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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY CONAL MORGAN (A MINOR) BY HIS GRANDFATHER AND NEXT FRIEND, PATRICK RYAN TO APPLY FOR JUDICIAL REVIEW

Applicant

and

DEPARTMENT FOR INFRASTRUCTURE

First Respondent

and

MOTOR INSURERS' BUREAU

Second Respondent

and

SECRETARY OF STATE FOR TRANSPORT

Notice Party

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Mr R Lavery KC with Mr C Fegan (instructed by McIvor Farrell Solicitors) for the Applicant
Dr T McGleenan KC with Mr Phillip McAteer (instructed by the Departmental Solicitor) for the first Respondent and (instructed by the Crown Solicitor's Office) for the Notice Party
Mr P McLaughlin KC with Mr C Coyle (instructed by Clyde & Co, Solicitors) for the second Respondent

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ROONEY J

Introduction

[1] The background to these proceedings is that on 22 August 2011, the minor applicant who was only three months old, suffered personal injuries when an

unidentified vehicle driven by an untraced driver collided with the applicant's pram as it was being pushed by the applicant's mother.

[2] Following the accident, the applicant's mother, on behalf of the applicant, brought a claim for compensation under the terms of the Untraced Drivers' Agreement of 1 June 2004, ("the 2004 Agreement") as between the Motor Insurers' Bureau (MIB) and the Department for Infrastructure ("DfI") being the current successor to the Department of the Environment ("DoE").

[3] The MIB investigated the claim and determined an amount of compensation further to clause 7 of the 2004 Agreement. The initial determination was rejected by the applicant's solicitor who stated that, following an opinion from counsel, the minor applicant's injuries attracted a valuation at £1,500. On 11 October 2018, the MIB made an offer of compensation at £1,500.

[4] The applicant's solicitors indicated to the MIB that, whilst the proposed figure of £1,500 was acceptable, the said offer of compensation required approval by a judge and that, if approved, the monies should be paid into the Court Funds Office. The applicant's solicitor also requested payment of costs on the applicable county court scales.

[5] The applicant claims that the second respondent failed or refused to allow the offer of compensation to be approved by a judge, or to have the sum paid into court or to set up a trust pursuant to clause 25 of the 2004 Agreement. Further, it is claimed that the second respondent insisted that compensation be paid directly to the applicant's mother. Solicitors for the applicant stated that since the applicant's mother's lifestyle was unstable, she should not hold compensation monies on his behalf.

[6] In 2021, judicial review proceedings were commenced. In summary, the applicant challenges the decisions of the respondents and their alleged failures to act in that they refused or failed to:

(a) Give effect or proper effect to the Directive 2009/103/EC ("the 2009 Directive") and that the arrangements under the 2004 Agreement are not adequate to transpose directly effective obligations arising under that Directive;

(b) Provide the applicant with access to the Court to have his offer of compensation approved and for the sum to be paid into the Court Funds Office;

(c) Provide the applicant with a trust for his award of compensation until his majority; and/or

(d) Required that the compensation be paid directly to the applicant's mother.

[7] The relevant grounds of challenge will be considered in more detail below. It should be noted that the judicial review proceedings were adjourned on a number of occasions to consider, inter alia, the status of the 2009 Directive; the implementation and the effects of a revised Untraced Drivers' Agreement; the impact of the European Union (Withdrawal Act) 2018 ("EUWA") and the overall impact of the Retained EU Law (Revocation and Reform) Act 2023 ("REUL").

[8] In order to complete the factual matrix, on 8 August 2024, the second respondent made a formal determination of the applicant's claim at the increased sum of £2,901.28, namely £2,500 plus interest. The second respondent states that the increased sum reflected the passage of time since the offer of compensation was made in 2018 and a review of damages for personal injuries in the interim. On 30 August 2024, the applicant's solicitors indicated that the increased figure represented sufficient compensation for the injuries sustained but refused to accept the sum on behalf of the applicant in the absence of court approval of the settlement offer and provision for holding settlement monies in Court.

[9] In light of these recent developments, the second respondent maintains that the proceedings were now academic and/or that alternative remedies exist which should be exhausted.

Grounds of challenge

[10] The grounds of challenge may be summarised as follows:

(i) Breach of EU law;

(ii) Breach of common law constitutional rights;

(iii) Breach of article 6 of the European Convention on Human Rights (ECHR);

(iv) Breach of article 14 ECHR;

[11] Each ground will be considered in more detail below.

Relief sought

[12] The applicant seeks the following primary relief:

(a) A declaration that the Untraced Drivers' Agreement (Compensation of Victims of Untraced Drivers) made between the respondents dated 1 June 2004 as amended ('2004 Agreement') is inconsistent or is being operated inconsistently with the Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles and the enforcement of the obligation to insure against such liability ("the 2009 Directive");

(b) A declaration that the 2004 Agreement is unlawful, ultra vires, and of no force or effect;

(c) An order of certiorari to quash the 2004 Agreement;

(d) An order of certiorari to quash the respondents' decisions or failures to allow the offer of compensation to be brought for approval before a court and for the compensation to be paid into the Court Funds Office.

(e) Further, or in the alternative, an order of certiorari to quash the respondents' decisions or failures not to set up a trust in favour of the applicant pursuant to clause 25 of the 2004 Agreement.

(f) A declaration pursuant to section 8(4) of the Human Rights Act 1998 that the respondents' acts or failures to act are incompatible with the applicant's rights pursuant to articles 6, 14 and/or article 1 of the First Protocol to the ECHR in breach of the respondents' duty pursuant to section 6(1) of the Human Rights Act 1998.

(g) A declaration pursuant to section 3 of the Human Rights Act 1998 that the 2004 Agreement must be construed to allow the applicant's offer of compensation to be approved and for the compensation to be paid into the Court Funds Office to ensure conformity with the applicant's rights pursuant to article 6, 14 and/or article 1 of the First Protocol of the ECHR.

(h) A declaration that the said decisions/failures to act were unlawful, ultra vires and void.

(i) An order of mandamus requiring the respondents to take all necessary steps to:

    (i) Give effect or proper effect to the 2009 Directive;

    (ii) Allow the offer of compensation to be brought before the court to be approved and for the compensation to be paid into the Court Funds Office; and/or

    (iii) Establish a Trust for the payment of the compensation until the applicant reaches majority.

Motor Insurers' Bureau

[13] The MIB is a company limited by guarantee which was incorporated under the Companies Act 1929 on 14 June 1946. It was created by the United Kingdom government for the purpose of providing compensation to victims of road traffic collisions involving uninsured or untraced drivers. The MIB obtains the funding for

this compensation from insurers who provide compulsory motor insurance. The insurers are obligated to belong to the MIB and to contribute to its funding further to Part VIII of the Road Traffic (Northern Ireland) Order 1981 ("the 1981 Order"). The MIB performs its intended function through a series of agreements in Great Britain between the Secretary of State for Transport and the MIB and in Northern Ireland between the DfI and the MIB.

[14] At a time when the application for compensation was initially filed on behalf of the applicant, the 2004 Agreement set out the procedure and principles regarding the compensatory regime for victims of untraced drivers. The 2004 Agreement has since been superseded by the Untraced Drivers' Agreement 2024 ("the 2024 Agreement") which came into force on 1 January 2024 in relation to accidents occurring after this date.

EU Law and the 2009 Directive

[15] The modern origins of the MIB agreements are found in EU Directives which, among other things, require Member States to establish compensation bodies for the victims of uninsured and untraced drivers. EEC Directive 72/166/EEC ("the First Council Directive"), inter alia, required member states to ensure that civil liability in respect of the use of motor vehicles was covered by insurance. (see Article 3(1)). EEC Directive 84/5/EEC ("the Second Council Directive") required member states to set up a body to provide compensation for damage to property and persons caused by an unidentified vehicle/unidentified driver. (see Article 1(4)). The United Kingdom sought to implement the requirements of Article 1(4) by means of the Untraced Drivers' Agreements with the MIB. The 2009 Directive is a consolidating EU Directive as set out in its Recitals. The provisions of the 2009 Directive which are relevant to these proceedings are Article 3, which provides for the compulsory insurance of vehicles and Article 10, which requires Member States to set up or authorise a body to provide compensation for damage to property or personal injuries caused by vehicles driven by an unidentified or uninsured person.

[16] In *Evans v the Secretary of State for the Environment, Transport and the Regions* (Case C-63/01), the Court of Justice of the European Communities (now the Court of Justice of the European Union (CJEU)) held that the procedural arrangements under the MIB agreements at that time were sufficient to provide protection to victims under the Second Council Directive, which considered the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles.

[17] The CJEU ruled that the UK's obligation under the Directive was to set up and maintain a system to provide compensation to victims of injury caused by untraced drivers "equivalent to, and as effective as, that available to persons injured by identified and insured vehicles." (see para 27).

[18] This wording incorporates two important Community law principles which are explained further in the judgment at para 45:

> "It is settled case law that in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights with individuals derived from community law, provided, however, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness)."

[19] The principles of equivalence and effectiveness as considered by the CJEU in *Evans* and which are relevant to the facts of this case will be considered in more detail below.

[20] The primary source underpinning the MIB's role is found in Article 10 of the 2009 Directive which states:

> "(1) 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…
>
> (4) Each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by the body, without prejudice to any other practice which is more favourable to the victim."

[21] The 2009 Directive does not contain any express reference to the status of minors. The applicant contends that the 2009 Directive refers to access to the courts within Article 22 and paras 37-39 of the Recitals. The respondents submit that the 2009 Directive does not contain any reference to an obligation on Member States to ensure access to the courts. Rather, the said provisions relate to the processing of claims by insurers, the appointment and powers/responsibilities of representatives of insurers and interest which may be payable on compensation in certain circumstances.

Status of Directive 2009/103/EC

[22] During the continuation of these protracted proceedings, a major issue was raised regarding the status of the 2009 Directive within UK domestic law in light of the EUWA 2018 which repealed the European Communities Act 1972 ("ECA 1972").

[23] The EUWA 2018 provided for the continuation in force of all "EU-derived domestic legislation", which is principally delegated legislation passed under the ECA 1972 to implement directives. It also converted all "direct EU legislation", being EU regulations, decisions and tertiary legislation, into domestic law and rights to remain in domestic law after 31 December 2020 ("IP Completion Day") which was the end of the implementation period during which EU law applied in the UK.

[24] The parties are now agreed, following the recent decision of the Supreme Court in *Lipton v BA City Flyer Ltd* [2024] UKSC 24, that the key date for determining the applicable law is when the cause of action accrued. On the facts of this case, the cause of action accrued in 2011.

[25] Accordingly, for the reasons summarised below, it is no longer necessary to determine the status of the 2009 Directive within UK domestic law nor to consider the implications of the amendments to the EUWA 2018 by the REUL.

[26] Section 1 EUWA 2018 provides for the repeal of the ECA 1972 on "exit day" defined in section 20(1) as 29 March 2019. The European Union (Withdrawal) Act 2018 (Exit Day) Amendment (No.3) Regulations 2019 amended the definition of exit day to 31 January 2020. The European (Withdrawal) Act 2020 ("EUWA 2020") introduced the concept of the implementation period after Brexit on 31 January 2020, to the "IP completion date" on 31 December 2020, which would effectively conclude the implementation period.

[27] Section 2 EUWA 2018 provided that "EU-Derived Domestic Legislation" would continue to have effect after IP completion day, subject to certain exceptions in section 5 and Schedule 1.

[28] Section 4 EUWA 2018, provided as follows:

> "(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day—
>
> (a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and
>
> (b) are enforced, allowed and followed accordingly,

> continue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly)."

[29] Section 4(2)(b) provides that the said rights, powers, liabilities, obligations, restrictions, remedies or procedures which arise under an EU Directive will only apply if they are:

> "Of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before IP completion day (whether or not as an essential part of the decision in the case)."

[30] Section 4 EUWA 2018, has since been repealed by the REUL, although the provisions remain applicable to the issue in this case.

[31] The provisions of the 2009 Directive that are relevant to these proceedings are:

(a) Article 3, which provides for compulsory insurance of vehicles; and

(b) Article 10, which requires Member States to set up or authorise a body to provide compensation for damage to property or personal injuries caused by an unidentified or uninsured vehicle.

[32] It has been agreed by the parties that the direct effect of Articles 3 and 10 of the 2009 Directive were recognised by the courts prior to IP completion day. Therefore, the rights arising from Articles 3 and 10 of the 2009 Directive, continue to be recognised and available to the applicant on the facts of this case. The issue in dispute relates to the extent of the said rights.

[33] Section 5(4) EUWA provides that the Charter of Fundamental Rights is not part of domestic law on or after IP completion day. However, section 5(4) does not affect the retention in domestic law after IP completion day of "any fundamental rights or principles which exist irrespective of the Charter (section 5(5)).

[34] Relevant to the facts of this case, section 6(3) provides as follows:

> "(3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it—
>
> (a) in accordance with any retained case law and any retained general principles of EU law, and

(b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences."

Key issues for Determination

(a) Alleged Breach of EU Law

[35] In light of the above, the key issues for determination in this case in respect of EU law are as follows:

(i) The precise nature and extent of the rights under Articles 3 and 10 of the 2009 Directive and, more particularly, whether the said Articles encompass a right to court approval of an award of compensation to a minor under the 2004 Agreement and/or a right to investment of any such award by the court; and

(ii) Whether the principles of equivalence and effectiveness are satisfied by the 2004 Agreement.

The principles of Equivalence and Effectiveness

[36] The principle of equivalence requires Member States to ensure that domestic procedural rules laid down to safeguard rights deriving from EU law are not less favourable to those governing similar domestic procedures. In essence, the principle of equivalence ensures that the procedural mechanisms available under domestic law for the enforcement of EU rights and obligations are not less favourable than those available for the enforcement of similar rights and obligations arising under domestic law. The principle does not impose an obligation of parity either at the level of national law, nor across the EU.

[37] The principle of effectiveness requires Member States to ensure that national procedures for giving effect to EU law do not render the enforcement of EU rights impossible or excessively difficult, contrary to the principle of proportionality. The question is, therefore, whether national procedural rules hinder the operation of EU law to a degree that cannot be justified by a Member State.

[38] Recent examples of the operation of the principles of equivalence and effectiveness can be found in the decisions of the UK Supreme Court in *Totel Ltd v Revenue and Customs Commissioners* [2018] UKSC 44 and *PSNI v Agnew and others* [2023] UKSC 33. The following key principles have been reaffirmed.

[39] Firstly, whilst it is a general principle of EU law that Member States have autonomy in setting procedural rules governing how EU rights are to be secured and enforced in domestic law, there are two qualifications to that procedural autonomy, namely the principle of effectiveness and the principle of equivalence (see *PSNI v Agnew* at para [50]).

[40] Secondly, referring to the decision of the CJEU in *Levez v TH Jennings (Harlow Pools) Ltd* (C-326/96) at para [44], the Supreme Court in *Agnew* emphasised that "whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts." (see Agnew at para [51]).

[41] Thirdly, the Supreme Court in *Agnew* stressed that the exercise of an EU right must not be subjected to stricter conditions than the exercise of a corresponding right conferred by national law alone. (see *Agnew* at para [54]).

[42] Fourthly, the Supreme Court in *Agnew* noted two limitations in respect of the principle of equivalence. First, there may not be a similar action available in domestic proceedings as an appropriate comparator. In this regard, national courts should avoid superficial similarity as being sufficient. For example, it is insufficient to say that two claims arise in the same area of law (see *Agnew* at para [56]). Secondly, the principle of equivalence is not to be interpreted as requiring Member States to extend their most favourable rules to all actions brought in a particular area of law (see *Agnew* para [57]).

[43] Fifthly, as stated by the Supreme Court in *Agnew* at para [68]:

> "[68] …the CJEU has repeatedly stated that it is for the courts of each Member State to determine whether its national procedures for claims based on EU law fall foul of the principle of equivalence, both by identifying what, if any, procedures for domestic law claims are true comparators for that purpose, and in order to decide whether the procedure for the EU law claim is less favourable than that available in relation to a truly comparable domestic claim. This is because the national court is best placed, from its experience and supervision of those national procedures, to carry out the requisite analysis."

[44] It is therefore clear, in light of the analysis above, that when conducting a comparison based on the principle of equivalence, the domestic court must focus on the purpose and essential characteristics of the allegedly similar procedures in order to assess whether they are "true comparators."

[45] In *Evans v Secretary of State for the Environment, Transport and the Regions and MIB* (C-63/01); [2003] All ER(D) 84 the CJEU considered the principles of equivalence and effectiveness in the context of the relevant MIB agreements. In its preliminary observations at para [27], the CJEU stated as follows:

> "[27] It is thus clear that the Community legislature's intention was to entitle victims of damage or injury caused by unidentified or insufficiently insured vehicles to protection equivalent to, and as effective as, that available to persons injured by identified and insured vehicles."

[46] However, the CJEU went further and stated as follows:

> "[28] It must nevertheless be emphasised that, to meet the requirements of the Second Directive, the body responsible for awarding compensation does not necessarily have to be placed, as far as civil liability is concerned, on the same footing as a defendant such as the driver of an identified and sufficiently insured vehicle."

Relevant case law

[47] During the course of oral submissions, the court was directed to several relevant authorities which I have taken into consideration in reaching my decision on the issues raised in these proceedings. I took the view that the following authorities required particular analysis, namely *Evans v Secretary of State for Environment, Transport and the Regions (CJEU) (Case-63/01); Farrell v Whitty* (No.2) Case-413/15); *R (Roadpeace Ltd) v Secretary of State for Transport* [2017] EWHC 2725; *Lewis v Tindale* [2019] EWCA Civ 909. I will consider each case seriatim.

[48] Firstly, *Evans v Secretary of State for Environment, Transport and the Regions* (CJEU) (Case-63/01) (hereinafter 'Evans'). Mr Evans was injured in 1991 by a vehicle driven by an untraced driver. In 1992, he made a claim against the MIB under the Untraced Drivers Agreement 1972. In 1996, the MIB awarded Evans £50,000. Mr Evans referred the dispute to arbitration under the 1972 Agreement. The arbitrator considered that Mr Evans' damages on a full liability basis would have been £58,286 but by reason of his contributory negligence assessed at 20%, reduced the award to £46,629. The arbitrator also considered that Mr Evans had been dishonest and ordered him to pay the fees of the arbitration. The arbitrator did not award him interest on the damages. The MIB paid Mr Evans the sum of £46,629 together with his representative's costs of £770 and an ex gratia payment of £150 plus VAT.

[49] In December 1996, Mr Evans was granted leave to appeal to the High Court against the arbitrator's refusal to award him interest. His appeal was dismissed.

[50] In September 1998, the Court of Appeal dismissed a further appeal. In January 1999, the House of Lords refused his application for leave to appeal.

[51] On 25 February 1999, Mr Evans commenced proceedings against the Secretary of State for the Environment, Transport and the Regions, who was responsible for the implementation of the First Directive (72/166) and the Second Directive (84/5) by the United Kingdom. Mr Evans submitted, in essence, that the United Kingdom had failed to implement the Second Directive or had done so inadequately in the following respects:

(a) The MIB Agreement made no provision for payment of interest on the damages awarded;

(b) The MIB Agreement failed to make provision for payment of costs incurred by victims in proceedings for compensation;

(c) Access to court by victims was insufficient in that they had a full right of appeal against the determination of the MIB only to an arbitrator and not to a court; and

(d) The United Kingdom had not duly authorised a body to provide compensation for victims of untraced drivers, as required by the Second Directive, since the MIB Agreement did not create rights which such victims can enforce directly against the MIB.

[52] The High Court decided to stay the proceedings and referred a number of questions for preliminary ruling to the Court of Justice of the European Communities (CJEU) under Article 234 EC (formerly Article 177 of the EEC Treaty).

[53] The relevant questions referred to the CJEU for a preliminary ruling are set out in para [19] of its judgment, which included, inter alia, the proper interpretation of Article 1(4) of the Second Motor Insurance Directive, and whether, if the victim's application for compensation is determined by a body that is not a court, must he have a full right to appeal against that determination to a court, on both the facts and the law, rather than an appeal to an independent arbitrator.

[54] Pausing for a moment, the respondents in this case draw the court's attention to the fact that Article 1(4) of the Second Directive equates precisely to Article 10 of the 2009 Directive, which as stated, is a consolidating Directive.

[55] In its preliminary observations at paras [21]-[28], the CJEU stated that it was appropriate to consider the nature of the system established by the Second Directive for the benefit of victims of damage or injury caused by unidentified or insufficiently insured vehicles. At para [22], the CJEU stated as follows:

> "22. In contrast to victims of damage or injury caused by an identified vehicle, victims injured by an unidentified vehicle are normally unable to enforce their claims in legal proceedings for compensation because of

> the impossibility of identifying the person against whom proceedings should be brought."

[56] In respect of the stated mischief, in the context of the relevant MIB agreements, the CJEU emphasised the principles of equivalence and effectiveness. At para [27], the CJEU stated that it was the intention of the Second Directive to ensure that victims who sustained injury or damage caused by unidentified or insufficiently insured vehicles had protection equivalent to, and as effective as, that available to persons injured by identified and insured vehicles. However, at para [28] the CJEU went further and stated that in order to fulfil the requirements of the Second Directive, the body responsible for awarding compensation does not necessarily have to be placed, as far as civil liability is concerned, on the same footing as an identified defendant of a sufficiently insured vehicle.

[57] It is significant from the above that the CJEU, in its consideration of victims of unidentified or insufficiently insured vehicles considered the correct comparator to be persons injured by identified and insured vehicles. Significantly, the CJEU did not specify that the correct comparator was that which occurs in another state.

[58] The CJEU held, firstly, that a responsible body must be regarded as authorised by a member state within the meaning of Article 1(4) of the Directive where its obligation to provide compensation to victims derived from an agreement concluded between that body and a public authority of the member state and where victims might apply to that body for the compensation guaranteed to them by the Directive. The fact that the source of the obligation was in an agreement concluded between the body and the public authority was immaterial.

[59] Secondly, the CJEU held that the procedural arrangements of the MIB were sufficient to provide the protection to which victims were entitled under the Directive, except to the extent that the procedure had to guarantee that, both in dealings with the MIB and before the arbitrator, victims were made aware of, and given the opportunity to comment on, any matter that might be used against them.

[60] Thirdly, the CJEU observed that, although the MIB is not a court, it is nonetheless required to determine the amount of the compensation under the same conditions in which a court would determine an amount of damages from a person identified as responsible.

[61] Fourthly, with reference to the particular facts in *Evans*, although the Directive contained no provision concerning interest, compensation for the purposes of the Directive was intended, so far as possible, to provide restitution for the victim of an accident, taking account of factors, such as the effluxion of time, which might reduce its value. However, in order to compensate for the loss suffered by victims as a result of the effluxion of time, member states were free to choose between awarding interest or paying compensation in the form of aggregate sums.

[62] Fifthly, again with specific reference to the facts in *Evans*, compensation paid by the authorised body was not required to include reimbursement of the costs incurred by victims in connection with the processing of their application, save to the extent to which such reimbursement was necessary to safeguard the rights derived by victims from the Directive in conformity with the principles of equivalence and effectiveness. The Directive contained no provision concerning the reimbursement of costs. Reimbursement of costs was a procedural matter. Therefore, in the absence of community rules governing the matter, it is for the domestic legal system of each member state to lay down the detailed procedural rules.

[63] It is worthwhile pausing at this juncture to note that under the Untraced Drivers Agreement 2017 which applies to England & Wales, the MIB must now take into account interest and legal costs when issuing an award.

[64] The respondents submit that the only question considered by the CJEU in *Evans*, which is of relevance to the present proceedings, is whether the fact that the MIB agreement only permits access to arbitration, and not to the courts, is contrary to the principles of equivalence and effectiveness. In this regard, the CJEU in *Evans* ultimately concluded that the Directive did not require that compensation disputes must be resolved by a court and that the MIB agreements for unidentified and uninsured drivers complied with the principles of effectiveness and equivalence, notwithstanding the choice of arbitration, with subsequent review by a Court, as the applicable dispute resolution mechanism. As stated by the CJEU at paras [54] to [56]:

> "[54] In the light of all the foregoing considerations, it must be held that the procedural arrangements laid down by the national law in question do not render it practically impossible or excessively difficult to exercise the right to compensation conferred on victims of damage or injury caused by unidentified or insufficiently insured vehicles by the Second Directive and thus comply with the principle of effectiveness referred to in paragraphs 45 and 46 of this judgment.
>
> [55] In view of the objective pursued by the Second Directive which, as stated in paragraphs 21 to 28 of this judgment, is to provide a simple mechanism for compensating victims, it further appears that the cumulative effect of the possibilities of review available under the procedure established in the United Kingdom and also the practical advantages associated with that procedure confer on victims of damage or injury caused by unidentified or insufficiently insured vehicles a level of

> protection corresponding to that provided for by that directive.
>
> [56] Nevertheless, it is important to stress that the procedure established must guarantee that, both in dealings with the MIB and before the arbitrator, victims are made aware of any matter that might be used against them and have an opportunity to submit their comments thereon."

[65] The respondents accept that the CJEU decision in *Evans* does not cover every issue that could potentially arise under the MIB Agreement. As stated by Mr Lavery KC, on behalf of the applicant, *Evans* does not consider the failure under the 2004 Agreement to refer awards made to minors for court approval. However, the decision in *Evans* does confirm that a national court, in its consideration as to whether a provision of the Untraced Drivers Agreement is compatible with the 2009 Directive, the principles of equivalence and effectiveness must still be applied.

[66] The next case for consideration is the decision of the CJEU in *Farrell v Whitty* (No.2) (Case-413/15). In this case, the claimant suffered personal injuries in a road traffic accident in the Republic of Ireland when she was a passenger in a van, seated on the floor in the rear compartment, which had been neither been designed nor constructed to carry passengers. Since the driver was not insured, the claimant sought compensation from the Motor Insurers' Bureau of Ireland ("the MIBI") which refused to pay compensation on the ground that under Irish law there was no insurance obligation covering passengers travelling in part of a commercial vehicle not fitted with seats. The claimant initiated legal proceedings against the driver, the Minister for the Environment (Ireland), the Attorney General and MIBI, claiming, inter alia, that the restriction on compensation provided for in Irish law was contrary to the directly effective rights to compensation contained in the First and Third Directives and hence there had been ineffective transposition of the Directives. The High Court, Ireland, then made a reference to the CJEU for a preliminary ruling.

[67] In *Farrell v Whitty "Farrell 1"* (Case C-356-05), the CJEU held that, Article 1 of the Third Directive was to be interpreted as precluding national legislation whereby compulsory motor vehicle liability insurance did not cover personal injury liability to persons travelling in part of the motor vehicle which had not been designed and constructed with seating accommodation for passengers. Significantly, Article 1 of the Third Directive produced direct effect and, accordingly, rights were conferred on individuals which could be directly relied upon before the national courts. However, it was held that it was for a national court to determine whether Article 1 could be relied upon against bodies such as the MIBI.

[68] On referral back to the High Court, Ireland, the court held that MIBI was an emanation of the state and that, consequently, the complainant was entitled to claim compensation from the MIBI. The MIBI then brought an appeal against that

judgment, contending that it was not an emanation of the state and that, accordingly, the provisions of the Directive, even those having direct effect, which had not been transposed into national law, could not be relied upon.

[69] In *Farrell v Whitty (No.2),* the CJEU stated that the provisions of a Directive which 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. In this case, the provisions of the Third Directive were unconditional and sufficiently precise and consequently could be relied upon against an organisation such as the MIBI.

[70] The next case for consideration is the decision of Ouseley J in *R (Roadpeace Ltd) v Secretary of State for Transport* [2017] EWHC 2725 ("*Roadpeace*"). The claimant was a national charity which provided support for road crash victims and sought to improve road safety. Judicial review proceedings were instigated to challenge the lawfulness of various statutory and other provisions governing compulsory insurance in respect of the use of motor vehicles and for the provision of compensation in respect of injury and damage caused by uninsured or unidentified drivers. In essence, it was claimed that the said provisions did not comply with Council Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles and the enforcement of the application to ensure against such liability.

[71] Many of the issues raised in the decision in *Roadpeace* are not relevant to the matters for determination in this case. However, one relevant issue in *Roadpeace* related to the compatibility of the 2003 Untraced Drivers' Agreement and the 2017 Untraced Drivers' Agreement in England & Wales with the 2009 Directive. As stated above, the 2003 Untraced Drivers' Agreement in England & Wales contained materially equivalent provisions to the 2004 Untraced Drivers' Agreement in this jurisdiction.

[72] In *Roadpeace*, the claimant contended that the 2003 and 2017 Untraced Drivers' Agreements were unlawful because they fell short of the protection required to be given to minors and protected persons involved in seeking compensation from the MIB equivalent to the protection they would receive in civil litigation under the Civil Procedure Rules (CPR) in England & Wales.

[73] The relevant issue, namely safeguards for the settlement of claims by minors and protected parties, were considered by Ouseley J at paras [101] to [113] in his judgment. Under the 2003 Agreement, following an investigation and a report by the MIB, any award to the applicant must be equivalent to the amount which a court would have awarded if the applicant had brought successful proceedings to enforce a claim for general and special damages against the unidentified person (Clause 8). In calculating that sum, the MIB is required to adopt the same method that a court would adopt in its assessment.

[74] In paras [103] and [104], Ouseley J considered the new provision introduced in Clause 14 of the 2017 Untraced Drivers' Agreement for the approval of claims made by minors and protected parties. The court summary of the revised Clause 14 is as follows:

> "103. The 2017 UtDA in clause 14 introduced provision for the approval of claims made by minors and protected parties. Where the MIB received unconditional acceptance of its proposed award or there was no unconditional acceptance or notice of appeal within the time limit but either the claimant was under the age of 18 in England and Wales or 16 in Scotland or the MIB decided from the evidence that the claimant lacked capacity within the meaning of the Mental Capacity Act 2005 to conduct and/or make decisions in relation to his claim: [the] "MIB shall, rather than being obliged to pay the award in accordance with the time limits provided by clause 13, apply to the Secretary of State for the appointment to the arbitrator and the provisions of clause 18 shall apply." The arbitrator's principal function by clause 14(2) is to determine whether the proposed award represents a fair settlement for the claimants. Before seeking approval of the award by the arbitrator, the MIB must request certain information from the claimant and provide any such information to the arbitrator. This includes for example, in relation to a person who lacks capacity, the identity of anyone who holds a power of attorney, and in relation to a minor, the name of any person who has parental responsibility for the claimant. Where the claimant has a personal injury trust, the claimant's suggestions as to how the award should be paid, should also be sought.
>
> 104. There are then provisions in relation to the other material to be placed before the arbitrator which includes the proposed award, evidence to show the claimant wishes to accept it and information provided by the claimant. The claimant has to provide a copy of any advice from counsel in respect of the adequacy of the award, which is not to be disclosed to the MIB without the claimant's written permission. If the arbitrator approves the award, he specifies who is "the appropriate representative" to whom the MIB shall pay the award, or the lump sum element where periodical payments are also involved. The "appropriate representative" is a person designated by the arbitrator "as a most suitable

> personal body to receive and administer the award on the claimant's behalf." In certain circumstances, this may be the claimant himself. If no appropriate representative is available, the MIB can be directed to pay the costs of setting up a trust. If the arbitrator is unable to approve and/or the form of the award on the information and documentation available to him, he may ask MIB to consider the claim further giving directions in that respect and seek counsel's advice and set a date for an oral hearing if he wishes to see the Claimant or anyone else in person. If he refuses to approve the award the claim will continue and the MIB must either decide to alter the terms of the proposed award and go through the same process or maintain his original proposal in which case it goes by way of an appeal to a different arbitrator. The arbitrator's decision is to be written and final when they approve the award.'"

[75] The claimant, *Roadpeace Ltd,* advanced two arguments. Firstly, the protection for minors under Clause 14 of the 2017 Untraced Drivers' Agreement did not exist under the 2003 Untraced Drivers' Agreement. Secondly, the new provision under Clause 14 still does not provide an equivalent protection for minors to that which can be found under CPR Pt 21. Drawing from the decision in *Dunhill v Burgin* [2014] 1 WLR 933, the rationale for those provisions under CPR Pt 21 was that children and protected parties require protection, not only from themselves, but also from legal advisers who might lack the necessary skill or experience, leading to a settlement less than the valuation of the claim. It was argued that an opinion of counsel was almost always required to assist the court approving a settlement. Without such an opinion, neither the court nor arbitrator could assess whether a minor claimant had been properly advised.

[76] Counsel for the defendants argued that there were marked differences between the context in which the CPR and the Untraced Drivers' Agreements operated. A claim against the MIB under the Untraced Drivers' Agreements did not involve adversarial litigation comparable to that to which the CPR applied. There is no defendant, nor is the MIB in a position equivalent to a defendant. Under the 2003 Untraced Drivers' Agreement, if an applicant did not accept the MIB decision, an independent Queen's Counsel would determine the award, acting as an arbitrator. The amendment under the 2017 Untraced Drivers' Agreement makes that process mandatory, and the arbitration is inquisitorial rather than adversarial or negotiated. Written advice from counsel was not mandatory because the arbitrator would be independent and experienced in that area. If the arbitrator considered, however, that full advice was required, he could make such a request.

[77] In his consideration of whether the arrangements under the 2003 Agreement for approval of offers for minors complied with the principles of equivalence and

effectiveness, Ouseley J was not convinced that the CPR represented the correct measure for equivalence. He stated at para [110]:

> "But even if one compares a claim in respect of an unidentified driver with a claim in respect of an identified, insured driver, which would be governed by the CPR, the differences are quite significant, in particular the absence of a defendant in an adversarial process. The MIB is under a duty to investigate the claim, and to determine the award under the same conditions as those which would apply where the claim is made against an identified driver. No such duty applies to a defendant under the CPR. The arbitrator has the power to require counsel's advice. There is no bar on legal advice or representation for a minor, and they would have an authorised person to assist. Clause 14 represents a careful provision for minors and protected parties."

[78] The paragraph highlighted above is Ouseley J's position in respect of the 2017 Untraced Drivers' Agreement. In respect of the 2003 Untraced Drivers' Agreement, he stated as follows:

> "111. So far as the position in respect of accidents occurring before 1 March 2017 is concerned, I have concluded that the provisions *just about satisfy the principles*. This is because of the duties on the MIB, the independent arbitrator and the process of onward review under the Arbitration Act. This has been a long-standing process in respect of which there has been, so far as I am aware, no complaint by the European Commission; nor have I seen evidence of real problems on the part of minor or protected claimants in obtaining satisfactory awards under the UtDA, which would not have been found in a CPR claim against an insured driver. In any event I could not order the dis-application of the agreement in relation to accidents before 1 March 2017; I could only make a declaration that the defendant or agreement had failed to fulfil the duty imposed by the Directive." (My emphasis)

[79] It is clear that the 2003 Agreement in England & Wales and the 2004 Agreement in this jurisdiction do not provide for a compulsory approval mechanism for awards made to minors. Although Ouseley J did not have before him "any evidence of real problems on the part of minor or protected claimants in obtaining satisfactory awards under the UtDA", he did not rule out the possibility of problems arising on the facts of a particular case.

[80] Ouseley J did not condemn the 2003 Agreement because of an absence of a compulsory referral to an arbitrator for approval of a minor's award. On the basis of the generic challenge raised in *Roadpeace*, he was not prepared to make a declaration that the agreement had failed to fulfil the duty imposed by the Directive. Although Ouseley J did not flatly condemn the 2003 Untraced Drivers' Agreement in respect of a safeguard for settlement of claims by minors and protected parties, the door was not firmly closed on a challenge based on particular circumstances. In *Evans*, I remind myself that the CJEU did state that the identified and insured driver could be the correct comparator.

[81] In *Lewis v Tindale* [2019] EWCA Civ 909, the Court of Appeal held that the UK government had failed to fulfil its obligation under Article 3 of the 2009 Directive to ensure that civil liability in respect of the use of motor vehicles on private land was the subject of a scheme of compulsory motor insurance. In this case, the claimant whilst walking on private land, had been seriously injured by the first defendant who was driving an uninsured vehicle. The decision is also significant in that it was held that the government had also failed to comply with its core obligation under Article 10 of the 2009 Directive to assign responsibility for meeting the said liability to a compensation body. Article 3 of the 2009 Directive was unconditional and precise, so it was capable of having direct effect. Since Articles 3 and 10 were co-extensive, it followed that Article 10 of the 2009 Directive was also capable of having direct effect. The MIB, although a private law body, was an emanation of the state against which Article 10 could be enforced by the claimant. In this regard, the Court of Appeal applied the decision in *Farrell v Whitty*, as considered above.

The Untraced Drivers Agreement 2004

[82] The following is a summary of the provisions of the 2004 Agreement insofar as they are relevant to the facts of this case. The scope of the 2004 Agreement is considered in clause 4. The Agreement applies in the circumstances where the death of, or bodily injury to, a person or damage to any property of a person has been caused by, or arisen out of, the use of a motor vehicle on a road or other public place in Northern Ireland and it is not possible to identify the person who is, or appears to be, liable in respect of the death, injury or damage. The death, bodily injury or damage to property must occur in circumstances giving rise to liability of a kind which is required to be covered by a policy of insurance or security under Part VIII of the 1981 Order as amended.

[83] Under the heading 'Principal terms and conditions', the MIB's obligation to investigate and determine the amount of the award is specified in clauses 7-11. Pursuant to clause 7, the MIB must, at its own cost, take reasonable steps to investigate the claim made in the application for compensation. If the MIB is satisfied, after conducting a preliminary investigation, that the case is not one to which the agreement applies, the application is rejected and the applicant informed. If the application falls within the terms of the Agreement, the MIB is obliged to conduct a full investigation and as soon as reasonably practicable, having regard to

the availability of the evidence and provide a report on the applicant's claim. Where the MIB decides to make an award, it must then determine the amount of the award.

[84] Pursuant to clause 8, compensation for the death, bodily injury or damage to property is paid equivalent to the amount which a court would have awarded as general and special damages if the applicant had brought successful proceedings to enforce a claim for damages against the unidentified person. The award shall, in an appropriate case, include a sum representing interest on the compensation payable at a rate equal to that which a court would have awarded to a successful applicant. Under clause 10, the MIB shall include a contribution towards legal costs in respect of advice in making an application for compensation, a challenge to the correctness of a decision made by the MIB or the adequacy of an award offered by the MIB. Cost contributions are determined in accordance with Schedule 1.

[85] Clause 16 provides that the MIB shall give the applicant notice of a decision or determination under clause 7 in writing and, in every case, a statement of reasons for making the decision or determination.

[86] Under clause 17, where a full and final award has been made pursuant to clause 7(3) or 7(5)(b) and the applicant accepts the award, the applicant must notify the MIB. If the applicant does not notify the MIB of its acceptance and the time limit for a notice of appeal under clause 19 has expired, payment by the MIB shall discharge it from all liability under the agreement.

[87] Under clause 18, where an applicant is not willing to accept (a) a decision or determination made by the MIB under clause 7 or a part thereof, or (b) a proposal for a structured settlement or a rejection of the applicant's request for a provisional award under clause 17, the applicant shall issue a notice of appeal in writing within a period of six weeks from the date specified in clause 19(1). Clause 19(2) provides that the notice of appeal shall state the relevant grounds, contain the applicant's observations on the MIB's decision, provide further evidence in support of the appeal and shall contain an undertaking (subject to his rights under section 67 and 68 of the Arbitration Act 1996), that he will abide by the decision of the arbitrator made under the agreement.

[88] Once a notice of appeal has been received, the MIB shall (a) apply to the Department for the appointment of a single arbitrator, or (b) conduct a further investigation on foot of the fresh evidence supplied by the applicant (clause 20(1)). Pursuant to clause 20(2), if the only ground of appeal is that the award is insufficient, the MIB may ask the arbitrator to decide whether its award exceeds what a court would have awarded and whether the case is one in which it would make an award at all.

[89] Clause 21 deals with the appointment of an arbitrator. Significantly, if the MIB fails to apply to the Department for the appointment of an arbitrator nor conducts a further investigation on foot of fresh evidence, the applicant may apply

to the Department for the appointment of an arbitrator. Clause 21(2) provides that for the purposes of the Arbitration Act 1996, the arbitral proceedings are to be recorded as commencing on the date when the application for an arbitrator was made by the MIB or the applicant. Clause 21(3) states that the arbitrator shall be from a panel of Queen's Counsel appointed for the purpose of determining appeals under the U2004 Agreement by the Chief Justice of Northern Ireland.

[90] Clause 22 deals with the arbitration procedure. The arbitrator is to be provided with copies of the applicant's application, the MIB's decision and all statements, declarations, notices, reports, observations and transcripts of evidence made or given under the 2004 Agreement by the applicant or the MIB. The arbitrator may, if it appears necessary or expedient for the purpose of resolving any issue, ask the MIB to carry out a further investigation and to submit a written report of its findings for consideration by the arbitrator. Copies of the report should also be sent to the applicant, who may submit written observations to the arbitrator and the MIB. The arbitrator shall, after considering the written submissions, send to the applicant and the MIB, a preliminary decision letter setting out the decision the arbitrator proposes to make under Clause 23, to include his/her reasons. Within 28 days of the preliminary decision letter, the applicant and the MIB may, by written notification given to the arbitrator and copied to the other party, either (a) accept the preliminary decision; or (b) submit written observations upon the preliminary decision or the reasons, or both; or (c) request an oral hearing.

[91] If the applicant submits new evidence within any written observations, the MIB may carry out an investigation into that evidence, submit its own written observations on that evidence and, if it has not already done so, request an oral hearing.

[92] Except where an oral hearing has been requested, the arbitrator shall, in the exercise of his/her powers under section 34 of the Arbitration Act 1996, determine whether, and if so, how such evidence shall be admitted and tested. Pursuant to clause 22(7), if the applicant or the MIB request an oral hearing, any party to the hearing may be represented by a lawyer and each party shall be entitled to call witnesses and put questions to those witnesses.

[93] Pursuant to clause 23, the arbitrator, having regard to the subject matter of the proceedings, may (a) determine whether or not the case is one to which the Agreement applies; (b) remit the application to the MIB for a full investigation and a decision in accordance with the provisions of the Agreement; (c) determine whether the MIB should make an award under the Agreement and, if so, what the award should be; (d) determine such other questions as have been referred to him as he thinks fit; (e) subject to clause 24 and clause 23(4) order that the costs of the proceedings shall be paid by one party or allocated between the parties in such proportions as he thinks fit.

[94] Regarding costs, under clause 23(4) where an oral hearing has taken place at the request of the applicant, and an arbitrator is satisfied that it was unnecessary and the matter could have been decided on the basis of written submissions referred to in clause 22(1) and (2), the arbitrator shall take that into account when making an order for costs. In a case where it appears to the arbitrator that, having regard to all the surrounding circumstances, there were no reasonable grounds for making the appeal or bringing the question before him, an arbitrator may, in his discretion, order the applicant or his solicitor to reimburse the MIB the fee that was paid to the arbitrator or any part thereof. Pursuant to clause 24(4), where there is an oral hearing and the applicant secures an award of compensation greater than that previously offered, then (unless the arbitrator orders otherwise), the arbitrator shall make a contribution of £500 per half day towards the costs incurred by the applicant in respect of representation by a Solicitor or Barrister.

[95] Clause 25 deals with applicants under a disability and provides as follows:

> "25(1) If in any case it appears to MIB that, by reason of the applicant being a minor or of any other circumstances affecting his capacity to manage his affairs, it would be in the applicant's interest that all or some part of the award should be administered for him by an appropriate representative, MIB may establish for that purpose a trust of the whole or part of the award (such trust to take effect for such period under the statutory provisions as appears to MIB to be appropriate in the circumstances of the case) or, as the case may be, initiate or cause any other person to initiate the proceedings necessary to have the award administered by an appropriate representative and otherwise cause any amount payable under the award to be paid to and administered by the appropriate representative.
>
> (2) In this clause "appropriate representative" means the Office of Care and Protection."

[96] Clauses 26 and 27 deal with an accelerated procedure for settlement of claims. After a preliminary decision has been made under clause 7, the MIB can make a settlement offer to the applicant rather than initiate a full investigation. The applicant may accept or reject a settlement offer under clause 26. If rejected, the MIB proceeds to investigate the case and make a final decision which is notified under clause 16. Clause 28 covers the referral of disputes to an arbitrator and will be considered in more detail below together with the impact of the Contracts (Right of Third Parties Act 1999 (clause 31) and clause 32 (enforcement of the Agreement through the courts.

The applicant's submissions

(a) Court approval

[97] The applicant asserts that there is a common law right that approval of the court is required in cases where a minor claimant has received an offer to settle a claim (see *Dunhill v Burgin* [2014] UKSC 18; *Dietz v Lennig Chemicals Ltd* [1969] 1 AC 170). The applicant maintains that the purpose of the rule was to impose an external check on the proprietary of any proposed settlement. As stated by Lady Hale in *Dunhill* at para [33] "…the policy underlying the Civil Procedure Rules is clear; that children and protected parties require and deserve protection, not only from themselves but also from their legal advisers. The notes to Order 80 in the last (1999) edition of the *Supreme Court Practice* stated that among the objects of the compromise rule was 'to protect minors and patients from any lack of skill or experience of the legal advisers which might lead to a settlement of a money claim far less than it is worth.' A sentiment which has been carried forward into the current edition of Civil Procedure."

[98] Order 80 of the Rules of the Court of Judicature (NI) 1980 ("RsCJ 1980") provides as follows:

> **"*Compromise, etc., by person under disability***
>
> 8. Where in any proceedings money is claimed by or on behalf of a person under disability, no settlement, compromise or payment and no acceptance of money paid into court, whenever entered into or made, shall so far as it relates to that person's claim be valid without the approval of the Court.
>
> ***Approval of settlement***
>
> 9.-(1) Where, before proceedings in which a claim for money is made by or on behalf of a person under disability (whether alone or in conjunction with any other person) are begun, an agreement is reached for the settlement of the claim, and it is desired to obtain the Court's approval to the settlement, then, notwithstanding anything in Order 5 rule 2, the claim may be made in proceedings begun by originating summons, and in the summons an application may also be made for-
>
> (a) the approval of the Court to the settlement and such orders or directions as may be necessary to give effect to it or as may be necessary or expedient under Article 21 of the County Courts (Northern Ireland) Order 1980, or rule 10, or

(b) alternatively, directions as to the further prosecution of the claim.

(2) Where in proceedings under this rule a claim is made under the Fatal Accidents Order (Northern Ireland) 1977, the originating summons must include the particulars mentioned in Article 4 of the Order.

(3) No appearance need be entered to an originating summons under this rule.

(4) In this rule "settlement" includes a compromise.

[99] Order 44, rule 1 of the County Court Rules (Northern Ireland) 1981 ("CCR 1981"), states in almost identical terms to Order 80, rule 8 the following:

"***Compromise or payment of claim***

1.–(1) In any proceedings in which money or damages is or are claimed by or on behalf of or for the benefit of a minor or patient suing either alone or in conjunction with other parties-

(a) no settlement or compromise or acceptance of money paid into court, whether before, at or after the hearing, shall be valid without the approval of the judge or district judge (as the case may be)."

[100] For the sake of completeness, similar provisions are found in the CPR 21.10 in England & Wales.

(b) Payment into Court and Investment of Funds

[101] The applicant submits that in the High Court and County Court, in cases where a minor plaintiff has reached a settlement against an insured driver and the court has approved the settlement figure, the minor plaintiff (and, indeed, any person under disability) will have the protection of ensuring that the settlement figure is invested as directed by the court. The applicant emphasises that the same protection applies where a minor has brought a claim under the Uninsured Drivers' Agreement against the MIB.

[102] Pursuant to Order 80, rule 1 of the RsCJ 1980, a "person under disability" means a person who is a minor or a person who by reason of mental order within the meaning of the Mental Health (Northern Ireland) Order 1986, is incapable of managing or administering his property and affairs.

[103] Order 80, rule 10 RsCJ deals with the control of money recovered by a person under disability and states as follows:

> "10.—(1) Where in any proceedings—
>
> (a) money is recovered by or on behalf of, or adjudged or ordered or agreed to be paid to, or for the benefit of, a person under disability, or
>
> (b) money paid into court is accepted by or on behalf of a plaintiff who is a person under disability,
>
> the money shall be dealt with in accordance with directions given by the Court, whether under Article 21 of the County Courts (Northern Ireland) Order 1980 or this rule, or under both that Article and this rule and not otherwise.
>
> (2) Directions given under this rule may provide that the money shall, as to the whole or any part thereof, be paid into the High Court and invested or otherwise dealt with there.
>
> (3) Without prejudice to the foregoing provisions of this rule, directions given under this rule may include any general or special direction that the court thinks fit to give and, in particular, directions as to how the money is to be applied or dealt with and as to any payment to be made, either directly or out of the amount paid into court and whether before or after the money is transferred to or paid into a county court, to the plaintiff, or to the next friend in respect of moneys paid or expenses incurred for or on behalf or for the benefit of the person under disability or for his maintenance or otherwise for his benefit or to the plaintiff's solicitor in respect of costs.
>
> (4) Where in pursuance of directions given under this rule money is paid into the High Court, to be invested or otherwise dealt with there, the money (including any interest thereon) shall not be paid out, nor shall any securities in which the money is invested, or the dividends thereon, be sold, transferred or paid out of court, except in accordance with an order of the court."

[104] For completeness, Order 44, rule 1(2) of the CCR 1981 provides as follows:

> "(2) All money so recovered or adjudged or ordered or awarded or agreed to be paid shall be dealt with as the judge shall direct and the said money or any part thereof may be so directed—
>
> (a) to be paid into court and to be invested or otherwise dealt with there; or
>
> (b) to be otherwise dealt with.
>
> (3) The directions referred to in paragraph (2) may include any general or special directions that the judge may think fit to give, including (without prejudice to the generality of the foregoing provision) directions as to how the money is to be applied or dealt with and as to any payment to be made either directly or out of the amount paid into court to the plaintiff, to the next friend or to the solicitor for the plaintiff in respect of moneys paid or expenses incurred or for maintenance or otherwise for or on behalf of or for the benefit of the minor or person of unsound mind or otherwise, or to the solicitor for the plaintiff in respect of costs.
>
> (4) Where, under, paragraph (2), money is directed to be paid into court on behalf of a minor, the next friend or solicitor of the minor shall lodge in the office a copy of the minor's certificate of birth."

[105] Order 44, rule 2 CCR further provides that money paid into court under Rule 1(2) or securities purchased under Rule 1(3) and, the dividends or interest thereon shall not be sold, transferred or paid out to a party entitled to the monies, except pursuant to an order of the judge or district judge.

[106] In summary, the applicant argues that the arbitration process under the 2004 Agreement is not equivalent to the process for the settlement of claims involving minors against insured and uninsured drivers. Fundamentally, it is argued that the 2004 Agreement fails to protect minors to ensure court approval of settlement figures and fails to provide a mechanism for investment of the settlement awards.

[107] The applicant submits that, although the Untraced Drivers' Agreement 2017 (applicable to England, Wales and Scotland) and Untraced Drivers' Agreement 2024 (applicable to Northern Ireland) represents a step forward regarding the position of minors, the applicant still does not accept that the revised Agreements satisfy the equivalence and effectiveness requirement.

[108] The applicant further submits that the process to be adopted regarding the settlement of claims involving minors against untraced drivers should be that which applies in the Republic of Ireland under the equivalent Untraced Drivers' Agreement 2009. The applicant argues that in the Republic of Ireland, equivalent to a claim involving an insured and uninsured driver, the MIBI may also be joined as a sole defendant in a case involving an untraced driver. Thereafter, any settlement figure will require court approval, and the monies paid into court funds. Therefore, according to the applicant, any minor seeking to enforce their rights under the 2004 Agreement in this jurisdiction is at a significant disadvantage to claimants in the Republic of Ireland due to the absence of the protection and scrutiny of the court regarding both the settlement figure and the safe investment of the monies paid into court.

[109] The applicant, in support of its arguments, also highlights the Civil Justice Report, September 2017, in which Sir John Gillen highlighted the issue of 288 minor claimants who had their cases settled without legal representation and court approval and also the recommendation made in the Report that "serious consideration be given to introducing legislation to make court approval of legal settlements of financial cases involving minors mandatory." (Para 7.58)

[110] Furthermore, citing *Withers v MIBI* (Case C-158/01), the applicant claims that the ECJ made it clear that in relation to the insurance directives, disparity of treatment must not exist between member states.

[111] As set out below, in its counter submissions, the MIB refers to the decision of Ouseley J in *RoadPeace* and particularly para [111] of his judgment (see para [78] above). In essence, having considered the position in respect of accidents under the 2003 Agreement in England & Wales (equivalent to the 2004 Agreement in Northern Ireland), the learned judge concluded that the provisions "just about" satisfied the principles of equivalence and effectiveness. Ouseley J's justification for this conclusion was due to the "duties on the MIB, the independent arbitrator and the process of onward review under the Arbitration Act 1996."

[112] Mr Lavery KC accepts that the decision of Ouseley J in *RoadPeace* causes difficulties for the applicant. However, he submits that the decision can be distinguished in a number of respects. Firstly, the central issue in this application, namely the right of a minor to court approval, is only considered in para [110] of the judgment. Secondly, the *RoadPeace* decision concerned various technical procedural issues under the Agreements in Great Britain and CPR, to include the functions of the arbitrator, the differences between the arbitration process and CPR, the necessity for counsel's opinion and the definition of "significant personal injuries" and the definition of "terrorism." The necessity for court approval and the investment of the funds by the court was not considered. Thirdly, it is submitted that Ouseley J declined to make a finding that the 2009 Directive was directly effective or that the MIB was an emanation of the state. Fourthly, it is submitted that the decision in *RoadPeace* was wrongly decided on the issue that there was no equivalence as

between the 2009 Directive as implemented by the Untraced Drivers' Agreement 2017 and the CPR.

[113] The applicant further argues that following the decision in *Lewis*, when implementing its duties under the 2009 Directive, the MIB must act in the public interest. The applicant claims that, following the decision in *Dunhill*, it is in the public interest that a minor has their offer of settlement approved by a judge and, thereafter, to have the settlement monies paid into court funds as directed by the judge. The MIB's requirement to act in the public interest and the requirement to ensure equivalence and effectiveness of rights under the 2009 Directive must mean that the applicant in this case is provided the same protection as afforded to other minors injured by insured and uninsured drivers. Since such protection is not provided under the 2004 Agreement, it is claimed that the respondents are in breach of the 2009 Directive on which the applicant relies and seeks to enforce directly against the respondents.

Analysis of the Submissions and Decision

[114] In *Roadpeace* at para [133], Ouseley J stated that "…whether the MIB is an emanation of the State may be a lively issue, but it is one to be pursued where an actual claim depends on it." Following the decisions of the CJEU in *Farrell (No.2)* and the Court of Appeal in *Lewis*, it is clear that the provisions of the Directive are capable of having direct effect and may be relied on against a private law body on which a Member State has conferred the task of implementing the Directive. The MIB is an emanation of the State. As stated by the English High Court in *Lewis* at para [131], "the effect of European law was to treat the designated compensation body as if the application imposed on the State had been delegated to it in full." The Court of Appeal in *Lewis* went further and stated that Article 3 of the 2009 Directive was unconditional and precise, so it was capable of having direct effect. Since Articles 3 and 10 of the 2009 Directive were co-extensive, it followed that Article 10 was also capable to having direct effect.

[115] The onus is upon national courts to give effect to the rights created by EU law, even where a variance exists with national law and procedures. As stated in *Marleasing SA v La Comercial Internacional de Alimentacion SA (case C-106/89)*, national courts must, as far as possible, interpret national law in light of the wording and purpose of the Directive in order to achieve the result pursued by the Directive.

[116] Article 10 of the 2009 Directive provides "Each Member State shall apply its laws, regulations and administrative provisions to the payment of compensation by the body, without prejudice to any other practice which is more favourable to the victim."

[117] Referring to the decision of Supreme Court in *PSNI v Agnew and others* [2023] UKSC 33, at para [50], Mr McLaughlin KC on behalf of the MIB, acknowledged that whilst it is a general principle of EU law that member states have autonomy in

settling procedural rules governed by EU rights, there are two qualifications to this autonomy, namely the principle of effectiveness and the principle of equivalence.

[118] Mr McLaughlin KC highlighted that, with reference to paras [56] and [57] in *PSNI v Agnew*, there are two limitations on the principle of equivalence. First, as stated by the Supreme Court, there may be no similar action available in domestic proceedings for the purposes of comparison (see *Palmisani v Instituto Nazionale della Previdenze Sociale* [1997] ECR 1-4025, 4049 (para [39]). The court is not required to find the nearest comparison but rather to decide whether there really is a similar action to enforce the rights in question. Secondly, the principle of equivalence is not to be interpreted as requiring member states to extend their most favourable rules to all actions brought in a particular area of law.

[119] In *PSNI v Agnew* at para [68], the Supreme Court referred to its decision in *Totel Ltd v Revenue and Customs Commissioners* [2018] UKSC 44, which considered the application of the principle of equivalence in the context of a taxpayer's obligation to repay disputed VAT before appealing against HMRC's assessment as to its liability for that VAT. In that case, the taxpayer sought to compare its position under the VAT legislation with the regimes for certain domestic taxes where an appeal could be brought without first paying the disputed tax. Regarding the approach to be taken by the national courts, the Supreme Court stated as follows:

> "68. …Lord Briggs JSC (with whom the other Justices agreed) held that there was no breach of the principle of equivalence because there were other domestic taxes which also imposed a "pay first" requirement. Lord Briggs noted, citing *Levez*, that the CJEU has repeatedly stated that it is for the courts of each Member State to determine whether its national procedures for claims based on EU law fall foul of the principle of equivalence, both by identifying what if any procedures for domestic law claims are true comparators for that purpose, and in order to decide whether the procedure for the EU law claim is less favourable than that available in relation to a truly comparable domestic claim. This is because the national court is best placed, from its experience and supervision of those national procedures, to carry out the requisite analysis. He said that identifying true comparators will depend critically upon the level of generality at which the process of comparison is conducted: para 8. The domestic court must focus on the purpose and essential characteristics of the allegedly similar claims. He said, "it is no part of the purpose of the principle of equivalence to prevent member states from applying different procedural requirements to different types of claim, where the differences in those procedural

> requirements are attributable to, or connected with, differences in the underlying claims" (para 11). However, alternative types of claim for compensation for exactly the same loss are a common example of true comparators."

[120] It is clear from the Supreme Court's analysis of the principles above that a national court when determining whether a claim based on EU law falls foul of the principle of equivalence, they must identify if any procedures for domestic law claims are true comparators and, if so, whether the procedure for the EU law claim is less favourable than that available in relation to a truly comparable domestic claim. Accordingly, when conducting the comparison, the court must look at the purpose and essential characteristics of the allegedly similar claims and the special features of the procedural requirements.

[121] Turning to the central issues in this case, the MIB emphasises that the 2009 Directive does not make any express reference to the status of minors and does not contain any reference to an obligation on Member States to ensure access to the court. This observation is plainly correct. However, the applicant argues that, if a victim of an uninsured driver under the 2002 Agreement has access to the courts, then in the exercise of the principle of equivalence, the victim of an untraced driver should have similar access with regard to approval of a settlement and, thereafter, investment of the award into court funds.

[122] The 2003 Agreement in England & Wales and the corresponding 2004 Agreement in this jurisdiction has attracted considerable criticism in many respects, to include the position of minors and protected persons. For example, one alleged flaw is that there is no guarantee under the Agreements that minors and protected persons will receive legal representation. Another criticism, which is essentially the subject of these proceedings, is that there is no specific provision within the said agreements for the independent assessment of the adequacy and fairness of any proposed settlement.

[123] The potential for claims involving minors and protected persons to be determined and disposed of without legal representation is a real concern under the 2004 Agreement. However, my decision must be confined to the factual circumstances as presented. In this case, at all relevant times under the process for compensation, the applicant had the benefit of legal representation.

[124] In *RoadPeace*, in his consideration of the safeguards for the settlement of claims by minors and protected parties and the compatibility of the 2003 Agreement with the 2009 Directive, Ouseley J concluded at para [111] that the provisions of the 2003 Agreement "just about" satisfied the principles of equivalence and effectiveness.

[125] Having carefully considered the comprehensive submissions of the parties, on the facts of this case and for the reasons given below, it is my decision that the duties

imposed on the MIB under the 2004 Agreement, the right of appeal to an independent arbitrator and the process of review under the Arbitration Act 1996 are sufficiently equivalent to the procedure for court approval in respect of an identified insured or uninsured driver, so as to achieve compliance with the principles of equivalence and effectiveness in relation to the approval of MIB awards to minors and the investment of the awards.

[126] In reaching this conclusion, I have taken into consideration the decision of the CJEU in *Evans* which analysed the principles of equivalence and effectiveness in the context of the MIB Agreements in existence at that time. The decision has been considered more fully at paras [48] – [62] above. Significantly, the CJEU concluded that victims of damage or injury caused by unidentified or insufficiently insured vehicles were entitled to a protection equivalent to, and as effective as, that available to persons injured by identified and insured vehicles.

[127] In *RoadPeace*, as considered above at paras [70] – [80], Ouseley J expressed reservations that the CPR in England & Wales represented a correct measure for equivalence with the revised 2017 Untraced Drivers' Agreement.

[128] Clearly, there are differences in the defined processes dealing with claims brought against identified and insured drivers on the one hand, and claims brought against an untraced driver. But, as stated by the CJEU in *Evans*, to meet the requirements of the Directive, "the body responsible for awarding compensation does not necessarily have to be placed, as far as civil liability is concerned, on the same footing as a defendant such as a driver of an identified and sufficiently insured vehicle." (see para [28])

[129] Turning to the facts of this case, I take into consideration the fact that at all times the minor applicant has been legally represented. An initial determination made by the MIB under clause 7 of the 2004 Agreement was rejected by the applicant's solicitor who stated that, following an opinion from counsel, the minor applicant's injuries attracted a valuation of £1,500. The MIB then made an offer of compensation of £1,500. These judicial review proceedings were commenced when the applicant's solicitor maintained that the said offer of compensation required approval by a judge and that, if approved, the money should be paid into the Court Funds Office.

[130] Significantly, on 8 August 2024, the MIB made a formal determination under the 2004 Agreement of the applicant's claim at an increased sum of £2,901.28, namely £2,500 plus interest. The MIB stated that the increased sum reflected the passage of time since the initial offer of compensation in 2018 and a review of damages for personal injuries in the interim. The MIB also made clear in its determination that if the applicant elected to appeal to an arbitrator on the grounds of sufficiency of compensation that it would pay the reasonable costs of that procedure and would not make submissions requesting a reduction in the award. Accordingly, the practical effect of the terms on which the MIB made its offer was to ensure that any

arbitration procedure would be sufficiently equivalent to the court process for approving a minor settlement, in which the court could increase the award. The applicant's solicitors indicated that the increased figure represented sufficient compensation for the injuries sustained by the minor applicant but refused to accept a sum in the absence of court approval.

[131] As considered above, once an award is made by the MIB under the 2004 Agreement, there is a right to request an appointment of an arbitrator, for which the recognised grounds of reference include the sufficiency of the award. The express objective of the arbitration procedure is to ensure that the award reflects the appropriate level of compensation for the injury, loss and/or damage sustained by the minor. On the facts of this case, bolstered by the fact that the applicant was legally represented, it is my view that, for the reasons stated below, the right of appeal to an arbitrator under the 2004 Agreement is equivalent to the procedure for court approval of a minor settlement.

[132] Firstly, the arbitration process under the 2004 Agreement is governed by the Arbitration Act 1996. The arbitrator is an independent judicial authority who must decide the claim in accordance with the law. Pursuant to clause 21 of the 2004 Agreement, the arbitrator must be from a panel of KCs appointed for the purpose of determining appeals under the 2004 Agreement by the Chief Justice of Northern Ireland.

[133] Secondly, the MIB Agreement specifies in clause 8(1) that any award of compensation for death, bodily injury or damage to property must be for "a sum equivalent to the amount which a court would have awarded to the applicant as general and special damages if the applicant had brought successful proceedings to enforce a claim for damages against the unidentified person." Also, as provided in clause 9(1), the MIB shall in an appropriate case, also include in the award a sum representing interest on the compensation at a rate equal to that which a court would have awarded to a successful applicant.

[134] Thirdly, an appeal to an arbitrator may be made on any ground, including the sufficiency of the proposed award (see clause 20(2)). A notice of appeal may be accompanied by such further evidence in support of the appeal as the applicant thinks fit. Accordingly, in my view, there is nothing to prevent the applicant's solicitors obtaining and submitting counsel's opinion in relation to the valuation of the injuries sustained by the applicant.

[135] Fourthly, if the MIB does not apply to the Department for the appointment of an arbitrator in accordance with the provisions of clause 20, nor takes any further steps in accordance with that clause, the applicant can apply to the Department for the appointment of an arbitrator.

[136] Fifthly, the arbitration procedure is dealt with in clause 22. The arbitrator is provided with the applicant's application, the decision of the MIB and all statements,

declarations, notices, reports, observations and transcripts of evidence made or provided pursuant to the Agreement by the applicant or the MIB. Significantly, pursuant to clause 22(2), the arbitrator may, if it appears to him/her to be necessary or expedient for the purpose of resolving any issues, direct the MIB to make further investigations and to submit a written report of its findings for further consideration. Following the investigation by the MIB, the report is sent to the arbitrator and the applicant. The applicant is permitted time to provide written submissions. Under clause 22(3), the arbitrator shall, after considering the written submissions, send to the applicant and the MIB a preliminary decision letter which sets out the decision the arbitrator proposes to make under clause 23 and his reasons for so doing. The applicant and the MIB may, by written notification to the arbitrator and copied to each other, either (a) accept the preliminary decision; or (b) submit further written observations on the preliminary decision and the reasons or both; or (c) request an oral hearing.

[137] If both the applicant and the MIB accept the reasoned preliminary decision, that decision shall be treated as the arbitrator's final decision for the purposes of clause 23. However, if the applicant or MIB request an oral hearing, the arbitrator shall determine the appeal at a hearing in public unless the applicant requests it to be heard in private. Any party to the hearing may be represented by a lawyer and any party shall be entitled to address the arbitrator, to call witnesses and to put questions to those witnesses and any other person called as a witness.

[138] The powers of the arbitrator are considered in clause 23. Equivalent to a court dealing with a proposed settlement of an award to a person under a disability, the arbitrator has powers to determine the amount of compensation. The arbitrator has power to remit the application to the MIB for a full investigation and a decision in accordance with the provisions of the Agreement. Plainly, if the arbitrator is not satisfied that a full investigation has been carried out in respect of the injuries sustained by the minor applicant, the arbitrator can direct further medical reports, accountancy reports, cost of care reports etc.

[139] Under clause 23(1)(a), the arbitrator has power to make an order that the costs of the proceedings shall be paid by one party or allocated between the parties in such proportions as the arbitrator thinks fit. Pursuant to clause 24(4), where an oral hearing has taken place at the request of the applicant, and the arbitrator is satisfied that it was unnecessary and that the matter could have been decided on the basis of written submissions referred to in clause 22(1), the arbitrator shall take this into account when making an order under clause 24(1)(a). I have significant concerns in respect of this clause since it only appears to penalise the applicant (and not the MIB) who have requested an oral hearing. In this case, I have taken into consideration the MIB's assertion in its written submissions that "it is inconceivable that an arbitrator would make such an order (for costs) in a minor's case where the appeal was made on sufficiency grounds alone. In any event, in this case, the MIB has made it clear in its award decision that it would not seek any such penalty."

[140] An area of concern relates to the limitation in time for lodging an appeal. Under clause 19(1), a notice of appeal shall be given in writing to the MIB at any time before the expiration of six weeks from the date on which the applicant is given notification of the MIB's decision under clause 16. On its face, this would appear to limit the right of a minor to seek a determination of sufficiency beyond this period. If so, this would constitute a relevant procedural distinction in a case in which a minor plaintiff is to have an award approved by the court and where no time constraints are placed on a minor plaintiff. In response to his concern, the MIB assures the court that arbitration procedures are, by definition, consensual in nature and that, properly construed, the 2004 Agreement does not preclude arbitration beyond six weeks. The MIB also states that, in this case, in light of the fact that these proceedings challenge the lawfulness of the arbitration process, the MIB does not oppose a referral to arbitration outside the six-week period. Accordingly, the MIB will not object to any late appeal and will request the DfI to appoint an arbitrator. The DfI has already indicated that it is willing to make an appointment of an arbitrator if a request is made.

[141] Turning to investment of funds, the relevant statutory provisions in respect of a person under disability are considered at paras [102]-[105] in this judgment. In summary, Order 80, rule 10 RsCJ and Order 44, rule 1(2) CCR 1981 provides that money recovered or adjudged or ordered or agreed to be paid on behalf of a person under a disability shall be dealt with in accordance with directions given by the court. Normal practice for a court in this jurisdiction is to order that the funds are paid into court and are invested in accordance with the directions of the Accountant General until the minor attains a majority (see part VII, Judicature (NI) Act 1978). As part of its broad discretion, the court may also order payment out of any of the funds at any time for any particular purpose. However, neither Order 80 RsCJ nor Order 44 CCR 1981, mandates a particular procedure. Protection of the funds in the minor's best interests ultimately rest with the court.

[142] The applicant argues that not only does the 2004 Agreement fail to protect minors to ensure court approval of settlement figures, it also fails to provide a mechanism for investment of the settlement awards.

[143] The second respondent submits that there is no provision within the 2004 Agreement which precludes the MIB, following a determination of an award, from putting in place arrangements for the investment of the compensation.

[144] Clause 25 of the 2004 Agreement provides as follows:

> "25.(1) If in any case it appears to MIB that, by reason of the applicant being a minor or of any other circumstance affecting his capacity to manage his affairs, it would be in the applicant's interest that all or some part of the award should be administered for him by an appropriate representative, MIB may establish for that purpose a trust

> of the whole or part of the award (such trust to take effect for such period and under such provisions as appears to MIB to be appropriate in the circumstances of the case) or, as the case may be, initiate or cause any other person to initiate the proceedings necessary to have the award administered by an *appropriate representative* and otherwise cause any amount payable under the award to be paid to and administered by the appropriate representative.
>
> (2) In this clause "appropriate representative" means the Office of Care and Protection."

[145] The Office of Care and Protection has jurisdiction only to handle the affairs of persons lacking capacity under the Mental Health (NI) Order 1986. Therefore, since the Office of Care and Protection cannot be considered the "appropriate representative" regarding a minor, the question must be raised as to the identification of the appropriate person to administer the Trust.

[146] My concerns and reservations regarding the investment of the proposed settlement figure in this case will be eased if the matter is referred to an arbitrator. I appreciate that the size of the proposed settlement is very small and that the costs of administering the Trust are likely to be disproportionate. However, the arbitrator, as an independent judicial authority, will have the experience to direct and arrange for the appropriate investment of the applicant's compensation.

[147] Also, pursuant to Order 80, rule 14 RsCJ, the court may appoint the Official Solicitor or some other suitable person to be a guardian of the fortune of the estate of a person provided that (a) the appointment is to subsist only until the child reaches the age of 18; and (b) the consent of the persons with parental responsibility for the child (within the meaning of Article 6 of the Children (NI) Order 1995) have been obtained, or in the opinion of the court, cannot be obtained or may be dispensed with. I have been advised that approaches have been made by the MIB and DfI to the Official Solicitor and that, if appointed by a court, the Official Solicitor would be willing to act as a guardian of the applicant's fortune and that the funds will be held in court pending the applicant's majority and investment by the Accountant General, in precisely the same manner as would be directed by a court.

[148] The MIB submit, and I agree, that the 2004 Agreement contains sufficient flexibility to ensure that, in cases where the applicant is legally represented and the matter regarding the sufficiency of the award has been referred to the independent arbitrator, that mechanisms exist to secure the appropriate investment of the compensation award in a manner equivalent to the protections available following court approval and directions by the court.

[149] Furthermore, the MIB makes the very relevant observation that, since the applicant has refused to date to avail of the arbitration process, the appropriate directions for investment approved by the arbitrator have not as yet crystalised.

[150] For the reasons stated above, I dismiss the applicant's grounds of challenge founded on (i) breach of EU law and (ii) breach of common law constitutional rights.

(b) Article 6 ECHR

[151] The applicant submits that by failing or refusing to allow the applicant access to the court to exercise his common law rights to have his offer of compensation approved and invested by the court, the respondents have acted incompatibly and disproportionately with the applicant's rights under article 6 ECHR contrary to their obligations under section 6 of the Human Rights Act 1998. Specifically, he alleges that he has been deprived of an external check by the court to ensure the propriety of the settlement and, potential procedural unfairness and a denial of substantive justice, if the compensation payment is paid to the applicant's mother without procedural safeguards for the investment of the sum.

[152] Dr McGleenan KC, on behalf of the DfI, made an opening statement that it is more difficult for the applicant to succeed in a claim based on Convention grounds as opposed to a claim based on EU law. In essence, he submitted that if the claimant fails to prove a breach of EU law, then it will not be necessary to go further and consider whether there is a breach of the Convention. The underlying rationale for this submission is that if the arrangements under national law are found to comply with the Directive and the principles of equivalence and effectiveness have been met, then an argument cannot be sustained that the Directive has breached the Convention. Therefore, Dr McGleenan KC asserts, the challenge in this case should focus on the EU grounds. Although I considered that there is substantial merit in this argument, in all the circumstances of the case, I took the view that the applicant's submissions in relation to the alleged breach of article 6 ECHR should be carefully analysed.

[153] Dr McGleenan KC acts on behalf of DfI in Northern Ireland and the Department for Transport in England & Wales as notice party. The DfI has responsibility for the MIB and its position under the said Agreement. However, it has no responsibility for court rules or for the investment in court funds, which remain under the auspices of the Department of Justice, who is not a party to these proceedings. Dr McGleenan KC submits that this factor is important when the court comes to consider whether this respondent has discriminated against the applicant.

[154] Turning to the applicant's claim based on article 6 ECHR, Dr McGleenan KC submits that a critical issue is whether article 6 can be engaged at all on the facts of this case. He argues that if one looks at the text of article 6, it is concerned with civil rights and obligations. Where a case relates to an award made to the applicant under the 2004 Agreement, there is plainly a civil right in play. However, in this

case, the applicant is not complaining about the award but rather whether there should be court approval of the award and whether the funds arising from the award should be invested. Dr McGleenan KC claims that there is no civil right to court approval or investment of funds and accordingly an article 6 claim does not arise. Regarding the text of article 6, there must be a determination of the civil right which would include the determination of an award. However, the applicant has not challenged the award. The applicant is content with the award. The challenge relates to the refusal of court approval and investment of funds, which it is argued, is not a civil right.

[155] Leaving aside this argument, the DfI further submits that, with specific reference to the 2004 Agreement, not only does it comply with the 2009 Directive and the principles of equivalence and effectiveness, it is also article 6 compliant regarding access to the courts.

Access to the court in cases involving untraced drivers

[156] The major thrust of the DfI's submissions is that there is a range of ways in which access to the court is available to a claimant. Firstly, it is claimed that the process contained in the 2004 Agreement includes the availability of an appeal to an arbitrator and, thereafter, an appeal to the High Court and further with leave to the Court of Appeal. Secondly, there is scope to sue the MIB itself in certain cases. Thirdly, the residual availability of judicial review provides a further avenue of access to the courts.

[157] As stated, the 2004 Agreement in Northern Ireland mirrors the 2003 Agreement in England & Wales. The 2003 Agreement was shaped in response to the litigation in *Evans* and also to reflect the enactment of the Human Rights Act.

[158] Dr McGleenan KC argues that, for the purposes of the article 6 analysis, clauses 18-24 of the 2004 Agreement are important. These clauses deal with appeals from a decision of the MIB to an arbitrator and, thereafter, to the court. Under clause 19(2)(d) of the Agreement, the applicant will undertake to abide by the decision of the arbitrator subject to his rights under section 67 and 68 of the Arbitration Act 1996. Pursuant to section 67 of the Arbitration Act 1996, a party to arbitral proceedings may apply to the court, (a) to challenge any award of the arbitral tribunal as to its substantive jurisdiction; or (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction. Under section 68 of the Arbitration Act 1996, a party to arbitral proceedings may apply to the court challenging an award in the proceedings on the grounds of serious irregularity affecting the tribunal, the proceedings or the award.

[159] The argument is advanced that it is a design feature of the 2004 Agreement that ensures the process contained within the Agreement is linked to access to the courts. So, where there is a civil right in relation to the determination of the award,

there is access to an arbitrator and, thereafter, to a court. If this interpretation is correct, according to the DfI, there cannot be any issue in respect of compliance with article 6. It is noteworthy, as the DfI observe, that this is precisely the route that was adopted in *Evans* to the Court of Appeal.

[160] Clause 28 of the 2004 Agreement deals with referral of disputes to an arbitrator. If there is a dispute between the applicant and the MIB concerning a decision, determination or requirement made by the MIB under the terms of the Agreement, other than matters covered by Clause 18, it shall be referred to and determined by an arbitrator. The respondent maintains that this is another example whereby the Agreement is article 6 compliant.

[161] In further support of its argument that the Agreement is article 6 compliant, the respondent highlights clause 31 of the Agreement which makes specific reference to the Contracts (Rights of Third Parties) Act 1999 and was included after concerns were expressed by the Advocate General in *Evans*. Clause 31(5) declares that the Agreement is intended to confer a benefit on the applicant and has been interpreted to mean that proceedings can be brought directly against the MIB for breach of contract if the MIB fails in its obligations under the Agreement and has been deprived of an opportunity to enforce those obligations under clauses 18 and 28.

[162] Finally, the respondent highlights clause 32 of the Agreement which provides that if MIB fails to pay compensation in accordance with the provisions of the Agreement, the applicant is entitled to enforce payment through the courts.

[163] Dr McGleenan KC, in support of his submissions, drew my attention to the analysis of Hickinbottom J in *Carswell v Secretary of State for Transport and the Motor Insurers' Bureau* [2010] EWHC 3230. In this case, the victim was crossing the road when he was struck by a vehicle which did not stop. The driver was never traced. The victim sustained severe head injuries. The claimant, the wife of the victim, brought a claim for compensation under the 2003 Agreement. An offer of compensation made by the MIB was accepted by the claimant. The issue in the case related to outstanding legal costs. The claimant argued that due to a failure to properly implement various European Motor Insurance Directives (particularly Article 1(4) of Directive 84/5/EEC), she had not received a sufficient sum for legal costs incurred in her application to the MIB.

[164] Similar to this case, the issues in *Carswell* focused upon whether the 2003 Agreement satisfied the principles of equivalence and effectiveness and access to the courts. In line with the arguments advanced by Dr McGleenan KC above, paras [50]-[64] of the decision in *Carswell* focused on various provisions in the 2003 Agreement which enabled an applicant to challenge and enforce various decisions of the MIB. Significantly, having considered the relevant provisions, Hickinbottom J said at paras [63] and [64]:

> "[63] For those reasons, I consider that an applicant has the right to sue the MIB if the MIB fails in its clause 7 obligations under the 2003 Agreement, insofar as performance of those obligations confer a benefit upon an applicant, and insofar as the applicant has no opportunity to enforce them by way of appealing to an arbitrator under clauses 18 or 28.
>
> [64] Fourth, and finally, clause 32 enables an applicant to enforce an award of compensation from the MIB through the courts, if the MIB fails to pay."

[165] Having carefully considered the submissions advanced by the parties, I am persuaded by and agree with respondent's arguments, fortified by the analysis in *Carswell,* that the said clauses as identified within the Agreement have the capacity to ensure article 6 compliance regarding the determination of the applicant's civil rights. The respondent maintains and I agree that, stepping back and looking at the Agreement as a whole, the features highlighted above are sufficient to discharge the article 6 obligations.

[166] Dr McGleenan KC also referred the court to the decision of the CJEU in *Evans* as providing further support for the respondent's assertion that the 2004 Agreement complies with article 6 ECHR. One of the arguments advanced by Mr Evans was that the arbitration procedure under the Agreement did not comply with the right to a fair trial under article 6. Specifically, it was alleged that where victims had not been granted an oral hearing, an appeal against the arbitrator's decision was possible only on grounds of serious irregularity affecting the arbitration or on a question of law, and in the latter case leave to appeal must be obtained.

[167] The Commission, in its consideration as to whether the arbitration procedure satisfied the requirements of article 6, pointed to shortcomings in relation to the status of the arbitrator regarding his independence, the lack of any hearing and the limited scope of the right of appeal against the arbitrator's award.

[168] The Advocate General in *Evans*, as highlighted above, also expressed concern governing access to the courts for an untraced driver. He stated that when one compares the avenues of legal address, the legal protection available for victims of untraced drivers falls far behind the legal protection guaranteed to victims of insured or uninsured drivers of traced vehicles (for whom the ordinary avenues of legal redress remain open). He stated that:

> "While the possibilities of legal protection for both groups of persons need not, from the perspective of Community law, be absolutely identical, the latter protection must nonetheless be qualitatively equivalent. In the context of

> the present case, this means that a guarantee of recourse to the ordinary courts must be provided."

[169] It is noted that in response to this criticism, the 2003 Agreement was amended to introduce clause 31(5).

[170] Significantly, the decision of the CJEU did not adopt the analysis of the Advocate General. The findings of the CJEU as provided in paras [44]-[58] of its decision have been considered above. Essentially, the CJEU emphasised that the victim of an untraced driver has a right of appeal to an arbitrator and, under the general rules on arbitration laid down by the Arbitration Acts, the victim may, in certain cases, appeal against the award to the High Court. The right of appeal is automatically available to a victim who alleges a serious irregularity affecting arbitration. That right is also available to a victim, albeit subject to leave being granted by the High Court, if he alleges infringement of a rule of law, which may include the question of whether there was evidence to support any particular conclusion of the arbitrator or whether any particular conclusion was one to which no arbitrator could reasonably have reached based on the evidence.

[171] The CJEU stated at para [55] that the objective of the Directive was to provide a simple mechanism for compensating victims. In effect, the CJEU concluded that the procedural arrangements adopted by the UK under the Agreement, which included the possibilities of review, were sufficient to provide the protection to which victims of damage or injury caused by unidentified vehicles and untraced drivers were entitled under the second Directive. Plainly, it was accepted that the Agreement did comply with the right to a fair trial under article 6.

[172] Mr Lavery KC, on behalf of the applicant, emphasises that the decision of the CJEU does not deal specifically with the issues regarding court approval for awards relating to minors and investment into court funds. This is plainly correct, and I have taken this into consideration in my decision.

[173] Leaving aside the respondent's argument that these issues do not constitute civil rights under article 6, I am also persuaded by the submissions made by the respondent, based on the decision in *Evans*, that the procedural arrangements contained within the Agreement, not only comply with the principles of equivalence and effectiveness, but also do not infringe article 6.

[174] I turn to another issue raised by Mr Lavery KC regarding the alleged deficiency of the arbitration process contained within the 2004 Agreement. In *Chitty on Contracts* at para 35-017, it is stated that:

> "An arbitral tribunal established by voluntary agreement of the parties is not a 'tribunal established by law' within the meaning of [article 6(1) ECHR] as it is not an emanation of the state. It might, therefore, appear that to

> compel a person to resort to arbitration would be incompatible with its entitlement under the article to have his civil rights and obligations determined by a tribunal established by law, eg by a court…"

[175] In my view, in the context of the 2004 Agreement, an appeal to and, thereafter, a determination by an arbitrator is not the end point of the process. As considered above, pursuant to sections 67 and 68 of the Arbitration Act 1996, following a decision by the arbitrator, the applicant has direct access to the court and potentially to the Court of Appeal.

(c) Article 14 EHCR

[176] The applicant submits that the decisions of the respondents and/or the 2004 Agreement are a disproportionate infringement of the applicant's right not to be subject to discrimination pursuant to article 14 ECHR when read with article 6 ECHR, in that the refusal to have his compensation approved by a court disproportionately interferes with his right of access to the court. It is claimed that the applicant is being treated less favourably than a comparator, namely a child or a person under a disability injured by an uninsured driver under the Uninsured Drivers' Agreement.

[177] The applicant also alleges that the decisions of the respondents and/or the 2004 Agreement are a disproportionate infringement of the applicant's right not to be subject to discrimination pursuant to article 14 ECHR when read with Article 1 Protocol 1 ("A1P1") ECHR, in that the refusal to have his compensation paid into and invested in court funds disproportionately interferes with his property rights and he is thereby being treated less favourably than a comparator, namely a child or a person under a disability injured by an insured driver or a vehicle under the Uninsured Drivers' Agreement.

[178] As stated by the Court of Appeal in *Cox v Department for Communities* [2021] NICA 46 at para [49], article 14 can only be considered in conjunction with one or more of the substantive rights and freedoms set forth in the Convention or its protocols insofar as they have been given effect by the Human Rights Act 1998.

[179] For the reasons I have stated above, in my judgment, article 6 is not engaged in this matter and, accordingly, article 14 is not applicable to the relevant issues.

[180] A1P1 states:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law…"

[181] The basis of engagement asserted by the applicant cannot be characterised as interference with peaceful enjoyment, nor deprivation of his possessions. Further, in my judgment, there is nothing within the 2004 Agreement that prevents the referral to an arbitrator and, thereafter, investment of the compensation.

[182] Accordingly, it is not necessary for this court to consider the ambit of article 14 as scrutinised in a recent judgment of the Supreme Court in *R(SC, CB) v Secretary of State for Work and Pensions* [2021] UKSC 26.

[183] For the reasons stated above I dismiss the applicant's claim based on (i) breach of article 6 ECHR and (ii) breach of article 14 ECHR.

General Conclusions

[184] The facts of this case focus on a minor applicant who, from the instigation of the claim for compensation under the 2004 Agreement, has been legally represented. The applicant's solicitors agreed that the sum awarded to the applicant represented adequate compensation for the injuries sustained. However, it was contended that in order to ensure protection to the minor applicant, he was entitled to have court approval of an award made by the MIB and thereafter investment of the award as directed by the court. The 2004 Agreement makes no provision for court approval and investment of the minor's award. Accordingly, the applicant submitted that the existing provisions under the 2004 Agreement regarding these issues are in breach of EU law, common law and articles 6 and 14 ECHR.

[185] At the commencement of these proceedings, I was particularly cognisant of the words of Lady Hale in *Dunhill v Burgin* [2014] UKSC 18, that in cases where a minor claimant or person under a disability has received an offer of compensation, there should be court approval of any proposed settlement figure "to protect minors and patients from any lack of skill or experience of the legal advisers which might lead to a settlement of a money claim far less than it is worth."

[186] A similar view was emphasised in the *'Review of Civil and Family Justice in Northern Ireland'* ("the Review") which was published in September 2017, particularly to protect minors in cases where proceedings had not been issued. Regrettably, despite a consultation process which commenced in July 2021 by the Department of Justice, legislation has still not been enacted "to compel a requirement for court approval for all legal cases involving a settlement or award of damages to minors." (see CJ34 Review)

[187] A number of concerns raised in the consultation document relate to (a) the absence of legal representation for children; (b) the absence of court approval of the sum agreed between the parties; and (c) the absence of court protection and supervision of the award until the child reaches adulthood. It was stated that "combination of these factors creates risks that children may be under-compensated and that awards may not in all cases be used for the benefit of the child, or in the

child's best interests." (para 1.4). For what it is worth, I endorse the view that these concerns are real and that immediate legislative intervention is required.

[188] The Consultation document did not consider the ambit of the 2004 Untraced Driver's Agreement in relation to these concerns. In my deliberation of the issues in these proceedings, I have been particularly mindful of these matters which have also been reflected by the parties in their comprehensive and thought provoking written and oral submissions.

[189] For the reasons detailed above in the substantive judgment, I have concluded that, on the facts of this case, the arrangements contained within the 2004 Agreement are adequate to transpose the directly effective obligations arising under the 2009 Directive. It is my decision that the duties imposed on the MIB under the 2004 Agreement, the right of appeal to an independent arbitrator and the process of review under the arbitration Act 1996, are sufficiently equivalent to the procedure for court approval in respect of an identified insured or uninsured driver, so as to achieve compliance with the principles of equivalence and effectiveness in relation to the approval of MIB awards to minors and the investment of the awards. The arbitrator, when determining the amount of the award, is required to apply the same principles regarding the assessment of damages as would be carried out by a court. The award of the arbitrator is legally binding and enforceable. It is also subject to onward review by a court on a point of law.

[190] The process of referral of a minor's award to an arbitrator is critical in order to ensure it is sufficiently equivalent to the process of approval of a settlement by a court. In this case, from the instigation of his claim, the minor applicant has had the benefit and protection of legal representation. Further protection of the minor applicant will be ensured when, as I anticipate, the adequacy and investment of the award will be referred to and determined by the arbitrator. The MIB has stated that if the applicant elects to appeal to an arbitrator on the grounds of sufficiency of compensation that it would pay the reasonable costs of that procedure and would not make submissions requesting a reduction of the award. The court was also advised that the MIB will not object to any late appeal and will request the DfI to appoint an arbitrator. The DfI has already indicated that it is willing to make an appointment of an arbitrator if a request is made.

[191] Accordingly, the factual circumstances of this case are very relevant to my analysis and decision. If the applicant had not been legally represented and the potential of referral to an arbitrator had not been available, there is a real possibility that I would have not reached the same conclusions applying the principles of effectiveness and equivalence.

[192] In relation to the remaining grounds of challenge, as considered at length in the substantive judgment, even if it is accepted (contrary to the submissions of the second respondent) that the right to court approval and investment of funds is a civil right under article 6 ECHR, the procedural rules under the 2004 Agreement do not

breach article 6 ECHR. If article 6 has not been engaged, then a breach of article 14 ECHR is not applicable to the relevant issues. Also, for the reasons given, there has been no breach of A1P1 ECHR, nor the applicant's common law constitutional rights.

[193] I conclude by noting that the 2004 Agreement has been superseded by the 2024 Agreement. The 2024 Agreement came into force on 1 January 2024 in relation to accidents occurring on or after that date. The 2004 Agreement continues to operate in relation to accidents occurring on or after 1 June 2004 but before 1 January 2024. The court was not advised as to the number of outstanding claims remaining in relation to minors and protected persons under the 2004 Agreement. Hopefully, not many.

[194] Clause 14 of the 2024 Agreement deals with the approval of claims from minors and protected parties. Where the MIB receives unconditional acceptance of its proposed award or there is no unconditional acceptance or notice of appeal within the time limit, but either the claimant is a minor or lacks capacity within the meaning of section 3 of the Mental Capacity Act (Northern Ireland) 2016, the MIB *must* apply for the appointment of an arbitrator. Pursuant to Clause 14(2) the arbitrator's principal function is to determine whether the proposed award represents a fair settlement for the claimant.

[195] These proceedings do not require me to consider the ambit of the 2024 Agreement. It must be stated that the mandatory requirement on the MIB to ensure that an arbitrator is appointed represents an essential safeguard to protect both a minor and a person under a disability. The arbitration process remains inquisitorial rather than adversarial and further protections in relation to the adequacy of the award are contained within the Agreement. Significantly, court approval of an award is not required.

[196] For the reasons as stated, the judicial review proceedings will be dismissed.