Neutral Citation Number: [2020] EWHC 3200 (Ch)

Case No: CP-2020-000004

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPETITION LIST (ChD)

Royal Courts of Justice
Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 25 November 2020

Before:

HIS HONOUR JUDGE KEYSER QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

THE DURHAM COMPANY LIMITED (trading as MAX RECYCLE)	**Claimant**
- and -	
DURHAM COUNTY COUNCIL	**Defendant**

- -

Michael Bowsher QC and Ligia Osepciu (instructed by **Tilly Bailey & Irvine LLP**) for the **Claimant**
Aidan Robertson QC (instructed by **DWF Law LLP**) for the **Defendant**

Hearing date: 18 November 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HIS HONOUR JUDGE KEYSER QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10 a.m. on Wednesday 25 November 2020.

JUDGE KEYSER QC:

1. By an application notice filed on 20 May 2020 the defendant, Durham County Council ("the Council"), applies for an order that the claim brought against it by the claimant, The Durham Company Limited ("TDC"), be struck out pursuant to CPR r. 3.4(2)(a) because there are no reasonable grounds for bringing the claim, or in the alternative for an order for summary judgment on the claim pursuant to CPR r. 24.2(a)(i) because TDC has no real prospect of succeeding on the claim.

2. The claim, which was commenced by the issue of a claim form on 22 January 2020, seeks remedies, including a permanent injunction to regulate the Council's future conduct, for what is alleged to be a long-term and continuing breach by the Council of the European Union's State aid rules. The application was heard 43 days before those rules cease to be applicable to Great Britain on 31 December 2020 and at a time when it is unclear what regime will replace them. The House of Commons Library's Briefing Paper No. 9025, dated 19 October 2020, *UK subsidy policy: first steps*, states in its Summary section:

> "As an EU Member State, the UK was part of the EU state aid regime that limits trade-distorting government support to businesses. Having left the EU, the government is setting up for an independent UK state aid or 'subsidy control' regime, based on WTO rules. The EU state aid framework will cease to apply after the end of transition on 31 December 2020, but the discussion is ongoing about what will replace it.
>
> This briefing describes how the UK government's approach has shifted from remaining in step with EU state aid rules under Theresa May's Government towards regulatory sovereignty and a focus on WTO rules under Boris Johnson's leadership.
>
> …
>
> The UK government's position in the negotiations with the EU has been that developing domestic subsidy controls is separate from a free trade agreement with the EU. UK's international commitments, based on the WTO rules, should only catch subsidies that can distort trade. It's up to the government to tailor the domestic rules, to choose which policy priorities to support and to decide how much funding will be available. But the government has recognised that its domestic choices are influenced by the ongoing negotiations on the UK future relationship with the EU.
>
> As confirmed in the Government statement of 9 September 2020, the UK will follow the WTO subsidy rules. On 29 September the government has laid a statutory instrument which disapplies EU state aid law that would otherwise be retained in the UK by the EU Withdrawal Act 2018. The details of the new regime will be decided after a consultation, which the government has planned for the end of 2020 or 2021.

> It is not yet known whether the government will legislate to go further with domestic regulation than required under its international commitments on subsidies."

3. In the course of argument, Mr Michael Bowsher QC happily observed that the picture might be clearer by the time that the appeal from this judgment is heard. Nonetheless, I am grateful to him and Ms Ligia Osepciu, who appeared for TDC, and to Mr Aidan Robertson QC, who appeared for the Council, for their very helpful and remarkably succinct oral and written submissions.

Summary of the facts and of the claim

4. TDC carries on the business of the provision of commercial waste services in Northern England and Scotland, and in particular within County Durham. TDC's evidence is that its costs and charges for such services vary, depending on the nature of the commercial waste, the frequency of collection, the number and volume of the waste receptacles to be collected, and the weight of the waste collected and disposed of; and that it calculates its charges on the basis of its costs and using estimated profit margins of up to 5%.

5. The Council is the waste collection authority for County Durham for the purposes of the Environmental Protection Act 1990 ("EPA 1990"). Section 45 of the EPA 1990 provides, so far as material, as follows:

> "(1) It shall be the duty of each waste collection authority—
>
> (a) to arrange for the collection of household waste in its area except waste—
>
> (i) which is situated at a place which in the opinion of the authority is so isolated or inaccessible that the cost of collecting it would be unreasonably high, and
>
> (ii) as to which the authority is satisfied that adequate arrangements for its disposal have been or can reasonably be expected to be made by a person who controls the waste;
>
> (b) if requested by the occupier of premises in its area to collect any commercial waste from the premises, to arrange for the collection of the waste; …
>
> …
>
> (3) No charge shall be made for the collection of household waste except in cases prescribed in regulations made by the Secretary of State; and in any of those cases—

> (a) the duty to arrange for the collection of the waste shall not arise until a person who controls the waste requests the authority to collect it; and
>
> (b) the authority may recover a reasonable charge for the collection of the waste from the person who made the request.
>
> (4) A person at whose request waste other than household waste is collected under this section shall be liable to pay a reasonable charge for the collection and disposal of the waste to the authority which arranged for its collection; and it shall be the duty of that authority to recover the charge unless in the case of a charge in respect of commercial waste the authority considers it inappropriate to do so."

6. At all times relevant to this case, the Council has discharged its duty in respect of household waste by providing household waste collection services directly rather than by outsourcing them to a third party. It has also provided commercial waste collection services directly to premises in County Durham. The Council has not charged for its household waste collection services, except in the limited cases where a charge is permitted. It has charged for its commercial waste collection services. The Council has a single fleet of 86 waste collection vehicles and a relevant workforce of 275 employees, which it says is the number of vehicles and staff required to provide its household waste collection services. For the purpose of providing its commercial waste collection services, the Council uses vehicles from the fleet, as well as assets and personnel that are also used for the provision of household waste collection services. The Council has disposed of household and commercial waste together, using the same long-term disposal contracts. The Council has not kept separate accounts of its costs and revenues for providing household waste collection services and commercial waste collection services.

7. TDC asserts that its charges for commercial waste collection services of a given nature, frequency and volume were and remain higher than the Council's charges for commercial waste collection services of a similar nature, frequency and volume. It contends that over the course of the last six years it has lost significant business from customers who have begun to purchase commercial waste collection services from the Council instead of from it. The solicitor with conduct of the case on behalf of TDC puts the matter as follows in her witness statement dated 10 November 2020 in answer to the Council's application:

> "The Claimant has informed me that the prices offered by the Defendant are simply unsustainable for a private company given the costs and overheads involved in waste collection and disposal. The Claimant is not able to compete with the Defendant on price, despite having attempted to do so on countless occasions. The Claimant believes that the reason that the Defendant is able to offer such low prices and therefore win business is due to the fact that it utilises the same infrastructure and resources for collection of commercial waste as it does for household waste; infrastructure and resources which are at least

> in part, if not entirely, funded by the tax payer. In addition to the infrastructure, the Defendant also benefits from a further tax advantage which is attractive to certain categories of customers, which is the VAT exemption granted to the provision of its services by HMRC."

8. The final sentence in the passage just cited is a reference to the decision of Warren J, sitting as a judge of the Upper Tribunal (Tax and Chancery Chamber), in proceedings brought by TDC against HM Revenue and Customs and HM Treasury, whereby the Company sought judicial review of the VAT treatment being afforded to local authorities carrying out commercial waste collection and disposal services. TDC contended that such services provided by local authorities were properly subject to VAT. On 19 July 2016 Warren J handed down judgment on a preliminary issue, [2016] UKUT 417 (TCC), holding that the charges made by the Council for the provision of commercial waste collection services were not subject to VAT, although TDC's charges for such services were subject to VAT. That judgment was determinative against the application for judicial review. On 8 June 2018 Nugee J refused permission to appeal against Warren J's decision.

9. The course of events after Warren J's decision may be summarised as follows.

   1) In November 2016 the Council refused a Freedom of Information request from TDC, relating to details about the basis of the commercial waste collections undertaken by the Council, on grounds relating to confidentiality of commercial/industrial interests. Further Freedom of Information requests were made; the evidence is that about 20 such requests in total were made between January 2015 and January 2017. On 6 January 2017 the Council informed TDC that an internal review had deemed the requests to be vexatious.

   2) On 31 July 2017 TDC's solicitors wrote to the Council, asking the Council either to acknowledge that it benefitted from State aid with regards to the "commercial trade waste services" it provided or to explain its reasons for saying that it did not benefit from State aid. This led to numerous exchanges of correspondence during 2017.

   3) On 21 December 2017 TDC's solicitors wrote to the Council, stating shortly that it was apparent that the Council had provided unlawful State aid to its "waste business", thereby giving that business an unfair competitive advantage that had caused and would continue to cause loss and damage to TDC. The letter sought a response to certain Freedom of Information requests.

   4) On 30 July 2018, three weeks after Nugee J's decision, TDC sent a complaint to the European Commission ("the Commission"), alleging a breach of State aid rules by the Council and raising concerns about the manner in which local authorities engage in commercial waste collection activities and the unfair advantage they perceived them to have as a result of also collecting household waste. That complaint was acknowledged on 2 August 2018 by the Office of the Directorate-General for Competition. The Commission has the power to determine the presence of unlawful State aid and to request information from a complainant and from the Member State concerned.

5) On 22 February 2019 the Commission notified the Council of the complaint.

6) On 15 March 2019 the Council acknowledged the complaint and provided to the Commission an overview of its waste management activities.

7) On 11 July 2019 the Council received an email from the Commission, via the Department for Business, Energy and Industrial Strategy, requesting a meeting. The Council provided updated information to the Commission and on 11 September 2019 officers of the Council attended a meeting with the Commission and responded to questions. The Commission informed the officers that it was considering the complaint and would reach a decision in due course.

8) On 16 October 2019 TDC's solicitors sent a pre-action protocol letter to the Council.

9) On 7 November 2019 the Council responded to the pre-action protocol letter. The response denied that the Council's commercial waste collection services were operating in breach of the State aid rules and complained: "Your client has referred the Council to the European Commission and asked them to investigate this very matter. It now appears that your client is unconcerned with the outcome of that investigation and is willing to press ahead with legal action regardless based on little more than speculation. That is notwithstanding the fact that the European Commission are the ultimate arbiters of what does, or does not, amount to unlawful state aid."

10) On 17 January 2020 TDC contacted the Commission to seek an update on progress with its complaint and was informed that the Council had made submissions in response to it.

11) On 22 January 2020 TDC commenced these proceedings.

12) On 12 February 2020 TDC again contacted the Commission to seek a further update and was told that the Commission was removing confidential information from the Council's submissions before providing a copy to TDC. The Commission's email ended: "In addition, you would also obtain a first preliminary assessment from our side."

13) TDC's evidence is that it has received no further information from the Commission regarding its complaint. So far as I am aware, no further enquiry as to progress has been made of the Commission.

14) The Council filed its application on 20 May 2020. Statements of case have been exchanged but no further steps have been taken in the proceedings, save in connection with the application.

10. The EU State aid rules are contained in Articles 107 and 108 of the Treaty on the Functioning of the European Union ("TFEU"). For present purposes, the important provisions are Article 107(1) and Article 108(3).

"Article 107

(1) Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

(2) The following shall be compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

(3) The following may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission."

"Article 108

(1) The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

(2) If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission. If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct. On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known. If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

(3) The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision. [Emphasis added.]

(4) The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article."

11. In order to bring a case within the scope of the State aid principle in Article 107(1), a claimant must establish the following: (1) that there is aid, in the sense of an economic advantage, granted by the State or through State resources; (2) that the measure favours certain undertakings over others in a comparable legal and factual situation (that is, that a 'selective advantage' is conferred); (3) that the advantage is not justified by the nature or general scheme (or structure) of the system; and (4) that the advantage is liable to distort competition and to affect trade between Member States. See *Credit Suisse (Securities) Limited v Commissioners for Her Majesty's Revenue and Customers* [2019] EWHC 1922 (Ch), [2019] 5 CMLR 17, ("*Credit Suisse*"), *per* Falk J at [8].

12. The case set out in TDC's particulars of claim dated 11 March 2020 may be summarised as follows:

    1) The Council's provision of household waste collection services (its "Household Waste Business") is and has been funded largely or entirely through council tax revenue.

    2) The Council's Household Waste Business has been subsidising its provision of commercial waste collection services (its "Commercial Waste Business"), in particular by giving it access to assets and personnel at a cost less than the market price. As a result, its Commercial Waste Business has gained a commercial advantage over TDC and other private companies providing similar services, because it has been able to set its charges at lower levels by reason of not being required to bear the market costs of providing the commercial waste collection services.

    3) The provision of this subsidy by the Council constitutes State aid (the Council being for these purposes an emanation of the State) and is prohibited by Article 107(1) of TFEU unless it is notified to the European Commission under Article 108(3) of TFEU and is declared by the European Commission to be compatible with the internal market: "The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision" (Article 108(3)).

    4) As the Council has not obtained a decision under Article 108(3) the State aid that it has provided to its Commercial Waste Business is unlawful in breach of that provision.

    5) The prohibition in Article 107(1) and Article 108(3) is directly effective against local authorities, including the Council.

    6) By reason of the Council's breach of the final sentence of Article 108(3), TDC has suffered and will continue to suffer loss and damage.

    7) The principal relief sought in the prayer is: (a) declarations to the effect that the Council has unlawfully provided State aid to its Commercial Waste Business; (b) a "permanent mandatory injunction requiring the Defendant to set its price for commercial waste collection services so as to cover the costs of providing those services on a standalone basis"; (c) damages, which according to the claim form are expected to exceed £500,000.

13. By its amended defence dated 16 June 2020 the Council denies that it has provided State aid and that it is in breach of Article 108(3) of TFEU; it contends that TDC has not alleged any matters that would entitle it to maintain a claim for damages; and it asserts that the claims for declaratory and injunctive relief are an abuse of process because they seek to pre-empt the outcome of an investigation currently being held by the European Commission into TDC's complaints.

14. The following parts of TDC's pleaded case are common ground, at least upon this application:

- The Council is an emanation of the State for the purposes of the provisions of Article 107(1).

- The measures by which the Council provides commercial waste collection services were put into effect without prior compliance with the procedure in Article 108(3). (Of course the Council denies that it was required to comply with that procedure, because it denies that the measures constitute the grant of State aid.)

- The final sentence of Article 108(3) is directly effective under EU law and generates an obligation on a Member State which may be relied upon by a private party before the courts of that Member State.

- Therefore, if the measures by which the Council provides commercial waste collection services constitute the grant of State aid, the Council was in breach of the requirement of the final sentence of Article 108(3).

Strike-out and summary judgment: the law

15. The first limb of the Council's application is CPR r. 3.4, which provides so far as material:

> "(1) In this rule …, reference to a statement of case includes reference to part of a statement of case.
>
> (2) The court may strike out a statement of case if it appears to the court—
>
> (a) that the statement of case discloses no reasonable grounds for bringing … the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; …
>
> (3) When the court strikes out a statement of case it may make any consequential order it considers appropriate."

The witness statement in support of the application referred also to r. 3.4(2)(b), which concerns abuse of process, but Mr Robertson did not rely on any argument based on abuse of process.

16. The second limb of the Council's application is CPR r. 24.2, which provides in part:

> "The court may give summary judgment against a claimant … on the whole of a claim or on a particular issue if—
>
> (a) it considers that—(i) that claimant has no real prospect of succeeding on the claim or issue; … and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

17. In *EasyAir Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch), Lewison J explained at [15] the correct approach to r. 24.2:

> "As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
>
> iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is

> possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

18. There is a close relation between the test under r. 3.4(2)(a) and that under r. 24.2. However, they are not quite the same. The former test is concerned with the adequacy of the facts and matters set out in the statement of case, the latter with the prospects of succeeding on a case or issue. As a party is required to plead the material facts on which it relies, the inadequacy of the pleaded facts to support the case advanced is liable to result in the striking out of the statement of case, subject to the possibility that the deficiency can be cured by amendment; and for the same reason the party advancing the case will similarly be liable to adverse summary judgment as the case will have no realistic prospect of success. But summary judgment may be given against a party whose statement of case shows no deficiency and is not liable to be struck out, if the pleaded case nevertheless has no realistic prospect of being successful at trial.

19. In response to the Council's application TDC cross-applies, by notice filed on 16 November 2020, for permission to amend the particulars of claim in order to plead further particulars of its case and remedy any shortcoming in the existing pleading. The threshold test for permitting an amendment to a statement of case is the same as that for resisting summary judgment; the question is whether the case advanced in the proposed amendment has a real prospect of success: see *SPI North Limited v Swiss*

Post International (UK) Limited [2019] EWHC 2004 (Ch), *per* Andrew Hochhauser QC at [5]. As I made clear in the course of argument, I do not consider that other potentially relevant matters, such as delay in making an application, would militate against the grant of permission to amend in this particular case.

Summary of the grounds of the application

20. For the Council, Mr Robertson advanced three distinct grounds:

    1) That TDC had not pleaded, and had no real prospect of establishing, matters capable of establishing a right to recover damages from the Council;

    2) That TDC had no real prospect of establishing that the matters complained of against the Council constituted the unlawful grant of State aid;

    3) That TDC had no real prospect of succeeding in its claim for declaratory and injunctive relief.

21. I shall address the grounds in a different order, beginning with the ground that concerns the underlying cause of action (ground 2) and then turning to the grounds that concern the relief sought (grounds 1 and 3).

The underlying complaint of State aid

22. Mr Robertson submitted that TDC had no real prospect of establishing that the Council's commercial waste collection services involve unlawful State aid within the meaning of Article 107(1) of TFEU, because the so-called "selectivity" criterion is not met. (His written and oral submissions on the point were addressed to Part 24, not Part 3.) The selectivity criterion is condition (c) in the following passage in para 2.02 of Bacon, *European Union Law of State Aid* (3rd ed, 2017) ("Bacon"):

> "The cumulative result of the Court's interpretation of Article 107(1) is that in order to fall within that Article a measure must satisfy all of the following conditions:
>
> (a) there must be aid in the sense of an economic advantage;
>
> (b) the advantage must be granted directly or indirectly through State resources and must be imputable to the State;
>
> (c) the measure must favour certain undertakings or the production of certain goods ('selectivity'); and
>
> (d) the measure must be liable to distort competition and affect trade between Member States."

23. Mr Bowsher objected to this ground being advanced at the hearing, because the point was not raised in the Council's defence and was not mentioned in the application notice or the supporting witness statement; it first appeared on 16 November 2020 in Mr Robertson's skeleton argument. He submitted that the ground raised a mixed issue of fact and law; that the facts should and the law could have been set out in the defence; and that the point ought anyway to have been identified in the application notice. Mr Robertson's response was that the ground was one of law, based on facts already set out in the statements of case, and that the skeleton argument was the correct place to advance it. He also pointed out that he had been ready to exchange skeleton arguments on 13 November 2020 but that Mr Bowsher had not been ready until the following Monday, 16 November.

24. I do not permit the Council to seek summary judgment on this ground on this application, for the following reasons.

    1) The Council's defence squarely denies the allegation that its commercial waste collection services operate in breach of the State aid rules. The particulars of claim and the defence set out extensive matters both of fact and concerning the legislative framework within which the Council operates, namely under the EPA 1990. It is permissible but not obligatory to plead matters of law in a statement of case. Accordingly it is in principle open to the Council to advance legal arguments based on matters of fact that have been pleaded or are agreed. Only if it were necessary, for the purposes of those arguments, to rely on additional facts would the arguments be precluded in principle without amendment of the statements of case.

    2) However, an application notice is required to "state … briefly, why the applicant is seeking the order" (r. 23.6). Although the grounds must be stated briefly, "they must also be adequate and, in particular, must be stated in a manner that complies with any special provisions relating to the application made": *Civil Procedure 2020*, para 23.6.1. The specific provisions for applications under Part 24 include requirements for notice of the application (r. 24.4) and for service of evidence (r. 24.5). Rule 24.4(3)(b) requires that a respondent be given at least 14 days' notice of "the issues which it is proposed that the court will decide at the hearing." Practice Direction 24, para 2(3) provides:

> "The application notice or the evidence contained or referred to in it or served with it must—
>
> (a) identify concisely any point of law or provision in a document on which the applicant relies, and/or
>
> (b) state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates,

> and in either case state that the applicant knows of no other reason why the disposal of the claim or issue should await trial."

3) When r. 23.6, r. 24.4(3)(b) and PD 24 para2(3) are read together, they show clearly, in my judgment, that, if the Council intended to seek summary judgment on the claim on the basis of the argument that the selectivity criterion was not met, it ought to have given notice of the fact; such notice ought properly to have been given in the application notice, but at the very least it ought to have been given not less than 14 days before the hearing of the application. Instead, the only points of which notice was given prior to the week of the hearing were the contentions (i) that no entitlement to damages could be shown, (ii) that there was no real prospect of the grant of injunctive or declaratory relief, and (iii) – a point not ultimately pursued – that the claim was an abuse of process.

4) The best argument in favour of permitting the Council to rely on the selectivity criterion argument at this application is that, despite his protests, Mr Bowsher addressed it substantively in his oral submissions. However, in the exercise my discretion I shall not allow the Council to rely on this ground in support of its application. Counsel in Mr Bowsher's position is on the horns of a dilemma, because he will be understandably reluctant to assume that the judge will rule out the applicant's argument *in limine*. The fact that he therefore adopts a belt-and-braces approach ought not to count definitively against his primary submission. In the present case, there is substantial litigation in the context of a long-running dispute between the parties. Wherever the merits might lie, the selectivity criterion argument involves a difficult and disputed question of law that goes to the fundamental basis of the claim. To give notice of the point almost six months after the application was filed and only two days before the hearing, with the result that it was first addressed by TDC in a very short supplemental skeleton argument on the day before the hearing, is a substantial unfairness to TDC. There is no good reason why the Council could not have raised the point much earlier and I shall not permit it to do so now.

5) Although I reach my decision on other grounds, I note that the application of the selectivity criterion falls within the scope of the complaint made by TDC to the Commission. It is therefore a matter of which the Commission is already seised and of which it is the final arbiter. In response to my enquiry, counsel did not suggest to me that the involvement of the Commission was a reason why either I at this stage or a judge at trial ought not to engage with the substantive issue of the grant of State aid. However, my ruling on this point does have the collateral advantage of preventing encroachment on a matter that the Commission is dealing with.

25. Despite my ruling, the argument that I heard on the selectivity criterion is not redundant. I shall have cause to refer to it in the context of the primary basis on which Mr Robertson put the Council's application, that TDC has no real prospect of establishing a right to claim damages from the Council.

The claim for a remedy in damages

26. In Joined Cases C-6/90 and C-9/90, *Francovich and Bonifaci v Italy* [1991] ECR I-5357 ("*Francovich*"), the CJEU considered the existence and scope of a State's liability to make reparation for loss and damage resulting from breach of its obligations under Community law and concluded:

> "38. Although State liability is thus required by Community law, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage.
>
> 39. Where, as in this case, a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.
>
> 40. The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.
>
> 41. Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law."

27. The conditions of State liability were refined in Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA and Factortame Ltd* [1996] ECR I-1029 ("*Factortame*"), where the CJEU set out three conditions of liability in damages (I shall call them "the State Liability Conditions", though they are sometimes referred to as "the *Francovich* conditions"):

> "51. … Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties."

28. The Council's argument is that breach of the prohibition in the final sentence of Article 108(3) of TFEU does not by itself give rise to a right to claim damages, and that TDC has failed to plead sufficient facts and matters to establish a case with realistic prospects of success that the breach is sufficiently serious to ground a damages claim, as required by the second State Liability Condition. This basis of the application is identified in paragraphs 20 to 23 of the amended defence and in

paragraph 6 of the statement dated 20 May 2020 of Jonathan Branton, the solicitor instructed by the Council, filed in support of the application.

29. TDC makes two responses to the Council's argument. First, it says that it has a right of action in English law for damages for breach of statutory duty without having to satisfy the State Liability Conditions. Second, it says that, if it is necessary to plead and prove satisfaction of the second State Liability Condition, either it has pleaded the case adequately by alleging deliberate conduct that is in breach of Article 108(3) or, if more is required, it is capable of setting out a more detailed case by amendment of the particulars of claim. It seeks permission to add two new paragraphs that would repeat the substance of paragraph 13 of its reply, as follows:

> "28B. For the avoidance of doubt, it is averred that a breach of the last sentence of Article 108(3) TFEU is independently actionable under English law as a breach of statutory duty. It is averred that such English breach of statutory duty claim is not subject to conditions for State liability under EU law, as set out in, inter alia, the *Brasserie du Pecheur* case (the 'State liability conditions'): see *Betws Anthracite Ltd v DSK Anthrazit Ibbenburen GmbH* [2003] EWHC 2403 (Comm); by analogy, *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] A.C. 130 and related cases concerning Article 101 TFEU.
>
> 28C. Further or in the alternative, in the event that the State liability conditions apply to the Claimant's claim for damages by virtue of either English or EU law, it is averred that the Defendant's breach of Article 108(3) TFEU is sufficiently serious for at least the following reasons:
>
> a. Article 108(3) TFEU supports an important rule of EU law, namely, the prohibition on State aid;
>
> b. Article 108(3) TFEU is a clear and precise rule of EU law;
>
> c. The Defendant's breach of Article 108(3) TFEU has persisted long after (i) 31 July 2017, when the Claimant first alerted the Defendant to the presence of State aid by cross-subsidy in the conduct of its Commercial Waste Business, by letter from its Solicitors, Tilly Bailey & Irvine LLP, and (ii) 24 October 2018, when the Claimant drew the Defendant's attention to the judgment of 4 May 2018 of the French-Speaking Court of First Instance of Brussels in case 2017/1957/A, holding that arrangements similar to those obtaining between the Defendant's Household and Commercial Waste

> Businesses amounted to State aid for the purposes of Article 107(1) TFEU;
>
> d. In light of (d) above, the Defendant's breach of Article 108(3) TFEU has been deliberate since at least 31 July 2017; alternatively, since at least 24 October 2018;
>
> The Defendant has persisted in its breach of Article 108(3) in flagrant disregard for the detrimental economic impacts on the Claimant of the cross-subsidy of between the Defendant's Household Waste Business and its Commercial Waste Business on Claimant. The Defendant has been aware of such impacts since 21 December 2017."

Direct claim for breach of statutory duty

30. TDC's case as set out in the proposed paragraph 28B is that as a matter of English law a right of action for breach of Article 108(3) is not subject to satisfaction of the State Liability Conditions but is a simple claim for breach of statutory duty.

31. That proposition is both surprising and, in my judgment, plainly wrong. Article 108(3) concerns obligations of the State, and the liability to which it gives rise at EU law is subject to the State Liability Conditions. No authority has been produced to suggest that, despite the limitations on liability in EU law, the English courts recognise that breach of Article 108(3) gives a cause of action for breach of statutory duty in English law free of the State Liability Conditions. The authorities relied on by Mr Bowsher do not support his submission.

32. Mr Bowsher relied principally on the decision of Morison J in *Betws Anthracite Ltd v DSK Anthrazit Ibbenburen GmbH* [2003] EWHC 2403 (Comm), which he said was the only case in which an English court has considered an award of damages for breach of the State aid rules. The issues, reasoning and result in the case show that it does not assist TDC at all.

33. The claimant, Betws, alleged that the defendant, Preussag, a commercial undertaking, had unlawfully used State aid given to it by Germany and that in consequence it, the claimant, had suffered loss and damage. Morison J considered first the question whether the claimant had a cause of action against the defendant. He referred to Articles 87 and 88 of the Treaty establishing the European Community, which correspond to their successor provisions in Articles 107 and 108 of TFEU and noted at [17]:

> "It is common ground between the parties that the last sentence of Article 88.3 [= the last sentence of Article 108(3) of TFEU] has direct effect and parties affected, such as competitors of the entity to whom the aid is being granted, may bring proceedings in the national courts against the State concerned seeking appropriate relief to stop the aid being granted or continued. The Commission has the exclusive right to decide whether aid

> is compatible with the Treaty, but the national courts have a duty to protect the rights of individuals in cases where there has been a breach of Article 88.3."

The claimant was not suing a Member State for breach of what is now Article 108(3). Its case, as recorded at [27] – and see also, for example, [22] and [28] – was that

> "a competitor who has been damaged as a result of the use or misuse of unlawful State aid can sue for compensation for the damage caused to them by the (unlawful) competitive advantage. Preussag is responsible for the unlawfulness. It has an obligation to use the aid conferred on them properly and that obligation is owed to competitors such as Betws. A remedy against the State is not enough: the State may not be at fault; it cannot supervise everything."

Similarly, at [29] Morison J recorded the claimant's submission, on the basis of a decision of the CJEU, that "a party to a contract which was in breach of Article 85 of the EC Treaty 'can rely on a breach of that article to obtain relief from the other contracting party' and Article 85 'precludes a rule of national law under which a party to a contract liable to distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is not a party to that contract.'"

34. Thus the claim in *Betws Anthracite* did not concern State liability. The authorities relied on by the claimant to establish a cause of action against a commercial competitor were all concerned with claims by one undertaking against another undertaking, not with claims by an undertaking against a State. Further, the claimant's case was put squarely on the basis of EU law, not English law. The authorities relied on were all decisions of the CJEU on EU law, not of English courts on English law. At [36] Morison J recorded expressly:

> "Mr Brealey [counsel for the claimant] does not contend that as a matter of English Law the recipient of an unlawful aid, who thereby damages a competitor's business, is liable to the competitor for the damage caused. On the facts, this is not a case which could give rise to one of the economic ['aiming at'] torts which form part of our law. His case is firmly put on the basis of a Community Law tort."

As for the result of the case, at [37] Morison J concluded:

> "In my view there is no cause of action in Community Law for the claim advanced by Betws. Specifically, there is no cause of action by Betws against Preussag on the ground that Preussag has used unlawful State aid to the detriment of their competitors including Betws."

35. In summary, therefore, *Betws Anthracite* did not concern a claim for damages for the unlawful grant of State aid; it did not concern the presence or absence of State Liability Conditions for a claim for damages for breach of Article 108(3) or for any

other claim against a Member State for a breach of EU law; it did not concern claims for breach of statutory duty in English law; and it did not even accept that there was a right of action in EU law by one undertaking against another for damage for misuse of State aid.

36. Mr Bowsher tried to find support for TDC's case in two particular parts of the judgment of Morison J. Neither of them helps him.

1) First, he submitted that the judgment in general and [37] in particular were of assistance because the present case involved two commercial undertakings, namely TDC and the Council in the form of what TDC calls its "Commercial Waste Business". There is nothing in that submission. First, *Betws Anthracite* did not concern a claim for breach of statutory duty in English law. Second, it found that there was no cause of action for misuse of State aid in EU law. Third, the complaint in the present case is that the Council is in breach of Article 107(1) and Article 108(3) of TFEU; and the duties under those provisions relate to the provision, not the misuse, of unlawful State aid and rest on Member States, not on undertakings.

2) Second, Mr Bowsher relied on [40] – [57], where Morison J considered questions of causation and quantum of damages in case he were wrong in holding that there was no cause of action. Mr Bowsher submitted that it was significant that the judge did not suggest that the *Francovich* conditions, including the requirement of a sufficiently serious breach, would apply. No significance at all attaches to that point. Morison J was considering what the position would have been if he had held that the claimant had a right of action in EU law for damages against a commercial competitor for misuse of State aid. No question of State liability arose. The conditions established in *Francovich* and *Factortame* are State Liability Conditions: that is, they are conditions for the liability of Member States for breach of EU law. *Betws Anthracite* did not say or imply that the State Liability Conditions do not apply to claims for State liability; it could not have done so, because *Factortame* has established that they do apply.

37. Mr Bowsher also sought to rely, by way of analogy, on *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130 as an example of a case where infringement of other Articles of TFEU or its predecessors has been held to give rise to an actionable breach of statutory duty in English law. Again, neither the case nor the reasoning in it assists TDC. The plaintiff, Garden Cottage Foods, sued the defendant, the Milk Marketing Board, claiming a final injunction to restrain breaches of Article 86 of the EEC Treaty (now, in substantially identical terms, Article 102 of TFEU). The judge at first instance refused an application for an interlocutory injunction, on the ground that damages would be an adequate remedy at trial. That decision was ultimately upheld by the House of Lords.

38. Article 86 stated:

> "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member states. Such

> abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Lord Diplock (with whose speech Lord Keith of Kinkel, Lord Bridge of Harwich and Lord Brandon of Oakbrook agreed) said at 141C-E:

> "This article of the Treaty of Rome (the E.E.C. Treaty) was held by the European Court of Justice in *Belgische Radio en Televisie v. S.V. S.A.B.A.M.* (Case 127/73) [1974] 1 E.C.R. 51, 62, to produce direct effects in relations between individuals and to create direct rights in respect of the individuals concerned which the national courts must protect. This decision of the European Court of Justice as to the effect of article 86 is one which section 3 (1) of the European Communities Act 1972 requires your Lordships to follow. The rights which the article confers upon citizens in the United Kingdom accordingly fall within section 2 (1) of the Act. They are without further enactment to be given legal effect in the United Kingdom and enforced accordingly.
>
> A breach of the duty imposed by article 86 not to abuse a dominant position in the common market or in a substantial part of it, can thus be categorised in English law as a breach of statutory duty that is imposed not only for the purpose of promoting the general economic prosperity of the common market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty."

39. The reason why the Court of Appeal, differing from the judge, had thought it appropriate to grant an injunction was that it considered it uncertain that the plaintiff's cause of action would sound in damages. Lord Diplock answered this point at 144B-G:

> "… I, for my own part, find it difficult to see how it can ultimately be successfully argued, as M.M.B. will seek to do, that a contravention of article 86 which causes damage to an individual citizen does not give rise to a cause of action in English law of the nature of a cause of action for breach of statutory duty; but since it cannot be regarded as unarguable that is not a matter for final decision by your Lordships at the interlocutory stage that the instant case has reached. What, with great respect to those who think otherwise, I do regard as quite unarguable is the proposition, advanced by the Court of Appeal

> itself but disclaimed by both parties to the action: that if such a contravention of article 86 gives rise to any cause of action at all, it gives rise to a cause of action for which there is no remedy in damages to compensate for loss already caused by that contravention but only a remedy by way of injunction to prevent future loss being caused. A cause of action to which an unlawful act by the defendant causing pecuniary loss to the plaintiff gives rise, if it possessed those characteristics as respects the remedies available, would be one which, so far as my understanding goes, is unknown in English private law, at any rate since 1875 when the jurisdiction conferred upon the Court of Chancery by Lord Cairns' Act passed to the High Court. I leave aside as irrelevant for present purposes injunctions granted in matrimonial causes or wardship proceedings which may have no connection with pecuniary loss. I likewise leave out of account injunctions obtainable as remedies in public law whether upon application for judicial review or in an action brought by the Attorney-General ex officio or ex relatione some private individual. It is private law, not public law, to which the company has had recourse. In its action it claims damages as well as an injunction. No reasons are to be found in any of the judgments of the Court of Appeal and none has been advanced at the hearing before your Lordships, why in law, in logic or in justice, if contravention of article 86 of the Treaty of Rome is capable of giving rise to a cause of action in English private law at all, there is any need to invent a cause of action with characteristics that are wholly novel as respects the remedies that it attracts, in order to deal with breaches of articles of the Treaty of Rome which have in the United Kingdom the same effect as statutes."

40. Although Mr Bowsher submitted that the *Garden Cottage Foods* case was closely analogous to the present case, it is apparent that it was quite different. It concerned a claim by one undertaking against another for relief for abuse of a dominant market position in breach of Community law, where the relevant Article produced direct effects between individuals. It had nothing to do with State liability, which is unequivocally governed by the principles in *Francovich* and *Factortame.*

41. Accordingly, I conclude that TDC has no real prospect of succeeding on the claim set out in paragraph 28B of the draft amended particulars of claim and ought not to be permitted to advance such a claim.

42. I turn to consider the position regarding the second State Liability Condition.

Satisfaction of the "seriousness" condition

43. In a claim for damages from the State for a breach of EU law, it is not enough for a claimant to show that the rule of EU law infringed was intended to confer rights on individuals and that infringement of that rule of EU law has caused the claimant to suffer loss. The claimant must also show that the breach was sufficiently serious to give rise to State liability.

44. In *LC Management Services (Scotland) v Highlands and Islands Enterprise* [2020] CSIH 37, Lord Woolman, delivering the Opinion of the First Division, Inner House, Court of Session, said at [41] – [43] that, if it had been necessary, the court would have dismissed the damages claim in that case because the pleadings failed to perform "their essential function" in that they failed to give "fair notice" of the case being advanced as to the second and third State Liability Conditions. The remarks were *obiter* and would anyway not be binding on this court, but I consider that they reflect the approach properly applicable also in this jurisdiction. Particulars of claim are required to set out all, but only, such matters as are required to be proved in order to establish the claim. In *Portland Stone Firms v Barclays Bank* [2018] EWHC 2341 (QB), Stuart-Smith J stated succinctly the basic principle of pleading:

> "It should not need repeating that Particulars of Claim *must* include a *concise* statement of the facts on which the Claimant relies: CPR 16.4(1)(a). The 'facts on which the Claimant relies' should be no less and no more than the facts which the Claimant must prove in order to succeed in her or his claim."

In a claim for damages it will always be necessary to plead the facts that are constitutive of the cause of action and it will usually also be necessary to plead the fact of damage and the causal connection between the wrong and the damage. As a *Francovich* claim can only succeed upon proof of satisfaction of the second State Liability Condition, the matters relied on to establish satisfaction of that condition ought also to be pleaded. Of course, this will be done as succinctly as possible: as Lord Woolman said at [43], "Abbreviation is encouraged." And it will not be appropriate to plead evidence. But the normal obligation to set out the necessary components of the claim and give fair notice of the matters relied on applies here as elsewhere.

45. TDC's particulars of claim do not mention the second State Liability Condition and do not contain anything that might address it, beyond the allegation of breach of Article 108(3). Mr Robertson says that this is a complete failure to set out grounds capable of establishing a sufficiently serious breach of EU law. Mr Bowsher says that it is sufficient, given the nature of the rule infringed and the consequences of infringement. He also, however, proposes to rely on the matters in paragraph 28C of the draft amended particulars of claim. In the circumstances, the question is whether TDC has a real prospect of establishing satisfaction of the State Liability Condition. If it has, any necessary amendment of the pleadings can be allowed, for reasons already indicated.

46. In *Factortame*, the CJEU gave guidance as to the meaning of the second State Liability Condition:

> "55. As to the second condition, as regards both Community liability under Article 215 and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.

> 56. The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.
>
> 57. On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement."

47. As this passage makes clear, the focus of the second condition is on the seriousness of the *breach* rather than the seriousness of the *consequences* of the breach. This is not to say that known or anticipated consequences are irrelevant, but their relevance if any will concern the quality of the State's conduct. Consistently with this, in his Opinion in Case C-224/01, *Köbler* [2003] ECR I-10239, Advocate General Léger, having reviewed the authorities, concluded in terms that are substantially correct, although they require some modification in the light of the authorities referred to below:

> "139. In my opinion, the decisive factor is whether the error of law at issue is excusable or inexcusable. That characterisation can depend either on the clarity and precision of the legal rule infringed, or on the existence or the state of the Court's case-law on the matter."

48. The remarks at [55] in *Factortame* were in the context of the existence of a measure of choice or discretion on the part of the Member State. The State aid rules in Article 107 do not involve discretion on the part of the State; State aid that is not compatible with the internal market is *ipso facto* unlawful. European jurisprudence establishes that the second State Liability Condition applies also where the State had limited or no discretion; however, in such a case the mere fact of breach may be sufficient to satisfy the condition. In Case C-5/94 *R v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Limited* [1996] ECR I-2553, [1997] QB 139, the High Court asked the CJEU to state the conditions under which a Member State is obliged to make good damage caused to an individual by its refusal to issue an export licence in breach of Article 34 of the Treaty of Rome. The judgment of the CJEU said:

> "24. The principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty (judgment in Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraph 35, and judgment in Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame, not yet published in the ECR,

> paragraph 31). Furthermore, the conditions under which State liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss or damage (judgment in Francovich and Others, cited above, paragraph 38; judgment in Brasserie du Pêcheur and Factortame, cited above, paragraph 38).
>
> 25. In the case of a breach of Community law attributable to a Member State acting in a field in which it has a wide discretion to make legislative choices the Court has held, at paragraph 51 of its judgment in Brasserie du Pêcheur and Factortame, cited above, that such a right to reparation must be recognized where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.
>
> …
>
> 28. As regards the second condition, where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach."

49. Mr Bowsher relies in particular on the remarks of the CJEU at [28]. Mr Robertson emphasises that the court said "may be sufficient", not "must be", "shall be" or "is" sufficient. He also refers to the remarks of Lord Tyre in the Outer House of the Court of Session in *Angus Growers v Scottish Ministers* [2016] CSOH 26, 2016] SLT 529, where he referred to the requirement of a sufficiently serious breach and observed:

> "36. … Not every breach of community law involves the exercise of a discretion conferred upon a member state. However, the factors that the court may take into consideration in cases not involving exercise of discretion are the same: see *Haim v Kassenzahnarzliche Vereinigung Nordrhein* [2002] 1 CMLR 247 at para 43. Where no discretion is conferred, the mere infringement of a rule of community law may of itself constitute a sufficiently serious breach, but it will not necessarily do so: *Hedley Lomas* (above), para 28; *Haim*, para 41.
>
> …
>
> 40. As Carnwath LJ observed in *Byrne* v *Motor Insurers' Bureau* [2009] QB 66 at paragraph 45, the 'sufficiently serious' criterion for *Francovich* liability is not a hard-edged test, but requires a value judgement by the national court, taking account of the factors listed by the Court of Justice in, *inter*

> *alia*, *Brasserie du Pêcheur* (above). It is clear from the Luxembourg jurisprudence that in a case such as the present one which does not involve the exercise of a discretion, it is not necessarily enough to give rise to state liability that an error of law has been made. More may be required, and other factors must be considered. …"

50. Several important English cases have considered the State Liability Conditions, notably *R v Secretary of State for Transport, ex parte Factortame Ltd (No.5)* [2000] 1 AC 524. I need only refer to two of the more recent cases.

51. *R (o.a.o. Negassi and another) v Secretary of State for the Home Department* [2013] EWCA Civ 151, [2013] 2 C.M.R.C. 45, concerned claims by two asylum-seekers for damages on account of the UK's failure to transpose the EU Reception Directive (Directive 2003/9) into domestic law. Mr Negassi claimed "that he [was] entitled to *Francovich* damages on one of two bases – either they flow without more from a serious breach of an obligation arising under EU law or, applying a multifactorial test, the entitlement arises in the circumstances of this case": at [8]. Maurice Kay LJ, with whose judgment Rimer LJ and Sir Stanley Burnton agreed, considered first the question of automatic entitlement. He considered several decisions of the CJEU and noted that the UK had not deliberately failed to transpose the Reception Directive into domestic law but had attempted to do so, albeit without complete success. He concluded at [13]:

> "Where does all this lead? In my judgment, it demonstrates that, although there will be some cases where a failure to transpose a specific provision at all by a required date may, without more, amount to a sufficiently serious breach, a *bona fide* attempt at transposition will attract a more nuanced approach. I am entirely satisfied that the breach of EU law with which we are concerned in the present case does not entitle Mr Negassi to say that he is automatically entitled to reparation. On any view, the United Kingdom's breach was unintentional. It arose from a genuine misapprehension of the true legal position. Whatever may be the reach of automatic entitlement, it does not extend to this case."

52. Maurice Kay LJ proceeded to consider the "multifactorial test". At [14] he said:

> "It follows that Mr Negassi's claim for damages must be assessed by reference to the multifactorial test for sufficient seriousness, the essence of which is apparent from *British Telecommunications* [1996] 2 C.M.L.R. 217 and *Haim* [2002] 1 C.M.L.R. 11. In the domestic context, it was the subject of helpful guidance in the speech of Lord Clyde in *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.5)* [1999] 3 C.M.L.R. 597; [2000] 1 A.C. 524, at pp.554–556. He identified the following as potential factors: (1) the importance of the principle which has been breached; (2) the clarity and precision of the rule breached; (3) the degree of excusability of an error of law; (4) the existence of any relevant judgment on

> the point; (5) whether the infringer was acting intentionally or involuntarily or whether there was a deliberate intention to infringe as opposed to an inadvertent breach; (6) the behaviour of the infringer after it has become evident that an infringement has occurred; (7) the persons affected by the breach or whether there has been a complete failure to take account of the specific situation of a defined economic group; (8) the position taken by one of the Community institutions in the matter. He added (at p.554B-D) that the application of the 'sufficiently serious' test 'comes eventually to be a matter of fact and circumstance'.
>
> > 'No single factor is necessarily decisive. But one factor by itself might, particularly where there was little or nothing to put in the scales on the other side, be sufficient to justify a conclusion of liability.'"

53. The facts and legal context of *Negassi* are very different from those of the present case, and not much is to be gained by a compare-and-contrast exercise. However, it is interesting to see how the Court of Appeal considered the question of "the clarity and precision of the rule breached" (factor 2 above). The Secretary of State argued that the relevant rule only became clear and precise by virtue of a decision of the Supreme Court. Maurice Kay LJ noted that, despite the "powerfully expressed conclusions" of the Supreme Court, which implied that the Secretary of State's view of the law was obviously wrong, the history of the litigation in that case had revealed strongly differing opinions as to the law. At [18] he remarked that it did "not necessarily follow that what had become 'indisputably clear' after two days of argument in the highest Appellate Court should have been manifestly obvious to the Secretary of State several years earlier." He concluded at [20]:

> "The evaluation of the seriousness of the breach in the present case seems to me to be quite finely balanced. I have come to the conclusion that, notwithstanding the points in Mr Negassi's favour (the most striking of which was the total exclusion of the subset of applicants for asylum of which he was one), the breach was not of sufficient seriousness to satisfy the test. It was not deliberate. It was the result of a misunderstanding of new provisions in an area of recent EU concern. It was not a cynical or egregious misunderstanding. It was not confined to the Secretary of State. It was shared, as a matter of first impression, by a number of judges. Whilst now all is clear, I do not think that it can be said to have been self-evidently so before the conclusion of *ZO*. Mr Negassi's fallback position is that at the very least it had become so by the time of the decision of the Court of Appeal in *ZO* and yet almost another year was to pass before the Secretary of State yielded on the grant of indefinite leave to remain. However, this gives insufficient recognition to the fact that the Secretary of State sought and obtained permission to appeal to the Supreme Court."

54. In *Credit Suisse*, Falk J considered the issue of liability in a claim for damages for breach of the State aid rules in connection with the bank payroll tax ("BPT") imposed on a one-off basis as a response to the financial crisis. In the event, she held that there had been no breach of the rules; her remarks on the conditions identified in *Francovich* and *Factortame* for liability for payment of damages, and on the application of those conditions to the facts of the case before her, are therefore o*biter,* but they are nonetheless instructive and of assistance and it has not been suggested before me that they contain any error of law:

> "87. In determining whether any infringement of Article 108(3) is sufficiently serious to give rise to a claim for damages under the *Francovich* principle, a multi-factorial assessment must be undertaken. The criteria to take into account and weigh up were summarised by the Court of Appeal in *R. (on the application of Negassi) v Secretary of State for the Home Department* [2013] EWCA Civ 151, [2013] 2 CMLR 45, at [14] as:
>
> > '…(1) the importance of the principle which has been breached; (2) the clarity and precision of the rule breached; (3) the degree of excusability of an error of law; (4) the existence of any relevant judgment on the point; (5) whether the infringer was acting intentionally or involuntarily or whether there was a deliberate intention to infringe as opposed to an inadvertent breach; (6) the behaviour of the infringer after it has become evident that an infringement has occurred; (7) the persons affected by the breach or whether there has been a complete failure to take account of the specific situation of a defined economic group; (8) the position taken by one of the Community institutions in the matter'.
>
> 88. In *Byrne v Motor Insurers Bureau* [2009] QB 66 at [45] Carnwath LJ noted that the 'sufficiently serious' test is not hard-edged. It requires a value judgment by the national court, taking into account the relevant factors.
>
> 89. Clearly, the State aid rules are important. There is also no discretion conferred on Member States in relation to compliance with them. As regards criteria (2) to (4), it is worth remarking that the limited period for which a tax is in force has not previously been held to be State aid. It is a novel argument, which was presumably not immediately apparent to anyone (bearing in mind that Credit Suisse's own claim was only made in August 2016). Although the BPT rules were announced with immediate effect, rather than after prior consultation, that was done for obvious reasons relating to forestalling risk, and there was a period following announcement when representations were considered and various changes were made to the scope of the rules to take those representations into account. This point was not raised, and the evidence indicates that it was only after

> the end date of 5 April had been confirmed, and the Finance Act 2010 had been enacted, that the four banks named at [22] above contacted HMRC to explain that they considered that BPT did not apply to them or had limited effect.
>
> 90. As regards criterion (5), whilst the legislation was obviously intentional, and resulted from deliberate policy choices, there was clearly no deliberate intention to infringe, and indeed advice was taken from experienced Counsel about the possible State aid risk in respect of other aspects of the rules, without the point being picked up. Importantly, there was clearly no intention to confer an advantage on Untaxed Banks, unlike, for example, the facts of *R. v Secretary of State for Transport Ex p. Factortame Ltd* (C-48/93) [1996] 1 CMLR 889, where the Government's intention was to protect fishing communities.
>
> 91. Mr Robertson submitted that Mr Peretz's advice (privilege in respect of which had been waived) was that the State aid position was not risk free, and therefore the proper course was to notify the Commission. I disagree. First, the point does not assist Credit Suisse because the risks being considered related to other aspects of the rules. Secondly, as confirmed by Ms McGeehan's evidence the Government takes a risk-based approach in relation to State aid, and will not notify a measure just because it is told that there is some element of risk. That seems to me to be a reasonable and proportionate approach to take where substantial risk is not identified. Ms McGeehan's recollection was that they had concluded based on the legal advice, and taking account of the rationale for the tax, that notification was not required.
>
> 92. As regards (7), there was no failure to take account of the position of the Taxed Banks: banks paying bonuses during the period of operation of BPT were the target of the measure. As regards (8), it appears that Credit Suisse have not complained to the Commission. In any event the Commission has expressed no view.
>
> 93. In all the circumstances I would conclude that, if there were State aid, there would be no 'sufficiently serious' breach to justify an award of damages for consequential losses, and would therefore decide Issue 4 in favour of HMRC."

55. In the light of the guidance in the case-law, I turn to consider whether TDC's prospects of satisfying the condition of a "sufficiently serious" breach are realistic, in the sense of being more than merely arguable but carrying some degree of conviction. I assume for present purposes that TDC has a realistic prospect of establishing a breach of the State aid rules, and the present exercise assumes that breach will be established. I bear in mind the principles summarised by Lewison J in the *EasyAir* case (paragraph 17 above), including in particular those numbered (v), (vi) and (vii).

Mr Bowsher submits that great caution is needed, in circumstances where the present application is being heard before disclosure has been given and TDC's ability to advance a case on the seriousness of the breach is necessarily limited by its lack of access to the internal workings and deliberations of the Council; the court should be mindful of the evidence that, though not at present to hand, might reasonably be expected to become available in the course of fully contested proceedings. On the other hand, Mr Robertson submits that, although it is relevant to have regard to the evidence that might be anticipated to be obtained hereafter, a claimant which brings proceedings is not excused from the obligation to put forward an adequately particularised case that carries some conviction by the mere hope that "something might turn up".

56. As to the first factor mentioned in *Negassi* (importance of the principle), Falk J in *Credit Suisse* recognised at [89]: "Clearly, the State aid rules are important. There is also no discretion conferred on Member States in relation to compliance with them." The authorities show that this is a significant factor but that it is not necessarily determinative of the question of seriousness.

57. Factors (2) to (5) can be considered together and lie at the heart of the matter. There is no direct evidence to indicate that the Council either deliberately flouted the State aid rules or acted without regard to those rules, not caring whether its conduct infringed them. Mr Bowsher submitted that such an inference could be drawn from either or both of two things: first, the Council's persistence in the conduct complained of after TDC had expressly alleged breach of the State aid rules in correspondence; second, the clarity and precision of the State aid rules. I do not consider that these matters justify the inference that the breach of the State aid rules (assuming there to have been a breach) was anything other than unintentional. In itself, the fact that the Council rejected TDC's complaints in correspondence does not take the matter very far: mere refusal to accept someone else's contentions is not itself a matter for criticism. Mr Bowsher relies on a letter of 24 October 2018, in which TDC drew the Council's attention to a judgment of 4 May 2018 of the French-Speaking Court of First Instance of Brussels, in which arrangements for waste collection similar to those of the Council were held to amount to State aid for the purposes of Article 107(1). I agree with Mr Robertson that a first-instance decision on Belgian legislation does not materially advance the matter.

58. The important question concerns the ostensible merit, not the fact, of the TDC's complaint. In one sense, the State aid rules are clear and easy to state. However, their application in differing contexts and circumstances can be far from plain and obvious. That is one reason why there is much litigation about them. It is also a reason why Article 108 provides a mechanism by which it can be determined whether aid offends against Article 107(1). There is no case-law of the CJEU or of the courts of England and Wales that establishes that arrangements such as those made by the Council constitute unlawful State aid. No Community institution has taken a position on the matter (cf. factor (8) in *Negassi*), and the Commission has not even stated a preliminary opinion since the matter was referred to it. The clarity and precision of the basic principle therefore has limited force in the present case.

59. Although I do not seek to determine whether the Council is correct to contend that TDC has no realistic prospect of establishing that its arrangements constitute unlawful State aid, it is relevant to consider the Council's argument on the point, insofar as it

has a bearing on the factors identified in *Negassi*. If the argument is plainly weak, or even obviously wrong, a breach of the State aid rules by the Council may well be more likely to be considered inexcusable, perhaps even wilful, and thus to be sufficiently serious. On the other hand, if the argument is plausible and might be advanced reasonably and in good faith, a breach might be less likely to be considered serious. As *Negassi* shows, this is not a consideration that need await the final determination of whether the Council's actions were lawful.

60. The Council contends that its arrangements do not fall within Article 107(1) because the "selectivity" criterion (that the measure must favour certain undertakings) is not met. In *Credit Suisse* Falk J had to decide whether the selectivity criterion was met. Having reviewed the authorities, she said at [30]:

> "As can be seen from this, there are a number of elements to selectivity. In particular:
>
> a) it must be determined whether the measure favours certain undertakings (or sectors) over others;
>
> b) those undertakings must be in a 'comparable factual and legal situation';
>
> c) whilst a tax advantage can constitute State aid, it will not do so if it results from a general measure applicable without distinction to all economic operators;
>
> d) the starting point is to identify the ordinary or 'normal' tax system, and then determine whether the tax measure is a derogation from that system;
>
> e) the question whether undertakings are in a comparable factual and legal situation must be determined in the light of the objective pursued by the ordinary tax system; and
>
> f) even if a measure is a priori selective, there will be no State aid where the Member State shows that the differentiation in treatment flows from the 'nature or general structure' of the system."

61. Bacon states at para 2.114 (I omit the references):

> "Despite the number of cases which have addressed the selectivity condition, it remains the most difficult of the State aid conditions to apply in practice, and the assessment of selectivity has thus been described as 'a difficult exercise with an uncertain outcome'. The basic problem is that not every measure that can be described as producing an advantage for one or more groups of undertakings over others is regarded as selective within the meaning of Article 107(1). Rather, the case-law of the Court has distinguished two particular situations where a measure with differential effects may

> nevertheless escape classification as aid on the basis of a selectivity analysis: the favoured undertakings may not be comparable, properly speaking, to the non-favoured group; and the different treatment may be justified by the nature and scheme of the relevant system. To address those issues a three stage analysis of selectivity has emerged for complex cases (particularly tax cases). First, the relevant reference system must be identified. Secondly, it must be established whether the measure is prima facie selective, in light of that reference system. The third question is whether the measure is justified by the nature of the scheme. … It should be emphasised, however, that it is not necessary to address all three stages in every case: in most cases, the prima facie selectivity of the measure will be obvious without having to look at a reference framework; and the 'nature or scheme' issue will only arise to the extent that this is advanced as a justification by the relevant Member State."

62. The Council says that its factual and legal positions are not comparable to those of TDC and that any differential treatment is justified by the general nature and structure of the scheme in section 45 of EPA 1990, under which the Council operates. Mr Robertson referred me to two decisions in this connection: by way of illustration and analogy, the judgment of the CJEU in *R (o.a.o. Eventech Ltd) v The Parking Adjudicator* [2015] EUECJ C-518/13, EU:C:2015:,9 [2015] WLR 3881; and, specifically regarding the position of the Council, the decision of Warren J, already mentioned, in *R (o.a.o. Durham Co Ltd v Revenue and Customs Commissioners* [2016] UKUT 417 (TCC).

63. *Eventech* was a decision upon a request by the Court of Appeal for a ruling on questions concerning the application of Article 107(1). The case concerned a challenge to the lawfulness of a regulation that permitted Black Cabs but not licensed minicabs to use bus lanes in London; the claimant alleged was that the regulation conferred a selective economic advantage on Black Cabs. Having set out the relevant legal and factual position, the CJEU said that the question whether the bus lanes policy conferred on Black Cabs a selective economic advantage was one for the domestic courts, but it made the following observations:

> "54. … [I]t must be recalled that Article 107(1) TFEU prohibits State aid 'favouring certain undertakings or the production of certain goods', that is to say, selective aid (the judgment in *Mediaset v Commission*, C-403/10 P, EU:C:2011:533, paragraph 36).
>
> 55. It follows from the Court's settled case-law that Article 107(1) TFEU requires an assessment of whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation (the judgment in *Mediaset v Commission*, EU:C:2011:533, paragraph 36).

> …
>
> 61. It follows [i.e. from the facts set out] that Black Cabs and minicabs are in factual and legal situations which are sufficiently distinct to permit the view that they are not comparable and that the bus lanes policy therefore does not confer a selective economic advantage on Black Cabs.
>
> …
>
> 63. In the light of all the foregoing, the answer to the first and second questions is that the practice of permitting, in order to establish a safe and efficient transport system, Black Cabs to use bus lanes on public roads during the hours when traffic restrictions relating to those lanes are operational, while prohibiting minicabs from using those lanes, except to pick up and set down passengers who have pre-booked such vehicles, does not appear, though it is for the referring court to determine, to be such as to involve a commitment of State resources or to confer on Black Cabs a selective economic advantage for the purpose of Article 107(1) TFEU."

64. Mr Robertson submitted that the fact that the Council and TDC are not in comparable legal and factual positions is shown by section 45 of EPA 1990 and by Warren J's judgment in *R (o.a.o. Durham Co Ltd v Revenue and Customs Commissioners*. As already mentioned, that was a case about the different treatment by HM Treasury and HMRC of TDC and local authorities regarding VAT. The preliminary issue before Warren J was:

> "Where a local authority ['LA'] that is a Waste Collection Authority ['WCA'] for the purposes of the Environmental Protection Act 1990 ['EPA 1990'] is making supplies of trade waste collection services to business customers (i.e. entities occupying non-residential property) in its area, are those supplies by the LA 'activities in which it is engaged as a public authority' within the meaning of section 41A(1) of the Value Added Tax Act 1994 ['VATA 1994'] and/or Article 13(1) of the Principal VAT Directive ['Article 13(1)' and 'PVD']?"

65. Although the specific issue in that case was different from that in this case, there is a close and obvious connection between the two, at least as regards the present discussion. At [24] Warren J explained the point that arose on TDC's case before him:

> "TDC contends that the LAs engaging in the activity of trade waste collection services are not doing so 'as public authorities' within the meaning of Article 13(1). In accordance with the case law of the CJEU, that phrase has been interpreted to mean that the authority must be acting under what it has described as a 'special legal regime'. TDC contends that a LA which has chosen effectively to 'go into the business' of providing trade

> waste collection services, doing so in competition with private sector operators, is not thereby acting in its capacity as a local authority, but rather is engaging in an activity which is equally open to a private sector operator under the same (or essentially the same) legal conditions."

Warren J noted the differences between the positions of local authorities and commercial operators. At [35] he referred to evidence, which was not subject of challenge, from North Lincolnshire Council, that "the Council's commercial waste collection therefore sits within a framework of environmental obligations and objectives. The Council does not seek to make a profit and does not seek to increase waste collections. Rather, it encourages residents to reduce waste." At [63] he said: "A LA has wide social responsibilities which a private sector operator does not, responsibilities which include statutory duties. Its purposes in providing a particular service may be to fulfil those responsibilities. The service is not, in those circumstances a commercial purpose." At [97] Warren J said:

> "… I consider that LAs have no power to provide commercial waste collection services on a commercial basis other than through a company. … If LAs are acting within their powers in providing directly, and not through a company, the services which they have, then the only available power is to be found in section 45(1)(b) EPA 1990."

At [102] he referred to the "essential element of the jurisprudence of the CJEU" that "the only criterion making it possible to distinguish with certainty between those two categories of activity [commercial activity and activity as a public authority] is the legal regime applicable under national law". The following parts of his judgment show material parts of his consequent reasoning:

> "103. I have no doubt that section 45(1)(b) EPA 1990 is, or at least is capable of being, a 'special legal regime'. This is demonstrated by consideration of a LA which provides a commercial waste collection service only if requested to arrange for such collection by an occupier of premises and does so for a reasonable charge which, taking the provision of the service to occupiers generally, results only in cost recovery and no surplus. … Indeed, TDC itself does not deny that a LA that is actually arranging a collection in response to a request under section 45(1)(b), and then levying a charge under section 45(4) for the reasonable costs of that collection, may be 'acting as a public authority'.
>
> 104. Since it cannot be said that section 45(1)(b) is not ever capable of constituting a special legal regime, it must follow, even on TDC's case, that whether any particular LA is acting as a public authority will depend on the facts relevant to that LA. …
>
> 105. It is therefore impossible, even on TDC's case, to answer the preliminary issue with the answer 'No' (so that the VAT

> derogation does not apply) since there are at least some, and may be many, LAs who are not to be regarded as taxable persons in relation to supplies of commercial waste collection services. The answer, on TDC's case, would have to be 'it all depends'.
>
> 106. However, once it is accepted, as it must be, that section 45(1)(b) EPA 1990 is capable of constituting a special legal regime in some cases, then in my view any activities carried out by a LA pursuant to that special legal regime fall within the VAT derogation, subject always to the competition proviso. As the cases show, the only criterion making it possible to distinguish with certainty between activities as a public body and activities subject to private law is 'the legal regime applicable under national law'. I accept, of course, that not every activity carried on by a LA is subject to a special legal regime simply because some statutory basis has to be found for that activity. But once a legal regime has been identified as a special legal regime in accordance with the case-law, it would defeat the purpose of that clear criterion – namely to provide a clearly and readily applicable test – to require national courts to enter into a further enquiry as to whether particular activities within that legal regime are entitled to the benefit of the VAT derogation. …
>
> …
>
> 109. The preliminary issue is to be answered in the sense that, where a LA is making supplies of trade waste collection services to business customers in its area and does so in the performance of its duties under section 45(1)(b) EPA 1990, the supplies are 'activities in which it is engaged as a public authority' within the meaning of section 41A(a) VATA 1994 and Article 13(1). Whether a LA is in fact providing its commercial waste collection services under section 45(1)(b) is a matter to be determined on the facts of each case."

66. Mr Bowsher submitted that Warren J's decision was irrelevant to the present case, because it concerned the question whether, in providing commercial waste collection, the Council is engaged in activities as a public authority, not the question whether it acts as an undertaking for the purpose of the State aid rules. Certainly, the decision is not directly on point and does not decide the issues arising in these proceedings. However, its relevance lies in its analysis of the particular legal regime under which local authorities provide commercial waste collection services and the distinction between the positions of local authorities and commercial undertakings.

67. Mr Bowsher submits that the Council has admitted in its defence that its operations constitute it an "undertaking", and by reference to comments in Bacon he says that aid that confers advantage solely on a single undertaking will necessarily meet the selectivity criterion. The point may be arguable, but I think that the contrary is also arguable and that Mr Bowsher's case is overstated. He cites Bacon at para 2.113: "An

aid to an individual undertaking is obviously selective …" However, at 2.115 the author states: "A measure is prima facie selective if it produces advantages exclusively for certain undertakings or certain sectors of activity. As noted above, this will normally be the case where aid is granted to a single undertaking" (my emphasis). The footnote observes that "some cases of measures of individual application may require a more complex assessment by reference to a relevant reference framework, such as individual tax rulings". The important point made by the Council is that it does not provide its commercial waste collection services on a commercial basis but under a specific regime for environmental protection, which is directed to the public benefit not to the economic advantage of local authorities, and that as such its factual and legal situation is not comparable to that of TDC. That point seems to me to be at the least strongly arguable. Indeed, I should be inclined to accept it, although I am not deciding the question.

68. For present purposes, what is important is that, even if the Council is wrong, the position it has taken it not so obviously lacking in merit that its conduct can be considered to amount to a wilful breach of the State aid rules or to be inexcusable.

69. The sixth factor in *Negassi* does not advance matters. The Council has persisted in its conduct, despite complaints by the Company. But it has never become "evident" that its conduct is a breach of the State aid rules. I have mentioned that neither the Commission nor any other EU institution has taken a position on the matter; this is the eighth factor. The seventh factor does not seem to me to have significant weight in the circumstances. The Council knows of the effect complained of by TDC. Wilful flouting of the State aid rules would in those circumstances be the more serious. If, however, the Council believes that it is not acting unlawfully, there is no good reason why, simply to avoid commercial damage to TDC, it should increase its charges to its commercial customers.

70. Having considered the factors, I conclude that TDC's case on the second State Liability Condition is at best merely arguable but that it carries no conviction and has no realistic, as opposed to merely fanciful, prospect of success. It ought not, therefore, to be permitted to proceed.

71. I have borne in mind Mr Bowsher's reminder that "the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case" (principle (vi) in *EasyAir*). I am not persuaded that this presents a sufficient reason for refusing summary judgment in this case. First, a party that brings a claim is obliged to be able to set out the matters on which it relies to ground the claim and to verify those matters with a statement of truth. This requirement is not negated or diluted by the obvious fact that the balance of the evidence for and against the matters relied on in the claimant's pleaded case may appear different at trial, after disclosure and exchange and examination of witness evidence, from the way it appeared at an early stage. It seems to me that TDC has not set out any plausible grounds for establishing State liability against the Council and is not in a position to do so. Related to this, secondly, I agree with Mr Robertson that TDC's position is not properly to be viewed as a case of awaiting evidence that will establish the matters on which it currently relies but is in the nature of a fishing expedition, hoping that something will turn up

that will enable it to advance a case on the second State Liability Condition that it cannot advance at present. Even on that basis, thirdly, I do not consider that reasonable grounds exist for supposing that anything of assistance to TDC would turn up.

72. I note, incidentally, that in *Credit Suisse* Falk J noted that no case had been brought to her attention where damages had been awarded for breach of the State aid rules. No such case has been brought to my attention either.

The claim for declaratory and injunctive relief

73. The other substantive relief claimed in the prayer to the particulars of claim is as follows:

> "(1) A declaration that the Defendant has granted aid within the meaning of Article 107(1) TFEU to its Commercial Waste Business and some of its customers in the form of access to relevant employees, assets and contracts for disposal at below market value;
>
> (2) A declaration that the aid referred to in (1) was implemented in breach of Article 108(3) TFEU;
>
> (3) A permanent mandatory injunction requiring the Defendant to set its price for commercial waste collection services so as to cover the costs of providing those services on a standalone basis".

(There is also a prayer for "Further or other relief as the court deems fit", but no one has suggested any such further or other relief that might be awarded, and I can think of none, save possibly for declarations or injunctions in slightly different terms.)

74. In my judgment, TDC has no prospect of obtaining a final mandatory injunction on the basis of its claim in these proceedings. By the time any trial took place, the EU State aid rules that such an injunction would be designed to enforce compliance with would no longer apply. Of course, there might be a new regime in place (cf. paragraph 2 above); but any claim for an injunction to enforce compliance with such a regime would have to be a new claim based on a different cause of action. I understood Mr Bowsher to accept this point in the course of argument.

75. I also consider that there is no real (that is, as opposed to fanciful) prospect of obtaining declaratory relief in the absence of a damages claim. If the only surviving claim to relief were a claim for a declaration, it would be of no more than historic interest: the declarations of breach of EU State aid rules would have no practical consequences in terms of redress of past wrongs, and they would have no prospective value where the legal framework to which they related no longer applied. The grant of declaratory relief is discretionary. Where the only surviving claim is academic, there is no real prospect of a court granting such relief, albeit that it might have jurisdiction to grant it. Mr Bowsher suggested that the claim for declarations might

have some relevance to the availability of disclosure in an attempt to enforce the Council's compliance with a new regime, but I had difficulty understanding that suggestion. If there were to be a new claim alleging breach of the requirements of the new regime, the availability and extent of disclosure would depend on the application of the disclosure rules to that claim, not on the existence of a claim for a declaration regarding breach of a different regime. Further, talk of a new claim under a new regime is speculative.

76. Accordingly, there will be judgment for the Council on the claims for declaratory and injunctive relief, which will therefore be dismissed.

Conclusion

77. TDC has no real prospect of establishing an entitlement to any of the relief sought in the case. I shall accordingly give summary judgment for the Council.