

SUMMARY OF JOINT OPINION

1. We were asked to advise whether the Loan Charge, a tax charge introduced by Schedules 11 and 12 of the Finance Act (No. 2) 2017, as amended breaches the fundamental right of free movement of capital under European Union law.
2. It is important to emphasise that EU law takes precedence of domestic law if the latter is incompatible with EU law. In *Fleming t/a Bodycraft v CCE*,¹ Lord Walker held at §24:

My Lords, it is a fundamental principle of the law of the European Union (EU), recognised in s 2(1) of the European Communities Act 1972, that if national legislation infringes directly enforceable Community rights, the national court is obliged to disapply the offending provision. The provision is not made void but it must be treated as being (as Lord Bridge of Harwich put it in Factortame Ltd v Secretary of State for Transport [1990] 2 AC 85 at 140): 35 ‘... without prejudice to the directly enforceable Community rights of nationals of any member state of the E.E.C.’

3. If the Loan Charge is found to be in breach of EU law, it would, therefore, have to be disapplied.
4. EU law had effect in the UK by virtue of the European Communities Act 1972. The 1972 Act was repealed by section 1 of the European Union (Withdrawal) Act 2018. Following an amendment to the 2018 Act made by the European Union (Withdrawal Agreement) Act 2020, EU law continues to apply in the UK during the transition period, i.e. until 31 December 2020, in accordance with and subject to the provisions of the Withdrawal Agreement.

¹ [2008] UKHL 2

5. Article 63 of the Treaty on the Functioning of the European Union sets out the fundamental freedom regarding free movement of capital. Any justification for breaching this fundamental right can be made under Articles 64(1) or 65 TFEU.

6. In *R (Lumsdon) v Legal services Board*,² the Supreme Court considered the application of the principle of proportionality in EU law. While the Supreme Court acknowledged that “*the only authoritative interpreter of that principle is the Court of Justice*”,³ its analysis in *Lumsdon* is nonetheless the starting point in considering justification / proportionality in any claim. court, even if the matter is referred to the CJEU to rule on a question of interpretation.⁴ The Supreme Court also drew attention to the fact that “*the principle of proportionality in EU law is neither expressed nor applied in the same way as the principle of proportionality under the European Convention on Human Rights.*”⁵

7. This means that the first instance decision in *R (Zeeman)* and *R (Cartref)*, which are now being appealed to the Court of Appeal, considered whether the legislation was disproportionate under European Convention law, on an entirely different principle that that used under EU law. *R (Zeeman)* and *R (Cartref)*, both considered whether the legislation breached Convention law as being “*manifestly without reasonable foundation*”.⁶

8. Importantly, however, the proportionality principle under EU is very much stricter so that it is very much harder for a defendant to prove that interfering with freedom of capital is properly justified.

9. In fact, we have advised that the prospects of this claim succeeding are better than 50%.

² *R (Lumsdon) v Legal services Board* [2015] UKSC 41

³ *Ibid.*, §23

⁴ *Ibid.*, §29

⁵ *Ibid.*, §26

⁶ See e.g. *R (Zeeman) and R (Murphy) v HMRC* [2020] EWHC 794 (Admin), §99 and *R (Cartref and ors.) v HMRC* [2019] EWHC 3382 (Admin), §199

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