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Case No: BL 2018 000737

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

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

Date: 27 November 2020

Before :

HHJ JOHNS QC
Sitting as a Judge of the High Court

- -

Between :

JERSEY CHOICE LIMITED — **Claimant**

- and -

HER MAJESTY'S TREASURY — **Defendant**

- -
- -

MR AIDAN O'NEILL QC and MR NICHOLAS GIBSON (instructed by **CJ Jones Solicitors LLP**) for the **Claimant**
MS JESSICA SIMOR QC and MS AMY MANNION (instructed by **General Counsel and Solicitor to HMRC**) for the **Defendant**

Hearing date: 14 October 2020

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JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on Friday 27 November 2020.

HHJ JOHNS QC:

1. On 17 July 2012 Parliament enacted s.199(3) of the Finance Act 2012 to remove VAT relief known as Low Value Consignment Relief ("LVCR") from low value goods sold to UK customers using mail order from the Channel Islands.

2. That legislation had already been challenged at the bill stage by way of judicial review. Mitting J rejected that challenge to what was then the Finance Bill 2012 by his decision given on 15 March 2012 in *R (Jersey) v HMRC and R (Guernsey) v HM Treasury* [2012] EWHC 718 (Admin) ([2012] STC 1113) ("the Channel Islands JR").

3. The claimant, Jersey Choice Limited ("JCL"), a seller of low value horticultural products by mail order from Jersey, now says that the provision has caused it loss in excess of £15m and by these proceedings issued on 29 March 2018 seeks damages for breach of EU law from the Defendant, Her Majesty's Treasury ("HMT").

4. HMT applies by notice dated 6 March 2020 for strike out of the claim or summary judgment against JCL, pointing to the 2012 decision in the Channel Islands JR.

5. It is necessary to refer in detail to the decision of Mitting J and set out the legislative background before addressing the arguments made on the application.

The Channel Islands JR and legislative background

6. The circumstances in which Mitting J was considering what became s.199(3) of the 2012 Act appear from paragraph 12 of his decision:

> "12. The Channel Islands contend that the proposed clause would, if enacted, be unlawful under European Union law and invite me so to declare. If I do, it is unlikely

that the draft clause will be included in the Finance Bill. If I do not, it will be; and if Parliament enacts the Bill containing the clause, it will become law with effect from 1 April 2012."

7. His summary of the evidence before him included reference to the market in low value horticultural products, being the market with which the present case is concerned:

"16. A third category of Channel Island business which would be affected by the withdrawal of LVCR is horticulture and flower selling, both indigenous to the Channel Islands. The withdrawal of LVCR would have a significant adverse impact on all of these categories of business."

8. He accepted the "general thrust" of the evidence and was "satisfied that the withdrawal of LVCR would have a severe adverse impact on employment and business, including that of the postal services, in the Channel Islands." That evidence included a witness statement from Tim Dunningham, then managing director of JCL, made in support of the application for judicial review. The statement was included in the bundle for the hearing before me. Mr Dunningham described JCL's main business as the supply of Jersey grown bedding plants, perennials, shrubs, vegetable plants, seeds and bulbs to UK customers. JCL was said to have around 300,000 active customers, 40 permanent employees, and 80 seasonal staff. It operated a high volume, low margin, business model. 100 percent of its products enjoyed VAT relief.

9. Mitting J identified the nub of the case in paragraph 33 of his decision:

" 33. Is the United Kingdom entitled selectively to disapply LVCR? This is the nub of the case…"

10. The complaint before him by Jersey and Guernsey was that the removal of LVCR would not be to treat them in the same way as other non-EU territories, as appears from paragraph 67 of his decision:

"The Channel Islands compare goods imported from their territory with goods imported from other non-EU territories and contend that they should be treated with fiscal equality".

11. Mitting J accepted that fiscal neutrality, non-discrimination or equal treatment and proportionality are basic principles of European Union law (para.65) but decided that those principles did not help the Channel Islands. Key to his decision was that Jersey and Guernsey, while part of the customs territory, are not part of the European Union for the purposes of VAT. He had spelled that out in para.1:

"1. The European Union is a complex organism. Some territories are part of the Union for some purposes, but not for others. The bailiwicks of Jersey and Guernsey ('the Channel Islands') are part of the customs territory of the Union, but are not part of the territory of a member state, the United Kingdom, for the purposes of VAT; see EC Council Directive 2006/112 of 28 November 2006 on the common system of value added tax ('the Principal VAT Directive') art 6(1)."

12. Having referred to two decisions of the Court of Justice of the European Union, he expressed his conclusion as follows:

"75. These two cases, taken together, demonstrate that the European Union and, by necessary extension, member states, when permitted to do so or not prohibited from doing so by Union legislation, may, for any reason or none, discriminate against non-EU states in relation to the import of goods from them; even in the field of indirect

taxation. The principle of fiscal neutrality is not, therefore, engaged in that context. There is no requirement that the United Kingdom should treat one non-EU territory in the same manner for the purposes of LVCR as any other, or as every other. For the same reasons, the principle of proportionality is also not engaged.

76. These considerations provide most of the answer to the question which is at the heart of this case. There is no principle of EU law which requires the United Kingdom to treat the importation of low value goods on mail order from the Channel Islands in the same manner as similar goods from any other non-EU territory. They also assist in construing the language of art 23. There is nothing in the words to prohibit a selective disapplication of the proviso. If there is nothing in the basis of EU law to prohibit a selective disapplication, and I decline to do so."

13. As to the legislative context for this application, the EU rules on VAT derive from what is now article 113 of the Treaty on the Functioning of the European Union ("TFEU"), which is found in Chapter 2 of TFEU dealing with tax provisions.

"The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition".

14. The articles relied on by JCL are also now to be found in TFEU, in the section dealing with free movement of goods.

"Article 28

1. The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

2. The provisions of Article 30 and of Chapter 3 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

…

Article 30

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

…

Article 34

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."

15. As to the applicability of articles 28, 30 and 34 of TFEU, article 355(5)(c) of TFEU provides for a limited application of the treaties to the Channel Islands. It was common ground before me that articles 28, 30 and 34 relating to the free movement of goods apply to the Channel Islands as part of the customs territory. That common ground reflects the discussion of the position of Jersey in the judgment of the Supreme Court

in the recent case of *Routier v Revenue & Customs Commissioners (No.2)* [2019] UKSC 43.

"15. The combined effect of article 299(6)EC [now art.355 of TFEU] and Protocol 3 to the Act of Accession is that the rules of EU law relating to the common customs area, including the free movement of goods, apply in Jersey (*Jersey Produce Marketing Organisation Ltd v States of Jersey* (Case C-293/02) [2005] ECR I-9543."

16. The principal rules on VAT are found in Council Directive 2006/112/EC ("the Principal VAT Directive"), made under article 113 of TFEU. Article 1(1) records that "This Directive establishes the common system of value added tax (VAT)"; article 1(2) providing that "The principle of the common system of VAT entails the application to goods and services of a general tax on consumption exactly proportional to the price of the goods and services, however many transactions take place in the production and distribution process before the stage at which the tax is charged". Article 2 sets out those transactions which are subject to VAT. As to goods, they include, in addition to the supply of goods within a member state (article 2(1)(a)), and intra-community acquisition of goods (article 2(1)(b)), by article 2(1)(d) the importation of goods.

17. Importation of goods is dealt with at article 30 of the Principal VAT Directive as follows:

"'Importation of goods' shall mean the entry into the Community of goods which are not in free circulation within the meaning of Article 24 of the Treaty.

In addition to the transaction referred to in the first paragraph, the entry into the Community of goods which are in free circulation, coming from a third territory

forming part of the customs territory of the Community, shall be regarded as importation of goods."

18. Accordingly, for the purposes of VAT charged on importation, importation includes goods coming from a third territory which is within the customs territory. "Third territories" are defined by article 5 as those territories referred to in article 6. Article 6(1) comprises a list of third territories forming part of the customs territory. It includes the Channel Islands, as well as Mount Athos, the Canary Islands, the French overseas departments, and the Aland Islands.

19. Article 143 of the Principal VAT Directive requires member states to exempt certain importation transactions from VAT. Those transactions include at (b) the final importation of goods governed by what is now Council Directive 2009/132/EC ("the 2009 Directive"). It is to be noted that the recitals to the 2009 Directive highlight the distinction between customs duties and value added tax. Recital (4) is in these terms:

"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."

20. The origin of s.199(3) of the 2012 Act, being the statutory provision in issue in this case, is article 23 of the 2009 Directive:

"Goods of a total value not exceeding EUR 10 shall be exempt on admission. Member States may grant exemption for imported goods of a total value of more than EUR 10, but not exceeding EUR 22.

However, Member States may exclude goods which have been imported on mail order from the exemption provided for in the first sentence of the first subparagraph."

21. By article 5, schedule 2, group 8, item 8 of the Value Added Tax (Imported Goods) Relief Order 1984/746 in force prior to the enactment of s.199(3), the UK did grant exemption for imported goods (save for some excepted categories of goods) not exceeding £15 in value.

22. S.199(3) of the 2012 Act removed that exemption for goods sent on mail order from the Channel Islands by amending the 1984 Order so that:

"…

'(2) Item 8 does not apply in relation to any goods sent from the Channel Islands under a distance selling arrangement.

(3) For the purposes of Note (2)—

"distance selling arrangement", in relation to any goods, means any transaction, or series of transactions, under which the person to whom the goods are sent receives them from a supplier without the simultaneous physical presence of the person and the supplier at any time during the transaction or series of transactions, and

"supplier" means any person who is acting in a commercial or professional capacity.'"

23. The 1984 Order has since been further amended by the Value Added Tax (Imported Goods) Relief (Amendment) Order 2014/2364 but nothing was said to turn on that.

The application for strike out or summary judgment

24. I turn to consider the arguments on the application to strike out JCL's claim. The application was made on alternative bases, namely that there are no reasonable grounds for the claim or that the claim is an abuse of process.

25. While the issue of abuse of process might be said to be logically prior to consideration of the merits of the proceedings, not being a defence as such but an objection to the claim being brought at all, the question of strike out on the merits was put first in argument by both sides. I will therefore address the issues on the application in that same order.

No reasonable grounds or no real prospect of success

26. The relevant rule is CPR 3.4(2)(a) which provides that "The court may strike out a statement of case if it appears to the court … that the statement of case discloses no reasonable grounds for bringing or defending the claim". This part of the application is also framed, in the alternative, as an application for summary judgment under CPR 24.2 on the grounds that JCL's claim has no real prospect of success and there is no other compelling reason for a trial.

27. The claim is for damages for breach of EU law. In a witness statement made in response to the application, Mr Dunningham, now a consultant to JCL, states that the removal of LVCR has reduced JCL's profits; JCL being unable to pass on the VAT charge to customers. He says it was this very concern which he addressed in his witness statement in the Channel Islands JR. The brief details of the claim given on the claim form in these proceedings are that it "is for loss and damage caused to the Claimant during the six-year period preceding the issue of these proceedings as a consequence of the

Defendant legislating in breach of EU law to withdraw the low-value consignment relief exemption from VAT on all goods imported on mail order from the Channel Islands". The pleaded loss is "at least £15,544,000 as at 31 December 2017" – see para.30 of the Particulars of Claim.

28. Mr Aidan O'Neill QC, appearing with Mr Nicholas Gibson for JCL, explained that the claim is concerned with the alleged improper exercise of discretion in enacting s.199(3) of the 2012 Act thereby removing LVCR for the relevant goods from Jersey and Guernsey. The impropriety lay, says the claim, in treating Jersey and Guernsey differently from the other third territories within the customs territory, being Mount Athos, the Canary Islands, the French overseas departments, and the Aland Islands. As it was put in his skeleton argument, VAT charged only on goods imported from the Channel Islands but not from these other territories was experienced by JCL as a customs charge or quantitative restriction or charge or measure having an equivalent effect.

29. Being a claim for damages for breach of EU law, JCL must meet the requirements for such claims laid down in the *Factortame* (Case C-48/*93 R v Sec of State for Transport, ex parte Factortame Ltd (No.4)* [1996] QB 404) and *Francovich* (Case C-6/90 *Francovich v Italy No.1* [1991] ECR I-5357) cases. The first, or part of the first, is a rule of law conferring a right on the individual which is said to be infringed.

30. Ms Simor QC, appearing with Amy Mannion for HMT, submitted that JCL fails at that first hurdle. JCL has not identified a provision conferring on it a relevant individual right. The attack in her skeleton was directed at article 23 of the 2009 Directive. That article could not be sufficient, she submitted, as it affords a discretion. She relied on the recent decision of Mann J in *Allen v HM Treasury & HMRC* [2019] EWHC 1010. The

claimant in that case was a UK trader seeking damages for the defendants' failure to remove LVCR sooner. His claim was rejected by Mann J who held that article 23 did not confer rights on individuals.

31. But as he emphasised in his skeleton and oral submissions, Mr O'Neill did not seek to rely on article 23 to satisfy the first requirement for a damages claim. He relied instead on articles 28, 30 and 34 of TFEU and the principles of fiscal neutrality, non-discrimination or equal treatment and proportionality. The right was formulated as the right for the import of JCL's products of negligible value into the UK not to be treated differently for VAT purposes from the way in which imports into the UK of products of negligible value from the other third territories within the customs territory were treated.

32. Ms Simor accepts that those different articles do confer rights on individuals but argues that does not help JCL as the provisions are not concerned with VAT. Her argument reflected the denial in the Defence that these articles have any relevance to the claim. Not being concerned with VAT, they cannot found a case that s.199(3) of the 2012 Act is unlawful.

33. It seems to me that the central question as to whether s.199(3) of the 2012 Act brought articles 28, 30 or 34 of TFEU or principles of fiscal neutrality, equal treatment and proportionality into play at all is a nettle to be grasped at this strike out or summary judgment stage. Indeed, I understood that to be accepted by both sides when this was explored in oral submissions. It is a question on which all the material necessary for its determination was before me and which was addressed extensively in submissions. If JCL is wrong on this central question, it will in truth have no real prospect overall of succeeding on its claim. If the articles or principles relied on do apply so that there is

a relevant right, then the issues of the other requirements for damages for breach of EU law, including the issue of infringement of the principles, will be for trial.

34. As to the principles of fiscal neutrality, non-discrimination or equal treatment and proportionality, JCL cannot, in my judgment, rely on those principles unless articles 28, 30 and/or 34 are engaged for the reasons given by Mitting J. Jersey is a third territory for VAT purposes.

35. The key question is therefore whether articles 28, 30 and 34 are engaged. In my judgment, they are not. My reasons for that conclusion are these.

36. The levying of VAT on imports is expressly provided for in the 2009 Directive made under article 113 of TFEU. Clearly, therefore, such taxation charges are something different to and distinct from customs duties or charges having equivalent effect, or quantitative restrictions on imports or measures having equivalent effect as there is an absolute prohibition in TFEU on those.

37. The difference was highlighted by the Court of Justice of the European Union in *Commission v Italy* C-24/68 [1960] ECR 193:

"6. In prohibiting the imposition of customs duties, the Treaty does not distinguish between goods according to whether or not they enter into competition with the products of the importing country. Thus, the purpose of the abolition of customs barriers is not merely to eliminate their protective nature, as the Treaty sought on the contrary to give general scope and effect to the rule on the elimination of customs duties and charges having equivalent effect, in order to ensure the free movement of goods.

7. It follows from the system as a whole and from the general and absolute nature of the prohibition of any customs duty applicable to goods moving between Member

States that customs duties are prohibited independently of any consideration of the purpose for which they were introduced and the destination of the revenue obtained therefrom. The justification for this prohibition is based on the fact that any pecuniary charge, however small, imposed on goods by reason of the fact that they cross a frontier constitutes an obstacle to the movement of such goods.

8. The extension of the prohibition of customs duties to charges having equivalent effect is intended to supplement the prohibition against obstacles to trade created by such duties by increasing its efficiency. The use of these two complementary concepts thus tends, in trade between Member States, to avoid the imposition of any pecuniary charge on goods circulating within the Community by virtue of the fact that they cross a national frontier.

9. Thus, in order to ascribe to a charge an effect equivalent to a customs duty, it is important to consider this effect in the light of the objectives of the Treaty, in the Parts, Titles and Chapters in which Articles 9, 12, 13 and 16 are to be found, particularly in relation to the free movement of goods. Consequently, any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Articles 9, 12, 13 and 16 of the Treaty, even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product.

10. It follows from all the provisions referred to and from their relationship with the other provisions of the Treaty that the prohibition of new customs duties or charges

having equivalent effect, linked to the principle of the free movement of goods, constitutes a fundamental rule which, without prejudice to the other provisions of the Treaty, does not permit of any exceptions.

11. In this respect, it follows from Articles 95 et seq that the concept of a charge having equivalent effect does not include taxation which is imposed in the same way within a State on similar or comparable domestic products, or at least falls, in the absence of such products, within the framework of general internal taxation, or which is intended to compensate for such internal taxation within the limits laid down by the Treaty."

38. It is a difference drawn attention to in recital 4 to the 2009 Directive containing article 23, already quoted at paragraph 19 above, which refers to and indicates that account should be taken of "the differences as regards objective and structure between customs duties and value added tax".

39. S.199(3) of the 2012 Act removed relief from VAT on certain imports. It was therefore a measure concerning the system of internal taxation which article 113 of TFEU and the rules made thereunder address. Such taxation is not included in the concepts of customs duties or charges having equivalent effect, or quantitative restrictions on imports or measures having equivalent effect, which articles 28, 30 and 34 of TFEU prohibit.

40. Mr O'Neill seemed to suggest that the amendment of the 1984 Order by s.199(3) of the 2012 Act meant that the VAT charge was no longer part of a system of internal taxation because the legislative measure discriminated between different territories within the customs territory. But I cannot see how that measure altered the character of the charge. It did not become a charge imposed by reason of crossing the frontier. It remained a charge imposed whether or not the goods sold in the UK cross the frontier between

Jersey and the UK. The legislation simply removed a form of relief from such charge. I should add that there was a side debate, conducted largely by way of footnotes to skeleton arguments and further skeleton arguments, as to whether some UK horticultural product sellers enjoyed some different VAT relief. But the complaint of JCL was of treatment different to other third territories in the customs territory, and it was that which was said somehow to change the character of the charge.

41. JCL's argument seems to me to involve seeking to have Jersey treated as subject to EU rules for VAT purposes. But articles 28, 30 and 34 cannot be used to that end. The Supreme Court in *Routier* referred at paragraph 19 to the "clear and consistent approach" in EU jurisprudence, being that "the question whether a territory is to be regarded as a third country is context specific and will depend on whether, under the relevant Treaty of Accession and supplementary measures, the relevant provisions of EU law apply to that territory." Jersey is not a third territory for the purposes of the free movement of goods provisions including articles 28, 30 and 34. But it is a third territory for VAT purposes. JCL cannot use articles 28, 30 and 34 as a gateway to challenging a VAT measure such as s.199(3) of the 2012 Act.

42. Mr O'Neill submitted that this case is on all fours with the *Jersey Produce* case already referred to. But that case was concerned with levies on exports from Jersey which did not correspond to any internal dues. They were therefore understandably regarded as charges having an equivalent effect to customs duties. I was informed by counsel that there has been no case in which a VAT charge has been characterised as a customs duty or quantitative restriction so as to bring articles 28, 30 or 34 into play.

43. He also submitted that the payment made by JCL following the enactment of s.199(3) of the 2012 Act was not VAT as such. As Mr O'Neill put it in an email on the day of

the hearing before me, by reason of the operation of a memorandum of understanding what is being paid is "rather a sum equivalent to VAT which a UK registered trader might otherwise pay". But that point does not seem to me to help his argument. It is a matter of mechanics. The payment remains one in the nature of VAT in that it is to discharge what is or would otherwise be a VAT liability. The legislation attacked is, after all, effecting the removal of VAT relief. This point goes no way towards establishing that it is a customs duty or like charge or quantitative restriction.

44. It follows from the above that, in my judgment, JCL's claim cannot succeed. I consider that the appropriate course, given how I have arrived at that conclusion, is strike out rather than summary judgment, reflected in the fact that HMT filed no evidence in support of the application.

45. I will therefore strike out the claim form and particulars of claim as disclosing no reasonable grounds for the claim.

Abuse of process

46. Had I not done so, I would, on balance and while making clear that I have not found the question an easy one, have struck the claim out on the different basis of abuse of process. As it is, the claim falls to be struck out on both bases put forward in the application.

47. This alternative basis of the application relies on CPR 3.4(2)(b).

48. The nature of judicial review proceedings means that they do not give rise to res judicata in the sense of cause of action or issue estoppel. They can however lead to subsequent proceedings being an abuse of process. As was said in *Eco-Power UK Ltd v Transport for London* [2010] EWHC 1683 (Admin) by Simon J:

"19. It seems to me that there is now a well-established rule that a decision in judicial review proceedings cannot be relied on to found an estoppel per rem judicatem. It may be that this principle, if such it is, needs to be looked at again; and Mr Chamberlain undoubtedly makes a strong case for doing so, answering each of the three objections raised by May LJ, and referring to the note in *Phipson on Evidence* at paragraph 43-35 in the context of Habeas Corpus proceedings and the case of the *R v Governor of Brixton Prison, ex parte Osman* [1991] 1 WLR 281: 'There seems no obvious reason why estoppels on similar subsidiary issues could not arise in applications for judicial review.'

20. Nevertheless, in my view, if the rule needs to be reconsidered it is for the Court of Appeal to do so. The Hackney case was decided 26 years ago; and has been assumed to be a correct statement of the law for as long. It is not for a single judge in this court to embark on restating the law in this area.

21. However, there is plainly another principle which can be invoked by Mr Chamberlain: the inherent jurisdiction to prevent issues being tried repeatedly before different tribunals. It is not simply a question of finality, important as this principle is, it is in the overall interests of justice that limited resources should not be deployed so that a party can raise before a different tribunal a point which it has previously argued without success. This has less to do with questions of estoppel and much to do with common-sense and practicality. If an argument has failed before one tribunal which has heard the argument and seen the evidence, there will be little likelihood of success before a second tribunal.

22. This approach is recognised in the principle of abuse of process whereby a court will not countenance what, on proper analysis, is a collateral challenge to an earlier

judgment, see *Secretary of State for Trade and Industry v Bairstow*. In that case and having reviewed a number of earlier decisions, Sir Andrew Morritt V-C set out various principles of general application at paragraph 38:

'In my view these cases establish the following propositions:

a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court.

b) If the earlier decision is that of a court exercising a criminal jurisdiction then, because of the terms of ss. 11 to 13 Civil Evidence Act 1968, the conviction will be conclusive in the case of later defamation proceedings but will constitute prima facie evidence only in the case of other civil proceedings.

c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings.

d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."

23. It seems to me that those are principles which should be applied in the present case. Here the parties are the same and the standard of proof is the same."

49. Those principles from *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321 are the ones I must apply here; both sides approaching the case on the

basis that the relevant potential form of abuse was a collateral attack on a previous decision, namely that of Mitting J in the Channel Islands JR.

50. But the parties here are not the same. And that is an important point as:

"It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse." - *In re Norris* [2001] UKHL 34, para.26, from the speech of Lord Hobhouse.

51. Deciding whether it is such a rare case involves, in the words of Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1, "a broad merits-based judgment". Each case must depend on all the relevant circumstances. It is not, however, the exercise of a discretion.

52. In submitting that these proceedings were abusive, Ms Simor argued that the issue in the Channel Islands JR was the same, namely whether s.199(3) of the 2012 Act was unlawful as being in breach of EU law, pointed to the fact that JCL's managing director was a witness, and suggested that JCL chose not to act as a claimant or interested party.

53. Mr O'Neill argued that the issue was not the same. Unlike in the Channel Islands JR, s.199(3) is not challenged. Rather, JCL is claiming damages flowing from that enactment as having been made in breach of EU law. Further, Mitting J's decision was right on the arguments presented to him. But it does not deal with the different argument now put forward, relying on articles 28, 30 and 34 of TFEU, that s.199(3) was in breach of EU law by reason of unjustifiably discriminating between territories in equivalent positions, namely those within the customs territory as listed in article 6(1) of the Principal VAT Directive. He observed that there was no evidence that JCL chose not

to be a party to the Channel Islands JR. It may, for example, have been unable to afford that course of action.

54. There are significant factors which can be prayed in aid against a conclusion that these proceedings are abusive.

55. The claimant in these proceedings, JCL, is different to the claimant in the Channel Islands JR. This is not a case like *Eco-Power UK Ltd v Transport for London* where the claimant brought a challenge by way of judicial review and then sought to bring a damages claim.

56. JCL was involved only, through its managing director, as a witness in the Channel Islands JR. While the principles of abuse of process can extend to the situation where the party in the later proceedings was a witness in the earlier proceedings, being a witness was not enough in *Norris* or in *Shalabayev v JSC BTA Bank* [2016] EWCA Civ 987.

57. The argument now made is not the argument dealt with by Mitting J in the Channel Islands JR. It seems to me clear that the argument made and addressed in that case was that it was unlawful to discriminate for VAT purposes between non-EU territories. Not the argument now made that there has been unlawful discrimination between territories which are within the customs territory and therefore have the benefit of articles 28, 30 and 34 of TFEU. Had that been part of the argument, Mitting J would probably not have expressed himself in the same way at paragraph 75 of his decision where he said that "the European Union and, by necessary extension, member states, when permitted to do so or not prohibited from doing so by Union legislation, may, for any reason or none, discriminate against non-EU states in relation to the import of goods from them". That

would not be true in the case of customs duties and charges of equivalent effect or quantitative restrictions.

58. There is no evidence as to whether, as matter of practical reality, JCL should, or even could, have been involved as a party or even an intervener. Either course would have required permission and the necessary resources. The most that can be said is that the opportunity was there under the rules in CPR Part 54.

59. However, the following considerations mean, in my judgment, that these proceedings are an abuse.

60. First, the character of the Channel Islands JR. It was a challenge, at the suit of the governments of the two territories affected, to a provision about to be enacted by Parliament. The purpose of the exercise was to settle the question of lawfulness in order that the provision could be enacted as part of an Act of Parliament and then acted on by HMT. And it was an exercise in which the most appropriate parties, being the governments of Jersey and Guernsey, were involved.

61. Second, in my judgment, the issue is the same. Mitting J decided in the Channel Islands JR that what became s.199(3) of the 2012 Act would not infringe EU law. He said, therefore, at paragraph 77, that "For those reasons, I propose to declare that the draft clause in the forthcoming Finance Bill is not unlawful under EU law." JCL is asking the Court, by these proceedings, to reach a contrary conclusion, namely that s.199(3) did breach EU law, being an unlawful exercise of the article 23 discretion.

62. Third, while the argument now made is, as I have said, different to that presented to Mitting J, it was plainly an argument available to the parties bringing the challenge to

what was then the draft clause in the Finance Bill in the Channel Islands JR. It could and should have been run then, had it been a good argument.

63. Fourth, the defendant is the same. HMT has been vexed once with defending the lawfulness of s.199(3). To allow these proceedings to continue would be to vex HMT again.

64. Fifth, JCL's involvement in the Channel Islands JR, giving evidence in support, seems to me more significant than that of the witnesses in *Norris* and *Shabalayev*. The purpose of the two sets of proceedings here is essentially the same, namely to determine whether s.199(3) is in breach of EU law; then prospectively, now retrospectively. That was not the case in *Norris* and *Shalabayev*. In *Norris* the first proceedings were criminal confiscation proceedings against the husband in the Crown Court at which the wife gave evidence about ownership of the matrimonial home. Their purpose was to determine the sum to be paid by the husband under a confiscation order. It was not an abuse for her to contend for ownership of the home in the second set of proceedings, being civil proceedings in the High Court, as that was the stage at which, under the scheme of the drug trafficking legislation, the issue of her interest fell to be determined. In *Shalabayev* the first set of proceedings were committal proceedings against Mr Ablyazov under CPR Part 81. Again, it was not an abuse for Mr Shalabayev, a witness in the committal proceedings, to contend in the second set of proceedings, being an application for a charging order over property under CPR Part 73, that he owned the property. The charging order proceedings, not the committal proceedings, represented the appropriate time and place for the issue of Mr Shalabayev's interest in the property to be asserted and determined. Further, JCL had at stake in the Channel Islands JR the same financial consequences. Then the expected business losses, now (subject to proof

at trial) the incurred business losses, arising from s.199(3) of the 2012 Act. The ownership of property was not at stake in the first sets of proceedings in *Norris* and *Shalabayev*.

65. Sixth, the effect of allowing this claim to proceed would be that all Channel Islands traders affected could, subject to limitation arguments, reopen the question of lawfulness of s.199(3). It seems to me that would be to undermine the exercise undertaken in 2012 by Mitting J.

66. Seventh, HMT have operated this legislation for several years now. The force of this point is not the mere fact of delay in bringing the current proceedings but the conduct of business, including by HMT, according to this legislation (declared lawful in 2012) in respect of all affected traders for several years. That is something which would fall to be undone by way of damages to JCL and, subject to limitation arguments, others affected who bring claims.

67. Given those considerations and despite the points referred to at paragraphs 54 to 58 above, to permit these proceedings to continue would, in my judgment, bring the administration of justice into disrepute as well as being manifestly unfair to HMT. It would make largely meaningless Mitting J's determination of the lawfulness of s.199(3) and HMT's defence of s.199(3) before him when the whole purpose of that exercise, in which the most appropriate parties were involved, was to settle that question of lawfulness in order that the provision could be enacted as part of an Act of Parliament and then acted on by HMT.

68. It follows from all I have said that this claim cannot proceed. I have clarified, at paragraphs 33 and 46 above, the approach I have taken to the application to strike out in light of submissions made following circulation of a draft of this judgment.