Neutral Citation Number: [2024] EWHC 1443 (KB)

Case No: KA-2023-LDS-006013

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

On appeal from the County Court at Newcastle
HH Judge Freedman

Leeds Combined Court
1 Oxford Row
Leeds LS1 3BG

Date: 13/06/2024

Before :

MR JUSTICE EYRE

- -

Between :

MARK WETHERELL	**Appellant**
- and -	
STUDENT LOANS COMPANY LIMITED	**Respondent**

- -
- -

Tom Carter (instructed by **Tilly, Bailey & Irvine**) for the Appellant
Michael Rapp (instructed by **Mills & Reeve LLP**) for the Respondent

Hearing date: 17th May 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 13th June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE EYRE

Mr. Justice Eyre:

1. The Appellant brought a personal injury claim against the Respondent. The Appellant founded that claim on European Directives 2009/1 04/EC and 2003/1 OSEC ("the Directives"). He contended that the Directives were directly enforceable against the Respondent and that his injury had been caused by the Respondent's breach of them. The enforceability of the Directives was disputed by the Respondent. It was accepted by the Appellant that he could not pursue a claim in common law negligence nor one based on any breach of the Provision and Use of Work Equipment Regulations 1998 ("the Regulations"). At the trial of the claim HH Judge Freedman dealt with the question of the enforceability of the Directives as a preliminary issue. The judge dismissed the claim having concluded that the Respondent was not an emanation of the state and that as a consequence the Directives were not directly enforceable against it.

2. The Appellant appeals against the dismissal of the claim pursuant to permission given by Foster J. The principal issue is whether Judge Freedman was right to hold that the Respondent is not an emanation of the state. There is a secondary issue as to whether the Directives are directly enforceable even if the Respondent is such an emanation.

3. A striking feature of the case is the paucity of the evidence on the principal issue with the Appellant resting his case on asserted facts which he contends are matters of general public knowledge of which judicial notice is to be taken.

The Proceedings in the County Court.

4. The Respondent administers the system whereby student loans are provided out of public funds for those undertaking higher education. The Appellant formerly worked for the Respondent in a call centre. That work required the use of a headset. The Appellant's case was that he suffered injurious levels of noise through the use of the headset and developed tinnitus as a result. He said that the headset was not suitable for this work and that this unsuitability and other related matters were breaches of the Directives which were directly enforceable against the Respondent as an emanation of the state.

5. The Respondent advanced a limitation defence (an issue which was determined in the Appellant's favour as a preliminary issue in May 2022); disputed causation; and denied that there had been any breach of duty. For present purposes the relevant part of the defence case was the denial that the Directives were directly enforceable against the Respondent. In the Defence the Respondent described itself as a private limited company and "an executive non-departmental public body".

6. The only evidence put before the judge as to the nature of the Respondent came in the second statement of the Respondent's senior estates manager, Mark Brennan. There Mr Brennan said:

> "The Student Loans Company is a non-profit making government-owned organisation that administers loans and grants to students in universities and colleges in the UK.
>
> The Student Loans Company is an executive non-departmental public body, sponsored by the Department for Education.

> I should make it clear that the Student Loans Company is not an emanation of the state. It is not a body that provides a public service under the control of government. It is simply a vehicle for the administration of student loans and it has no special powers."

7. In his skeleton argument for the hearing below Mr Carter for the Appellant quoted from the Respondent's website but this did not advance matters because paragraphs [3] and [4] of Mr Brennan's statement were in identical terms to the passage quoted from the website.

8. In addition Mr Carter drew Judge Freedman's attention to the judgments delivered in the Supreme Court in *R(Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, [2015] 1 WLR 3820. The issue there had been lawfulness of regulations restricting student loans to those who had been lawfully ordinarily resident in the United Kingdom for the three years before the start of the relevant course and who were settled in this country on that date. The nature and status of the Respondent was not at issue in that case but the members of the Supreme Court did make reference to the system for student loans when addressing the context of the regulations.

9. Thus at [1] Lady Hale (with whom Lord Kerr agreed) said:

> "As is common knowledge, the whole system of funding higher education was reformed, broadly in accordance with the recommendations of Lord Browne's report, Securing a Sustainable Future for Higher Education (October 2010), in 2011... The fees which universities were allowed to charge their students would increase to something closer to what it cost to educate them; the fees paid by the students, and a sum for their maintenance, would be financed by loans from Government (through an arms-length entity); these loans would only be repaid when the students could afford to do so and at a rate which they could afford..."

10. At [4] Lady Hale referred to Student Finance England as being "the trading name of the Student Loans Company Ltd which administers the scheme".

11. At [75] Lords Sumption and Reed said:

> "Student loans are provided out of public funds on terms which are much more advantageous to students than any commercial alternative. They are a form of state benefit..."

12. Judge Freedman addressed the preliminary issue in an *ex tempore* judgment. He noted that by virtue of section 69 of the Enterprise and Regulatory Reform Act 2013 ("the Enterprise Act") breaches of the Regulations could not give rise to civil liability under domestic law. The judge then turned to what he described as the Appellant's "enterprising approach to liability" based on the Directives which would "bring back into play" the Regulations.

13. At [5] having said that there were "formidable obstacles in the [Appellant's] path" the judge said:

> "Specifically, it is not clear to me at this stage how it can be argued that the European directive is somehow different, or materially different to the terms of the Health and Safety Regulations, and therefore, upon what basis it can be said that the regulations should be invoked, notwithstanding, the provisions of section 69 of the Act. It seems to me, on the face of it, that the directives can only be engaged if it can be demonstrated

> that UK legislation has failed successfully to implement the directives into the regulations, in other words, to follow the directives when drafting the regulations. On the face of it, whilst there may be some nuanced difference in wording, for example, in relation to foreseeability, in practical terms, there is no material distinction between how a Court should interpret the directives and how a Court should interpret the regulations... "

14. At [6] Judge Freedman noted "an added difficulty" saying that it was "very unclear" to him to what extent the Appellant was able to rely on the Directives following the withdrawal of the United Kingdom from the European Union. At [7] the judge summarised the parties' competing contentions as to the effect of that withdrawal before saying that they were "very interesting arguments which may be canvassed at another time in another place". He then identified the issue he had to determine thus:

> "... what it does fall for determination now, is whether this defendant can properly be described as an emanation of state. If it is not, then Mr Carter, as he must, accepts that all his arguments about invoking the European directives fall away. It is, in other words, a pre-requisite, as he demonstrates that Student Loans Company Ltd is an emanation of state..."

15. At [8] – [10] Judge Freedman set out the evidence which had been put before him in these terms;

> "The role of the Student Loans Company Ltd is to administer loans to students on behalf of the government; that much is clear. Its role, further, is to administer those loans in accordance with the regulations brought into being by a statutory instrument. The relevant regulations are the Education Student Support Regulations 2011. I am satisfied, on the basis of what Mr Carter has told me, and his citation from the case of *R (on the application of Tigere) (Appellant) v Secretary of State for Business, Innovation and Skills (Respondent)* [2015] UKSC 57, that this company is responsible for administering the loan scheme provided for under the relevant regulations.
>
> It is also accepted within the defence, that whilst the defendant is a private limited company, it is an executive non-departmental public body. I am unclear what that phrase actually means, but I understand it to mean that it is connected to the government. It is a public body, and I am prepared to have regard to what is said in Mr Carter's skeleton argument in relation to this matter, in particular, his citation from the web where the company is described as a non-profit making government-owned organisation that administers loans and grants to students in colleges and universities in the UK.
>
> The only other evidence that I have in relation to the duties, powers, responsibilities, and obligations of this company comes from a very brief statement from Mark Brennan. It is his second statement in this case, and it deals specifically with this point, and he says he agrees that it is a non-profit making government-owner organisation, and it administers loans and grants to students in universities and colleges in the UK. He agrees it is an executive non-departmental public body. He says:
>
> > 'It is not an emanation of the state. It is not a body that provides a public service under the control of government. It is simply a vehicle for the administration of student loans and has no special powers'."

16. Then the judge pointed to the inadequacy of the evidence with which he had been provided saying, at [11] and [12]:

> "That is the extent of the evidence placed before me. As I observed in the course of argument, and I do not think counsel disagree with me, there is a serious and material dearth of evidence as to the true status of this company, and as I have already observed

> as to its powers, duties, and responsibilities. It seems to me that if I am to make a ruling that this is an emanation of the state in the face of the evidence from the senior estate manager, Mr Mark Brennan, that it is not an emanation of the state for the reason which he gives, namely that it is simply administering the policy of the government, then I need persuasive, extensive and compelling evidence of which I have none.
>
> I say again, all I know is that it is a vehicle for the administration of the government scheme. I am prepared to accept that it is only this company that is responsible for the administration of the loan scheme. I have no idea, what, if any, part it plays in the recovery or repayment of the loans once a student has graduated. There is simply no evidence before me about that, and so I find myself in very considerable difficulty in trying to come to a conclusion as to whether it is an emanation of the state."

17. At [13] – [17] Judge Freedman addressed the authorities to which he had been referred and in particular the decision in *Foster v British Gas* [1991] 2 AC 306 to which I will return below. He noted, at [17], that it was agreed that for a body to be an emanation of the state it had to have a "special power". He reverted to the point that he had limited evidence and in particular that there was "no evidence … that this company has any power of enforcement or enforceability".

18. At [18] the judge said:

> "On the information before me, all I know is that it is an administrative vehicle doing that which it is required to do by the government. I have no information whether it be the case or not, as to whether it has a discretion about whether loans can be advanced or not, whether it has any powers of decision-making at all. Thirdly, in the British Gas case, it was said it had the powers of borrowing from the Secretary of State. I very much doubt if that is something that arises in the instant case"

19. At [19] the judge said that the Appellant's counsel had contended that the special power which the Respondent had was that of "being the only body that can administer student loans, pursuant to regulations made by the government".

20. The judge then dismissed the Appellant's contentions in these terms at [20] – [22]:

> "On the evidence before me, I am wholly unconvinced that that constitutes a special power. What it does do, is describe its function. Its function as a limited company is to administer loans, but it does so, as I understand it, pursuant to instruction and on authority of the government. It does not seem to me that that necessarily, at any rate, confers special powers upon it. The fact that it is the only company that is engaged by the government to perform that role, again, does not seem to me to give it a special power.
>
> One can think of many examples when a company has a specific designated power to do something, but it does not mean that that equates to a special power. The reality here is that on the evidence I have, this company is no more than an administrative body, albeit answerable to the government. To be compared and contrasted with a Health Authority or a Local Authority, which has its own powers of self-regulation, its own powers of control, and which has its own mechanisms for decision-making and the like, I do not understand this company, absent any further evidence, to have any control, responsibility, duty or power to do anything other than apply and enforce the regulations made under a statutory instrument.
>
> In short, on the evidence before me, I cannot be satisfied that it possesses a special power..."

21. In the balance of [22] and in [23] Judge Freedman set out a number of criticisms of the adequacy of the evidence which had been put before him. I will not rehearse those criticisms here: it suffices to say that I agree with them as did Foster J.

22. The judge's finding that the Respondent was not an emanation of the state was conclusive of the matter and in the light of that finding he did not engage in the "sterile and academic" exercise of exploring further the application of the Directives.

The Grounds of Appeal.

23. The first ground of appeal is that the judge erred in finding that the Respondent was not an emanation of the state and as a consequence erred in finding that the Directives were not directly enforceable against the Respondent.

24. The second ground was that:

> "The Judge misdirected himself that any finding that the Appellant could rely on the principle of vertical direct effect required an express or implied criticism of the removal of the civil cause of action based on a breach of the Regulations made under the relevant Directive by virtue section 69 of the Enterprise and Regulatory Reform Act 2013. In fact, the only three requirements for the Appellant to on the principle of vertical direct effect were that the Directive was unconditional and sufficiently precise, the Appellant's cause of action accrued after the Directive was implemented and that the Respondent was an emanation of the state."

25. The grounds of appeal had been formulated before the transcript of the judgment was available and Mr Carter put the Appellant's case in this regard rather more succinctly in his skeleton argument and in his submissions to me. As it was developed the Appellant's case on ground 2 was that the judge had erred in his approach at [5]. The Appellant said that the judge should have found that there had been a failure to implement the Directives with the consequence that they were directly enforceable against bodies which were emanations of the state. It is apparent that this development of the ground is not only more succinct but is also making a rather different argument from that in the ground as originally formulated. In any event the point only becomes relevant if the judge was wrong to conclude that the Respondent was not an emanation of the state.

26. The third ground was that:

> "Insofar as he made any finding on this issue, the Judge erred in concluding that the effect of the European Union (Withdrawal) Act 2018 meant that the Appellant could not rely on the principle of direct effect. The Appellant's cause of action accrued in 2014. The relevant test for the Respondent's duty was the applicable at the time which was that under the EU Directive."

27. That ground was also formulated without sight of the transcript of the judgment. The judgment makes it clear that the judge did not regard the effect of the United Kingdom's withdrawal from the European Union as an issue he had to address. Before me both sides agreed that although the competing positions had been articulated below the point had not been explored in detail. For the Respondent Mr Rapp conceded that if grounds 1 and 2 succeeded (with the consequence that the judge was wrong in his conclusions that the Respondent was not an emanation of the state and that there had been implementation of the Directives) he would not seek to uphold the decision on the basis that the position had been changed by the United

Kingdom's withdrawal from the European Union. Mr Rapp left open the possibility of reviving that argument if the appeal succeeded and the matter was remitted for rehearing but before me neither side advanced arguments on the point. In those circumstances I will not consider ground 3 any further.

The Permission given by Foster J.

28. Foster J gave permission on all three grounds. She explained that she was doing so under CPR rule 52.6(1)(b), namely that there was some other compelling reason for the appeal to be heard. Foster J said that "an important point arguably arises" and that the application was "(just) arguable on the basis that it raises an important issue that is not covered (for obvious reasons) by authority".

29. Foster J echoed Judge Freedman's criticism of the adequacy of the evidence before him. She said that:

> "… it is clear from his reasoning that the learned judge of first instance was not given the assistance he required to determine the issue which required the application of law to a detailed factual background. That factual background was lacking …"

30. In light of that Foster J provided for the appeal bundle to contain "such further evidence as … the Claimant deems necessary to assist the court in determining the appeal" and for the Respondent to be at liberty to file evidence in reply. I do not understand that in making that provision Foster J was determining whether such evidence would be admissible on the hearing of the appeal. That was a matter which would depend on the material being put forward and on the explanation for the failure to put it before Judge Freedman.

31. Against that background Foster J concluded her observations thus:

> "The Appellant, if he chooses to proceed with appeal, would be well advised to make a close assessment of the facts he relies upon to assert the status of the Respondent, and decide whether it is proper in light of that to continue with this appeal, in particular as he appears to be in receipt of public funding."

32. Notwithstanding Foster J's observations the Appellant continued with the appeal but chose not to seek to adduce any further evidence.

Ground 1

The Circumstances in which there can be Direct Enforcement of an European Directive.

33. The approach to be taken in this regard was set out in *Foster v British Gas Plc* [1991] 2 AC 306. There Lord Templeman (with whom the other members of the House agreed) explained the effect of the relevant provisions of European Law and of the decision in *Marshall v Southampton & South-West Hampshire Health Authority (Teaching)* [1986] QB 401.

34. When the United Kingdom was part of the European Union it was obliged to implement European Directives. Typically this was done by way of statutory instrument or legislation giving effect to the provisions of the relevant directive as a matter of domestic law.

35. The starting point was that a directive "may not of itself impose obligations on an individual and a provision of a directive may not be relied upon as such against such a person" (311C). The relevant rights and obligations were to be found in the terms of the domestic legislation giving effect to the directive and not in the directive itself. However, there was an exception to that approach in cases where a member state had not adopted measures to give effect to the relevant directive. In such a case it was "necessary to prevent the state from taking advantage of its own failure to comply with Community law" (311C) and to avoid the effectiveness of the duty to implement the directive being diminished (312D). In those circumstances, and for that purpose, the position was that the member state "may not plead, as against individuals, its own failure to perform the obligations which the directive entails" (311B). In such a case an individual could rely on the terms of a directive and could do so against the state "regardless of the capacity in which the latter is acting, whether employer or public authority" (311C).

36. The test of whether a body was an emanation of the state such as to be subject to the direct effect of a directive was explained at 313A and D as being whether it was:

> "a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals"

37. It will be seen that the test has two limbs. First, the body must have been made responsible for providing a public service under the control of the state. Second, the body must have special powers going beyond those available as a matter of general law in dealings between private persons.

38. In *Foster v British Gas* the first limb of the test was satisfied because (at 314B) the defendant:

> "performed its public service of providing a gas supply under the control of the state. The B.G.C. was not independent; its members were appointed by the state; the B.G.C. was responsible to the minister acting on behalf of the state, and the B.G.C. was subject to directions given by the Secretary of State"

39. There the second limb of the test was satisfied by reason of section 29 of the Gas Act 1972 which provided that no person could supply gas to any premises without the consent of the defendant and subject to such conditions as the defendant should impose. That gave British Gas a "special power beyond those which resulted from the normal rules applicable in relations between individuals" (314D).

The Respondent's Status and Powers.

40. As I have already noted, despite the comments of the judge and the observations of Foster J the Appellant has not sought to adduce any further evidence but instead bases his appeal on matters of which he contends the court should take judicial notice.

41. The Appellant was critical of the evidence of Mr Brennan. In his skeleton argument Mr Carter said that this evidence "should carry no weight" and described it as "a self-serving assertion by the Respondent, made by an employee who does not engage with the idiosyncrasies of the Respondent and who appears [to be] in no better position than anyone else involved in these proceedings". That is an unattractive submission

(even leaving aside the overly heightened language in which it is expressed) in circumstances where the Appellant has chosen to advance no evidence of his own and where a large part of Mr Brennan's evidence replicated the passage from the Respondent's website which Mr Carter had quoted in his skeleton argument below. The contention nonetheless has force to the extent that Mr Brennan is not in a position to say whether the Respondent is an emanation of the state as a matter of law. Moreover, Mr Brennan's statement at [5] that the Respondent is "not a body that provides a public service under the control of the government" does not sit easily alongside the explanation at [3] that the Respondent is wholly owned by the government and that it administers the student loan scheme on behalf of the government.

42. Mr Carter says that there are three factual propositions of which the court should take judicial notice. They are:

    i) That there is a scheme for higher education finance governed by statute and taking the form of loans made to students.

    ii) That the scheme is administered only by the Respondent.

    iii) That the provision of loans under the student loan scheme is different from other forms of financial provision in that repayment is by way of payments through the tax system, whether by way of PAYE or self-assessment, with repayment only being due after the debtor's income has crossed a relevant threshold.

43. I note that although the second of those propositions was at the forefront of the Appellant's case before Judge Freedman the third does not appear to have been relied on below. Indeed, it is a matter to which the judge referred at [12] lamenting the absence of evidence as to the role of the Respondent in the recovery of the loans.

44. The Respondent accepted the first proposition. It accepted the second proposition to the extent of agreeing that it was the sole body administering the government student loan scheme. However, it emphasised that this did not mean that it had a monopoly in law on making loans to students and it did not accept that it even had a *de facto* monopoly. The Respondent took issue with the third proposition. Mr Rapp said that, as formulated by the Appellant, this conflated the role of the Respondent with that of HM Revenue and Customs. He said that it was HMRC which undertook the recovery of student loans for the benefit of the Treasury. He submitted that the Respondent was a vehicle for the administration of the making of student loans but that the recoupment of payment was a matter for the Treasury and HMRC.

45. The approach to be followed when taking judicial notice of matters of fact was summarised by Choudhury J (as President of the Employment Appeal Tribunal) in *Dodson v North Cumbria Integrated Care NHS Trust* [2021] ICR 1699 at [41] and [42] approving passages in *Phipson on Evidence* at 3-02, 3-03, and 3-017 (the passages approved by Choudhury J in the 17th edition being replicated in the current, 20th, edition). Two of the principles identified there are relevant for current purposes. The first is that the party seeking judicial notice of an asserted fact bears the burden of persuading the court that the fact falls into one of the two categories of matters which can be the subject of judicial notice (no question arises here of matters of which

statute requires the court to take judicial notice). The second is that those two categories are (a) facts which are "so notorious or so well-established to the knowledge of the court that they may be accepted without further inquiry" or which are "so notorious as not to be capable of dispute among reasonable men" and (b) matters "capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy".

46. The powers and structure of the Respondent and the related matters as to its nature might have been thought to be matters potentially falling into the second of those categories. It might have been thought that much could have been learnt from the constitution of the Respondent and/or from the regulations governing the student loans scheme or related material. Somewhat surprisingly neither party has chosen to put any such material before the court either at first instance or on this appeal.

47. I turn, therefore, to the three propositions of which the Appellant says that I should take and that the judge should have taken judicial notice as being matters of "public knowledge" (as it was put in Mr Carter's skeleton argument) or as being matters "which everyone knows to be true" (as it was put in his oral submissions).

48. The first and second propositions are not substantially controversial and subject to the qualification made to the second by the Respondent they are properly matters of judicial notice and were treated as such by the judge. I have already said that the third proposition does not appear to have been advanced before the judge and so he cannot be criticized for having failed to take judicial notice of it. In any event the third proposition is not accepted by the Respondent. In my judgement it can only be accepted as a matter of judicial notice with considerable qualification. It is a matter of judicial notice that the repayment of student loans is made through the tax system. That system is administered by HMRC and to that extent the repayment of student loans is different from the repayment of other loans. It is not, however, possible to go beyond that. The arrangements for triggering repayment and as to by whom and how repayment is enforced are not matters of judicial notice. Still less can there be judicial notice of the destination of the recovered funds and under whose control they are held. It may well be (indeed it is likely) that those are matters which would be readily capable of clear demonstration by reference to sources of indisputable accuracy. However, nothing of that kind was put before the judge nor has it been provided to me. There appears to be considerable force in the Respondent's contention that the recoupment of the loans is for the benefit of the Treasury. If that is so then the position on a proper analysis would appear to be that the Respondent administers the making of the loans with their recovery being effected by and for the benefit of the Treasury. However, the judge was not in a position to come to a conclusion as to that on the material before him and I am no better-placed than he was.

49. The judge found that the Respondent was a vehicle for the administration of the student loans scheme and that it was the only body responsible for this [12]; that it was an administrative vehicle doing what it was required to do by the government [18]; and that its function was that of a company administering loans [20]. The judge accepted [17] that as the only body administering the loans the Respondent could be said to have "a regulatory monopoly". He noted [12] that he had "no idea" as to the part the Respondent played in the "recovery or repayment" of the loans.

50. Subject to two modest qualifications the judge was entirely justified in confining himself to those findings. The first qualification is that it is questionable whether he was justified in describing the Respondent as having a regulatory monopoly. However, to the extent that was an overstatement of the position it was in the Appellant's favour. The further qualification is that the judge could have taken judicial notice of the fact that recoupment of the loans took place through the tax system. However, as noted above that point does not appear to have been advanced before him. Moreover, its relevance and weight were markedly reduced by the fact that the judge rightly said that he was not able to make any finding as to the part the Respondent played in the repayment process. In addition, as already explained, there is no information about the beneficiary of the repayments.

51. It follows that the judge's factual findings cannot be faulted to any significant degree. It is now necessary to consider whether in the light of those findings as just qualified the judge should nonetheless have found that the Respondent was an emanation of the state for the purposes of the direct enforcement of the Directives.

Is the Respondent an Emanation of the State?

52. Before the judge the Appellant's emphasis was on the fact that the Respondent was the only body administering the student loans scheme. Before me that point was supplemented by the argument based on recovery of the loans through the tax system. However, that did not materially advance the case in light of the conclusions I have just explained as to the limited scope of the matters of which judicial notice could be taken coupled with the failure to put this argument before the judge.

53. The first limb of the test set out in *Foster v British Gas* is satisfied here. The Respondent is wholly owned by the government and it is responsible for the administration of the student loans scheme which, as noted in *Tigere*, is a form of state benefit paid out of public funds. As the judge noted Mr Brennan gave no explanation of what it meant for the Respondent to be an executive non-departmental public body. Nonetheless, it is clear that the Respondent was under the control of the state.

54. The difficulty for the Appellant lies in the second limb of the test. The Respondent was the sole body administering the scheme for student loans funded by the government. However, that did not give it a monopoly on the provision of loans to students. In *Foster v British Gas* the relevant special power lay in the fact that it was unlawful for others to supply gas to premises without the consent of British Gas. That corporation could prevent others from supplying gas and could impose conditions on such supply as it did authorise. The Respondent has no equivalent power. Any commercial lender can make loans to students on such terms as it chooses and without reference to the Respondent. It may well be the case that for most of the time and for most students the loans provided through the student loans scheme will be more attractive than those offered by commercial lenders and potentially markedly more attractive. That will depend on the terms of the competing loans including matters such as the rate of interest, the arrangements for repayment, and the amount being lent. Those are considerations which will vary from time to time and from lender to lender. Moreover, no student is required to take a loan from the student loans scheme. The action of the Respondent in administering the loan scheme on behalf of the

government did not, without more, amount to the exercise of a special power going beyond that available between private individuals.

55. An enforceable monopoly is not the only potential kind of special power for these purposes but the Appellant has not shown that the Respondent had any other special power.

56. At [18] the judge explained that he had no information as to whether and if so to what extent the Respondent had a discretion about the advancing of loans nor as to its decision-making powers if any. That is correct but beside the point for current purposes because the existence of a discretion as to the making of student loans would not of itself be a special power.

57. The key points were those made at the end of [17] and [20] of the judgment, namely that there was no evidence that the Respondent had any power of enforcement and that being the only body engaged to perform a role did not give it a special power. That conclusion was unimpeachable. In that regard the contrast which the judge made at [21] between the Respondent and local authorities and health authorities is a cogent one.

58. It follows that the second limb of the test explained in *Foster v British Gas* is not satisfied. The judge was entirely right to find that the Respondent does not have a relevant special power and that it is not to be seen as an emanation of the state for these purposes. The judge was, accordingly, right to conclude that there was no scope for the direct enforcement of the Directives. As a consequence ground 1 fails.

Ground 2

59. The conclusion that the judge was right to conclude that the Respondent is not an emanation of the state is determinative of this appeal. It means that even if there was a failure to implement the Directives they would not be directly enforceable against the Respondent. However, in deference to the arguments advanced before me I will address this ground and will address it in the form articulated before me.

60. I quoted above the passage at [5] where the judge addressed the issue of whether there had been a failure to implement the Directives. The judge's reasoning is expressed in somewhat condensed terms (understandably in the circumstances of the *ex tempore* judgment given at the conclusion of the hearing) but the conclusion reached and the route taken to it are clear. The judge took the view that as there was no material distinction between the terms of the Directives and the relevant domestic regulations it could not be said that there had been failure to implement the Directives and, therefore, there was no scope for direct enforcement of the Directives.

61. The Appellant says that the judge's approach was incorrect because the test is not that of a difference of wording between the Directives and the Regulations but whether there had been implementation of the former by the latter. Mr Carter submitted that the consequence of the removal by the Enterprise Act of civil liability for breach of the Regulations (and of related regulations) meant that there had not been implementation of the Directives. He said that the judge had failed to address this argument and had thereby fallen into error.

62. I can say immediately that the criticism of the judge for an alleged failure to address this argument is misconceived. The contention that the removal by the Enterprise Act of civil liability for a breach of the Regulations was a failure to implement the Directives had not been put before the judge by the Appellant either in his pleadings or in Mr Carter's skeleton argument. In the Particulars of Claim the Appellant had pleaded starkly at [3] that "the Defendant is and was at all material times an emanation of the state against which the following European Directives are directly enforceable". Similarly, the skeleton argument did not address the question of any failure of implementation of the Directives. Instead it focused on the contention that the Respondent was an emanation of the state. The skeleton argument appeared to proceed on the basis that the requirements for direct enforcement of a European directive against an emanation of the state were solely that the provisions of the directive were unconditional and sufficiently precise and that the time for implementation had passed.

63. In his skeleton for the Respondent at the hearing below Mr Rapp did raise the issue of implementation pointing out that direct enforceability was only possible where there had been a failure to implement the relevant directive and citing the passages in *Redgrave's Health and Safety* (10th edition) to which I will refer below.

64. In those circumstances the issue of implementation of the Directives was before the judge but as part of the Respondent's case. The effect of the removal of civil liability and the contention that it amounted to a failure to implement the Directives had not been put before the judge as part of the Appellant's case save to the extent that those points were advanced orally in response to the defence case.

65. In those circumstances I have considerable reservations as to whether the Appellant should be allowed to advance the point on appeal. To the extent that it is a fresh point the cautious approach set out by Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360 at [16] – [18] is to be followed. However, the point is an issue of law and as the question of implementation was before the judge albeit to the limited extent I have just noted. I will, therefore, address it.

66. It was common ground that there had been effective implementation of the Directives in the law as it stood before the coming into force of the Enterprise Act. In that regard I was referred to *Hide v The Steeplechase Company (Cheltenham) Ltd* [2013] EWCA Civ 545 although I note the court there was concerned with the predecessors of the Directives on which the Appellant relies.

67. The Respondent contended that the absence of civil liability for breach of the Regulations did not mean that there had been a failure to implement the Directives. Mr Rapp referred me to paragraphs 2.64 and 2.66 of *Redgrave*. He said that those passages showed that the approach taken by the Court of Appeal in *R (United Road Transport Union) v Secretary of State for Transport* [2013] EWCA Civ 962 as summarised in *Redgrave* was applicable here. In that case the Court of Appeal had held that there had not been a failure to implement the European Road Transport Working Time directive in circumstances where the relevant domestic regulations had not provided a civil cause of action for a breach. The editors of *Redgrave* said that if the same logic was applicable to the health and safety directives that would mean that the removal of civil liability by the Enterprise Act would not have the consequence that there had been a failure to implement the directives.

68. The Appellant contended that it was not open to the Respondent to advance this argument given that the judge had not addressed the argument that the removal of civil liability for breach of the Regulations was a failure to implement the Directives. Mr Carter submitted that the Respondent was seeking to uphold the judge's decision on a different ground without having served a Respondent's Notice. That argument is misconceived. The Appellant was contending that the removal of civil liability meant that there had been a failure to implement the Directives and that the judge should not only have addressed this point but on doing so should have found that there had been a failure to implement the Directives making them directly enforceable. In reality the Appellant was saying that to the extent that the judge found at [5] that there had been no failure of implementation he was wrong because even though the wording of the Regulations mirrored that of the Directives the absence of civil liability meant that there had been a failure to implement the latter. This was an argument which had not formed part of the Appellant's case below other than at most as an oral response to the Respondent's arguments. In those circumstances it is open to the Respondent to counter the Appellant's argument by saying that the absence of civil liability was not a failure to implement the Directives. In doing so the Respondent was not seeking to uphold the decision on different grounds but was arguing against the Appellant's criticism of the grounds of the decision.

69. Before me both sides proceeded on the basis that the European law doctrine of direct effect could operate where a member state had initially implemented a directive but subsequently made changes which had the effect that the directive was no longer being implemented.

70. The question of whether the absence of civil liability meant that the Regulations no longer implemented the Directives is not as straightforward as the parties contended. It is not possible simply to say either that the absence of civil liability amounts to a failure to implement the Directives or that the existence of criminal liability for a breach of the Regulations is necessarily to be seen as implementation of the Directives.

71. I note that although the editors of *Redgrave* see force in the analogy to the approach adopted in the *United Road Transport Union* case they identify a "powerful argument" against that analogy. That argument is that it is necessary to consider the terms of the directive in question to see whether there has been proper implementation and if the result of that exercise is the conclusion that the domestic provisions do not implement the directive then the existence of the criminal sanctions will not alter the position. I would qualify that point by noting that regard is to be had to the existence of criminal sanctions when considering whether there has been implementation. However, I agree that it cannot follow that such sanctions will always be sufficient to implement a particular directive. The editors of *Redgrave* say there are "two formidable obstacles" to an action based on the Directives. The first is the argument based on the analogy to the approach in the *United Road Transport Union* case but that is subject to the counter-argument I have just noted. The second is the potential consequences of the withdrawal of the United Kingdom from the European Union – a point which as explained above is not in issue before me. Moreover, it is of note that the editors of *Redgrave* do not express a concluded view as to whether the obstacles which they identify can be overcome.

72. In the *United Road Transport Union* case the Court of Appeal did hold that the absence of a civil liability for a breach of the domestic regulations did not amount to a failure to implement the relevant European directive. However, the court's treatment of the point was rather more nuanced than either party before me contended. It is apparent from the judgment of Davis LJ, in particular at [51], that the court attached weight to the facts that where there had been a breach of the domestic regulations an employee would be able to make a complaint to the Vehicle and Operator Services Agency and that such an employee would "have a potential civil claim against his employer for breach of implied duty in the contract of employment". In those circumstances there were factors in addition to the criminal sanctions which gave an employee protection against being required to work for longer than the prescribed period.

73. The position, therefore, is that in a case where there are some domestic provisions purporting to implement a directive the question of whether there has been a failure of implementation such as to bring the doctrine of direct effect into play will require a careful analysis of the terms of the relevant directive and of the domestic provisions.

74. What is the consequence of that understanding of the position for this appeal? The onus of showing that there was a failure to implement a European directive lies on the party contending that a purported implementation was not effective as such. Here that party is the Appellant. The issue is one of law but depends on an analysis of the terms of the Directives and of the Regulations with regard being had to their context and to other provisions potentially giving effect to the Directives. A party contending that there has not been implementation needs to set out in detail the reasoning which is said to lead to that conclusion. The onus of doing that is all the greater where, as here, the point is being advanced on an appeal in circumstances where it was not articulated as part of the pleaded case below. The Appellant did not engage in that exercise. Instead his case rested simply on the assertion that the removal of civil liability for breach of the Regulations amounted to a failure to implement the Directives. As I have already explained that is not of itself determinative of the question. The position, therefore, is that the Appellant has failed to demonstrate that the state of the domestic law after the Enterprise Act came into force amounted to a failure to implement the Directives. He has, accordingly, failed to demonstrate that the judge was wrong to proceed on the basis that there had been implementation.

75. It follows that ground 2 is also dismissed and the appeal fails.