Neutral Citation Number: [2019] EWHC 1010 (Ch)

Case No: HC-2012-000207

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17/04/2019

Before :

MR JUSTICE MANN

- -

Between :

Mr Richard Allen	**Claimant**
- and -	
(1) Her Majesty's Treasury	
(2) The Commissioners for Her Majesty's Revenue and Customs	**Defendants**

- -
- -

Mr Leslie Allen (instructed by **Mishcon de Reya LLP**) for the **Claimant**
Ms Jessica Simor QC and **Ms Amy Mannion** (instructed by **GLD**) for the **Defendant**

Hearing dates: 12th & 13th March 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MANN

Mr Justice Mann :

Introduction

1. This is trial of an action brought by the claimant, Mr Richard Allen, claiming damages from the defendants (representing the United Kingdom as a Member State of the European Union) for failing to implement measures to remove a VAT exemption from Channel Island suppliers which, it is said, enabled those suppliers to compete with his business on unfairly advantageous terms (they could sell more cheaply) which eventually drove his company out of business. Although the business was conducted by a company in which Mr Allen was a shareholder, he has sued in his own name. The defendants expressly said to me, through counsel, that they took no point on that, so I have ignored the corporate veil and approached the matters before me as though Mr Allen would be able to make such claims as the company could have made. Since Mr Allen shares the same surname as his counsel, I shall hereafter refer to the claimant Mr Allen as the claimant.

2. This trial, as it arrived before me, was inadequately set up. The parties had agreed broadly that the trial would take certain issues of liability and put off questions of causation and quantum until a later date when liability (if any) had been determined. They proposed determining the liability points via some formulated questions, but unfortunately had not completely agreed the formulation. I had two different versions of what were said to be the relevant questions in my papers, with no agreement as to their final form. Nor was I asked to determine which form was appropriate. Although the formulations were sufficiently similar to enable the parties to address points in their skeleton arguments, that is still an unsatisfactory state of affairs and should not have been allowed to happen.

3. It may or may not have contributed to the other omission from what was necessary. Neither party proposed to adduce oral evidence, and there was no documentary evidence before me either. The prima facie gratifyingly thin single trial bundle turned out to consist of procedural documents and a long witness statement from the claimant which was put into the bundle by the defendant, apparently in order to evidence the fact that the claimant had previously intended judicial review proceedings on two separate occasions and sent pre-action protocol letters. The claimant did not adduce the evidence in that witness statement himself. Nor was there an agreed statement of facts. So there was no evidential framework for the determination of the issues which the parties invited me to decide (whatever they were). It did not take much probing to reveal that some of the apparent issues which I was to decide were to a degree fact sensitive, and the parties accepted that I could not deal with those. However, there seemed to be two points which I could decide on the basis of a broad agreement as to some incontestable legislative history and some basic facts about the claimant's business, and rather than waste the whole trial opportunity the parties agreed that we could tackle those (subject

to its becoming apparent that one or other of them became dependent on disputed facts after all, which it did not). This again is not a state of affairs which should have been allowed to arise, particularly since this action was started as long ago as 2012.

4. It was in those circumstances that this turned out to be a rather limited trial.

The background

5. This case concerns exemptions from VAT known as low value consignment relief – "LVCR". As appears from the legislation which I have to set out below, under that relief some importation of low value goods is exempt from the VAT that might otherwise be chargeable. It applied, inter alia, to goods imported from the Channel Islands. Retailers started to take advantage of that, and one of the main activities in which they did that was the sale of CDs and DVDs, which was the mainland business of the claimant. Because VAT was not payable on those imports, the goods were cheaper than those sourced from mainland suppliers. That was a benefit to Channel Islands based suppliers, but some mainland suppliers also started to exploit the exemption as well. They would take an order on the mainland, send the goods from the mainland to the Channel Islands (claiming repayment of the VAT that they had already paid here), and would then supply free of VAT from the Channel Islands. This process was known as "round-tripping".

6. In the early 2000s some UK retailers complained about this. They included the claimant. The claimant even went so far as to threaten two sets of judicial review proceedings, which were ultimately abandoned for want of funds (or so it is said). The essence of the complaint (as I understand it) was that the UK government should have tackled what was said to be an abuse and had failed to do so – the complaint that is now made in these proceedings. It is the claimant's case that his business was adversely affected to such an extent that it was no longer viable by 2007 and had to be closed down, with losses having accrued. He sues for those losses.

7. That VAT state of affairs continued until 2012 when the UK introduced a statutory instrument which removed the exemption on imports from the Channel Islands where there was a commercial mail order or "distance selling" sale. That removed the scope for the round-tripping abuse, but of course by then it was too late for the claimant's business. When the proposal to remove the relief was announced the governments of Jersey and Guernsey launched judicial review proceedings challenging the proposed statute on the basis that the UK was not entitled to introduce a selective removal of the exemption under the applicable European Directives. The matter was heard speedily by Mitting J who rejected that claim – *R (on the application of the Minister for Economic Development of the States of Jersey and another v The Commissioners for*

Her Majesty's Revenue and Customs [2012] STC 1113; [2012] EWHC 718 (Admin). I shall call this the "*Jersey*" case. Mitting J declared the proposal to be lawful. The case was relied on by the parties before me as providing factual background against which I could decide the issues I was to decide, and (by the defendant) as deciding certain matters which are relevant to my issues. I shall return to it as necessary.

8. The two questions that I am invited to decide, arising out of that background, are as follows:

(a) Should this claim have been brought by judicial review? If so, it is brought way beyond the 3 month time limit applicable to such claims.

(b) Can the claimant identify a right under the Directives pursuant to which he is entitled to claim as an individual?

The relevant EU legislation and the nature of the claim

9. Those issues have to be determined against the legislative background and the nature of the claim. That background is as follows.

10. So far as the legislation is concerned, it is probably easier to understand its effect by a short narrative description before embarking on the actual text. The names that I give to the Directives are not necessarily names which they bear on their face; they are names that I have given them to aid understanding.

11. **The Sixth Directive** of 1977 (77/88) sets up a broad framework for a harmonised VAT regime. It anticipated exemptions from VAT and contained recitals which suggested that exemptions were not to be allowed to have any serious effect on competition or to be abused. These recitals and their successors form an important part of the claimant's case. However, it did not confer the exemptions. It anticipated (in Article 2) that they would be provided in a later Directive, and they were. That later Directive (83/181/EEC – the "**1983 Directive**") had more recitals about abuse and provided for various exemptions. They included a <u>discretion</u> to allow LVCR on goods not exceeding €22. That was the original amount of LVCR. In a 1988 (Directive 88/331/EEC – the "**1988 Directive**") the amounts and nature were amended. A <u>mandatory</u> exemption for goods not exceeding €10 was substituted for the €22; and a <u>discretionary</u> further exemption could be allowed by Member States for goods with a value between €10 and €20; but there was also a discretion to allow no exemption at all for mail order goods.

12. With effect from 1st January 2007 the Sixth Directive was replaced by the **Principal VAT Directive** (2006/112/EC) which was a largely consolidating measure with more recitals said to be relevant. It confirmed, by incorporating by reference, the exemption in the 1983 Directive as amended. It, too, contained recitals said by the claimant to be relevant.

13. Last, Directive 2009/132/EC (the "**2009 Directive**") sought to bring about a further consolidation. It was not said to be directly relevant to the cause of action in this case because it is too late in time, but was shown to me because it was the legislative context of the *Jersey* case.

14. I therefore revert to the relevant text. Any emphasis in what follows is provided by me to flag up words which are said to be particularly significant to this case.

15. The **Sixth Directive** sets out the reasons for harmonisation of VAT across the European Union and the purposes of promoting the single market. The fourth recital reads:

> *"Whereas account should be taken of the objective of abolishing the imposition of tax on the importation and the remission of tax on exportation in trade between Member States; whereas it should be ensured that the common system of turnover taxes is non-discriminatory as regards the origin of goods and services, so that a common market permitting fair competition and resembling a real internal market may ultimately be achieved"*

And later:

> *"Whereas a common list of exemptions should be drawn up so that the Communities' own resources may be collected in a uniform manner in all the Member States"*

16. Article 14 (entitled "Exemptions on importation") paves the way for the introduction of the specific exemption which became LVCR:

> *"1. Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemption and of preventing any possible evasion, avoidance or abuse: "*

> *(…)*
>
> *(d) final importation of goods qualifying for exemption from customs duties other than as provided for in the Common Customs Tariff or which would qualify therefor if they were imported from a third country. However, Member States shall have the option of not granting exemption where this would be liable to have a serious effect on conditions of competition on the home market;*
>
> *(…)*
>
> *2. "The Commission shall submit to the Council at the earliest opportunity proposals designed to lay down Community tax rules clarifying the scope of the exemptions referred to in paragraph 1 and detailed rules for their implementation".*

The emphasised wording is the chronological starting point for the claimant's arguments. It is actually a form of standard wording for other exemptions provided for earlier – all specified exemptions are subject to the same qualification (see Articles 13 sections A and B).

17. Although the wording of Article 14(1)(d) is somewhat oblique, it is common ground that LVCR was within the sort of matters contemplated by (d). Thus it was one of the things for which the Commission was to make proposals. Those proposals resulted in the exemption articulated in the **1983 Directive**. That Directive starts with a number of recitals including the following (the numbering of the recitals is not in the original and is mine in order to facilitate cross-references later in this judgment):

> "*[1] Whereas, pursuant to [Article 14(1)(d) above] … Member states shall, without prejudice to other Community provisions and under conditions which they shall lay down for the purpose inter alia of preventing any possible evasion avoidance or abuse, exempt final importation of goods qualifying for exemption from customs duties other than as provided for in the Common Customs Tariff or which would qualify therefor if they were imported from a third country …*
>
> *[2] Whereas, in accordance with Article 14 (2) of the above-mentioned Directive, the Commission is required to submit to the Council proposal designed to lay down Community tax rules*

> *clarifying the scope of the exemptions referred to in paragraph 1 of the said Article and detailed rules for their implementation;*
>
> *[3] Whereas, while it is deemed desirable to achieve the greatest possible degree of uniformity between the system for customs duties and that for value added tax, account should be taken, nevertheless, in applying the latter system, of the differences as regards objective and structure between customs duties and value added tax;*
>
> *[4] Whereas arrangements for value added tax should be introduced that differ according to whether goods are imported from third countries or from other Member States and to the extent necessary to comply with the objects of tax harmonisation; whereas the exemptions on importation can be granted only on condition that they are not liable to affect the conditions of competition on the home market*"

18. Article 1 explains the purpose of the Directive:

> "*Article 1*
>
> *1. The scope of the exemptions from value added tax referred to in Article 14 (1) (d) of [the Sixth Directive] and the rules for their implementation referred to in Article 14 (2) of that Directive shall be defined by this Directive. In accordance with the aforesaid Article, the Member States shall apply the exemptions laid down in this Directive under the conditions fixed by them in order to ensure that such exemptions are correctly and simply applied and to prevent any evasion, avoidance or abuses*."

19. The following Articles provide for a series of exemptions and qualifications, amongst which is Article 22 which contains the earliest version of the LVCR exemption, under the heading "Imports of Negligible Value":

> "*Article 22*
>
> *"Member states may allow exemptions on imports of goods of a total value not exceeding 22 ECU*"

This was amended in the **1988 Directive** both as to amount and as to the discretion:

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

20. The Sixth Directive was replaced by the **Principal VAT Directive** in 2006 (2006/112/EC) with effect from 1st January 2007. The third recital recited that its intention was to recast existing legislation with a few substantive amendments. The fourth recital repeated a theme from the earlier legislation:

> "*The attainment of the objective of establishing an internal market presupposes the application in Member States of legislation on turnover taxes that does not distort conditions of competition or hinder the free movement of goods and services. It is therefore necessary to achieve such harmonisation of legislation on turnover taxes by means of a system of value added tax (VAT), such as will eliminate, as far as possible, factors which may distort conditions of competition, whether at national or Community level.*"

And Article 131 was similarly repetitive:

> "*Article 131*
>
> *The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.*"

21. The Directive then went on to incorporate by cross-reference the latest form of the LVCR from the the 1988 Directive (referring to mail order sales).

22. That is the last piece of European legislation technically applicable to this claim because the claimant's company was lost in 2007. However, I was also shown the 2009 Directive because it was the main Directive considered in the *Jersey* case; the purpose of showing it to me was to demonstrate (which it did) that the terms of that Directive set out yet again the form of exemption appearing in the 1988 Directive. It is unnecessary to set out parts of that Directive verbatim here. It is sufficient to note that Article 1 is the equivalent of Article 1 of the 1983 Directive and Article 23 is the equivalent of Article 22 of the 1988 Directive.

23. That is the relevant European legislation. It was carried into effect by the UK Parliament via statute and statutory instrument. Section 19 of the **Value Added Tax Act 1983** empowered to Treasury to:

> "*by order, make provision for giving relief from the whole or part of the tax chargeable on the importation of goods, subject to such conditions (including conditions prohibiting or restricting the disposal of or dealing with the goods) as may be imposed by or under the order, if and so far as the relief appears to the Treasury to be necessary or expedient, having regard to any international agreement or arrangements*"

This was to be done by statutory instrument (section 45) and the relevant order was the **Value Added Tax (Imported Goods) Relief Order 1984** (SI 1984/746), in which Schedule 2 Item 8 contained the first formulation of the relief:

> "*Any consignment of goods (other than alcoholic beverages, tobacco products, perfumes or toilet waters) not exceeding £6 in value, sent by post.*"

24. The value specified in that instrument was amended from time to time over the years in a manner which is irrelevant to this action, save to note that it allowed CDs and DVDs to enter the UK free of VAT (and thus allegedly to undercut the claimant's products), and from July 2012 goods imported by commercial organisations by mail order from the Channel Islands were taken out of the exemption. It was the introduction (or threatened introduction) of that qualification which generated the *Jersey* case, in which Jersey and Guernsey challenged its introduction, a case to which I will come.

Should this claim have been brought by judicial review?

25. There are some odd features about this question. On the claimant's side, and as has already appeared, the claimant threatened judicial review proceedings in 2007 and 2008 but did not follow through. Then he started the present Part 7 action via a claim form in 2012. One would have thought that if the defendants had considered that they ought to have been brought by judicial review then they would have taken the point at that stage. However, they did not. A Defence was served in 2014 which did not take the point, and it was not until an amended Defence was served in 2017 that the point was taken. That delay was unexplained, though it appears that the claimant did not take a delay point so no justification had actually been called for. (Part of the prior delay in pursuing the proceedings themselves was because of stays to allow for a settlement of the case.)

26. Be that as it may, the defendants now take the judicial review point. Ms Simor QC, for the defendants, says that whether the claim is for a failure to achieve particular exemption, or for a failure to prevent abuse more generally, it is a complaint about a failure to exercise a discretion and a claim of a pubic nature, and authority requires that such claims be pursued via judicial review.

27. The pleaded case of the claimant appears in paragraphs 22 to 29 and is (in summary) that the UK was under an obligation to prevent evasion, avoidance and abuse, and to prevent the distortion of competition. What was allowed to happen in relation to LVCR and the Channel Islands was an abuse, and/or it distorted competition, and the UK ought to have stopped it by excluding goods imported from the Channel Islands, or limiting commercial activity in the way in which it ultimately did in 2012, much earlier than it did. In failing to do so the UK was in breach of its obligations under the various Directives referred to above (including the 2009 Directive). As a result the claimant is said to have suffered damage, and damages are claimed. That, then is the nature of the claim.

28. Ms Simor submitted that a condition precedent for this claim is that the claimant had to show a failure to exercise a discretionary power in not removing an exemption or failing to control an abuse. This was a public law matter and could only be dealt with in a judicial review application – see *O'Reilly v Mackman* [1982] 2 AC 237; *Cocks v Thanet District Council* [1983] AC 286; *British Steel plc v Customs & Excise Commissioners* [2996] 1 All ER 1002 (per Laws J at first instance).

29. The premise of Ms Simor's submission may be correct, but her conclusion is not. The matter seems to me to be conclusively dealt with by CPR 54.3(2):

> "(2) A claim for judicial review may include a claim for damages, restitution or the recovery of a sum due but may not seek such a remedy alone." (my emphasis).

30. The present claim is, in form and in substance, a claim for damages alone. The only thing claimed in the claim form is "A claim for damages …", and the prayer in the Particulars of Claim seems just "Damages" (apart from interest, which is immaterial to this point). It therefore seems to be a species of claim which falls completely within the prohibition in CPR 54.3(2).

31. This provision was not referred to at the oral hearing before me. When I drew it to the attention of the parties after the hearing and asked for their submissions Ms Simor sought to meet it by repeating her submissions that it was a public law point that lay at the heart of the claim and that that required proceedings to be brought "in which declaratory relief would necessarily be sought". She said that if the proceedings had been brought "on time" it would have been a proper application for judicial review in which damages would only have been ancillary and which therefore not only could, but should, have been brought by judicial review proceedings.

32. I agree that if the claimant had brought his proceedings at a time at which he was substantively challenging the failure of UK to act and seeking some form of satisfaction (other than damages) at a time at which it made some difference to him, then he would have had to have claimed one of the traditional judicial review remedies, and Ms Simor's authorities to the effect that such a claim needed judicial review proceedings would have been in point and would probably have required proceedings under CPR 54. However, he did not do that; he has applied later and has confined himself to a claim in damages. He does not seek a declaration, and I do not see why he should have to if he otherwise has a good claim. Accordingly, Ms Simor cannot escape the clutches of CPR 54.3(2) in that way. Nothing in her citation of *O'Reilly v Mackman* assists her because the passages in that case do not deal with the present situation where there is a claim for damages only. Nor do two parallel cases relied on by her, which are said to demonstrate that "numerous damages actions, including for breach of EU law, have been properly considered by the Administrative Court," assist her. By way of example she cited *R (Elite Mobile plc v Commissioners of Customs and Excise* [2004] EWHC 2923 (Admin) and *R (on the application of Kemp) v Denbighshire Local Health Board and another* [2006] EWHC 181 (Admin). Neither of those cases assists her because the facts of those cases were different from the facts of the present. In each of those cases an application for judicial review was apparently started at a time at which remedies other than damages were sought. For reasons which varied as between the two cases, the non-damages points actually fell away, and the court considered the damages point in what was left of the proceedings. The crucial point is that in each case the cases started as full-blown judicial review cases, and not as "damages only" cases.

33. Accordingly, this first point of the defendants fails and, if he has a claim, the claimant is not barred for the procedural reasons suggested. I should add that, even if the point were good, I would have had misgivings about allowing the defendants to take the point at this stage in the proceedings. As identified above, the defendants did not take the point when the proceedings were started and did not take it in their Defence. It was only in the amended Defence five years after the case started that point was first taken. It can be seen from the authorities that using the wrong procedure is treated as an abuse point (see the notes in the White Book at paragraph 54.3.2). An abuse point ought to be taken promptly in proceedings, and not four or five years after they are started (if the point was available at the outset). Starting judicial review proceedings by the wrong method is, apparently, not a fatal flaw anyway, since the parties can agree that the relevant remedies would be available notwithstanding that they are sought in a Part 7 claim. In *O'Reilly v Mackman*, in which Lord Diplock considered the mechanisms of a judicial review claim (and in which the need for leave, and the time limit for it, were justified by the need for public authorities and individuals to know the status of a given decision as soon as possible, a consideration which does not arise in cases like the present, or not to the same extent), his Lordship said:

> "Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.
>
> My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons." (p285)

34. The emphasised words (the emphasis is mine) show that parties can agree to proceed under the Part 7 procedure, and if that is right then it must follow that choosing what the defendants would say in this case is the "wrong" procedure is not procedurally fatal. In another case it might be an abuse of process, but that would be a difficult point for the defendants to run in this case in the face of their delay in taking the point; but the point was not developed in the case before me and it is unnecessary for me to say

anything more about it. It suffices to reject the defendants' objections in the manner in which I have.

Do the Directives confer rights on an individual which the claimant could invoke? – the law

35. This question emerged as a relevant question as a result of agreement between the parties that it was one of the tests that needed to be fulfilled to give an individual a "*Francovich"* claim such as that which the claimant claims to have. It was also agreed that this could be taken as a question of law which involved primarily looking at the legislation and which did not involve any questions of potentially disputed fact.

36. A *Francovich* damages claim of the present type is one in which an individual sues a Member State for damages for failing to implement an EU Directive properly or at all. It takes its name from the leading case in which such claims (and more direct claims) were established as existing, namely *Francovich v Italian Republic* (Joined cases C-6/90 and C-9/90). The European Court held that a Member State could be liable to an individual in damages for such a state of affairs and laid down three conditions for state liability:

> "40. The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties."

37. The third of those conditions is something that cannot be investigated in this case at present for the reasons given above. This part of this judgment concerns the application of the first of those conditions (the grant of rights to individuals), though it may be necessary to allow the argument to trespass slightly into the second.

38. Some of the elements in this statement were re-affirmed, in a modified form which does not affect the point in the present case, by the ECJ in what is known in this jurisdiction as the *Factortame* case [1996] QB 404:

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

So far as the first of those elements is concerned, the Advocate-General had said:

> "Accordingly, in those circumstances, since the court [in *Francovich*] had first found that the Directive could not be relied on directly by individuals before the national courts, it merely indicated that, for the purposes of the obligation to make reparation of the member state in breach of its obligations, it must be possible to identify a precise, exact right on the part of the individuals." (p 462H)

39. Both parties in the case before me drew attention to the closing words of that paragraph.

Relevant interest – the arguments

40. I therefore turn to consider whether the Directives confer on Mr Allen, as an individual, rights which would enable him to make the complaint that he has. Although extensive reference was made to the various Directives referred to above, Mr Allen's point on this seemed to come down to two provisions of the 1983 Directive (which was the one in force during most of the period of his complaint), namely Article 1 supplemented by Recital [4]. In order to disentangle them from the wider legislative background I set them out again here with relevant emphasis:

[Recital 4]

> "[4] Whereas arrangements for value added tax should be introduced that differ according to whether goods are imported from third countries or from other Member States and to the extent necessary to comply with the objects of tax harmonisation; <u>whereas the exemptions on importation can be granted only on condition that they are not liable to affect the conditions of competition on the home market</u>"

> "Article 1
>
> 1. The scope of the exemptions from value added tax referred to in Article 14 (1) (d) of [the Sixth Directive] and the rules for their implementation referred to in Article 14 (2) of that Directive shall be defined by this Directive. In accordance with the aforesaid Article, the Member States shall apply the exemptions laid down in this Directive under the conditions fixed by them in order to ensure that such exemptions are correctly and simply applied and to prevent any evasion, avoidance or abuses."

41. It was Mr Allen's submission that those provisions imposed a negative obligation on a Member State to ensure that competition on the home market was not negatively affected and a negative obligation to ensure that exemptions were not abused. Those were obligations owed to individuals such as the claimant. His case on breach is that they were both broken because the UK government failed to stop the abuse of LVCR when it first arose and that the failure to limit it adversely affected competition on the home market. He pointed to apparent findings by Mitting J in the *Jersey* case to the effect that round-tripping was an abuse. His client was someone who was capable of benefiting from the proper implementation of the Directive (because he would be adversely affected by poor implementation) and that the scheme of the Directives meant that that should give rise to a right in the individual, because otherwise there was no way in which a Member State could be induced to curtail an abuse. He specifically adopted a submission made in the *Jersey* case by counsel for a UK retailers' organisation to the effect that Article 1 positively required the UK to take measures to combat avoidance or abuse. There was therefore an individual right conferred by the legislation for the purposes of the first of the three *Francovich* requirements.

42. The defendant, through Ms Simor QC, submitted that that analysis was wrong. She drew a distinction between standing for judicial review purposes and the interest necessary to maintain the damages claim that is said to arise in this matter. This was not a case in which the Directives gave an interest to the individual for the purposes of the first limb of the *Francovich* requirements and she leant heavily on certain determinations of Mitting J in the *Jersey* case which she said indicated that there was no free-standing obligation at all under Article 1 of the 1983 Directive, much less one which conferred rights on the individual. Furthermore, any such rights could not be established with sufficient clarity from the terms of the Directive(s). The claimant was not relying on any initial failure to implement the Directive; rather, he seemed to be saying that at some unspecified point thereafter the UK came under an obligation to act against an abuse. That did not demonstrate a sustainable relevant interest.

Relevant rights – conclusion

43. Logically the first question is to consider whether anything in Mitting J's judgment decides the points which I have to decide.

44. The case before him was of a different nature to mine. As appears above, it was a judicial review challenge by the Jersey and Guernsey governments arguing the opposite of what the claimant in this case is arguing. They were arguing that the modification of the exemption for the Channel Islands was not permitted, whereas the claimant is saying it should have been applied a long time previously. Accordingly, Mitting J did not have to confront the sort of points which arise now. However, he did make some remarks about the terms of the 2009 Directive (which correspond to the 1983 Directive with which this case is concerned) which the defendants rely on as delimiting the scope of any obligation.

45. At paragraph 33 of his judgment Mitting J described the nub of the case as being:

> "Is the United Kingdom entitled selectively to disapply LVCR?"

And he went on to summarise some of the arguments as follows:

> "34. Ms Whipple QC, for the Treasury and HMRC, submits that the answer is yes, for four reasons:
>
> (1) Selective disapplication is permitted by the language of the proviso; a power to disapply LVCR across the board includes a power to disapply it to a lesser extent.
>
> (2) The principles of fiscal neutrality, non-discrimination and proportionality have no part to play in assessing the lawfulness of a measure which targets imports from a territory outside the EU.
>
> (3) The United Kingdom is entitled to take measures to limit avoidance or abuse or distortion of competition and the draft clause is such a measure.
>
> (4) Properly understood, the draft clause will enhance, not diminish, fiscal neutrality.
>
> 35. Mr Vajda QC, for RAVAS [an interested retail party resisting the attack on the legislation], additionally submits that Article 1 of the 2009 Directive requires the United Kingdom to take measures to combat avoidance or abuse and the draft clause fulfils that obligation.

> 36. Mr Vaughan and Mr Grodzinski [for Jersey and Guernsey] submit in response that the legislative history and wording of Articles 1 and 23 of the 2009 directive exclude Ms Whipple's third and fourth propositions and Mr Vajda's additional proposition."

46. Having considered the legislative history Mitting J then accepted a submission from Jersey and Guernsey to the effect that there was no free-standing *right* or *discretion* for the UK government to prevent avoidance or the distortion of competition, at least so far as his Article 23 was concerned, because the discretion to remove the exemption was unfettered. He held that:

> "54 … It is the detailed rules adopted by the Union legislature which now determine how and to what extent harmonisation, the minimisation of avoidance and abuse and of distortion of competition are to be achieved, not the separately determined legislative and administrative acts of the member states.
>
> 55. It follows that subject to Article 1, the extent to which the importation of goods of low value may give rise to avoidance or abuse or to distortion of the market is conclusively determined by Article 23. None of the following will do so: the blanket exemption of goods of a value not exceeding 10 euros, the blanket exemption of goods of a value not exceeding 22 euros, or of neither, if imported on mail order."

Then he dealt with other submissions, and in particular the Vajda submission that he had recorded previously (and which was expressly adopted by Mr Allen in this case):

> "58. Mr Vajda submits that Article 1 imposes a freestanding obligation on the United Kingdom to act to eliminate avoidance and abuse by the imposition of a condition which excludes goods imported from the Channel Islands from LVCR. [my emphasis]
>
> 59. I will deal with Mr Vajda's submission first. I do not accept it. It requires a construction to be placed on the words of Article 1 which they do not bear. Member states are required to apply the exemptions laid down in the 2009 Directive; the words "shall apply" leave them no choice. They may impose conditions, but

> only for the purposes identified in Article 1; correct and simple application and to prevent evasion, avoidance or abuse. A "condition" which has the effect of disapplying the exemptions altogether would frustrate, not fulfil, the primary task of applying the exemptions. [my emphasis]
>
> 60. Thus, if there are importations of small value items which are not on mail order, which may be open to doubt, a member state would not be entitled to revoke the exemption which requires that importation to be permitted under Article 23."

47. Ms Simor QC relied on this determination. She said that it demonstrated that the sort of obligation which lay at the heart of the claimant's claim in the present case (which was said to flow from Article 1) had been held not to exist. I do not accept that submission. It is not clear enough to me that that is what Mitting J was saying. I have underlined significant words in my citation of paragraph 58. They seem to indicate a more focused submission than the one Mitting J had recorded at paragraph 35. Paragraph 35 records a general duty to avoid evasion and abuse; paragraph 58 records a duty to impose a particular restriction pursuant to a "freestanding obligation", namely a restriction on the exemption applying to all imports from the Channel Islands, and not just mail order items. The judge's use of the word "altogether" in the last sentence of paragraph 59, together with the terms of paragraph 60, seems to confirm that that is what he was addressing. This is not quite the same thing as the sort of obligation (with a corresponding right) which is relied on by the claimant in this case, but it is close.

48. Mitting J then went on to consider the submissions of Ms Whipple, which he found "more persuasive" but since he was not satisfied that there was abuse other than "round tripping" he did not think they assisted her. All that Channel Island traders were doing was using a legitimate tax differential. He then went on to find, for reasons not material to the present case, that the UK was entitled to enact the statute in question which was not contrary to EU law.

49. Since it is not clear to me that Mitting J decided matters which are sufficiently clearly matters which go directly to the claim made in the present case, I prefer to base my conclusion on my own analysis of the legislation.

50. It will first be useful to identify the right claimed. This was not always clearly articulated at the hearing, either in skeleton arguments (two were submitted by the claimant) or in oral argument. Nor was it clearly articulated in the Particulars of Claim. However, there was a clear statement in response to a challenge in the form of a Request for Further Information. The right was said to be "the right not to be harmed by market

distortion caused by the State's application of LVCR". It has to be said that the reasoning which is used to get there (which is long and which I will not set out) depends far more on background factual circumstances than the terms of the Directive itself (contrary to the second factor in the *Francovich* case). I shall take that as the relevant encapsulation of the right but bear in mind that second factor.

51. The starting point is the precise wording of the first condition in *Francovich* – "the result prescribed by the directive should entail the grant of rights to individuals". The inquiry is therefore as to what the result (object) of the Directive is. Having considered all its terms, and in particular those set out above, I have come to the conclusion that the purpose of the parts relied on is not to confer rights on individuals; rather, it is to prescribe wide conditions to ensure alignment between member states, in order to achieve certain objectives, including the prevention of abuse and avoiding adverse effect on competition. In order to achieve that a number of matters are prescribed, but none of them support the idea individuals are supposed to benefit directly from them.

52. The inquiry is as to whether "the result prescribed by the directive should entail the grant of rights to individuals". For these purposes (where the directive is not alleged to have direct effect) one has to look to see whether the end result of a properly implemented directive would be conferring rights on individuals. The inquiry is not as to whether the directive appears to give those rights; it looks to the intended result of the directive. That is illustrated by the facts of *Francovich* itself. As recorded in paragraph 3 of the judgment of the Court, the purpose of the directive in that case was to give minimum insolvency protection to employees. The implementation of the Directive was to achieve that result – it entailed the grant of rights to individuals. That was clear enough from the Directive, and therefore an individual had a right to claim where he/she was not afforded those rights.

53. This is not a question that falls to be addressed in general terms in relation to the whole of the Directive. It is possible that parts of the Directive can be demonstrated as intended to confer rights on the individual and other parts cannot. The question has to be answered by reference to the rights sought to be asserted and the provisions said to give rise to those rights.

54. I have set out the articulated right above. The provisions relied on as demonstrating that this right was intended to be conferred are Recital [4] and Article 1 of the 1983 Directive. Taken by themselves they are not a promising basis for an averment that they were intended to confer rights on an individual. The most directly relevant wording is the reference to competition in recital [4], but this is a recital, not an operative part. The claimant really needs Article 1, which is a more directly operative provision.

55. Taken by itself, that provision looks very general and does not deal with the sort of things that individuals can benefit from. An individual citizen of a Member State suffers indirectly from "evasion, avoidance and abuse", but does not thereby generally sustain the sort of direct individual harm which would be contemplated by the conferring of rights on an individual. Those words do not, or do not sufficiently clearly, apparently confer individual rights. They are more in the nature of general qualifications to a general regime, and that is the clear impression given by other parts of the Directive, and in particular the recitals. The recitals clearly indicate that a prime objective of the Directive, along with the Sixth Directive whose objectives it is furthering, is to produce a harmonised regime across Member States. That is also the impression given by the first sentence of Article 1, and it is very materially enhanced by putting the Directive in the legislative context of the Sixth Directive, which is plainly focused on harmonisation. A large number of the recitals in that Sixth Directive (not all of which have been set out by me) make that plain.

56. Looking at the 1983 provisions relied on and the remainder of the Directive, I do not consider that the words relied on were intended to give an individual the rights propounded in this litigation. If one wants an analogous case, it is analogous to the provisions of a banking Directive held by the House of Lords not to give individual rights in *Three Rivers District Council v Governor and Co of the Bank of England (No 3)* [2003] 2 AC 1, notwithstanding that part of the purpose of the Directive was to give some customer protection.

57. In coming to this conclusion I have not overlooked the fact that some aspects of this VAT legislation have been held to give rise to enforceable individual rights – see eg *Sweden v Stockholm Lindopark AB* Case C-150/99 at paras 29-33, in relation to certain exemptions provided for in the Sixth Directive. However, that does not mean that every provision of these Articles was intended to confer an individual right, or entailed the grant of individual rights (to get closer to the wording of *Francovich*). One has to consider the right claimed and the provisions said to give rise to it. When one does that in the present case one arrives at the clear conclusion that such rights were not conferred.

Conclusion

58. In the light of that conclusion it follows that the first limb of the Francovich requirements is not fulfilled (nor is the second) and the other issues that arise under them do not need to be decided. Subject to successful submission from the parties as to some other order, it seems to me that the appropriate order would be to dismiss this action.