivers' Agreement would be required in order to pinpoint the potential problem".

51. The judge observed that Mr Kennelly's strongest point was that the Secretary of State's breach simply was not serious enough, but he went on to dismiss the contention that the issue could not be altogether plain and obvious because the forensic process had required detailed written and oral argument and the review of a number of authorities. He concluded:

> "117. I therefore conclude that the Defendant is guilty of a serious breach of Community law in circumstances where its room for manoeuvre under the Directives was closely circumscribed. It did not have a wide discretion. Its obligations under the Directives, and their relevant confines, were quite clear, and – in the absence of knowing the actual reason for this policy decision – the best that may be said is that the Defendant decided to run the risk, which was significant, knowing of its existence. I have examined all of Lord Clyde's factors: the majority bear on the seriousness, and some are of little weight in these circumstances. I conclude with little hesitation that the Defendant's breach is so serious that, subject to the final issue of causation, it must pay compensation to the Claimant under the *Francovich* principle."

The challenge to the judge's conclusion

52. Mr Kennelly submitted that (1) the judge erred in a number of respects and would have reached a different conclusion but for those errors, and (2) this court should find in any event that the breach was not sufficiently serious to give rise to liability. I will deal first with the respects in which the judge is said to have erred.

53. The first alleged error is that the judge wrongly considered this to be a case in which the Member State had little or no discretion as to the implementation of the directive. Following the reasoning articulated in the *British Telecommunications* and *Negassi* cases, that the implementation of a directive will necessarily involve legislative choice and attract a more nuanced approach, the judge should have found that the implementation of the directives was an area which would involve important policy and legislative decisions and an inevitable degree of discretion. On the reasoning applied by the judge, *every* case concerning the interpretation of EU law would be one in which the Member State had no discretion.

54. I do not accept that submission. In my view the judge was correct to treat this as a case where the Member State had little or no relevant discretion. True it is that the Second Directive gave Member States a legislative choice as to the means by which they fulfilled the obligation to set up or authorise the body provided for by Article 1(4); but the scope of that body's obligation to pay compensation, including the permitted exclusions, was clearly defined by Article 1(4) itself and there was no discretion to adopt additional exclusions. Moreover, as the judge pointed out, the United Kingdom had originally implemented the directive in relevant part, through the 1988 version of the Uninsured Drivers' Agreement, without clause 6.1(e)(iii) or any equivalent, and it could not be taken to have been making a relevant legislative choice in relation to implementation of the directive by introducing such a clause in 1999, thereby removing from the scope of protection a category of victim previously included within it. The judge's reasoning related to the particular features of the case and did not have the wider consequence suggested by Mr Kennelly.

55. It is submitted next that the judge attached insufficient weight to the fact that no Court of Justice judgment existed at the relevant time which came close to establishing that the exclusions in Article 1(4) of the Second Directive are exhaustive. *Ruiz Bernaldez* was the only relevant case at the time when clause 6.1(e)(iii) was introduced into the Uninsured Drivers' Agreement in 1999, but the judgment of the Court in that case did not address Article 1(4), and in so far as the opinion of the Advocate General did address it, his comments were not clear-cut and were in any event moot. *Candolin*, in which judgment was given on 30 June 2005, less than 6 months prior to Mr Delaney's accident, established no more than that the exclusions in Article 2(1) of the Second Directive are exhaustive; it had no bearing on the construction of Article 1(4). *Farrell* post-dated the accident and is of no relevance to this issue. The absence of a judgment on Article 1(4) at the relevant time goes not only to the fourth factor (existence of any relevant judgment) but also to the second factor (clarity and precision of the rule breached) and the third factor (degree of excusability of the error).

56. Again I reject the submission. In my view the judge adopted the correct approach to the judgments of the Court of Justice. He attached primary importance to the wording of the directive but he relied in addition on *Ruiz Bernaldez* as showing that the introduction of clause 6.1(e)(iii) into the Uninsured Drivers' Agreement was incompatible with the directive. I have given my reasons for agreeing with him that although the judgment of the Court in *Ruiz Bernaldez* was concerned specifically with the obligation to provide insurance cover and not with the obligation under Article 1(4), the reasoning in it had a direct bearing on Article 1(4) and supported the judge's interpretation of the article. The "scintilla of uncertainty", as the judge put it, arising

out of the Advocate General's reference to the need to ensure that there were no gaps in the duty to compensate the victim "[a]part from those highly exceptional cases of the victim's blameworthy conduct" (see paragraphs 18 and 27 above) provided altogether too tenuous a basis for any view that it was lawful to introduce additional exclusions such as clause 6.1(e)(iii). The judge was also right to concentrate on *Ruiz Bernaldez*. Although *Candolin* pre-dated the accident by a few months, it post-dated the introduction of the clause into the Uninsured Drivers' Agreement by several years, the United Kingdom was not a party to it and the decision by itself would not necessarily have been picked up as signalling the need for urgent review of the agreement. The seriousness of the breach lay in the circumstances that existed at the time when clause 6.1(e)(iii) was introduced into the agreement in 1999.

57. In relation to excusability and the state of mind of the department, Mr Kennelly raised a quibble as to whether the judge was right to describe the issue as one of "obvious sensitivity and potential controversy" on which any department of State acting responsibly should have taken legal advice. In my judgment, however, the department should plainly have taken legal advice about this issue even if the judge's description of it overstates the position. The 1988 version of the Uninsured Drivers' Agreement was evidently intended to secure compliance with the Second Directive. It would have been unwise in the extreme to introduce an additional exclusion in 1999 without seeking advice as to the legal position.

58. Mr Kennelly submitted that the Commission's inaction should have been given greater weight in the Secretary of State's favour. The Commission had been sent a draft of the revised agreement. It was not a lengthy document and if the new clause had stood out as an impermissible exclusion the Commission would have raised an objection even if its attention was focused on a different part of the document. The judge's acceptance of the argument that a close reading of the document would have been required in order to pinpoint the potential problem was inconsistent with his view, expressed frequently in the judgment, that the legal position was straightforward and clear.

59. This, too, seems to me to be a misplaced criticism. I do not think that the judge's point about the need for a close reading of the document was inconsistent with his view as to the clear position under EU law. Although the Commission had been sent a draft of the agreement, it appears that this was because of an issue between the United Kingdom and the Commission on an altogether different point; and there is no evidence that the Commission's attention was drawn to clause 6.1(e)(iii) or to the fact that it was an addition to the agreement entered into at the time of implementation of the Second Directive. I do not accept that in those circumstances any problem concerning the clause would have been obvious to the Commission without a close reading of the document or that the judge was wrong in the circumstances not to place greater weight on the lack of objection by the Commission.

60. Accordingly, I reject Mr Kennelly's submission that the judge's conclusion was flawed by material errors in his analysis.

61. That leaves the question whether the judge was nonetheless wrong to reach the conclusion he did. At a late stage in the case, Mr Kennelly submitted that in answering that question this court should undertake the multifactorial assessment for itself and reach its own conclusion on the seriousness of the breach. He submitted

that that was the approach taken by the Court in *Byrne v Motor Insurers' Bureau* [2008] EWCA Civ 574, [2009] QB 66, in particular per Carnwath LJ at paragraphs 39-45, and in *Negassi* (see paragraph 39 above), and that such an approach falls properly within the flexible scope of a "review" of the decision of the lower court, as provided for in CPR rule 52.11(1). He confirmed in writing after the hearing that his submission represented the general position of Her Majesty's Government in *Francovich* damages cases. Mr Moser QC, for Mr Delaney, did not address the issue in any detail in his submissions at the hearing or respond to Mr Kennelly's written confirmation.

62. In *Recall Support Services and Others v Secretary of State for Media, Culture and Sport* [2014] EWCA Civ 1370 the court upheld a finding at first instance that the relevant breach by the Secretary of State was *not* sufficiently serious to give rise to liability in damages. In my judgment in the case, with which the other members of the court agreed, I used language reflective of a more limited review function, stating at paragraphs 87-88:

> "It seems to me that the judge, having directed herself correctly as to the multifactorial test, applied that test in a manner that is not open to material criticism ….
>
> I am therefore satisfied that there is no basis for interfering with the judge's conclusion that the breach she had found did not amount to a manifest and grave disregard of the United Kingdom's obligations under the directive."

To the best of my recollection, however, the approach that the appellate court should adopt in this context was not the subject of any debate in that case. Nor was the point material to the outcome: I have no doubt that the decision of the court would have been the same if the approach now contended for by Mr Kennelly had been adopted.

63. Indeed, the difference in approach is unlikely to make any practical difference in the generality of cases. The exercise undertaken by the judge at first instance will normally be the appropriate focus of attention even if this court needs in the end to reach its own conclusion on the seriousness of the breach. So it was that Mr Kennelly's submissions in the present appeal focused on Jay J's analysis and in particular on the alleged errors within it, rather than trying to take the court through the multifactorial assessment as a fresh exercise. If there is no material error or omission in the judge's analysis, there will in practice be only limited room for disagreement as to the overall assessment of seriousness of breach.

64. In the present case, not only am I satisfied that the judge directed himself correctly and that his analysis was not flawed by material error or omission, but I agree in any event with the conclusion he reached. In my judgment, his conclusion was correct for the reasons he gave.

65. In those circumstances I do not think it necessary to reach any decision on which approach is strictly correct. The point is better left for decision in a case where it matters and where it has the benefit of fuller submissions than we received on it in the present appeal.

Conclusion

66. For the reasons given I would dismiss the appeal.

Lord Justice Kitchin:

67. I agree.

Lord Justice Sales:

68. I also agree.