Neutral Citation Number: [2022] EWCA Civ 360

Case Nos: CA-2021-000457 (formerly B3/2021/0345)
CA-2021-000516 (formerly B3/2021/0562)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
MR JUSTICE FREEDMAN
E90MA082

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 March 2022

Before:

LORD JUSTICE HOLROYDE
LORD JUSTICE STUART-SMITH
and
LORD JUSTICE WARBY

- -

Between:

DANIEL JAMES COLLEY

Claimant/ Respondent

- and –

MOTOR INSURERS' BUREAU

Third Defendant/ Appellant

- -
- -

Thomas de la Mare QC and Jason Pobjoy (instructed by **Weightmans LLP**) for the **Appellant**
Philip Moser QC and Philip Mead (instructed by **Irwin Mitchell LLP**) for the **Respondent**

Hearing dates: 2-3 February 2022

- -

This judgment was handed down remotely at 10.30am on 22 March 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

Approved Judgment

Stuart-Smith LJ:

Introduction

1. Is the obligation of the Motor Insurers' Bureau ("the MIB") that arises under Articles 3, 10 and 12 of Directive 2009/103/EC ("the Codified Directive") an obligation limited to providing compensation where there is an unidentified vehicle or a vehicle in respect of which there is no policy of insurance in being at the time of the incident giving rise to liability? Or does the obligation also extend to a case where there is a policy of insurance in being at the time of the incident giving rise to liability, but that policy is subsequently avoided ab initio?

2. The answer to these questions and the determination of this appeal depends upon the meaning to be attributed to the words "covered by insurance" in Article 3(1) of the Codified Directive. Those words determine the extent of the insurance obligation imposed upon the Secretary of State by Article 3(1) and whether that obligation has or has not been satisfied. The Codified Directive was preceded by five other Directives between 1972 and 2005. Most of the relevant authorities considered the terms of one or more of the preceding Directives. I shall refer to the obligation that now arises under Article 3(1) of the Codified Directive as "the Article 3 insurance obligation" and to the body that was originally required to be set up by Article 1(4) of the Second Directive (now Article 10(1) of the Codified Directive) as "the compensation body". In the United Kingdom, the MIB is the compensation body.

3. In a careful and detailed judgment Freedman J concluded that the MIB's obligation under the Codified Directive covers a case where there is a policy of insurance in being at the time of the incident giving rise to liability but that policy is subsequently avoided ab initio; and that it gives rise to a direct right of action by a victim against the MIB, which he held to be an emanation of the state for these purposes: [2020] EWHC 3433 (QB), [2021] 1 WLR 1889. He therefore held the MIB liable to the Claimant, Mr Colley, in respect of the injuries he suffered when travelling as a passenger in a vehicle being driven by the first Defendant, Mr Dylan Shuker. At the time of the accident there was an insurance policy in existence issued by UK Insurance Ltd ["the Insurer"]; but that policy was subsequently avoided ab initio, in circumstances to which I will return.

4. The MIB now appeals against Freedman J's decision. It contends that the vehicle in which the Claimant was travelling was not "uninsured" within the meaning of the Codified Directive. It submits that therefore the facts of the present case do not fall within the scope of the MIB's obligation to provide compensation pursuant to the Directive. The MIB accepts that (a) it is an emanation of the state for these purposes and (b) that the obligation in question is directly enforceable, whatever its scope may be. The issue is about the scope of the obligation.

5. I have come to the conclusion that the Judge's decision was correct, for the reasons I set out below.

The factual and procedural background

The accident

6. On 27 March 2015 Mr Colley was a passenger in a car being driven by Mr Shuker ["the Vehicle"] when, by reason of Mr Shuker's negligence, an accident occurred which caused Mr Colley to suffer catastrophic injuries. Mr Shuker was the registered keeper of the vehicle. His father had taken out a policy of insurance with the Insurer ["the Policy"]. It named the father as Policyholder and Main Driver of the Vehicle and his partner as the Other Driver. The Policy did not provide cover for Mr Shuker himself to drive the Vehicle as he was not a named driver. He was therefore uninsured at the time of the accident. Mr Colley knew before he entered the Vehicle that Mr Shuker did not have a valid driving licence and was not insured to drive the vehicle.

7. Mr Colley has brought these proceedings against four defendants.

The claim against Mr Shuker

8. Mr Colley sued Mr Shuker as first defendant. On 10 June 2020, judgment was entered against Mr Shuker for damages to be assessed, subject to the issue of contributory negligence. It is to be assumed that Mr Shuker is not in a position to satisfy any significant award of damages. Hence the need to join other Defendants.

The claim against the Insurer

9. Subject to s. 152(2), which I set out below, s. 151 of the Road Traffic Act 1988 ["the Act"] makes provision for an insurer that has issued a policy to pay to a person who is entitled to the benefit of a judgment (such as that obtained by Mr Colley against Mr Shuker) any sum payable under the judgment as regards liability in respect of death or bodily injury. Subject to s. 152(2), therefore, Mr Colley would be entitled to look to the Insurer to satisfy any judgment for damages that he obtains against Mr Shuker.

10. After the accident but before these proceedings were issued the Insurer sought and, on 27 June 2016, obtained a declaration against Mr Shuker's father that it was entitled to avoid the Policy on grounds of material misrepresentation. The misrepresentation upon which the Insurer relied was that Mr Shuker's father had stated wrongly that he was the registered keeper of the Vehicle and that the only drivers of the Vehicle would be himself and his partner.

11. Pursuant to the provisions of s. 151 and 152 of the Act as they then stood, this declaration released the Insurer as a matter of English law from any obligation arising under s. 151 of the Act to make payment to Mr Colley in respect of any award of damages he may subsequently obtain against Mr Shuker. That was because, as it then stood, s. 152(2) provided that:

> "… no sum is payable by an insurer under s.151 of this Act if, *in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given*, he has obtained a declaration—(a) that, apart from any provision contained in the policy or security, he is entitled to avoid it either under the Consumer Insurance (Disclosure and

> Representations) Act 2012 or, if that Act does not apply, on the ground that it was obtained—(i) by the non-disclosure of a material fact, or (ii) by a representation of fact which was false in some material particular, or (b) if he has avoided the policy under … that Act or on that ground, that he was entitled so to do apart from any provision contained in the policy …" (Emphasis added)

12. It is common ground that this provision was not compliant with the terms of the Codified Directive and that, to that extent, the Secretary of State was in breach of Articles 3(1) and 13(1) of the Codified Directive, which I set out at [18] below. The problem that gave rise to the breach was remedied by the amendment of s. 152(2) on and from 1 November 2019 so that an insurer is now only able to avoid its liability under s. 151 if it obtains the s. 152 declaration "before the happening of the event which was the cause of the death or bodily injury or damage to property giving rise to the liability … ." This amendment was prospective only. It did not apply to or assist Mr Colley in his claim against the Insurer.

13. Undaunted by the fact that the Insurer had obtained its declaration, Mr Colley joined the Insurer as second defendant, alleging that the Insurer was liable to compensate him by the operation of EU law. His claim against the Insurer was struck out by the judgment and order of O'Farrell J on 5 March 2019. O'Farrell J held that the words of s. 152(2) before amendment were clear and provided the Insurer with a complete defence; and that, although the words of s. 152 were incompatible with the Secretary of State's obligations under the Codified Directive, the Codified Directive has no horizontal effect in respect of a private individual or other entity that is not an emanation of the state. Accordingly:

> "The claim made by the claimant is against the second defendant, a private entity, to enforce rights arising out of the Directive. It does not assert directly enforceable rights against the second defendant as an agent of a Member State. Therefore, there is no obligation on the court, or power, to disapply the domestic legislation."

14. It is not suggested by any party that O'Farrell J was wrong in her conclusion and, in my judgment, she was clearly right for the reasons she gave. What is more, her decision was made in the present proceedings and has not been appealed. It is therefore binding on the parties to the present proceedings, including the MIB and the Secretary of State.

The claim against the Secretary of State

15. In March 2019, Mr Colley added the Secretary of State as fourth defendant. His claim against the Secretary of State is for *Francovich* damages and arises if he has no remedy against either the Insurer or the MIB. In that event, Mr Colley submits that the Secretary of State has unlawfully failed to implement the Codified Directive and is therefore in breach of statutory duty arising under the European Communities Act 1972. The Secretary of State defends the claim for a number of reasons, including that any breach was insufficiently serious to give rise to *Francovich* liability. The claim against the Secretary of State has been stayed to await the determination of the issue of the MIB's liability.

The claim against the MIB

16. In other circumstances, Mr Colley may have had a claim against the MIB under the provisions of the domestic Uninsured Drivers Agreement 1999. But, because it was accepted that he knew before entering the Vehicle that Mr Shuker was not insured to drive it, the MIB's obligation to satisfy his claim under the domestic Agreement was excluded by Clause 6(1)(e) of the Agreement: he "was voluntarily allowing himself to be carried in the vehicle … and knew … that the vehicle was being used without there being in force in relation to its use such a contract of insurance as would comply with Part VI of the Road Traffic Act 1988." His claim is therefore restricted to asserting a direct right of action against the MIB relying on the directly enforceable operation of the Codified Directive under EU law.

The Codified Directive

17. The most relevant of the 54 recitals to the Codified Directive are:

    i) Recital 3:

    > "Each Member State must take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the insurance cover are to be determined on the basis of those measures."

    ii) Recital 14:

    > "It is necessary to make provision for a body to guarantee that the victim will not remain without compensation where the vehicle which caused the accident is uninsured or unidentified. It is important to provide that the victim of such an accident should be able to apply directly to that body as a first point of contact. However, Member States should be given the possibility of applying certain limited exclusions as regards the payment of compensation by that body and of providing that compensation for damage to property caused by an unidentified vehicle may be limited or excluded in view of the danger of fraud."

    iii) Recital 16:

    > "In order to alleviate the financial burden on that body, Member States may make provision for the application of certain excesses where the body provides compensation for damage to property caused by uninsured vehicles or, as the case may be, vehicles stolen or obtained by violence."

    iv) Recital 18:

    > "In the case of an accident caused by an uninsured vehicle, the body which compensates victims of accidents caused by uninsured or unidentified vehicles is better placed than the

> victim to bring an action against the party liable. Therefore, it should be provided that that body cannot require that victim, if he is to be compensated, to establish that the party liable is unable or refuses to pay."

18. Freedman J set out the relevant Articles of the Codified Directive, indicating the source of particular provisions in earlier iterations of the Directive, as follows (save that I have altered the various points of emphasis):

> "20. **Article 3** introduces the requirement for compulsory liability insurance:
>
> "Article 3
>
> Compulsory insurance of vehicles
>
> **Each Member State shall, subject to Article 5, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance.**
>
> **The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of the measures referred to in the first paragraph.**
>
> Each Member State shall take all appropriate measures to ensure that the contract of insurance also covers: (a) according to the law in force in other Member States, any loss or injury which is caused in the territory of those States
>
> …
>
> The insurance referred to in the first paragraph shall cover compulsorily both damage to property and personal injuries." (Article 3, First Directive)
>
> 21. **Article 10(1)** of the [Codified] Directive sets out the duty to establish a body responsible for compensating injured victims:
>
> "Each Member State shall set up or authorise a body with the task of providing **compensation, at least up to the limits of the insurance obligation for** damage to property or **personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied**." (Article 1(4), Second Directive)
>
> 22. …
>
> 23. …

24. **Article 10(2)** permits Member States to restrict the scope of the body's liability in respect of a claim by an injured passenger who entered the vehicle knowing there was no insurance:

> "Member States may, however, exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that **they knew it was uninsured.**" (Article 1(4), Second Directive)

25. …

26. **Article 12(1)** further defines the scope of the obligation under Article 3 by expressly providing that it covers liability to certain categories of person including all passengers:

> "Without prejudice to the second sub-paragraph of Article 13(1), **the insurance referred to in Article 3 shall cover liability for personal injuries to all passengers**, other than the driver, arising out of the use of a vehicle". (Article 1, Third Directive)

27. **Article 13(1)** defines how Member States must take steps to ensure that three specific kinds of exclusion clauses are deemed to be void:

> "Each Member State shall take all appropriate measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3 shall be deemed to be void in respect of claims by third parties who have been victims of an accident where that statutory provision or contractual clause excludes from insurance the use or driving of vehicles by (a) persons who do not have express or implied authorisation to do so; (b) persons who do not hold a licence permitting them to drive the vehicle concerned; (c) persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned."
>
> **However, the provision or clause referred to in point (a) of the first sub-paragraph may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen.**
>
> Member States shall have the option — in the case of accidents occurring on their territory — of not applying the provision in the first sub-paragraph if and in so far as the victim may obtain compensation for the damage suffered from a social security body.

> 2. In the case of vehicles stolen or obtained by violence, Member States may provide that the body specified in Article 10(1) is to pay compensation instead of the insurer under the conditions set out in paragraph 1 of this Article. Where the vehicle is normally based in another Member State, that body can make no claim against any body in that Member State.
>
> Member States which, in the case of vehicles stolen or obtained by violence, provide that the body referred to in Article 10(1) is to pay compensation may fix in respect of damage to property an excess of not more than EUR 250 to be borne by the victim.
>
> 3. Member States shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy which excludes a passenger from such cover on the basis that he knew or should have known that the driver of the vehicle was under the influence of alcohol or of any other intoxicating agent at the time of an accident, shall be deemed to be void in respect of the claims of such passenger." (Largely derived from Article 2(1), Second Directive)"

19. The second paragraph of Article 13(1) provides an exception by way of derogation from the general rule set out in the first. It was referred to during the hearing as "the joyrider exclusion" and I shall do the same. Under EU law it is the sole permitted exclusion that may be valid against third party victims who have suffered personal injuries and it must be interpreted strictly: see *Churchill Insurance Co Ltd v Wilkinson* (Case C-442/10) [2013] 1 WLR 1776 at [35], reaffirmed in *Fidelidade-Companhia de Seguros SA v Caisse Suisse* (Case C-287/16), [2017] RTR 26 ("*Fidelidade*") at [26]. It must be interpreted as meaning that a statutory provision or a contractual clause in an insurance policy which excludes the use or driving of vehicles from the insurance may, as a matter of EU law, be relied on against third parties who are victims of a road accident only where the insurer can prove that the persons who voluntarily entered the vehicle which caused the injury knew that it was stolen: see *Candolin and others v Vahinkovakuutusosakeyhtiö Phojola and another* (Case C-537/03) [2005] 3 CMLR 17 ("*Candolin*") at [21] and [23].

The issues

20. Freedman J tried two preliminary issues:

    i) Issue 1: whether the Claimant can rely upon Articles 3(1) and 12 of the Codified Directive to require the MIB, an emanation of the state and compensation body for the purposes of Article 10, to pay compensation in the circumstances of the present case; and

    ii) Issue 2: whether the MIB is entitled to rely on the exclusion permitted by Article 10(2) second sub-paragraph of the Codified Directive in respect of the Claimant, in the circumstances of the present case. The second sub-paragraph states: "Member States may, however, exclude the payment of compensation by that

> body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured."

21. I can deal with issue 2 shortly. The Judge found in favour of Mr Colley on the basis that the wording of the exclusion in the second sub-paragraph of Article 10(2) is a reference to the *vehicle* being uninsured and not to the *driver* being uninsured. Mr Colley could not have known that the Vehicle was uninsured because at the time he entered it there was a policy in existence which subsisted until it was avoided after the accident. The MIB's proposed appeal against the Judge's findings on issue 2 was abandoned shortly before the hearing. It follows that the Article 10(2) exclusion is of no further relevance to this appeal. For the purposes of this appeal, the sole permitted exclusion, whether by statutory provision or contractual clause, is the joyrider exclusion.

The judgment of Freedman J

22. The judge faithfully rehearsed the arguments of the parties, to which I will refer in a little more detail below. In briefest outline, Mr Colley submitted that the Government has an obligation under Article 3 to take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in this country is covered by insurance. That is the "insurance obligation provided for in Article 3". It also has an obligation under Article 10 to set up, and has set up, a compensation body, the MIB, to remedy any failure by the Government to discharge the insurance obligation provided for in Article 3. Mr Colley's inability to obtain compensation via the Insurer is attributable to the Government's failure to discharge the insurance obligation provided for in Article 3. The MIB is therefore obliged to remedy that failure by paying the compensation that would, but for the failure, have been covered by insurance. Mr Colley relied upon the decision of this court in *Lewis v Tindale* [2019] EWCA Civ 909, [2019] 1 WLR 6298 ("*Lewis*") to support the proposition that the obligation of the MIB to provide a remedy was coextensive with the failure of the Government to discharge its obligation under Article 3.

23. The MIB referred to a clutch of decisions of the CJEU to support its case that an Article 10 compensation body is not obliged to compensate a third party in circumstances where a policy of insurance has been taken out but has been avoided ab initio after the accident that causes the third party to suffer property damage or, as in this case, personal injuries. It placed at the forefront of its submissions the decisions of the CJEU in *Csonka v Magyar Allam* (Case C-409/11) [2014] CMLR 377 ("*Csonka*") and *Fidelidade.* It also relied upon the travaux préparatoires leading to the formulation of the relevant provisions of the Codified Directive which, it submitted, demonstrated an intention to exclude from the responsibility of a compensation body such as the MIB a case where a policy of insurance has been taken out but is avoided after the incident giving rise to liability.

24. Having given detailed consideration to the decisions of Jay J and the Court of Appeal in *Delaney v Secretary of State for Transport* [2014] EWHC 1785 (QB), [2015] EWCA Civ 172, [2015] 1 WLR 5177 ("*Delaney*") and *Lewis*, the judge commenced his discussion and reasons at [115]. He first noted that the MIB's task pursuant to Article 10 is not expressed as being to provide compensation for injuries caused by vehicles that are unidentified or uninsured, but is expressed as being to provide compensation, at least up to the limits of the Article 3 insurance obligation for damage to property or

personal injuries caused by "an unidentified vehicle or a vehicle *for which the insurance obligation provided for in Article 3 has not been satisfied*." At [120] he gave nine reasons why, in his view, the phrase used in Article 10 has a meaning that is wider than it would have been had it merely referred to unidentified and uninsured vehicles.

25. Though it does not contain the full scope of the judge's reasoning, his ratio may be found in [125] where he said:

> "In short, the words in Article 10(1) of "a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied" are broad enough to include any breakdown in the system whether due to the vehicle being uninsured because of the driver or its owner or the vagaries of the national legislation, in this case one that created the declaration in section 152(2) of the RTA 1988, as Flaux LJ found in *Lewis*. The words in *Lewis* applying the Directive are broad enough to include a case of the insurance obligation not being satisfied because the insurance does not cover use of the vehicle on private land (the facts in *Lewis*) or because it is and has been subject to avoidance under section 152(2) as it then was. This provision is incompatible with the Directive and has been acknowledged as such by the Secretary of State. The effect of the existence of section 152(2) and the declaration in this case is that this was a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied and/or the vehicle was equivalent to or treated as an uninsured vehicle: see the opinion of Mr Mengozzi in *Csonka* and Richards LJ in *Delaney* ... [and to the] relevant parts of the judgment of the Court of Appeal in *Lewis*."

A preliminary point

26. Before going further, it is worth noting one feature which, if neglected, can lead to confusion. The scope of the Article 3 insurance obligation is a matter to be determined by the application of EU law. In contrast, it is now well established that questions of the validity and effect of particular policies of insurance (including questions of the effect of an exclusion clause or avoidance) are a matter for the national law of the state in which they are issued, not EU law: see *Fidelidade* at [31]. This needs to be borne in mind when reading decisions of the CJEU, which are prone to make and repeat statements such as that "a compulsory insurance contract *may not provide* that in certain cases … the insurer is not obliged to pay compensation for … personal injuries caused to third parties by the insured vehicle": see *Ruiz Bernaldez* (Case C-129/94) [1966] 2 CMLR 889 ("*Ruiz Bernaldez*") at [24]; or that Article 3 "*precludes* a company insuring against civil liability in respect of the use of motor vehicles from relying on statutory provisions or contractual clauses in order to refuse to compensate … victims for an accident caused by the insured vehicle": see *Churchill* at [33], *Fidelidade* at [24] and elsewhere; or that provisions of the Directive "must be interpreted as *precluding* national rules the effect of which is to omit automatically the requirement that the insurer should compensate a passenger .on the ground that the passenger was insured to drive the vehicle which caused the accident but that the driver was not": see *Churchill* at [36].

27. These are statements of EU law. At least when the insurance is provided by a private body that is not an emanation of the state, they do not have any direct effect on the position of the insurer because they have no horizontal effect in relation to such private bodies: see *Smith v Meade* (Case C-122/17) [2019] 1 WLR 1823 ("*Smith*") at [49]. So, despite the unqualified nature of such statements, when the CJEU says that an insurance contract "may not provide" for an insurer to be relieved of liability pursuant to terms of the contract, or that the Directive "precludes" a company from relying on statutory provisions or contractual clauses in order to refuse to compensate third party victims, or that national rules are "precluded", it does not in fact prevent the existence of such provisions or clauses or affect their validity where the insurance provider is not an emanation of the state. Those are questions of validity and effect which it is for the national law to resolve. What it does mean, however, is that if the national law permits (or holds to be valid) a statutory provision or contractual clause which relieves the insurer of liability to third parties (other than in relation to the joyrider exclusion) there will be a gap or shortfall in the insurance cover provided, which should not have existed as a matter of EU law because the result reached by the application of the Member State's national law was either "precluded" or "may not [be provided]" under EU law. Because the scope of the insurance obligation under Article 3 is a question of EU law, it follows that three issues may arise in any case. First, a question of EU law, what is the scope of the Member State's insurance obligation under Article 3? Second, a question of national law, what is the meaning, validity and effect of any insurance that has been provided in relation to the vehicle? Third, a question of fact, is there a disparity and shortfall between the Member State's Article 3 insurance obligation and any insurance that has been provided? If there is a disparity or shortfall, a fourth question arises, to which I will return later, namely: is the victim entitled to require the State's compensation body to plug the gap by paying them the shortfall?

28. The facts of the present case provide a neat illustration of this point. The Secretary of State has accepted and it is common ground that s. 152(2) of the Act as it then stood put the United Kingdom in breach of the Directive which, *as a matter of EU law*, precluded the Insurer from avoiding liability to Mr Colley, he being an injured third party. But that had no practical effect as between Mr Colley and the private entity Insurer because, *as a matter of English law*, the Insurer was entitled to take advantage of the provisions of s. 152 so as to avoid liability to compensate Mr Colley. There was therefore a disparity and shortfall between the United Kingdom's insurance obligation under Article 3 and the insurance cover that, as determined by national law, was provided.

29. Naturally, when giving the Directive direct effect against emanations of the state, different considerations apply.

The MIB's submissions on appeal

30. The central contention of the MIB's appeal is that the insurance obligation provided for in Article 3 has been satisfied because the Insurer's policy was in being at the time of the accident. It therefore submits that the United Kingdom has taken all appropriate measures to ensure that civil liability in respect of the use of the Vehicle was covered by insurance. It submits that this contention is supported both by the travaux préparatoires leading to the formulation of the relevant provisions of the Codified Directive and by multiple decisions of the CJEU.

Travaux préparatoires

31. The MIB's submissions about the travaux préparatoires are summarised at paras [28]-[36] of its skeleton argument on this appeal as follows:

> "28. The Article 10 body has its legislative origins in Article 1 of the Second Directive, which in turn has its genesis in a proposal submitted by the European Commission to the Council on 7 August 1980. What is now Article 10 of the Codified Directive was originally contained in Article 1(3) of the draft Second Directive proposed by the Commission:
>
> "*Each Member State shall make provision that compensation within the limits authorised by paragraph 2 for damage to property or personal injuries caused by an unidentified vehicle in respect of which the insurance obligation provided for in paragraph 1 has not been satisfied shall be borne by a body set up or authorised by that State."*
>
> 29. Article 2 of the draft Second Directive provided:
>
> "*For the purposes of Article 1(3) of this Directive … where an insurer refuses to make payment by virtue of the law or of a contractual provision authorised by law, the vehicle shall be treated as an uninsured vehicle*".
>
> Therefore, at the outset the Commission's proposal was that the Article 10 body would be liable where no insurance had been taken out and, additionally, where an insurance policy had been taken out but an insurer was entitled to refuse to pay – on the basis of law or the insurance contract. This is confirmed by Recital 6 of the Proposal which states:
>
> "*Whereas it is necessary to make provision for a body to bear secondary liability for the payment of compensation in cases where the vehicle responsible is unidentified or uninsured, or where the insurer is entitled to disclaim liability; whereas the latter case must be treated in the same way as a case of non-insurance.*"
>
> 30. The European Parliament amended the draft Second Directive to remove the proposed Article 2 (but not the Recital). The Parliament instead inserted a provision that rendered contractual terms that excluded vehicles from cover if driven by certain categories of person void insofar as an injured third party might rely on the insurance policy.
>
> 31. The Commission accepted this amendment in part and proposed an amended version of Article 2 to reflect this. However, the Commission did not accept the Parliament's proposed deletion of the original Article 2, noting that it

considered "*it is essential to retain the principle of treating as cases of non-insurance those residual cases in which the insurer can avoid payment for any compensation to the victim*", precisely the position that arises in this case. The Commission's Amended Proposal inserted a new recital ("*whereas it is necessary to provide that all other instances in which the insurer is entitled to disclaim liability must be treated as instances of non-insurance*") to reflect the point previously covered by original Recital 6 together with a revised Article 2 which includes the following:

"Where an insurer refuses to make payment by virtue of the law or of another contractual provision authorized by law, the vehicle shall be treated as an uninsured vehicle".

32. The Commission's clear intention was to include within the scope of the Article 10 body's liability, damage caused by vehicles for which an insurance policy had been taken out but was subsequently disclaimed by the insurer.

33. The Council, in adopting the Second Directive, did not adopt the Commission's recommendation that, where an insurer refuses payment, the vehicle should be treated as an uninsured vehicle and therefore fall into the Article 10 body's scope. Both the relevant Article and Recital were removed from the Second Directive as adopted (and there was no subsequent change in this respect in the Codified Directive).

34. The legislative history demonstrates a clear conscious choice by the legislature to limit the scope of the liability required to be imposed on the Article 10 body. Notwithstanding the Commission's clear intention, the Council refused to include in the Second Directive provisions which would have brought within the body's remit claims arising from damage caused by vehicles, for which insurance had been taken out but in respect of which the insurer had been able to disclaim liability to the victim. This is a fundamental restriction on the scope of the body's liability and key to the proper interpretation of the Directive.

35. The *travaux* provide further evidence of the legislature's desire to restrict the scope of the body's liability. For example, the original Commission Proposal included imposing liability for property damage on the Article 10 body but this was subsequently excluded on the recommendation of the European Economic and Social Committee (which was concerned about the risk of abuse against the Article 10 body). The Parliament voted to remove property damage caused by unidentified vehicles from the scope of the Article 10 body's obligations and the Commission accepted this. The Amended Proposal permitted

> Member States to limit or exclude compensation by the body in respect of property damage caused by unidentified vehicles.
>
> 36. Of particular importance for the issues on appeal is what is now the exception in Article 10(2) of the Codified Directive. This did not feature in the Commission's proposal and was not introduced into the legislation until the end of the legislative process. It was introduced by the Council in the final text and was intended to exclude passengers who voluntarily assumed the risk of travelling in a vehicle which was not insured. This represents a further and significant narrowing of the body's compulsory liability."

CJEU jurisprudence

32. In its written and oral submissions, the MIB relied primarily upon *Csonka*, *Fidelidade* and *Smith*.

33. In *Csonka* the claimants had taken out insurance policies with an insurer which had become insolvent and unable to discharge its obligations. The claimants were therefore obliged to pay compensation for damage caused by their vehicles without being indemnified by the insurer. They brought a claim against the Hungarian State, claiming to have suffered loss as a result of the State's alleged failure to transpose into national law the provisions of Article 3 of the First Directive - the equivalent of Article 3 of the Codified Directive. Their claim was rejected on the basis that the Article 3 insuring obligation was satisfied by the taking out of the policies issued by the insolvent insurer and that the Article 3 insuring obligation did not require the state to guarantee the insurer's solvency or to take on the risk of its insolvency.

34. The MIB relies upon the Opinion of Advocate General Mengozzi and the terms of the judgment. Having reviewed the travaux préparatoires, the Advocate General stated his conclusion at [31]: "… it appears that, in the mind of the legislature, a vehicle in respect of which the insurance obligation has not been satisfied was equivalent to an uninsured vehicle… ." At [44], having emphasised that the compensation body is required to pay compensation in only two specific situations (expressed in Article 1(4) of the Second Directive and subsequently as damage or injuries caused by (a) an unidentified vehicle or (b) "a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied") he said:

> "… I should also like to emphasise the important difference that exists, in my view, between a vehicle in respect of which the insurance obligation as described in art.3 of [the First Directive] has not been satisfied and a vehicle insured with an insolvent insurer. After all, a vehicle for which the insurance obligation has not been satisfied is an uninsured vehicle. A vehicle which was insured with an insolvent insurer has satisfied the obligation to secure insurance against civil liability in respect of the use of vehicles. The risk cover is genuine but the compensation is delayed by the financial situation of the insurer."

The MIB relies upon these passages to support the proposition that, where there is a policy in being at the time of the incident that causes injury or damage, that satisfies the Article 3 insurance obligation.

35. Turning to the judgment, the MIB relies for the same purpose upon [28], [30] and [31] where the court said that Article 3(1) required each Member State to ensure "that every owner or keeper of a vehicle normally based in its territory takes out a policy with an insurance company for the purpose of covering, up to the limits established by European Union law, his civil liability arising as a result of that vehicle"; and that the compensation body was considered to be a measure of last resort, envisaged only for cases in which the vehicle that caused the injury or damage "is uninsured or unidentified or has not satisfied the insurance requirements referred to in art. 3(1) of the First Directive"; and that the compensation body must pay compensation only where "the insurance obligation provided for in art. 3(1) of the First Directive has not been satisfied, that is to say, a vehicle in respect of which no insurance policy exists." The MIB relies upon these passages to support its submission that the critical question in the present case is whether there was an insurance policy in being at the time of the accident.

36. The passage I have cited above from [31] of *Csonka* was repeated almost word for word at [35] of *Fidelidade*.

37. *Fidelidade* arose out of a crash between a car and a motorcycle. The motorcyclist's insurer paid sums to the motorcyclist's family which it then sought to recover from the Portuguese compensation body and the owner of the car. The compensation body and the owner of the car resisted the claim on the basis that there was in existence at the time of the accident a valid insurance contract covering civil liability in respect of the car. When attempts were made to join the car insurer, the car insurer resisted on the grounds that the policy was invalid because of material misrepresentation by reason of express provisions of the Portuguese Commercial Code. One possible consequence was that the policy would be null and void even against third party victims. The question for the CJEU was whether the articles of the Directives then in force that were equivalent to Articles 3(1) and 13 of the Codified Directive "precluded national legislation having the effect of allowing an insurer to invoke against third-party victims the nullity of a contract for motor vehicle insurance against civil liability arising as a result of the policyholder initially making false statements concerning the identity of the owner and the usual driver of the vehicle or from the fact that the person for whom or on whose behalf that insurance contract was concluded had no economic interest in the contract."

38. I interpose that this was a question of EU law, not national law, and that caution needs to be exercised to avoid confusion: see [26] to [29] above. The CJEU answered that question of EU law in the affirmative. At [27] the Court said:

> "Accordingly, it must be held that the fact that the insurance company has concluded that contract on the basis of omissions or false statements on the part of the policyholder does not enable the company to rely on statutory provisions regarding the nullity of the contract or to invoke that nullity against a third-party victim so as to be released from its obligation under art.3(1)

> of the First Directive to compensate that victim for an accident caused by the insured vehicle."

39. It is material to see the terms in which the Court at [37] answered the question that had been posed:

> "… art.3(1) of the First Directive and art.2(1) of the Second Directive must be interpreted as precluding national legislation which would have the effect of making it possible to invoke against third-party victims, in circumstances such as those at issue in the main proceedings, the nullity of a contract for motor vehicle insurance against civil liability arising as a result of the policyholder initially making false statements concerning the identity of the owner and of the usual driver of the vehicle concerned or from the fact that the person for whom or on whose behalf that insurance contract was concluded had no economic interest in the conclusion of that contract."

40. The MIB submits that *Fidelidade* confirms that, where a contract of insurance exists, EU law does not provide for the Article 10 body to be liable if the insurer does not compensate the victim.

41. *Smith* arose because Irish law, in breach of the Article 3 insurance obligation, did not require cover for passengers travelling in a van but not on seats. The policy in question excluded cover for passengers travelling in the back of the van. The judge of the Irish court disapplied the exclusion, holding that the national legislation had to be interpreted (or rewritten) in order to conform with the requirement (now contained in Article 12(1) of the Codified Directive) that there be cover for *all passengers*. The insurer (which was a private entity) appealed. The Irish appeal court referred to the CJEU the question whether it was obliged to disapply the Irish legislation so as to achieve conformity with Article 12(1). The CJEU held that it was not, because the Directive did not have horizontal effect as between private entities such as the claimant and the insurer.

42. The CJEU went on to consider whether the Claimant could bring a *Francovich* claim against the Irish State, and held that he could. No consideration was given to the possibility of a claim against the appointed Irish compensation body. The Claimant had joined the Irish State in the proceedings, but not its appointed compensation body. The MIB suggests that this was because there was a policy in existence, in contrast to the facts of *Farrell v Whitty (No 1)* (Case-356/05) [2007] 2 CMLR 46 and *Farrell v Whitty (No 2)* (Case C-413/15) [2018] QB 1179. It submits that this is supported by the observation of Advocate General Bot at [58] of his opinion that the reason why there was no claim against the Irish compensation body "appears to be" that, unlike in the *Farrell* cases, the driver in *Smith* had taken out a motor insurance policy. That suggestion is not taken up in the judgment of the Court.

43. The MIB also relies upon:

    i) *Fundo de Garantia Automóvel v Juliana* (Case C-80/17) [2018] 1 WLR 5798 ("*Juliana*"), which is submitted to be consistent with the MIB's analysis. The owner of a vehicle in Portugal took it off the road but did not de-register it. She took out no policy of insurance to cover its use. Without her permission her son

took the car and used it on a public road, causing his own death and the death of two other occupants. The national compensation fund paid out and then sought to recover its outlay from the owner. The question for the CJEU was whether the Article 3 insurance obligation applied in such circumstances. The CJEU held that it did. In the course of its judgment it said at [47] that its interpretation of the effect of the Directive (as then in force):

> "… makes it possible to ensure the attainment of the objective of protecting the victims of accidents caused by motor vehicles, laid down by the Directives concerning insurance against civil liability in respect of the use of vehicles, which has consistently been pursued and reinforced by the EU legislature: … . That interpretation guarantees that those victims are, in any case, compensated, either by the insurer, under a contract entered into for that purpose, or by the [Article 10 compensation] body, in the event that the obligation to insure the vehicle involved in the accident has not been satisfied or where that vehicle has not been identified.";

ii) A markedly similar passage that is to be found in *Ostrowski v Ubezpieczeniowy Fundusz Gwarancyjny (Case* C-383/19), [2021] 3 CMLR 21 ("*Ostroswski*") at [56].

The MIB submits that these statements support its case that the Scheme of the Codified Directive is that vehicles are required to be covered by insurance and only where there is no insurance policy in being is the Article 10 compensation body required to provide compensation.

44. The MIB criticises the judge's reliance on *Lewis* and *Delaney*. It submits that *Delaney* is superseded by *Fidelidade* and that *Lewis* is on a different point, namely whether the MIB could avoid liability to the claimant in that case by relying on the limited scope of the liabilities that were required under national law to be covered by policies of insurance issued in conformity with the provisions of the Act. On the basis of its analysis, it submits that there is no obligation upon the MIB to respond in a case where there is a policy of insurance in being.

Mr Colley's submissions on appeal

45. The bedrock of Mr Colley's submissions is that it is common ground that s. 152 was incompatible with EU law because it enabled the Insurer to avoid the liability it would otherwise have been under by virtue of s. 151 to pay to Mr Colley any sums awarded for his personal injuries by a judgment against Mr Shuker. Specifically, it is common ground that this incompatibility placed the United Kingdom in breach of its Article 3 insurance obligation "to take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance." Relying upon the decision of this court in *Lewis*, Mr Colley submits that the MIB is the compensation body appointed by the United Kingdom government to indemnify claimants in respect of injuries suffered in cases where the United Kingdom's Article 3 obligation has been breached. Mr Colley therefore submits that the MIB must indemnify him in respect of the injuries he has suffered because "it is accepted [in

paragraph 8 of the MIB's skeleton argument] that the Claimant has been deprived of his entitlement to compensation from the Insurer due to national legislation which, it is accepted, is in breach of EU law."

46. Mr Colley seeks direct support from the passage at [39] of *Farrell (No 2)*, citing [31] of *Csonka*, that:

> "In that regard, it must be borne in mind that, in case of damage to property or personal injuries caused by a motor vehicle for which the insurance obligation provided for in article 3(1) of the First Directive has not been satisfied, the court has held that the intervention of such a body is designed to remedy the failure of a member state to fulfil its obligation to ensure that civil liability in respect to the use of motor vehicles normally based in its territory is covered by insurance."

47. That passage was endorsed by Flaux LJ at [73] of *Lewis* (with whom Henderson LJ and Sir Stephen Richards agreed) in terms on which Mr Colley relies:

> "… it is quite clear from the broad terms of para 39 of the judgment of the CJEU in *Farrell v Whitty (No 2)* … that the compensation body is intended to protect and compensate victims by remedying the failure of the member state to fulfil its obligation under article 3 to ensure that civil liability in respect of the use of motor vehicles is covered by insurance."

48. Addressing the terms of the Codified Directive, Mr Colley submits that they support the conclusion that an injured claimant should in accordance with EU law be compensated *either* by an insurer *or* by the compensation body, with no scope other than the joyrider exclusion for a third category where the injured claimant receives no compensation from either. This conclusion, he submits, is supported by the passage at [47] of *Juliana*, which I have set out at [43(i)] above, and the markedly similar passage at [56] of *Ostrowski*.

49. Mr Colley submits that *Fidelidade* assumes (expressly at [35]) that, if the insurer is not held liable, then the compensation body will be. He therefore rejects the suggestion that *Fidelidade* provides support for the existence of a third category of case where neither the insurer nor the compensation body will be liable to compensate the injured victim. He points out that what was considered in *Smith* was (a) the obligation of the national courts to reach a compatible interpretation and result provided it was not *contra legem*, and (b) the possibility of a *Francovich* claim against the Irish State; and that no consideration was given to the possibility of a direct claim against the MIBI, which was not before the court.

50. In Mr Colley's submission the scope of the MIB's liability under Article 10 is coextensive with the Member State's obligation under Article 3 of the Codified Directive. He relies upon the acceptance of this proposition at [63] of *Lewis*, and upon [46] of *Juliana* where the court said:

> "… the scope of obligatory intervention of the compensation body referred to in [the equivalent of Article 10(1) of the

> Codified Directive] is therefore, as regards the damage or injuries caused by an identified vehicle, coextensive with the scope of the general insurance obligation laid down in [the equivalent to Article 3 of the Codified Directive]."

51. It follows in his submission that, since there is no room for a third category of case where the injured victim is not compensated by either an insurer or the compensation body, his acknowledged direct right of action entitles him to recover from the MIB the difference between the scope of what should have been provided in accordance with EU law (i.e. full compensation) and what falls to be recovered under English law as a consequence of the United Kingdom's breach of its Article 3 insurance obligation (i.e. nothing).

Discussion and resolution

52. In my judgment, the decisions in *Ruiz Bernaldez* and *Fidelidade* provide a complete answer to the MIB's submissions. In deference to the carefully crafted arguments of Mr De La Mare QC, who appeared for the MIB on the appeal, I shall have to explain my reasons in some detail; but their essence can be shortly stated.

53. It is common ground that the provisions of the United Kingdom's national law which permitted the Insurer to avoid its policy were incompatible with and in breach of the Article 3 insurance obligation. That is because the scope of the Article 3 insurance obligation was such that, under EU law, avoidance for material misrepresentation was not permitted: the only potentially relevant exceptions to the Article 3 insurance obligation to ensure that civil liability in respect of the use of the Vehicle was covered were those provided by Article 10(2) of the Codified Directive and the joyrider exclusion. The consequence of this incompatibility and breach was that Mr Colley will not receive the compensation from the Insurer that, as a matter of European law, he should receive. The MIB's (directly enforceable) obligation under Article 10(1) is to provide compensation "at least up to the limits of the [Article 3] insurance obligation for … personal injuries caused by … a vehicle for which the [Article 3] insurance obligation … has not been satisfied." Its obligation is coextensive with the Article 3 obligation and it must therefore make good the shortfall between what should have been provided had there been compliance with the Article 3 obligation and what was provided as a result of the non-compliance.

54. I start with the terms of the Codified Directive itself. It is now established that, as a matter of EU law, the exceptions provided by the terms of the Directive are the sole exceptions upon which an insurer may rely, and that they are to be strictly interpreted: see [19] above. The immediate consequence of this approach is that if there is a policy in being, the insurer will not be entitled (as a matter of EU law) to rely upon other statutory provisions or contractual clauses that purport to exclude liability: they will be treated (as a matter of EU law) as being void and of no effect: see Article 13(1). In practical terms this means (as a matter of EU law) that, if there is a policy in being, the insurer will have to respond, the Article 3 insurance obligation will be satisfied and there should be no residual liability for the compensating body to cover. *Csonka* confirms that the Article 3 insurance obligation does not impose the risk of insurers' insolvency upon the state: but it says nothing otherwise to derogate from the scope of the obligation.

55. It is in this light that [40] of *Churchill* and similar statements (including [44] of *Csonka*, which I have cited above, and [29] of *Fidelidade*) must be understood. The court in *Churchill* said:

> "… it is first necessary to point out that the situation in which the vehicle that caused the damage was driven by a person not insured to do so, while a driver was, moreover, insured to drive that vehicle, and the situation specified in the third sub-paragraph of article 1(4) of the Second Directive [now Article 10(2) of the Codified Directive] in which the vehicle which caused the accident was not covered by any insurance policy, are situations neither similar nor comparable. The fact that a vehicle is driven by a person not named in the relevant insurance policy cannot, having regard, in particular, to the aim of protecting victims of road traffic accidents pursued by the First, Second and Third Directives, support the view that that vehicle was not insured for the purpose of that provision."

56. This and other variations on the same statement do not support the proposition that the Article 3 insurance obligation is satisfied for all purposes whenever there is a policy in being. Rather, they identify that (as a matter of European law) where there is a policy in being, the insurer may not rely upon a clause excluding liability if the vehicle was being driven by a person who was not insured to drive it: such a clause should be held to be void as a matter of EU law and the insurer should remain liable. It is an observation on the scope of the Article 3 insurance obligation when interpreted in accordance with EU law.

57. *Ruiz Benaldez* is in point. The national court held that the defendant, who had caused property damage when driving while intoxicated, was not able to recover an indemnity from his road traffic insurers because of national legislation which provided that insurers were not liable in respect of property damage where the driver was intoxicated. The question for the CJEU was whether the national legislation which allowed insurers to avoid liability to compensate their insured was compatible with the Directives then in force. This was and was treated as a question pertaining to the position under EU law. The answer provided by the Court was:

> "[18] In view of the aim of ensuring protection, stated repeatedly in the directives, Article 3(1) of the First Directive [equivalent to Article 3 of the Codified Directive], as developed and supplemented by the Second and Third Directives. must be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and injuries sustained by them up to the amounts fixed in Article 1(2) of the Second Directive.
>
> …
>
> [24] The answer to Questions 1 to 4 must therefore be that Article 3(1) of the First Directive is to be interpreted as meaning that, without prejudice to the provisions of Article 2(1) of the

> Second Directive [the predecessor and broadly equivalent to Article 13(1) of the Codified Directive], a compulsory insurance contract may not provide that in certain cases, in particular where the driver of the vehicle was intoxicated, the insurer is not obliged to pay compensation for the damage to property and personal injuries caused to third parties by the insured vehicle. It may, on the other hand, provide that in such cases the insurer is to have a right of recovery against the insured."

58. These statements of EU law go to the scope of the Article 3 insurance obligation. They are made in the context of a policy being in existence but national legislation permitting the insurer to avoid liability, which is closely analogous to the present case. Properly understood, their effect is that *if* national legislation were to permit the avoidance of liability, it would be incompatible with the position that should obtain under EU law, which is as set out above. Put in other words, if a national legislature or general law permits the insurer to avoid liability (or, by parity of reasoning, the policy) the Member State is in breach of its Article 3 insurance obligation because the victim will be deprived of insurance cover of which, according to EU law, he should have the benefit.

59. The fifth question that had been asked of the court was predicated on the answer to the first four questions being the opposite of what the court in fact held. As summarised by Advocate General Lenz at [43] of his opinion the question was:

> "if an exclusion of insurance cover where the driver is intoxicated is valid as against the victim, [may that] be regarded as an "absence of insurance" for the purposes of Article 1(4) of Directive 84/5 [equivalent to Article 10(1) of the Codified Objective], leading to the involvement of and assumption of liability by the body provided for in that Article?"

60. Because of the answer given by the court to questions 1-4, question 5 did not arise and the court did not consider it. However, the Advocate General considered it at [45]-[52] of his opinion, in a passage on which both sides rely. He started by pointing out that the premise for the question was "most unlikely" because "under the system established by the directive, a defence as against the person who has suffered harm appears to be conceivable only if it can be proved that he was himself guilty of misconduct." He then continued:

> "46. Apart from those highly exceptional cases of the victim's own blameworthy conduct. it must be assumed that there is a need to ensure that there are no gaps in the duty to compensate the victim. That principle can be seen to be the guiding principle of the directives. To that effect, the national guarantee body must be regarded as a means of covering accident victims who would otherwise be unprotected. The reason for requiring such a body to be established is the concern to protect victims.
>
> 47. How the duty to provide compensation is actually to be allocated lies, at least partially, in the discretion of the Member States. However, the directives themselves show that, as a rule, it is the insurer of the vehicle that has caused damage who is

> responsible for covering that damage. Only in cases in which the vehicle is uninsured or unidentified that is to say, if the responsible insurer cannot be established, must the body referred to in Article l(4) of [the Second] Directive act."

61. Having reviewed the travaux préparatoires, the Advocate General concluded:

> "51. The wording finally adopted and the provision's legislative history show that the "body" is in no way conceived as a general "catch-all", providing compensation upon the occurrence of any excluded events. Nor does the provision simply refer to the "absence of insurance" which the national Court alludes. Everything therefore indicates that, within the framework established by the directive, the person who has suffered harm as a result of an accident must recoup his loss from the insurer. *Only* if, for whatever reasons, he has no claim for compensation against an insurer, would the "body" have to pay compensation in the interest of the extensive protection of victims. Furthermore, the Member States are free to extend the competence of the "body" by statute, provided complete protection is ensured for victims.
>
> 52. Question 5 should therefore be answered as follows:
>
> If, on account of the driver's intoxication, an exclusion of insurance cover is valid as against the person suffering harm, the body referred to in Article 1(4) of [the Second Directive] is required to pay compensation." (Emphasis in the original)

62. The following points emerge from this passage. First, it is the Advocate General's opinion that there should be no gaps in the duty to compensate the victim. Second, the close conjunction in [47] between (a) the observation that, as a rule, it is the insurer who is responsible for covering the damage and (b) the reference to the compensation body responding "only in cases in which the vehicle is uninsured or unidentified" reflects the view of the Advocate General that a policy that is in being should, according to EU law, respond because of the very limited circumstances in which liability may be excluded. In practical terms, the assumption is that, if there is a policy in existence, EU law requires the insurer to respond. Hence the assumption that, if EU law prevails, the compensation body will only have to act if the vehicle is unidentified or is "uninsured" in the sense that there is no insurance policy in place: see also [30] of the judgment in *Csonka*, which is based on the same premise. Third, nothing said by the Advocate General suggests that the vehicle should be regarded as "insured" if a policy is in existence but, by the operation of national law and in breach of EU law, the insurer is able to avoid liability because of a national statutory provision. As the Advocate General had already made clear – and the court duly held – such an outcome is incompatible with the Article 3 insurance obligation. Fourth, in the event that the court had given contrary answers to questions 1-4, it would remain the Advocate General's opinion that there should be no gap in cover: if, "for whatever reasons", the person who has suffered harm has no claim against the insurer, the compensation body would have to pay compensation in the interest of the extensive protection of victims. Fifth, this opinion was reached having taken full account of the travaux préparatoires.

63. I take the Advocate General's opinion as providing persuasive support for Mr Colley's submissions in three particular respects. First, it emphasises the breadth of the Article 3 insurance obligation. Second, it maintains that there is no gap between the cover to be provided by insurers and the compensation body. Third, these views confirm that it is more important to look at the terms of the Codified Directive rather than at what could have been but was not enacted, as shown by the travaux préparatoires.

64. *Csonka* provides no assistance to the MIB. All that it decided was that the Article 3 insurance obligation did not extend to require the assumption of the risk of insurers' insolvency. It did not address the position (either under EU law or at all) where there is a policy in existence at the time of the incident giving rise to liability but that policy is subsequently avoided. This is hardly surprising as (a) it did not arise on the facts and (b) it should not arise under EU law, for the reasons already outlined. Throughout the Advocate General's opinion and the judgment of the court, what is considered is a binary system where either there was a subsisting insurance policy, the continued existence and terms of which were not in question, or there was no insurance policy in being.

65. The passages in *Csonka* upon which the MIB relies do not, in my judgment, bear the weight or justify the importance that the MIB seeks to place upon them. Viewed in context, they reflect the EU law assumption that, if there is a policy in being, it will respond. That assumption is not vindicated on the facts of the present case because of the operation of national law. Where they have direct relevance is in emphasising the scope of the Article 3 insurance obligation: if there is a policy in existence then, in order to be EU law compliant with the Codified Directive, it cannot exclude liability for material misrepresentation. If and to the extent that it does so, it is in breach of the Article 3 insurance obligation and, in the absence of an effective insurer, the compensation body should respond.

66. I have summarised the factual background for *Fidelidade* at [37] above and have set out the Court's answer to the question it was required to consider at [38]-[39] above. What immediately appears is that (a) the facts are strikingly similar in all essentials to the facts of the present case, and (b) the court held that under EU law an insurer was not entitled to avoid its policy on grounds of misrepresentation. Hence the court's use of the phrase that the Codified Directive (or equivalent predecessor provisions) "must be interpreted as precluding national legislation" which could enable the insurer to avoid in such circumstances. In normal English meaning it does not "preclude" the national legislation. What is meant is that, according to EU law, the scope of the insurance cover required by Article 3 is not limited by excluding cases where a policy was in existence at the time of the accident but was entered into on the basis of a misrepresentation by the policy holder.

67. The court appreciated that the question it had been asked could be interpreted as involving questions both of EU law and of national law. At [30]-[32] it said:

> "30 … [T]he referring court also asks the court whether an insurance company is entitled to rely, in the case of an ongoing contract for compulsory motor vehicle insurance against civil liability and in order to avoid its obligation to compensate third-party victims of an accident caused by the insured vehicle, on a statutory provision, such as art.428(1) of the Portuguese

> Commercial Code, which provides for the nullity of an insurance contract in the event that the person for whom or on whose behalf the insurance has been taken out has no economic interest in the conclusion of that contract.
>
> 31 It must be noted that such a question is concerned with the legal conditions of validity of the insurance contract, which are governed not by EU law but by the laws of the Member States.
>
> 32 Those states are none the less obliged to ensure that the civil liability arising under their domestic law is covered by insurance which complies with the provisions of the three abovementioned Directives. It is also apparent from the court's case law that the Member States must exercise their powers in that field in a way that is consistent with EU law and that the provisions of national legislation which govern compensation for road accidents may not deprive the First, Second and Third Directives of their effectiveness: *Marques Almeida* at [30] and [31] and the case law cited."

68. The most that can be said in such circumstances is that the national legislation is incompatible with the Codified Directive and that the Directive is directly enforceable against an emanation of the state: but that is different from saying (in normal English) that the Directive "precludes" the national legislation. The real significance for present purposes is that where, as in the present case, incompatible national legislation enables the Insurer to avoid its policy or liability, there is to that extent a breach of the Article 3 insurance obligation because of the failure to provide the cover that should be provided in order to comply with the EU law obligation.

69. Having noted at [34] that provisions such as art. 428(1) of the Portuguese Commercial Code were liable to result in compensation not being paid to third party victims and, consequently, in the Directives being deprived of their effectiveness, the Court continued at the start of [35]: "That finding is not called in question by the fact that it is possible for the victim to receive compensation from the [Portuguese compensation body]." It is not clear whether this simply reflects that the Portuguese compensation body *would*, as a matter of fact, compensate the victim or whether it reflects an assertion that the Portuguese compensation body *should* do so to make good the failure of the state to comply with its Article 3 obligation. In either event, the outcome is consistent with the approach seen elsewhere, namely that there should be no gap into which a victim should fall because of exclusion of liability by his insurer.

70. To my mind, the judgment in *Fidelidade* provides strong support for Mr Colley's position. It supports the conclusion that the Insurer's ability to avoid and avoidance of the policy was incompatible with the scope of the Article 3 insurance obligation. It provides no support for a submission that the Vehicle was in any material sense not "uninsured" or that the fact that the policy was in being at the time of the accident means that the insuring obligation had been satisfied. To the contrary, it is plain that the question of potential avoidance for non-disclosure falls within the ambit of the scope of the Article 3 insuring obligation; and that the consequence of avoidance ab initio is that the cover that should be available in order to satisfy the Article 3 insurance obligation is not there.

71. *Juliana* provides further support for Mr Colley and does not assist the MIB. A clear statement of principle appears at [44] and [46]:

> "44 As is apparent from its wording, [the equivalent to Article 10(1) of the Codified Directive] obliges member states to set up a body with the task of providing compensation, at least up to the limits of the insurance obligation provided for by EU law, for damage to property or personal injuries caused in particular by a vehicle with respect to which that obligation has not been satisfied.
>
> …
>
> 46 …[T]he scope of obligatory intervention of the compensation body referred to in [the equivalent to article 10(1) of the Codified Directive] is therefore, as regards the damage or injuries caused by an identified vehicle, coextensive with the scope of the general insurance obligation laid down in [the equivalent of article 3 of the Codified Directive]. The obligatory intervention of that body in such a situation cannot therefore extend to situations in which the vehicle involved in an accident was not covered by the insurance obligation."

72. The liability of the compensation body will therefore be determined by the scope of the Article 3 insurance obligation. *Fidelidade* is direct authority for the proposition that the obligation includes that policies should not be avoided for material misrepresentation. As the citations and analysis above show, compliance with the obligation is not dependent upon whether or not there is a policy in existence: it is dependent upon whether the policy as interpreted and applied under national law provides the cover required by Article 3. In a case where, in accordance with national law, the policy is avoided for non-disclosure, it does not do so.

73. I would reject the submission, lightly sketched as it was, that the possible existence of a *Francovich* claim affects assessment of whether or not there is a direct claim against the MIB. There is no principled reason why it should when the MIB has been appointed to be the United Kingdom's compensation body. The MIB is an emanation of the state for these purposes, and the purpose of the compensation body is to make good the consequences of the State's failure to comply with its Article 3 insurance obligation The fact that no direct claim was brought in *Smith* is uninformative. I do not consider it to be either helpful or valid to speculate about the reasons why the Irish equivalent of the MIB had not been joined.

74. For these reasons, I consider that the CJEU authorities are determinative of the appeal, which should fail. In those circumstances I need only refer to the two most relevant domestic authorities briefly.

75. It will be apparent from what I have said thus far that I am in respectful agreement with the conclusion in *Delaney* that the only exclusions from the obligation to provide compensation for personal injuries caused by an uninsured vehicle (as properly understood) are those set out in the Codified Directive itself and that there is no discretion to add or legitimise additional exclusions. The claim in *Delaney* was a

Francovich claim at a time when it was not yet being submitted that s. 152(2) was incompatible with EU law and it was not yet established that the MIB was to be regarded as an emanation of the state. As a result, although the case involved an avoidance of the insurer's policy on grounds that were held to be incompatible with the equivalent of Article 10(1) of the Codified Directive, the issue that is now before this court did not directly arise. The Secretary of State had raised the point but did not pursue it: see [26] of the judgment of the Court of Appeal. That said, I respectfully agree with the approach adopted by the Judge at first instance, specifically, in relation to the arguments based on the travaux préparatoires at [55], his interpretation of the Opinion of Advocate General Lenz in *Ruiz Bernaldez*, and his holding at [38]-[39] that "the victim cannot be permitted to fall between two metaphorical stools".

76. I am also in respectful agreement with the observation of Richards LJ (with whom Sales and Kitchen LJJ agreed) at [33(viii)] that:

> "The present case falls within [the equivalent of article 10(1) of the Codified Directive] rather than under the general provisions concerning insurance cover only because, fortuitously and as a result of particular provisions of national law, the driver's insurer succeeded in avoiding the policy ab initio on the ground of non-disclosure of material facts, which had the consequence that the vehicle fell to be treated as an uninsured vehicle. It is common ground that, if the policy had not been avoided, the insurer would not have been able to rely on any equivalent to clause 6(1)(e)(iii) of the Uninsured Drivers' Agreement 1999 to defeat the claimant's claim: such an exclusion is not permitted by [the equivalent to article 13(1) of the Codified Directive]. Having regard to the aims of the Directives, it would be very surprising if such an exclusion were none the less available to the body provided for by article 1(4)."

77. While noting that the reference to the vehicle "[falling] to be treated as an uninsured vehicle" is evidently a statement of English law which has no impact on the use of the word "uninsured" in judgments of the CJEU to which I have referred above, I agree and would go further: the exclusion is not available.

78. I turn finally to *Lewis*. If there were previously any doubt, [63] of *Lewis* together with [46] of *Juliana*, establishes that the obligation of the MIB under Article 10(1) of the Codified Directive is coextensive with the scope of the Article 3 insurance obligation. Equally, if there were previously any doubt, [66] of *Lewis* establishes that Articles 3 and 10 of the Codified Directive are of direct effect in relation to emanations of the State. I am also in respectful agreement with the conclusion drawn by Flaux LJ at [72] of *Lewis* that:

> "… the judgment of the CJEU *in Juliana* recognises and applies the broader objective of the Motor Insurance Directives of protecting the victims of motor accidents, by requiring member states to ensure that motor insurance is compulsory, so that the victims are compensated by the insurer or, in cases where the obligation to insure the vehicle has not been satisfied, by the compensation body to which that task has been delegated under

> article 10. In my judgment, the last sentence of para [46] is sufficiently widely phrased to encompass both the case where the state has not fully implemented its insurance obligation under article 3 of the 2009 Directive (as in the present case) and the case where, although the state has implemented the obligation, the driver or owner of the vehicle has not taken out the compulsory insurance required."

The present case is a case where the state has not fully implemented its Article 3 insurance obligation. Accordingly, the MIB as compensation body, must compensate Mr Colley.

79. To recapitulate: in my judgment, the MIB's relentless concentration on the word "uninsured" is misplaced. As Freedman J pointed out, whether a vehicle is "uninsured" is not the test for the scope of the Article 3 insurance obligation. Where the word "uninsured" is used, both in the CJEU and in the Recitals to the Codified Directive, it reflects the EU law assumption that, if a policy is in existence, it will respond. If it does not do so in a particular Member State, for whatever reasons, there is a failure by that State to comply with its Article 3 insurance obligation. That is what has happened here. There can be no doubt that, if judged by EU law standards and EU law's understanding of the scope of the Article 3 insurance obligation, the Insurer's avoidance could and would not have been effective as against Mr Colley: see *Fidelidade*. On the facts of this case, the national law of the United Kingdom has deviated from the system and scope of the obligation which should, as a matter of EU law, have been in place with the result that Mr Shuker's civil liability is not covered. The directly enforceable obligation upon the MIB is to compensate him "at least up to the limits of the obligation" provided for in Article 3: see *Lewis* at [73]. There can be and is no gap into which Mr Colley may fall.

80. I would dismiss the appeal.

Warby LJ

81. I agree.

Holroyde LJ

82. I too agree.