Neutral Citation Number: [2020] EWHC 3433 (QB)

Claim No: E90MA082

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2020

Before :

MR JUSTICE FREEDMAN

- -

Between :

MR DANIEL JAMES COLLEY

Claimant

- and –

(1) MR. DYLAN SHUKER
(2) UK INSURANCE LIMITED
(3) MOTOR INSURERS BUREAU
(4) SECRETARY OF STATE FOR TRANSPORT

Defendant

- -
- -

MR. PHILIP MOSER QC and **MR. PHILIP MEAD** (instructed by **Irwin Mitchell LLP**) for the **CLAIMANT**
MS. MARIE LOUISE KINSLER QC and MR. RICHARD VINEY (instructed by **Weightmans**) for the **THIRD DEFENDANT**

Hearing dates: 3rd and 4th November 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 14 November 2020 at 3pm.

MR JUSTICE FREEDMAN:

I Contents

II Introduction

1. This is a claim arising out of a road traffic accident in which Mr Daniel James Colley ("the Claimant") suffered catastrophic life changing injuries. A Vauxhall Corsa vehicle registered number BJ51 AUE ("the Vehicle") was being driven by its registered owner, Mr Dylan Shuker ("the First Defendant"). The Vehicle was insured by the father of the First Defendant with an insurer, the Second Defendant ("the Insurer"). It was not disclosed that the First Defendant was the registered keeper, and he was not a named driver and was an uninsured driver. The Insurer has avoided liability for material misrepresentation. On a strike out application, the Claimant's claim against the Insurer was dismissed by an order of 5 March 2019 by Mrs Justice O'Farrell whose judgment was reported at [2020] RTR 13.

2. The Court has heard a trial of preliminary issues against the Third Defendant, the Motor Insurers' Bureau ("the MIB"). The preliminary issues raise questions of EU law, which turn on the proper construction of the EU Motor Insurance Directives. At issue are two points: firstly, whether the MIB is liable to indemnify the Claimant in the circumstances of this case (**Issue 1**); secondly, whether the MIB has a defence under Article 10(2) of Directive 2009/103/EC ("**the Motor Insurance Directive**" or "**the 2009 Directive**") (**Issue 2**).

III The facts

3. The preliminary issues proceed on the basis of agreed facts contained in an agreed Statement of Facts. This has rendered unnecessary the calling of any evidence. The Claimant was a passenger in the Vehicle and was the victim of an accident caused by the Vehicle which was being driven by the First Defendant. On 27 March 2015 at about 2.20am, the Vehicle was being driven by the First Defendant on a public road known as Jiggers Bank, near Telford in Shropshire.

4. The Claimant was aged 19 at the time of the accident. As a result of the accident, which was caused by the negligence of the First Defendant, the Claimant suffered very serious injuries including an incomplete spinal-cord injury at level C4 and he is an incomplete tetraplegic.

5. At Shrewsbury Crown Court, on 22 March 2016, the First Defendant was convicted of causing serious injury by dangerous driving.

6. The insurance position was described at para. 5 of the agreed Statement of Facts as follows:

> "On 20 May 2014, the father of the First Defendant, Mr Nicholas Shuker, applied to UK Insurance Limited (the Second Defendant) ["the Insurer"] for motor insurance in respect of the Vehicle, which application was accepted and a policy was issued and incepted on 21 May 2014 under policy number 19862770 ("the Policy"). The Policy named Mr N Shuker as the Policyholder and Main Driver, and A Hutchinson (Partner) as the Other Driver. The Policy did not provide cover for the use of the Vehicle by the First Defendant, who was an uninsured driver".

7. The knowledge of the Claimant about the insurance position was described at para. 6 of the agreed Statement of Facts:

> "At all material times the Claimant knew that the First Defendant did not have a valid driving licence and was not insured to drive the Vehicle".

8. By proceedings commenced on 3 May 2016 in the High Court, Queen's Bench Division, Birmingham District Registry, under Claim No: C90BM129, the Insurer sought a declaration pursuant to section 152(2) of the Road Traffic Act 1988 ("the RTA"), as against the Policyholder, Mr Nicholas Shuker, that the Insurer was entitled to avoid the Policy on the grounds of material misrepresentation. The particulars of misrepresentation were that Mr Nicholas Shuker had stated wrongly that he was the registered keeper of the Vehicle, and that the only drivers of the Vehicle would be himself and his partner.

9. On 27 June 2016, the Court made an Order in the Birmingham District Registry granting the Insurer the declaration of avoidance in the terms sought, pursuant to section 152(2) of the 1988 Act, as amended by section 11 of the Consumer Insurance (Disclosure and Representations Act 2012). The effect of that declaration was to exempt the Insurer from the obligation under section 151 to make payment to the Claimant in respect of the judgment he obtained against the First Defendant.

10. By a claim form dated 23 March 2018, the Claimant sought compensation against the First Defendant. On 10 June 2020, judgment was entered against the First Defendant, subject to issues of contributory negligence.

11. In addition to this, the Claimant sought compensation from the Insurer, who had provided the insurance policy in respect of the Vehicle. As above noted, this claim was struck out on by an order of 5 March 2019. The judgment of Mrs Justice O'Farrell will be considered in greater detail below.

12. For the moment, it suffices to say this. Despite the making of the declaration under section 152(2) of the Road Traffic Act 1988, it was submitted that this section was incompatible with the EU law Directive 2009/103 which required Member States to make provision for compensation to third party victims of motor vehicle accidents. The words of section 152(2) of the Road Traffic Act 1988 were clear and provided the Insurer with a complete defence and did not admit the exercise of any discretion. The consequence was that the UK Government had been rendered unable to fulfil its duty to make provision for compensation to third party victims of motor vehicle accident where a declaration was obtained under section 152(2). Any incompatibility between the section and the EU Directive could not be resolved by a purposive interpretation, giving rise to a direct claim to damages of the Claimant against it. The claim against the Insurer was not a direct claim, but a derivative claim under section 151 to satisfy any judgment obtained against the First Defendant. However, the Claimant did not have a directly enforceable right to claim damages against the Insurer, a private entity and not a direct emanation of a Member State. There was therefore no power of the Court to disapply section 152(2).

13. The claim against the MIB can be summarised at this stage as follows. By contrast with the position with his claim against the Insurer, it was submitted on behalf of the Claimant that the MIB is an emanation of the State. Further, it was submitted that the UK government had conferred on the MIB the task under the EU Directive to remedy its failure to implement its obligation under the EU Directive consequent upon the above incompatibility. Unlike in the case of the Insurer where there could be no direct claim, there was no impediment to the Claimant having directly effective rights against the MIB in the circumstances of this case. The precise nature of the claim against the MIB and of MIB's defence to the claim will be set out in more detail below after setting out the nature of the structure of the EU Directive and the UK legislative position.

14. On 28 March 2010, the claim was amended to add as Fourth Defendant, the Secretary of State for Transport ('the Secretary of State'). The claim against the Secretary of State is a "*Francovich*" claim (based on the case of *Francovich v Italian Republic* [1995] ICR 722), namely that if the Claimant has no remedy against the Second

Defendant and the MIB, the Secretary of State has failed to implement the 2009 Directive and is therefore in breach of statutory duty under the European Communities Act 1972 which was a sufficiently serious breach of EU law to sound in damages. By para. 4 of an order made on 10 June 2020, the claim against the Secretary of State has been stayed pending the determination of the preliminary issue. The Secretary of State denies the claim for a number of reasons: in particular, he contends any breach was not sufficiently serious to give rise to a *Francovich* liability.

IV Application of EU law and the provisions of the 2009 Directive

15. Under section 2(1) of the European Communities Act 1972 and the EU law principle of direct effect, the Claimant is entitled to rely on certain enforceable European rights and to enforce those rights against an emanation of the State, in the present case the MIB. The Claimant relies in this regard upon the doctrine of direct effect under EU law, which provides that a claimant can rely directly upon the terms of a directive (such as the 2009 Directive) against an emanation of the State (which in the case of the 2009 Directive includes the MIB). This is where such terms appear, so far as their subject matter is concerned, to be unconditional and sufficiently precise: Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53 "Becker"). Under the principle in *Becker* at para. 18, it was stated that "It is clear from that provision that states to which a directive is addressed are under an obligation **to achieve a result**, which must be fulfilled before the expiry of the period laid down by the directive itself (emphasis added)."

16. The 2009 Directive being an instrument of EU law, it also falls to be interpreted according to European law and not national law. In this way, it is intended that the Directives are to be interpreted uniformly, autonomously and in context so as to achieve its objectives: see C-283/81 *CILFIT Srl v Ministry of Health* [1982] ECR 3415 paras. 18-20. In the context of the Motor Insurance Directives, the CJEU stated in C-162/13 *Vnuk v Zavarovalnica Triglav DD* [2016] RTR 10 at para. 42:

> *"According to the court's settled case law, the need for a uniform application of European Union law and the principle of equality require the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope normally to be given an independent and uniform interpretation throughout the European Union; that interpretation must take into account not only its wording but also its context and the objectives pursued by the rules of which it is part"*

17. The Directives are also to be interpreted purposively. In that regard it is the responsibility of the national courts to provide the legal protection which individuals derive from rules of EU law and to ensure that the objectives of the legislation are met and that those rules are fully effective; see: Joined Cases C-397/01 to 403/01 *Pfeiffer and others* [2004] ECR I-8835 at paras. 110-119.

18. As emphasised by the CJEU and the UK Courts one of the principal objectives of the 2009 Directive is to protect victims of accidents caused by motor vehicles, and to guarantee compensation for such victims, see: Case C-129/94 *Bernáldez* [1996] ECR I-1829 at paras. 13 and 18*;* Case C-162/13 *Vnuk* [2016] RTR 10 at paras. 49-50;[1] and *Lewis*, e.g. at para. 72.

V Articles 3, 10 and 12 of the 2009 Directive

19. The particular rights relied upon by the Claimant are those contained in Articles 3, 10 and 12 of the 2009 Directive. The preliminary issues turn on the proper interpretation of Article 3, 10 and 12 of the Codified Directive. The key parts of those Articles are set out below: the equivalent Article in the earlier individual Directives is noted where relevant.

20. Article 3 introduces the requirement for compulsory liability insurance:

> *"Article 3*
>
> **Compulsory insurance of vehicles**
>
> ***Each Member State shall, subject to Article 5, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance.***
>
> *The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of the measures referred to in the first paragraph.*
>
> *Each Member State shall take all appropriate measures to ensure that the contract of insurance also covers: (a) according to the law in force in other Member States, any loss or injury which is caused in the territory of those States*
>
> *…*
>
> *The insurance referred to in the first paragraph shall cover compulsorily both damage to property and personal injuries."* (**Article 3, First Directive**)

21. Article 10(1) of the 2009 Directive sets out the duty to establish a body responsible for compensating injured victims:

> *"Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for*

[1] And in the A-G's Opinion at paras. 37 and 43, referring to the Court's clear inclination to interpret broadly and generously provisions which may be favourable to victims

> *which the insurance obligation provided for in Article 3 has not been satisfied."* (emphasis added) (**Article 1(4), Second Directive**)

22. It is clear that the guarantee body's task under Article 10 is to provide compensation for personal injuries caused by a vehicle in the two cases identified, namely where damage is caused by: (a) an unidentified vehicle; or (b) a vehicle for which the insurance obligation in Article 3 has not been satisfied.

23. There is a controversy which will be discussed in detail below as to the meaning of the second of these cases. The first case is an unidentified vehicle. The second category is a vehicle for which the insurance obligation in Article 3 has not been satisfied. The MIB says that this is limited to a vehicle in respect of which no insurance policy has been taken out. The Claimant says that it also applies to a vehicle where an insurance obligation has been taken out, but where the obligation has not been satisfied because under the national law, the insurer has been allowed terms which did not implement the full extent of the compulsory insurance required under the Directive.

24. **Article 10(2)** permits Member States to restrict the scope of the body's liability in respect of a claim by an injured passenger who entered the vehicle knowing there was no insurance:

> *"Member States may, however, exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured".* (**Article 1(4), Second Directive**)

25. As quoted from the Statement of Facts, it is agreed in this case that the Claimant entered the Vehicle knowing the First Defendant did not hold a driver's licence and was not insured to drive the Vehicle.

26. **Article 12(1)** further defines the scope of the obligation under Article 3 by expressly providing that it covers liability to certain categories of person including all passengers:

> *"Without prejudice to the second sub-paragraph of Article 13(1), the insurance referred to in Article 3 shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle".*

27. **Article 13(1)** defines how Member States must take steps to ensure that three specific kinds of exclusion clauses are deemed to be void:

> *"Each Member State shall take all appropriate measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3 shall be deemed to be void in respect of claims by third parties who have been victims of an accident where that statutory provision or contractual clause excludes from insurance the use or driving of vehicles by (a) persons who do not have express or implied authorisation to do so; (b) persons who do not hold a licence permitting them to drive the vehicle concerned; (c) persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned."*
>
> *However, the provision or clause referred to in point (a) of the first sub-paragraph may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen.*
>
> *Member States shall have the option — in the case of accidents occurring on their territory — of not applying the provision in the first sub-paragraph if and in so far as the victim may obtain compensation for the damage suffered from a social security body.*
>
> *2. In the case of vehicles stolen or obtained by violence, Member States may provide that the body specified in Article 10(1) is to pay compensation instead of the insurer under the conditions set out in paragraph 1 of this Article. Where the vehicle is normally based in another Member State, that body can make no claim against any body in that Member State.*
>
> *Member States which, in the case of vehicles stolen or obtained by violence, provide that the body referred to in Article 10(1) is to pay compensation may fix in respect of damage to property an excess of not more than EUR 250 to be borne by the victim.*
>
> *3. Member States shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy which excludes a passenger from such cover on the basis that he knew or should have known that the driver of the vehicle was under the influence of alcohol or of any other intoxicating agent at the time of an accident, shall be deemed to be void in respect of the claims of such passenger.*

28. **Recital 14** states that the Article 10 body's liability is not absolute: "Member States should be given the possibility of applying certain limited exclusions as regards the

payment of compensation by that body…". The MIB says that one such exclusion is Article 10(2).

29. Each of Articles 3, 10 and 12 of the 2009 Directive have been found to have direct effect by binding decisions of the Court of Justice of the European Union and the Court of Appeal: see *Farrell v Whitty (No 1)* [2007] ECR I-3067 at para. 38, where the CJEU held that the predecessor of what is now Article 12(1) has direct effect. This was followed and applied in *Lewis v Tindale & ors [2019] 1 WLR 6298 ("Lewis")* at paras. 29 and 61-66. The direct effect is only on the Member State and an emanation of the State. The CJEU in *Farrell v Whitty (No.2)* at para. 38 and following stated:

> "38 Therefore, the task that a compensation body such as MIBI is required by a Member State to perform, a task that contributes to the general objective of victim protection pursued by the EU legislation relating to compulsory motor vehicle liability insurance, must be regarded as a task in the public interest that is inherent, in this case, in the obligation imposed on the Member States by Article 1(4) of the Second Directive.
>
> 39 In that regard, it must be borne in mind that, in case of damage to property or personal injuries caused by a motor vehicle for which the insurance obligation provided for in Article 3(1) of the First Directive has not been satisfied, the Court has held that the intervention of such a body is designed to remedy the failure of a Member State to fulfil its obligation to ensure that civil liability in respect to the use of motor vehicles normally based in its territory is covered by insurance (see, to that effect, *Csonka* at paragraph 31).
>
> …
>
> 41 The provisions of a directive that are unconditional and sufficiently precise may consequently be relied upon against an organisation such as the MIBI."

30. The 2009 Directive has no horizontal effect in respect of a private individual or other entity: see *Smith v Meade* C-122/17 (which was quoted and followed by O'Farrell J in this case against the Insurer at para. 36 of her judgment). The CJEU held as follows:

> "[45] A national court is obliged to set aside a provision of national law that is contrary to a directive only where that directive is relied on against a Member State, the organs of its administration, such as decentralised authorities, or organisations or bodies which are subject to the authority or control of the State or which have been required by a Member State to perform a task in the public interest and, for that purpose, possess special powers beyond those which result

> from the normal rules applicable to relations between individuals.
>
> …
>
> [49] It follows from the foregoing considerations that a national court, hearing a dispute between private persons, which finds itself unable to interpret provisions of its national law in a manner that is compatible with a directive, is not obliged, solely on the basis of EU law, to disapply the provisions of its national law which are contrary to those provisions of that directive that fulfil all the conditions required for them to produce direct effect and thereby to extend the possibility of relying on a provision of a directive that has not been transposed, or that has been incorrectly transposed, to the sphere of relationships between private persons."

VI The UK legislative framework for compulsory third-party motor insurance

31. When an insurer issues a motor insurance policy, its potential liability extends beyond the contractual liability under the policy and includes liabilities imposed by the Road Traffic Act 1988 ('RTA 1988'), in particular section 151. Of relevance to this case is the obligation under section 151(5) RTA 1988 imposed on an insurer who issued a policy to make payment to a person entitled to the benefit of a judgment any sum payable under the judgment in respect of bodily injury. Furthermore, by section 151(2)(b), section 151 applies to a judgment which would be covered by an insurance policy if that insurance policy insured "all persons".

32. Section 151 of the Road Traffic Act 1988 provides:

> "(1) This section applies where, after a policy … is issued for the purposes of this Part of this Act, a judgment to which this subsection applies is obtained.
>
> (2) Subsection (1) above applies to judgments relating to a liability with respect to any matter where liability with respect to that matter is required to be covered by a policy of insurance under s.145 of this Act and either—(a) it is a liability covered by the terms of the policy … and the judgment is obtained against any person who is insured by the policy … or **(b) it is a liability, other than an excluded liability, which would be so covered if the policy insured all persons … and the judgment is obtained against any person other than one who is insured by the policy.**
>
> **…**
>
> **(5) Notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, … he must, subject to the provisions of this section,**

> **pay to the persons entitled to the benefit of the judgment— (a) as regards liability in respect of death or bodily injury, any sum payable under the judgment in respect of the liability …"** (emphasis added).

33. The operation of section 151 would have required the Insurer to satisfy the judgment the Claimant has obtained against the First Defendant in this action if it were not for a specific exception to section 151 which was provided by section 152 of the RTA 1988 at the relevant time. Section 152(2) was amended by section 11 of the Consumer Insurance (Disclosure and Representations) Act 2012 ("CI(DR)A 2012"). The CI(DR)A 2012 regulates the circumstances in which an insurer was entitled to avoid a consumer insurance policy as a result of misrepresentations made before the contract was entered into. Thus, an insurer could avoid its section 151 liabilities if it was entitled to avoid the insurance policy and obtained a declaration to that effect complying with section 152 of the RTA 1988.

34. Section 152(2) of the RTA 1988 provided:

> "… no sum is payable by an insurer under s.151 of this Act if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration—(a) that, apart from any provision contained in the policy or security, he is entitled to avoid it either under the Consumer Insurance (Disclosure and Representations) Act 2012 or, if that Act does not apply, on the ground that it was obtained—(i) by the non-disclosure of a material fact, or (ii) by a representation of fact which was false in some material particular, or (b) if he has avoided the policy under … that Act or on that ground, that he was entitled so to do apart from any provision contained in the policy …"

35. With effect from 1 November 2019, and only prospectively, section 152(2) was amended by the Motor Vehicles (Compulsory Insurance) (Miscellaneous Amendments) Regulations 2019 providing that "in subsection (2), for the words before paragraph (a) substitute "No sum is payable by an insurer under section 151 of this Act in connection with any liability **if, before the happening of the event which was the cause of the death or bodily injury or damage to property giving rise to the liability, the insurer has obtained a declaration**—" (emphasis added).

VII Failure to implement the Motor Insurance Directive

36. At para. 6(b) of its Defence to the Amended Particulars of Claim, the Secretary of State admitted that section 152(2) of the Road Traffic Act 1988 was no longer compliant with the Directive and for that reason and to that extent the Secretary of State was therefore in breach of Articles 3(1) and 13(1) of the Directive. This realisation took place as a result of a number of cases, both before the Court of Justice and in the English Courts.

37. It is only as a result of the application of section 152(2) of the 1988 Act that the Insurer was entitled to avoid and to obtain a declaration against any liability to compensate the Claimant. Thus, the Government had failed to institute in full a compulsory insurance regime.

38. The Claimant's case is that he is entitled to the protection of EU law as a passenger and victim in accordance with Articles 3 and 12(1) of the Motor Insurance Directive.

VIII Claim against Insurer

39. Against that background, the Claimant brought this case against the Insurer, which was struck out as noted above by O'Farrell J. She held against the Insurer, that under EU law Directive 2009/103 required Members States to make provision for compensation to third party victims of motor vehicle accidents. Its operation was that, save for limited exceptions, insurers should not be able to raise against such innocent victims defences based on breach or nullity for which the policyholder was responsible ([24]). The EU jurisprudence and domestic authorities supported the Claimant's contention that section 152(2) of the Road Traffic Act 1988 was, therefore, incompatible with the Directive ([28]). In *RoadPeace v Secretary of State for Transport & MIB* [2018] 1 WLR 1293 at 1316, the Secretary of State (through Counsel) accepted that sections 152(2) to (4) of the RTA 1988 were not compatible with EU law.

40. However, the words of section 152 (before they were amended) were clear and provided the Insurer with a complete defence and did not admit the exercise of any discretion. The Claimant had a real prospect of success in its claim that section 152(2) of the RTA is incompatible with the Directive. However, any incompatibility between section 152(2) and EU law could not be resolved by any permissible purposive interpretation ([34]). The claim against the Insurer was not a direct claim but a derivative claim under section 151 to satisfy any judgment obtained against the First Defendant ([40]). As the Claimant did not have a directly enforceable right to claim damages against the Insurer, the court had no obligation, or power, to disapply section 152(2) ([41]).

41. O'Farrell J concluded at para. 41(iv) as follows:

> "The claim made by the claimant is against the second defendant, a private entity, to enforce rights arising out of the Directive. It does not assert directly enforceable rights against the second defendant as an agent of a Member State. Therefore, there is no obligation on the court, or power, to disapply the domestic legislation."

42. It followed that the Insurer has a statutory defence to the claim based on section 152(2) of the Road Traffic Act as it then stood, and as it remained in respect of declarations granted up to 1 November 2019 [41(i))]. The consequence was that the direct claim against the Insurer had no real prospect of success and would therefore be struck out.

43. To the extent necessary, it was clarified in the context of the hearing that the MIB, which had been a party to the proceedings and appeared before O'Farrell J, does not contend that the decision of O'Farrell J was wrong. The claim has been made against the Insurer. It was done in an action in which the MIB was a party and in which MIB appeared and could have made submissions to the effect that the Insurer was liable. The Court resolved the matter against the Insurer, and neither was the decision challenged nor is it contended before this Court that the decision of the Court against the Insurer was wrong. Had it been so contended, it would have been necessary to consider the submissions of the Claimant as regards res judicata, issue estoppel, *Henderson v Henderson* abuse of process and the like. In the circumstances, those submissions did not arise for consideration. The importance of this is that a claim against the guarantee body is a claim of last resort and could not succeed if there was an insurer which was liable.

44. It is therefore now necessary to consider the claim against the MIB, which is made in circumstances where the claim for compensation against the Insurer has been struck out. That having been established in the above judgment, the Court made an order for the trial of preliminary issues against the MIB.

IX The preliminary issue

45. By Order of HHJ Bird dated 10 June 2020, trial of the following preliminary issues was ordered:

(1) Issue 1: whether the Claimant can rely upon Articles 3(1) and 12 of Directive 2009/103/EC to require the Third Defendant, an emanation of the state and compensation body for the purposes of Article 10, to pay compensation in the circumstances of the present case; and

(2) Issue 2: whether the Third Defendant is entitled to rely on the exclusion permitted by Article 10(2) second sub-paragraph of Directive 2009/103/EC in respect of the Claimant, in the circumstances of the present case. The second sub-paragraph states: "*Member States may, however, exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured*."

X Issue 1:
Can the Claimant rely upon Articles 3(1) and 12 of Directive 2009/103/EC to require the MIB, an emanation of the state and compensation body for the purposes of Article 10, to pay compensation in the circumstances of the present case?

46. It is broadly accepted that the MIB is an emanation of the State. In this regard, the Claimant derives assistance from the Court of Appeal case of *Lewis v Tindale & ors* [2019] 1 WLR 6298 ("*Lewis*"), especially at paras. 37 and 67-74. Mr Moser QC on behalf of the Claimant points to the pleadings in which it is pleaded that the MIB is an emanation of the State (see Statement of Facts, para. 11; paras. 17 and 20 of the Re-Amended Defence). Nonetheless, the MIB continues to deny that it is an emanation of the State "in the circumstances of this case" (para. 17 Re-Amended Defence) and in para. 18 that the MIB "has no obligation under the Directive to provide compensation where the Article 3 obligation has been satisfied." In respect of the words of Article 10 "the insurance obligation provided for in Article 3 has not been satisfied", it is necessary in each case to consider what is the relevant obligation and whether it has been satisfied. The MIB contends that it is limited to the obligation to provide compensation where there is an unidentified vehicle or an uninsured vehicle. The Claimant says that it extends also to a case where a vehicle is insured, but where the law of the Member State allows the insurer to avoid liability, thereby leaving the third party without a remedy. All of this is subject to any exclusion in the words of the Directive e.g. the second paragraph of Article 10(2) which is the subject of Issue 2.

XI The nature and history of the MIB

47. The starting point of the analysis must be consideration of the nature of the MIB. It is a company limited by guarantee, incorporated in England under the Companies Act 1929 on 14 June 1946. Its members include all insurers authorised to issue motor insurance policies in the United Kingdom. Its role in respect of accidents involving untraced or uninsured drivers comes from the first Uninsured Drivers Agreement in 1946, between the MIB and the Minister of War Transport. Since then, there have been a number of Uninsured Drivers' Agreements and Untraced Drivers' Agreements under which, in certain circumstances, the MIB compensates victims of uninsured/untraced drivers.

48. Given the date of the accident, the Uninsured Drivers Agreement 1999 is the relevant agreement in respect of this claim. Pursuant to clause 6(1)(e) of that Agreement, the MIB's obligation to satisfy compensation claims under the Agreement is excluded in circumstances where a claimant "*was voluntarily allowing himself to be carried in the vehicle…. and knew …. that …. the vehicle was being used without there being in force in relation to its use such a contract of insurance as would comply with Part VI of the [RTA 1988]*".

49. Since the implementation of the Fourth Directive (2000/26/EC of 16.05.00), the MIB has fulfilled the role of the Compensation Body required by that Directive.

XII Claimant's case of a direct claim against the MIB.

50. The Claimant puts his case by contrasting his position against the MIB with his position against the Insurer. Whereas the Insurer is a private body and so the doctrine of direct effect does not apply, Mr Moser QC submits that the position is different as regards the MIB in that (a) the MIB is an emanation of the State, (b) the UK

Government has an obligation under Article 3 to take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance, (c) the UK Government also has an obligation under Article 10 to set up a body (in this case the MIB) charged with the task of remedying the failure of the UK Government to implement the obligation under Article 3, and (d) there is no impediment to enforcement of his directly effective rights against the MIB under Issue 1 in the circumstances of this case.

51. I shall return to the way in which Ms Kinsler QC on behalf of the MIB developed this during the hearing. Before I do so, it is necessary to consider the decision in *Lewis*.

52. In *Lewis*, the MIB contended that it was not obliged to compensate the claimant pursuant to the 1999 MIB agreement because there was no requirement to have a contract of insurance under Part VI of the Road Traffic Act 1988. This was because the motor accident occurred on private land, whereas it was contended that insurance was required only in the use of a motor vehicle on a public road or other public place.

53. Despite the fact that there was no UK law obligation to insure in respect of the use of the vehicle on private land, the Court of Appeal (and the High Court) held that the United Kingdom was obliged under Article 3 of the 2009 Directive to ensure that such liability was covered by insurance. Further, this liability was directly effective against the MIB as an emanation of the state with the consequence that the MIB was liable to indemnify the claimant in respect of the injury which he had suffered in the collision.

54. At para. 37 of *Lewis*, Counsel for the MIB (Mr Hugh Mercer QC) accepted that the MIB was an emanation of the State in relation to the tasks delegated to it. In that case, the MIB argued that the task delegated to it was the "RTA Liability", i.e. only such liability as existed under the RTA itself, not the broader obligation on the State to comply with the 2009 Directive. However, the Claimant submitted that the obligation to provide insurance was owed in respect of driving on private land under the applicable law, namely EU law, even although under English law there was no such obligation.

55. The MIB's argument that its liability as an emanation of the State was restricted to its RTA liability as defined by domestic law was rejected by the Court of Appeal. The Court considered the obligation under Article 3 of the Directive [namely the obligation to take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance] was co-extensive with the obligation under Article 10 [namely the duty to establish a body with the task of providing compensation for damage caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied]: see paras. 66 and 72-74. At paras. 67-68, the Court of Appeal noted as follows:

> "[67] The distinction which Mr Mercer QC sought to draw between cases where there had been a breakdown of the system and cases, such as he categorised the present case, where there was no system at all, is a wholly artificial one which will not bear scrutiny. In both cases, in the words of the CJEU in [39] of *Farrell v Whitty (No 2)*, the Member State has failed "to fulfil its obligation to ensure that civil liability in respect to the

> use of motor vehicles…is covered by insurance". Mr Mercer QC sought to argue that because the CJEU then cited [31] of *Csonka*, this analysis was intended to be confined to cases where a system had been put in place but it had broken down. I reject that argument. [39] of *Farrell v Whitty (No 2)* is in broad general terms, not limited to cases where the failure of the Member State is partial as opposed to total. Furthermore, the fact that the UK government has failed to legislate for compulsory insurance in respect of the use of motor vehicles on private land and then specifically to delegate to the MIB the residual liability where the relevant vehicle is uninsured, can legitimately be described as a breakdown in the system put in place by the government.
>
> [68] Both in *Farrell v Whitty (No 2)* and the present case, the effect of the failure is the same: a gap in the insurance cover compulsorily required by the domestic legislation and a corresponding gap in the protection of the victims of motor accidents, which, as is clear from all the CJEU jurisprudence, is the very mischief that the Motor Insurance Directives are designed to avoid…"

56. At para. 72 of *Lewis*, by reference to the CJEU authority of *Juliana* (Case C-80/17) [2018] 1 WLR 5798, Flaux LJ held: "Thus, contrary to Mr Mercer QC's submissions, *Juliana* is not authority for the proposition that Article 10 does not extend to provide compensation in situations where the national legislation did not provide for compulsory motor insurance. On the contrary, the judgment of the CJEU recognises and applies the broader objective of the Motor Insurance Directives of protecting the victims of motor accidents, by requiring Member States to ensure that motor insurance is compulsory, so that the victims are compensated by the insurer or, in cases where the obligation to insure the vehicle has not been satisfied, by the compensation body to which that task has been delegated under Article 10. In my judgment, the last sentence of [46] is sufficiently widely phrased to encompass both the case where the State has not fully implemented its insurance obligation under Article 3 of the 2009 Directive (as in the present case) and the case where, although the State has implemented the obligation, the driver or owner of the vehicle has not taken out the compulsory insurance required." The last sentence of para. 46 of Juliana was as follows: "The obligatory intervention of that body in such a situation cannot therefore extend to situations in which the vehicle involved in an accident was not covered by the insurance obligation."

57. Flaux LJ continued, at para. 73: "However, even if I were wrong about that, it is quite clear from the broad terms of para. 39 of the judgment in *Farrell v Whitty (No. 2)* [2018] QB 1179 that the compensation body is intended to protect and compensate victims by remedying the failure of the Member State to fulfil its obligation under Article 3 to ensure that civil liability in respect of the use of motor vehicles is covered by insurance." Para. 39 of *Farrell v Whitty (No.2)* of the judgment of the CJEU read as follows: "In that regard, it must be borne in mind that, in case of damage to property or personal injuries caused by a motor vehicle for which the insurance

obligation provided for in article 3(1) of the First Directive has not been satisfied, the Court has held that the intervention of such a body is designed to remedy the failure of a Member State to fulfil its obligation to ensure that civil liability in respect to the use of motor vehicles normally based in its territory is covered by insurance". At the end of his passage, a reference is made to *Csonka* at para. 31 which must have been on the understanding that this provided support to the proposition.

58. At para. 74, the Court of Appeal held that "the MIB … has had conferred on it by the UK government the task under Article 10 [of the 2009 Directive], which … includes remedying the failure of the government to institute in full a compulsory insurance scheme" [in that case in respect of the use of vehicles on private land].

59. As a result, the Court held, at para. 75, that "the MIB is an emanation of the State against which Article 10 of the 2009 Directive can be enforced by the Claimant, as it has direct effect." Further, the Court held: "on the basis that the MIB is an emanation of the State, it is no answer to its liability to compensate the claimant that this liability has only arisen through the fault of the UK government".

60. At para. 76, the Court described the argument of the MIB that its obligation to compensate is limited by the RTA liability as "fallacious". Accordingly, the MIB's appeal was dismissed. Permission to appeal was refused by the Supreme Court on 20 February 2020.

61. Thus, the Court of Appeal held that

(1) the obligation to provide insurance cover under Article 3 and the duty of the compensation body under Article 10 are co-extensive;

(2) the United Kingdom Government has not retained a discretion to assign that responsibility to some other body than the MIB, since article 10 contemplated the setting up of a single compensation body, not a whole series of bodies; that, accordingly, articles 3 and 10 are both unconditional and sufficiently precise so as to be capable of having direct effect. At para. 63 of *Lewis*, Flaux LJ stated "Contrary to the arguments advanced by Mr Mercer QC, I do not consider that the UK government has retained a discretion to delegate to some other compensation body than the MIB the residual liability to compensate those injured by uninsured vehicles on private land";

(3) the MIB, albeit a private law body, has had conferred on it by the United Kingdom Government the task under article 10, which includes remedying the Government's failure to institute in full a compulsory insurance regime in respect of the use of vehicles on private land;

(4) since that task is in the public interest and since the MIB possessed special powers by virtue of the provisions of the RTA 1988 which obliges all authorised motor insurers to be members of the MIB and to contribute to its funding, the MIB was an emanation of the State against which article 10 of Directive 2009/103 could be enforced by the claimant: see also the Defence of the Secretary of State in this action to like effect at para. 4(b).

62. Therefore, the Claimant submits that the UK government failed properly to implement the Directive because of the old form of section 152(2). Although repealed on 1 November 2019, it remains in force in respect of prior declarations and, in particular, the one obtained by the Insurer in this case. The effect is that the Claimant has not been protected as a result of the old form of section 152(2) and the declaration. He therefore says that the UK Government has failed to institute in full the compulsory insurance regime. On the basis of the above reasoning, he seeks to enforce his directly effective rights against the MIB.

63. The following additional points may be added:

(1) As an emanation of the State, the MIB would not be assisted by arguing that the breach of EU law was committed by the UK Government. Where the Claimant is able to rely on a directive as against the State, he may do so regardless of the capacity in which the latter is acting, whether as central government, an agency or a private law body entrusted with the relevant task, as it is necessary to prevent the State from taking advantage of its own failure to comply with EU law (see: Case 152/84 *Marshall* [1986] ECR 723 at para. 49; Case C-188/89 *Foster* [1990] ECR I-3313 at para. 17, applied more recently in Joined Cases 444/09 and 456/09 *Gavieiro* [2010] ECR I 14031, at para. 82).

(2) The provisions of the Directive are binding on all authorities of the Member States, which includes the MIB as an emanation of the State: see Case 103/88 *Costanzo* [1989] ECR 1839, at paras. 29-33.

(3) The principle of primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rules: Case C-378/17 *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission* EU:C:2018:979 (judgment, 4 December 2018), see paras. 38-46 and 50. Thus there is a positive duty on the body (here the MIB) tasked with implementing the provisions of a directive (here the Motor Insurance Directive), to disapply any conflicting provisions (here including in the Uninsured Drivers' Agreement).

XIII MIB's case that there is no direct claim because the Article 3 obligation has been satisfied

64. The MIB accepts that the Claimant can rely directly against it on certain provisions of the Directive, namely those which reflect the requirements imposed by the Second Directive in respect of the body to be established pursuant to Article 1(4). However, properly construed, the Directive does not give rise to liability on MIB's part in the circumstances of this case. The MIB here relies on the *travaux préparatoires* to which this judgment shall return.

65. The MIB's primary case is that the Directive does not impose liability on it where an insurance policy was in place in respect of the use of the Vehicle at the date of the accident. Article 10 requires Member States to set up a body to pay compensation for damage in two specific cases: where the damage was caused (i) by an unidentified vehicle, or (ii) by a vehicle for which "*the insurance obligation in [Article 3 of the First Directive] has not been satisfied*". The MIB says that this phrase is to be construed strictly: it only encompasses vehicles in respect of which no insurance policy has been taken out. To this effect, it relies on the CJEU case of C-409/11 *Csonka v Magyar Allam* (11 July 2013) [2014] CMLR 377 (*"Csonka"*), especially at para. 31:

> "As regards the determination of the actual circumstances in which the insurance obligation laid down in Article 3.1 of the First Directive may be regarded as not having been satisfied, it is significant – as the Advocate General stated in point 32 of his opinion – **that the European legislature did not confine itself to providing that the body must pay compensation in the event of damage caused by a vehicle for which the insurance obligation has not been satisfied in general, but made it clear that that was to be the case only in relation to damage caused by a vehicle for which the insurance obligation provided for in Article 3.1 of the First Directive has not been satisfied, that is to say, a vehicle in respect of which no insurance policy exists."** (emphasis added) Such a restriction is explained by the fact that Article 3(1) of the First Directive – as has been pointed out in paragraph 28 above – requires each Member State, subject to the derogations allowed under Article 4 of that directive, to ensure that every owner or keeper of a vehicle normally based in its territory takes out a policy with an insurance company for the purpose of covering, up to the limits established by European Union law, his civil liability arising as a result of that vehicle. Viewed in that light, the very fact that damage has been caused by an uninsured vehicle attests to a breakdown in the system which the Member State was required to establish and justifies the payment of compensation by a national body providing compensation."

66. *Csonka* was a case where drivers of motor vehicles caused property damage to third parties and were constrained to pay the victims in circumstances where the insurer was unable to do so due to being insolvent. The drivers then brought a *Francovich* claim against the Hungarian Government on the basis that it had failed to transpose into domestic law the obligation under Art 1(4) of Directive 84/5, namely to set up a national body to satisfy the underlying civil liability. The essential words were "to take all appropriate measures to ensure that civil liability in respect of the use of the vehicles normally based in its territory is covered by insurance". It was not required by the Directive to guarantee the insurance obligation. The insurance obligation had been satisfied when the insurance obligation had been taken out. The fact that the

insurer subsequently became insolvent did not mean that the relevant obligation on the Member State was not satisfied.

67. In the instant case, the MIB says that the insurance obligation has been satisfied by the First Defendant's father taking out the Policy with the Insurer. Unlike in *Lewis* and *Farrell v Whitty (No.2)*, where no insurance was in place at the time of the accident, there was a motor insurance policy which applied to the vehicle in this case and which would have responded to the Claimant's claim arising from the accident. *Lewis* was a case which concerned the absence of insurance over private land with the argument that this was not required under national law at the time: as a matter of EU law, it was required. However, the MIB says that *Lewis* is not binding in the instant case because there was no insurance cover in respect of the vehicle on public land, whereas in the instant case there was insurance cover. In the case of *Farrell v Whitty (No.2)*, there was no insurance in respect of the non-seated part of the vehicle, and so the MIB say that this is akin to no cover at all.

68. As a matter of EU law, for the purposes of Article 3, the MIB submits that the insurance obligation had been satisfied at the date of the accident because there was a policy providing cover in respect of the Vehicle. The fact that subsequent to the accident, the insurer could escape liability to the Claimant by relying on national law under section 152(2) of the RTA 1988 as it then stood (which was in breach of EU law) does not retrospectively convert this case to one where the insurance obligation had not been satisfied.

69. As a matter of EU law, the insurer is liable in such a case and national legislation which permits an insurer to escape from such liability is precluded by EU law: see *Fidelidade-Companhia de Seguros SA v Caisse Suisse* (Case C-287/16) [2017] RTR 26 (*"Fidelidade"*). Through the Community lens, the insurance obligation would therefore be satisfied where there was insurance in place since the insurer should not have as a defence something going beyond or outside the exclusions or limitations within the Directive. The problem which has arisen in this case is the combination of incompatible national legislation in the form of section of 152(2) of the RTA 1988 and the inability to enforce the legislation against an insurance company, which is a private body and not an emanation of the State. In circumstances where non-compliant national legislation cannot be interpreted consistently with EU requirements, the CJEU has identified the remedy for the Claimant: a *Francovich* claim for damages against the Member State. The MIB submits that there is no basis in EU law for imposing that liability on the MIB.

XIV MIB's case as to the effect of the travaux préparatoires

70. Ms Kinsler QC included in her submissions a detailed forensic analysis of the history of the Directive. Since the most recent Directive is a consolidating Directive, she submitted that the legislative history should be examined. This is said to demonstrate that whilst pursuing the overall objective of protecting victims, the EU legislature deliberately limited the circumstances in which the guarantee body was required to be liable.

71. She pointed to the following stages:

(1) The outset: the guarantee body has its legislative origins in Article 1 of the Second Motor Insurance Directive, article 1(3) being the forerunner to Article 10 of the Codified Directive originally provided:

> *"Each Member State shall make provision that compensation within the limits authorised by paragraph 2 for damage to property or personal injuries caused by an unidentified vehicle in respect of which the insurance obligation provided for in paragraph 1 has not been satisfied shall be borne by a body set up or authorised* Article 1(3) of the draft Second Motor Insurance Directive*: by that State."*

Article 2 of the draft Second Motor Insurance Directive provided:

> *"For the purposes of Article 1(3) of this Directive….where an insurer refuses to make payment by virtue of the law or of a contractual provision authorised by law, the vehicle shall be treated as an uninsured vehicle".*

Therefore, at the outset the Commission's proposal was that the guarantee body would be liable where no insurance had been taken out and, additionally, where an insurance policy had been taken out but an insurer was entitled to refuse to pay – on the basis of law or the insurance contract. This is confirmed by Recital 6 of the Proposal which stated:
"*Whereas it is necessary to make provision for a body to bear secondary liability for the payment of compensation in cases where the vehicle responsible is unidentified or uninsured,* ***or where the insurer is entitled to disclaim liability; whereas the latter case must be treated in the same way as a case of non-insurance.*****"** (emphasis added)

(2) The European Parliament amended the draft Second Motor Insurance Directive to remove the proposed Article 2 (but not the Recital). The European Parliament instead inserted a provision that rendered contractual terms that excluded vehicles from cover if driven by certain categories of person void insofar as an injured third party might rely on the insurance policy.

(3) The Commission partially accepted this amendment and proposed an Amended version of Article 2 to reflect this. However, the Commission did not accept the European Parliament's proposed deletion of the original Article 2, noting that it considered "*it is essential to retain the principle of treating as cases of non-insurance those residual cases in which the insurer can avoid payment for any compensation to the victim*". The Commission's Amended Proposal inserted a new recital ("*whereas it is necessary to provide that all other instances in which the insurer is entitled to disclaim liability must be*

treated as instances of non-insurance") to reflect the point previously covered by original Recital 6 together with a revised Article 2 which includes the following:

> *"Where an insurer refuses to make payment by virtue of the law or of another contractual provision authorized by law, the vehicle shall be treated as an uninsured vehicle".*

72. The Commission's intention was to include, within the scope of the guarantee body's liability, damage caused by vehicles for which an insurance policy had been taken out but which was subsequently disclaimed by the insurer. However, the MIB submits that the Council, in adopting the Second Motor Insurance Directive, did not adopt the Commission's recommendation that where an insurer refuses payment the vehicle should be treated as an uninsured vehicle and therefore fell into the guarantee body's scope. Both the relevant Article and Recital were removed from the Second Motor Insurance Directive as adopted (and there was no subsequent change in this respect in the Codified Directive).

73. The MIB also points to how the exception in Article 10(2) of the Codified Directive did not feature in the Commission's proposal and was not introduced into the legislation until the end of the legislative process. It was introduced by the Council in the final text. It is said that this represents a further and significant narrowing of the body's compulsory liability.

74. The submissions of the MIB are based on an analysis for the purpose of this case, but have been referred to in decisions of the CJEU and in Opinions of Advocates General. Ms Kinsler QC drew attention to the paragraphs of the Opinion of Advocate General Lenz in *Ruiz Bernaldez*. In that case, a Spanish royal decree excluded from insurance cover property damage caused by an intoxicated driver. A question formulated by the provincial court for the CJEU (the third question) was whether the statutory provisions and contractual clauses referred to in article 2(1) of Directive 84/5, which exclude insurance cover but are void as against a third party victim, are to be regarded as an exhaustive list.

75. Advocate General Lenz's answer to that question was that, given that the overall objective of the Directives was the protection of victims, an insurer could not seek to rely upon an exclusion which went beyond the terms of Article 2.1. That did not address the scope of possible exclusions within Article 1.4. However, a fifth question of the Spanish Provincial Court was on the hypothesis that the relevant exclusion clause might be held to be valid as against the victim. In such circumstances the potential liability of the national body would arise. Advocate General Lenz decided to answer that question in the event that the Court took a different view on the previous questions.

76. In his Opinion, Advocate General Lenz commented on the travaux préparatoires at paras. 47-50 and the first part of para. 51, which can be summarised as follows:

(1) the Directives show that as a rule it is the insurer of the vehicle that has caused damage who is responsible for covering that damage. Only in

cases in which the vehicle is uninsured or unidentified, that is to say, if the responsible insurer cannot be established, must the body referred to in Article 1(4) of the Directive 84/5 act [Lenz Opinion para. 47);

(2) originally under the documents concerning the preparatory work on Directive 84/5, the Commission wanted a more extensive duty of the body to pay compensation. The original proposal for Article 2 was then quoted (Lenz Opinion para. 48). The vehicle was to be deemed to be uninsured in the case of all statutory or contractual exclusions (Lenz Opinion para. 49).

(3) Article 1(4) as finally adopted is then set out, showing that the proposal did not survive in the Council: (Lenz Opinion para. 50).

(4) The first part of para. 51 of Lenz Opinion reads as follows:

> "The wording finally adopted and the provision's legislative history show that the "body" is in no way conceived as a general "catch-all", providing compensation upon the occurrence of any excluded events. Nor does the provision simply refer to the "absence of insurance" to which the national court alludes. Everything indicates that within the framework established by the directives, the person who has suffered harm as a result an accident must recoup his loss from the insurer."

77. The MIB also relies on the Opinion of Advocate General Mengozzi in *Csonka*. Reference above has been made to *Csonka* at para. 31 of the judgment. That is to be seen in the context of Mr Mengozzi who also referred to the travaux préparatoires, saying at paras. 30-32 the following:

> [30] It is also worth examining the travaux préparatoires for Directive 84/5/EEC. Those preparatory documents show that the legislature wished to some extent to limit the circumstances calling for the compulsory payment of compensation by the body to be set up in accordance with Article 1(4) of Directive 84/5 and to adopt a strict interpretation of the expression 'vehicle for which the insurance obligation … has not been satisfied'. **In the initial proposal for Directive 84/5, the intention was to treat as an 'uninsured' vehicle a vehicle which has caused damage for which, by virtue of the law or of a contractual provision authorised by the law, the insurer is entitled to refuse compensation; ultimately, that proposal was not adopted.**
>
> [31] I draw two sets of conclusions from that significant shift between the wording of the proposal and the final wording of Directive 84/5. First, it appears that, **in the mind of the legislature, a vehicle in respect of which the insurance**

> **obligation has not been satisfied was equivalent to an uninsured vehicle**– which is confirmed, moreover, by the wording of the fifth sub-paragraph of Article 1(4) of Directive 84/5. **Next, it is clear that, in the final version of Directive 84/5, the EU legislature knowingly set boundaries to the circumstances calling for the payment of compensation by the body which was to be set up, inasmuch as its only express reference – other than to unidentified vehicles – was to 'vehicle[s] for which the insurance obligation provided for in paragraph 1 has not been satisfied', that is to say, vehicles for which an insurance policy has not been taken out.** The measure adopted in 1983 clearly shows that the legislature did not itself see Article 3 of Directive 72/166 as a general clause requiring the Member States to set up a guarantee mechanism.
>
> [32] It is worth noting that the legislature did not confine itself to providing that the body to be set up should pay compensation in the event of damage caused by vehicles for which the insurance obligation was not satisfied *in general*, but was minded to make it clear that this was to be the case only in relation to damage caused by vehicles for which the insurance obligation *provided for in paragraph 1* of Article 1 of Directive 84/5 was not satisfied."

78. The MIB submits that the legislative history of what is now Article 10 shows a significant and deliberate contraction in the guarantee body's remit in comparison to the original proposal. The Council expressly restricted the ambit of the guarantee body's compulsory liability: the body was not required to respond where an insurance policy had been taken out in respect of the vehicle, but the insurer subsequently sought to disclaim liability. The suggestion of the Commission that the guarantee body was there to fill the gaps was rejected: it is only there to provide compensation where no insurance contract has been taken out. One of the reasons for this contraction was that despite the concern to protect victims, there was also a concern about the financial burden represented by the payment of compensation on the guarantee body (*Csonka* Opinion of Mr Mengozzi at para. 43) as a result of which the insurance obligation became confined to "specific, clearly identified, sets of circumstances" (*Csonka* at para. 32). Moreover, even in uninsured cases, the body was not required to cover claims within the scope of what became Article 10(2). Ms Kinsler QC submits that this reveals a legislative intent which is highly relevant to the proper interpretation of the Directive and to the outcome of the preliminary issues.

XV Claimant's response as regards travaux préparatoires

79. The Claimant also emphasises the analysis of Advocate General Lenz in *Ruiz Bernaldez*, but points to what appears before and after the paragraphs relied upon by the MIB. In *Delaney v Secretary of State for Transport* [2015] 1 WLR 5177 (*"Delaney"*), Jay J at first instance cited para. 46 and the latter part of para. 51 (before and after the analysis of the travaux préparatoires relied upon by the MIB). In the

Court of Appeal, Richards LJ at para.18 also quoted these paragraphs without paras 47-50 and the first part of para. 51. Those paragraphs read as follows:

> "46. Apart from those highly exceptional cases of the victim's own blameworthy conduct, it must be assumed that there is a need to ensure that there are no gaps in the duty to compensate the victim. That principle can be seen to be the guiding principle of the directives. To that effect, the national guarantee body must be regarded as covering accident victims who would otherwise be unprotected. The reason for requiring such a body to be established is the concern to protect victims."
>
> "51. ….*Only* if, for whatever reason, he has no claim for compensation against the insurer, would the 'body' have to pay compensation in the interest of the extensive protection of victims. Furthermore, the Member States are free to extend the competence of the body by statute, provided complete protection is ensured for victims."

80. The submission was made by Ms Kinsler QC that the citation of these paragraphs by Jay J (and presumably also by Richards LJ) failed to heed the significance of the interim paras. 47-50 and the first part of para. 51. The answer to this of Mr Moser QC was that the Court in *Delaney* must have been cognisant of the interim paragraphs not quoted. Despite the analysis of the travaux préparatoires, Mr Lenz came to the conclusion in the second part of para. 51. It is to be inferred in the course of a very thorough judgment that Jay J (and Richards LJ) must have read and had in mind the parts of Mr Lenz's Opinion which he did not quote between paras. 46 and 51. Further, although this part of the judgment of Jay J was not a part of the issues for determination on the appeal, the reasoning was not irrelevant to the matters before the Court of Appeal which did arise in the appeal. In the Court of Appeal, Richards LJ considered extensively the judgment of Jay J at first instance, and he did not comment adversely on its reasoning.

81. Whereas the submission of the MIB is that the limitation in the guarantee on the part of the guarantee body is to unidentified vehicles and uninsured vehicles, Advocate General Lenz evidently did not confine it as such. The liability was not unlimited: it had to be confined to a case where the insurance requirements referred to in Article 3(1) of the First Directive had not been satisfied. If the victim had no claim for compensation against an insurer in circumstances where the Directive required the insurer to be liable, then and only then the guarantee body would have to pay compensation as part of the extensive protection of victims.

82. Mr Lenz took into account the change in direction and the move away from a general 'catch all'. However, his conclusion was that the protection, with the wording as it evolved and into its final form, was not limited to an absence of insurance. Recoupment would be from the insurer, but "*only* if, for whatever reason, he has no claim for compensation against the insurer, would the 'body' have to pay compensation in the interest of the extensive protection of victims." Seen this way, there is no contradiction between para. 46 and the second part of para. 51 of the

Opinion of Mr Lenz and the intervening paragraphs concerning the travaux préparatoires. It must follow that in the opinion of Mr Lenz, a vehicle for which the insurance obligation in Article 3 has not been satisfied can apply both to the case of an uninsured vehicle and a vehicle which is insured but where for whatever reason the victim has no claim against the insurer.

83. To like effect, the Claimant referred to the discussion in *Csonka* in the opinion of Advocate General Mengozzi who drew attention to an earlier draft of Directive 84/5 about the intention to treat an uninsured vehicle as one where the insurer was entitled to refuse to pay compensation. However, this was not the regime which was in the end implemented. In those circumstances, Jay J in *Delaney* at para. 55 stated that it was wrong to place reliance on this reasoning because this was not the draft which was implemented. Similarly, Mr Moser QC submits that the Court should reject reliance on that which was not implemented and concentrate on construing that which was implemented.

XVI Further consideration of Delaney

84. In *Delaney,* the Court was considering an exclusion for the use of a vehicle in the course or furtherance of a crime, there being a substantial amount of cannabis found in the motor vehicle at the time of the accident. Jay J found that the exclusion in Clause 6(i)(e)(iii) was incompatible with article 1(4) of the Council Directive and awarded *Francovich* damages against the Government. An appeal to the Court of Appeal was dismissed.

85. A particular preliminary issue was whether the Directive imposed obligations on Member States in respect of damage caused by vehicles in relation to which a valid policy of insurance was taken out, but where that policy was subsequently avoided by the insurer. Jay J determined that issue against the Government. There was no appeal against that part of his judgment.

86. Jay J specifically derived from Mr Lenz's answer to the fifth question that the principal obligation under Article 2.1 of the Second Directive rests on the insurer, but if that is not satisfied then the national body must step up to the plate. At para. 38, he said that "on any fair reading of paragraph 46 of his Opinion the Advocate General was not suggesting that there might be an ability in Member States to create specific exceptions which were not expressly mentioned in the Second Directive or were not otherwise justifiable on public policy grounds according to established principles of domestic law."

87. Jay J then continued as follows:

> "39. The third point I derive from these paragraphs of Advocate General Lenz's Opinion is that, although the scheme of the Second Directive is such that the insurer (if it exists) and not the national body should pay compensation, provided that the system as a whole ensures complete protection for victims there may be no objection in principle to the national body having an enhanced role. This is exactly the position which obtains in this

> jurisdiction on account of section 152(2) of the RTA 1988. However, the logical corollary must evidently be this: that the national body, here the MIB, must pay compensation in circumstances where the insurer - "for whatever reasons", which must include the avoiding of the insurance policy for misrepresentation or non-disclosure by the insured – owes no liability in respect of the victim's claim. Were the position otherwise, the victim would be left without a remedy even in circumstances where there was no blameworthy conduct on his part.
>
> 40. I have paid particular attention to the Opinion of Advocate General Lenz because it appears to me to contain a flawlessly coherent, logical and principled guide to the scheme of the Second Directive….The only matter where there might be a scintilla of uncertainty (viz. the first sentence of paragraph 46 of his Opinion) is answered by an accurate reading of the Directive itself and subsequent ECJ jurisprudence. As for the language of the Directive, I am referring to the fact that it sets out a number of exclusions and derogations, and it is an established principle of Community law that these must be read restrictively.
>
> 41. The Judgment of the ECJ in Ruiz Bernaldez was couched in characteristically elliptical terms, and in line with its traditionally parsimonious approach no answer was supplied to the fifth question; it simply did not arise. However, at paragraph 20 of its Judgment the ECJ supported the Advocate General's reasoning in relation to his answer to the third question and, because the point was effectively the same, the fourth:
>
> > "That being so [the need to avoid disparities in the treatment of victims], Article 3.1 of the First Directive precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle."

88. Jay J referred to other cases of the CJEU, in particular *Candolin v Vahinkovakuutusosakeyhtio Pohjola* (Case C-537/03) (*"Candolin"*) [2006] 1 RTR 1. This case concerned whether the insurer could avoid liability to compensate victims of a road traffic accident caused by the negligence of a drunk driver because they too were under the influence of alcohol and must have known of the driver's condition. This was the first occasion when the Court of Justice made clear that exclusion clauses relating to the conduct of the victim, as opposed to that of the insured, could not be relied upon beyond that expressly mandated by the Directive. Consistently with *Ruiz Bernaldez*, the Court of Justice concluded that the Directives provided an exhaustive list of the applicable exclusions from the subrogated obligations of

insurers in respect of liabilities of this nature. Although *Candolin's* case was one where the insurer was liable, Jay J said at para. 48 that "if, by dint of a vagary of domestic law, an insurer *is* entitled to avoid liability and article 1(4) comes into play, the logic of *Candolin's* case must surely be that the ability of the national body to avoid paying the victim is constrained to exactly the same extent."

89. At paragraph 49 of his judgment in *Delaney*, Jay J referred to *Farrell v Whitty* (Case C-356/05)[2007] ECR I-30067, where the issue was whether the Irish MIB, the MIBI, was able to refuse to compensate the victim of a road traffic accident on the basis that she had been travelling in a part of a van not designed for seating accommodation. It was held that it could not as a matter of construction of the word "passengers", but also because it was not open to carve out exceptions or derogations other than those specified in Directive 84/5

90. The foregoing is inconsistent with the reading of the travaux préparatoires by Ms Kinsler QC in that it recognises that the guarantee body can be liable even where the vehicle was insured, but where an insurer is entitled to avoid liability for the claim for whatever reasons going beyond any exclusion under the Directives.

91. In his consideration in the Court of Appeal on a different issue, namely whether the exclusions in the Directive were exhaustive, Richards LJ used language at para. 33(viii) about the case where the insurer avoids the policy which had the consequence of the vehicle falling to be treated as an uninsured vehicle. He said:

> "The present case falls within Article 1(4) rather than under the general provisions concerning insurance cover only because, fortuitously and as a result of particular provisions of national law, **the driver's insurer succeeded in avoiding the policy *ab initio* on the ground of non-disclosure of material facts (see paragraph 2 above), which had the consequence that the vehicle fell to be treated as an uninsured vehicle.** It is common ground that, if the policy had not been avoided, the insurer would not have been able to rely on any equivalent to clause 6.1(e)(iii) to defeat Mr Delaney's claim: such an exclusion is not permitted by Article 2(1) of the Second Directive. Having regard to the aims of the directives, it would be very surprising if such an exclusion were nonetheless available to the body provided for by Article 1(4)." (emphasis added)

92. Thus, it was, submitted Mr Moser QC, that "a vagary of our system as it was under the old 152(2)" did not excuse the Secretary of State. Once it was established that the MIB was an emanation of state, it would not excuse the MIB also.

XVII The consideration of the Csonka case by the MIB

93. The case of *Csonka* as seen above was a case where the vehicle was insured, and the insurance satisfied the insurance requirements referred to in Article 3(1) of the First Directive. The problem was that the insurance company had become insolvent, but the obligation of the guarantee body was "not in respect of insurance against civil liability relating to the use of motor vehicles; rather, it is intended to take effect only in specific, clearly identified, sets of circumstances." (*Csonka* at para. 32).

94. The submission by reference to *Csonka* was that it distinguished between a case where the vehicle causing the damage or injury had insurance and one where the insurance obligation has not been satisfied, which at para.31 of *Csonka* was "a vehicle in respect of which no insurance policy exists". This in turn borrowed from the language of Advocate General Mengozzi at para. 44, namely "a vehicle for which the insurance obligation has not been satisfied is an uninsured vehicle." This was in contrast to a vehicle insured with an insolvent insurer where the insurance obligation had been satisfied.

95. The MIB submitted that since the Directive was to be construed according to Community law, anything incompatible with the Directive under the law of the Member State was to be ignored. Accordingly, any right or remedy of an insurer which was contrary to the obligation under the Directive would give way to the Directive obligation. Thus, whatever the position under the law of the Member State, for the purpose of EU law, there would not be a protection required from the guarantee body other than in respect of unidentified vehicles and uninsured vehicles. Where a vehicle was insured, the insurance obligation would as a matter of Community law have to be honoured by the insurer. That was irrespective of any incompatible provisions in the insurance contract or the national law. In this context, the wording that "a vehicle for which the insurance obligation has not been satisfied is an uninsured vehicle" was said to be apt. It was submitted that from the perspective of Community law, there was no need for protection from the guarantee body where there was insurance. Any defence conferred upon an insurer under national law caused by the failure to implement fully the insurance obligation would give rise to a *Francovich* liability only, and not to a responsibility on the guarantee body.

XVIII The consideration of the Csonka case by the Claimant

96. The above submission was made to Jay J in *Delaney* that in view of *Csonka*, where there was an insurance policy but that this had been avoided for misrepresentation or non-disclosure, obtaining a declaration under the then section 152(2) RTA 1988, this was not a vehicle for which the insurance obligation had not been satisfied. It was submitted that the Member State's obligations under Article 1.4 of the Directive comprise solely the obligation to provide for a national body to meet the liability where no contract of insurance exists at all. It has no application where there is a contract of insurance, even one which is avoided for non-disclosure where the avoidance is based on the concept of voidable *ab initio*.

97. In the judgment of Jay J at para. 60, he rejected the notion that "a vehicle for the insurance obligation has not been satisfied" was confined to a vehicle which had

never had an insurance policy in place. The obligation also applied where the insurer has no residuary liability, such as where it was entitled to seek a declaration under the then section 152(2). Insofar as the submission was based on *Csonka* at para.31 and generally, Jay J said that *Csonka* concerned a strict dichotomy: either there is no insurance, or the insurer is unable to satisfy the subrogated liability in that case due to the subsequent insolvency of the insurer. However, in the judgment of Jay J, the position was different where the insurer's avoidance of liability under the national law left the victim without a remedy. In those circumstances, the insurance requirements were not satisfied where there was a policy, but the policy was avoided due to non-disclosure or misrepresentation, and the then UK legislation under section 152(2) allowed the insurer to avoid liability.

98. It was said that Jay J was considering a *Francovich* liability of the Government, where there was a right to damages against the Member State for failing to implement the Directive properly. However, the reasoning of Jay J in these paragraphs showed a liability also on the MIB to meet a liability where there "has not [been] satisfied the insurance requirements referred to in Article 3(1) of the First Directive". Nothing in the judgment of the Court of Appeal in the same case in any way undermined his reasoning. There was a reason why in *Delaney* the Court was considering a *Francovich* liability, namely that at that time, the domestic authorities were to the effect that the MIB was not an emanation of the State. Accordingly, at that time, it appeared that no direct action was available against the MIB, and the only remedy was against the Secretary of State: see *Byrne v MIB* [2007] EWHC 1268 (QB); [2009] QB 66, following Hobhouse LJ in *Mighell v Reading* [1999] Lloyd's Rep IR 30. Subsequently, as a result of the case of *Farrell v Whitty (No.2)* in the CJEU, *Lewis* in the Court of Appeal overruled those earlier cases.

99. As noted above with reference to paras. 74-75 of *Lewis*, the Court of Appeal held that "the MIB … has had conferred on it by the UK government the task under Article 10 [of the 2009 Directive], which … includes remedying the failure of the government to institute in full a compulsory insurance scheme" [in that case in respect of the use of vehicles on private land]. As a result, "the MIB is an emanation of the State against which Article 10 of the 2009 Directive can be enforced by the Claimant, as it has direct effect." Further, the Court held: "on the basis that the MIB is an emanation of the State, it is no answer to its liability to compensate the claimant that this liability has only arisen through the fault of the UK government". This reasoning supports the fact that the MIB as an emanation of the State is required to remedy the failure of the government to institute in full a compulsory insurance scheme. It follows that it is no answer to the claim against the MIB that there might have been a possibility of a *Francovich* liability. This itself in any event depends in part upon establishing that the breach by the Member State in the implementation of the European law is "sufficiently serious", something which is denied by the Secretary of State.

100. Ms Kinsler QC still sought to derive support for the MIB's case from *Csonka*, submitting that there is no obligation of the guarantee body to underwrite the insurance. If insurance is in place at the time of the accident, the fact that it is not then honoured e.g. due to insolvency of the insurer, is not a result which the guarantee body agreed to procure. Likewise, the argument of the MIB is that since under Community Law, the insurer is not able to avoid liability to the victim due to non-disclosure or misrepresentation, the guarantee body is not liable to underwrite cases

where there is insurance. The guarantee is only liable where the vehicle is unidentified or there is no insurance at the time of the accident.

101. It is instructive to consider how Jay J dealt with *Csonka*. He said the following at [57-58]:

> "57. Thus, the principle of Community law vouched by *Csonka* is clear. An Article 1.4 compliant regime does not have to guarantee the satisfaction of the insurance obligation in some general way: the national body is not a long-stop to meet the obligations of insolvent insurers. **The guarantee which Article 1.4 mandates is limited to cases where there is no insurance policy in existence at all** (emphasis added).
>
> 58. In my judgment, *Csonka*'s case [2014] 1 CMLR 377 has no relevance to the situation where an insurer seeks to avoid liability to the victim, either on the basis of misrepresentation or non-disclosure by the insured, or on the basis of some misconduct by the victim which is not expressly catered for in the exceptions to the Directive. As it happens, Advocate General Mengozzi mentioned only the first type of case, not the second, and as we have seen he did so in a different context. It is entirely plain from earlier ECJ jurisprudence, which I have discussed, that the insurer cannot seek to avoid liability to the victim on the basis of the insured's failures or the victim's misconduct, subject to one of the limited exceptions being in application.

102. Richards LJ in the Court of Appeal quoted these paragraphs at para. 30 without any qualification. Jay J then dealt with the submission that the sole obligation of the State is to provide a national body to meet the liability where no contract of insurance exists. He said the following about *Csonka* at [60]:

> " For the purposes of its analysis of Article 1.4, *Csonka* proceeded on the basis of a strict dichotomy: either there is no insurance, or the insurer is unable to satisfy the subrogated liability for a reason unconnected with the requirements of the Directives as revealed by an examination of their language and intendment. There is no room for an additional category of case, that is to say the situation where the insurer seeks to avoid liability under the policy on a basis which is unsupported by the language and intendment of the Directives. In any event, as soon as one brings into play other provisions of the Directives, as the reformulated first preliminary issue now does, it is clear from the raft of ECJ decisions to which I have referred that a situation cannot arise whereby the insurer's avoidance of liability leaves the victim without a remedy. These decisions apply to the obligations of

> the relevant national body if, as here, the victim has no remedy against the insurer under domestic law."

This part of the judgment did not form a part of the challenge before the Court of Appeal.

103. On this basis, the Insurer not being liable (as established in the instant case by the judgment of O'Farrell J), and the domestic regime being one which ought to have provided cover or compensation for third party victims even where the policy would be avoided for misrepresentation or non-disclosure, the guarantee body is liable to pay compensation in default. This is what Advocate General Lenz was saying at para. 51 of his Opinion. This was said by Jay J in in *Delaney v Secretary of State for Transport* especially at paras. 39, 58 and 60.

104. Mr Moser QC also drew attention to the Opinion of Advocate General Mengozzi in *Csonka* at para. 31 who said that "...it appears that, in the mind of the legislature, a vehicle in respect of which the insurance obligation has not been satisfied was equivalent to an uninsured vehicle…" The accuracy of this translation from the Italian, particularly the use of the Italian word for equivalent, was confirmed. This has an echo in the above quoted words of Richards LJ in *Delaney* at para. 33(viii) where Richards LJ referred to what occurred when a contract was avoided for non-disclosure or misrepresentation and a declaration was obtained pursuant to the then section 152(2) of the RTA 1988. In his words, this "had the consequence that the vehicle **fell to be treated as** an uninsured vehicle." (emphasis added)

105. All of this is subject to the second issue to be discussed below, namely the effect of the Claimant entering the vehicle which caused the damage knowing that the driver was uninsured.

XIX Other European decisions and especially Fidelidade: submission of the MIB

106. In *Fidelidade* the dispute arose in circumstances closely analogous to the present case, where an insurer of a vehicle involved in a road traffic accident sought to rely on the invalidity of the policy on grounds of misrepresentation under domestic law, as a result of the policyholder falsely representing to the insurer on the date the contract of insurance was concluded that she was both the owner of the vehicle and its usual driver. The fact the insurance contract had been concluded on the basis of misrepresentation did not enable the guarantee body to invoke any consequent avoidance or nullity of the insurance against a third party so as to be released from the Article 3 obligation to compensate that victim. The CJEU then considered the position of such a victim in the context of the second sub-paragraph of Article 10(2) of the Directive as appears in the emboldened extracts in the next paragraph.

107. At paras. 27-36 of its judgment, the CJEU held:

> "27 Accordingly, it must be held that the fact that the insurance company has concluded that contract on the basis of omissions or false statements on the part of the policyholder does not enable the company to rely on statutory provisions

regarding the nullity of the contract or to invoke that nullity against a third-party victim so as to be released from its obligation under [Article 3 of the 2009 Directive] to compensate that victim for an accident caused by the insured vehicle.

28 The same is true regarding the fact that the policyholder is not the usual driver of the vehicle.

29 **Indeed, the Court has held that the fact that a vehicle is driven by a person not named in the insurance policy relating to that vehicle cannot, in view, in particular, of the aim pursued by the First, Second and Third Directives of protecting victims of road traffic accidents, support the conclusion that that vehicle is uninsured for the purposes of the [second] sub-paragraph of [Article 10 of the 2009 Directive]** (judgment of 1 December 2011, Churchill Insurance Company Limited and Evans, C-442/10, EU:C:2011:799, paragraph 40).

30 In that context, the referring court also asks the Court whether an insurance company is entitled to rely, in the case of an ongoing contract for compulsory motor vehicle insurance against civil liability and in order to avoid its obligation to compensate third-party victims of an accident caused by the insured vehicle, on a statutory provision, such as Article 428(1) of the Portuguese Commercial Code, which provides for the nullity of an insurance contract in the event that the person for whom or on whose behalf the insurance has been taken out has no economic interest in the conclusion of that contract.

31 It must be noted that such a question is concerned with the legal conditions of validity of the insurance contract, which are governed not by EU law but by the laws of the Member States.

32 Those States are nonetheless obliged to ensure that the civil liability arising under their domestic law is covered by insurance which complies with the provisions of the three abovementioned directives [as now consolidated in the 2009 Directive]. It is also apparent from the Court's case-law that the Member States must exercise their powers in that field in a way that is consistent with EU law and that the provisions of national legislation which govern compensation for road accidents may not deprive the First, Second and Third Directives of their effectiveness (judgment of 23 October 2012, Marques Almeida, C-300/10, EU:C:2012:656, paragraphs 30 and 31 and the case-law cited).

33 As noted by the European Commission, the right of victims of an accident to receive compensation may be

> impaired by the conditions for the validity of the insurance contract, such as the general clauses set out in Article 428(1) and the first paragraph of Article 429 of the Portuguese Commercial Code.
>
> 34 Such provisions are thus liable to result in compensation not being paid to third-party victims and, consequently, in those directives being deprived of their effectiveness.
>
> 35 That finding is not called in question by the fact that it is possible for the victim to receive compensation from the Fundo de Garantia Automóvel. The payment of compensation by the body referred to in [Article 10(2) of the 2009 Directive] was, in fact, designed to be a measure of last resort, envisaged only for cases in which the vehicle that caused the injury or damage has not satisfied the requirement for insurance referred to in [Article 3], that is to say, it is a vehicle in respect of which no insurance contract is in place. Such a restriction is explained by the fact that that provision, as recalled in paragraph 23 of the present judgment, requires each Member State to ensure, subject to the derogations allowed under Article 4 of the First Directive, that every owner or keeper of a vehicle normally based in its territory concludes a contract with an insurance company in order to guarantee, up to the limits established by EU law, his civil liability arising as a result of the use of that vehicle (see, to that effect, judgment of 11 July 2013, Csonka and Others, C-409/11, EU:C:2013:512, paragraphs 30 and 31).
>
> 36 However, as recalled in paragraph 29 of the present judgment, **the fact that a vehicle is driven by a person not named in the insurance policy relating to that vehicle cannot support the conclusion that that vehicle is uninsured for the purposes of the [second] sub-paragraph of [Article 10(2) of the 2009 Directive].**" (emphasis added)

108. The MIB says that *Fidelidade* provides support in that EU law treats the vehicle as insured even where there has been non-disclosure or misrepresentation. It does not recognise any avoidance provisions in those circumstances such as would provide an answer to a claim of a victim where such provisions would be inconsistent with the Directive. Since as a matter of EU law, the insurer is not permitted to avoid liability vis-à-vis the victim, this is said to support the absence of need under EU law to require a guarantee body to support the victim in these circumstances.

109. The MIB relies on statements in the above citation such as in para. 35: "*The payment of compensation by the body referred to in [Article 10 of the 2009 Directive] was, in fact, designed to be a measure of last resort, envisaged only for* ***cases in which the vehicle that caused the injury or damage has not satisfied the requirement for insurance referred to in [Article 3], that is to say, it is a vehicle in respect of which no insurance contract is in place."*** (emphasis added). This is said to be consistent

with the references above to *Csonka* at "a vehicle for the insurance obligation has not been satisfied is an uninsured vehicle": see para. 44 of the Opinion of Advocate General and the judgment of the Court at para. 31.

110. The MIB also submits that *Smith v Meade* also supports its case. This is a case about the question whether as between the victim and the insurer, the insurer was bound to give effect to the Directive. The insurer argued successfully that as between the two private entities the insurance only had no horizontal effect: see para. 30 of the draft judgment, and quotations from paras. 45 and 49 of *Smith v Meade*. In oral submission, Ms Kinsler QC referred to the Advocate General's Opinion at paras. 58-64 who had said that the dispute did not involve the guarantee body, and that the reason appeared to be that the owner of the vehicle had taken out a motor insurance policy [58]. He said that it fell upon the state to bear the consequences [62]. The EUCJ did not say why guarantee body was before the Court, but it did refer to the Francovich liability [56]. Thus, it is said that this case supports the submission that the MIB is not liable because otherwise it would have referred not only to a Francovich liability, but also to an MIB liability. The MIB submits that statements of Jay J in *Delaney* to contrary effect cannot stand in the light of *Fidelidade* and *Smith v Meade*. It submits also that *Lewis* is authority on a different point in that there was no policy of insurance which did not cover the particular risk, in that case the risk of damage or injury in the use of a vehicle whilst driving on private land. Thus, it was a case of an uninsured vehicle and does not provide support for the liability of the guarantee body where the vehicle is insured.

111. In these circumstances, the MIB submits that there is no scope to interpret the insurance obligation as being not satisfied to extend to an insured vehicle, especially where the facts of *Fidelidade* are so close to the facts of the instant case. This is said also to be consistent with the interpretation of the second sub-paragraph of Article 10(2) in describing a difference between knowledge that vehicle was uninsured and knowledge that the driver was uninsured. This judgment shall return to that aspect of *Fidelidade* in its discussion of Issue 2 below.

XX Other European decisions and especially Fidelidade: submission of the Claimant

112. It follows specifically from *Fidelidade* that the avoidance of a policy for non-disclosure or misrepresentation under domestic law has no effect by itself. It therefore follows as a matter of EU law that the policy remains in effect against the insurer at the time of the accident and even at the time of discovery of the vitiating event. There is then the effect of the court declaration pursuant to section 152(2) of the RTA 1988 as it then was, which Jay J described as "this domestic idiosyncrasy", which entitled avoidance in an action commenced within the statutory limitation period. It would be at this point, if, for whatever reason, the victim had no claim for compensation against an insurer that the guarantee body would have to pay compensation in the interests of the protection of victims: see Jay J at para. 60 of *Delaney* and see also the second part of para. 51 of the Opinion of Advocate General Lenz in *Ruiz Bernaldez*, as cited by Jay J and Richards LJ in *Delaney*.

113. The Claimant submits that this remains post-Fidelidade. Even applying European law, the backstop of Advocate General Lenz "if for whatever reason" recognises the

imperfect position that there may be cases where the law of a Member State incompatibly with the Directive confers a defence or avoidance on an insurer, leaving the victim without a remedy. In those circumstances, the remedy is not a *Francovich* liability in the first instance, but to the extent that the guarantee body is an emanation of the State, a right against that body. This reasoning is clearer still because of the analysis of the Court of Appeal in *Lewis* about the nature of the MIB, and specifically (at para.74 above cited) that "the MIB … has had conferred on it by the UK government the task under Article 10 [of the 2009 Directive], which … includes remedying the failure of the government to institute in full a compulsory insurance scheme" [in that case in respect of the use of vehicles on private land].

114. As regards *Smith v Meade*, the Claimant submits that this does not affect the analysis. That was a case between a victim and an insurer suing on the terms of the contract of insurance, and the CJEU answer the questions which were before it and as between the parties before it. That was why the guarantee body was not before the Court. The suggestion that mention of a remedy against the state without mention of a remedy against the guarantee body is not probative when one does not exclude the other and when the decision was simply between the victim and the insurer.

XXI Discussion

115. It is common ground that the obligation of the guarantee body is not unlimited. It is specific and it is confined to two instances, namely compensation for damage to property or personal injuries caused by (a) an unidentified vehicle, or (b) a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied. The issue is whether the second of these is confined to an uninsured vehicle: the MIB says "yes", and the Claimant says "no".

116. If the MIB were correct, this would beg instantly the obvious question: "why did not the Directive simply contain the words 'caused by an unidentified vehicle or an uninsured vehicle'"? The European case law indicates that a wider meaning was intended than an uninsured vehicle. This is evident from the language in *Churchill* at para. 41 and in *Csonka* at para. 30 as follows:

> "Second, as noted by the Commission, the payment of compensation by a national body is considered to be a measure of last resort, provided for only in cases in which the vehicle that caused the injury or damage is **uninsured or unidentified or has not satisfied the insurance requirements referred to in Article 3(1) of the First Directive**" (emphasis added).

117. The reference to uninsured or unidentified or "has not satisfied the insurance requirements" appears to indicate that the last of those three ["has not satisfied the insurance requirements"] adds something to the first two of the three ["uninsured or unidentified"]. If it was intended only to refer to an uninsured vehicle, then why did it refer to "a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied"?

118. The words "has not satisfied the insurance requirements referred to in Article 3(1) of the First Directive" in the quotation from *Churchill* and *Csonka* at paragraph 116 above mirror the words in Article 10(1), which refer to the obligation to set up a body to provide compensation for damage caused by an unidentified vehicle or "a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied."

119. The MIB places an emphasis on the judgment in *Fidelidade* at para. 35 that "The payment of compensation by the body referred to in [Article 10 of the 2009 Directive] was, in fact, designed to be a measure of last resort, envisaged only for cases in which the vehicle that caused the injury or damage has not satisfied the requirement for insurance referred to in [Article 3], **that is to say, it is a vehicle in respect of which no insurance contract is in place"** (emphasis added). The MIB submits that if insurance is taken out, then whatever the exclusions under national law, if they are incompatible with the Directive, they have no effect as a matter of EU law. Thus, EU law does not need to consider a circumstance in which insurance has been taken out, since in that event, the insurer will be liable, and therefore not the guarantee body.

120. In my judgment, that is not correct. It does not suffice for the guarantee body simply to compensate for damage or injury caused by an unidentified driver or an uninsured vehicle. It extends also to a case where the vehicle is insured, but where the law of the Member State allows the insurer to avoid liability, thereby leaving the third party without a remedy. The words of Article 10(1) *"the insurance obligation provided for in Article 3 has not been satisfied"* are not so confined that the obligation of the guarantee body is limited to cases of unidentified and uninsured vehicles. Contrary to the submissions of the MIB, the words are not so confined for the following reasons:

(1) If the scope of the Directive had been so narrow, then narrower words would have been used so as to refer specifically to uninsured vehicles and not to the broader concept of "a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied".

(2) The perfect framework according to EU law is that if there is insurance in place, the claim can be brought against the insurer no matter what incompatible exclusions or defences exist according to the national law. However, the guarantee body is there to provide compensation where the system breaks down. The system can break down where there is no insurance. It can also break down where the insurance according to the national law is inadequate and in circumstances where the Directive has no direct effect.

(3) The concept of last resort was expressed in the Opinion of Advocate General Lenz in *Ruiz Bernaldez* especially at paras. 46 and 51 referred to above. That is broad enough to indicate a claim against the guarantee body at para. 51 of the Opinion: "….*only* if, for whatever reason, he has no claim for compensation against the insurer, would the 'body' have to pay compensation in the interest of the extensive protection of victims." In my judgment, this provides a complete answer to the submissions of the MIB as regards the travaux préparatoires: see paras. 79-83 and see also paras.112-113 above. As there noted, the Court should reject reliance on that which was not implemented and concentrate on construing that which was implemented.

(4) This accords with the understanding of the position in these courts, which I respectfully follow. In *Lewis*, the Court of Appeal (per Flaux LJ at para. 72) stated that the protection encompasses both the case where the State has not fully implemented its insurance obligation under Article 3 of the 2009 Directive (as in the present case) and the case where, although the State has implemented the obligation, the driver or owner of the vehicle has not taken out the compulsory insurance required. Reference is made to the analysis of *Lewis* at paras. 52-61 in this Judgment above which is strongly supportive of the Claimant's case. This culminates in the four conclusions derived from *Lewis* at para. 61 of this Judgment above.

(5) The effect is that the direct rights which the Claimant has as a result of the Directive against the MIB as an emanation of the State have not been protected as a result of the old form of section 152(2) of the RTA 1988 and the declaration. The UK Government has failed to institute in full the compulsory insurance regime. On the basis of the above reasoning, the Claimant is entitled to enforce his directly effective rights against the MIB: see paras. 62-63 above.

(6) In any event, the CJEU in *Farrell v Whitty (No.2)* stated that the task which a compensation body is required to perform is to contribute to the general objective of victim protection by the EU legislation regarding compulsory motor vehicle insurance. That is to remedy the failure of a Member State to fulfil its obligation to ensure that civil liability in respect to the use of motor vehicles is covered by insurance: see paras. 38-39 of *Farrell v Whitty (No.2)* as referred to in *Lewis* at paras. 73-74: see especially paras. 57, 67 and 98 of this Judgment above.

(7) In *Delaney*, the understanding of Jay J was that protection was not limited to cases where the vehicle was unidentified or uninsured, but applied where an insurer would seek to avoid due to non-disclosure or misrepresentation invoking section 152(2) of the RTA 1988. Whilst that was in the context of a *Francovich* claim, it is no longer a *Francovich* claim. That is for two reasons, namely

> (a) the result of *Smith v Meade* confirming the absence of horizontal effect of the Directives in respect of private bodies such that an insurer can avoid liability due to a measure such as section 152(2) of the RTA; and
>
> (b) the result of *Lewis* [at 74-75] confirming the role of the MIB as an emanation of State and as having to remedy the failure of the government to institute in full a compulsory insurance scheme and being subject to a direct action from the victim.

This was expressed by Mr Moser QC, namely that "a vagary of our system as it was under the old 152(2)" did not excuse the Secretary of State: see the further analysis in respect of *Delaney* especially at paragraphs 86-92 of this Judgment above. Once it was established that the MIB was an emanation of State, the national law which was incompatible with the Directive would not excuse the MIB.

(8) The Directive is to be construed purposively in the context of the extensive protection to victims of road accidents. This is consistent with the responsibility of the national courts to provide the legal protection which individuals derive from rules of EU law. It is to ensure that the objectives of the legislation are met and that those rules are fully effective.

(9) The construction that such a victim is confined to a *Francovich* claim despite the availability of a direct claim of a victim against the MIB would represent a major lacuna in the protection of the Directive. The suggestion that *Smith v Meade* provides support is not accepted for the reasons advanced by the Claimant and summarised at paragraph 114 above and having regard to all the matters set out in this para. 120. A *Francovich* claim provides a limited protection because of the need to prove a sufficiently serious breach by the Government. In this case the Secretary of State contends for the reasons set out in sub-paragraphs 10a–10g of his Defence that the breach does not satisfy the sufficiently serious test in Francovich.

121. There are a number of references to the words "*the insurance obligation provided for in Article 3 has not been satisfied"* in Article 10(1) being a reference to where the vehicle is uninsured e.g. in *Csonka* in the Opinion of Advocate General Mengozzi at para.31 ("vehicles for which an insurance policy has not been taken out"), in the Judgment of the Court in *Csonka* at para.31 ("a vehicle in respect of which no insurance policy exists") and in *Fidelidade* at para. 35 ("that is to say, it is a vehicle in respect of which no insurance contract is in place"). The expression at para. 35 of *Fidelidade* expressly draws on para. 31 of *Csonka*, and that paragraph in turn appears to draw on the Opinion of Mr Mengozzi, so it is not a coincidence that virtually the same language appears in these three paragraphs.

122. However, none of this shows that what was being said was that the insurance obligation was only not satisfied where the vehicle was uninsured. There is a telling feature in the citations of *Csonka* and *Fidelidade*. There has been cited above para. 41 of the CJEU in *Churchill* referring to the uninsured vehicle, the unidentified vehicle and the vehicle which has not satisfied the insurance requirements as if they are not the same. That para. 41 of *Churchill* was quoted at para. 30 of *Csonka* and at para. 35 of *Fidelidade* ("to that effect"). All of this shows that the insurance obligation not being satisfied is not limited to the case of an uninsured vehicle. The reference to *Churchill* in or close to para. 31 of *Csonka* and in para. 35 of *Fidelidade* is a further indication that the unsatisfied insurance requirement was not limited to a driver or owner failing to obtain motor insurance.

123. Further, in the same para. 31 of his Opinion in *Csonka*, Mr Mengozzi said that "in the mind of the legislature, a vehicle in respect of which the insurance obligation has not been satisfied was equivalent to an uninsured vehicle…". The reference to equivalence was to a case of something other than an uninsured vehicle. To like effect, Richards LJ in *Delaney* at para. 33(viii) (quoted in para. 91 of this Judgment above) referred to a vehicle falling "to be treated as an uninsured vehicle" following the declaration under section 152(2) of the RTA 1988. This indicates that an insurance obligation having not been satisfied is not confined to the case where the vehicle is uninsured, but to treat all instances where the particular obligation had not been satisfied as either an uninsured vehicle or a vehicle which is insured, but is the equivalent of an uninsured vehicle: see paragraph 104 above.

124. It will be recalled that the essence of *Csonka* was a contrast between the vehicle insured with an insolvent insurer where the insurance obligation had been satisfied and one where the insurance obligation had not been satisfied. Jay J alighted at para. 60 of his judgment to this dichotomy which led to equating the insurance obligation not being satisfied as an uninsured vehicle (see also para. 44 of the Opinion of Mr Mengozzi in *Csonka*). That was not to confine the insurance obligation only to the uninsured vehicle. Hence, in *Lewis*, Flaux LJ even looking at para. 39 of *Farrell v White (No.2)* which there referred back specifically to *Csonka* at para. 31 understood the CJEU as protecting the victims of motor accidents so that the compensation body was intended to protect and compensate victims in two ways. First, it was to remedy the failure of the Member State to institute in full the compulsory insurance regime so as to fulfil its obligation under article 3 to ensure that civil liability is covered by insurance. Second, it was to provide protection where, although the Member State had implemented the obligation, the driver or the owner of the vehicle had not taken out the required insurance. As regards *Csonka*, the Court accepts the analysis of the Claimant as above and as summarised in paras. 96-99 and 101-104 of this Judgment above.

125. In short, the words in Article 10(1) of "a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied" are broad enough to include any breakdown in the system whether due to the vehicle being uninsured because of the driver or its owner or the vagaries of the national legislation, in this case one that created the declaration in section 152(2) of the RTA 1988, as Flaux LJ found in *Lewis*. The words in *Lewis* applying the Directive are broad enough to include a case of the insurance obligation not being satisfied because the insurance does not cover use of the vehicle on private land (the facts in Lewis) or because it is and has been subject to avoidance under section 152(2) as it then was. This provision is incompatible with the Directive and has been acknowledged as such by the Secretary of State. The effect of the existence of section 152(2) and the declaration in this case is that this was a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied and/or the vehicle was equivalent to or treated as an uninsured vehicle: see the opinion of Mr Mengozzi in *Csonka* and Richards LJ in *Delaney* referred to at paragraphs 104 and 123 of this Judgment above. Reference is again made to paras. 52-61 of this Judgment above in the summary of relevant parts of the judgment of the Court of Appeal in *Lewis*.

126. In my judgment, the above references to the insurance obligation not being satisfied being a reference to an uninsured vehicle are either because this is the most common example of where this breakdown occurs: alternatively, they are to be understood as a shorthand capable of referring both to the absence of insurance cover or the equivalent thereof where the insurance cover is inadequate for all of the many reasons set out above.

127. The submissions of the MIB to contrary effect run contrary to the reasoning of Jay J in *Delaney* (and of Richards LJ) and of Flaux LJ in *Lewis*. These submissions are not only inconsistent with the cases of this jurisdiction, but also with the European cases cited above. They would treat as a lacuna a case where a victim had no remedy against an insurer where the vagaries of the national legislation exempted the insurer from liability. This does not meet a purposive understanding, or the plain text, of the words in Article 10(1) "a vehicle for which the insurance obligation provided for in

Article 3 has not been satisfied". Those words refer both to the case of the uninsured vehicle and to its equivalent where the vehicle is insured but a vagary of the national legislation of the Member State gives rise to the insurance obligation not being satisfied.

128. For all of the above reasons, the submissions of the MIB are rejected, and the submissions of the Claimant are accepted. It therefore follows that the answer to Issue 1 is in the positive, and it is answered consistently with the case of the Claimant. The Claimant is able to rely upon Articles 3(1), 10 and 12 of Directive 2009/103/EC to require the MIB, an emanation of the State and compensation body for the purposes of Article 10, to pay compensation in the circumstances of the present case.

XXII Issue 2: whether the Third Defendant is entitled to rely on the exclusion permitted by Article 10(2) second sub-paragraph of Directive 2009/103/EC in respect of the Claimant, in the circumstances of the present case. The second sub-paragraph states: "*Member States may, however, exclude the payment of compensation by that body in respect of* ***persons who voluntarily entered the vehicle*** *which caused the damage or injury when* ***the body can prove that they knew it was uninsured*****"** [emphasis added].

129. Issue 2 relates to the defence if the first issue is resolved against the MIB. The MIB claims to be able to rely on the second sub-paragraph under Article 10(2) of the 2009 Directive quoted above. The MIB says that this sub-paragraph applies as an exclusion which defeats this claim in that "the Claimant voluntarily entered the vehicle which caused [him] the… injury when [the MIB] can prove that [he] knew the vehicle was uninsured." The MIB relies on the agreed Statement of Facts, and in particular paras. 5 and 6 thereof quoted above.

130. It is apparent from those facts that the MIB is able to establish that the Claimant entered the vehicle knowing that the First Defendant was not an insured driver. However, the Statement of Facts does not refer to knowledge that the vehicle was uninsured, and indeed there was insurance in respect of the vehicle. Hence the declaration was sought and obtained under section 152(2) of the RTA 1988 in its then form. That was predicated upon the vehicle having been an insured vehicle at the time of the accident, but having an entitlement to avoid the insurance policy and obtain a declaration to that effect complying with section 152(2) of the RTA 1988.

XXIII Submission of the Claimant

131. The Claimant submits that the Article 3 obligation, including its coextensive Article 10 obligations, are EU law concepts that fall to be interpreted as such. As the CJEU held, e.g., in *Torreiro v AIG Europe Ltd, Sucursal en España* (Case C-334/16) [2018] Lloyds Rep IR 418, at para. 24, the "very concept" of Article 3 of the 2009 Directive could not be left to the discretion of the Member State "but constitutes an autonomous concept of EU law", which falls to be interpreted in accordance with the CJEU's applicable case law. Thus far, there is nothing which appears to divide the parties.

132. The question arises as to whether the knowledge that the driver was uninsured is, at least, on the facts of the case, to be equated with the knowledge that the Vehicle was

uninsured. The Claimant submits that "uninsured" in Article 10 must mean "uninsured" for the purposes of EU law, for the defence could only arise as a matter of EU law and the relevant provision forms part of the 2009 Directive. The clause therefore needs to be interpreted in accordance with the principles of EU law. Viewed through the lens of Community law, the knowledge that the vehicle was uninsured is clearly distinct from knowledge that the driver is uninsured and might give rise to different outcomes: see the CJEU judgment in *Churchill*. This was a reference from the Court of Appeal for a preliminary ruling. It sets out when a vehicle is uninsured for the purposes of EU law and the 2009 Directive.

133. In *Churchill*, the dispute arose in two cases where the accidents were caused by uninsured drivers. In each case, the uninsured driver had been given permission to drive the vehicle by the victim. The victim was a passenger in the vehicle at the time of the accident, and the victim was insured to drive the vehicle in question (see judgment, para.18). Thus, it was a case where the distinction mattered because the driver was uninsured, but there was a motor vehicle policy under which a person was insured to drive the car in question. From the perspective of EU law, was there a distinction between a driver being uninsured and a vehicle being uninsured?

134. The first and second limbs of the first question in *Churchill* concerned whether a particular provision of English law was an exclusion from insurance for the purpose of Article 13(1) of the Directive and whether the exclusion came within one of the permitted exclusions under Article 13 (1). The third limb of the first question which the Court of Appeal asked the CJEU was as follows: "Is the answer to this question affected by the fact that, pursuant to Article 10 of [the 2009 Directive],[2] national bodies charged with providing compensation in the case of damage caused by unidentified or uninsured vehicles may exclude the payment of compensation in respect of persons who voluntarily enter the vehicle which caused the damage or injury when the body can prove that those persons know that the vehicle was uninsured?"

135. In answering the third limb of the first question in the negative, the CJEU held as follows at para. 40:

> "In that regard, it is first necessary to point out that the situation in which the vehicle that caused the damage was driven by a person not insured to do so, while a driver was, moreover, insured to drive that vehicle, and the situation specified in [Article 10(2) of the 2009 Directive] in which the vehicle which caused the accident was not covered by any insurance policy, are situations neither similar nor comparable. The fact that a vehicle is driven by a person not named in the relevant insurance policy cannot, having regard, in particular, to the aim of protecting victims of road traffic accidents pursued by the First, Second and Third Directives, support the view that that vehicle was not insured for the purpose of that provision."

[2] In fact, the relevant accidents occurred prior to the expiry of the date for implementation into domestic law of the provisions of the 2009 Directive, so the CJEU referred to the identical antecedent provisions in the earlier Directives (see judgment, para. 39).

136. In the paragraphs which followed (paras. 42 and 43), the CJEU summarised the exclusion in Article 10(2) as being "in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that **they knew that neither the driver nor the vehicle was insured."** The CJEU then went on to find that that the answer to the third limb had no bearing on the issue before the Court.

137. The reasoning in *Churchill* was followed and applied, and the definition of "uninsured" developed further, by the CJEU in *Fidelidade*. In *Fidelidade* the dispute arose in circumstances closely analogous to the present case, where an insurer of a vehicle involved in a road traffic accident sought to rely on the invalidity of the policy on grounds of misrepresentation under domestic law, as a result of the policyholder falsely representing to the insurer on the date the contract of insurance was concluded that she was both the owner of the vehicle and its usual driver. That the insurance contract had been concluded on the basis of misrepresentation did not enable the insurance company to invoke any consequent avoidance or nullity of the insurance against a third party so as to be released from the Article 3 obligation to compensate that victim. The CJEU then considered the position of such a victim in the context of the second sub-paragraph of Article 10(2) of the Directive as appears in the emboldened extracts in paras. 29 and 36 of *Fidelidade* quoted at para.107 above of this judgment. Those paragraphs applied para. 40 of *Churchill* to the effect that the fact that a vehicle is driven by a person not named in the insurance policy relating to that vehicle cannot, in view, in particular, of the aim of the Directive of protecting victims of road traffic accidents, support the conclusion that that vehicle is uninsured for the purposes of the second sub-paragraph of Article 10(2).

138. The CJEU has since also applied para. 40 of *Churchill* e.g. in Case C-648/17 *BTA Baltic Insurance Company AS*, ECLI:EU:C:2018:917 (judgment, 15 November 2018), at para. 46. The way in which it was there expressed was as follows:

> "Finally, it must be recalled that the EU legislation concerning civil liability insurance in respect of the use of vehicles prevents the exclusion of the insurer's obligation to compensate a victim of a road traffic accident involving an insured vehicle when the accident has been caused by a person who is not the person covered by the insurance policy: see *Churchill Insurance Co Ltd v Wilkinson (Case C-442/10) EU:C:2011:799; [2013] 1 WLR 1776; [2011] ECR I-12639,* paras. 33–44 and the case law cited."

139. It therefore follows that the exclusion in the second sub-paragraph of Article 10(2) could not apply in that the fact that the accident was caused by a person known not to be insured does not mean that the accident was caused by an uninsured vehicle.

XXIV Submission of the MIB

140. The submission of the MIB is that if the Court accepts MIB's case on Issue 1, this will necessarily involve the Court concluding that the insurance obligation was satisfied in this case, that is to say that the vehicle was insured. Whatever happened thereafter by subsequent avoidance of the policy and the invoking of section 152(2) of the RTA 1988 and the declaration, at the time of the accident the insurance obligation had been satisfied by a policy of insurance being in place. In those circumstances, Article 10 is not engaged and the issue relating to Article 10(2) would not arise.

141. If, however, the Court does not accept the submission of the MIB on Issue 1, it would follow that the vehicle would have been uninsured, in which case the MIB submits that it can rely on the exclusion in Article 10(2). In *Delaney* in the Court of Appeal at para. 33(viii), Richards LJ referred to what occurred when a contract was avoided for non-disclosure or misrepresentation and a declaration was obtained pursuant to the then section 152(2) of the RTA 1988. In his words, this "had the consequence that the vehicle fell to be treated as an uninsured vehicle."

142. The MIB submits that there is no scope for any argument that in such circumstances only part of Article 10 is engaged: either Article 10 as a whole is engaged or none of it is. There is nothing in the case law of the CJEU on which such an argument could properly be advanced. Ms Kinsler QC submitted that the Claimant was seeking 'to have its cake and eat it'. When it suited him in respect of Issue 1, the Claimant was submitting that the vehicle was to be treated as uninsured in that the insurance obligation was not satisfied. However, on Issue 2, he was in effect submitting that the vehicle was insured. That was a contradiction in terms.

143. Ms Kinsler QC submitted that the cases relied on by the Claimant did not assist him because they were to be understood against different factual backgrounds. As regards *Fidelidade*, the MIB says that it does not support the Claimant's case. *Fidelidade* involved a motor insurer seeking to avoid a policy of insurance due to misrepresentation and the Portuguese Article 10 body arguing that an insurer was not able to do so. The issue before the CJEU was whether the insurer was able to escape liability in such circumstances. In such a case, EU law required the insurer to compensate the victim and national legislation which enabled an insurer to escape liability was precluded. It was in that context that the Court noted that the fact that a vehicle – which was by definition covered by insurance – was driven by a person not named in the insurance policy. The MIB submits that this cannot support the conclusion that the vehicle is uninsured for the purposes of what became Article 10(2). The point which the Court was making was that in such circumstances Article 10 was not engaged. This is made clear at paras. 27 – 29 of the judgment in *Fidelidade* cited above.

144. As regards reliance on *Churchill*, the relevant policyholders allowed others to drive their vehicles with the policyholders as passengers. The policyholders knew that the drivers were not insured. The insured claimed for personal injuries from their insurers. The insurers accepted liability to compensate them but claimed an indemnity from them pursuant to relevant domestic provisions. The CJEU was asked to determine whether the relevant EU law precluded national rules whose effect was to exclude from the benefit of insurance a victim of a road traffic accident. The question arose as to what would happen when the victim was also the insured. The CJEU held that the

fact that the victim was also the insured did not mean that that person was excluded from the protection of the Directives. National rules that automatically omitted the requirement that the insurer should compensate a passenger who was the victim of a road traffic accident were precluded by the Directives.

145. Again, *Churchill*, like *Fidelidade*, is not a case about Article 10 guarantee bodies. It is a case about insurers' liabilities under the EU motor insurance framework. It is in that context that the Court has stated that a vehicle driven by a non-insured driver does not make the vehicle uninsured for the purposes of Article 10(2) – the fact is, as stated in relation to Issue 1, the Vehicle was not uninsured.

146. If, contrary to the MIB's submission on Issue 1, the Court concludes on Issue 1 that the MIB must meet the liability of the Insurer where it is entitled under its domestic law to avoid liability, the MIB submits that in those circumstances it would have the benefit of the exclusion in Article 10(2). It submits that the legislative history demonstrates that the clear purpose of what is now Article 10(2) was to restrict further the scope of the Article 10 body's liability to a victim. In this case, there is no dispute that the Claimant voluntarily got into the Vehicle when he knew the driver of the Vehicle was uninsured. If the Court finds the Vehicle was uninsured, sufficient to engage the Article 10 guarantee body's *prima facie* liability, then the Article 10 guarantee body has the right to rely on Article 10(2) in the circumstances of this case.

XXV Discussion

147. In my judgment, the wording of the exclusion in the second sub-paragraph of Article 10(2) is a reference to the vehicle being uninsured and not to the driver being uninsured. That comes from the syntax of Article 10(2), which refers to the knowledge that "it" is uninsured. The word "it" in the context of the sentence means "the vehicle", whereas the word "they" refers to the drivers. The exclusion is therefore where there is knowledge that the vehicle is uninsured rather than the driver not being a named or an insured driver.

148. It is clear in my judgment that there is a distinction between the two. That is stated very clearly in *Churchill* and in *Fidelidade.* The clarity of that distinction is not made less so because those cases raised different issues. In *Churchill*, the issue was where the policyholders who were injured had allowed uninsured persons to drive their vehicle. There is no reason why it would be different where an uninsured driver of an insured vehicle allowed a passenger to come into the car. In both cases, the vehicle was insured, but the driver was uninsured. It is said that on the facts of *Churchill*, the policyholder would have all the requisite knowledge about the insurance in place, and the vehicle clearly had insurance. There is no reason why it should make a decisive difference that the injured person in *Churchill* was the insured, whereas in the instant case, it was a third party.

149. In *Fidelidade*, the fact that the question which arose about whether the insurer was entitled to avoid, and the question was not about the claim of a third party against the guarantee body, does not alter the fact that the same distinction was emphasised in *Fidelidade*: see especially paras. 27-29 above of *Fidelidade.* As stated in para.36 of *Fidelidade*, "the fact that a vehicle is driven by a person not named in the insurance

policy relating to that vehicle cannot support the conclusion that that vehicle is uninsured for the purposes of the [second] sub-paragraph of [Article 10(2) of the 2009 Directive]". That proposition should apply whether the passenger was the policyholder or a third party as in the instant case. It also applies when looking at the matter in the context of the insurer being the relevant party.

150. The alleged inconsistency in the submissions of the Claimant needs to be addressed between the submissions directed to Issue 1 and those directed to Issue 2. The suggestion in essence is that the Claimant would seek to say the position is that the Vehicle was uninsured for Issue 1, but insured for Issue 2. This is the criticism of "wanting to have its cake and eat it."

151. In my judgment, the fallacy of this submission is the assumption that the vehicle, if identified, must be uninsured for the purpose of Issue 1. As set out above, it suffices if there is breakdown in the system such that the Claimant has no claim for compensation against the insurer. That breakdown can arise either on the basis that the vehicle was not insured at all or that it was insured, but that under the national law, the insurer was able to have a defence to liability in the events which occurred: in this case, by obtaining a declaration pursuant to section 152(2) of the RTA 1988. This follows from *Lewis* in the Court of Appeal, especially at para. 72, that the responsibility of the guarantee body encompasses both the case where the State has not fully implemented its insurance obligation under Article 3 of the 2009 Directive (as in the present case) and the case where, although the State has implemented the obligation, the driver or owner of the vehicle has not taken out the compulsory insurance required. It also follows from *Farrell v Whitty (No.2)* at para. 39 that the compensation body is intended to protect and compensate victims by remedying the failure of the Member State to fulfil its obligation under Article 3 to ensure that civil liability in respect of the use of motor vehicles is covered by insurance.

152. The consequence as regards Issue 2 is that the vehicle was insured at the time of the accident. It was at that point in time insured until such time as the Court issued a declaration pursuant to section 152(2) of the RTA 1988. This means that at the point in time of the Claimant entering the vehicle and the time of the accident, the vehicle was insured, and the Claimant could not have known that the vehicle was uninsured (because it was at that point in time insured).

153. That does not give rise to a contradiction between Issue 1 and Issue 2. On Issue 1, the question is not whether the vehicle was uninsured, but whether the relevant obligation was not satisfied. It was not satisfied as a result of the ability under the national law as it then stood to seek a declaration under section 152(2) of the RTA 1988. The vehicle was not one which satisfied the obligation in the *Csonka* sense because the insurance was capable of being set aside and was set aside through the declaration. On Issue 2, the vehicle was insured at the time of the accident, and so the victim could not have known that the vehicle was uninsured. The Claimant's knowledge was confined to knowledge that the driver was not insured, which the CJEU authorities from *Churchill* onwards state is different from knowledge that the vehicle was uninsured.

154. It follows that the submission of the MIB is not accepted: this is not a case of a person "wanting to have its cake and eat it". The case of the Claimant as summarised in paras.131-139 above is accepted. If there ever was an apparent contradiction, a more

detailed examination shows that there is no contradiction at all. This is a case where Issues 1 and 2 are resolved in favour of the Claimant's case, and without any inherent inconsistency.

155. At para. 21(b) of the MIB's Re-Amended Defence, the MIB contended that the *"use"* of the vehicle was uninsured. This is contrary to the above-mentioned reasoning of the Court of Appeal in *Lewis.* The only permissible and relevant concept in the interpretation of Articles 3 and 10 is that of the autonomous concept of EU law as to knowledge of *whether the vehicle which caused the injury was uninsured*. I accept the submission made by Mr Moser QC that by introducing another concept, the Defence of the MIB fails to give full effect to EU law and in particular case law of the CJEU. Were there a use test, the reasoning and outcome of *Fidelidade* would have been different. As is clear from the case law cited above, the test is not whether the use of the vehicle at the time of the accident was insured, but whether there was in existence a policy of insurance in relation to the vehicle at the time of the accident. There was in existence in relation to the vehicle at the time of the accident a policy of insurance, and accordingly there is no scope for a defence under the second sub-paragraph of Article 10.

156. Contrary to that which the MIB avers at para. 21(c) of the Re-Amended Defence, there is a breach of Article 3 which arises as a result of the statutory exclusion of liability under section 152(2) of the RTA 1988 as it stood at the relevant time. The same is evident from the fact that the UK's failure properly to implement the 2009 Directive has resulted in a failure to protect victims of accidents caused by motor vehicles in the position of the Claimant and specifically a failure to guarantee compensation for such victims. As noted above, this has been acknowledged by the UK Government, and it is accepted by the Secretary of State in clear terms in his Defence in this action at para. 6(b).

157. It follows that Issue 2 is to be resolved as follows: the MIB is not entitled to rely on the exclusion permitted by Article 10(2) second sub-paragraph of Directive 2009/103/EC in respect of the Claimant, in the circumstances of the present case.

XXVI Conclusion

158. The UK Government has accepted that the regime of section 152(2) of the RTA 1988 constitutes a failure of the UK Government to institute in full a compulsory insurance regime (see *Lewis*, para. 74), that is to say one that guarantees compensation to passenger victims. The Secretary of State acknowledges this in his Defence in this action at para.6(b): see para. 156 above. The Claimant, being such a victim, has thus far gone unprotected by the UK regime, being unprotected by the RTA and unable to claim against the (private party) insurers (see *Colley v Shuker* [2020] RTR 13). The MIB has the task under Article 10 to remedy the failure of the Government to institute in full a compulsory insurance regime. The Claimant is entitled to invoke his directly effective Article 3, 10 and 12 rights in the circumstances of this case against the MIB as an emanation of the State which has the obligation to provide compensation in these circumstances: see *Lewis* especially at para. 72 and *Farrell v Whitty (No.2)* at para. 39. Further, for the reasons above set out, there is no defence available to the

MIB under Article 10(2) of the Directive against the Claimant's directly enforceable rights.

159. It has been submitted by both parties that if the Court regards the matter as unclear and requiring the assistance of clarification in Europe that the parties would assist in the drafting of a reference. If this were to be done, it would have had to be by 31 December 2020. Both parties nevertheless submitted from their respective standpoints that this would not be required in view of their respective convictions in the rightness of their submissions. In my judgment, with the assistance of considerable jurisprudence both in the CJEU (particularly in numerous recent cases cited above) and in the national court (including in the Court of Appeal, particularly in *Delaney* and *Lewis*), a reference is in my judgment unnecessary. For the reasons set out above, this Court has been able to form a clear view of the two preliminary issues without the assistance of a reference.

160. Following a draft of the judgment being sent to the parties in the usual way and a request to submit typing and other obvious errors, the MIB provided a written submission that the Court should refer the matter to the CJEU for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union. The Claimant responded in writing expressing concern about these submissions going unacceptably beyond what was permitted at this stage. It is unnecessary for me to consider matters of that kind because I have considered the additional submissions. They contrast with para. 75 of the opening submissions of the MIB's primary position (maintained during the hearing) that "the Court is in a position to determine the preliminary issues in MIB's favour. However, if the Court considers that the interpretation of the Directives on the facts of the present case is not sufficiently clear, MIB respectfully submits that it would be appropriate for the Court to seek guidance from the CJEU by making a reference."

161. The submissions made by the MIB are not new. They refer to *Fidelidade* and to the travaux préparatoires: they are dealt with in the Judgment. There is a submission which was made orally (not in writing) relating to *Smith v Meade.* That submission was not dealt with expressly in the draft, but it has been in the judgment as handed down. I have no reason to alter my conclusion in para. 159 above. The test for a reference is not satisfied. If and to the extent that it is said that the Court should be more ready to make a reference because the latest time for making a reference is 31 December 2020, in my judgment this does not alter the test to be applied in deciding whether or not to make a reference: see *Coal Staff v HMRC* [2017] EWHC 1064 at para. 26 per Rose J (as she then was).

162. It only remains to express appreciation of the expertise of Counsel on both sides for the very high standard of their respective submissions, both in content and clarity of presentation.