Neutral Citation Number: [2024] EWHC 2009 (KB)

Case No: QA-2022-000067

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2024

Before:

MR JUSTICE MOULD

- -

Between:

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS	**Appellants/ Defendants**
- and –	
DONATAS LABEIKIS and others	**Respondents/ Claimants**

- -
- -

SAM CHANDLER (instructed by **HMRC Solicitors**) for the **Appellants**
SETU KAMAL (instructed on direct access) for the **Respondents**
Hearing dates: 13th and 14th March 2024

- -

Approved Judgment

This judgment was handed down remotely at 2:00pm on Wednesday 7th August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE MOULD

Mr Justice Mould: -

Introduction

1. This appeal is brought by the Appellants in relation to two sets of linked claims issued by the Respondents on 31 December 2020 under Part 8 of the Civil Procedure Rules **['the Part 8 claims']**. The Appellants appeal from the Order of Master Dagnall dated 20 January 2022, by which he rejected the Appellants' applications to strike out the Part 8 claims as an abuse of process. Master Dagnall gave permission to appeal on 1 March 2022.

2. The subject matter of the Part 8 claims is essentially common to both.

3. Claim QB-2020-004697 **['the Labeikis claim']** is a claim in relation to tax avoidance provisions enacted in respect of employment income principally under Part 7A of the Income Tax (Earnings and Pensions) Act 2003 **['ITEPA']** and Schedule 11 of the Finance (No. 2) Act 2017 **['FA2017']**. Claim QB-2020-004698 **['the Kang Kim claim']** is a claim in relation to corresponding tax avoidance provisions enacted in respect of trading income under Schedule 12 to FA2017 and sections 23A to 23H of the Income Tax (Trading and Other Income) Act 2005 **['ITTOIA']**.

The Loan Charge

4. Those statutory provisions enact the so-called "Loan Charge". The Loan Charge is designed to combat the use of "disguised remuneration schemes" by both employees and the self-employed. Such schemes entail the avoidance of income tax and national insurance contributions through arrangements by which individuals receive monies or assets in a form other than straightforward salaries and fees including in the form of "loans" that HMRC reasonably believe are unlikely ever to be repaid. I was referred to *Zeeman v HMRC* [2020] EWHC 794 (Admin) at [5] for an example given by Andrews J of how a disguised remuneration scheme might operate.

5. In [10]-[14] of his judgment **['the judgment']**, Master Dagnall provided the following helpful explanation of the Loan Charge and of the legislation by which it has been enacted –

> *"The Particulars of Claim identify what is said to be the loan charge, much of which is common ground. It arises in the following general circumstances.*
>
> *There have been attempts by HMRC over the years to impose tax charges upon the situations where employers have made payments into pension schemes, trusts and other corporate or third party arrangements which the employer and employee contend are legitimate uses of such constructs and legitimate obtaining of related tax reliefs, but which HMRC say are effectively disguised remuneration of the employees and ought to be taxed as such. These arrangements have featured, amongst other things, what are called "loans" made to the employees or relevant bodies.*
>
> *The result is that the Revenue has over the years introduced various tax avoidance legislation. Under Part 7A of the Income Tax (Earnings and Pensions) Act 2003 tax liabilities will arise if a relevant person has taken a relevant step under a*

relevant arrangement. By Schedule 11 of the Finance (No.2) Act 2017, there was introduced a new provision that a "relevant step" for these purposes will have been taken if a loan, which includes certain transactions which are said to be quasi-loans, had been made to a "relevant person" on or after 6 April 1999, although this was subsequently changed to 9 December 2010 in relation to various loans, and if the loan remains also outstanding on 5 April 2019 or possibly later agreed date.

That effectively meant that certain tax charges, which for these purposes are termed "the loan charge", would arise if such a loan was in existence and was not repaid within a set period of time, which subsequently by provision of the Finance Act 2020 was extended to a date in September 2020. Related legislation extended these provisions to National Insurance as well as income tax.

There was a review carried out in 2019 which resulted in the provisions of the Finance Act 2020 which made changes to the dates and contained certain other provisions, somewhat (but only somewhat) ameliorating the basic provisions as far as the taxpayer was concerned".

The Part 8 claimants

6. The claimants in the Labeikis claim are some 29 named employees or former employees for the purposes of ITEPA who say that they have each received loans which were owed or else came to be owed to a person resident in a country outside the United Kingdom. They claim declaratory relief in relation to Part 7A of ITEPA and Schedule 11 of FA2017 and in respect of the compatibility of that legislation with European Union (EU) law and the European Convention of Human Rights (ECHR).

7. The claimants in the Kang Kim claim are some 32 named sole traders or professionals who say that they have each received loans which were owed or else came to be owed to a person resident in a country outside the United Kingdom. They claim declaratory relief in relation to sections 23A to 23H of ITTOIA and Schedule 12 of FA2017 and in respect of the compatibility of that legislation with European Union (EU) law and the European Convention of Human Rights (ECHR).

8. In [15] Master Dagnall provided a succinct summary of the Part 8 claims –

"The claimants say that the loan charge is incompatible with European Union law, which they say governed matters prior to Brexit and, they say, may well still govern the position. They say that the loan charge and its provisions are contrary to the European Union's fundamental principle of freedom of establishment and various articles of the treaty governing the European Union and lack sufficient justification for these purposes. They seek declarations accordingly. They also say that the loan charge is contrary to the Human Rights Convention, and by extension the Human Rights Act, in two ways. First, they say it is a disproportionate interference with property rights within Article 1 of the First Protocol; secondly, they say it is a disguised penalty such as to fall to be treated as criminal charges within Article 6 of the Convention and they seek declarations to such effect. I also note that they further claim a declaration they should be entitled to recover from the UK Government any actual loss arising".

9. In the Labeikis claim, the claimants have each made witness statements in support of the claims for declaratory relief. The witness statements are in essentially similar terms. Some of the Labeikis claimants state –

> *"I have entered into arrangements in connection with the provision of services. Under these arrangements, my business made a contribution to a trust. A company agreed upon with the trustees then received payments after the 9th December 2010 which it held on behalf of the trust. The trust was resident in Belize. These arrangements remained in place in some form till at least the 5th April 2019.*
>
> *I am told by tax advisors that these facts are such as could potentially have given rise to a liability upon me under the Loan Charge which applied on the 5th April 2019 and Part 7A ITEPA 2003 or section 23 ITTOIA (were those laws to be read without reference to the laws of the European Union or the Human Rights Act 1998)."*

10. The remaining Labeikis claimants state –

> *"I have entered into arrangements in connection with the provision of services. Under these arrangements, I received payments after the 9th December 2010. These were made on behalf of the employer. The employer was resident in Switzerland. These arrangements remained in place in some form till at least the 5th April 2019.*
>
> *I am told by tax advisors that these facts are such as could potentially have given rise to a liability upon me under the Loan Charge which applied on the 5th April 2019 and Part 7A ITEPA 2003 or section 23 ITTOIA (were those laws to be read without reference to the laws of the European Union or the Human Rights Act 1998)."*

11. The Kang Kim claimants have each made witness statements in support of their claim for declaratory relief in essentially similar terms to the evidence given by Labeikis claimants as set out in paragraph 9 above.

12. One of the declarations sought in the Part 8 claims is in the following terms –

> *"(5) The Claimant should be entitled to recover from the UK government any actual loss, (including any tax paid under a settlement) arising by reason of the infringement by the UK of Articles 63 TFEU and, to the extent that it is engaged, Article 49 in accordance with the principle developed by the European Court of Justice in Andrea Francovich and Others v Italian Republic, Joined Cases C-6/90 and C-9/90, [1991] ECR 1-5357 (notwithstanding any change to the terms of the relationship between the UK and the EU by the time this application is heard)."*

13. However, in neither the Labeikis claim nor the Kang Kim claim is there a claim for damages. Nor do the Part 8 claims seek any remedy other than declaratory relief. As is recorded in [19]-[21] of the judgment, Master Dagnall sought and received confirmation from Counsel for the Respondents that the Part 8 claims do not include claims for damages.

The strike out applications

14. On 12 February 2021 the Appellants applied for orders from the court declining jurisdiction to hear the Part 8 claims under CPR Part 11 or striking out the Part 8 claims as an abuse of process under CPR 3.4. The Appellants' primary contention was that the Part 8 claims comprise challenges to prospective decisions by HMRC which will be subject to the exclusive jurisdiction of the First-tier Tribunal **['the Tribunal']** once made. The Appellants relied upon certain provisions of the Taxes Management Act 1970 **['the 1970 Act']** and the principle stated by the House of Lords in *Autologic Holdings plc v Inland Revenue Commissioners* [2006] 1 AC 118 **['the *Autologic* principle']**.

15. Alternatively, the Appellants contended that the Part 8 claims comprise public law challenges to the lawfulness of primary tax legislation which ought to have been brought by way of judicial review in accordance with CPR Part 54. (I note that the Appellants further argued that Part 8 was an inappropriate procedure as in the case of the many claimants, individually the proceedings were likely to involve substantial issues of fact).

The appeals

16. On 19 November 2021, Master Dagnall handed down the judgment. In a carefully reasoned and comprehensive analysis, he rejected the Appellants' primary argument. He held that notwithstanding the *Autologic* principle, the subject matter of the Part 8 claims did not fall within the exclusive jurisdiction of the Tribunal. He accepted the Appellants' secondary argument that the Part 8 claims should have been brought by way of claims for judicial review under CPR Part 54. His overall conclusions are set out in [166] of the judgment –

> *"166. For all those reasons, I am going to decide against the Revenue on the tax exclusivity point but stay the Part 8 claims due to the judicial review exclusivity point. It seems to me that a claim can be brought in the courts, where the Revenue have not instituted any inquiry or raised any assessment, but that the claim, however, is a claim that should be brought by judicial review using the Part 54 procedure, and that the solution in this case is not to strike out the Part 8 claim but to stay it, with permission to restore or other directions (which I will consider at the hearing consequential upon this judgment) designed to enable it to be dealt with depending on what happens on any judicial review claim".*

17. On 20 January 2022 Master Dagnall made an order staying the claims until 14 days after the final determination of any applications for judicial review made by the Respondents on the same grounds as the Part 8 claims. He further ordered that *"if a Claimant has not applied for judicial review by 28 February 2022 on the same grounds as the present claims, the claim of that Claimant be struck out without further order"* (paragraph 7 of the Order made by Master Dagnall on 20 January 2022).

18. On 25 March 2022 the Appellants filed their appellant's notice. They contended that having found that the Part 8 claims constituted a public law challenge which ought to have been brought by way of a claim for judicial review under CPR Part 54, Master Dagnall's decision and order staying the Part 8 claims, rather than striking them out, was an error of law. The Appellants relied on the principle that the proper forum for a public law challenge is the Administrative Court, and that any other procedure is an abuse of process – the *"exclusivity principle"* established in *O'Reilly v Mackman*

[1983] 2 AC 237 **[*'O'Reilly v Mackman'*]**. See *Trim v North Dorset District Council* [2011] 1 WLR 1901 **[*'Trim'*]** at [20].

The judicial review proceedings

19. In the meantime, on 23 February 2022 and 24 February 2022 two sets of claims for judicial review were issued in the Administrative Court by the Trustees of the Setu Kamal Action Man Trust 2022 and other individual claimants. Those individual claimants largely corresponded to the two sets of claimants in the Part 8 claims. Both claims for judicial review were founded upon substantially similar grounds of challenge to the statutory arrangements for the Loan Charge as those advanced in the Part 8 claims.

20. On 17 June 2022, Foster J made an order refusing permission to apply for judicial review. On 19 January 2023, following an oral hearing Swift J refused renewed applications for judicial review. Swift J found that the claims had not been properly formulated and were accordingly not reasonably arguable. The claims were not supported by a proper statement of facts or by evidence which explained how the claimants' rights had been infringed. He continued –

> *"I also suspect that it is likely to be the case that by the time the facts necessary to plead the case have arisen, a claim for judicial review would be unnecessary because by then a claim to the First-tier Tribunal Tax Chamber would be available, either presently or imminently, and would be a better alternative course of action to a claim for judicial review.*
>
> *...*
>
> *So far as concerns this claim for judicial review there is not yet any sufficient practical as opposed to academic or theoretical dispute that is fit for consideration. In these circumstances refusing permission to apply for judicial review is not contrary to any right of access to a court for an effective remedy".*

21. The claimants in the judicial review claims applied for permission to appeal from the order of Swift J refusing permission. On 15 June 2023 Males LJ refused permission to appeal. He said that a challenge in the abstract to the provisions of Part 7A of ITEPA, unrelated to any facts, was not suitable for judicial review. The challenge was well out of time for the reasons given by Foster J and Swift J. There was no justification for the claimants' argument that the 3-month time limit for bringing judicial review proceedings contravenes the EU law principle of effectiveness. It remained open to the claimants to challenge any assessment to tax or, should they consider that they had a claim, to bring ordinary proceedings for damages.

The grounds of appeal

22. The Appellants advance 2 grounds of appeal against the order and decision of Master Dagnall. They are helpfully summarised in the Appellants' skeleton argument –

(1) Ground 1

The Part 8 claims comprise a public law challenge to the lawfulness of primary legislation. This challenge ought to have been brought timeously by judicial review under CPR Part 54, not by later private proceedings under CPR Part 8. The essence of the exclusivity principle as stated in *O'Reilly v Mackman* is that claimants should not be able to evade the strict procedural rules applicable to judicial review. The strictness of those rules is no ground on which to disapply the principle. Further, the principle of effectiveness did not require that the Part 8 claims should remain before the court.

(2) Ground 2

The Part 8 claims constitute a challenge to prospective decisions by HMRC which will be subject to the exclusive jurisdiction of the Tribunal once made. The statutory appeals procedure should be followed, in accordance with the *Autologic* principle. The principle of effectiveness does not require that the taxpayer should have the right to an immediate remedy in advance of the operation of the statutory appeals procedure. Properly understood, neither *Aklagaren v Akerberg Fransson* [2013] 2 CMLR 24 **['*Fransson*']** *nor Unibet (London) Ltd v Justitiekanslern* [2007] 2 CMLR 30 **['*Unibet*']** is authority for Master Dagnall's contrary conclusion in [135] of the judgment.

Ground 1

The judgment

23. In [157] of the judgment, Master Dagnall concluded that the Respondents' claims for declaratory relief plainly fell within the scope of CPR Part 54 and were subject to the exclusivity principle established in *O'Reilly v Mackman*. He rejected the Respondents' argument that the Part 8 claims were concerned with private law issues. He found that the issues raised by the Part 8 claims affect very many individuals and are correctly to be regarded as issues of public law.

24. At [158], Master Dagnall said that the Part 8 claims were, therefore, *"at first sight…an abuse"*. He declined simply to transfer the claims to the Administrative Court but proceeded to consider the effect of the 3-month time limit for filing a claim for judicial review under CPR 54.5. At [162], he rejected the Respondents' contention that the 3-month time limit contravened the principle of effectiveness. There was power to extend time under CPR 3.1. In a claim for judicial review which involved issues of EU law, the court would expect to exercise its powers so as to fulfil the principle of effectiveness.

25. The Appellants do not challenge that reasoning. On the contrary, they support it as an orthodox application of the exclusivity principle. Nor have the Respondents sought to challenge the validity of Master Dagnall's reasoning in [157]-[162] of the judgment. The Respondents have not filed a respondent's notice.

26. The Appellants' complaint on ground 1 is directed at the Master's reasoning in [163] to [165] of the judgment -

"163. However, although this leads me to the conclusion that at first sight the claimant should be proceeding by judicial review, thus enabling, in particular, the

important initial step of consideration of whether permission should be granted to proceed to actually take place; and where, if the court refuses to grant permission on the basis that the European law arguments simply do not have sufficient likelihood of success to be allowed to proceed, that would be an end of matters; I do have to bear in mind that the court might take the view that it should insist, at least for judicial review purposes, on the three month time period standing. In those circumstances, it seems to me that it would be unfortunate if the claimants were then to be able to say that, in order to maintain the principle of effectiveness, they should be able to go down the Part 8 route; but where in some way or another they may have been disadvantaged, for example because they would be having to issue new proceedings which would be issued after the Brexit withdrawal date (which might affect their ability to obtain a damages remedy) and where they would have to pay a further fee - although in all of this I bear in mind that they have only paid £528 twice, which in court terms is a relatively low amount.

164. In all those circumstances, it seems to me that, to convert this claim into a Part 54 claim and out of a Part 8 claim would be inappropriate, and to strike it out without knowing what would happen with regards to a judicial review claim and its three month time limit could be unjust. All of that leads me towards a conclusion that it would be better for a judicial review to be initiated from the start (rather than to transfer this case to the Administrative Court), but that it would also be inappropriate to strike out this claim. It seems to me that it is much more appropriate to stay this claim, and in order to see what happens in the Administrative Court, without having prejudiced the position by what might be a premature strike-out.

165. I am reinforced in this conclusion by the facts that: (a) it is not guaranteed as to whether the three month period will be extended; (b) it is not even HMRC's position that the three month period will be extended - HMRC wishes to reserve its position and potentially say that it should not be; and (c) that it seems to me that it would be highly unfortunate and simply give HMRC a technical advantage if it was able to say, "Well, this claim should be struck out, the taxpayer should have to go to the Administrative Court and should lose on the three month basis and should then have to commence new Part 8 or Part 7 proceedings in order to be able to bring a claim to vindicate its European rights, but should be disadvantaged because it is no longer a claim which will have been issued within the Brexit withdrawal time period".

The parties' contentions

27. On behalf of the Appellants, Mr Sam Chandler submitted that before Master Dagnall, the Appellants had contended that the Part 8 claims were in substance public law challenges to the compatibility of primary legislation with EU law. Having correctly found the Part 8 claims to be public law challenges which ought to have been brought by way of claims for judicial review under CPR Part 54, Master Dagnall ought to have ordered the Part 8 claims to be struck out as an abuse of process.

28. Mr Chandler relied upon the exclusivity principle established in *O'Reilly v Mackman*, that it is generally an abuse of process to challenge the validity of public law actions or decisions other than by judicial review. In *Trim* at [20], Carnwath LJ said –

> *"The main issue in the present case turns on the effect of the so-called "exclusivity" principle, established in O'Reilly v Mackman [1983] 2 AC 237: that is, that in general it is an abuse of process to challenge the validity of public law actions or decisions other than by judicial review. Among the factors leading to this conclusion was the streamlined procedure by then available for judicial review, the requirement for leave, and the short time-limit (normally three months) for commencing proceedings. Lord Diplock said:*
>
> > *"The public interest in administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision." (p 281A, see also p 284E).*

29. The Appellants' particular concern arose from the Master's decision to stay the Part 8 claims pending the outcome of any claim for judicial review, rather than simply to strike out the Part 8 claims as an abuse of process. Mr Chandler relied upon Lord Diplock's speech at page 285D-E in *O'Reilly v Mackman* –

> *"Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities".*

(Following the coming into effect of the Civil Procedure Rules, CPR Part 54 has replaced Order 53 of the old Rules of the Supreme Court.)

30. In the present case, it was submitted, the Master should have followed the general rule and struck out the Part 8 claims. As Master Dagnall had correctly found in [157] of the judgment, the Part 8 claims did not assert any claim founded upon the infringement of a right arising under private law. On the contrary, as was the case in *O'Reilly v Mackman*, the Part 8 claims sought only declaratory relief. In accordance with the exclusivity principle, it would be for the Administrative Court to determine whether any claim for judicial review lodged by the Part 8 claimants should be permitted to proceed.

31. In [157] of the judgment Master Dagnall concluded that the issues raised by the Part 8 claims sound in public law rather than private law. Strictly speaking, Master Dagnall's conclusion that the Part 8 claims raise only public law challenges to the validity of tax legislation is not open to argument on this appeal. The Appellants both accept that conclusion and rely upon it. There is no respondent's notice.

32. Nevertheless, on behalf of the Respondents Mr Setu Kamal submitted that it had been open to the Respondents procedurally to bring a claim for declaratory relief under CPR Part 8 in respect of the compatibility of domestic tax legislation with EU law. In

O'Reilly v Mackman at page 285F-G, Lord Diplock acknowledged that there would be exceptions to the exclusivity principle –

> *"…I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis…".*

33. In the present case, it was submitted, judicial review under CPR Part 54 was an inappropriate procedural route. The Part 8 claims had been made in the context of legal uncertainty as to the claimants' potential liability to tax under the Loan Charge legislation. The declarations sought in the Part 8 claims had been designed to establish the legal basis for a claim for damages under the *Francovich* principle (see *Francovich and Bonifaci v Italy* [1993] 2 CMLR 66), in the event that the Loan Charge legislation was found to be incompatible with EU law. Damages were not ordinarily available as a remedy under Part 54 and there was a 3-month time limit within which claims must be brought. By contrast, the limitation period for ordinary claims under Part 8 (or Part 7) was 6 years. In the light of these limitations, Master Dagnall had been correct to conclude in [164] that the claims should be allowed to proceed under Part 8, albeit stayed pending the outcome of judicial review proceedings, in order to avoid contravening the EU law principle of effectiveness.

34. Mr Kamal relied upon *Phonographic Performance Limited v Department for Trade and Industry* [2005] 1 All ER 369, a claim for breach of statutory duty founded upon an alleged breach by the Crown of an obligation arising under EU law in relation to domestic copyright law. At [47] to [50] the Vice-Chancellor said –

> *"47. I start with a consideration of the nature of the proceedings. The decision of the Divisional Court in **Factortame V** to which I have referred in paragraph 12 was considered by the Court of Appeal ([1998] EuLR 456) and the House of Lords ([2000] 1 AC 524), but not with regard to the claim for exemplary damages which had been abandoned. In both those courts there was clear recognition that the effect of **Francovich** and subsequent cases was to subject Member States to an obligation under Community Law to compensate individuals who have sustained consequential loss if they satisfy the conditions identified by the ECJ in those cases. Such an obligation gives rise to a correlative right in one who has suffered such damage. Such a right is not discretionary.*
>
> *48. Nor in my view can such a right be categorised as a public law right even though the Crown's obligations under Community Law and how to discharge them fall to be considered. As in the context of the Limitation Act, the remedy is for damages for breach of a statutory duty arising under Article 8.2 of the Rental Directive and s. 2(2) European Communities Act. This is recognised by the relief sought in the form of a declaration and damages. Counsel for PPL accepted that a declaration was a discretionary remedy but offered to abandon it if that mattered.*

> *49. Neither party referred me to the provisions of CPR Part 54. Nevertheless it appears to me that though the nature of the proceedings might fall within the definition of a claim for judicial review in Rule 54.1(2)(a) if the claim for a declaration is abandoned it would be excluded by Rule 54.3(2). I do not suggest that the form of the proceedings can govern their substance but, to my mind, this confirms the view that the proceedings are essentially private law proceedings which can and prima facie should be brought by an ordinary claim.*
>
> *50. I see nothing in the features on which the Crown relied to suggest that the court should regard the continuation of the claims as ordinary actions as an abuse of the process. So to do would be to subject the rights of an individual to a discretion and a time limit much more restrictive than those normally appropriate to a private law claim for breach of statutory duty and would itself constitute a breach of community law".*

35. Mr Kamal also relied upon *Stagecoach East Midlands Trains Ltd v Secretary of State for Transport* [2019] EWHC 2047 (TCC); 185 ConLR 163, in which Stuart-Smith J dismissed an application to strike out as an abuse of process claims for damages brought under CPR Part 7 arising from breach of duties derived from EU law. At [17] Stuart-Smith J said –

> *"The incorporation of EU law has led to the incorporation into English law of principles and duties such as those of transparency, equal treatment, fair process and proportionality upon which the Claimants rely as the basis of both their Part 7 proceedings and their judicial review proceedings. Where a claimant alleges breaches of such duties, there is nothing intrinsically surprising about the bringing of both a public law challenge to the validity of an act or omission by a public authority claiming one or more of the public law remedies that are available and also a private law claim for one or more of the remedies that are available in private law. It is established beyond argument that the same set of facts and matters may found both a public law challenge and a private law claim for remedies; and that a liability for damages arising from breach of duties derived from EU law should be regarded as liability for breach of statutory duty but subject to Francovich conditions: see R v Secretary of State for Transport, Ex p Factortame Ltd (No 5) [1998] 1 CMLR 1353 at [173]-[174]…".*

36. A similar statement of principle is to be found in the judgment of Coulson LJ on appeal at [71] in *Stagecoach East Midlands Trains Ltd v Secretary of State for Transport* [2020] 3 All ER 948 –

> *"… I consider that there is ample authority for the proposition that a private law claim for damages arising out of the decision of a public body or authority will not automatically be categorised as a "purely public law act" (as it was called in Trim) in order to activate the vastly truncated limitation period applicable to judicial review…".*

Discussion

37. In my judgment, Master Dagnall was clearly correct in his conclusion in [157] of the judgment. Both the Labeikis claimants and the Kang Kim claimants seek declaratory relief only. The principal target of the Part 8 claims is the legislation which establishes

the Loan Charge. The principal complaint is that the relevant statutory provisions are incompatible with EU law. Although one of the declarations sought is a declaration as to the Respondents' entitlement to recover damages arising by virtue of the Crown's infringement of articles 49 and 63 of the Treaty on the Functioning of the European Union in accordance with the *Francovich* principle, none of the Part 8 claimants brings a claim for damages or other restitutionary relief. The Part 8 claims do not allege any breach of private rights against the Appellants. The Part 8 claims do not plead any facts which are said to give rise to a claim for breach of statutory or common law duty sounding in damages. The witness statements submitted in support of the Part 8 claims do not attest to facts in support of any such claim.

38. In the absence of any claim for damages or any asserted claim for breach of statutory duty or other duty arising at common law, the authorities on which the Respondents rely are not in point. The absence of any asserted claim in private law and for damages or other restitutionary relief provides a clear distinction between the Part 8 claims and the subject matter of the claims under consideration in *Phonographic Performance* and *Stagecoach*. In each of those cases, the factual position was that the claimants advanced claims for damages for breach of statutory duty in addition to their claims for declaratory relief. In each case, those claims for damages sounded in private law and benefitted from limitation periods which were far more generous than the 3-month time limit laid down in CPR Part 54 for judicial review claims. In each case, unlike the prerogative remedies available in a claim for judicial review, the private law remedy of damages was available as of right. Hence, the conclusions of the Vice-Chancellor at [50] in the *Phonographic Performance* case.

39. On behalf of the Appellants, it was submitted that having correctly concluded in [158] of the judgment that the Part 8 claims were an abuse of process and should not be transferred to the Administrative Court, Master Dagnall had erred in principle in staying the Part 8 claims. On the correct application of the exclusivity principle, the Part 8 claims should have been struck out.

40. For the Respondents, Mr Setu Kamal submitted that Master Dagnall had been correct not to strike out the Part 8 claims as an abuse of process. In deciding to stay the Part 8 claims, Master Dagnall had acted in accordance with the EU law principle of effectiveness.

41. The principle of effectiveness is explained by the European Court of Justice (Grand Chamber) at [39]-[43] in *Unibet* –

> *"39. …in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law….*
>
> *…*
>
> *42. …while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection….It is for Member States to establish a system of legal remedies and procedures which ensure respect for that right…*

> *43. In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)…".*

42. In [157] of the judgment, Master Dagnall said that the permission stage is a crucial part of the judicial review procedure under CPR Part 54. That is plainly correct. The exclusivity principle is founded upon the existence and operation of the 3-month time limit to bring a claim for judicial review under Part 54: see *Trim* at [20]. The 3-month time limit does not offer a legitimate basis for making an exception to the general rule stated at page 285D of *O'Reilly v Mackman*.

43. At [157] of the judgment, Master Dagnall continued -

> *"…Having a permission filter does not in any way, it seems to me, to contravene the principle of effectiveness in European law. It is simply a domestic law procedure designed to test whether or not there is sufficient in the claim to start with. It is, at first sight, a legitimate national law procedural mechanism".*

44. As Master Dagnall went on to say in [162] of the judgment, the judicial review procedure and the CPR (in particular, CPR 3.1) contain their own mechanism to enable judicial review to satisfy the EU law principle of effectiveness, notwithstanding the initial 3-month time limit for bringing a claim under CPR Part 54. The Administrative Court was under a duty to consider whether applying the 3-month time limit under CPR Part 54 would be in compliance with applicable principles of EU law. If the Administrative Court concluded that an extension of time must be given in order to give proper effect to the principle of effectiveness in the instant case, that court had the power to grant the necessary extension.

45. Master Dagnall's reasoning and conclusions in [157] to [162] of the judgment lead inexorably to the overall conclusion that, applying the exclusivity principle in *O'Reilly and Mackman*, the Part 8 claims should be struck out as an abuse of process. Indeed, Master Dagnall recognised that to be the position. In [163] he said –

> *"… at first sight the claimant should be proceeding by judicial review, thus enabling, in particular, the important initial step of consideration of whether permission should be granted to proceed to actually take place…".*

46. In my judgment, both the existence of the 3-month time limit in CPR Part 54 and the possibility that the Administrative Court might enforce it were essential to the operation of the exclusivity principle in the present case. Those matters provided no proper basis for departing from the general rule and allowing the Part 8 claims to continue, albeit stayed. The Administrative Court was able to supervise any claims made by the claimants for judicial review in accordance with CPR Part 54 and, as appropriate, to consider in the exercise of its case management powers under CPR 3.1 whether there were meritorious grounds for extending time to bring proceedings for judicial review.

47. In so doing, the Administrative Court was in a position to vindicate the Respondents' procedural rights under the EU law by virtue of the principle of effectiveness. In

Revenue and Customs v Marks and Spencer plc [2012] 1 CMLR 937 at [68], the Court of Appeal said –

> *"…The ECJ has espoused the principle that, provided that the time limits are not discriminatory and do not render the exercise of Community Law rights virtually impossible or excessively difficult in practice, a Member State may lay down reasonable time limits even if their effect is to deprive a claimant of such a right…".*

48. In the context of the EU law questions raised by the Part 8 claims, the powers available to the Administrative Court would enable it to act in accordance with the principle of effectiveness. The question whether the 3-month time limit for judicial review claims should be applied, or whether an extension of time was justified in order to vindicate the Respondents' asserted rights under EU law, was for the Administrative Court to resolve in the exercise of its undoubted powers under the CPR.

49. In [164], Master Dagnall said that to strike out the Part 8 claims without knowing what would happen with regards to a judicial review claim and its 3-month time limit would be *"unjust"*. His concern in [163] of the judgment was that the Administrative Court may decide, at the permission stage, to refuse to extend time for the Respondents to bring claims for judicial review on the same grounds as those advanced in the Part 8 claims. In that event, the Respondents would be faced with the prospect of bringing fresh claims under CPR Part 7 or Part 8 after the date of the United Kingdom's withdrawal from the EU and so be disadvantaged in their ability to seek *Francovich* damages.

50. In my view, the concerns outlined in [163] and [164] of the judgment provide no proper basis for staying rather than striking out the Part 8 claims. There is an inescapable inconsistency between the conclusion correctly drawn in [162], that the Part 54 procedure and the CPR enable claims for judicial review to be managed and determined in accordance the EU law principle of effectiveness; and the decision to stay the Part 8 claims in order to *"see what happens in the Administrative Court"*. It is not a proper purpose of case management of the Part 8 claims to review decisions made in the Administrative Court on a claim for judicial review subsequently begun in accordance with the exclusivity principle established by *O'Reilly v Mackman*. If the Respondents are dissatisfied with the refusal of permission to apply for judicial review by the Administrative Court, including a decision based upon the refusal to extend time in which to begin the claim, a remedy is provided initially by CPR 54.12(3) – which enables the claimant to seek oral reconsideration of the application for permission; and if permission is again refused, by way of an application for permission to appeal to the Court of Appeal under CPR 52.8(1).

51. It follows that the considerations stated in [165] of the judgment are matters for the Administrative Court to consider in the exercise of its case management powers under Part 54 and the CPR. The Administrative Court is well able to judge whether an extension of time to begin a claim for judicial review is justified, in a case in which the issues raised by the claim have been the subject of Part 8 (or Part 7) proceedings which have been struck out as abuse in accordance with the exclusivity principle. Moreover, in making that judgment, the Administrative Court is well able to act in accordance with the principle of effectiveness insofar as the circumstances of the case demand.

52. Those conclusions are unaffected by the possibility that, following unsuccessful claims for judicial review, the Respondents may be faced with the prospect of bringing fresh claims for *Francovich* damages under Part 8 or Part 7 in the changed legal landscape following the United Kingdom's withdrawal from the EU. Mr Chandler drew my attention to another passage in [68] of *Revenue and Customs v Marks and Spencer plc* [2012] 1 CMLR 937 –

> *"…There is no principle that a reasonable time must be afforded to a claimant in which to bring about the circumstances which would generate the community law right. The error of the FTT lay in the assumption that M&S had a right at the time it made its claim; on the findings of fact, at that time it had no such right and the principle of effectiveness cannot be invoked to create one…".*

53. The Part 8 claims do not assert a factual basis for a claim for damages. It was wrong in principle to stay those claims pending the outcome of judicial review proceedings brought by the Respondents, in order to protect the Respondents' ability to generate claims for *Francovich* damages in future, should circumstances arise which provide the factual basis for such claims. The principle of effectiveness did not demand that the court should protect the Respondents from changes in the law which might occur in the intervening period and which might affect their ability to generate such claims.

Conclusion on ground 1

54. In conclusion, in my judgment, the Appellants succeed on ground 1. Having decided on the application of the exclusivity principle in *O'Reilly v Mackman* that the Part 8 claims raised only issues of public law which should have been pursued by way of claims for judicial review in accordance with CPR Part 54, and were for that an abuse of process, Master Dagnall should have struck out the Part 8 claims. His reasons for not doing so and instead staying the Part 8 claims pending the determination of such claims for judicial review were wrong in principle. They run contrary to the exclusivity principle and interfere with the undoubted powers of the Administrative Court to manage justly any claims for judicial review in accordance with the CPR, the principle of effectiveness and the exclusivity principle itself.

55. My determination of ground 1 is a sufficient basis to allow the appeal, since (subject to the submissions of Counsel) it follows that I should now make an order striking out the Part 8 claims as an abuse of process.

56. However, as I heard full argument from the parties in relation to ground 2 and in deference to Master Dagnall's careful and comprehensive consideration of the application of the *Autologic* principle to the Part 8 claims, I shall set out my conclusions on that ground also.

Ground 2

The Autologic principle

57. In *Knibbs v Revenue and Customs Commissioners* [2020] 1 WLR 731 CA at [17] David Richards LJ said –

"It is well established that if Parliament has laid down a statutory appeal process against a decision of HMRC, a person aggrieved by the decision and wishing to challenge it must use the statutory process. It is an abuse of the court's process to seek to do so through proceedings in the High Court or the County Court".

58. Both that exclusivity principle and the role of the Tribunal in giving effect to relevant principles of EU law was explained by Lord Nicholls of Birkenhead at [11] to [13] in *Autologic* –

"11. In resolving this question of jurisdiction the starting point is to note two basic principles. The first concerns the exclusive nature of the appeal commissioners' jurisdiction to decide certain types of disputes arising in the administration of this country's tax system. The present disputes concern claims for group relief. The way a taxpayer claims group relief depends on whether the claim relates to an accounting period before or after 1 July 1999. Before that date the corporation tax (pay and file) system was in force. This has now been replaced by the corporation tax (self-assessment) system. For present purposes this difference is immaterial. What matters is that, whichever system is applicable, an assessment which disallows a group relief claim cannot be altered except in accordance with the express provisions of the tax legislation. Statute so provides: see, in respect of the pay and file system, section 30A of the Taxes Management Act 1970 and, in respect of the self-assessment system, paragraphs 47(2) and 97 of Schedule 18 to the Finance Act 1998. Further, the statutory code makes its own provision for appeals. Under both the 'pay and file' system and the self-assessment system a taxpayer has a right of appeal to the appeal commissioners against assessments of tax, including amendments made by the revenue to a taxpayer's tax return. The appeal commissioners' findings of fact are final. In appropriate cases a further appeal lies to the High Court by way of case stated on a point of law. Where the appeal commissioners reduce the amount of an assessment, any overpaid tax must be repaid to the taxpayer, with a repayment supplement by way of interest as provided in section 825 of the ICTA.

12. Clearly the purpose intended to be achieved by this elaborate, long established statutory scheme would be defeated if it were open to a taxpayer to leave undisturbed an assessment with which he is dissatisfied and adopt the expedient of applying to the High Court for a declaration of how much tax he owes and, if he has already paid the tax, an order for repayment of the amount he claims was wrongly assessed. In substance, although not in form, that would be an appeal against an assessment. In such a case the effect of the relief sought in the High Court, if granted, would be to negative an assessment otherwise than in accordance with the statutory code. Thus in such a case the High Court proceedings will be struck out as an abuse of the court's process. The proceedings would be an abuse because the dispute presented to the court for decision would be a dispute Parliament has assigned for resolution exclusively to a specialist tribunal. The dissatisfied taxpayer should have recourse to the appeal procedure provided by Parliament. He should follow the statutory route.

13. I question whether in this straightforward type of case the court has any real discretion to exercise. Rather, the conclusion that the proceedings are an abuse follows automatically once the court is satisfied the taxpayer's court claim is an indirect way of seeking to achieve the same result as it would be open to the

taxpayer to achieve directly by appealing to the appeal commissioners. The taxpayer must use the remedies provided by the tax legislation.

….

16. The second basic principle concerns the interpretation and application of a provision of United Kingdom legislation which is inconsistent with a directly applicable provision of Community law. Where such an inconsistency exists the statutory provision is to be read and take effect as though the statute had enacted that the offending provision was to be without prejudice to the directly enforceable Community rights of persons having the benefit of such rights. That is the effect of section 2 of the European Communities Act 1972, as explained by your Lordships' House in R v Secretary of State for Transport, Ex p Factortame Ltd [1990] 2 AC 85, 140, and Imperial Chemical Industries Plc v Colmer (Inspector of Taxes) (No 2) [1999] 1 WLR 2035, 2041.

17. Thus, when deciding an appeal from a refusal by an inspector to allow group relief the appeal commissioners are obliged to give effect to all directly enforceable Community rights notwithstanding the terms of sections 402(3A) and (3B) and 413(5) of ICTA. In this regard the commissioners' position is analogous to that of the Pretore di Susa in Amministrazione delle Finanze dello Stato v Simmenthal SpA (Case 106/77) [1978] ECR 629. Accordingly, if an inconsistency with directly enforceable Community law exists, formal statutory requirements must where necessary be disapplied or moulded to the extent needed to enable those requirements to be applied in a manner consistent with Community law. Paragraph 70 of Schedule 18 to the Finance Act 1998 is an instance of such a requirement. Paragraph 70 provides that a claim for group relief requires the consent of the surrendering company, which must be given by notice in writing to its own inspector of taxes when or before the claim is made. This provision cannot be applied literally in the case, say, of a German subsidiary which makes no tax returns in this country. So if the residence restriction is found to be inconsistent with Community law this provision will need adapting so as to give effect to the overriding Community rights. In this regard the appeal commissioners have the same powers and duties as the High Court".

The parties' contentions

59. In the present appeals, the Appellants founded their primary argument before Master Dagnall on the *Autologic* principle. The Appellants' submissions are summarised in [122] of the judgment. They argued that the Respondents should await an enquiry under section 9A of the 1970 Act (or a determination under the Income Tax (Pay As You Earn) Regulations 2003 **['the PAYE Regulations']**). They should then either insist upon a closure notice or wait for an assessment. They should then bring a challenge in the Tribunal. The Appellants submitted: (a) that was the procedure laid down by Parliament; (b) which was an effective procedure satisfying EU law; and (c) which avoided the need to deal with hypothetical questions which may never arise. The Appellants relied upon the absence of any claim for damages. In any event, it was submitted, although the Tribunal has no power to award damages, any claim for damages that may in fact arise could be dealt with following the determination of appeals by the Tribunal.

60. The Respondents' arguments in response to those contentions are summarised in [123] of the judgment. It was submitted that the Respondents should not have to wait for HMRC to take action (if any) under section 9A of the 1970 Act or under the PAYE Regulations. In order to vindicate the Respondents' rights under EU law, the issues raised by the Part 8 claims should be determined now. It was said that the statutory appeal procedure before the Tribunal is not an effective procedure in EU law for three reasons: (a) delay; (b) because the Tribunal was not able to award damages; and (c) prejudice, by virtue of the Respondents being exposed to continuing uncertainty as to their obligations under the Loan Charge scheme and to the risk of penalties and substantial cost.

61. The Respondents contended that *Fransson*, *Unibet* and other CJEU decisions supported the conclusion that the exclusionary principle explained in *Autologic* could not be applied in the present appeals so to prevent the Respondents seeking declaratory relief now for the purpose of establishing the incompatibility of the Loan Charge scheme with EU law.

The judgment

62. Master Dagnall addressed these competing arguments with great care and in considerable detail in [124]-[137] of the judgment. He referred to the *Autologic* principle as *"the tax exclusivity principle"*. In [137] he concluded in favour of the Respondents –

> *"137. ...I find, for the reasons I have given, that the tax exclusivity principle does not mean that the taxpayer has to wait and go to the tribunal but can seek to resolve the matter through the courts".*

63. His essential reasoning is stated in [135] of the judgment –

> *"135. I therefore come to, analysing all that, the facts of this case against my review of the England and Wales, and European law. My general conclusion in relation to pure England and Wales law is that, in principle, where there is not an open assessment, the court will, nonetheless, consider whether the tax tribunal route is sufficiently available to mean that the taxpayer should have to go down that route, but where the challenge to the tax law is, as here, on a European basis, that the court will ask itself very carefully as to whether or not the principle of effectiveness is satisfied? The facts of this case, of course, are that the Revenue has not yet initiated any inquiry, there is no possibility of a closure notice being obtained at this point, and there is no assessment. And the question is whether to require the taxpayer to wait and then go to the tribunal would result in the absence of an effective remedy? My judgment is that it would, in the light of the above matters, and especially for the following reasons:*
>
> *a. Firstly, the thrust and policy of decisions such as Fransson is that the individual should be able to have the point determined, and determined now.*
>
> *b. Secondly, it is an important part of the certainty of European law that individuals should be able to have determined the question of whether national law infringes European law, and effectively be able to do so as a matter of right. There is substantial force in Mr Kamal's submissions, firstly, that it is part of the*

principle of legality of European law that the national courts should be able to declare what the law is in terms of possible domestic law incompatibility; and, secondly, that it is unfair to individuals not to have that certainty where they are having to take decisions and that they should be able to take decisions on a basis of knowing what the law is in terms of compatibility.

c. Thirdly, that, although Unibet says that it is sufficient to be able to challenge national law on grounds of incompatibility with European law by indirect means, including by the taxpayer taking particular steps, there are two important qualifications to this:

i. Firstly, that the steps need to be able to be taken without cooperation from the other side, or in circumstances where the other side (in this case HMRC) has no choice but to cooperate in a way which will enable a dispute to exist such as can be determined by a judicial or other court or tribunal process. In Unibet, that was actually the situation and Unibet could have asked for an exemption, which the relevant authority would have been bound either to grant or to refuse, thus enabling a case to be taken to a court or tribunal. However, that is not the situation here. Here, the taxpayer cannot force HMRC to do anything. In those circumstances, it seems to me that the taxpayer is not in a situation of having an effective remedy

ii. Secondly, although I place little weight on this because, for reasons I have already given, it seems to me to be premature, for there to be an effective remedy, the taxpayer should not be subject or potentially subject to any penalty or significant disadvantage in the meantime. It seems to me that there is some ground for saying that the taxpayer is exposed to this, albeit for the reasons I have already given I place little weight on that.

d. Fourthly, I do not see this conclusion as in any way being contrary to England and Wales case law. Autologic and Knibbs are not dealing with the situation where a taxpayer is able to go to the tribunal but only in the future when HMRC decides to take steps which enable that to occur. It does in fact seem to me that the situation here is more like Autologic type 2 cases and Knibbs, where the position is that the taxpayer simply cannot go to the tribunal at this point in time and, therefore, ought to be allowed to go to the court. Although the court refused something like this in the Clamp decision, that Clamp decision is distinguishable because: (i) it had no European law aspect, and it is the European law principle of effectiveness which is key here, and (ii) the Clamp actual situation was all a purely hypothetical situation, where it seems to me that the judge was very much proceeding on the basis that it is not for the courts to deal with hypothetical situations rather than actual situations, into which latter category I conclude that this one falls".

64. In [136] of the judgment, Master Dagnall recognised that his conclusion was contrary to *Finucane v Inland Revenue Commissioners* (2021) SLT 665, a decision of the Court of Session (Outer House) concerning the loan charge scheme, but gave his reasons for deciding not to follow that decision.

Discussion

65. As is clear from [135] of the judgment, Master Dagnall founded his rejection of the Appellants' arguments for striking out the Part 8 claims on the basis of the *Autologic* principle on his conclusion that to do so would offend the EU law principle of effectiveness. As he indicated in [135], he saw the issue as being whether to strike out the Part 8 claims and to require the Respondents to rely upon future claims before the Tribunal would result in their being denied an effective remedy on their challenge to the compatibility of the Loan Charge scheme with EU Law.

66. The mere fact that the Respondents' challenge to the Loan Charge scheme is founded upon EU law principles is no justification for disapplying the *Autologic* principle. As Lord Nicholls explained at [16] and [17] of *Autologic*, the Tribunal is obliged to give effect to directly enforceable EU law and, insofar as necessary, to disapply or to adapt domestic legislation for that purpose. In this regard, the Tribunal has the same powers and duties as the High Court.

67. Central to Master Dagnall's conclusion that recourse to the Tribunal does not provide the Respondents with an effective remedy is his finding in [135(a)] of the judgment, that the thrust and policy of decisions such as *Fransson* is that the individual taxpayer should be able to have the domestic tax regime's compatibility with EU law determined, and determined now.

68. The Respondents relied on three decisions of the CJEU in support of that proposition: *Unibet*, *Fransson* and *Metallgesellschaft Ltd and Hoechst AG v Inland Revenue Commissioners* [2001] Ch 620 **[*'Hoechst'*]**.

69. In *Unibet*, the question for the CJEU was whether the principle of effective judicial protection of an individual's rights under EU law must be interpreted as requiring it to be possible in the legal order of a Member State to bring a free-standing action for an examination as to whether national provisions are compatible with Article 49 EC if other remedies permit the question of compatibility to be determined as a preliminary issue: see [36].

70. In answering that question, the CJEU noted at [39] that it was for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. At [43], the CJEU said that such procedural rules must fulfil the principle of effectiveness, in that they must not render practically impossible or excessively difficult the exercise of rights conferred by EU law.

71. At [55], the CJEU noted that Swedish law did not prevent a person such as Unibet from disputing the compatibility of national legislation with EU law. On the contrary, under Swedish law there existed various indirect legal remedies for that purpose. The CJEU went on in [56]-[61] to consider those indirect legal remedies. They included the right of Unibet to raise the question of compatibility with EU law in the context of a claim for damages before the ordinary courts. They also included the ability of Unibet to argue on a claim for judicial review of a decision based on application of the domestic legislation that the legislation was incompatible with EU law and that the offensive provisions of domestic law should be disapplied. At [64] and [65] the CJEU said –

> *"64.…it is clear from paras [56] to [61] above that Unibet must be regarded as having available to it legal remedies which ensure effective judicial protection of its rights under Community law.*
>
> *65. Accordingly, the answer to the first question must be that the principle of effective judicial protection of an individual's rights under Community law must be interpreted as meaning that it does not require the national legal order of a Member State to provide for a free-standing action for an examination of whether national provisions are compatible with Art. 49 EC, provided that other effective legal remedies, which are no less favourable than those governing similar domestic actions, make it possible for such a question of compatibility to be determined as a preliminary issue, which is a task which falls to the national court".*

72. In *Fransson*, the question for the CJEU was whether a national judicial practice is compatible with EU law if it makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the European Convention of Human Rights and the EU Charter of Fundamental Rights conditional upon that infringement being clear from the instruments concerned or the case law relating to them: see [43].

73. In answering that question (and having in [44] explained the status of the ECHR and the Charter under EU law), in [45] the CJEU noted that the national court was under a duty to give full effect to the provisions of EU law, if necessary refusing of its own motion to apply any conflicting provision of national legislation. At [46] the CJEU said –

> *"Any provision of a national legal system and any legislative, administrative or judicial practice which may impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent EU rules from having full force and effect are incompatible with those requirements, which are the very essence of EU law (Melki [2011] 3 CMLR 45 at [44] and the case-law cited)".*

74. At [48] the CJEU said that it followed that EU law precluded a judicial practice which made the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case law relating to it –

> *"…since it withholds from the national court the power to assess fully, with, as the case may be, the co-operation of the Court of Justice, whether that provision is compatible with the Charter".*

75. In *Hoechst*, the question was effectively whether the national court was entitled to find that the taxpayers had failed to mitigate their loss, in circumstances where the taxpayers had chosen to pay the tax and not to make an election for an exemption which would have relieved them from paying tax in advance. It was not in dispute that had the taxpayers sought to do so, their application would have been refused as they were ineligible under domestic law. The CJEU rejected the Commissioners' argument that the taxpayers' restitutionary claim must be refused or reduced on the sole ground that

the taxpayers had failed to mitigate their loss in those circumstances. At [105] to [107] the CJEU said –

> *"105. It therefore appears that, in the cases in the main proceedings, the United Kingdom Government is blaming the plaintiffs for lack of diligence and for not availing themselves earlier of legal remedies other than those which they took to challenge the compatibility with Community law of the national provisions denying a tax advantage to subsidiaries of non-resident parent companies. It is thus criticising the plaintiffs for complying with national legislation and for paying ACT without applying for the group income election regime or using the available legal remedies to challenge the refusal with which the tax authorities would inevitably have met their application.*
>
> *106. The exercise of rights conferred on private persons by directly applicable provisions of Community law would, however, be rendered impossible or excessively difficult if their claims for restitution or compensation based on Community law were rejected or reduced solely because the persons concerned had not applied for a tax advantage which national law denied them, with a view to challenging the refusal of the tax authorities by means of the legal remedies provided for that purpose, invoking the primacy and direct effect of Community law.*
>
> *107. The answer to the fifth question must therefore be that it is contrary to Community law for a national court to refuse or reduce a claim brought before it by a resident subsidiary and its non-resident parent company for reimbursement or reparation of the financial loss which they have suffered as a consequence of the advance payment of corporation tax by the subsidiary, on the sole ground that they did not apply to the tax authorities in order to benefit from the taxation regime which would have exempted the subsidiary from making payments in advance and that they therefore did not make use of the legal remedies available to them to challenge the refusals of the tax authorities, by invoking the primacy and direct effect of the provisions of Community law, where upon any view national law denied resident subsidiaries and their non-resident parent companies the benefit of that taxation regime".*

76. At [29] of *Autologic*, Lord Nicholls explained the CJEU's ruling in *Hoechst* –

> *"In the Hoechst case this ruling was directed at rejecting a governmental defence based on the taxpayers' alleged lack of reasonable diligence in pursuing its claims. The Hoechst ruling was not directed at a situation where, as here, the claimants' claims have yet to be decided by the national court and there exists a statutorily prescribed route by which the claimants are able to obtain the tax relief they say is their entitlement under Community law. Which court or tribunal has jurisdiction to hear disputes involving rights derived from Community law is a matter for determination by each member state".*

77. For the same reasons, the CJEU's ruling in *Hoechst* does not assist the Respondents' argument in the present case. In this case also, the 1970 Act and the PAYE Regulations provide a statutorily prescribed route for both the Labeikis claimants and the Kang Kim claimants to obtain from the Tribunal the relief that they seek from the Loan Charge (if

and insofar as they are assessed to tax in accordance with the Loan Charge legislation) in reliance on the principles of EU law.

78. In [30] of *Autologic*, Lord Nicholls recognised the need to give effect to the EU law principles of equivalence and effectiveness –

> *"30. Of course, to be compliant with Community law the remedial route prescribed by the legal system of a member state must be such that the rules 'are not less favourable than those governing similar domestic actions (principle of equivalence)' and, additionally, the rules must not render 'practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)': see the Hoechst case, para 85. The statutory route prescribed for group relief claims was not designed for claims in respect of non-resident companies. So, as United Kingdom law presently stands, at the initial step a taxpayers' group relief claim will inevitably be refused by the revenue. Further, as already noted, some statutory requirements will need adaptation to accommodate claims in respect of non-resident companies. But neither of these features should present any major problem. Neither of them renders the statutory route 'practically impossible or excessively difficult'. Adaptation of the formal requirements will be needed whichever route is followed, and the appropriate adaptation is a matter on which the Special Commissioners' practical expertise will be invaluable".*

79. At [124] of the judgment, Master Dagnall accepted that, as a general rule, substantive tax matters are exclusively for the Tribunal under the domestic legislative and procedural arrangements. That is the effect of the *Autologic* principle. At [126], Master Dagnall acknowledged that the court will generally decline to determine hypothetical issues. More specifically, at [130] he concluded that the scenario in which the Part 8 claims have been advanced, in which the Respondents await assessments to tax being raised by HMRC, is not of itself a special circumstance which justifies acting otherwise than in accordance with the *Autologic* principle –

> *"130. … I say that because in my view it is a matter which Parliament has effectively stated by the fact that Parliament has laid down in the Taxes Management Act the inquiry and assessment procedure as being the preliminary course before a taxpayer can appeal".*

80. In [131] to [133] of the judgment, Master Dagnall turned to consider whether these domestic arrangements were in accordance with the principle of effectiveness, as that principle was explained and applied in *Fransson* and *Unibet*. He concluded as follows in [133] –

> *"133. …it seems to me, therefore, that the consequence of having analysed those European cases is, (a) that the England and Wales courts will generally treat the exclusivity of the FTT to determine tax matters, including whether domestic tax law is compatible with European Union law, as meaning that the court will not grant declarations and will postpone damages questions to a tribunal determination regarding compatibility, as long as the FTT procedure satisfies the requirements of European Union effectiveness, but (b) and secondly, that European Union effectiveness means that it must be possible for the taxpayer to initiate the course of bringing the compatibility question before the tribunal".*

81. Master Dagnall returned to that theme in [135(c)] where he said that the Respondents as taxpayers cannot force HMRC to do anything, thus leaving the Respondents in a state of continuing uncertainty as to their liability to tax under the Loan Charge and without an effective remedy. The underlying distinction which Master Dagnall sought to draw was between the undoubted powers of the Tribunal to rule on the issues of EU law which the Respondents sought to raise against the Loan Charge and the Respondents' ability to get before the Tribunal in the first place, in the face of inaction on the part of HMRC. As Master Dagnall put it in [135(d)] –

> *"… Autologic and Knibbs are not dealing with the situation where a taxpayer is able to go to the tribunal but only in the future when HMRC decides to take steps which enable that to occur. It does in fact seem to me that the situation here is more like Autologic type 2 cases and Knibbs, where the position is that the taxpayer simply cannot go to the tribunal at this point in time and, therefore, ought to be allowed to go to the court".*

82. The question, however, is whether the Respondents as taxpayers are as powerless in the face of inaction on the part of HMRC as Master Dagnall took to be the case. The Appellants argued to the contrary that the Respondents were able to take effective steps without the consent of HMRC to bring the dispute before the Tribunal for determination. For the following reasons, I accept that submission.

83. Mr Chandler drew my attention to the following provisions of the 1970 Act –

    (1) In relation to individuals, HMRC are entitled to give notice to the taxpayer and to open enquiries into a submitted tax return in accordance with section 9A of the 1970 Act. There are time limits within which such enquiries may be opened. Essentially, any enquiries must have been opened within the period 12 months after the day on which the tax return is delivered to HMRC.

    (2) Enquiries under section 9A of the 1970 Act are completed by the issue of a final closure notice under section 28A(1B) of that Act. Section 28A(4) of the 1970 Act enables a taxpayer to apply to the Tribunal for a direction requiring the relevant officer of HMRC to issue a final closure notice within a specified period. The Tribunal is required to give that direction unless satisfied that there are reasonable grounds for not doing so: section 28A(6) of the 1970 Act.

    (3) In relation to employed individuals, by virtue of regulation 80 of the PAYE Regulations 2003. HMRC have the power to raise determinations in respect of unpaid tax with their employers. Any such determination must be made within the period of 4 years after the end of the year of assessment to which it relates: section 34(1) of the 1970 Act.

    (4) Section 31(1) of the 1970 Act gives the right of appeal to the Tribunal against a conclusion stated or amendment made by a closure notice under section 28A of the 1970 Act; and against any assessment to tax which is not a self-assessment.

84. In the light of these statutory tax management arrangements, it is incorrect to say that the Respondents have no legal means under domestic law of bringing the issues raised in the Part 8 claims before the Tribunal for determination. Contrary to what is said in

[130] of the judgment, the inquiry and assessment procedure enacted by the 1970 Act and the PAYE Regulations does not contemplate that it is for HMRC alone "*to decide when, if ever, to start things"*. Whether the Respondents are self-employed or employed taxpayers, they are protected by the statutory time limits imposed on HMRC by the legislation to which I refer in the preceding paragraph; and they are able to invoke the powers of the Tribunal to bring unresolved matters of tax assessment either to a head or to an end.

85. On that analysis, applying the approach to the principle of effectiveness stated in [133] of the judgment, the fact that HMRC have yet to raise tax assessments against the Respondents which seek to apply the Loan Charge scheme does not justify disapplying the *Autologic* principle. Under the procedural arrangements enacted by the 1970 Act and the PAYE Regulations which I summarise in paragraph 83 above, the Respondents are able to take effective steps to bring the issues which they raise in the Part 8 claims before the Tribunal for determination, in accordance with the *Autologic* principle. It follows that the principal reasons given for the contrary conclusion in [135] of the judgment are unsound.

86. It is, nevertheless, necessary to consider whether the CJEU's rulings in *Unibet* and *Fransson* support the proposition stated in [135(a)] of the judgment that in order to comply with the principle of effectiveness, the individual taxpayer should be able to have a point of law as to the compatibility of domestic tax legislation with EU law *"determined, and determined now"*; that is to say, in advance of any assessment to tax under that legislation having been raised against the taxpayer.

87. I have summarised the relevant reasoning and rulings of the CJEU in *Unibet* and *Fransson* in paragraphs 69 to 74 above. I cannot find any support for the argument that the principle of effectiveness requires a Member State to afford the right to such an immediate determination as an essential element of its domestic legal and procedural arrangements. In *Unibet*, the CJEU held that the existence and availability of indirect but effective legal remedies in the Swedish legal system were sufficient to satisfy the principle of effectiveness. The *Autologic* principle is consistent with the CJEU's ruling in *Unibet*. The Respondents are able to invoke the jurisdiction of the Tribunal under the 1970 Act and the PAYE Regulations to vindicate their rights under EU law.

88. In *Fransson*, the CJEU was concerned with a rather different question, as to whether a judicial practice under Swedish law which limited the jurisdiction of the Swedish court to give full effect to EU law was contrary to the principle of effectiveness. In was in the context of striking down that domestic judicial practice that the CJEU said at [46] of *Fransson* that the national court having jurisdiction to apply EU law should have *"the power to do everything necessary at the moment of its application"* to set aside national legislative provisions which might prevent EU rules from having full force and effect. The CJEU was not concerned with the timing of such a decision relative to the circumstances of the underlying dispute. The CJEU was concerned with the extent of the powers available to the national court, when the question of compatibility of the domestic legal arrangements with EU law came to be determined by that court. In the case of the Tribunal, the principle of effectiveness as explained and applied by the CJEU in *Fransson* is plainly satisfied, since the Tribunal is both empowered and required to give full effect to relevant and applicable EU law: see *Autologic* at [17].

89. For these reasons, in my judgment, Master Dagnall was wrong to conclude in [135] of the judgment that to require the Respondents to wait and to raise the issues advanced in the Part 8 claims before the Tribunal, in accordance with the *Autologic* principle, would fail to give an effective remedy and so conflict with the EU law principle of effectiveness.

90. I am reinforced in that conclusion by the following observations of Swift J in refusing the renewed application for permission to apply for judicial review on 19 January 2023 –

> *"There is no requirement under EU law for Member States to have in place systems by which at a level of generality, domestic legislation may be reviewed for consistency with EU law. That much is clear from the judgment of the Court of Justice in Unibet. It is entirely consistent with the principle of effectiveness for the exercise of ensuring consistency of domestic law with EU law to take place in the context of a specific dispute affecting an individual. The premise of the right to an effective remedy is that individuals must be able, in domestic courts, to enforce the rights available to them under EU law. In other words, when a dispute has arisen and EU law is material to the resolution of the dispute, there should be access to the court for that purpose".*

91. I respectfully agree. As Swift J observed, there was not yet any sufficient practical as opposed to academic or theoretical dispute that was fit for consideration. That was the position before Master Dagnall.

92. Counsel for the Respondents sought to address that state of affairs by relying on the argument that the Respondents as taxpayers are already having to take decisions about their financial affairs in a state of uncertainty as to the legal status of the Loan Charge. It was submitted that the Respondents had a sufficient actual as opposed to hypothetical interest in the outcome of the Part 8 claims to justify bringing those claims for declaratory relief now, in order to enable the Respondents to arrange their tax affairs on the basis of authoritative guidance from the court.

93. I cannot accept these submissions. It is not the proper function of the court to grant declaratory relief on a claim whose primary purpose is not to rule on any actual dispute between the parties, but rather to enable the claimant to obtain guidance from the court on how to manage or arrange their tax affairs. The proper role of the court is to adjudicate on real and specific disputes, not on hypothetical or academic arguments. If a taxpayer wishes to obtain advice or guidance on the management or arrangement of their tax affairs, they are able to seek professional advice for that purpose. They are also able to approach HMRC or to consult with the plethora of published guidance from HMRC and other sources. The Part 8 claims confuse the proper role of the court with the role of professional advisers and public bodies whose role it is to offer advice and guidance to taxpayers.

Conclusion on ground 2

94. For the reasons I have given, I conclude that Ground 2 should also succeed.

The application to strike out made on 15 February 2024

95. On 15 February 2024, pending the hearing of these appeals the Appellants applied for an order striking out the Part 8 claims on the grounds that following final determination of the judicial review proceedings by the order of the Court of Appeal issued on 15 June 2023, the stay ordered by Master Dagnall on 20 January 2022 had now expired and the Part 8 claims were liable to be struck out. The Appellants also applied for an order removing those named Part 8 claimants who had not joined in the subsequent applications for judicial review (again, in accordance with the order of Master Dagnall dated 20 January 2022).

96. At the hearing of the appeals, Counsel for the Respondents said that he needed more time to prepare his response to that application. It seemed to me therefore to be sensible to proceed to hear full argument and to determine the Appellants' appeals. Depending on the outcome of the appeals, I would then give appropriate directions for the application to strike out. I therefore made case management directions adjourning the application to strike out until I had handed down judgment on the appeals. I would then allow the parties the opportunity to consider their position in relation to that application in conjunction with any consequential submissions that they wished to make in the light of my decision on the appeals.

97. Having concluded that I should allow the appeals (and subject to my determination of the application that I should recuse myself), my provisional view is that in consequence of my decision I should make an order on the Appellants' original application dated 12 February 2021, striking out the Part 8 claims as an abuse of process. However, I shall invite written submissions from the parties on that question and any other matters arising from this judgment.

Recusal application

98. Following the hearing of this appeal, on 7 April 2024 I received an informal request by email from Counsel for the Respondents that I recuse myself from further conduct of these appeals on the grounds of bias. Simply put, the basis for that request was that whilst I was in practice at the Bar, between 1997 and 2006 I held the appointment of Standing Counsel to the Inland Revenue (Rating and Valuation), a fact that I had not disclosed to the parties and which gave rise to the appearance of bias in favour of the Appellants.

99. I informed Counsel that I was not prepared to deal with that request on an informal basis. On 16 April 2024, one of the Respondents, Luke Sydenham, filed an application notice seeking an order that I recuse myself in the light of my "longstanding relationship" with the Appellants. The application notice was supported by brief grounds headed "Bias".

100. Following resolution of an administrative matters relating to the application fee, on 19 June 2024 the Court invited written submissions in response to the application from the Appellants. Those submissions were provided on 26 June 2024. On 3 July 2024 submissions in reply were provided on behalf of the Respondents.

101. The grounds for the application are as follows –

(1) I did not disclose to the parties that I was Standing Counsel to the Inland Revenue (Rating and Valuation) between 1997 and 2006 and did not recuse myself.

(2) My failure to disclose and to recuse myself was all the more serious as the Respondents had raised an allegation of bias against Swift J following his determination of the renewed application for permission to apply for judicial review on 19 January 2023, on the grounds that he had been First Treasury Counsel between 2006 and 2014. My failure to recuse myself from hearing a case in which an allegation of bias had been made against another judge on the grounds of a connection with the same party in the litigation raised not only the appearance of bias but also of institutional corruption.

102. In submissions in reply, Counsel for the Respondents confirmed that the allegation was one of the appearance of bias rather than actual bias.

103. The established legal test for apparent bias is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased: see *Porter v Magill* [2002] 2 AC 357 at [103] and *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451.

104. In the present case, the fair minded and informed observer would know that I held the appointment of Standing Counsel to the Inland Revenue (Rating and Valuation) between 1997 and 2006. I relinquished the appointment upon being appointed as Queen's Counsel in July 2006. During the course my career in silk between 2006 and 2024, I acted both for taxpayers, local authorities and HMRC in rating and valuation litigation. Both during my time as Standing Counsel and thereafter I acted in my professional capacity as a barrister in private practice at the independent Bar. At one point in his written submissions, Counsel for the Respondents asserts that I was "standing solicitor" for the Appellants for 9 years. That is incorrect. I was a barrister, not a solicitor. I was neither employed by the HMRC or the Solicitor of Inland Revenue, nor was I paid a retainer. During the period of my appointment as Standing Counsel I was instructed to advise or to act for HMRC on the same basis as my instructions for other clients; that is to say, I received a fee for each case on which I was instructed.

105. My appointment as Standing Counsel to the Inland Revenue (Rating and Valuation) between 1997 and 2006 was and remains a matter of public record. My biographical notes on the UK Courts and Judiciary website refer to that appointment.

106. In all these respects, my position is indistinguishable from that of Laws LJ as stated in *R v Spear* [2001] QB 804 at [55], addressing an argument that he was unable to be perceived as an impartial judge under article 6(1) of the ECHR –

> *"55. … My appointment as First Junior Counsel to the Treasury, Common Law, is a matter of public record. We assume that Mr Mackenzie's complaint based upon it is intended to suggest an appearance of bias on my part. If so, we regard it as wholly unrealistic. Upon his appointment to the Bench, Treasury Counsel's connections with previous government at once become historic only. That is the expectation of the profession, the Bench, the public, and previous clients themselves. This is as well settled as any convention of law that comes to mind.*

There is simply no question of such an earlier connection giving rise to anything approaching a reasonable apprehension of impartiality".

107. In *Locabail* at [25], Lord Bingham gave the previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him as an example of the kind of situation in which it would be extremely unlikely that the test of apparent bias would be met in relation to a judge.

108. For these reasons, I am in no doubt at all that the fair minded and informed observer would without hesitation conclude that there was no possibility of my being biased on the grounds advanced by the Respondents. Moreover, I am quite satisfied that it was unnecessary for me to raise the fact of my historic appointment as Standing Counsel to the Inland Revenue (Rating and Valuation) between 1997 and 2006 with the parties in advance of or during the hearing of these appeals: see *Taylor v Lawrence* [2003] QB 528 at [64].

109. The allegation of apparent bias made against Swift J is equally unmeritorious, for the same reasons as I have given above. It is of course the case that any complaint of apparent bias or application for Swift J to consider recusing himself ought properly to have been made at the time of the hearing before him on 19 January 2023. It is not for me in these appeal proceedings to entertain such allegations made against a High Court Judge sitting in the Administrative Court, from whose decision an appeal lay and was pursued in accordance with CPR Part 52. Insofar as it is necessary or appropriate for me to offer my judgment on the allegation made against Swift J, I reject it as without foundation or any merit.

110. Finally, it is suggested that my decision to adjourn the hearing of the Appellants' application made on 15 February 2024 until after I had given judgment on the Appellants' appeals is indicative of apparent bias. I have explained the reasons which I gave at the hearing for that case management decision in paragraph 96 above. First and foremost, my decision to proceed in that way was in response to Counsel for the Respondents' indication to me that he had not had sufficient time to prepare his submissions in response to that application. The assertion of apparent bias is simply unsustainable.

111. In summary, for the reasons I have given, I reject the recusal application. It is misconceived, as is the like allegation made against Swift J. The frankly scurrilous allegation of institutional corruption is equally lacking in any merit. It is regrettable, given the clear and compelling explanation of the established convention given in *R v Spears* to which I have referred in paragraph 106 above, that the recusal application was made at all. Particularly so, given that Mr Chandler helpfully cited that authority in open court during the hearing of the appeals. The proper course would have been for the Respondents then to have withdrawn their unfounded allegation of apparent bias against Swift J and to have desisted from advancing a further allegation of apparent bias against me.

Disposal

112. The Appellants' appeals succeed. I invite the parties to agree a timetable for written submissions on consequential matters, including those that I have raised in paragraphs

96 and 97 of this judgment. The parties should also seek to agree the terms of a draft order for consideration by the court.