Neutral Citation Number: [2021] EWCA Civ 1941

Case No: A3/2021/0246

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
His Honour Judge Johns QC (sitting as a High Court Judge)
[2020] EWHC 3258 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2021

Before :

LORD JUSTICE GREEN
LORD JUSTICE ARNOLD
and
LORD JUSTICE SNOWDEN

- -

Between :

Jersey Choice Limited	**Appellant**
- and -	
Her Majesty's Treasury	**Respondent**

- -
- -

Aidan O'Neill QC & Nicholas Gibson (instructed by **CJ Jones Solicitors LLP**) for the **Appellant**
Jessica Simor QC & Amy Mannion (instructed by **Solicitor's Office & Legal Services, HMRC**) for the **Respondent**

Hearing date: Tuesday 16th November 2021

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Approved Judgment

Lord Justice Green:

A. Introduction and Context

The issue

1. This is an appeal from the judgment of the High Court dated 27th November 2020 ([2020] EWHC 3258 (Ch)) which struck out the claimant's claim form and particulars of claim upon the basis that they disclosed no reasonable grounds for the claim and were, otherwise, an abuse of process. The claim was for damages against the Government for breach of EU law by virtue of the alleged unlawful enactment of Section 199(3) Finance Act 2012 which had the effect of removing VAT relief, known as "Low Value Consignment Relief" ("*LVCR*"), from low value goods sold to customers in the United Kingdom using mail order despatched from the Channel Islands.

The Jersey judicial review / "roundtripping"

2. The withdrawal of this relief was subject to a claim for judicial review, initiated upon an expedited basis, during the Bill stage of the Act. This was brought by the Minister for Economic Development of the States of Jersey, and the States of Guernsey, who contended that the relevant Article of the Directive (Article 23) did not permit selective disapplication of LVCR, either by reference to categories of goods or territories and that selective disapplication of the proviso offended against the principles of fiscal neutrality, non-discrimination and proportionality. In a judgment given on 15th March 2012 ([2012] EWHC 718 (Admin) – "*the Jersey judicial review*") Mitting J rejected the claim. He concluded that the law arising was not *acte clair* and had time permitted he would have referred the issue to the CJEU. However, that was not an option given that judgment was required on a highly expedited basis before the next Budget Day which was imminent. In paragraphs [18] – [20] the judge explained that the motivation behind withdrawal of the relief was the growth of the practice of "*roundtripping*" which was considered to be an abuse of the tax system:

> "18. The total value of goods imported with LVCR has risen from about £454 million in 2006, but has held steady for the last four years. This may be the combined result of the recession in the United Kingdom and steps taken by the States of Jersey and Guernsey to reduce or eliminate the practice of "round tripping" by which large UK retailers took orders for goods from UK customers in the United Kingdom which they then delivered from the United Kingdom to the Channel Islands and which were then dispatched from the Channel Islands to the UK customers. This commercially pointless exercise was worthwhile because of the tax consequences. The UK retailer paid VAT on the goods when delivered to its warehouse in the United Kingdom and then exported them to the Channel Islands free of VAT. The same goods were then reexported to the United Kingdom customer, also free of VAT, due to LVCR. The UK retailer recovered the VAT which it had paid as input tax; the UK customer paid a price which was free of VAT.

> 19. There is evidence from members of RAVAS that this practice has not stopped. It is unnecessary for me to determine the extent to which it continues, if at all. It was, and if it continues is, clearly an abusive practice. I accept, as RAVAS members and HMRC witnesses assert, that it has had a significant adverse impact on the turnover and profitability of some UK retailers in the affected sectors.
>
> 20. What can properly be categorised as legitimate export activity has also been conducted by Channel Island-based companies, of which Play.com and Indigo Lighthouse are exemplars. Both have established a warehousing and distribution centre in Jersey, from which orders placed by the internet from the United Kingdom are supplied. The business of Play.com is the supply of digital media, principally CDs and DVDs. That of Indigo Lighthouse is more diversified. Both have invested significantly in establishing and developing their facilities and operations in Jersey, and both are substantial employers of local labour."

3. The appellant, and claimant below, Jersey Choice Limited ("*JCL*"), a company incorporated and registered in Jersey in 2003, was not a party to the Jersey judicial review. Witness statement evidence dated 20th January 2012 was however given by Mr Tim Dunningham. He has also produced a witness statement for the present proceedings dated 1st October 2020. He was the founder of JCL. He is now a consultant with JCL. He is a British citizen resident in Jersey who has been involved in horticultural mail order in Jersey since January 1984. The company grows and sells, by mail order from Jersey, bedding plants and other live gardening products mainly to customers throughout the UK. The nature of the products is such that they are low value and generally sell for under £18. The business thrived and was profitable, and VAT exempt, until the Government removed the LVCR with effect from 1st April 2012. It is not alleged that JCL has at any time been engaged in "*roundtripping*".

The Particulars of Claim

4. On 19th July 2018 JCL served Particulars of Claim seeking damages against HMT upon the basis that the removal of LVCR amounted to a breach of (*inter alia*) the directly effective Articles 28, 30 TFEU (prohibiting customs charges and charges of equivalent effect), and the general principles of EU law of equal treatment, fiscal neutrality and proportionality.

5. It is common ground between the parties that, prior to Brexit, the EU customs rules applied to the Channel Islands, including Jersey, under the same conditions as they applied to the UK. Jersey was part of the customs territory of the EU. It is also common ground that the Channel Islands, including Jersey, were not, a "*Member State*" of the EU. Nor were they a part of the territory of the UK (or any other Member State of the EU) for the purpose of the EU common system of VAT. These distinctions are relevant to legal issues which I address below.

6. It is central to the claimant's case that the withdrawal of the LVCR applied only to the Channel Islands and not to the other overseas territories of EU Member States which

have the same, somewhat *sui generis*, status as the Channel Islands under EU law, namely that they form part of the customs union of the EU but not a part of the EU common system of VAT. The Particulars of Claim aver that the provisions of EU law relied upon confer private law rights enforceable in the domestic courts. Further, by reason of the breach of those rights, the claimant suffered substantial loss. Damages are quantified at in excess of £15 million, comprising: (i) repayment of monies charged by way of importation of VAT on the claimant's goods in breach of EU law which charges were not passed on to customers but which were absorbed into the claimant's costs with a consequential decrease in profit margins; (ii) monies paid through the claimant's membership of the Import VAT Accounting Scheme; (iii) monies paid via the Low Value Bulking Import Scheme; (iv) lost profits resulting from reduced sales calculated by reference to those which would have been achieved but for the unlawful imposition of the charge; and (v) additional costs, including the costs of additional borrowing, as a result of paying for the charge which was not properly due.

7. By an application dated 9th March 2020, the respondent - HMT - applied to strike out the Particulars of Claim upon the basis that it disclosed no reasonable grounds for bringing the claim and/or that it was otherwise an abuse of the court's process or was otherwise likely to obstruct the just disposal of the proceedings. Alternatively, HMT sought summary judgment against the claimant upon the basis that there was no real prospect of success and there was no other compelling reason for trial. The gist of the application was that the matter had already been decided, correctly, by Mitting J in 2012 in the Jersey judicial review and that reasoning should be followed. Nothing in the Particulars of Claim was new. Further, it was an abuse of process to permit JCL to, in effect, re-litigate the same issues as had been determined in the judicial review, in particular because Mr Dunningham had given evidence on behalf of the claimants in those proceedings.

8. In the judgment under appeal dated 27th November 2020, the judge struck out the claim upon the basis that it had no prospect of success and that it was, in addition, an abuse of process. The judge endorsed the conclusions arrived at by Mitting J in the earlier Jersey judicial review. Permission to appeal was given by Nugee LJ on 27th April 2021. He considered that there was a real question as to whether this was a case of abuse of process. He also considered that it was sufficiently arguable that it was unlawful under EU law for HMT to discriminate between the Channel Islands and other comparable territories who were also within the customs territory of the EU, albeit outside of the VAT territory of the EU.

Summary of parties' arguments

9. The appellant argues as follows: (i) it was not an abuse of process for JCL to have brought this claim; (ii) although described as a tax the imposition of VAT was in truth a charge having equivalent effect to a customs duty because it was applied simply because goods crossed a frontier; (iii) accordingly, the correct regime for analysing the charge was not the EU tax regime but the EU customs regime whereby all customs duties and charges having equivalent effect are prohibited outright, which prohibitions are directly effective and found claims for damages in the national courts; (iv) if this is wrong and the issue had to be analysed as a tax matter then the general principles of EU law applied such that the decision to remove LVCR was unlawful because it was discriminatory, violated the principle of fiscal neutrality and was disproportionate which principles were capable of being enforced in the national courts through

"*Francovich*" damages claims. It followed that the judge erred in concluding that this was a fiscal issue subject to the tax rules and not a customs matter and that the general principles of EU did not apply in relation to imports into the UK from Jersey so that in the field of VAT, in effect, the UK could discriminate at will or otherwise act in a disproportionate manner.

10. The respondent – HMT – argues that for the reasons given by the judge below: (i) it was abusive for JCL to bring the claim; (ii) in any event the customs regime did not apply and to the extent that the removal of LVCR could be challenged this had to be under the EU tax regime; (iii) the principles of equality, fiscal neutrality and proportionality did not apply to direct imports from Jersey; (iv) accordingly there was no basis for any *Francovich* damages claim; and (v) the judge was therefore correct to strike out the claim.

The issues for determination on the appeal

11. The issues which arise on this appeal are as follows:

Issue 1: Is the claim an abuse of process?

Issue 2: Which regime applies: Customs or tax?

Issue 3: Was removal of the LVCR a breach of the general principles of equality, fiscal neutrality or proportionality?

12. To understand these issues, it is necessary to set out some introductory and background matters.

B. The position of damages claims against the state following the exit of the UK from the EU

13. As explained below *if* the claim is to succeed it can do so, not upon the basis of directly effective rights under Article 28 and 30 TFEU, but only upon the basis that, in the context of the EU tax regime, HMT has breached general principles of EU law and that this can give rise to a "*Francovich*" claim. I explain now what a "*Francovich*" damages claim is, and, how the exit of the UK from the EU impacts generally upon claims for damages (including *Francovich* claims) based on EU law.

The nature of a Francovich damages claim

14. A *Francovich* claim arises out of the failure of a Member State properly to implement a directive where, had there been proper implementation, benefits would have accrued to an individual who, in view of the failure to transpose, now seeks damages to compensate for the loss of those benefits. The CJEU has made clear that such claims are different from and supplementary to claims based upon directly effective provisions of EU law. In the present case it is said that under EU law (set out below) the claimant was entitled under the relevant directive to exemption from VAT on exports into the UK. However, the UK wrongly withdrew the exemption. Had the UK acted lawfully JCL would have continued to enjoy the significant benefit of the tax exemption. This is hence a case of the wrongful implementation of an EU directive designed to confer a right on JCL i.e. tax-free status.

15. In Joined Case C-6/90 and C-09/90 *Andrea Francovich v Italian Republic* [1991] ECR I-5359 ("*Francovich*") the claimants were employees of an insolvent company. Under Directive 80/987 on the protection of employees in the event of the insolvency of the employer Italy should have introduced into Italian law protection for employees of companies which had become insolvent. However, Italy failed to transpose the directive and the employees were left without the protection they would otherwise have enjoyed. Applying the traditional test of clarity, precision and unconditionality, the Court held, for reasons that it is unnecessary to explore, that the directive was not directly effective.

16. However, the absence of direct effect was not dispositive since the central issue was the State's liability for its *own* failure to comply with its obligations under the law (i.e. to implement in accordance with the duty in Article 189 EC and the concomitant duty of the state to make good loss caused by that failure). Courts had a duty to ensure that the rules "*take full effect and must protect the rights which they confer on individuals*" (citing Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629 paragraph [16]; and Case C-213/89 *Factortame* [1990] ECR 1-2433 paragraph [19]). It followed that States had to be held liable for loss and damages caused to individuals as a result of their breaches of Community law. The Court then laid down three conditions governing a claim for damages:

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

17. In Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* EU:C:1996:79, one of the leading cases on this issue, at paragraphs [20] - [22], the Court reaffirmed that a claim for damages could arise where a Member State failed to transpose a right conferred by a directive, even absent direct effect:

> "20. The court has consistently held that the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty: see, in particular, Commission of the European Communities v. Italian Republic (Case 168/85) [1986] E.C.R. 2945, 2960, para. 11; Commission of the European Communities v. Italian Republic (Case C-l20/88) [1991] E.C.R. 1-621, 638, para. 10, and Commission of the European Communities v. Kingdom of Spain (Case C-l 19/89) [1991] E.C.R. 1-641, 654, para. 9. The purpose of that right is to ensure that provisions of Community law prevail over national provisions. It cannot, in every case, secure for individuals the benefit of the rights

> conferred on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a member state. As appears from paragraph 33 of the judgment in Francovich [1995] I.C.R. 722, 771, the full effectiveness of Community law would be impaired if individuals were unable to obtain redress when their rights were infringed by a breach of Community law.
>
> 21. That will be so where an individual who is a victim of the non- transposition of a Directive and is precluded from relying on certain of its provisions directly before the national court because they are insufficiently precise and unconditional, brings an action for damages against the defaulting member state for breach of the third paragraph of article 189 of the Treaty. In such circumstances, which obtained in Francovich, the purpose of reparation is to redress the injurious consequences of a member state's failure to transpose a Directive as far as beneficiaries of that Directive are concerned.
>
> 22. It is all the more so in the event of infringement of a right directly conferred by a Community provision on which individuals are entitled to rely before the national courts. In that event, the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained."

18. At paragraph [51] the Court identified the three cumulative conditions for liability but now focused upon the quality of the breach which had to be "*sufficiently serious*":

> "51. In such circumstances, Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious, and there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties."

This formulation has been consistently followed: see e.g. Case C-571/16 *Kantarev* EU:C:2018:807 at paragraphs [91] – [97].

19. It follows that a *Francovich* damages claim can arise from a failure to implement or directive, in whole or in part, where the directive confers rights on individuals and the breach is sufficiently serious.

Damages claims following UK exit from the EU

20. I turn now to the availability of damages claims following the exit of the UK from the EU. Whilst the UK was a member of the EU the principal domestic measure which governed the relationship between EU and domestic law was the European Communities Act 1972 ("*ECA 1972*"). Section 2(1) was the portal through which all EU rights flowed into domestic law:

> "General implementation of Treaties
>
> (1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies."

21. This was repealed by section 1 European Union (Withdrawal) Act 2018 ("*EU(W)A 2018*") with effect from "*exit day*" which was defined as 31st January 2020 at 11.00pm (section 20(1)). Transitional and savings provisions were included for certain rights under section 2(1) ECA 1972 which were to continue to be recognised and available in domestic law on and after "*IP completion day*", defined as 31st December 2020 at 11.00pm. Important exceptions to such saved and preserved rights were set out: (a) the EU Charter of Fundamental Rights was not part of UK domestic law on or after IP completion day (section 5(4)); (b) there was no right of action in domestic law on or after IP completion day based upon a failure to comply with any of the general principles of EU law (section 5(6) and Schedule 1 paragraph 3); (c) there was no right in domestic law on or after IP completion day to *Francovich* damages (section 5(6) and Schedule 1 paragraph 4).

22. Under section 23(7) and Schedule 8 paragraph 39(1),(3), these exceptions apply to anything occurring before IP completion day in addition to anything occurring after that date. But the three exceptions do *not* apply to proceedings commenced, but not finally decided, before a court or tribunal in the UK before IP completion day.

23. In addition the removal of a right of action relating to general principles of EU law does not apply to any proceedings commenced within the period of 3 years beginning with IP completion day insofar as the proceedings involved a challenge to acts occurring before IP completion day and the challenge was *not* for the disapplication or quashing of an Act of Parliament or a rule of law which was not an enactment or certain other specified laws (see section 23(7) and Schedule 8 paragraph 39(5)). And further the removal of the right to *Francovich* damages does not apply to proceedings commenced within the period of 2 years starting with IP completion day insofar as the proceedings relate to anything which occurred before IP completion day (section 23(7) and Schedule 8 paragraph 39(7)).

24. Rights which were saved under this somewhat convoluted regime form part of the body of retained EU case law and retained general principles of EU law in accordance with which domestic courts must decide any questions as to the validity meaning or effect of retained EU law so far as relevant and so far as that law is unmodified on or after IP completion day (sections 6(3) and 6(7)). Parliament specified in section 6(4)(a) that the UK Supreme Court was not bound by retained EU case law and the Secretary of State made regulations to the effect that the Court of Appeal was not bound by retained EU case law except so far as there was binding post-transition domestic case law which modified or applied that retained EU case law; section 6(4)(ba), 6(5A) and Regulations 3(b) and 4

of the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020/1525.

25. Pulling the strands together the present claim of JCL is preserved and UK exit from the EU does *not* affect JCL's right to pursue its damages claim, its reliance upon its rights under the EU Charter and/or its reliance upon rights under general principles of EU law. JCL's claim based upon these rights was commenced before IP completion day on 31st December 2020.

26. Mr O'Neill QC did though point out, in addressing HMT's abuse of process arguments about the risk of floodgates (see paragraph 65(vi) below), that because the window for bringing *Francovich* and other claims was rapidly closing under these transitional and saving provisions the ability of *other* persons comparable to JCL (e.g., other Channel Islands horticultural businesses) to bring a claim on the same basis was diminishing and would close after 31st December 2022.

27. I turn now to consider the relevant legislative provisions.

C. Relevant legislative provisions

The difference between fiscal and customs regimes

28. This case focuses upon the distinction between the EU customs and fiscal laws. A customs union is one where there are either no customs charges applied to trade crossing the frontiers between contracting states or where there is an agreed list of tariffs. In the case of the EU it was a basic premise from the outset that there would be no customs charges at all. Trade between Paris, Brussels, Rome and Munich would be on the same terms as trade between Paris and Marseilles. For this reason, the treaties imposed an absolute prohibition on customs duties and all other charges (howsoever designated, for example as a "tax", under domestic law) which applied simply because the product crossed a frontier between Member States.

29. The same approach could not be applied to fiscal arrangements. No Treaty could - sensibly – impose an equivalent prohibition on all taxes; and equally at the stage when the treaties were first concluded there was no realistic possibility of Member States agreeing harmonised tax rates. The setting of domestic tax rates was a complex social and political issue and unsurprisingly views about appropriate rates varied substantially as between the Member States. Moreover, there were many different types of tax and many had little connection to the creation of a single trading market. For these reasons the treaties provided only (i) that discriminatory, protectionist, measures were prohibited and (ii) that the EU institutions would, under secondary legislation, progressively move towards harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent necessary to ensure the establishment and the functioning of the internal market and to avoid distortions of competition.

30. Applying the above logic, it is clearly important for JCL to be able to argue that the removal of LVCR and the reimposition of VAT was, in truth, a charge applied only because goods were crossing a frontier and that, thereby, the proper analysis is under the customs regime where outright prohibitions bite hard.

The customs regime

31. This brings me to the customs regime. Title I Part 3 TFEU establishes the customs union. Article 28 TFEU prohibits "*customs duties*":

> "1. The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.
>
> 2. The provisions of Article 30 and of Chapter 3 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States."

32. Article 30 TFEU prohibits "*charges having equivalent effect*":

> "Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature."

33. It is not in dispute that these prohibitions are directly effective and can be relied upon in proceedings before the national courts. The strictness of the prohibitions was very early on confirmed by the CJEU in *Commission v Italy* C-24/68 [1960] ECR 193 at paragraphs [6]-[9]. There the Court emphasised the absolute nature of the prohibitions and the complementary functions of Articles 28 and 30. The customs regime applied to all charges "*imposed on goods by reason of the fact that they cross a frontier*". The prohibition applied even if: (i) the charge was nominal or minimal ("*however small*") there being no *de minimis* rule; (ii) the charge was not imposed for the benefit of the State; (iii) the charge was not discriminatory or protective in effect; and (iv) the product on which the charge was imposed was not in competition with domestic products. The treaty prohibitions were "*fundamental*" rules which did not permit of "*any exceptions*" (paragraph [10]). The Court importantly went on to distinguish between the customs and fiscal regimes. It followed from the fact that there was a different regime for taxation that the ban on customs charges did not extend to include taxation which was imposed in the same way within a State on similar or comparable domestic products, or at least fell, in the absence of such products, within the framework of general internal taxation, or which was intended to compensate for such internal taxation.

The fiscal regime

34. The tax rules are more complicated but less strict than the customs rules. Title VII TFEU (common rules, *inter alia*, on taxation) sets out, at Chapter 2, "*Tax Provisions*". Article 110 is the principal prohibition curbing the discretion of the Member States to set taxes. In contrast to the customs measures, it does not impose outright prohibitions but proscribes only direct and indirect discrimination and protectionism:

> "No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any

> kind in excess of that imposed directly or indirectly on similar domestic products.
>
> Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products."

35. Article 113 TFEU empowers the European Council to adopt provisions for the harmonisation of legislation concerning turnover taxes (i.e. VAT), excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.

EU VAT legislation: The Sixth Directive

36. The two measures of immediate relevance to this appeal are: (i) Directive 2006/112/EC on the common system of VAT (the "*Principal VAT Directive*" or "*PVD*); and (ii) Directive 2009/13/EC ("*the Exemptions Directive*"). These set out the scope of the tax rules, their applicability to territories such as Jersey, and the nature and extent of the exemption for LVCR by mail order and the circumstances in which the relief can be withdrawn.

37. I should first refer briefly to predecessor provisions since these underscore important policy considerations relevant to the facts of the present case. As of 23rd May 1977, Directive 77/388 (the *"Sixth Directive"*) was implemented to harmonise the law of the Member States concerning turnover taxes. It emphasised (Recital 4) the importance of non-discrimination "… *as regards the origin of goods and services, so that a common market permitting fair competition and resembling a real internal market may ultimately be achieved*."

38. A system of exemptions on importation from VAT was authorised by Article 14(1) Sixth Directive which included an obligation upon Member States to exempt low value imports but subject to rules ensuring the "…*correct and straightforward application of such exemption and of preventing any possible evasion, avoidance or abuse*". Member States had an "*option*" (under Article 14(1)(d)) of not granting the exemption where this would be "*liable to have a serious effect on conditions of competition on the home market*…".

39. The Sixth Directive imposed a duty upon the Council *"at the earliest opportunity"* to put forward proposals for Community tax rules clarifying the scope of the exemptions and detailed rules for their implementation. Council Directive 83/181/EEC of 28th March 1983 was hence adopted. Recitals 1 and 4 identified two factors relevant to the exercise of the power. Recital 1 referred to the objective of "*preventing any possible evasion avoidance or abuse… of the Sixth Directive*"; and Recital 4 stated that the exemptions could be granted: "…*only on condition that they are not liable to affect the conditions of competition on the home market.*"

40. Article 1, which determined the scope of the exemption in Article14(1)(d) confirmed that the exemption had to be applied, "…*in order to ensure that such exemptions are*

correctly and simply applied and to prevent any evasion, avoidance or abuses." Article 22 empowered Member States to allow exemptions on imports of goods of a total value not exceeding 22 ECU. On 13th June 1988 Directive 88/331/EEC, amending Directive 83/181/EEC, replaced Article 22 with the following:

> "Goods of a total value not exceeding 10 ECU shall be exempt on admission. Member States may grant exemption for imported goods of a total value of more than 10 ECU but not exceeding 22 ECU. However, Member States may exclude goods which have been imported on mail order from the exemption provided for in the first sentence of the first subparagraph."

EU VAT legislation: The PVD

41. The Sixth Directive (as amended) was replaced on 28th November 2006 by the Principal VAT Directive. Whilst the structure and language used in the PVD differs from that in the Sixth Directive it was not intended to introduce changes, in principle, to the existing legislation (Recital 3). Again, the objective of the harmonisation exercise, as set out in Recitals 4 and 7, was couched in terms of achieving fiscal neutrality and avoiding distortions of competition on the internal market.

42. Article 1 establishes the common system of VAT. Article 2 sets out the transactions subject to VAT which under Article 2(1)(d) includes the importation of goods.

43. Article 5 defines four types of territory relevant to the application of the PVD. The concept of a "*Member State*" excludes "*third territories*" covered by Article 6 so that the Channel Islands, including Jersey, are not "*Member States*" nor do they form part of the "*territory of the Community*":

> "For the purposes of applying this Directive, the following definitions shall apply:
>
> (1) '*Community*' and '*territory of the Community*' mean the territories of the Member States as defined in point (2);
>
> (2) '*Member State*' and '*territory of a Member State'* mean the territory of each Member State of the Community to which the Treaty establishing the European Community is applicable, in accordance with Article 299 of that Treaty, with the exception of any territory referred to in Article 6 of this Directive'
>
> (3) '*third territories'* means those territories referred to in Article 6;
>
> (4) '*third country*' means any State or territory to which the Treaty is not applicable."

44. Article 6 addresses "*third territories*" of which there are two types (i) those within the EU customs area and (ii) those which are not. Article 6(1) makes clear that (unlike in relation to the customs rules) the Channel Islands are not within the scope of the PVD:

> "1. This Directive shall not apply to the following territories forming part of the customs territory of the Community:
>
> (a) Mount Athos;
>
> (b) the Canary Islands;
>
> (c) the French overseas departments;
>
> (d) the Åland Islands;
>
> (e) the Channel Islands.
>
> 2. This Directive shall not apply to the following territories not forming part of the customs territory of the Community:
>
> (a) the Island of Heligoland;
>
> (b) the territory of Büsingen;
>
> (c) Ceuta;
>
> (d) Melilla;
>
> (e) Livigno;
>
> (f) Campione d'Italia;
>
> (g) the Italian waters of Lake Lugano."

45. It is relevant (see paragraph [79] below) that "*the Åland Islands*" are in the same category as the Channel Islands; both are within the "*customs territory of the Community*" but outside of the VAT rules.

46. The importation of goods for the purpose of the PVD is defined at Article 30 PVD as: "*the entry into the Community of goods which are not in free circulation within the meaning of Article 24 of the [TFEU]*", and "*…the entry into the Community of goods which are in free circulation, coming from a third territory forming part of the customs territory of the Community*" (Article 30(2) PVD). The place of importation of goods is the Member State within whose territory the goods are located when they enter the Community (Article 60 PVD). For tax purposes goods originating in the Chanel Islands are therefore treated as "*imports"* under the PVD.

47. Article 131 PVD stated that the exemptions provided for in the directive were to be applied "*… in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse*."

48. Article 143 PVD, concerning "*Exemption on Importations*", imposed obligations on Member States to exempt certain transactions including in Article 143(b) on "*…the*

final importation of goods governed by Council Directives 69/169/EEC, 83/181/EEC and 2006/79/EC…". Article 145(1) imposed a duty on the Commission "*as soon as possible*" to present to the Council proposals designed to delimit the scope of the exemptions provided for in Articles 143 and 144 and to lay down the detailed rules for their implementation.

EU VAT legislation: The Exemptions Directive

49. The Exemptions Directive was implemented with effect from 30th November 2009. As foreshadowed in Article 145(1) PVD, it determined the scope of Article 143(b) PVD as regards exemption from VAT on the final importation of certain goods. It sought to codify the various amendments to Directive 83/181/EEC. Recital 2 explained that the duty to exempt imports was subject to the need to prevent, inter alia, abuse:

> "…Member States are, without prejudice to other Community provisions and under conditions which they shall lay down for the purpose, inter alia, of preventing any possible evasion, avoidance or abuse, to exempt final importation of goods qualifying for exemption from customs duties other than as provided for in the Common Customs Tariff. "

50. Recital 3 states:

> "Pursuant to Article 145 of Directive 2006/112/EC [the PVD], the Commission is required to submit to the Council proposals designed to lay down Community tax rules clarifying the scope of the exemptions referred to in Articles 143 and 144 of that Directive and detailed rules for their implementation."

51. Recital 4 explains that VAT and customs duties as applied to imports have different objectives and legal structures:

> "While it is deemed desirable to achieve the greatest possible degree of uniformity between the system for customs duties and that for value added tax, account should be taken, nevertheless, in applying the latter system, of the differences as regards objective and structure between customs duties and value added tax."

52. As to competition, Recital 5 states:

> "Separate arrangements for value added tax should be laid down for imported goods to the extent necessary to comply with the objectives of tax harmonisation. The exemptions on importation can be granted only on condition that they are not liable to affect the conditions of competition on the market."

53. Article 1 provides:

> "The scope of the exemptions from value added tax (hereinafter VAT) referred to in Article 143(b) and (c) of Directive 2006/112/EC and the rules for their implementation, referred to

> in Article 145 of that Directive, shall be defined by this Directive.
>
> In accordance with Article 131 and Article 143(b) and (c) of Directive 2006/112/EC, the Member States shall apply the exemptions laid down in this Directive under the conditions fixed by them in order to ensure that such exemptions are correctly and simply applied and to prevent any evasion, avoidance or abuses."

54. Thereafter, the directive sets out a series of exemptions covering such diverse matters as: the importation of certain categories of personal property of persons transferring their normal place of residence to the EU coming from third countries or territories; certain goods imported on the occasion of a marriage; personal property acquired by inheritance; the importation of school outfits, educational material and related household effects to be used by students and others in educational establishments; pharmaceutical products for use in international sporting events; goods imported for charitable or philanthropic purposes, etc.

55. Article 23 ("*Imports of Negligible Value*") is therefore just one category of exemption out of many. It lays down a *prima facie* duty to exempt low value imports but makes this subject to a power to exclude imports of "*mail order*" goods from the exemption. Although not express it is plain from the recitals that the power to exclude mail order from the exemption includes where there is fiscal abuse:

> "Goods of a total value not exceeding EUR 10 shall be exempt on admission. Member States may grant exemption for imported goods of a total value of more than EUR 10, but not exceeding EUR 22.
>
> However, Member States may exclude goods which have been imported on mail order from the exemption provided for in the first sentence of the first subparagraph."

The domestic law provisions on the grant and removal of LVCR

56. The 1983 Value Added Tax Act empowered HMT by order to make provision for the giving of relief from the whole or part of the tax chargeable on the importation of goods subject to conditions. Section 45 provided that any order made by the Treasury should be by statutory instrument. The UK made provision for LVCR in the Value Added Tax (Imported Goods) Relief Order 1984/746 ("*the 1984 Order*"), in force from 1st July 1984. Article 5 of the 1984 Order ("*Relief for goods of other descriptions*"), provides:

> "(1) Subject to the provisions of this Order, no tax shall be payable on the importation of goods of a description specified in any item in Schedule 2 to this Order.
>
> (2) Schedule 2 shall be interpreted in accordance with the notes therein contained, except that the descriptions of Groups in that Schedule are for ease of reference only and shall not affect the interpretation of the descriptions of items in those Groups."

57. Part 8, item 8 of Schedule 2 as originally in force, listed: "*Any consignment of goods (other than alcoholic beverages, tobacco products, perfumes or toilet waters) not exceeding £6 in value, sent by post*." This item was periodically amended increasing the value of the exemption. From 1st January 1989, Item 8 was amended to remove the words "*sent by post*". Save for amendments to value from time to time, Item 8 remained in force in that form. The amendments in value were as follows: (i) from 9th March 1987 the value increased to £7; (ii) from 1st January 1991 the value increased to £15; (iii) from 1st January 1996 the value increased to £18; and (iv) from 19th July 2011 the value decreased to £15.

58. On 17th July 2012 the Finance Act 2012 (the measure challenged in the Jersey judicial review) obtained Royal Assent. It removed LVCR from goods imported by mail order from the Channel Islands. Section 199(3) amended part 8 of Schedule 2 of the 1984 Order to add two notes in respect of Item 8. This had effect in respect of sales made on or after 1st April 2012. It provided:

> "Note 2: Item 8 does not apply in relation to any goods imported on mail order from the Channel Islands.
>
> Note 3: For the purposes of note (2)—
>
> "mail order" in relation to any goods means any transaction or series of transactions under which a seller (S) sends goods in fulfilment of an order placed remotely,
>
> "remotely" means by any means that do not involve the simultaneous physical presence of S and the person placing the order, and
>
> "seller" does not include any person acting otherwise than in a commercial or professional capacity."

59. As a result of UK exit from the EU the LVCR was removed from all other countries and territories outside the UK VAT area with effect from IP completion day (31st December 2020): Taxation (Post-transition Period) Act 2020 section 7 and Schedule 3 paragraph 18. It follows that as matters stand LVCR does not now apply to imports from any third territories.

The relationship between the Channel Islands and the EU

60. Finally, the relationship between the EU and the Channel Islands was governed by Article 355(5)(c) TFEU and Protocol 3 of the UK Accession Treaty. Article 355(5)(c) TFEU provides:

> "In addition to the provisions of Article 52 of the Treaty on European Union relating to the territorial scope of the Treaties, the following provisions shall apply:
>
> …

> 5. Notwithstanding Article 52 of the Treaty on European Union and paragraphs 1 to 4 of this Article:
>
> …
>
> (c) the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972."

61. The 1972 UK Accession Treaty provided at Protocol 3 for the Channel Islands and the Isle of Man. Protocol 3 Article 1 stated:

> "1. The Community rules on customs matters and quantitative restrictions, in particular those of the Act of Accession, shall apply to the Channel Islands and the Isle of Man under the same conditions as they apply to the United Kingdom….
>
> 2. In respect of agricultural products and products processed therefrom which are the subject of a special trade regime, the levies and other import measures laid down in Community rules and applicable by the United Kingdom shall be applied to third countries…"

62. Article 2 provided:

> "The rights enjoyed by Channel Islanders or Manx-men in the United Kingdom shall not be affected by the Act of Accession. However, such persons shall not benefit from Community provisions relating to the free movement of persons and services."

D. Issue 1: Is the bringing of the claim an abuse of process?

63. I turn now to the first issue. The judge found that even had the claim been well founded – and that tax should not have been applied – to pursue the claim would nonetheless be an abuse of process which would bring justice into disrepute and be manifestly unfair to HMT. He cited the summary of authorities in the judgment of Sir Andrew Morritt V-C in *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321 at paragraph [38]:

> "In my view these cases establish the following propositions:
>
> a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court.
>
> b) If the earlier decision is that of a court exercising a criminal jurisdiction then, because of the terms of ss. 11 to 13 Civil Evidence Act 1968, the conviction will be conclusive in the case

> of later defamation proceedings but will constitute prima facie evidence only in the case of other civil proceedings.
>
> c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings.
>
> d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."

64. The judge also cited *R v Norris* [2001] UKHL 34 where Lord Hobhouse observed at paragraph [26] that *"It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse*". He referred also to Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1 ("*Johnson v Gore Wood*") who described the test to be applied as a "*…a broad merits-based judgment*". Each case turned on its own circumstances and the determination was one of principle not the exercise of a discretion.

65. The judge identified 7 factors which led him to conclude that the proceedings were an abuse. They can be summarised as follows: (i) the Jersey judicial review was to settle the question of lawfulness in order that the provision could be enacted as part of an Act of Parliament and then acted upon by HMT, therefore the "*most appropriate parties"* (the Governments of Jersey and Guernsey), were involved; (ii) the issue in the private proceedings was the same as that in the judicial review save that JCL was seeking to reach a contrary conclusion; (iii) whilst the arguments now advanced were different to those presented before Mitting J, they were nonetheless arguments available to the parties bringing the challenge and could and should have been run then; (iv) the defendant is the same in both cases and HMT having been "*vexed*" once should not be vexed again; (v) JCL gave evidence in the Jersey judicial review (through Mr Dunningham) and it had a stake in the judicial review; (vi) to allow the claim to proceed would mean that all Channel Islands traders could (subject to limitation), reopen the question of lawfulness which would undermine the exercise undertaken in 2012 by Mitting J; and (vii) finally, HMT had operated the legislation for some years now in a way which affected all traders.

66. With respect to the judge I disagree. I start by referring to the relevant test.

67. In *Johnson v Gore Wood (ibid)* the House of Lords heard an appeal where it was said that a shareholder (Johnson) should not be permitted to bring an action when a company (in which he was the controlling shareholder) had failed to raise the point in an earlier action against the same defendant arising out of the same facts. The defendant argued that this was an abuse of process. It was contended that Johnson had abused the process of the court by bringing an action in his own name and for his own benefit when such an action could and should have been brought, if at all, as part of or at the same time as the action brought against the defendant by his company when, in substance, the

allegations and the documentary and oral evidence were the same. To permit such re-litigation duplicated costs and court time, prolonged the time before the matter was finally resolved, subjected the defendant to avoidable harassment, and amounted to a collateral attack on the outcome of the earlier action which had been settled by the defendant upon the basis that liability was not admitted.

68. A unanimous House of Lords disagreed and held that the new claim was not an abuse. Lord Bingham started his judgment by emphasising that the rule of law was conditional upon the right of access to a court*:*

> "The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court."

This did not however mean that the Courts were powerless to prevent abuse in cases where it:

> "…would…be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

69. Lord Bingham then identified salient matters to be taken into account including that "*there should be finality in litigation and that a party should not be twice vexed in the same matter*". This was reinforced by the emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. As to the test:

> "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the

> circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

70. In the present case three fundamental considerations have in my view been lost sight of.

71. First, the judge does not attach sufficient weight to the seminal importance of not barring litigants from a right of access to a Court as a corollary of the rule of law, a consideration that must colour the analysis. Lord Bingham took this as his starting point in *Johnson v Gore Wood* and it has been accorded ringing endorsement by the Supreme Court more recently in *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission and another intervening) (Nos 1 and 2)* [2017] UKSC 51 at paragraphs [66ff]. There the Court emphasised that the right of access to a court was a "*constitutional*" right, reflected in Chapter 40 of Magna Carta 1215, which was "*inherent in the rule of law*" and that when the courts heard litigation between the citizen and the state, they performed a function at the heart of democracy. In this case the judge accepted: that JCL was not a party to the Jersey judicial review and nor was it in any way in control of the parties; that at least some of the arguments now advanced were not advanced in the judicial review; and, the Jersey judicial review was litigation where "*… the most appropriate parties, being the governments of Jersey and Guernsey, were involved*." These undeniable facts do not suggest abuse. It is rare that the courts will withhold the fundamental right of access to a court to a person who is not seeking to pursue an issue that has already been litigated and lost *by them*. Where an unsuccessful litigant is seeking to relitigate the same point the constitutional position is quite different; the litigant there has had access to a court but has simply lost. To preclude multiple bites of the same cherry is not to deny a right of access to a court. But where the litigant comes to court for the first time the position is very different.

72. Secondly, JCL is alleging a *continuing* breach which if left unchecked would endorse the extraction, with judicial approval, of unlawful charges by HMT in principle in perpetuity, not only from JCL but from all other affected taxpayers (subject to limitation defences). The judge suggested that, on the hypothesis that JCL was correct in law, it was administratively unfair to impose an obligation on HMT to repay taxes unlawfully extracted. It is sometimes said that all properly made out abuse cases proceed upon the premise that an otherwise good case may be suppressed. From this it is then argued

that it is no answer to the claimant to point to the merits. Whilst the premise is true that does not mean that it is *always* irrelevant to consider the consequences of a valid claim being suppressed. This case raises an important point of law where the answer was not clear ("*acte clair*") to Mitting J (see paragraph [2] above). There was however no appeal by Jersey or the Channel Islands. In my view the judge failed to recognise that the alleged unlawfulness was a continuing one with substantial ongoing financial consequences for taxpayers. Given the breadth of the judge's reasoning, and his desire to prevents the floodgates opening on tax recovery claims, his conclusion would seem to prevent a new entrant to the market who felt that the judgment of Mitting J was wrong but who, on this basis, would be unable to seek to persuade a court that the VAT which was being applied was unlawful. Seeking to bring this ongoing state of affairs to an end is not an affront to justice nor unfair to the Revenue. It cannot be abusive to invite the courts to prevent the State from, tax-year-in and tax-year-out, repeating the same legal error.

73. Thirdly, the Judge failed to address the important difference between the objectives behind a public law judicial review, and private proceedings to vindicate a private right brought properly within limitation. The Jersey judicial review was state *v* state, public law, litigation brought at great speed to test the legality of a Bill. If the Court had found against HMT, then the Bill would not have become law. The claim was not a claim for damages, and it was not focused upon the commercial position or rights of any particular trader or exporter. In contrast the claim by JCL is based upon private law rights and seeks a compensatory remedy. It is subject to the normal six year limitation period applicable to private law claims and is in no way anchored to the highly abbreviated judicial review limitation period which can set three months as an outer limit and can lead to an otherwise good claim being refused for lack of promptitude even within the three month period. It is trite under EU law that actions brought by individuals to vindicate their rights are different in nature from other actions which, for instance, resolve rights and obligations as between Member States or between the Member States and the Community institutions. A not dissimilar argument was advanced by the Secretary of State in *Secretary of State for Works and Pensions, and the Board of the Pension Protection Fund v Hughes and others* [2021] EWCA Civ 1093 at paragraphs [137]-[160] and in particular at paragraphs [155]-[157]. There, in concurrent public and private proceedings to enforce rights under a directive, the Court of Appeal emphasised the important difference in nature between public and private law rights and the duty on courts to ensure full and effective protection to private rights.

74. Ms Simor QC, for HMT, made two broad points about the particular circumstances of this case. First, she argued that even though JCL had not formally been a party to the Jersey judicial review nonetheless because Mr Dunningham had prepared a witness statement supporting the claimants in those proceedings the test to be applied was akin to the stricter test applicable to litigants who had already "had a go". Secondly, she contended that even if it had been inappropriate for JCL to join the Jersey judicial review as an interested party it could either (a) have issued fresh private law proceedings the moment the judgment was handed down, and then submitted to summary judgment upon the basis that there was a binding authority against it, but simultaneously sought permission to appeal; or (b) have refused to pay the tax and challenged demands for payment through the tax tribunal system. With respect I again disagree.

75. First, the involvement of Mr Dunningham in the Jersey judicial review is of little if any weight. The first reason given by the judge supporting the conclusion that the proceedings were an abuse was that the judicial review was in substance a political, inter-governmental, dispute where it was the *states* that were the "*most appropriate*" parties, not a private dispute (see paragraph [65(i)] above). This recognition should have militated against a conclusion of abuse. Mr Dunningham gave evidence in the judicial review as a witness of fact supporting claims brought by Jersey and Guernsey. He did not appear as a private litigant. He had no control over the claimant governments. He was not even as close to the litigation as was the shareholder in *Johnson v Gore Wood*, who was the controller of the company which had previously litigated and settled the same matter, but whose claim was nonetheless still not held to be abusive.

76. Secondly, as to the argument that JCL should, in the light of the judgment of Mitting J, have either issued proceedings and then succumbed to summary judgment and sought permission to appeal, or refused to pay the tax and appealed to a specialist tax tribunal, both arguments operate upon the premise that it was *not* an abuse for JCL to pursue separate proceedings. The objection is at base therefore one of timing; that JCL should have moved more swiftly in pursuing a second action. In my view once it is accepted that JCL was entitled to initiate separate proceedings to challenge the tax (which it did within limitation) then it is hard to see how such second action could be an abuse even if it would have been better for JCL to have moved quickly rather than at the end of the limitation period.

77. I would allow the appeal against the finding by the judge that the bringing of the action was an abuse of process. In my judgment it is appropriate for the Court to hear the appeal upon the basis that the claim was properly pursued.

E. Issue 2: Which regime applies: Customs or tax?

Appellant's arguments

78. The second issue concerns whether the reimposition of the tax amounted to a charge having equivalent effect to a customs duty which under the directly effective rules in Article 28 and 30 TFEU was prohibited without more.

79. Mr O'Neill QC, in attractive and forceful submissions, argued that: (i) there was discrimination as between Jersey and other third territories within Article 6(1) PVD (see paragraphs [43] and [44] above); (ii) Jersey and these other Article 6(1) territories were within the same class for the purpose of comparison; (iii) the removal of the LVCR therefore led to unlawful discrimination based upon the origin of the goods as between Jersey and other Article 6(1) territories; (iv) the imposition of the charge applied *only* because imports from Jersey into the UK crossed a border; (v) the correct classification of the charge was therefore as a charge equivalent to a customs duty falling within the scope of Articles 28 and 30 TFEU; (vi) there was no basis upon which such a charge could be justified because those prohibitions were absolute; (vii) accordingly the charge was unlawful and founded a claim for damages upon ordinary principles of direct effect of EU law; (viii) in the case of unlawful discrimination the only remedy permitted under EU law was levelling up (i.e. placing the discriminated against person in the same position as those in the same category who were not discriminated against) which, in this case, meant removing the charge from JCL so that it was in the same position as

traders in other Article 6(1) territories who were tax exempt. Mr O'Neill QC referred to evidence given by Mr Dunningham, in the present proceedings, that the removal of LVCR had not eradicated roundtripping altogether since, upon the basis of Mr Dunningham's researches, various operators in the Åland Islands (also an Article 6(1) PVD territory) had sought to set up roundtripping facilities to exploit the loss of relief on trade from the Channel Islands to the UK.

Which regime?

80. Fundamental to this argument is the premise that the differentiated exercise of the power under Article 23 Exemptions Directive to remove the relief was to be reviewed not under the tax regime but under the (much stricter) customs regime in Articles 28 and 30 TFEU. The test to determine into which regime a charge falls derived from case law, set out below, focuses upon a variety of factors the most important of which are: (i) the reasons for the imposition of the charge in dispute; (ii) the nature of the system of law from which the charge emanates; and (iii) whether in its application the charge applies only to imported products and not to comparable domestic production.

81. In my judgment the legality of the exercise of the power under Article 23 Exemptions Directive must be determined under the tax regime, *not* the customs regime.

82. A leading authority upon the difference between the customs and fiscal regimes is Case 15/81 *Gaston Schul Douane Expediteur BV* [1982] ECR 1409 ("*Gaston Schul")*. In that case the company, Gaston Schul, who acted as customs forwarding agents, imported a second-hand leisure and sports boat into the Netherlands upon the instructions and on behalf of a private person residing in the Netherlands who had acquired it in France from another private person. The Netherlands revenue authority levied upon that importation VAT at the rate of 18% of the sale price. This was the normal rate applicable within the country on the sale of goods for valuable consideration. The charge was imposed in circumstances where no equivalent tax was charged on the supply of goods which were already in the Netherlands where they were supplied by a private person. The issue, therefore, for the Court was whether the imposition of what was ostensibly a discriminatory turnover tax upon the importation of goods from another Member State which were intended for sale in the Netherlands should be regarded as a charge having an equivalent effect to a customs duty prohibited under the Treaty. In paragraphs [17] – [21], the Court stated as follows:

> "17. The first question which the Gerechtshof submits is essentially whether it is compatible with Articles 12 and 13 of the Treaty to levy value-added tax on the importation of products from another Member State supplied by a private person if no such tax is levied on the supply of similar goods by a private person within the territory of the importing Member State.
>
> 18. According to established case-law of the Court the prohibition, in relations between member states, of charges having an effect equivalent to customs duties, covers any tax which is payable on or by reason of importation and which, as it applies specifically to an imported product to the exclusion of a similar domestic product, ultimately produces, by adversely

> affecting the cost price of the former product, the same effect upon the free movement of goods as a customs duty.
>
> 19. The essential characteristic of a charge having an effect equivalent to a customs duty, and the one which distinguishes it from internal taxation, is therefore that it affects only imported products as such whereas internal taxation affects both imported products and domestic products.
>
> 20. The Court has nevertheless recognized that a pecuniary charge payable on a product imported from another Member State and not on an identical or similar domestic product does not constitute a charge having equivalent effect but internal taxation within the meaning of Article 95 of the Treaty if it is part of a general system of internal dues applicable systematically to categories of products according to objective criteria applied without regard to the origin of the products.
>
> 21. It is apparent from those considerations that a tax of the kind referred to by the national court does not have the ingredients of a charge having an effect equivalent to customs duties on imports within the meaning of Articles 12 and 13 (2) of the Treaty. Such a tax is part of the system of value-added tax the structure of which, and the essential terms governing its application, have been laid down by the council in harmonizing directives. Those directives have established a uniform taxation procedure covering systematically and according to objective criteria both transactions carried out within the territory of the Member States and import transactions. It should be pointed out in particular in that respect that the common system makes imports and supplies of like goods within the territory of a member state subject to the same rate of tax. As a result the tax in question must be considered as an integral part of a general system of internal taxation for the purposes of Article 95 of the Treaty and its compatibility with Community law must be considered in the context of that article and not of that of articles 12 et seq. of the Treaty."

83. The Court thus held that, notwithstanding that the tax was imposed by virtue of the act of importation, it was, nonetheless, a part of the system of VAT applied by the Netherlands. That conclusion did not, though, imply that the tax was thereby lawful. All it meant was that the legality of the charge had to be determined under Article 95 EC (now Article 110 TFEU). Applying those provisions the Court held that the application of VAT to a product imported where no equivalent tax was levied on the supply of similar products within the Netherlands constituted internal taxation in excess of that imposed upon similar domestic products which was capable of falling within the scope of the prohibition in Article 95 EU (*ibid* paragraph [40]). The Court also held that Article 95 EC was directly effective and, thereby, created for individuals' personal rights which the national courts were bound to protect (*ibid* paragraphs [45] – [46]).

84. A close analysis of the chargeable event is required. It is irrelevant whether the charge is labelled a "*tax*" in domestic law; substance prevails over form. This is exemplified by the judgment in Case C-402/14 *Viamar Ellinike Aftokiniton Kai Genikon Epicheiriseon AE*. In that case the claimant imported new passenger vehicles into Greece which had been manufactured in the Czech Republic. The claimant paid the registration tax required under Greek law. The vehicles, however, were never sold in Greece but were re-exported to Belgium where they were sold after payment of the Belgian registration tax. The claimant sought repayment of the registration tax earlier paid in Greece. The national customs authorities refused to make the refund. The claimant appealed in proceedings arguing that the registration tax constituted a prohibited charge having equivalent effect to a customs duty. The referring court was of the provisional view that the chargeable event for the purpose of the registration tax was not the crossing of the Greek border but the first registration of vehicles in Greece and, it followed, that the registration tax was not a prohibited customs duty charged upon imports. The CJEU disagreed. It held that the ban on customs duties and equivalent charges precluded a practice whereby registration tax collected upon import of motor vehicles originating from other Member States was not refunded when the vehicle concerned was not registered in that Member State but was instead re-exported to another Member State. At paragraph [44] the Court reiterated that any pecuniary charge, whatever its designation and mode of application, which was imposed unilaterally on goods "*by virtue of the crossing of a frontier*" and which was not a customs duty in the strictest sense nonetheless constituted a prohibited charge having an equivalent effect. The Court held:

> "45. Although a registration tax such as that provided for under the national rules at issue in the main proceeding has, in principle, as its chargeable event the registration of motor vehicles in a Member State and is, accordingly, internal taxation within the meaning of Art. 110 TFEU, that ceases to be the case if it is collected and not refunded when vehicles imported from other Member States have never been registered in that Member State. In such a scenario, it is in reality collected solely by virtue of the crossing of a frontier of a Member State, thereby causing it to constitute a charge having equivalent effect to a customs duty, which is prohibited by Art. 30 TFEU."

85. Both parties to this appeal rely upon Case C-387/01 *Weigel* [2004] ECR I-5005. There the claimants were German nationals who transferred their residence to Austria. Both had hitherto been employed in Germany. Each imported a car into Austria as personal property. After moving residence, they were required to register the cars in Austria and as a result received tax assessments pursuant to the Standard Fuel Consumption Tax ("*NoVA*"). This tax was charged, *inter alia*, upon the first-time registration in the national territory of vehicles. In such cases the tax was assessed upon the fair market value of the vehicle in question. The rate was dependent upon the fuel consumption of the vehicle but was increased by a 20% surcharge where the NoVA was not included in the chargeable value for VAT purposes. The claimants were subject to the 20% surcharge and they appealed against their assessments upon the basis that the tax imposed upon them was contingent solely upon the importation of the vehicle into Austria. It was, they submitted, therefore a prohibited charge having equivalent effect to a customs duty. The Court disagreed concluding that the charge was, legitimately, a

component of the national tax system. The Court acknowledged that a pecuniary charge imposed unilaterally upon goods by reason of the fact that they crossed a border could fall within the scope of the customs prohibitions. However, such a charge would not be so characterised *if* it nonetheless formed part of a general system of internal dues applied systematically to categories of products according to objective criteria applied without regard to the origin of the products. In such a case it fell within the confines of EU tax law. On the facts, the Court was clear as to the correct classification:

> "65. In the present case, the NoVA base tax is manifestly of a fiscal nature and it is charged not by reason of the vehicle crossing the border of the Member State which established it but in view of other operative events, of which first-time registration of the vehicle in that State is one. It must therefore be regarded as part of a general system of internal dues on goods and hence examined in the light of [Article 110 TFEU]."

86. The Court then considered whether the 20% surcharge was applied in a non-discriminatory way as between imported vehicles and domestic transactions. On the facts, the Court held that the tax was incompatible with the prohibition on discriminatory taxation.

87. The appellant takes a narrower view of the case law. Mr O'Neill QC argued that charges may fall within the scope of the internal taxation rules (governed by Art 110 TFEU), but "…*only if the charge in question … relates to a general system of internal dues applied systematically and in accordance with the same criteria to domestic products and imported and exported products alike*" (Case C-163/9 *Legros* EU:C:1992:326 paragraphs [11]-[12]) and, critically, there must be "… *objective criteria applied without regard to the origin of the products*" (*Weigel* (ibid) paragraphs [64] and [83]). The 1984 Order, following HMT's amendment in 2012, did not operate "*without regard to the origin*" of imports to the UK and as "*a general system*" of taxation "*applied systematically in accordance with the same criteria*". To the contrary the 1984 Order operated deliberately and unjustifiably to discriminate between supplies made within the EU customs territory, imposing different criteria for Channel Islands imports as against imports from other Article 6(1) third territories. Therefore, the tax laws did not apply but the customs prohibitions did.

Conclusions on applicable regime

88. I cannot accept this analysis. In my view it is plain that the tax rules apply. I can summarise my reasons for this shortly.

89. First, was the removal of LVCR an act which was part of a tax system? As to this both the grant of the exemption and the power granted to Member States to remove the charge are expressly mandated under the Exemptions Directive, which is undeniably a tax law.

90. Secondly, what was the reason for the removal of the relief and the imposition of the charge? In this case the relief was removed because of concerns about tax abuse – "roundtripping". The appellant does not argue that roundtripping was not an abuse of the system or that, otherwise, HMT was not entitled to exercise the power under Article

23 Exemptions Directive to remove relief from mail order for that reason. The reason for removal of the relief was a tax reason, not a customs reason.

91. Thirdly, what is the nature of the charge? Here the charge is to VAT which is a recognised turnover tax applied across the EU. It is true that it applies to imports. But, as case law makes clear, the fact that a product is imported, and thereby crosses a frontier, is only one amongst a number of other considerations which determine which regime governs the charge in question and the same applies even where there is differentiation as between the treatment of comparable products. Neither point is dispositive of whether the charge is a customs duty or a tax. That was expressly made clear by the CJEU in *Gaston Schul* paragraphs [19]-[21] (see paragraph [82] above) which held that *even where* a tax charge is differentiated by reference to origin, it would *still* be subject to the tax regime where it was "*part*" of a general system of dues applicable without reference to origin.

92. Fourthly, it is also true that there is discrimination or differentiation *as between* Article 6(1) territories. However, imposing tax on imports from Jersey places retailers in Jersey and in the UK on (more or less) the same footing. The system of tax is not intrinsically based upon differentiation according to origin. All have to pay a charge which is part of a turnover tax regime. This is not a case where Jersey has been singled out for a tax treatment not applied to competitors within the EU. This also suggests that the motivation behind the removal of the relief is for a tax reason not a customs reason.

93. For these reasons, the relevant regime which governs the present case is the tax regime, not the customs regime. This then brings me to the next question which is whether the removal of the LVCR relief was contrary to rules within the field of tax.

F. Issue 3: Was removal of the LVCR a breach of the general principles of equality, fiscal neutrality or proportionality?

Appellant's arguments

94. The Appellant argues that: (i) the exercise by a Member State of an EU power is always subject to superior treaty rules and general principles of EU law; (ii) the principles of non-discrimination, fiscal equality and proportionality are all acknowledged general principles of EU law capable of conferring rights upon individuals justiciable in the courts and which apply to the present facts; (iii) these principles have been breached in the present case by the domestic legislation withdrawing the relief; (iv) the superior nature of the principles relied upon and the manifest nature of the breach are such that they sound as a *Francovich* damages claim (the conditions of which are set out at paragraphs [14] – [19] above); (v) where there is a breach of the principle of equality (which includes fiscal neutrality) then the claimant is entitled to relief upon a levelling-up basis i.e. the claimant is entitled to be placed in a position comparable to those who are in a similar position which, in this case, is all other Article 6(1) territories in respect of whom the relief was not withdrawn.

95. On this appeal only points (i) and (ii) are in issue. If the Court finds for the appellant on those points, then the claim will proceed to trial at which all other points will be determined.

96. The questions which therefore fall for determination are: (i) are any of the rights relied upon capable in principle of conferring rights justiciable in the domestic courts; and (ii), if so are they capable of vesting at the behest of JCL in respect of direct imports from Jersey into the UK?

The justiciability of general principles

97. By the end of the appeal there was little disagreement between the parties as to the central principles. It is common ground that Member States must respect general principles when they apply EU law in the national context: e.g. C-5/88 *Wachauf* EU:C:1989:321. It is also common ground that general principles *are* capable of conferring justiciable rights even absent direct effect. It is also common ground that the principles of equality, fiscal neutrality and proportionality are, according to case law, capable of sounding in private law actions: e.g. Case T-103/12 *T & L Sugars Ltd* EU:T:2016:682 at paragraphs [62]-[63],[68] in relation to equal treatment and proportionality; and Case C-309/06 *M&S v Commissioners of Customs and Excise* [2008] ECR I-02283 at paragraphs [29]-[36] in relation to fiscal neutrality. It suffices to refer to one authority. In the context of measures implementing the Sixth VAT Directive, in Case C-174/08 *NCC Construction Danmark* [2009] ECR I-10567, the Court stated:

> "44. …[T]he general principle of equal treatment, of which the principle of fiscal neutrality is a particular expression at the level of secondary Community law and in the specific area of taxation, requires similar situations not to be treated differently unless differentiation is objectively justified. It requires, in particular, that different types of economic operators in comparable situations be treated in the same way in order to avoid any distortion of competition within the internal market…
>
> 45. In implementing the provisions of the Sixth Directive, the Member States were obliged to take into account the principle of equal treatment, like the other general principles of Community law, which, having constitutional status, bind those Member States when they take action in the field of Community law. …"

98. It is also not in dispute that case law under Articles 268 and 340 TFEU, which concerns claims for non-contractual damages against Community institutions, can guide the approach to *Francovich* claims in the domestic courts against Member States. This is because the Court has aligned the principles governing damages claims brought by individuals against either the Community Institutions or the Member States: see e.g. Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, EU:C:2000:361 at paragraphs [39]-[41]. This alignment explains why a breach simpliciter will not suffice to found a claim for *Francovich* damages; the law requires that the breach meet a higher threshold than mere breach before an award of damages will follow. In Case C-282/05P *Holcim (Deutschland) v Commission* EU:C:2007:226 at paragraph [47] the Court articulated the test governing claims against Community institutions: "… *there must be a sufficiently serious breach of a rule of law intended to confer rights on individuals*…". This reflects the test laid down by the Court in *Brasserie du Pêcheur* (*ibid*) at paragraph [51] (set out at paragraph [18] above).

99. Finally, confirmation that general principles are justiciable is found in Schedule 1 paragraph 3 EU(W)A 2018 which assumes that general principles are capable of founding private law claims:

> "(1) There is no right of action in domestic law on or after IP completion day based on a failure to comply with any of the general principles of EU law.
>
> (2) No court or tribunal or other public authority may, on or after IP completion day — (a) disapply or quash any enactment or other rule of law, or (b) quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law."

100. It follows that the principles pleaded in the Particulars of Claim and relied upon by JCL are capable of giving rise to *Francovich* damages claims in an appropriate case.

When can general principles be invoked?

101. I turn now to the crux of the substantive disagreement between the parties which is whether the general principles relied upon can be invoked by JCL given that the tax applies to imports from Jersey which is not a Member State of the EU and is not within the tax territory of the EU.

102. Mr O'Neill QC argues that such facts are beside the point because it is sufficient that JCL is based in Jersey which is within the EU customs union. Ms Simor QC, for HMT, says that this is irrelevant and that because Jersey is not within the tax territory of the EU imports from Jersey are, in this respect, no different to imports from any other third country such as Taiwan or Japan. EU general principles do not apply to discrimination against direct imports from outside of the EU. She argues that this does not create a jurisprudential void since in respect of trade between the EU and third countries there is always the GATT and other governing instruments such as free trade agreements.

103. As to this it is clear that as between direct imports from third countries there is no right for a such claimants to rely upon EU general principles. There is a significant body of case law on this. An early judgment which sets the law out clearly is Case 52/81 *Offene Handelsgesellschaft in Firma Werner Faust v the Commission* [1982] ECR I-3745. Faust, an importer of mushrooms from Taiwan, brought an action seeking compensation from the Community for damage claimed to have been sustained as a result of Commission regulations adopting protective measures relating to imports into the Community of preserved mushrooms from non-member countries. The effect of the Community measures was to discriminate against Taiwanese imports into the EU relative to imports from other third states. The Court rejected the submission that the principle of non-discrimination applied to direct imports from outside of the EU:

> "25. Although Taiwan certainly appears to have been treated by the Commission less favourably than certain non-member countries, it should be remembered that there exists in the Treaty no general provision obliging the Community, in its external relations, to accord to non-member countries equal treatment in all respects. It is thus not necessary to examine on what basis

> Faust might seek to rely upon the prohibition of discrimination between producers or consumers within the Community contained in Article 40 of the treaty. It need merely be observed that if different treatment of non-member countries is compatible with Community law, different treatment accorded to traders within the Community must also be regarded as compatible with Community law, where that different treatment is merely an automatic consequence of the different treatment accorded to non-member countries with which such traders have entered into commercial relations."

104. Advocate General Slynn (ibid page [3779]) put the proposition in stark terms in his Opinion:

> "In the ordinary way, the respective positions of importers who have dealings with third countries which accept a limitation on their exports and those who do not, are not the same or comparable. Any different treatment is objectively justifiable by reason of the threat to the market from third countries which have not agreed to limit their exports. Even where the failure to agree a limitation of exports is the result of arbitrary discrimination on the part of the Commission, it still does not constitute unlawful discrimination as between importers, because the Commission is under no legal duty to accord equal treatment to third countries. There are, of course, many cases where the court has held that the rules regarding equality of treatment also apply to covert or indirect discrimination. These have, in general, concerned acts whose effects are felt solely within the Community. The result of transposing these cases to the different situation of the Community's trade relations with third countries would be to bind the Community to give equal treatment to third countries as a general rule because the effects of any different treatment would, in the nature of things, be felt by some class of persons within the Community, whether importers, other operators or consumers, and could always be said on this hypothesis to constitute covert or indirect discrimination between them. None of the authorities cited supports the view that the mere effect on operators of treatment meted out to third countries which is different but not unlawful itself constitutes without more unlawful discrimination."

105. A significant number of other cases express the same position. I mention but a few. In Joined Cases C-228/90 to C-234/90, C-339/90 and C-353/90 *Simba and Other* [1992] ECR I-3743, questions arose in proceedings between importers of bananas and the Italian Finance Ministry concerning the compatibility with Article 95 EC of a national consumption tax on fresh bananas in so far as the tax was applied to fresh bananas imported directly from non-member countries. The importers argued that Community law precluded the levying of the tax in question on consignments of fresh bananas which were in the course of being imported directly from non-member countries either within the dollar area or parties to the Third ACP-EEC Convention. At paragraph [14]

the Court cited its earlier case law (Case 148/77 *Hansen v Hauptzollamt Flensburg* [1978] ECR 1787, paragraph [22]) to the effect that Article 95 was applicable only to products imported from other Member States and it followed did *not* apply to products imported directly from non-member States. In Case C-130/92 *OTO SpA v Ministero delle Finanze* [1994] ECR I-3281, the question arose in a reference between OTO SpA and the Finance Ministry in respect of the discriminatory basis of assessment of a national consumption tax payable on imports of goods from Japan. The case concerned charges on audio-visual and photo-optical products introduced in Italy with effect from 1st January 1983 which was imposed both on products manufactured in Italy and on imported products. However, so far as products manufactured in Italy were concerned the tax was assessed upon the basis of the ex-works value whereas in the case of imports tax was based upon the customs value of the goods free at the national frontier. The tax was therefore discriminatory. The CJEU confirmed that the charge was to be assessed under the fiscal rules not the customs rules (*ibid* paragraphs [12] and [13]). OTO SpA argued that within the confines of the tax regime the discrimination violated the principle of fiscal neutrality. The Court disagreed. Article 95 (now 110 TFEU) was concerned with free movement of goods as between Member States in normal conditions of competition. It did not apply to the treatment of goods being directly imported into the EU from non-Member States. Those goods became the beneficiary of free movement rights only once they had entered into free circulation which was after the point at which they had complied with import formalities. The Court stated:

> "16. According to a consistent line of cases, the aim of Article 95 of the Treaty is to ensure free movement of goods between the Member States in normal conditions of competition by the elimination of all forms of protection which result from the application of internal taxation which discriminates against products from other Member States. The Court has made it clear, as regards the free movement of goods within the Community, that products which are in free circulation are definitively and wholly assimilated to products originating in Member States. It follows that Article 95 covers all products from Member States, including products originating in non-member countries which are in free circulation in the Member States ...
>
> 18. The Court has also consistently held that Article 95 applies only to products from the Member States and, where appropriate, to goods originating in non-member countries which are in free circulation in the Member States. It follows that the provision is not applicable to products imported directly from non-member countries ...
>
> 19. Accordingly, a tax such as that which is the subject matter of the main proceedings does not come within the scope of Article 95 of the Treaty, insofar as it is applicable to goods imported directly from non-member countries."

106. Mr Justice Mitting in the Jersey judicial review, having reviewed some of the above authorities, held (in paragraphs [75] and [76]) that there was "… *no requirement that the United Kingdom should treat one non-EU territory in the same manner for the purposes of LVCR as any other, or as every other*." He added: "*There is no principle*

of EU law which requires the United Kingdom to treat the importation of low value goods on mail order from the Channel Islands in the same manner as similar goods from any other non-EU territory". He also considered that this logic extended to the exercise of the power under Article 23 Exemption Directive: "*If there is nothing in the basis of EU law to prohibit a selective disapplication, there is no reason to construe the words [of the Exemptions Directive] narrowly so as to achieve that result*…".

107. Mr O'Neill QC seeks to distinguish these cases upon the basis (i) that the case law on Article 95EC (now Article 110 TFEU) is not readily applicable to the exercise of the power under Article 23 Exemption Directive and (ii) that the Jersey judicial review did not address the *sui generis* nature of the Channel Islands as an Article 6(1) territory. With respect I disagree.

108. First, the premise underlying the authorities on the geographical limitations on the principle of non-discrimination under Article 110 TFEU (and its predecessor) derives from the nature of general principles under which the prohibition on unequal treatment is confined to the single market and to the club that is the EU. Once an imported product has entered into free circulation in the EU, a trader is then able to invoke the general principles if that product is subjected to discrimination as it crosses intra-EU borders. But it is not a principle designed to protect products imported direct from third countries into a single Member State which is the stage before entry into free circulation. These limits flow from the general principles themselves, and they are as relevant to the exercise of a power under Article 23 Exemption Directive as they are to Article 110 TFEU. Mitting J was in my view correct to so conclude.

109. Secondly, the classification of the Channel Islands as an Article 6(1) PVD territory does not assist. That article lists territories to which the tax rules do not apply (see paragraph [44] above). Once it has been determined that this is a tax case, and not a customs case, then Article 6(1) makes clear that the Channel Islands cannot in any way be equated with the Member States and they fall squarely into the category of non-member states to whom the protection of the general principles do not apply.

110. Finally, Mr O'Neill QC drew to our attention a series of authorities which he argued supported the proposition that discrimination in the application of taxation could violate general principles of law: Case C-174/08 *NCC Construction Danmark* [2009] ECR I-10567; Case T-103/12 *T & L Sugars Ltd* (ibid) at paragraphs [62]-[63], [68]; and Case C-129/19 *Presidenza del Consiglio dei Ministri v BV* EU:C:2020:566 (Grand Chamber, 16th July 2020). The difficulty with these authorities is that they are about *intra*-EU trade and do not address the issue which arises in this case, namely the ability of a Member State to discriminate as between or against direct imports from outside of the EU. They are not therefore on point whereas the authorities referred to above, and relied upon by HMT, are directly on point.

Proportionality

111. Finally, the conclusions set out above as to the geographical scope of application of the general principles applies equally to proportionality. In the Particulars of Claim the proportionality case is set out only in outline. JCL does not challenge the objective behind the removal of the relief, namely the eradication of the risk of tax abuse. Instead, it argues that the removal was disproportionate to the achievement of that (legitimate) objective. This is because: (i) those companies and individuals against whom the

removal was targeted could simply re-establish themselves and/or continue their business from another location within the EU customs territory other than the Channel Islands; and/or (ii) the removal was unnecessary since there were less extreme solutions that could have been adopted to secure the attainment of the same objective which could have involved a less restrictive outcome, for instance instead of applying LCVR to all goods HMT could have adopted an approach whereby it only removed the relief from those classes of goods which were exploiting or abusing the tax system, mainly CDs and DVDs. Be all of this as it may, the principle of proportionality does not apply to direct imports into an EU Member State from territories outside of the EU tax regime.

G. Conclusion

112. JCL was not a company engaged in roundtripping. It was unfortunately caught in the crossfire between HMT and those who did engage in the practice. However, for the reasons I have given I would dismiss the appeal.

Lord Justice Arnold:

113. I agree.

Lord Justice Snowden:

114. I also agree.