Neutral Citation Number: [2019] EWHC 3362 (QB)

Case No: HQ18P02345

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/12/2019

Before :

MR JUSTICE JULIAN KNOWLES

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Between :

(1) HAZEL WILSON (AS ADMINISTRATRIX OF THE ESTATE OF THE LATE JOHN WILSON) (2) HAZEL WILSON (3) DANIELLE WILSON (4) LEANNE WILSON (5) ALLEN WILSON	**Claimants**
- and –	
BEKO PLC	**Defendant**

- -
- -

Simeon Maskrey QC and Adam Korn (instructed by **Leigh Day**) for the **Claimants**
Charles Dougherty QC and Isabel Barter (instructed by **Kennedys**) for the **Defendant**

Hearing dates: 13 November 2019

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APPROVED JUDGMENT

Introduction

1. This case raises important issues of law but at its heart are the tragic death of John Wilson aged 63 in a house fire in Manchester on 9 August 2016 and the serious injuries suffered by members of his family. Nothing in this judgment is intended to minimise the loss and suffering they have experienced.

2. The inquest into Mr Wilson's death found that the fire was caused by a faulty component in a Beko fridge-freezer which he had purchased in 2005. The model in question was subject to a product recall in 2011 following a death in 2010. There was a further death in 2014. The Defendant admits in its Amended Defence at [4] that 'it is likely on the balance of probabilities' that the fire started in the fridge-freezer.

3. The Defendant was responsible for the sale, marketing and distribution of the fridge-freezer. It is a UK based company and describes itself on its website as 'one of the leading home appliance brands in the UK' which has been 'operating in the UK and Ireland since 1990 and have sold over 30 million appliances in the UK.' It is a subsidiary of Arçelik AS, a Turkish company based in Istanbul, who manufactured the fridge-freezer.

4. As well as John Wilson's death, the fire caused serious injuries to the other Claimants and property damage. Mr Wilson, his wife Mrs Hazel Wilson and the Third Claimant were in the property at the time of the fire. The Fourth and Fifth Claimants were rescuers and were injured in the rescue attempt.

5. The Claimants claim damages for personal injury and insured and uninsured and consequential losses arising out of the fire. The pleaded value of the claims exceeds £575,000. The claim is brought in negligence and breach of statutory duty, the latter arising from an alleged breach of s 41(1) of the Consumer Protection Act 1987 (the 1987 Act), which is contained in Part V.

6. The issues before me concern the claim for breach of statutory duty. Let me set them out straight away. By an order dated 30 May 2019 Senior Master Fontaine ordered the following be tried by way of preliminary issue:

> "(1) Are, on a true construction, section 41(1) of the Consumer Protection Act 1987 ('the 1987 Act') and/or the Electrical Equipment (Safety) Regulations 1994 applicable in this case (on the basis of the matters pleaded in the Amended Particulars of Claim), and taking into account insofar as relevant Products Directive (No 85/374IEEC) and EU law, and if so to what extent and on what basis?
>
> (2) In light of the answer to (1), should judgment be entered ?"

7. The Claimants are represented by Mr Maskrey QC and Mr Korn. The Defendant is represented by Mr Dougherty QC and Ms Barter. I am grateful to all of them for the high quality of their written and oral submissions.

8. Mr Dougherty accepted that the issues before me are ones of pure law. In particular, notwithstanding the lack of available forensic evidence, he said the Defendant was content to proceed on the basis that the fire was probably caused by an electrical fault in the product and that the fridge-freezer was unsafe under the relevant legislation (considered below).

9. As to the second issue, one of the defences relied upon by the Defendant is that there was a *novus actus interveniens* because it says the Claimants continued to use the fridge-freezer despite having been put on notice that it was defective. Mr Maskrey accepted that this defence will require evidence to be called, and thus that I could not enter judgment for the Claimants even if I were with him on the first issue.

The legal framework

10. Before turning to the parties' submissions, it is necessary to set out the relevant legal provisions.

Domestic law

11. Section 1 of the 1987 Act, as amended, declares that Part I (entitled 'Product Liability') was enacted for the purpose of making such provision as is necessary in order to comply with the Directive specified in s 1(2), namely the Directive of the Council of the European Communities, dated 25 July 1985, (No 85/374/EEC), on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. I will refer to this as 'the Directive'. The UK was the first Member State to implement the Directive when it enacted Part I of the 1987 Act.

12. Section 1(2) defines 'product' (in summary terms) as meaning any goods or electricity.

13. Section 1(2) defines 'producer', in relation to a product, as meaning the person who manufactured it.

14. Section 2 is headed 'Liability for Defective Products'. Section 2(1) provides that subject to the provisions of Part 1, where any damage is caused wholly or partly by a defect in a product, every person to whom s 2(2) applies shall be liable for the damage. Such persons include any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product (s 2(2)(b)) and; any person who has imported the product into a Member State from a place outside the Member States in order, in the course of any business of his, to supply it to another.

15. Section 3(1) provides that a product is 'defective' '[i]f the safety of the product is not such as persons generally are entitled to expect … in the context of risks of damage to property, as well as in the context of risks of death and personal injury'.

16. Section 3(1) defines 'defect'. There is a defect in a product for the purposes of Part I if the safety of the product is not such as persons generally are entitled to expect. Section 3(2)(a) specifies number of matters that are to be taken into account for the purposes of s 3(1) in determining what persons generally are entitled to expect in relation to a product.

17. Section 4 provides for a number of defences. For example, s 4(1) provides that it is a defence to civil proceedings under Part I against any person (the person proceeded against) in respect of a defect in a product for him to show that the defect is attributable to compliance with any requirement imposed by or under any enactment or with any EU obligation. Section 4(1)(e) contains what is often known as the 'Development Risks' defence. It is a defence to show that:

> "… the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control …."

18. Section 5 sets out what constitutes relevant damage. It includes death and personal injury and property damage. There is a minimum £275 threshold (s 5(4)).

19. The longstop limitation period for a claim under Part I is 10 years beginning with the date the product was supplied: Limitation Act 1980, s 11A(3) read with s 4(2) of the 1987 Act.

20. Part II of the 1987 Act is headed 'Consumer Safety'. Section 11(1) provides that the Secretary of State may by regulations under s 11 (safety regulations) make such provision as he considers appropriate (*inter alia*) for the purpose of securing that goods to which s 11 apply are safe. Section 11(7) provides that s 11 applies to any goods other than those specified in the sub-section (eg, growing crops (s 11(7)(a)).

21. Section 19(1) defines 'safe' for the purposes of Part II:

> "'safe', in relation to any goods, means such that there is no risk, or no risk apart from one reduced to a minimum, that any of the following will (whether immediately or after a definite or indefinite period) cause the death of, or any personal injury to, any person whatsoever, that is to say—
>
> (a) the goods;
>
> (b) the keeping, use or consumption of the goods;
>
> (c) the assembly of any of the goods which are, or are to be, supplied unassembled;
>
> (d) any emission or leakage from the goods or, as a result of the keeping, use or consumption of the goods, from anything else; or
>
> (e) reliance on the accuracy of any measurement, calculation or other reading made by or by means of the goods,
>
> and … 'unsafe' shall be construed accordingly …"

22. Section 41 of the 1987 Act is contained within Part V of the 1987 Act (Miscellaneous and Supplemental) and is headed 'Civil Proceedings'. Section 41(1)(2) provides:

> "(1) An obligation imposed by safety regulations shall be a duty owed to any person who may be affected by a contravention of the obligation and, subject to any provision to the contrary in the regulations and to the defences and other incidents applying to actions for breach of statutory duty, a contravention of any such obligation shall be actionable accordingly.
>
> (2) This Act shall not be construed as conferring any other right of action in civil proceedings, apart from the right conferred by virtue of Part I of this Act, in respect of any loss or damage suffered in consequence of a contravention of a safety provision …"

23. The relevant safety regulations for the purposes of this case are the Electrical Equipment (Safety) Regulations 1994 (SI 1994/3260) (the 1994 Regulations). These transposed Council Directive No 73/23/EC on the harmonisation of the laws of Member States relating to electrical equipment designed for use within certain voltage limits as amended by the CE marketing Directive (overall, the Low Voltage Directive).

EU law

24. The broad effect of the Directive is to make producers strictly liable for damage (within its scope) caused by defective products, ie, proof of negligence or other fault is not required. The Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of the Directive, COM(2018) 246 (7 May 2018) (the 2018 Directive Report) states at pp2-3 (footnotes omitted):

> "The Directive applies to all moveable products, even if integrated into another moveable product, and specifically includes electricity. It also introduces the concept of strict liability of producers. In line with EU safety legislation, producers are responsible for their products. If a product is defective and causes personal injury or material damage above EUR 500 to an item of property mainly for private use or consumption, producers are liable regardless of whether or not they are at fault. A product is considered defective if it does not provide the safety a person is entitled to expect."

25. There are various recitals to the Directive, some of which are as follows (I have numbered them for convenience):

> "(1) Whereas approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary because the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of

protection of the consumer against damage caused by a defective product to his health or property;

(2) Whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production;

(3) Whereas liability without fault should apply only to movables which have been industrially produced; whereas, as a result, it is appropriate to exclude liability for agricultural products and game, except where they have undergone a processing of an industrial nature which could cause a defect in these products; whereas the liability provided for in this Directive should also apply to movables which are used in the construction of immovables or are installed in immovables;

(4) Whereas protection of the consumer requires that all producers involved in the production process should be made liable, in so far as their finished product, component part or any raw material supplied by them was defective; whereas, for the same reason, liability should extend to importers of products into the Community and to persons who present themselves as producers by affixing their name, trade mark or other distinguishing feature or who supply a product the producer of which cannot be identified;

(5) Whereas, in situations where several persons are liable for the same damage, the protection of the consumer requires that the injured person should be able to claim full compensation for the damage from any one of them;

(6) Whereas, to protect the physical well-being and property of the consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety which the public at large is entitled to expect; whereas the safety is assessed by excluding any misuse of the product not reasonable under the circumstances;

…

(9) Whereas the protection of the consumer requires compensation for death and personal injury as well as compensation for damage to property; whereas the latter should nevertheless be limited to goods for private use or consumption and be subject to a deduction of a lower threshold of a fixed amount in order to avoid litigation in an excessive number of cases; whereas this Directive should not prejudice compensation for pain and suffering and other non-material damages payable, where appropriate, under the law applicable to the case;

…

> (13) Whereas under the legal systems of the Member States an injured party may have a claim for damages based on grounds of contractual liability or on grounds of non-contractual liability other than that provided for in this Directive; in so far as these provisions also serve to attain the objective of effective protection of consumers, they should remain unaffected by this Directive; whereas, in so far as effective protection of consumers in the sector of pharmaceutical products is already also attained in a Member State under a special liability system, claims based on this system should similarly remain possible;
>
> …
>
> (18) Whereas the harmonisation resulting from this cannot be total at the present stage, but opens the way towards greater harmonisation; … it is therefore necessary that the Council receive at regular intervals, reports from the Commission on the application of this Directive, accompanied, as the case may be, by appropriate proposals'.

26. Article 1 of Directive provides:

> "The producer shall be liable for damage caused by a defect in his product."

27. 'Product' is broadly defined in Article 2.

28. Article 3(1) provides:

> "'Producer' means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer."

29. Article 4 provides:

> 'The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage.'

30. Article 6 provides a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account.

31. Under Article 7, the producer is not to be treated as liable for the defective product if he proves that one of the conditions referred to in that provision is met.

32. 'Damage' is defined by Article 9 as meaning (a) death or personal injury and (b) damage to property (above a threshold of €500) which is of a type ordinarily intended for private use or consumption, and was used by the injured person mainly for his own private use or consumption. Thus, for example, damage to commercial property does not fall within the scope of the Directive.

33. Limitation periods are dealt with in Article 10 and Article 11 which provide:

> "1. Member States shall provide in their legislation that a limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this Directive. The limitation period shall begin to run from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.
>
> 2. The laws of Member States regulating suspension or interruption of the limitation period shall not be affected by this Directive.
>
> Article 11
>
> Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer."

34. Article 10 and Article 11 are given effect to in s 11A of the Limitation Act 1980 (see above).

35. Article 13 is important to the issues on this application. It provides:

> "This Directive shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability or a special liability system existing at the moment when this Directive is notified."

The parties' rival contentions in outline

36. In this case, unusually, I think it would best aid understanding of the issues if I set out the Claimants' case on breach of statutory duty under domestic law first; then summarise the Defendant's response, which brings in EU law principles which it says preclude the Claimants' claim under s 41(1) and the 1994 Regulations; and then address how the Claimants respond to the Defendant's arguments.

The Claimants' domestic law case on breach of statutory duty

37. As I have said, there is a negligence claim by the Claimants which I am not concerned with. That will need to be resolved at trial.

38. The Claimants' domestic law case on breach of statutory duty is as follows (see Amended Particulars of Claim (APOC), [9]-[12]).

39. They argue that by virtue of s 41(1), the Defendant had a statutory duty to comply with the 1994 Regulations. In particular, the Defendant was obliged by regs 5 and/or 14 to

ensure that all electrical equipment it supplied was (a) safe within the meaning of s 19(1) of the 1987 Act (by virtue of reg 3(1)); and (b) in conformity with the principal elements of the safety objectives for electrical equipment set out in Sch 3 to the 1994 Regulations.

40. For the reasons pleaded at [28] et seq of the APOC, the Claimants say that the Defendant was in breach of these obligations for which it is liable in damages. They say (at [30]) that the Defendant contravened these statutory requirements by supplying a product to the market which had both known and/or unknown incendive fault(s) which posed a safety risk to people, domestic animals and property as a result of foreseeable use.

41. The Claimants rely in support on *Stoke-on-Trent College v Pelican Rouge Coffee Solutions Group Limited* [2017] EWHC 2829 (TCC), [139]:

> "It is important to note that the cause of action for breach of the 1994 Regulations is a strict one, in the sense that once the claimant proves that the defendant has supplied electrical equipment which is unsafe and that the fire started as a result of that electrical equipment being unsafe then liability follows. There is a defence of due diligence available to a defendant in criminal proceedings (s 39(1) 1987 Act) but that does not apply to civil claims."

42. Therefore, the Claimants' claim as advanced at trial is straightforward:

    a. liability under the 1994 Regulations is strict; and

    b. the Defendant has conceded (or will concede):

        (i) that the fridge-freezer constituted 'electrical equipment' for the purposes of the 1994 Regulations; and

        (ii) the fridge freezer was *'*unsafe*'* under the Regulations; and

        (iii) that its lack of safety was the cause of the fire, which caused death, personal injury and property damage; and thus

    c. judgment should follow, subject to the Defendant's *novus actus interveniens* defence.

43. Mr Maskrey said that subject to the Defendant's *novus actus* defence, absent any European context, a court would be bound to find there was been a breach of statutory duty, that that breach of statutory duty caused death, personal injury, and damage to property in excess of £275, and hence would find the Defendant liable.

44. For completeness I should add that the Claimants are precluded from pursuing a strict-liability defective products claim under s 2 of the 1987 Act because of the overriding 10 year longstop for such claims: Limitation Act 1980, s 11A(3). That is common ground between the parties.

The Defendant's case in response: EU law issues

45. Mr Dougherty did not strenuously argue against the Claimants' case as it is simply put in domestic law or that, on its own terms, the domestic legislation cannot properly be read as the Claimants read it. His case depends upon reading the 1987 Act in a manner he said was consistent with EU law.

46. The Defendant's pleaded case in response is as follows (see Amended Defence, [10A]):

    a. In order to be consistent with the Directive, the 1987 Act must be read so that a claim under s 41(1) and/or the 1994 Regulations is precluded; and/or

    b. If a claim under the Directive and EU law is not absolutely precluded, it is only on the basis that negligence or some other fault element needs to be established.

47. The Defendant says that this is the first time that the court has been asked to consider whether such claims can be brought in consumer cases, bypassing (it says) the terms of the Directive as given effect to in Part I. It says that if the Claimants are right, it would mean that such a claim could be brought without establishing fault, outside the 10 year longstop provided for in the Directive and without any of the defences under Part I of the 1987 Act and the Directive applying. He says this would be inconsistent with settled EU law.

48. In summary, the Defendant's case is that the Claimant's claim under s 41(1) and the 1994 Regulations is precluded by Part I of the 1987 Act and the Directive. Part I gives effect to the Directive. Taken together, the Defendant says they provide for a harmonised and exhaustive system of civil liability for defective products based on strict liability that is subject to a 10 year long stop limitation period and the specified defences. In summary, it submits that to read s 41 as allowing a claim based on strict liability for a defective product in circumstances outside the scope of the Directive, would be an impermissible extension of liability and inconsistent with CJEU case law, and thus cannot prevail.

49. The Defendant's argument has the following steps.

50. The Directive seeks to achieve, in the matters regulated by it, complete harmonisation of the laws, regulations and administrative provisions of the Member States: *Commission of the European Communities v French Republic* (Case C-52/00) [2002] ECR I-3827 ("Commission v France"), [24].

51. The margin of discretion available to Member States in order to make provision for product liability is entirely determined by the Directive itself and must be inferred from its wording, purpose and structure: *Commission v France*, supra, [16].

52. The legal basis for the Directive is Article 100 of the EEC Treaty (now Article 115 of the Treaty on the Functioning of the European Union (TFEU)). This legal basis does not permit Member States to derogate from the provisions of the Directive: *Commission v France*, supra, [14]; Case C-154/00 *Commission v Greece* [2002] ECR I-3827, [10]; *González Sánchez v Medicina Asturiana SA* (Case C-183/00) [2002] ECR I-3901, [23].

53. The purpose of the Directive is to ensure undistorted competition between traders, to facilitate the free movement of goods and to avoid differences in levels of consumer

protection: *Commission v France*, supra, [17]; *Commission of the European Communities v Hellenic Republic*, (Case C-154/00) [2002] ECR I-3879 ("Commission v Greece") supra, [13]; *González Sánchez*, supra, [26]; *Moteurs Leroy Somer v Société Dalkia France* (Case C-285/08) [2009] ECR I-4733, [28].

54. In essence, the Directive provides maximal and not minimal protection. Member States are not free to extend strict liability for damage for defective products beyond the scope provided for in the Directive: *González Sánchez*, [31]-[34].

55. Article 13 of the Directive cannot be interpreted as giving the Member States the possibility of maintaining a general system of product liability based on strict liability different from that provided for in the Directive. That is because to do so would offend against the principles of harmonisation which underpin the Directive. What Article 13 does is to identify three possible types of liability which national law may provide for in parallel to the general system of strict liability allowed for in the Directive. These are (a) contractual liability; (b) non-contractual liability based on grounds *other than* strict liability; and (c) a special liability system existing at the moment the Directive was notified (which Mr Dougherty says is limited to a specific German special liability system concerning pharmaceutical products): *Novo Nordisk Pharma GmbH v S* (Case C-310/13) EU:C:2014:2385, opinion of Advocate General Szpunar at [26] and [37].

56. In the present case, the Claimants' breach of statutory duty claim is brought pursuant to s 41(1) of the 1987 Act and the 1994 Regulations. However, the Defendant says its subject matter clearly falls within the scope of the Directive and Part I of the 1987 Act and a claim under s 41 is thus precluded because it would allow for a no-fault claim outside the scope permitted by the Directive (including the 10 year limitation period and other defences it provides for and are contained in s 4 of the 1987 Act). Hence, the Defendant submits that s 41 must be read as precluding claims in respect of defective products which fall within the scope of Part I and the Directive.

The Claimant's submissions in response

57. The Claimants' submissions in reply to the Defendant's EU law arguments can be summarised as follows.

    a. Under Article 13 of the Directive read literally for its terms and effects, the Defendant's liability is established;

    b. Article 13, as interpreted in rulings of the ECJ, must be read subject to the requirement of *'*complete harmonisation*'* of the product liability laws of Member States:

        (i) The Claimants base their claim on a general system that is on a different basis from the product liability system, is one that is required by every Member State by virtue of the Low Voltage Directive, and is preserved by the Directive and the ECJ;

        (ii) Alternatively, the Claimants' claim in strict liability is a 'special system', preserved by Article 13 of the Directive and the ECJ;

(iii) This interpretation applies, at least insofar as the 1994 Regulations are concerned, because the Regulations are consequent upon the Low Voltage Directive and thus do not offend the principle of harmonisation.

58. If that analysis is incorrect then the ECJ decisions suggesting that 'complete harmonisation' is the overriding objective of the Directive are wrong because they prioritise harmonisation at the expense of safety.

59. Developing these submissions, Mr Maskrey QC submitted as follows.

60. He said the central issue from the Defendant's perspective is whether Article 13 of the Directive prevents Member States from introducing a system by which unsafe goods which result in personal injury can give rise to an action in civil law outside of Part 1 of the 1987 Act other than in situations where fault is alleged.

61. From his clients' perspective, Mr Maskrey said that their case is that Part II of the 1987 Act and the safety regulations made under it form an entirely different system with different objectives from Part I and that in those circumstances, it is a system that is specifically permitted by Article 13. It has a different objective. He said the central point is that it is designed to ensure that goods are taken off the market whereas Part I of the 1987 Act is nothing to do with taking goods off the market but rather is there to deal with what happens with goods that are on the market. He said Part II deals with safety and not defect and that while there may be an overlap, the two are different.

62. He said that under Article 13, read literally for its terms and effects, the Defendant's liability is established. He said that the recitals to Article 13 of the Directive make clear that Member States may provide, under their domestic legal systems (a) for injured parties to bring claims for damages based upon contractual or non-contractual liability other than as provided for in the Directive; and (b) 'special systems':

> "(13) Whereas under the legal systems of the Member States an injured party may have a claim for damages based on grounds of contractual liability or on grounds of non-contractual liability other than that provided for in this Directive; in so far as these provisions also serve to attain the objective of effective protection of consumers, they should remain unaffected by the Directive …."

63. And also:

> "(18) Whereas the harmonization resulting from this cannot be total at the present stage, but opens the way towards greater harmonization …."

64. He said that a literal, and natural, reading of Article 13 is that a Member State *can* have a parallel system of liability for defective products. The Claimants' claim in breach of statutory duty is 'a claim for damages based … on grounds of non-contractual liability other than that provided for in [the] Directive.'

65. The Claimants say that the system of liability provided by the 1994 Regulations is different from, and significantly wider than, the liability provided for by the Directive because (a) it is not restricted to consumers; (b) it is not restricted to producers; (c) there is no 10 year limitation long-stop; (d) there is a need only to prove that an obligation was imposed by the safety regulations on the defendant, that he was in breach of that obligation and that as a consequence injury occurred to the claimant (who can thus be regarded as '…any person who may be affected by a contravention of the obligation …); (e) there is no concept of the product being 'defective'; it is simply 'unsafe' as defined by s 19 of the 1987 Act.

66. Overall, the Claimants say that fault-based claims can still be brought, notwithstanding that a claim could (subject to limitation) also have been brought pursuant to Part 1 and against producers by consumers. It is submitted therefore that the Defendant is wrong to say that the claim falls within the scope of Part 1, if by that is meant that the two systems of liability are co-extensive or that the two systems are trying to achieve precisely the same result.

67. Alternatively, if I were to find (contrary to the Claimants arguments) that the system of liability for breach of statutory duty under the 1994 Regulations is a system of liability based on the *same* grounds as those found in the Directive and Part I of the 1987 Act, then the Claimants say it is a 'special liability system' within Article 13 and not a general system, and as such remains permissible under domestic law.

68. The Claimants say, simply, that Article 13 states that the Directive does not affect any rights existing at the moment the Directive was first notified on 30 July 1985. The Claimants point to the fact that the right of action in breach of statutory duty was conveyed by the Consumer Safety Act 1978 and the precursor to the 1994 Regulations. Therefore, a straightforward reading of Article 13 is that it permits a special system of liability that formed part of domestic law as at the 30 July 1985.

Discussion

The interpretative approach

69. The issues in this case are ones of statutory construction, and in particular how the 1987 Act is to be interpreted in light of EU law. I therefore begin with the relevant principles.

70. Domestic legislation has to be construed as far as possible so as to conform with EU Directives. This is known as the *Marleasing* principle: Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135, or the duty of conforming interpretation.

71. As the CJEU explained in *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Joined cases C-397/01 to 403/01) [2005] ICR 1307; [2004] ECR I-8835, [113]:

> "[W]hen it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as

> possible, in the light of the wording and purpose of the directive concerned in order to achieve the result sought by the directive".

72. This duty extends to all domestic legislation, and not only legislation specifically enacted or amended to implement a Directive.

73. In *Vidal-Hall v Google Inc (Information Comr intervening)* [2016] QB 1003, [86], Lord Dyson MR said:

> "The *Marleasing* principle is not in doubt. It is that the courts of Member States should interpret national law enacted for the purpose of transposing an EU directive into its law, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result sought by the directive. The critical words (which have given rise to some difficulty) are "so far as possible". It is recognised that there are circumstances where it is not possible to interpret domestic legislation compatibly with the corresponding directive even where there is no doubt that the legislation was intended to implement the directive. If a national court is unable to rely on the *Marleasing* principle to interpret the national legislation so as to conform with the directive, the appropriate remedy for an aggrieved person is to claim *Francovich* damages against the state."

74. The only relevant constraint on the broad and far-reaching nature of the interpretative obligation is that: the meaning should 'go with the grain of the legislation' and that it should be 'compatible with the underlying thrust of the legislation being construed*'* (at [38]), per Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [33]; and Dyson LJ in *Revenue and Customs Comrs v EB Central Services Ltd* [2008] STC 2209, [81].

75. There is a helpful summary of the relevant principles in the judgment of Morritt C in *Vodafone 2 v HM Commissioners of Revenue and Custom Comrs* [2010] Ch 77, [37]-[38], as approved by the Supreme Court in *Swift (trading as Swift Move) v Robertson* [2014] 1 WLR 3438 at [21]. He said that the *Marleasing* duty of conforming interpretation

    a. is not constrained by conventional rules of construction;

    b. does not require ambiguity in the legislative language;

    c. is not an exercise in semantics or linguistics;

    d. permits departure from the strict and literal application of the words which the legislature has elected to use;

    e. permits the implication of words necessary to comply with Community law obligations; and

f. The precise form of the words to be implied does not matter.

76. The Defendant submitted that in the present case, there is strictly no need to resort to the *Marleasing* principle. That is because the same answer is obtained on an ordinary construction of the 1987 Act. In particular, s 1(1) of the 1987 Act makes clear that Part I intends to enact the Directive, and should be construed accordingly, such that the balance of the 1987 Act (including Part II and Part V) must be intended to be read subject to this overall objective. Accordingly, insofar as the Directive precludes the s 41(1) claims, this must be also the effect of Part I of the 1987 Act. The most obvious way to achieve this is by reading s 41(1) as always being subject to the claim not falling within the scope of the Directive/ Part I of the 1987 Act.

77. I reject this submission. This case is concerned primarily with the proper scope and reach of s 41(which is in Part V and not Part I) and whether claims for defective products are excluded from its reach. This, it seems to me, to bring into play the *Marleasing* principle. I will return to this topic at the conclusion of this discussion.

78. I should make clear that neither side has invited me to make a reference to the CJEU. Both contend that the issues before me are *actes claires* so as to make a reference unnecessary.

The interpretation of the Directive

79. In my judgment the Defendant is correct in its central submission that the Directive as it has been interpreted by the CJEU was intended to provide for a maximal level of harmonisation in relation to defective products based upon strict liability, and hence it is not open to Member States to provide for a wider system of protection based on no fault than that provided for in the Directive. Article 13 does not permit a parallel general system of strict liability. It is also clear from the case law that the reference to 'special liability systems' in Article 13 is a reference to a particular German law in relation to the pharmaceutical industry, and that it cannot be interpreted more widely.

80. The starting point is what the Directive seeks to achieve. That is complete harmonisation of the laws, regulations and administrative provisions of the Member States in the area to which it relates, namely the liability of producers for defective goods. In *Commission v France,* supra, [2], [17], [24] the Court said:

> "[2] The Directive seeks to approximate the laws of the Member States concerning the liability of producers for damage caused by defective products. According to the first recital in the preamble thereto, approximation is necessary because legislative divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property.
> …
>
> [17] In that connection it should be pointed out first that, as is clear from the first recital thereto, the purpose of the

> Directive in establishing a harmonised system of civil liability on the part of producers in respect of damage caused by defective products is to ensure undistorted competition between traders, to facilitate the free movement of goods and to avoid differences in levels of consumer protection.
>
> …
>
> [24] It follows that, contrary to the arguments put forward by the French Republic, the Directive seeks to achieve, in the matters regulated by it, complete harmonisation of the laws, regulations and administrative provisions of the Member States (see the judgments of today in Case C-154/00 *Commission* v *Greece* [2002] ECR I-3879, paragraphs 10 to 20, and Case C-183/00 *González Sánchez* [2002] ECR I-3901, paragraphs 23 to 32)."

81. The Court has also made clear whilst it was left to national legislatures to determine the precise transposition of the Directive, 'Application of national rules may not impair the effectiveness of the Directive … and the national court must interpret its national law in the light of the wording and the purpose of the Directive': *Henning Veedfald v Århus Amtskommune* (Case C-203/99) [2001] ECR I-3569, [27]. In *Commission v France,* supra, the Court said at [16] that the margin of discretion available to Member States in order to make provision for product liability is entirely determined by the Directive itself and must be inferred from its wording, purpose and structure. In the case, the Court said at [14] that the legal basis for the Directive in EU law was Article 100 of the EEC Treaty (now Article 115 of the Treaty on the Functioning of the European Union (TFEU)). It said that that legal basis does not permit Member States to derogate from the provisions of the Directive.

82. The fact that the Directive provides for certain derogations or leaves certain matters to national law (such as the question of the recoverability of non-material damage) does not mean that in regard to the matters which it regulates harmonisation is not complete: *Commission v France,* supra, [19-20]; *Commission v Greece,* supra [15-16]; *González Sánchez,* supra, [28-29].

83. The Directive puts in place a system of strict liability for defective products. Article 4 enables the victim to seek compensation where he proves (a) damage; (b) a defect in the product; and (c) a causal link between the two. Nothing else need be proved, in other words, liability is strict. As I have set out, the Directive provides for a 10 year long stop limitation period, and other defences.

84. Article 13 preserves other systems of liability under national law which are permitted to run in parallel with the Directive. However, contrary to the Claimants' submission, in my judgment Article 13 cannot be interpreted as giving the Member States the possibility of maintaining a general system of product liability based upon no-fault liability that is different from, and more generous to consumers, than that provided for in the Directive. In other words, the language in Article 13 (emphasis added), 'This Directive shall not affect any rights which an injured person may have according to the rules of the law of

contractual or *non-contractual liability* …' must be read meaning non-contractual liability *other than* strict liability.

85. Such a reading is precluded by a number of the Court's decisions, which have held national laws which establish wider systems of consumer protection than that provided for in the Directive to be incompatible with it. In particular, they have held the extension of no-fault liability for defective products to circumstances not provided for by the Directive are not in compliance with it.

86. In *González Sánchez*, supra, the claimant brought proceedings in the Spanish court for damage caused by a blood transfusion. The essential question was whether she could rely on a Spanish law which was more generous to claimants than the law that transposed the Directive into Spanish law. The Court said at [9]-[13]:

> "9 María Victoria González Sánchez received a blood transfusion in a medical establishment belonging to Medicina Asturiana. The blood used for the transfusion had been treated by a transfusion centre.
>
> 10 She maintains that in the course of that transfusion she was infected by the Hepatitis C virus. Under the general provisions of the Spanish Civil Code and Articles 25 to 28 of Law No 26/84, she sought compensation from Medicina Asturiana for the damage suffered. Medicina Asturiana challenged the applicability of those articles of Law No 26/84 in the light of the first final provision of Law No 22/94.
>
> 11 The referring court regards it as established that the facts underlying the dispute come within the scope ratione materiae and ratione temporis of both Law No 26/84 and Law No 22/94 [the latter giving effect to the Directive].
>
> 12 Following an analysis of those two laws the referring court concluded that the rights which consumers and users may rely on under Law No 26/84 are more extensive than those which the victims of damage may rely on under Law No 22/94 and that, consequently, the transposition of the Directive into internal law under Law No 22/94 operated to curtail the rights enjoyed by the persons concerned at the time when the Directive was notified.
>
> 13 Taking the view that the dispute thus raises a question concerning the interpretation of Article 13 of the Directive, the Juzgado de Primera Instancia e Instrucción no 5 de Oviedo decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:
>
> 'Must Article 13 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products be interpreted as precluding the restriction

> or limitation, as a result of transposition of the Directive, of rights granted to consumers under the legislation of the Member State ?'"

87. The Court then said at [31]-[34]:

> "30 In those circumstances Article 13 of the Directive cannot be interpreted as giving the Member States the possibility of maintaining a general system of product liability different from that provided for in the Directive.
>
> 31 The reference in Article 13 of the Directive to the rights which an injured person may rely on under the rules of the law of contractual or non-contractual liability must be interpreted as meaning that the system of rules put in place by the Directive, which in Article 4 enables the victim to seek compensation where he proves damage, the defect in the product and the causal link between that defect and the damage, does not preclude the application of other systems of contractual or non-contractual liability based on other grounds, such as fault or a warranty in respect of latent defects.
>
> 32 Likewise the reference in Article 13 to the rights which an injured person may rely on under a special liability system existing at the time when the Directive was notified must be construed, as is clear from the third clause of the 13th recital thereto, as referring to a specific scheme limited to a given sector of production (see judgments of today in Case C-52/00 *Commission v France* [2002] ECR I-0000, paragraphs 13 to 23, and Case C-154/00 *Commission v Greece* [2002] ECR I-0000, paragraphs 9 to 19).
>
> 33 Conversely, a system of producer liability founded on the same basis as that put in place by the Directive and not limited to a given sector of production does not come within any of the systems of liability referred to in Article 13 of the Directive. That provision cannot therefore be relied on in such a case in order to justify the maintenance in force of national provisions affording greater protection than those of the Directive.
>
> 34 The reply to the question raised must therefore be that Article 13 of the Directive must be interpreted as meaning that the rights conferred under the legislation of a Member State on the victims of damage caused by a defective product under a general system of liability having the same basis as that put in place by the Directive may be limited or restricted as a result of the Directive's transposition into the domestic law of that State."

88. Paragraph 33 is the important one. The basis of producer liability put in place by the Directive is one of strict liability. Paragraph 33 therefore means that Article 13 cannot

be read as having within its scope a system of strict liability that is not limited to a specific sector of production.

89. There is a helpful summary of the effect of this decision in the Opinion of Advocate General Szpunar in *Novo Nordisk Pharma GmbH v S.*, ECLI:EU:C:2014:1825. He said at [26], summarising the relevant principles (footnotes omitted):

> "26. What then does Article 13 of Directive 85/374 authorise the Federal Republic of Germany to do? The judgment in *González Sánchez* throws light on this matter. That case concerned a system of liability for damage caused by products and services which was in force in Spain before Directive 85/374 was notified. That system, like the system established by the directive, was based on the principle of no-fault liability. After the Kingdom of Spain had acceded to the European Communities and that Member State had transposed the directive, the previous system, which was regarded as more favourable to injured persons, was kept in force, with the exception, however, of products covered by the directive. The applicant in the main proceedings challenged that solution on the grounds that it restricted consumers' rights in comparison with the situation before the transposition of the directive and claimed the benefit of the previous provision. In her view, under Directive 85/374 that option was justified by Article 13. The Court excluded that possibility. It found, first, that the Spanish liability system was neither a system of contractual or non-contractual liability nor a special liability system, for such a system must be limited to a given sector of production, whereas the Spanish system was of a general nature. The existence of such a system in parallel with the system under the directive could not be permitted. Summing up, the Court ruled that '… the rights conferred under the legislation of a Member State on the victims of damage caused by a defective product under a general system of liability having the same basis as that put in place by … directive [85/374] may be limited or restricted as a result of the Directive's transposition into the domestic law of that State'. Therefore, despite having a product liability system which predated Directive 85/374, the Kingdom of Spain had to exclude the application thereof to products covered by that directive."

90. In my judgment, these decisions pose considerable obstacles for the Claimants' case.

91. In *Commission v France*, supra, Court held a French law failed to properly implement the Directive: in allowing recovery of the first €500 Euros (at [26-35]) in contravention of Article 9(b); for making *suppliers* liable on the same basis as producers [36-41] (suppliers are not liable under the Directive unless they fail to identify a producer or importer (per Article 3(3) of the Directive)); and for imposing the extra condition that

the producer must prove he took appropriate steps to avert the consequences of a defective product in order to invoke compliance with mandatory requirements and the development risks defence [42-50].

92. In *Commission v Greece*, supra, [27-34], the Court held that Greek law failed properly to implement the Directive in failing to introduce the €500 Euro threshold for damage, in other words, that Greek law was incompatible with the Directive because it permitted consumers to sue on the basis of strict liability for damage less than that amount.

93. Later cases have taken the same approach, ie, they have rejected as incompatible with the Directive national laws which provide a greater level of no-fault consumer protection for defective products than that specified in the Directive. In Case C-402/03 *Skov Æg v Bilka Lavprisvarehus* (Case C-402/03) [2006] ECR I-199 the court considered a provision of Danish law under which a supplier had to assume the producer's no-fault liability in relation to the consumer. As I have explained, the Directive generally makes producers strictly liable. By Article 3(3) suppliers can be treated as producers but only where the producer cannot be identified and the supplier fails to inform the injured person within a reasonable time who the producer is. The Danish law which transposed the Directive made suppliers generally liable, not just in the circumstances specified in Article 3(3).

94. At [45] the Court said the law was incompatible with the Directive (emphasis added):

> "The Directive must be interpreted as *precluding* a national rule under which the supplier is answerable, beyond the cases listed exhaustively in Article 3(3) of the Directive, for the *no-fault liability* which the Directive establishes and imposes on the producer."

95. In his Opinion in the same case Advocate General Geelhoed said at [73] that the Directive (emphasis added):

> "… does not preclude maintaining, or even adopting, rules on the liability of suppliers *provided that such rules relate to fault-based liability and contractual liability*."

96. In Case C-117/04, *Commission v France* [2006] ECR I-2461, the Court considered a French law which retained strict liability for suppliers in the situation where a supplier informs the injured party within a reasonable time of the identity of the person who supplied him with the product (ie, the supplier's supplier), but the producer cannot be identified. The Court said at [55]:

> "In the light of all the foregoing, the conclusion must be that, by continuing to regard the supplier of a defective product as liable on the same basis as the producer where the producer cannot be identified, even though the supplier has informed the injured person within a reasonable time of the identity of the person who supplied him with the product, the French Republic has failed to take the necessary measures to comply fully with the judgment in

> Case C-52/00 *Commission v France* as regards the transposition of Article 3(3) of Directive 85/374, and has thereby failed to fulfil its obligations under Article 228 EC."

97. These cases therefore stand for the proposition that strict liability cannot be provided for in a national law transposing the Directive except in the circumstances provided for in the Directive. Article 13 does, however, permit non-contractual liability that is based upon fault or upon some other basis.

98. However, the harmonisation principle only applies to matters within the scope of the Directive. So, for example, damage to commercial property falls outside the scope of the Directive: Article 9(b); *Moteurs Leroy Somer v Dalkia France and Ace Europe* [2009] ECR I-4733, [17], [27] – [32]. The rationale for these cases is that the Directive does not purport to regulate all product liability claims – only such claims, and such matters, as fall within the scope of the Directive.

99. On this point, the Defendant says, rightly in my view, that the *Stoke-on-Trent College* case does not take the Claimants' case any further. Mr Dougherty said it is important to note that in that case, the claimant's claim fell outside the scope of the Directive and Part I of the 1987 Act as the loss claimed related to commercial property. This was also the case in *Howmet Ltd v Economy Devices Ltd* [2014] EWHC 3933 (TCC) (upheld on appeal at [2016] EWCA Civ 847 (dangerous electric fire-safety probe)), which was unsuccessful on the facts, and *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2017] EWHC 767 (TCC) (which concerned an application to amend, which failed).

100. In summary, the cases show that that Article 13 governs the relationship between the strict liability provisions of the Directive and other systems of liability in respect of defective products that may permissibly be in force in the Member State in parallel. Three types of liability are identified in Article 13 as being permissible: contractual liability; non-contractual liability based on grounds other than those specified in the Directive (ie, based on fault rather than strict liability); and special liability systems. I therefore reject the Claimants' central contention that the words 'non-contractual liability' can be read as allowing a national system of strict liability for defective products in circumstances other than those provided for in the Directive (including as to the limitation period and the specified defences).

101. This conclusion is consistent with the view of the editors of Winfield & Jolowicz, *Tort* (19th Edn), p307:

> "Article 13 of the Directive provided that it should not 'Affect any rights which an injured person may have according to the rules of contractual or non-contractual liability or a special liability system existing at the moment when' the Directive was notified. It was widely thought that this meant that the Directive merely set a minimum standard and left it open to the local law to impose a stricter or more extensive liability. However, the European Court of Justice has ruled that this is incorrect in the light of the fact that divergences in liability law may distort competition and

> 'maximal' rather than 'minimal' harmonization is imposed (*Gonzalez Sanchez v Medicina Asturiana SA*, supra). Hence, the French transposition of the Directive, which put the liability of the supplier on the same level as the manufacturer (whereas under the Directive the supplier is liable only if the manufacturer is unidentified) was struck down (*Commission v France*, supra). However, art 13 allows the imposition of liability on some other ground such as fault or warranty (*Commission v France*, supra) so in English law the general liability for negligence and breach of contract operate in parallel with the Directive regime."

102. It is also consistent with Mildred, *Product Liability: Law and Insurance* (2000), [9.32-9.33] (footnotes omitted):

> "9.32 Unique among EC Directives in the consumer field, the Product Liability Directive is a maximum Directive. Almost every other Directive is expressed to be a minimum one, with the effect that Member States are allowed to provide higher protection, provided it is not inconsistent with the Treaty of Rome. The effect here is that Member States can do no more than what is allowed in the Product Liability Directive.
>
> 9.33 The Directive remains a serious check on the development of public policy across this field. What it does do is to prevent government and Parliament from introducing other measures, such as the Law Commission's original suggestion that the burden of proof as to the existence of a defect be reversed. More critically, it prohibits the UK from legislating for a no-fault liability scheme for drugs or for road traffic accidents (where the cause is a defective car), as proposed by the Lord Chancellor's Department in 1990. Spain has managed to introduce a tighter regime for drugs by excluding the benefit of the development of risk from them."

103. It is also consistent with the 2018 Directive Report, p4 (emphasis added):

> "However, the Directive does not cover or harmonise all aspects of product liability. There is room for different national approaches, for example on systems to settle claims for damages, or on how to bring proof of damage. These are left to Member State to decide. Member States may also introduce or maintain other national instruments for the liability of producers *based on fault."*

104. I turn to the question of 'special liability systems' and what that phrase means. The Claimants submitted that their claim under s 41(1) and the 1994 Regulations constitutes a special liability system because it is limited to a specific manufacturing sector

(electrical goods) and is founded on the implementation of a European Directive, the Low Voltage Directive. They referred to the decision of the Court in Case C-310/13, *Novo Nordisk Pharma GmbH v S* EU:C:2014:2385, [21], where the Court referred to the Advocate General's opinion in the same case that the German system of liability for pharmaceutical products established under German law by the *Arzneimittelgesetz* was a special liability system '… in so far as it is limited to a specific manufacturing sector and it existed on 30 July 1985'.

105. In my judgment, this paragraph cannot be read as meaning that any liability system which has those characteristics falls within Article 13 as a special liability system. The Advocate General's opinion in the same case makes clear that Article 13 is referring solely to the German law system in relation to pharmaceuticals in response to the Thalidomide scandal. In Case C-310/13, *Novo Nordisk Pharma GmbH v S*, supra, Advocate General Szpunar said at [26], summarising the relevant principles (emphasis added):

> "26 Article 13 of Directive 85/374 governs the relationship between the provisions of that directive and the other systems of defective product liability that may be in force in the Member States. There are three types of liability: contractual liability; non-contractual liability, *which differs from the no-fault liability established by the directive (in practice, this may essentially be based on the principle of fault* [here there is a footnoted reference to *González Sánchez*, supra, [31]); and the 'special liability system existing at the moment this Directive is notified'. It is common ground – as, moreover, the Commission confirmed at the hearing - that the final part of Article 13 of Directive 85/374 actually relates only to the German system of liability for defective products, as established by the AMG, which was already in force at the time when Directive 85/374 was notified.* It is that final part of Article 13 of the directive that the Court is called upon to interpret."

106. This paragraph has the following relevant footnote at 16:

> "This is also confirmed in the 13th recital to the preamble to Directive 85/374. Despite certain differences on this point in the various language versions, it clearly concerns a system of liability relating to medical products which already exists (that is to say at the moment when the directive is notified) in a Member State (that is to say Germany."

107. The 13th recital to the Directive is as follows:

> "Whereas under the legal systems of the Member States an injured party may have a claim for damages based on grounds of contractual liability or on grounds of non-

> contractual liability other than that provided for in this Directive; in so far as these provisions also serve to attain the objective of effective protection of consumers, they should remain unaffected by this Directive; whereas, in so far as effective protection of consumers in the sector of pharmaceutical products is already also attained in a Member State under a special liability system, claims based on this system should similarly remain possible."

108. In [34] of his opinion the Advocate General said:

> "On the other hand, the system under the AMG falls within the ambit of Article 13 of Directive 85/374, for it is limited to a given sector of production and it did not, therefore, have to be repealed or adapted following the transposition of the directive into German law. Article 13 of Directive 85/374 thus allowed Germany not to restrict the rights of injured persons conferred by the system established by the AMG and going beyond the rights laid down in the directive. That was precisely the purpose of introducing that part of Article 13 of Directive 85/374, which allows a special liability system to be maintained. That is because, at the moment when the directive was notified, a system of liability for medicinal products, established as a result of dramatic events [ie, Thalidomide] was already in force in Germany and the Community legislature had no intention of restricting the rights of injured persons conferred by that system."

109. These passages make clear that the phrase 'special liability system' in Article 13 is a term of art referring to a specific German law, rather than something more general, as the Claimants contend.

Conclusion

110. It follows that I conclude the Defendant is right to say that the Claimants' 41(1) claim falls squarely within the scope of the Directive and Part I of the 1987 Act because they are claiming for personal injury and for non-commercial property damage caused by a defective product, both of which are covered by Articles 9(a) and (b) of the Directive and ss 2 and 5 of the 1987 Act. Put another way, the Defendant is correct to say the Claimants fall within the class of persons who would (but for the expiry of the limitation period) have been able to bring an action under the 1987 Act. I accept Mr Maskrey's general point that defectiveness and safety are differently defined under the 1987 Act. But an unsafe product may also be a defective one and, if actionable damage results from it, then the claim falls under Part I of the 1987 Act and the Directive. I see no way, consistently with the case law I have discussed, to conclude otherwise.

111. To read s 41 as permitting this claim on the basis of strict liability would be inconsistent with the Directive. That is because it would allow for a claim for damage arising out of a defective product to be made on the basis of strict liability beyond the 10 year limitation

period provided for in Article 10(2) of the Directive. It would also deprive the defendant of the defences in s 4 of the 1987 Act, including the 'development risks' defence in s 4(1)(e).

112. It follows that the 1987 Act must be read down so as to comply with the Directive. Mr Dougherty submitted that if it is necessary to resort to the *Marleasing*, supra, principle of conforming interpretation (which I have found that it is), the 1987 Act and 1994 Regulations can readily be construed so as to be consistent with the Directive via one of three routes:

    a. Firstly, it is open to me to construe s 41(1) of the 1987 Act as implicitly being limited to claims that do not otherwise fall within the scope of Part I of the 1987 Act and the Directive. This would leave unaffected claims falling outside the scope of the Directive, for example in relation to commercial property.

    b. Alternatively, any safety regulations made under s 11 of the 1987 Act (including the 1994 Regulations) can be construed ('read down') so as not to give rise to civil liability insofar as the claims would otherwise fall within the scope of Part I of the 1987 Act/Directive.

    c. The third option is to seek to construe the relevant provisions (whether s 41(1) or the 1994 Regulations) as requiring fault to be established (and therefore potentially falling outside the scope of the Directive), though he submitted that was a less satisfactory solution than the approaches set out above.

113. Mr Dougherty said that all of these approaches 'go with the grain' of the 1987 Act and are compatible with the underlying thrust of the 1987 Act.

114. For his part, Mr Maskrey said that if I were against him that the second of these routes was the appropriate one.

115. I agree. Section 41(1) operates by making a breach of the obligations imposed by safety regulations actionable. In my judgment, in order to conform with what I have held to be the correct interpretation of the Directive, breaches of obligation imposed by safety regulations made under Part II of the 1987 Act are not actionable under s 41(1) if and to the extent the breach of duty in question would fall within Part I of the 1987 Act as relating to a defective product that caused actionable damage.

Conclusion

116. I therefore answer the two preliminary issues as follows:

    a. On a true construction, s 41(1) of the 1987 Act and/or the 1994 Regulations are not applicable to the Claimants' claim for breach of statutory duty, taking into account the Directive and EU law.

    b. Judgment should not be entered.