Neutral Citation Number: [2020] EWHC 1808 (Ch)

Case No: BL-2019-002391

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

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 15/07/2020

Before:

CHIEF MASTER MARSH

- -

Between:

PANORAMA CASH & CARRY LIMITED T/A BOOZE DIRECT	**Claimant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Defendants**

- -
- -

Andrew Young (instructed by **Neil Davies & Partners**) for the **Claimant**
Joshua Carey (instructed by **HMRC Solicitors Office**) for the **Defendant**

Hearing dates: 16 June 2020

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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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CHIEF MASTER MARSH

Chief Master Marsh:

1. The defendant (HMRC) has applied to strike out this claim under CPR 3.4(2) on the ground that the particulars of claim do not show reasonable grounds for bringing the claim or, in the alternative, under CPR 24.2 that the court should enter judgment for HMRC on the claim on the basis that the claimant has no real prospect of succeeding at a trial and there is no other compelling reason why the claim should be disposed of at a trial. There are no issues between the parties about the way in which the court should deal with the application. The burden of establishing the grounds of the application is on HMRC. Under CPR 3.4(2)(a) HMRC must show that the claim is bound to fail and, furthermore, even if that is shown, the court may if the case is in an emerging area of jurisprudence decline to strike it out. The considerations the court must take into account under CPR 24.2 are set out in the judgment of Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15].

2. There is one further consideration in relation to the application under CPR 3.4(2)(a). Where a statement of case is found to be defective, the court should consider whether that defect might be cured by amendment and, if it might be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend (*Soo Kim v Youg* [2011] EWHC 1781 (QB)).

Background

3. The claimant is a trader in wholesale alcohol products and falls within the definition of a "revenue trader" set out in section 1 of the *Customs and Excise Management Act 1979* (CEMA). It was registered with HMRC from 2004 as an owner of warehoused excise goods pursuant to the *Warehousekeepers and Owners of Warehoused Goods Regulations 1999* (1999 No. 1728) ("WOWGR 1999"). Those regulations are made pursuant to section 100G of CEMA which provides for the registration of "registered excise dealers and shippers". It gives HMRC powers under regulations made under the section to maintain a register of approved persons and, for reasonable cause, to revoke approval. Without that registration, a trader such as the claimant is unable to continue to trade in duty suspended alcohol products.

4. In July 2010 the claimant entered into transactions under which it purchased and sold ten consignments of duty suspended beer. The purchaser was a Latvian company named Legata SIA. The consignments of beer were held by Edwards Beers and Mineral Bond Ltd ("Edwards") and the beer was to be transported by Revolution International 2000 to a bonded warehouse in Belgium registered in the name Simply Vodka BVBA.

5. Prior to movement of the consignments it was necessary for Edwards to undertake a 'SEED' check about Simply Vodka's standing. SEED is an acronym for 'System for Exchange of Excise Data'. Article 22 of *Council Regulation (EC) No 2073/2004* of 16 November 2004 was in force at the material time and it provides for each member state to maintain an electronic database comprising a register of persons who are authorised warehousekeepers or registered traders for excise purposes and a register of premises authorised as tax warehouses. It requires, in addition, a system for each state to share with other states information on its database and there is an electronic exchange of data twice daily.

6. The check carried out by Edwards was to obtain confirmation that Simply Vodka was an authorised recipient for the duty suspended beer and on 10 June 2010 that confirmation was duly obtained from HMRC, HMRC having consulted the register. In fact, and unknown to HMRC at that date, Simply Vodka had ceased to trade on 4 February 2010 and should no longer have been on the register.

7. HMRC commenced an investigation into Edwards and its customers on 5 July 2010 and the following day 7 lorry loads of beer were found at a haulier's site at Shepperton that included 2 loads originating from Edwards. In the vernacular, the haulier's premises were being used as a 'slaughter site'.

8. On 27 July 2010 HMRC learned that according to the SEED register in Belgium, Simply Vodka had closed before the movements started from Edwards. It is unclear why the data held by HMRC about Simply Vodka was inaccurate. The SEED system now shows that Simply Vodka ceased to be authorised on 4 February 2010 but the date of invalidation (the date on which the register was updated) is shown as being 20 December 2010.

9. By 12 August 2010 HMRC had established that the consignments of beer sold by the claimant had been fraudulently diverted by third parties for onward sale without duties and tax being paid.

10. On 20 August 2010 Robert McWilliam, a senior officer with HMRC took the decision to revoke the registration of all traders involved in the transaction, and the claimant was notified of that decision by a letter of that date. The reason given by Mr McWilliam for revocation was:

> "There have been 11 movements[1] of suspended excise goods from your account in Edwards Beers & Minerals Ltd which were not delivered to the declared destination warehouse – Simply Vodka BVBA in Belgium (as recorded in the accompanying paperwork)."

11. The claimant sought a formal review of that decision and provided HMRC with further information about the transaction and the checks that had been undertaken. The review was conducted by Mr Allan Donnachie. He wrote to the claimant on 9 November 2010 stating that the decision made by Mr McWilliam would be maintained. His decision letter stated that the claimant had not taken:

> "… any steps to confirm the bona fides of your customer or the authority of Simply Vodka BVA to receive these goods.
>
> Basic enquiries could have revealed that the Belgian tax warehouse was no longer in operation and given you sufficient information to make an informed decision about the request from your customer to dispatch the requested goods to that destination.
>
> You would appear to have made no investigation into your customer or destination and as the Belgian warehouse is not operational it follows that none of these consignments could possibly have been delivered."

[1] This was an error. There were 10 movements.

12. These reasons do not of course deal with the fact that Edwards had undertaken a SEED check and been informed by HMRC that Simply Vodka was accredited by the Belgian authorities to receive the beer.[2] At the date of Mr McWilliam's decision, and the review, HMRC was aware that Edwards and the claimant had relied upon the SEED check on Simply Vodka and that Simply Vodka was shown as being in the register at the time. It appears neither Edwards nor the claimant nor HMRC could have known that the register was inaccurate.

13. On 8 December 2010 the claimant made an application to the First-tier Tribunal (Tax Chamber) seeking to overturn the review decision. The appeal was eventually determined on 8 January 2014 when the Tribunal handed down its written decision. It determined, in classic administrative law terms, that the review decision was unlawful on the basis that HMRC took into account matters they were not entitled to take into account and failed to take into account matters they should have taken into account. The Tribunal does not have power to itself take the decision under appeal and so the decision was remitted to HMRC for reconsideration.

14. Mr Young who appeared for the claimant submitted that the decision is critical of HMRC and the Tribunal found that Mr Donnachie had given untruthful evidence. He described the Tribunal's approach as 'polite' and invited the court to read between the lines when considering the decision. I am unable to accept this submission. It is right that in evaluating Mr Donnachie's review decision the Tribunal was critical of the approach he adopted and it is clear there were failings. This can clearly be seen from paragraphs 129 to 135 and 142 of the decision. The deficiencies in Mr Donnachie's review decision are summarised in paragraph 205 of the decision in the following way:

> "(1) The appellant did take steps to confirm that Legata was bona fide.
>
> (2) The appellant did take steps to confirm the authority of Simply Vodka to receive duty suspended goods.
>
> (3) The appellant did make enquiries to confirm that Simply Vodka was operational.
>
> (4) The Appellant did make investigations into Legata and Simply Vodka.
>
> (5) The excise duty liabilities were considerably in excess of the £77,660 quoted in the letter.
>
> (6) The original decision was not contained in a letter dated 20 August 2010. That was a draft letter, the actual decision being contained in a letter dated 10 September 2010. 10
>
> (7) There was no letter to the appellant dated 19 August 2010.
>
> (8) Mr Donnachie failed to clarify whether there were 10 or 11 consignments.

[2] In what may have been an unintended irony, Simply Vodka was only ever authorised to deal in beer.

> (9) The review letter contains no reference to the relevant material provided by Mr and Mrs Kang in relation to the appellant's background and the specific transactions.
>
> (10) Mr Donnachie failed to take into account that conditions falling short of revocation could have been placed on the appellant's registration.
>
> (11) Mr Donnachie failed to take into account the effect revocation would have on the appellant's business."

15. Mrs Kulvinder Kang who is a director of the claimant has made a lengthy witness statement. She states that she was present during the Tribunal hearing and heard Mr Young's cross-examination of Mr Donnachie. She draws conclusions from what she heard and the Tribunal's reaction to it and says:

> "It is clear from the Decision and the evidence I heard that HMRC had targeted the Company and intended it to be unable to trade knowing this would cause it harm."

16. However, whatever members of the Tribunal may have indicated during the hearing, it is clear from the decision that no finding of impropriety on the part of HMRC or any of its officers was made; nor was there any finding concerning improper motivation of any officer of HMRC. The Tribunal decision simply found that Mr Donnachie's review decision was unlawful and had to be remitted for redetermination.

17. It is not suggested now (if it ever was) that the directors of the claimant were in any way complicit with the wrongdoing HMRC uncovered and the Tribunal accepted their evidence.

18. The claimant's directors understandably feel aggrieved about the review decision and the Tribunal decision marks out a number of failings in Mr Donnachie's approach. The removal of the claimant's ability to operate clearly had significant consequences for the business. This was compounded by very considerable delay in the Tribunal's Decision being put into effect. Although the review decision was remitted to HMRC for reconsideration in January 2014, it was not until 10 August 2017 that the registration was reinstated. The process of review did not start until 31 March 2017. A review decision that was favourable to the claimant was communicated on 31 May 2017 and the reinstatement took place over two months later. During the whole of the period from Mr McWilliam's decision in August 2010 up to August 2017 the claimant was unable to operate its business. There is some question about just how hard HMRC was pressed to undertake the re-review between January 2014 and March 2017, but it is undoubtedly the case that HMRC failed to implement the Tribunal's decision over a very lengthy period.

The claim

19. The claim was issued on 20 December 2019. The claim form does not identify a cause of action. It focuses on two points. First, that the withdrawal of the claimant's right to trade alcoholic dutiable goods was unlawful and, secondly, that HMRC failed to review the unlawful decision within a reasonable time. It goes on to say that HMRC

"debarred the claimant from duty suspended goods from 10 September 2010 until 10 August 2017 thereby causing loss and damage." As will become clear, there is a mismatch between the cause of action identified in the claim form and claims that appear to arise from the particulars of claim.

20. In the course of the hearing, Mr Young, who appeared for the claimant, rightly acknowledged that there are shortcomings with the way in which the particulars of claim are drafted. The claims that are put forward are for the most part poorly drafted and difficult to follow; and it is notable that despite the primary events that are relied upon having taken place in 2010, the subject of limitation is not mentioned. There is a false start even in the introductory paragraph which asserts that the claim raises issues of Human Rights under the *Human Rights Act 1998* and or European Community law. In fact, Mr Young clarified that although there are Human Rights claims, they are not made under the 1998 Act. Such claims are, he says, made under Community law. This seeks to sidestep the obvious difficulty for the claimant that arises under section 7(5)(a) of the *Human Rights Act 1998* which provides a limitation period of 1 year unless the court is persuaded to exercise its discretion to extend that period under section 7(5)(b) of the 1998 Act.

21. A further weakness is demonstrated by the claim for loss which is pleaded in spare terms in paragraph 37 of the particulars of claim. The first prayer for relief seeks damages of £2,446,294 without providing any particulars of how that (very precise) sum is calculated. It appears to have been based upon a report from Walker Thompson Accountants which Mrs Kang exhibits to her witness statement, albeit that the figure they put forward is £2,311,660. The difference between the two figures is not explained but they are within the same target area and it is obvious that the withdrawal of the claimant's ability to trade is likely to have caused substantial loss. The defect in the pleading concerning loss is an example of the sort of defect in the particulars of claim, all other things being equal, that is clearly capable of being corrected if the relief HMRC seeks on its application is not granted.

22. Mr Young clarified that the claim is made under two heads. First, a breach of European Community law and secondly a claim in domestic law under the tort of misfeasance in public office. I will deal with the claims in reverse order.

Misfeasance in public office

23. The elements of this tort were authoritatively explained in the speech of Lord Steyn in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 191 to 194. For the purposes of this judgment it is only necessary to consider that part of the cause of action which concerns the defendant's state of mind[3] because the other elements of the tort are not in issue.

24. There are two types of claim in misfeasance in public office that can be made; either a claim based on targeted malice or a claim based on untargeted malice. Lord Steyn described the distinction in the following way:

[3] The claim will be made against the public authority but it is the state of mind of the officer concerned that is relevant.

> "First there is the case of targeted malice by a public officer, ie conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense that the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful."

25. In a later passage Lord Steyn described the common feature of both types of the tort as comprising "an abuse of public power in bad faith".

26. Later in his speech Lord Steyn discussed the special nature of the tort where non-targeted malice is involved and the strict requirements governing it and went on to say:

> "This is a legally sound justification for adopting as a starting point that in both forms of the tort the intent required must be directed at the harm complained of, or at least to harm of the type suffered by the plaintiffs. This results in the rule that a plaintiff must establish not only that the defendant acted in the knowledge that the act was beyond his powers but also in the knowledge that his act would probably injure the plaintiff or person of a class of which the plaintiff was a member. In presenting a sustained argument for a rule allowing recovery of all foreseeable losses counsel for the plaintiffs argued that such a more liberal rule is necessary in a democracy as a constraint upon abuse of executive and administrative power. The force of this argument is, however, substantially reduced by the recognition that subjective recklessness on the part of the public officer in acting in excess of his powers is sufficient. Recklessness about the consequences of his act, in the sense of not caring whether the consequences happen or not, is therefore sufficient in law." [emphasis added]

27. Lord Hutton discussed the need for bad faith in his speech at [379]:

> "My Lords, I consider that dishonesty is a necessary ingredient of the tort, and it is clear from the authorities that in this context dishonesty means acting in bad faith. In some cases the term "dishonesty" is not used and the term "in bad faith" or acting from "a corrupt motive" or "an improper motive" is used, or the term "in bad faith" is used together with the term "dishonesty".

28. The claimant's case is set out in paragraph 34 of the particulars of claim:

> "34. The Claimant avers that it was the victim of the Commissioners Misfeasance in a Public Office.
>
> a. The Commissioners acting in the course of their Public Office abused their powers in three ways, each of which independently gives rise to liability. They:-
>
> i. Arrived at an unlawful decision to revoke the Claimant's registration as a registered owner of duty suspended goods, which appears to have been taken on 20 August 2010;

ii. Conducted a Statutory Review which unlawfully upheld the revocation; and

iii. Chose not to comply with the direction of the Tribunal to conduct a fresh review limited to the facts as found by the Tribunal within a reasonable time.

b. In respect of any or all of the above, the Commissioners could not have honestly believed they were exercising their powers lawfully and or in the alternative they exercised their powers recklessly.

c. The Commissioners knew that revocation would cause the Claimant economic loss. They further know or should have known that maintaining the revocation decision by way of an unlawful review would continue or cause further economic loss.

d. The Commissioners having been directed to conduct a further review by the Tribunal limited to the facts as found by the Tribunal could rationally have only reached a conclusion to restore the Claimant's authorisation.

e. The delay amounted to an abuse of the process of the Tribunal."

29. The two paragraphs that follow paragraph 34 appear on first reading to be a non-sequitur, or to plead an alternative Human Rights claim. However, Mr Young explained that they are intended to provide particulars of the mental element of the claim in misfeasance in public office.

> "35. The claimant's registration as a registered owner of duty suspended goods amounted to a property right for within [sic] the meaning of Article 1 Protocol 1 Convention on Human Rights.
>
> 36. The decision of the Commissioners to deprive the Claimant of its property right did not have a legitimate aim, it did not strike a balance between the Claimant and the general interest and lacked proportionality accordingly the decision was manifestly unreasonable."

30. Misfeasance in public office is a serious allegation to make. It involves an allegation that an officer or officers of a public authority has abused public power in bad faith and it must be properly pleaded and particularised. The particulars of claim do not:

(1) Identify the officer or officers who are said to have committed the wrong. Although conventionally the officer in question need not be a party to the claim because the public authority will be vicariously liable, it is necessary to make clear who is said to have been the wrongdoer. The wrongdoers on the facts of this case cannot be the Commissioners because they had no involvement at all. On the basis of the pleaded case, there are at least three possible wrongdoers, Mr McWilliam, Mr Donnachie and whomever is said to have chosen not to comply with the Tribunal's Decision within a reasonable time. Mrs Kang's witness statement suggests that the complaint lies against Mr Donnachie but that will not assist the claimant in respect of paragraphs 34a (i) and (ii) of the particulars of claim.

(2) Particularise the misfeasance. It does not suffice to assert that the original decision and the review were "unlawful", without more, or that some unnamed person or persons at HMRC chose to delay implementing the Tribunal's Decision.

(3) Explain whether the claimant's case is based on targeted or untargeted malice and plead the respective elements of the tort.

(4) Provide any, or least any adequate, plea of dishonesty or bad faith. Paragraphs 35 and 36 of the particulars of claim are unspecific and come nowhere to particularising the necessary mental element of the officer or officers against who the claimant wishes to claim.

(5) Explain the basis for alleging that the delay in implementing the decision of the Tribunal was an abuse of the Tribunal's process. The notion is a curious one bearing in mind the claimant took no steps to refer the case back to the Tribunal and, in any event, it is not promising basis for a misfeasance claim.

31. There is then the question of limitation about which there is no pleaded case. Under section 2 of the *Limitation Act 1980*, the claimant had 6 years in which to bring its claim. Time started to run from the point at which there is first material damage: *Iqbal v Legal Services Commission* [2005] EWCA Civ 623. Time would have started to run from the date of the original decision or the review (it matters not which for these purposes) but even if the date upon which HMRC served its evidence in the Tribunal is taken as a possible date to extend the period under section of the 1980 Act, time expired long before the claim was issued.

32. Mr Young made submissions about limitation in relation to the claim under Community law to which I will return. However, Mr Young was not able to provide any basis upon which a claim under domestic law for misfeasance in public office might not be time barred.

33. Mr Young submitted that the claim requires development through disclosure. The issue, however, is whether the claim pleads sufficient facts which, if proved, have some prospect of success and whether the claimant should be given an opportunity to amend this part of its case. If there were signs that the claimant might be able to plead a viable case that is not barred by limitation this might be an appropriate case in which to exercise that power because the claimant has clearly suffered substantial losses as a consequence of the decisions made in 2010. However, the claimant had 3½ months in which to consider the application despite that opportunity it has not provided a draft amendment. In those circumstances it is right to conclude that the claim for misfeasance in public office is bound to fail. If the CPR 24.2 test were to be applied, which provides a lower threshold for HMRC to establish, the claim has no real prospect of success and there is no other compelling reason for the claim to be disposed of at a trial.

Breach of Community law

34. The claim for breach of community law and how such a breach may give rise to a claim is far from clear. At paragraph 23 there is a bare assertion that HMRC breached Community law "… and so arrived at a decision to revoke the Claimants [sic]

registration as a registered owner of duty suspended goods." Mr Young explained in his submissions that the following paragraphs 24 to 33 are intended to provide particulars of the alleged breach.

35. The claimant says that the SEED databases "… are core component [sic] of the EU system of the monitoring of excise goods." After referring to the error and putting HMRC to strict proof of which state was responsible for the error, the particulars of claim go on at paragraph 28 to assert that the failure to update the database rests either with Belgium or HMRC and the failure "… amounts to an act of maladministration creating a liability for the loss and damage caused by that maladministration."

36. At this point in the pleading, the focus appears to be on the error in the database. The uncontradicted evidence provided by HMRC for the purposes of the application makes it clear that when the SEED check requested by Edwards was carried out, Simply Vodka was shown with a current registration. It must follow that to the extent there is a claim about the database being inaccurate (as opposed to reliance upon the information provided) any claim would have to be pursued against the Belgian authorities and not HMRC. Even if the particulars of claim taken in isolation show a claim that is not bound to fail, which I do not accept, when HMRC's evidence is taken into account it is a claim that has no real prospect of success.

37. The particulars of claim go on to assert that:

    (1) At the time of the revocation decision HMRC was aware, or should have been aware, of incorrect information about Simply Vodka's registration (or the absence if it) having been supplied: paragraph 29. It is not said that HMRC was aware of the error when the SEED check was carried out.

    (2) HMRC knew that in the absence of a valid SEED check the claimant could not have entered into the transactions: paragraph 30.

    (3) HMRC failed to act in accordance with the principle of Community law "… that an economic operator who has received precise assurances from an administrative authority may rely upon the protection of legitimate expectations which that authority caused it to entertain.": paragraph 31.

    (4) HMRC ought to have concluded that the claimant acted in good faith and taken account of the fact that the claimant had taken every reasonable precaution which could be reasonably required of it and relieved the claimant of any liability under the Community principle of proportionality: paragraph 32.

    (5) The statutory review of the revocation decision was unlawful. The claimant relies upon the findings of the First Tier Tribunal: paragraph 33. No particulars are given of the that ground this allegation.

38. The claimant produced as part of Mr Young's skeleton an opinion dated 29 October 2018 from Denis Waelbroeck who is a partner with Ashurst at their Brussels office and lawyer qualified with Brussels bar. It is clear that the pleaded case is based upon the opinion. Mr Waelbroeck concludes his opinion by advising that:

(1) If the Belgian authorities failed to update their SEED database the failure was an act of maladministration capable of engaging their liability under Article 22 of Regulation 2073/2004 and Article 16(3) of the law of 10 June 1997.

(2) The stronger and more evident cause of action against HMRC is based upon the adoption of the revocation Decision. He concludes by saying that: "We therefore consider that the Revocation Decision can be opposed on the basis of the ECJ case-law establishing that suppliers of excise goods may not be liable in the case of fraud by a third-party in circumstances where they took all reasonable precautions prior to the transaction and were not aware of, or involved in the fraud."

39. The claimant has chosen not to bring a claim against the Belgian state. The second route that is dealt with proposes there is a cause of action against HMRC. The opinion refers to there being an entitlement to 'oppose' the Revocation Decision. Possibly this expression is used as a shorthand for saying there is a claim under Community law that may be pursued in England, but that would not be an obvious reading of the advice.

40. Mr Carey in his submissions points to the unhelpful manner in which the claim under Community law is articulated and he is right to do so. Indeed, Mr Young acknowledged that the reliance upon the principles of legitimate expectation and proportionality are not pleaded in sufficiently clear terms.

41. Mr Carey drew attention to the approach to Community law claims that can be derived from the speeches in *Three Rivers (No.3).* Lord Hope suggested there are but two ways in which a claim might arise:

> "Community law, as it has been developed by the European Court of Justice, is capable of conferring upon individuals the right to claim damages from a national authority by one or other or both of two distinct routes. The purpose of the right to claim damages is to ensure that provisions of Community law prevail over national provisions. This is because the full effectiveness of Community law would be impaired if individuals were unable to obtain redress in the national courts of the relevant member state when their rights were infringed by a breach of Community law: *Brasserie du Pecheur SA v Federal Republic of Germany*; *R v Secretary of State for Transport, Ex p Factortame Ltd (No4)* (Joined Cases C-46/93and C-48/93) [1996] QB 404, 495, para20. The first route by which the right to claim damages against the state or an emanation of the state for the non-implementation or misimplementation of a Directive may be asserted is based upon the principle of direct effect. This is the principle which was established in Community law by *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse administratie derbelastingen* (Case26/62) [1963] ECR1. The second route is based upon the principle of state liability."

42. Later in his speech at p200B through to p201G, Lord Hope considers the scope of *Frankovich* liability and makes it clear that there must be a grant of rights under the Directive that was unconditional and sufficiently precise. Following the hearing, in one of two unsolicited emails, Mr Young clarified that the claim in Community law relies on the principle of state liability, that is the second of the two bases explained by Lord Hope in *Three Rivers (No 3).*

43. Mr Young relied upon Mr Waelbroeck's opinion as providing a basis for a claim arising from the direct effect of Community law. He pointed out that the effect of the revocation decision and the unlawful review was to prevent the claimant from operating not only until the Tribunal had handed down its decision but until HMRC had implemented a lawful review and reinstated the claimant's entitlement to trade.

44. Some indication of the basis of the claim in Community law can be gleaned from Mr Young's skeleton argument. He says:

    (1) There was a breach by HMRC of the claimant's right to own property within the scope of Article 1 of the Convention. The revocation of its authorisation to own excise goods under duty suspension amounted to a loss of a possession: *Van Marle v Netherlands* (1986) 8 EHRR 483, 491. The state cannot deprive a person of property unless there is an objective justification.

    (2) There is a right to rely upon a SEED check. The point is not developed but it appears to me to be a different way to make the same point about the deprivation of the right to property or perhaps a ground for saying there was a breach of the claimant's legitimate expectations.

45. There are two further paragraphs in Mr Young's skeleton argument that are worth setting out in full:

    (1) "It is respectfully submitted that the action before the High Court to seek damages in respect of clear breaches of Community law rights should be treated as an extension to the commencement of the Tribunal appeal. If the action in the Tribunal were not to be treated as a component in the Applicant's overall claim, then Community law rights would be violated. The Claimant's entitlement pursuant to Principles of Proportionality and Effective Judicial Control which encompasses Article 6 of the Convention along with The Charter of Fundamental Rights would lead to an issue of incompatibility."

    (2) "It is therefore the Claimant's submission that when taking account of Community Law which incorporates Convention Law it has a right to sue the State, in this case the Commissioners of HMRC, for damages. Domestic law both procedurally and substantively should be applied to ensure the effectiveness of the procedures for redress. The court should either regard the cause of action as not accruing until the re-review was complete and notified which is the most straightforward approach, or regard the claim as already having been started for the purposes of the 1980 Limitation Act. Certainly, the latter approach is no more dramatic than the courts disapplying an express limitation in the Marks and Spencer case[4] by applying a Simmenthal[5] approach."

[4] C-62/00 ECR 2002 1-06325
[5] ECJ Second Simmenthal Case 106/77

46. After the hearing, Mr Young supplied a copy of the ECJ decision in *Teleos plc*[6] and the Advocate General's opinion. However, the purpose in supplying the judgment was not explained and its importance was not explained in the hearing.

47. Mr Young devotes considerable space in his skeleton argument to questions of limitation as they affect a Community law claim. I can accept the possibility that the claimant might be able to plead a case based on the premise that (a) the decision taken by Mr McWillliam remained in effect until it and the review decision were reconsidered and the claimant's registration was reinstated in 2017; (b) the claimant had no choice but to seek to overturn the review decision through the Tribunal; and (c) it would be contrary to Community law for the effect of granting exclusive jurisdiction to the Tribunal to deprive the claimant of a claim. It may also be right that the principle in *Iqbal v Legal Services Comission* does not apply to Community law claims.

48. But it is not possible to discern from the particulars of claim the essential elements of the cause or causes of action that are relied upon. Even adopting a generous margin about the case in Community law the claimant might put forward, the case as it is put in the particulars of claim comes nowhere near to meeting the necessary threshold of showing that the claimant has a viable claim or that limitation can be overcome. In a claim that is based upon the direct application of Community law, it is necessary to plead the claim with precision. It does not suffice merely to assert a breach of the principles of legitimate expectation and/or proportionality.

49. The claim under Community law as it stands is bound to fail or, alternatively, it has no real prospect of success and there is no compelling reason which it should be tried. There is, however, some reason to believe that that if the claimant is given an opportunity to produce a revised claim it may be able to produce a claim based under Community law with a real prospect of success. The position is therefore different from the attempt to plead a case in misfeasance in public office.

50. I will make an order striking out the claim form and the entire particulars of claim. I will, however, give the claimant an opportunity to produce a draft amended claim form and draft amended particulars of claim that plead a claim based on a breach of Community law. The claimant may have to address the question of whether in seeking permission to amend the claim form it is introducing a new cause of action. Nothing in this judgment should be taken as indicating a view about the merits of such an application.

51. I will give directions on handing down this judgment if they are not agreed. I envisage that the claimant will have 28 days in which to serve upon HMRC draft amended statements of case. If HMRC accepts there is a viable claim, permission to amend to rely upon it will be granted. Alternatively, HMRC may restore its application for a further hearing.

[6] C-409/04