UPDATE ON MOTOR INSURANCE LAW

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Introduction

- This talk will focus on the impact of recent UK and European decisions upon motor insurance and claims following RTA's.
- To understand these cases, we need to go back to basics and consider the Road Traffic Act 1988 ("RTA 1988")
- The RTA 1988 sought to consolidate a variety of previous enactments.
- It also sought to give effect to the United Kingdom's obligations under Community Law.
- Further, the obligation on the UK courts is to construe the RTA 1988 in accordance with the relevant European "Motor Insurance Directives".

The Basics

- The starting point for this talk is of course Part VI of the RTA 1988 which confirms:
    - the minimum compulsory insurance requirements, and
    - the rights and duties of insurers in relation to judgments obtained against insured persons.

RTA 1988 Part VI

RTA Act - Minimum Compulsory Insurance requirements:

- There are two limiting aspects to the compulsory insurance requirements:
    1. Location - Limited to use of “a motor vehicle on a road [or other public place]”(see S 143(1)) and S145),
    2. Type of Vehicle – The RTA defines a “motor vehicle” as a “a mechanically propelled vehicle intended or adapted for use on roads” (see S 185(1)).

The duty of motor insurers to satisfy judgments:

- S151(5) - imposes a duty on insurers to satisfy judgments against persons insured or secured against third party risks, even if the insurer is not liable to its insured as a matter of contract, save that;
- S 152(2) – no sum is payable under S151 if the insurer has obtained a declaration that the policy was void ab initio
- Such a “S152(2) Declaration” may be obtained where the insured failed to disclose a material fact, or misrepresented a material particular.

The Motor Insurers Bureau

- The MIB exists as a 'fund of last resort' to compensate victims of uninsured and untraced Drivers.
- The MIB’s obligation is to handle claims in accordance with the Uninsured Drivers Agreements.
- All UK motor insurers must be members of the MIB, and sign up to the MIB Articles of Association.
- Article 75 of the MIB Articles of Association requires a motor insurer to meet a judgment, in circumstances where the insurer would not be so liable under S151.
- The Art. 75 insurer steps into shoes of MIB and so the relevant UDA applies to the claim.

European Union Law

The ”Marleasing Principle” –

The domestic court of a member state must interpret its national law so far as possible in the light of the wording and purpose of the relevant Directive.

The European "Motor Insurance Directives” -

- First Directive (72/166/EEC);
- Second Directive (84/5/EEC)
- Third Directive (90/232/EEC),
- Fourth Directive (2000/26/EC)
- Fifth Directive, and the
- Sixth Directive (2009/103/EC) ("the 2009 MID") – the 2009 MID consolidates the above Directives – so is sometimes called the Codified Directive.

<u>The 2009 Directive</u>

In simplified terms:

- Article 3 – imposes the compulsory insurance obligation. It requires member states to "ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance".
- Article 10 - imposes an obligation to have in place a body to provide compensation where someone is injured by the uninsured use of a vehicle (this being the MIB in the UK), save for persons who voluntarily entered the vehicle knowing it was uninsured.
- Article 12 –provides that Exclusion clauses within insurance policies that relate to claims by third party accident victims, are deemed to be void - save for persons who voluntarily entered the vehicle knowing it to be stolen.

<u>Recent UK Caselaw</u>

Important / Recent UK cases include on motor insurance law include:

1. Churchill Insurance Co Ltd v Fitzgerald & Wilkinson; Evans v Equity Claims Ltd [2012] EWCA Civ 1166 ("Churchill")
2. Sean Robert Delaney v Secretary of State for Transport (Court of Appeal) [2015] EWCA Civ 172
3. Sahin v Havard [2016] EWCA Civ 1202
4. UK Insurance Ltd v R & S Pilling [2017] EWCA Civ 259
5. Roadpeace v Secretary of State for Transport [2017] EWHC 2725 (Admin)
6. Cameron v Hussain & Liverpool Victoria Insurance [2017] EWCA Civ 366
7. Farah v Abdullahi & Ors [2018] EWHC 738 (QB) (April 2018)
8. Lewis v. Tindale, MIB and Secretary of State for Transport [2018] EWHC 2376 (QB)

<u>Recent EU Caselaw</u>

Recent European cases on motor insurance law include:

1. Vnuk v Zavarovalnica Triglav D. D. [2016] RTR 188
2. Fidelidade-Companhia de Seguros SA v Caisse Suisse de Compensation Case C-287/16 “Fidelidade”(Judgment: 20 July 2017)
3. Farrell v Whitty C-413/15 (Farrell 2)[C-413/15]] (Judgment: 10 October 2017)
4. Rodrigues de Andrade [C-514/16] (Judgment: 28 November 2017)
5. Torreiro v AIG Europe Ltd Case C-334/16 (Judgment: 29 December 2017)
6. Smith v Meade and Others C-122/17 (Judgment 7 August 2018, [2018 ALL ER (D) 88(Aug))
7. Fundo de Garantia Automóvel v Alina Antónia Destapado Pão Mole Juliana and Cristiana
8. Micaela Caetano Juliana C-80/17 (Judgment 4 September 2018)

The “Complete Game-Changer"[1]

Vnuk v Zavarovalnica Triglav D. D. [2016] RTR 188

C knocked off a ladder in farm barn by a reversing tractor/trailer. Did the CIO arise?

CJEU Held:

- The definition of ‘vehicle’ under the Directives is “any motor vehicle intended for travel on land but not running on rails, and any trailer, whether or not coupled”
- Such definition is unconnected with the use made of the vehicle. So, the fact that a tractor, may be used as an agricultural machine, has no effect on whether it is a ‘vehicle’ within the meaning of the Directives.
- Thus “use” of a vehicle under the Directives includes the manoeuvre of a tractor within a private farm.
- Paragraphs 56 – The EU legislation did not intend to exclude protection to injured parties “*caused by a vehicle in the course of its use, if that use is consistent with the normal function of that vehicle”.*
- Paragraph 59: “the concept of ‘use of vehicles’ in that [Article 3(1)] covers any use of a vehicle that is consistent with the normal function of that vehicle. That concept may therefore cover the manoeuvre of a tractor in the courtyard of a farm in order to bring the trailer

[1] The Department for Transport Minister, Andrew Jones, in his foreword to the Government’s Consultation upon their Technical Consultation on Motor Insurance dated December 2016, called Vnuk “a complete game-changer as far as motor insurance is concerned.”

attached to that tractor into a barn, as in the case in the main proceedings, which is a matter for the referring court to determine."

Impact of *Vnuk*

 The Vnuk judgment suggests that the compulsory insurance obligation under the European Motor Directives extends to:

- Any use of a vehicle
- That is consistent with the normal function of the vehicle
- Wherever the use takes place

Therefore the compulsory insurance obligation under the RTA 1988 is incompatible as it relates only to:

1. Use "on roads and other public places", and to
2. Use of a motor vehicle "intended or adapted for use on roads".

Estimated £1.83bn in premiums in the first year to extend UK compulsory insurance requirements in line with *Vnuk*. (see article at https://www.12kbw.co.uk/rodrigues-deandrade-v-salvador-ors/)

Should the State or the MIB now meet uninsured accidents that occur on private land and or involve motorised vehicles not normally intended for the road?

EU Cases post *Vnuk*

Torreiro v AIG Europe Ltd Case C-334/16 (judgment 29 December 2017)

T, an officer in the Spanish army, was injured whilst travelling in an all-terrain military vehicle with "Anibal" wheels which was being used on private land as part of a military exercise area.

He was refused compensation under Spanish law on the ground that the accident had not resulted from "an act classifiable as use of a vehicle". Various questions were referred to the CJEU for preliminary ruling.

The CJEU concluded that at the time of the accident the vehicle was being "used as a means of transport", and it should have been subject to compulsory insurance. Consistent with *Vnuk*, it did not matter where the vehicle was being used.

Pause for Thought

Conolly v Lancaster & MIB Manchester County Court, 4 March 2011, (HHJ Foster)

Client drove his FLT into collision with a motor vehicle on a public road.

The client's Plant insurers refused to indemnify, relying upon a policy clause which excluded cover in any case where the vehicle was subject to compulsory insurance requirements.

The MIB were joined into C's claim.

Preliminary Issue - Was this a case for compulsory insurance under the RTA 1988?

- If so, the MIB would meet the claim.
- If not, the Plant Insurers could be forced to indemnify

HELD: The FLT was not a vehicle intended or adapted for use on roads, therefore C.I. not required.

Would this case be decided differently today? (See below).

Rodrigues de Andrade [C-514/16] (judgment 28 November 2017)

C was spraying herbicides in a vineyard when, due to a landslip the stationary tractor carrying the herbicides moved, killing C.

Was this a case for compulsory insurance under the Directives?

ECJ Held: No; main points:

i. Where a vehicle is intended to be used not only as means of transport but also as a machine for carrying out work it is necessary to determine the use at the time of the accident.
ii. Compulsory insurance is only required where principal use was means of transport (see para. 40).

A reigning back of the *Vnuk* decision?

Wait a minute!!

Conolly v Lancaster & MIB Manchester County Court, 4 March 2011, (HHJ Foster)

On the journey out the FLT the principal use was to carry a large concrete block, and so the FLT was being used as a machine to carry out work.

However on the return journey (when the accident occurred) the FLT simply carried the client, and so was being used as a means of transport. (indeed in Lewington v the MIB [2017] EWHC 2848 (Comm) Mr Justice Bryan said that Conolly v Lancaster was wrongly decided (see paras 28-30))

Applying *Vnuk* and *Rodrigues de Andrade*, would the compulsory insurance obligation only arise on the return journey, but not on the journey out when the principal use was carrying the concrete block?

The UK Fallout

<u>Roadpeace v Secretary of State for Transport [2017] EWHC 2725 (Admin) [2017] EWHC 2848 (Comm)</u>

Roadpeace are a charity that provides support and campaigns for reform of the justice system.

Following *Vnuk*, Roadpeace brought JR proceedings maintaining that numerous domestic law provisions which govern compulsory motor insurance are incompatible with the MID 2009.

One of the many complaints was that the current insurance scheme wrongly restricts the requirement for insurance to the use of motor vehicles on roads or other public places.

During submissions the DfT conceded certain infringements:

i. <u>*Fidelidade v Caisse Suisse*</u> C-287/16 renders s152(2) incompatible (considered below) ie it wrongly permits an insurer to invoke its policyholder's misrepresentation or nondisclosure to avoid its statutory liability to compensate claimants (see para's 70 - 71)
ii. A motor vehicle used other than on a road or public place, in a manner consistent with the normal function of the vehicle, had to be covered by insurance against third party liability, subject to such limitations as might be agreed between insurer and insured (see para. 90)
iii. Regulation 2 of the Rights Against Insurers Regulations breaches the MID by limiting the direct right of action against motor insurers to accidents that occur in the UK (see para.100).

Roadpeace sought a Marleasing interpretation of the insurance provisions of the RTA 1988 to extend to cover to use of motor vehicles in any UK geographic location.

Mr Justice Ouseley –HELD (see para's 90-91):

1. Reading in words into domestic law, as proposed by the Claimant was against the principles enunciated in <u>*Vodaphone No 2 v HM Revenue and Custom Commissioner*</u> [2009] EWCA civ 446 .
2. The scope of the *Vnuk* judgment is unclear /Changing the law would cause chaos / EU considering legislative change post *Vnuk*.

3. However: Ouseley J noted the possibility of Franovich damages, where a breach of the Directive had in fact caused loss, referring to _Delaney v Secretary of State_ [2015].

 See para 90:

> *"The scope of the judgment in Vnuk is unclear. Did it decide that all use of a motor vehicle, whether on public and private land, in a manner consistent with the normal function of the vehicle, must be covered by insurance against liability to a third party, without limitation or exclusion, as Mr Hyam QC for RoadPeace contended? Did it simply mean that a motor vehicle used other than on a road or public place, in a manner consistent with the normal function of the vehicle, had to be covered by insurance against third party liability, subject to such limitations as might be agreed between insurer and insured, as Mr Palmer for the SST and Mr Worthington QC for the MIB contended. What the CJEU meant by normal function of the vehicle is unclear: was this the normal function of the type of vehicle, or of the particular vehicle in question? And, if types, how are they broken down into different types. Many issues are left for debate, and it would appear for domestic law or Court decision"*

Options to Consider

So how can a Claimant seek to recover damages where the UK framework falls short of the Directives?

1. A *Franovich* action?

    - A claim against the Secretary of State for failing to implement the Directives properly (as identified in *RoadPeace*).

2. Direct Effect against the MIB?

    - An action against the MIB, on the basis that they are an emanation of the state against which the provisions of the Directives have direct effect.

3. Claim against the Insurer?

Option 1 - *Franovich* action?

Sean Robert Delaney v Secretary of State for Transport (Court of Appeal) [2015] EWCA Civ 172)

The Background to the claim:

November 2006 – Delaney (C) was seriously injured whilst travelling as a passenger in SP's Mercedes, whilst out to sell cannabis

- SP’s insurers (Tradewise) avoided the policy of insurance pursuant to S. 152(2) of the RTA 1988.
- Tradewise therefore became the Art 75 insurer under the MIB Articles of Association.
- In a previous claim, HHJ Gregory and CA held that Tradewise were entitled to rely on cl 6(1)(e)(iii) (the crime exemption) of the Uninsured Drivers' Agreement 1999, so C’s claim was dismissed (See <u>*Delaney v Pickett and Tradewise*</u> [2011]).

The Argument:

- Having failed in the prior action against SP/ Tradewise, C brought a “Franovich claim” against SS.
- To succeed in a “Franovich” claim, C has to establish that:
    i. EU provisions were infringed, that were intended to confer rights on individuals;
    ii. The breach was sufficiently serious;
    iii. There was a direct causal link between the breach and the loss sustained;
- C maintained that the crime exemption clause in the UDA was not consistent with the Directives.

Result:

- Justice Jay held that “Clause 6(1)(e)(iii) was a material addition to the list of excepted categories”, and was not consistent with the specific exceptions permitted by Articles 1.4 and 2.1 of the Second Council Directive (NB now codified as Art 10 and 12 of 2009 Directive).
- CA endorsed this and agreed that the breach by the Secretary of State was sufficiently serious to establish a *Franovich* claim for damages from the state.
- Following this case, the “crime exemption” clause was removed from the subsequent UDA, issued in 2015.

<u>**Option 2 - Direct Effect against the MIB?**</u>

<u>Farrell v Whitty [2017] EUECJ C-413/15 (Farrell 2)</u>

The Background to the case:

- In 1996 Ms Farrell was gravely injured in a motor accident in the Irish Republic, whilst sat in the loading area of a van with no seating. The van was uninsured.
- Motor Insurers’ Bureau of Ireland (MIBI) rejected claim on basis that s56 of the 1961 RTA Act only applied to those parts of a vehicle equipped with seating.

Proceedings were issued against the impecunious driver, MIBI and the Irish state (in the latter case, as a Francovich action).

Case referred to ECJ on two occasions.

The first reference to ECJ (C-356/05) in 2007 confirmed that the S56 exception was inconsistent with the compulsory insurance obligation under the relevant Directive.

Subsequently in January 2008 Mr Justice Birmingham found that the MIBI was bound by the direct effect of the relevant provisions of the Directive, and judgment was given against MIBI.

MIBI appealed the judgment to the Irish Supreme Court, leading to a second referral to ECJ

On the second referral, the ECJ ruled that:

i. Arts 3 and 10 of the Directive qualify for direct effect.
ii. Art 10 (which defines the role of the compensating body that both the MIBI and the MIB discharge) is 'a task in the public interest'.
iii. MIBI has 'special powers beyond those which result from the normal rules applicable to relations between individuals', due to the express and practical effect of s 78 of the Road Traffic Act 1961 which requires every Irish motor insurer to be a member of the MIBI.

The ECJ concluded at para [42] :

> *'... provisions of a directive that are capable of having direct effect may be relied on against a private law body on which a Member State has conferred a task in the public interest, such as that inherent in the obligation imposed on the Member States by .... [now Article 10 of the Directive], and which, for that purpose, possesses, by statute, special powers, such as the power to oblige insurers carrying on motor vehicle insurance in the territory of the Member State concerned to be members of it and to fund it.'*

The Irish Supreme Court is still to make the final determination concerning the MIBI.

Lewis v. Tindale, MIB and Secretary of State for Transport [2018] EWHC 2376 (QB)

L was a pedestrian on T's private farm. T thought L was there to steal scrap metal.

L suffered serious injuries in a motor accident caused by T's 4X4.

T was uninsured. He, the MIB and Secretary of State were all named as Defendants.

The MIB maintained that it had no contingent liability to Mr Lewis pursuant to the UDA

1999, because the accident was not caused by or arising out of the use of a vehicle on a road or other public place (S. 145 of Part VI of the RTA 1988).
Firstly, and unsurprisingly, the decision confirmed that any judgment L might obtain against T was not a liability which was required to be insured, given the wording of S. 145.

Thereafter, the Hon. Mr Justice Soole was asked to determine:

a) Whether the MIB was otherwise obliged to satisfy any such judgment L may obtain, pursuant to the 2009 MID; and
b) Whether the provisions of the MID have direct effect against the MIB.

Both questions answered in the affirmative.
As to a); "the CJEU has made it unequivocal that the obligation of compulsory insurance extends to the use of vehicles on private land. This is implicit in Vnuk and explicit in subsequent decisions" (Paragraph 96).
As to b);
"the MIB is an emanation of the state for the full measure of the Article 3 obligation" (paragraph 101), and
That both in the current case, and in Farrell v Whitty [2017], "*... there has been an incomplete implementation of the obligation placed on member states by Article 3. In my judgement in each case the effect of European law is to treat the designated compensation body as if the obligation imposed on the state had been delegated to it in full" (paragraph 131).*

So in summary:

i. The provisions of the relevant Directives do have direct effect against the MIB,
ii. The MIB are obliged to satisfy judgments pursuant to the 2009 MID, despite the liability not requiring insurance pursuant to the RTA 1988.

However, the Honourable Mr Justice Soole points out that the "minimum requisite cover" is EUR 1M per victim (see paragraph 134).

<u>Option 3 – The Insurer?</u>

<u>Smith v Meade and FBD Insurance Plc, Ireland, Attorney General. C-122/17 - 2018 ALL ER (D) 88 (Aug 2018)</u>

Background:

- Another Irish involving a van with no fixed seating at the rear. Rear seat passenger sued the driver, the insurer (FBD) and the State of Ireland.
- FBD relied upon a policy clause which excluded insurance for passengers in the rear of the van (as allowed under Irish law).
- In 2009, the High Court in Ireland concluded that to conform with EU law it was necessary to disregard the exclusion clause, and treat it as void.
- FBD went on to settle Mr Smith's claim, and FBD was subrogated to the rights of Mr Smith as a result of the payment.
- FBD then appealed the HC decision arguing that the effect of the judgment was to (wrongly) create a form of direct horizontal effect against a private person (namely the insurer FBD).
- The CA referred the dispute between FBD and the State of Ireland to the ECJ.

- The ECJ decided:
   i. A national court is obliged to disapply a provision of national law that is contrary to a Directive only where the Directive is relied on against the member state, the organs of its administration, or organisations which are subject to the authority of control of the state, or have been required by the member state to perform a task in the public interest.
   ii. A Directive that had not been correctly transposed could not be relied upon in a claim by one private individual against another, as that would be tantamount to the Directive having direct effect against the private individual (in this case FBD).
   iii. FBD had complied with Irish national law, and under the terms of the policy of insurance it was not responsible for compensating the victim.
   iv. So when FBD settled Mr Smith's claim, they fulfilled an obligation which was incumbent on the Irish state.
   v. A person that has been adversely affected by the incompatibility of national law with EU law, or a person subrogated to the rights of that party can however rely on a *Franovich* action against the member state in order to obtain compensation for loss sustained.

<u>Fidelidade-Companhia de Seguros SA v Caisse Suisse de Compensation Case C-287/16 20 July 2017 (AB 36 – 40) "Fidelidade".</u>

Motorcyclist killed by D's negligent driving. D insured by F.

Under Portuguese law, D's insurance policy with F was held to be null and void due to false statements (NB: equivalent to our S152 declaration).

Deceased motorcyclists' claim settled by Swiss NGF. The Swiss NFG sought to recover their outlay from F.

Issue for the ECJ – could the policy invalidity be invoked against the innocent motorcyclist?

ECJ HELD: No, under the Directives, the nullity could not be invoked against the victim.

There is only one permitted derogation from the Directive's obligation that the insurer compensate the victim:

"*..namely where the company can prove that the victim knew the vehicle had been stolen (judgment of 1 December 2011, Churchill Insurance Company Limited and Evans, C-442/10, EU:C:2011:799, paragraph 35).*"

Comment: *Fidelidade* and *Roadpeace* provide authority that insurers can no longer rely upon a S152(2) declaration to avoid liability under S151.

Issues to Consider:

If the S152 declaration can be challenged, does this mean the insurer can no longer seek to rely upon the exemption under Clause 6(e)(ii) of the UDA (where C voluntarily entered the vehicle knowing it to be stolen)? As confirmed in *Churchill*, the avoidance of liability where C knew he was travelling in an uninsured claim is a derogation from the permitted exceptions to Article 12.

Impact for claims involving multiple insurers where one insurer has Article 75 status based on a S152(2) declaration?

Extension of Insurers Liability

Cameron v Hussain & Liverpool Victoria Insurance [2017] EWCA Civ 366

C injured in RTA. She sued the registered keeper (D1) and the insurer.

It transpired that the keeper was not the driver and insurance provided by LV was in fact held by a fictitious person.

Problem – insurer's S151 obligation only arises once a judgment is obtained against an insured person.

C sought to amend the CF to substitute D1 for "the person unknown driving vehicle registration number...". Was this permissible?

CA held YES for the following reasons:

(i)CPR -

Although the CPR generally required parties to proceedings to be named, in appropriate cases it was permissible for a Claimant to bring proceedings against an unnamed Defendant, suitably identified by an appropriate description.

(ii) Discretion -

Whether permission would be granted was a matter of discretion and would depend on whether this would further the overriding objective

(iii) Policy -

It was entirely consistent with the policy of Part VI of the RTA that an identified insurer's liability under S151 of that Act in relation to a policy of insurance, written in respect of a specific vehicle and a specific named insured, should not depend on whether, as at the date of issue of the proceedings, or thereafter, the claimant could identify the tortfeasor by name.

So why is this case important?

A claim against an insurer is significantly more cost effective than a claim against the MIB under the UtDA.

Exposes insurers to claims they previously thought would fall to the MIB.

Fear of scope for fraud – policies for fictitious drivers with purpose of claiming against an untraced driver.

NB Appeal listed to be heard by the Supreme Court on 28 November 2018.

<u>Farah v Abdullahi & Ors [2018] EWHC 738 (QB) (April 2018)</u>

Claim against unnamed driver of a Mercedes vehicle that was insured by EUI.

Following Cameron, Master Eastman permitted service of the claim against unnamed driver on EUI's solicitors.

EUI sought to set the Order aside, arguing inter alia, that the vehicle was off-cover following a S152(2) declaration. Therefore EUI argued that it had no liability under S151 to satisfy any judgment against the unnamed driver.

Held; the application was dismissed:

1. The issue was whether the claim against the unnamed party was capable of conferring a real benefit on a Claimant.

2. In this case it could, because the avoidance of the EUI policy under S152(2) could be challenged by C (relying upon *Fidelidade*, and the concession made by the Government *Roadpeace*).
3. Justice was served by permitting service on the insurer.

Conclusions

Key Messages

Recent ECJ decisions make it clear that the EU Directives deliver something very different to the UK motor insurance framework.

There creates a new legal landscape in which litigation is ripe and on-going.

The Directive requirements as to compulsory insurance are far more wide ranging than previously thought. Arguable claims involve:

i. RTA's involving plant, machinery and off road vehicles
ii. RTA's arising on private land
iii. Insurers' reliance upon S152(2) declarations

There is greater clarity over bringing *Franovich* claims against the state, where the insurance policy complies with national law, but national law fails to comply with EU law.

The scope of liability of the MIB (via direct effect) and insurers generally has been significantly extended by recent decisions.

Brexit Effect?

European Union (Withdrawal) Act 2018

Main Points

Section 1 - Repeals the European Communities Act 1972 on "exit day" (Exit day is defined as 29th March 2019 at 11pm).

Section 2 - Retains all "EU derived domestic legislation" .

Section 3 - Converts all "direct EU legislation" into domestic law. This includes all regulations, decisions and tertiary legislation, as on exit day.

Section 4 - Subject to exceptions, retains any rights, powers and liabilities which, immediately before exit day were recognised and available in domestic law by virtue of Section 2(1) of the ECA 1972.

Comment

EU law is therefore retained within our domestic law, but not as a living body of law. It is

preserved "frozen" as at 29th of March 2019. So future EU developments of these retained laws are excluded.

<u>Remedies?</u>

- Remedies to give full effect to EU law are either abolished or seriously curtailed.
- The Act removes, with some very limited exceptions, any right to *Franovich* damages (See Schedule 1, para. 4).
- However, there is a two year grace period. In particular *Franovich* actions can be commenced up to 29th March 2021, but only in respect of claims which accrue before the exit day (Schedule 8 Para. 39(1)). After that, it will be back to the position as it was before Franovich was decided in 1991.
- Section 4(2)(b) - prevents any rights arising under an EU directive, except where the right has already been recognised by the European court or the UK courts in a case decided before the exit day. So direct effect rights under the directives will not exist, save where the right has previously been recognised by either the UK or EU courts.

<u>Supremacy of EU law?</u>

- Section 5(1) - This principal will not apply to any enactment or rule passed after exit day.
- Post exit day, UK law will therefore trump retained EU law.

<u>CJEU?</u>

- Section 6 (1)(b) - The UK courts cannot refer matters to the CJEU after exit day.
- Section 6 (3) - UK courts are not bound by any decisions made by the EU after exit day, the weight of such decisions will be a matter of discretionary consideration.
- Section 6 (5) - Past CJEU decisions on retained EU law will be binding on all courts below the Supreme Court/High Court Justiciary Court.

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