

IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
ADMINISTRATIVE COURT

BETWEEN:

THE QUEEN  
(on the application of:  
(1) STEVEN ALAIN BOLTON  
(2) CHRISTOPHER ARTHUR EDWARD COOPER)

Claimants

-and-

(1) COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS  
(2) HER MAJESTY'S TREASURY

Defendants

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STATEMENT OF FACTS AND GROUNDS

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References: [x/y/z] are to bundle x, tab y, page y in the permission bundles. "LA" denotes the *Claim Form & Legal Authorities* bundle; "E" denotes the *Exhibits* bundle

Essential reading: Witness statement of Steven Alain Bolton dated 17.02.2016 [E/1/1]  
Witness statement of Christopher Arthur Edward Cooper dated 17.02.2016 [E/2/44]  
Summer Budget 2015 speech [E/14/139]  
HMRC, *Restricting finance cost relief for individual landlords*, 08.07.2015 [E/9/78]  
Submission of the Institute of Chartered Accountants for England and Wales to the Committee stage of the Finance (No. 2) Bill 2015 [E/12/122]  
Response to the pre-action protocol letter from the First Defendant dated 15.02.2016 [E/7/73]

## Introduction and Summary

1. The Claimants seek permission to apply for judicial review of section 24 of the Finance (No. 2) Act 2015 (“the 2015 Act”). [LA/5/45] The 2015 Act received Royal Assent on 18 November 2015. Section 24 amends the Income Tax (Trading and Other Income) Act 2005 (“the 2005 Act”) to restrict individual landlords’ ability to deduct loan interest and other financial costs as an expense against income from residential property to the basic rate of income tax. The measure will apply from the tax year 2017-18, and will be phased in fully by 2020-21.
2. Section 24 of the 2015 Act is unlawful:
  - (i) It constitutes the unlawful grant of State aid, in particular to corporate landlords and to the owners of commercially let holiday homes, contrary to Articles 107(1) and 108(3) of the Treaty on the Functioning of the European Union (“TFEU”) (“**ground one**”).
  - (ii) It breaches article 1 of Protocol 1 (“A1P1”) of the European Convention on Human Rights (“the Convention”) (“**ground two**”).
  - (iii) It breaches A1P1 taken with article 14 of the Convention (“**ground three**”).
3. The claim is plainly arguable. Moreover it raises matters of conspicuous public interest. Permission should be granted.

## The Claimants

4. The First Claimant, Steven Alain Bolton, is the founder and Executive Chairman of Platinum Property Partners (“the Company”). The Company is a property investment franchise that helps property investors to build a portfolio of properties to let. The First Claimant owns 14 buy-to-let properties in his own name, which are subject to a mortgage, and which he rents to tenants.
5. The Second Claimant, Christopher Arthur Edward Cooper, owns 15 properties in his own name that he rents out. Applying Section 24 of the 2015 Act to his income from his property business for 2014/15 would result in an increase in the income tax payable on the profits from £4,600 to £14,900 (and an increase in the marginal rate of tax from 29% to 93%).
6. Both Claimants will therefore be adversely affected by section 24 of the 2015 Act.

7. To date the Claimants have been supported financially to bring the claim by 737 individuals, understood to be private landlords and letting agents, through a public crowdfunding platform.

### **The Decision Challenged and the Proper Defendant**

8. The Claimants challenge the lawfulness of section 24 of the 2015 Act. That is an entirely legitimate challenge. The court has the power to determine whether an Act of Parliament is compatible with EU law and, if it is incompatible, to grant a declaration to that effect, see *R v. Secretary of State for Employment, ex p. Equal Opportunities Commission* [1995] 1 AC 1 (HL) (at §§26-27, per Lord Keith). Similarly, the court has the power to consider whether an Act of Parliament is compatible with Convention rights, and if it is not so compatible, to make a declaration of incompatibility under section 4 of the Human Rights Act 1998 (“the 1998 Act”).
9. The Claimants do not seek to challenge (as asserted in the First Defendant’s pre-action protocol response letter of 15 February 2016) the grant of Royal Assent, or the proceedings of Parliament or the acts of the House of Commons or the House of Lords in passing legislation (see §§10-12). In suggesting to the contrary, the First Defendant misstate the Claimants’ claim.
10. As to the correct defendant, the 2015 Act is primary legislation concerning taxation. Its implementation is for the First Defendant. The 2015 Act was promulgated as a bill by the Second Defendant. The Claimants consider the claim to be appropriately brought against both Defendants.
11. It is not entirely clear from the First Defendant’s response to the Claimants’ pre-action protocol letter dated 15 February 2016 [E/7/73] whether the First Defendant assert that they ought not to be a defendant. Indeed, it is not clear, if the First Defendant contend that they are not the correct defendant, which Government department or Secretary of State they consider ought to be the Defendant. Under the heading “out of time” in the letter, the First Defendant suggest that the Claimants do not make any challenge to a decision, act or omission of the First Defendant. That is a surprising stance given that the First Defendant are responsible for the implementation of the 2015 Act.
12. But in any event, one or other of the Defendants is responsible for the measure: the claim is properly brought against one of them (even if not, as the Claimants contend, both of them).

## The 2005 Act and the Impugned Measure

### *The 2005 Act*

13. Chapter 3 of Part 3 of the 2005 Act contains the law on how to calculate the profits of a property business [LA/4/40].
14. Section 268 provides that income tax is charged on the profits of a property business [LA/4/40]. Section 264 defines a “property business” as consisting of “(a) every business which the person carries on for generating income from land in the United Kingdom, and (b) every transaction which the person enters into for that purpose otherwise than in the course of such a business” [LA/3/38]. Section 266(1) defines “generating income from land” as “exploiting an estate, interest or right in or over land as a source of rents or other receipts” [LA/3/38].
15. Section 270(1) provides that tax is charged “on the full amount of the profits arising in the tax year” [LA/4/41].
16. Section 271 defines the person liable for any tax charged under Chapter 3 as “the person receiving or entitled to the profits” [LA/4/41].
17. Section 272(1) [LA/4/41] provides that the profits of a property business are calculated in the same way as the profits of a trade, save that the applicable provisions of Part 2 of the 2005 Act (trading income) are limited to those specified in subsection (2). Subsection (2) specifies section 34. Section 34(1) provides that in calculating the profits of a trade, no deduction is allowed for expenses not incurred wholly and exclusively for the purposes of the trade or losses not connected with or arising out of the trade.
18. Section 274 deals with the relationship between rules prohibiting and allowing deductions [LA/4/43]. Subsection (1) provides that any relevant permissive rules in Part 3 has priority over any relevant prohibitive rule in Part 3, but the general principle is qualified by reference to specified provisions (including after the amendments by the 2015 Act, to section 272A (finance costs), see below).
19. At present (and prior to the amendments made by the 2015 Act having effect) the provisions set out above constitute the income tax regime applicable to individual landlords. Thus, in

common with the general legislative provisions governing the calculation of taxable profits of a trade, individual landlords are able to deduct all of their finance costs (including mortgage interest, interest on loans to purchase furnishings and fees incurred when taking out mortgages and loans) from their property income to arrive at a figure for their profit. Income tax is payable only on the profit made.

***Announcement of the Amendment to the 2005 Act***

20. The Chancellor announced the proposal that became section 24 in the Summer Budget 2015. In his speech the Chancellor stated (“the Budget Speech”) [LA/139/158]:

“... another key to raising the productivity of our country is building more homes and creating a fairer property market...

Today I set out three important changes that will address unfairness in our taxation of property, and put the security of home ownership first.

First, we will create a more level playing-field between those buying a home to let, and those who are buying a home to live in.

Buy-to-let landlords have a huge advantage in the market as they can offset their mortgage interest payments against their income, whereas homebuyers cannot.

And the better-off the landlord, the more tax relief they get.

For the wealthiest, every pound of mortgage interest costs they incur, they get 45p back from the taxpayer.

All this has contributed to the rapid growth in buy-to-let properties, which now account for over 15% of new mortgages, something the Bank of England warned us last week could pose a risk to our financial stability.

So we will act – but we will act in a proportionate and gradual way, because I know that many hardworking people who’ve saved and invested in property depend on the rental income they get.

So we will retain mortgage interest relief on residential property, but we will now restrict it to the basic rate of income tax.

And to help people adjust, we will phase in the withdrawal of the higher rate reliefs over a four year period, and only start withdrawal in April 2017...”

21. In a policy paper published on 8 July 2015, *Restricting finance cost relief for individual landlords* (“the HMRC Policy Paper”) [E/9/78], HMRC described the policy objective as follows:

“To make the tax system fairer, the government will restrict the amount of Income Tax relief landlords can get on residential property finance costs (such as mortgage interest) to the basic rate of tax. This will ensure that landlords with higher incomes no longer receive the most generous tax treatment...”

22. The HMRC Policy Paper also contains a summary of impacts (which are said to have been certified by the Office for Budget Responsibility (“the OBR”). The HMRC Policy Paper summarises the economic impact as follows:

“This measure could marginally reduce demand for housing but it is not expected to have a significant impact on either house prices or rent levels due to the small overall proportion of the housing market affected and the offsetting impact of wider budget measures. The costing includes a behavioural response from the impacted population having relief for finance costs restricted to the basic rate of Income Tax.”

**[E/9/79]**

23. The HMRC Policy Paper sets out its expectation that 1 in 5 individual landlords will receive less relief as a result of this measure. It is not clear where this figure derives from (or how many properties, as opposed to landlords, the Government consider will be affected).
24. The HMRC Policy Paper contains the totality of the justification advanced by the Defendants and the totality of any empirical analysis undertaken.
25. Notably the Government appear not to be implementing the measure in order to stabilise or reduce house prices. In Committee on 13 October 2015 David Gauke (Financial Secretary to the Treasury) stated that “[w]e are not making any claims about the effect on house prices... The answer to the issue of house prices is improvement in supply”. **[E/10/95]**

***The Amendments to the 2005 Act by the 2015 Act***

26. The 2015 Act inserted 4 new sections into the 2005 Act (but did not — for the most part — amend the existing provisions). Section 272A (restricting deductions for finance costs related to residential property) provides **[LA/5/45]**:

“(1) Where a deduction is allowed for costs of a dwelling-related loan in calculating the profits of a property business for the tax year 2017–18, the amount allowed to be deducted in respect of those costs in calculating those

profits for income tax purposes is 75% of what would be allowed apart from this section.

(2) Where a deduction is allowed for costs of a dwelling-related loan in calculating the profits of a property business for the tax year 2018–19, the amount allowed to be deducted in respect of those costs in calculating those profits for income tax purposes is 50% of what would be allowed apart from this section.

(3) Where a deduction is allowed for costs of a dwelling-related loan in calculating the profits of a property business for the tax year 2019–20, the amount allowed to be deducted in respect of those costs in calculating those profits for income tax purposes is 25% of what would be allowed apart from this section.

(4) In calculating the profits of a property business for income tax purposes for the tax year 2020–21 or any subsequent tax year, no deduction is allowed for costs of a dwelling-related loan.

(5) Subsections (1) to (4) do not apply in relation to calculating the profits of a property business for the purposes of charging a company to income tax on so much of those profits as accrue to it otherwise than in a fiduciary or representative capacity.

(6) For the meaning of “costs of a dwelling-related loan” see section 272B.”

27. Section 272B(2) defines “costs of a dwelling-related loan” as meaning “so much of an amount borrowed for purposes of the business as is referable (on a just and reasonable apportionment) to so much of the business as is carried on for the purpose of generating income from — (a) land consisting of a dwelling-house or part of a dwelling-house, or (b) an estate, interest or right in or over land within paragraph (a)” [LA/5/46].
28. Notably, subsection (4) provides that an amount borrowed for purposes of a property business is not a dwelling-related loan so far as the amount is referable (on a just and reasonable apportionment) to so much of the property business as consists of the commercial letting of furnished holiday accommodation.
29. Subsection (5) states that costs in relation to a dwelling-related loan means, inter alia, interest on the loan and incidental costs of obtaining finance by means of the loan.

30. Section 274A provides for a tax reduction for individuals [LA/5/47]. The section is complicated, but effectively allows individuals to claim a basic rate tax reduction from their income tax liability on the portion of finance costs not deducted in calculating the profit. In practice, this reduction will be calculated as 20% of the lower of:
- (i) Finance costs not deducted from income in the tax year (25% for 2017-18, 50% for 2018-19, 75% for 2019-20 and 100% thereafter);
  - (ii) Profits of the property business in the tax year; and
  - (iii) Total income (excluding savings income and dividend income) that exceeds the personal allowance in the tax year.

### ***The Pre-Action Protocol***

31. The Claimants sent a pre-action protocol letter to the First Defendant on 27 January 2016 [E/3/50]. The Claimants accept that this was not, unfortunately, served at the correct address. The First Defendant became aware of the pre-action letter on 11 February 2016 and indicated that they would take 14 days to respond (see the First Defendant's letter of 11 February 2016) [E/4/62]. The First Defendant also stated that the pre-action letter ought to be served on the Second Defendant. This was done on 11 February 2016 [E/6/72].
32. In fact the First Defendant responded on 15 February 2016 [E/7/73] to which the Claimants replied on 16 February 2016 [LA/8/77]. At the time of lodging this claim, the Claimants had not received a response from the Second Defendant.
33. The Claimants contend that the effect of the 2015 Act is ongoing, and that a claim of this nature could be brought at any time (and in particular, could be brought in the tax year 2016/17 when the measure is applied to them). The Claimants consider, however, that it is at least arguable that the limitation period expires on 18 February 2016 (that being 3 months after the date on which the 2015 Act came into force) and have, accordingly, issued proceedings without a response to the pre-action protocol letter from the Second Defendant.

### **The Legal Framework**

#### ***State Aid: Overview***

34. Article 107(1) TFEU provides:

“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.”

35. Articles 107(2) and (3) TFEU allow for the approval of particular categories of State aids that are considered generally beneficial and, therefore, compatible with the internal market. But it is the EU Commission, subject to the European Council’s powers (and subject to judicial review by the Court of Justice and its General Court), which has exclusive jurisdiction under Article 108 TFEU to decide whether aids are compatible with the internal market: see Case C-354/90 *FNCEPA v France* [1991] ECR I-5504 at [14].
36. As a result Article 108(3) requires that the EU Commission be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. The purpose of Article 108(3) is to ensure that the Commission has a proper opportunity to assess the compatibility of proposed State aid with the internal market by reference to the considerations which are for the Commission alone to consider under Article 107(2) and (3).
37. The last sentence of Article 108(3) TFEU provides that the Member State concerned shall not put its proposed measures into effect until the European Commission’s procedure has resulted in a final decision. This provision has direct effect and therefore entitles a national court to determine whether a measure is an aid such that it should have been notified to the Commission: see Case C-354/90 *FNCEPA* at [10]-[14] and *R v C&E Commissioners, ex p Lunn Poly* [1999] STC 350 at 358. Where there has been a procedural failure to notify State aid, the effect is to render the aid unlawful. The national court is therefore concerned only with the threshold question of whether or not the measure falls within the definition of State aid; it is no part of that assessment to consider whether it is justified by reference to wider public policy objectives, which remains for the EU Commission to decide (see, e.g., the Opinion of Francis Jacobs AG in C-256/97 *DM Transport* [1999] ECR I-3913, at §§24-26).

***State Aid: the Constituent Elements***

38. The CJEU has, in a series of judgments, classified the criteria for a measure to constitute State aid as comprising four distinct elements (see, for example, Case C-399/08P, *Commission v.*

*Deutsche Post AG* [2010] ECR I-7831, at §§38-39). All four conditions must be cumulatively fulfilled:

- (i) There must be an intervention by the State or through State resources.
- (ii) The intervention must be liable to affect trade between Member States.
- (iii) It must confer an advantage on the recipient.
- (iv) It must distort or threaten to distort competition.

39. The CJEU has also recognised that the intervention in question, i.e. the measure adopted by the State or public authority, must give rise to an economic advantage to particular undertakings, see Cases C-393/04 & C-41/05, *Air Liquide Industries Belgium v Ville de Seraing* [2006] ECR I-5293 (at §28); Case C-15/14P, *Commission v MOL* EU:C:2015:362 (at §59).

40. It is often stated by the CJEU that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects. This serves primarily to ensure that ulterior motives for the adoption of a measure that grants aid does not fall outside of the scope of application of Article 107(1) TFEU. In particular, the mere fact that a measure has fiscal or social aims is not such as to allow it to escape classification as State aid (see Case 173/73, *Italy v Commission* [1974] ECR 709 at §13). On the one hand, it may be recognised that tax sovereignty essentially remains a matter, in the absence of EU harmonization, for the Member States' governments and parliaments which are entitled, within the scope of the democratic process, to determine their own policy objectives and to set appropriate burdens (see Cases T-211/04 & T-215/04, *Government of Gibraltar v Commission* [2008] ECR II-3745 at §146). Nevertheless, taxation is subject to the full effect of the State aid regime, so that the exercise of Member States' sovereignty in tax matters must be consistent with the State aid provisions of the TFEU, see Case T-538/11, *Belgium v Commission* EU:T:2015:188 (at §§65-66).

***The first requirement: an intervention by the State***

41. The relevant criterion for determining that State aid has been granted is the adoption of a legally binding act (see Case T-109/01, *Fleuren Compost BV v Commission* [2004] ECR II-127, para 74; Case T-11/07, *Frucona Košice as v Commission* [2010] ECR II-5453 (at §68). A distinction is drawn in EU State aid law between aid schemes and individual aid.

42. Normally, tax legislation granting aid will be regarded as an aid scheme, with individual aid being granted on the basis of the approved scheme. Aid is deemed to have been put into effect as soon as the legislative machinery enabling it to be granted without further formality has been set up. It is the aid scheme that must be notified in advance to the EU Commission under Article 108(3) TFEU for approval.

***The second and fourth requirement: the measure must be liable to affect trade between Member States and be liable to distort competition***

43. Although these are two separate criteria, the CJEU frequently assesses them together. The general rule is that when State aid strengthens the position of an undertaking compared with other undertakings competing in EU trade, the latter must be regarded as affected by that aid: Case 730/79, *Philip Morris v Commission* [1980] ECR 2671, at § 11. Competitors may be established in the same Member State or in other Member States. Any effect on production or business costs is regarded as sufficient to give rise to a distortion of competition and affect trade between Member States: Case 173/73, *Italy v Commission* [1974] ECR 709, para 18. The CJEU has applied this requirement broadly such that there is no need to show an actual distortion of competition or effect on trade, it being sufficient to show that the aid is of such a kind as potentially to effect trade and to distort or threaten to distort competition: Case C-66/02, *Italy v Commission* [2005] ECR I-10901, para 112. It is thus sufficient that the recipient carries on an activity in an economic sector in which the products or services concerned are subject to trade between Member States.

***The third requirement: the measure must confer an advantage on the recipient***

44. Selectivity applies under a tax system where certain undertakings are taxed in a way that derogates to their benefit from the common or normal regime. The element which constitutes aid is generally established by determining the normal application of the system of charges in relation to the nature or general scheme of that system (see Case C-88/03, *Portugal v Commission* [2006] ECR I-7115 at §56).
45. In order to determine whether the measure at issue is selective it is appropriate, therefore, to examine whether, within the context of a particular legal regime, that measure constitutes a selective advantage for certain undertakings in comparison with others which, in the light of the objective pursued by that regime, are in a comparable legal and factual situation (see Case

C-143/99, *Adria-Wien Pipeline GmbH v Finanzlandesdirektion für Kärnten* [2001] ECR I-8365, at §41).

46. Moreover, having established that a particular measure constitutes *prima facie* a derogation from the normal application of the system, it is necessary to determine whether such derogation is justified by reference to the nature and general scheme of the system, in which case it will be regarded as forming an integral part of the normal application of the system, see *Case 173/73, Italy v Commission* [1974] ECR 709, para 15; *Case C-353/95 P, Tiercé Ladbroke v Commission* [1997] ECR I-7007 at §§33-35).
47. This constitutes, accordingly, a three step test establishing (i) the appropriate reference framework, (ii) a derogation from that framework and (iii) whether the derogation is justified by reference to the nature and general scheme of the system.
48. The appropriate reference framework: since the existence of an advantage may generally be established only when compared with normal taxation, the relevant reference framework must be determined, see *Case C-88/03, Portugal v Commission* [2006] ECR I-7115 at §56 and *Cases C-106/09P & C-107/09P, Commission v Government of Gibraltar* [2011] ECR I-11113 at §90. The notion that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects means that such measures must be defined independently of the techniques used for the adoption of the measure.<sup>1</sup> The scope of the relevant reference framework applies to all undertakings in a comparable legal and factual situation in the light of the objective pursued by the tax measure. This involves two separate and cumulative matters: first, the objective pursued by the tax measure must be identified; secondly, those undertakings in a comparable position in the light of that objective must be ascertained. In most cases relating to income or corporation tax, the CJEU has held that the objective pursued is the mere collection of revenue by taxing profits.<sup>2</sup>
49. Having identified the appropriate objective of the tax measures, it is then necessary to determine which undertakings are in a comparable legal and factual situation in the light of that objective.

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<sup>1</sup> *Cases C-106/09P & C-107/09P, Commission v Government of Gibraltar* [2011] ECR I-11113, para 87; *Case C-5/14, Kernkraftwerke Lippe-Ems GmbH v Hza Osnabrück* EU:C:2015:354, para 75.

<sup>2</sup> *Cases C-78/08 – C-80/08, Ministero dell' Economia e delle Finanze v Paint Graphos* [2011] ECR I-7611, para 54.

50. Derogation from the reference framework: this may be established, on the terms of the legislation in issue, by differential treatment involving a derogation, exemption or exclusion from the generally applicable rules. The selective character of a measure may not necessarily be precisely circumscribed by the measure itself.<sup>3</sup> The mere exclusion of a comparable activity from the scope of a tax may thus be regarded as differential treatment. For example, a regional tax levied in Sardinia on stopovers made by aircraft and boats operated by persons having their tax domicile outside the territory of the region had the effect that the application of that tax made the services concerned more costly for those persons than for operators established in that territory, thus creating a selective economic advantage for the latter.<sup>4</sup>
51. In Case C-53/00, *Ferring SA v ACOSS* [2001] ECR I-9067 (at §§19-22) the application of a special levy to one category of undertakings was regarded as a State aid in favour of another category of undertakings which were in direct competition with them. The tax imposed on the former was regarded as State aid in so far as it was not imposed on the latter, even though there was no mention of the latter in the legislation in question.<sup>5</sup> This reflects the notion that State aid may be granted, according to Article 107(1) TFEU, in any form whatsoever and that regulatory technique may not be used to circumvent the application of the State aid rules. **[LA/15/133]**
52. Derogation justified by reference to the nature and general scheme of the system: there is no advantage for the purposes of establishing State aid where a difference in treatment is justified by reasons relating to the logic of the system.<sup>6</sup> This implies that a measure which creates an exception to the application of the general tax system may be justified by the nature and overall structure of the tax system only if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system.<sup>7</sup> Tax measures which differentiate between undertakings and which might appear, therefore, to be selective will not constitute State aid where the differentiation arises from the nature or the overall structure of the system of charges of which they are a part.<sup>8</sup> Such exemptions must be

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<sup>3</sup> Case T-399/11, *Banco Santander SA v Commission* EU:T:2014:938, para 39; Case T-219/10, *Autogrill España SA v Commission* EU:T:2014:939, para 35.

<sup>4</sup> Case C-169/08, *Presidente del Consiglio dei Ministri v Regione Sardegna* [2009] ECR I-10821, paras 31-32 and 53.

<sup>5</sup> Case C-53/00, *Ferring SA v ACOSS* [2001] ECR I-9067, paras 19-22; Case C-526/04, *Laboratoires Boiron SA v URSSAF* [2006] ECR I-7529, para 36.

<sup>6</sup> Case C-353/95 P, *Tiercé Ladbroke v Commission* [1997] ECR I-7007, paras 33-35; Case C-53/00, *Ferring SA v ACOSS* [2001] ECR I-9067, para 17.

<sup>7</sup> Case C-6/12, *P Oy* EU:C:2013:525, para 22.

<sup>8</sup> Case 173/73, *Italy v Commission* [1974] ECR 709, para 15; Case C-487/06P, *British Aggregates Association v Commission* [2008] ECR I-10515, para 56.

consistent with the principle of proportionality and not go beyond what is necessary, in that the legitimate objective being pursued may not be attained by less far-reaching measures.<sup>9</sup>

53. A distinction must be made between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives.<sup>10</sup> Examples of measures that might be regarded as intrinsic to the tax system include tax avoidance measures.<sup>11</sup> Extrinsic or external matters include objectives of general economic policy.<sup>12</sup> It follows that social or regional objectives fall outside the scope of the justification, whereas objectives that are inherent in the tax system itself, such as efficiency in tax collection and progressive taxation, may come within it.<sup>13</sup>

### ***The Human Rights Act 1998***

54. Section 3 of the 1998 Act provides:

“(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

- (a) applies to primary legislation and subordinate legislation whenever enacted;
- (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
- (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.”

55. Section 4 of the 1998 Act provides in relevant part:

“(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

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<sup>9</sup> Cases C-78/08 – C-80/08, *Ministero dell' Economia e delle Finanze v Paint Graphos* [2011] ECR I-7611, para 75.

<sup>10</sup> Case C-88/03, *Portugal v Commission* [2006] ECR I-7115, para 81; Cases T-211/04 & T-215/04, *Government of Gibraltar v Commission* [2008] ECR II-3745, para 144.

<sup>11</sup> Case C-308/01, *GIL Insurance Ltd. v Commissioners of Customs and Excise* [2004] ECR I-4777, paras 70-78.

<sup>12</sup> Cases T-227/01 etc., *Territorio Histórico de Álava – Diputación Foral de Álava v Commission* [2009] ECR II-3029, para 183.

<sup>13</sup> Case C-88/03, *Portugal v Commission* [2006] ECR I-7115, para 82 and *per* Advocate General Geelhoed, at para 76; Case C-6/12, *P Oy* EU:C:2013:525, para 29

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility...

... (6) A declaration under this section (“a declaration of incompatibility”)—

- (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
- (b) is not binding on the parties to the proceedings in which it is made.”

56. There are a number of decisions in which the court has considered the relationship between sections 3 and 4 of the 1998 Act, e.g. *Ghaidan v. Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 (at §33 per Lord Nicholls); and *Sheldrake v. DPP* [2004] UKHL 43; [2005] 1 AC 264 (at §28 per Lord Bingham). In *Sheldrake* Lord Bingham stated:

“The interpretative obligation of the courts under s 3 of the 1998 Act was the subject of illuminating discussion in *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113. The majority opinions of Lord Nicholls, Lord Steyn and Lord Rodger in that case (with which Lady Hale agreed) do not lend themselves easily to a brief summary. But they leave no room for doubt on four important points. First, the interpretative obligation under s 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament. Secondly, a Convention-compliant interpretation under s 3 is the primary remedial measure and a declaration of incompatibility under s 4 an exceptional course. Thirdly, it is to be noted that during the passage of the Bill through Parliament the promoters of the Bill told both Houses that it was envisaged that the need for a declaration of incompatibility would rarely arise. Fourthly, there is a limit beyond which a Convention-compliant interpretation is not possible, such limit being illustrated by *R (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837, [2002] 4 All ER 1089 and *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467, [2003] 2 All ER 593. In explaining why a Convention-compliant interpretation may not be possible, members of the committee used differing expressions: such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation (paras 33, 49, 110-113, 116). All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: “So

far as it is possible to do so...” While the House declined to try to formulate precise rules (para 50), it was thought that cases in which s 3 could not be used would in practice be fairly easy to identify.”

### **Article 1 of Protocol 1**

57. A1P1 provides as follows:

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

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary... to secure the payment of taxes...”

58. A court will consider, first, whether A1P1 has been engaged as a result of an interference with the landlord’s “possession” as that term is properly understood. In *Broniowski v. Poland* (2005) 40 EHRR 21 the European Court of Human Rights (“the ECtHR”) held that the concept of “possessions” in A1P1 has an autonomous meaning which is not limited to the ownership of material goods. The ECtHR stated “[i]n the same way as material goods, certain other rights and interests constituting assets can also be regarded as ‘property rights’, and thus as ‘possessions’ for the purposes of this provision”. In *Kopecky v. Slovakia* (2004) 41 EHRR 944 the ECtHR held that a possession can be an existing asset or claim in respect of which an applicant can argue that he has a legitimate expectation that the claim will be realised. The Court held, however, that its case-law did not contemplate the existence of a “genuine dispute” or an “arguable claim” as a criterion for determining whether there is a “legitimate expectation” protected by A1P1 but rather “where the proprietary interest is in the nature of a claim it may be regarded as an ‘asset’ only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it” (at §52).

59. The second issue is whether the interference with the possession is prescribed by law. The existence of a legal basis in domestic law is a necessary but not a sufficient condition. The measure must be clear and precise in its terms; sufficiently foreseeable; and must not

operate in an arbitrary manner, see *Axa General Insurance Ltd and others v. HM Advocate* [2011] UKSC 46; [2012] 1 AC 868 (per Lord Reed at §§116-124).

60. Third, an interference with possessions requires to be justified as being necessary in the public or general interest.

61. Finally, in order for an interference with possessions to be compatible with A1P1 it must not only be lawful and in the general interest, there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In *Bank Mellat v. HM Treasury* [2014] AC 700 Lord Sumption summarised the effect of the cases on proportionality as being:

“the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.”

62. In *Axa* Lord Reed described the proportionality assessment as involving “an assessment of whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights: the individual should not be required to bear an individual and excessive burden” (at §126) (emphasis added).

63. The “manifestly without reasonable foundation” formulation applies only to stages 1 and 2 of the *Bank Mellat* enquiry and not to the final “fair balance” question, see *Re Recovery of Medical Costs for Asbestos Disease* [2015] AC 1016.

64. In the area of taxation measures, the relevant test to determine whether the State has met the requirements of fair balance/proportionality was said by the ECtHR in *Bulves v. Bulgaria* [2009] STC 1193 (at §63) to be as follows:

“... a contracting state, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation, and the court will respect the legislature’s assessment in such matters unless it is devoid of reasonable foundation.” (emphasis added)

65. The ECtHR allows national authorities a wide margin of appreciation in implementing social and economic policies, and will respect their judgment as to what is in the public or general interest unless that judgment is manifestly without reasonable justification, *James v. United Kingdom* (1986) EHRR 123 (at §46). In *Axa Lord Reed* observed that at the domestic level, “courts require to be similarly circumspect, since social and economic policies are properly the responsibility of the legislature, and policy-making of this nature is amenable to judicial scrutiny only to a limited degree”.

#### **Article 14**

66. Article 14 of the ECHR provides:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” (emphasis added)

67. The general approach followed by the ECtHR in the application of Article 14 was explained by the Grand Chamber in *Carson v United Kingdom* (2010) 51 EHRR 369 (at §61). , para 61, 29 BHRC 22, [2010] ECHR 42184/05:

“In order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.”

68. A violation of Article 14 therefore arises where there is: (i) a difference in treatment on one of the prescribed grounds or on the ground of “other status”, (ii) of persons in relevantly similar positions, (iii) if it does not pursue a legitimate aim, or (iv) if there is not a reasonable

relationship of proportionality between the means employed and the aim sought to be realised.

69. National authorities enjoy a margin of appreciation in assessing whether and to what extent differences in treatment are justified. The ECtHR has emphasised the width of the margin of appreciation in relation to general measures of economic or social strategy, stating in its *Carson* judgment (at §61) (which approach was followed by the Supreme Court in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18, [2012] 1 WLR 1545, per Lady Hale (at §22)):

“The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background. A wide margin is usually allowed to the state under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'.” (emphasis added)

70. The burden of proving justification is on the State, *R (Quila) v. Secretary of State for the Home Department* [2012] 1 AC 621. What the State must justify under Article 14 is not the scheme as a whole, or the general policy behind the impugned restrictions, but rather the difference in treatment which results from the application of the criteria, *A v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68 (at §68, per Lord Bingham).

### ***Taxation of a Company's Property Income***

71. Part IV of the Corporation Tax Act 2009 (“the 2009 Act”) deals with the taxation of a company's property income. Section 205 defines a company's UK property business as consisting of “(a) every business which the company carries on for generating income from land in the United Kingdom; and (b) every transaction which the company enters into for that purpose otherwise than in the course of such a business”. Section 207(1) defines

“generating income from land” as meaning “exploiting an estate, interest or right in or over land as a source of rents or other receipts”.

72. Section 209 provides that the “charge to corporation tax on income applies to the profits of a property business”.
73. Section 211(1) provides that the profits of a property business are calculated without regard to items giving rise to credits or debits within Part 5 (loan relationships). The provisions of Part 5 of the 2009 Act are complex but in short allow the deduction of the interest payable on a loan entered into for the purposes of the business.
74. The exception to the general rule in Part 5 contained in section 211(1) of the 2009 Act is set aside in section 599(3) of the Corporation Tax Act 2010. This provides that section 211(1) of the 2009 Act does not apply in respect of “a loan relationship so far as it relates to property rental business”. Section 519 defines “proper rental business” as a UK property business within the meaning given by section 205 of the 2009 Act.

### **Grounds of Review**

#### ***State Aid***

75. First, section 24 of the 2015 Act constitutes an intervention by the State that grants State aid to corporate landlords, and to owners of commercially let holiday homes, in that no restriction has been imposed on their ability to deduct finance costs from the profits of the property business for the purposes of calculating their taxable profits whereas such a restriction has been imposed on individual landlords.
76. Second, the measure will be liable to affect trade between Member States. The business of renting out property in the United Kingdom is open to any person, whether individual or corporate, established in the European Union who wishes to carry on such a business, regardless of where that person may be established. There are no relevant legal barriers to any person established elsewhere in the European Union carrying on such a business in the United Kingdom. The Claimants are aware of a number of individual landlords who reside in the Republic of Ireland or Spain. Corporate landlords in other Member States may also carry on the trade of letting properties in the United Kingdom.

77. Third, the measure will confer an advantage on corporate landlords and owners of commercially let holiday homes. Specifically:
- (i) Individual and corporate landlords are in a comparable legal and factual position, such that, leaving aside section 24 of the 2015 Act, the calculation of their taxable profits from the business of letting residential property is the same and includes the same deductible items. Similarly, individual landlords and owners of commercially let holiday homes are in a comparable legal and factual position, such that, leaving aside section 24 of the 2015 Act, the calculation of their taxable profits from the business of letting residential property is the same and includes the same deductible items. It is irrelevant that some landlords are subject to income tax, whereas others are subject to corporation tax, since it is only the calculation of taxable profits that is in issue.
  - (ii) Section 24 of the 2015 Act constitutes a departure from the pre-existing reference framework and thereby grants a selective advantage to corporate landlords and individual landlords and owners of commercially let holiday homes.
  - (iii) The Defendants have sought to justify the departure from the existing reference framework on the basis that individual landlords are in competition with home buyers in relation to the purchase of individual property and that the tax benefit for the former should be reduced. This argument cannot justify, from a State aid perspective, a difference in treatment as between individual and corporate landlords (or between individual landlords and owners of commercially let holiday homes). Such differential treatment is not intrinsic to the tax system, but involves extrinsic considerations.
78. Fourth, the measure will distort or threaten to distort competition in that it alters the pre-existing competitive situation in the United Kingdom of corporate landlords and owners of commercially let holiday homes, on the one hand, and individual landlords, on the other.
79. Section 24 of the 2015 Act according constitutes a scheme to grant State aid within the meaning and scope of Article 107(1) TFEU.
80. This plan to grant aid has not been notified to the EU Commission pursuant to Article 108(3) TFEU and is accordingly unlawful.

### **Reference to the CJEU**

81. Article 267 of the TFEU provides for the making of references to the CJEU by the national courts. It provides that the CJEU shall have jurisdiction to give preliminary rulings concerning, inter alia, the interpretation of the Treaties. Paragraph (2) provides that a national court may only make a reference to the CJEU “if it considers that a decision on the question is necessary for it to give judgment”.
82. The domestic courts have set out guidelines for a reference to be made by a national court (save for the Supreme Court): if the facts have been found and the Community law issue is critical to the court’s final decision, the appropriate course is ordinarily to refer the issue to the CJEU unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantage enjoyed by the CJEU in construing Community instruments, see *R v. International Stock Exchange of the United Kingdom, ex p. Else* [1993] QB 534 (CA), per Sir Thomas Bingham MR and *H P Bulmer Ltd v. J Bollinger SA* [1974] Ch 401.
83. To the extent in the instant case that the parties disagree as to the correct interpretation of the State aid provisions in EU law, its proper interpretation raises difficult questions of EU law that the Administrative Court may feel should be referred to the CJEU. The Claimants urge the Administrative Court to make an immediate reference pursuant to Article 267 TFEU.

### **A1P1 of the Convention**

84. The Claimants have a possession within the meaning of A1P1, namely an entitlement to deduct all finance costs related to residential property in calculating the profit of a property business for income tax purposes.
85. The First Defendant’s pre-action response letter dated 15 February 2016 contends that the fact that the terms on which income tax will be calculated in 2016-17 will alter does not amount to a possession. The First Defendant rely on *APVCO 19 Limited and Others v. HM Treasury and HMRC* [2015] EWCA Civ 648; [2015] STC 2272 (at §§36-51). In the APVCO case the taxpayers had only an arguable claim to the tax relief sought, and as a result, the Court of

Appeal held that they did not have a possession for the purposes of A1P1 (see §§45-51). In this case the right to tax relief exists: is not controversial. The decision supports the proposition that the Claimants have a possession: Vos LJ stated (at §49): “[t]he prior question of whether the taxpayer has a right to the money must be decided before the taxpayer can claim to have been deprived by the legislative changes of a possession under A1P1. That makes sense from a practical point of view. If the taxpayer can show that his scheme works, e.g. by obtaining a declaration to that effect, then he clearly has a possession”.

86. Section 24 of the 2015 Act deprives individual landlords of this possession such that, by the tax year 2020-21, no deduction is permitted for the costs of a dwelling-related loan (save that a 20% relief is accorded).
87. The Claimants accept that the measure is prescribed by law. Further, the Claimants accept that in principle the objective of placing homeowners and landlords on a level playing field constitutes a legitimate aim for the purposes of A1P1.
88. The interference with the Claimants’ rights under A1P1 is not, however, proportionate for at least the following reasons.
89. First, the measure is devoid of reasonable foundation. It is not reasonably targeted at the policy objective of placing homeowners and landlords on a level playing field. Specifically:
  - (i) Individual landlords and homeowners are not similarly situated in that homeowners do not (in general) generate income from their land that is subject to income tax in the way that individual landlords do.
  - (ii) The measure does not take into account the relative advantage in respect of capital gains tax enjoyed by homeowners: the homeowner pays no capital gains tax on the sale of their home, but an individual landlord pays capital gains tax at up to 28%.
  - (iii) The measure does not affect corporate landlords, and thus ignores one aspect of creating a truly level playing field.
  - (iv) The measure does not affect individual owners of commercially let holiday homes, and thus ignores one aspect of creating a truly level playing field.
  - (v) The First Defendant suggest that entitlement to deduct interest on borrowing also puts investors in rental property at an advantage in comparison with investors in other assets, such as shares (see pre-action protocol response letter dated 16

February 2016 at §16). This is a bad point: any other trade or business allows the cost of funding the capital of the business to be deducted from the profit made (see the ICAEW submission at §9). Further, if a person buys shares in a family trading company (i.e. buys shares in the pursuance of their business) they do receive tax relief on their loan interest paid (see the ICAEW submission at §6).

90. This view has been confirmed by independent experts. For example, the director of the Institute for Fiscal Studies, Paul Johnson, observed in relation to the Chancellor's 2015 Summer Budget speech:

"The tax treatment of rental housing will be made less attractive though. At present if you own a property which you let out to tenants you can set any mortgage interest costs against tax due on rent received. The Budget red book states that this means that "the current tax system supports landlords over and above ordinary homeowners" and that it "puts investing in a rental property at an advantage". This line of argument is plain wrong. Rental property is taxed more heavily than owner occupied property. There is a big problem in the property market making it difficult for young people to buy, and pushing up rents. The problem is a lack of supply. This change will not solve that problem." **[E/13/138]**

91. Second, the measure imposes "an excessive and individual burden" on the individual landlord taxpayer. Taxable rental income has historically been treated in the same manner as income from a trade or profession (and continues to be so treated), and so costs of finance have been deductible as an expense. This accords with the principle (expressed in section 34 of the 2005 Act) that expenses incurred wholly and exclusively for the purposes of the business are deductible when calculating the taxable profit. The Institute of Chartered Accountants for England and Wales stated, in their submission at the Committee stage ("the ICAEW Submission"), that they "can think of no other business where the cost of funding the capital of the business is not tax allowable" (at §9). In other words, individual landlords carrying out a property business are being treated more punitively than other individuals carrying out a trade or profession.
92. The measure will result in some individual landlords being liable to tax on an economic loss (due to a theoretical, if not actual, increase in income). Further, any loss incurred can only be carried forward: it cannot be carried back to earlier years or set against general income.

93. The measure will cause some individual landlords who are presently basic rate taxpayers to become higher rate taxpayers (due to a theoretical, if not actual, increase in income). This may also cause other tax related benefits to be lost, for example, tax credits and child benefits. Further, it may cause the loss of the personal allowance.
94. The measure will lead in some cases to an effective tax rate on the actual profit far in excess of 40% (see the examples in Appendix 3 to the ICAEW Submission, which provide real life examples in which the effective tax rate on the real rental profit in 2020-21 would be 53.5%, 164.4% and 123.3% [E/12/132], in the submission to Committee by the Association of Taxation Technicians which gives examples of effective taxation rates of 65% and 140% (see §§2.22-2.2.3) [E/11/114] and the witness statement of Steven Alain Bolton from paragraph 52 [E/1/14]). It is apparent that for some individual landlords the effective rate of taxation will be far in excess of the higher rate of 40%. In *NKM v. Hungary* [2013] STC 1104 the ECtHR held that a tax on a civil servant's severance package that exceeded the general personal income tax rate of 16% by three times breached A1P1 (see §§65-69).
95. These impacts would be magnified should there be an increase in interest rates.
96. It is not an answer to the burden what the measure will impose on individual landlords to suggest that they are able to transfer their properties into the ownership of a limited company. Stamp duty would be payable, and a transfer may realise a capital gain for the landlord transferring ownership to a company. Further, for those landlords who have entered into long-term fixed rate mortgages, transfer now may well incur early redemption costs.
97. Neither is it an answer to say that landlords disadvantaged by the measure would have an opportunity to sell their properties if they wished to do so before the measure came into full effect in 2020. Whilst in property hot-spots such as the South East that might be a viable mitigation measure, this will not be the case in all parts of the country.
98. Third, the "phasing in" period is insufficient. Landlords who entered into long fixed term mortgages (e.g. for 10 years) who attempted to sell prior to the measure coming into

effect would face high redemption charges. Not all areas of the country have vibrant property market that would enable properties to be sold quickly.

99. Fourth, the measure will impose “an excessive and individual burden” on tenants by way of rent increases, evictions and possible homelessness.
100. The HMRC Policy Paper claimed that rents would not increase significantly as a result of the measure. [E/9/79] No empirical evidence has been advanced in support of the proposition. The Royal Institute of Chartered Surveyors (“RICS”) reported in 2015 that surveyors expect house prices and rents to rise by around 25% by 2020 [E/17/173]; the RICS Chief Economist has noted that “discouraging buy-to-let could see private rents take even more strain”. [E/18/191] A number of surveys undertaken since the measure was announced (summarised in the witness statement of Steven Alain Bolton at paragraphs [91] and [92]) have concluded that a majority of landlords will increase rents to offset the increase in their tax liability stemming from the measure.
101. Other landlords have indicated that they propose to evict tenants in order to attempt to sell the property prior to the measure coming into full effect.
102. Despite these likely detrimental effects on tenants, the Defendants appear not to have properly assessed or taken into account the impact of the measure on tenants.
103. The First Defendant aver that the Claimants lack standing to bring a claim on behalf of tenants (see pre-action protocol response letter dated 16 February 2016 at §20). [E/7/76] The Claimants are entitled to point to the overall effects of the measure when asserting that it is disproportionate.
104. Fifth, the measure imposes new tax arrangements on existing investments. It is not confined to residential dwellings purchased after the commencement of the 2015 Act.
105. For these reasons section 24 of the 2015 Act places an excessive and disproportionate burden on individual landlords. It constitutes an infringement of the claimants’ rights under A1P1.

***Article 14 of the Convention with A1P1***

106. The Claimants rely on “other status”. Each Claimant holds the status of “individual landlord of a residential dwelling”. That this constitutes an “other status” is apparent from the jurisprudence of ECtHR. The ECtHR has held that the status of landlord falls within “other status”; see *James v. United Kingdom* (1996) 8 EHRR 123 [73-76], and *Spadea and Scalabrino v. Italy*, Application No. 12868/87. Further, the ECtHR has held that the status of a company, or that of being a natural person, falls within “other status”; see *Fredin v. Sweden (No. 1)* (1991) 13 EHRR 784 and *Lithgow v. United Kingdom* (1986) 8 EHRR 329. Similarly, the ECtHR has held that being an owner of a piece of land that is less than 20 hectares in size constitutes an “other status” for the purposes of article 14, see *Chassagnou v. France* (1999) 7 BHRC 151 (at §§86-95).
107. The status “individual landlord of a residential dwelling” does not, contrary to what is alleged by the First Defendant, define the Claimants’ personal characteristic by reference to the treatment of which they complain (and does not, therefore, fall foul of the guidance in *R (Clift) v. Secretary of State for the Home Department* [2006] UKHL 54; [2007] 1 AC 484, per Lord Bingham at §28). Rather it defines them by reference to their status as a natural person, and by reference to their status as a landlord.
108. The differential treatment alleged is between an individual landlord of a residential dwelling and:
- (i) a corporate landlord of a residential dwelling;
  - (ii) an individual owner of a commercial holiday let; or
  - (iii) a person carrying on any other trade or business;
- in that all three of these categories will be able from the tax year 2017-18, and thereafter, to set their finance costs off against their income and be taxed only on their profit. An individual landlord of a residential dwelling will not (from 2020-21, and to a limited extent only between the tax years 2017-18 and 2020-21).
109. The Defendants have not sought to advance any justification for the difference in treatment as between an individual landlord of a residential dwelling and the comparators set out in paragraph 5.23. Notably, no such justification was advanced by the First Defendant in the response to the pre-action protocol letter dated 16 February 2016 [E/7/73]. Given the lack of any justification in the documents published at the time of the Finance (No. 2) Bill, section 24 infringes the Claimants’ rights under article 14 of the Convention taken with A1P1.

### Delay

110. In their pre-action protocol response letter dated 15 February 2016, the First Defendant sought to suggest that the Claimants have delayed in bringing these proceedings. The First Defendant contend that the Claimants were aware of the proposed measure from 8 July 2015, the date on which the Summer Budget 2015 was announced, and that the Claimants ought to have applied for judicial review within 3 months of this date (i.e. by 8 October 2015 at which point the policy was still contained in the Finance (No. 2) Bill 2015). [E/7/74]
111. The Government could not have implemented the measure without primary legislation. Therefore until the 2015 Act received Royal Assent, the Government could not have been sure (and neither could the Claimants) that the Government's policy would be implemented. Any application for judicial review of the Bill would have been premature.
112. Further, and in respect of the State aid ground, an aid measure is put into effect when the relevant authority adopts the "legally binding act by which the competent national authority undertakes to grant aid", Case T-11/07 *Frucona Kosice v. Commission* [2010] ECR II-5453 (at §68). In the case of an aid scheme, that is when the scheme is enacted as legislation, even if no specific aid has yet been paid under it, see Cases T-127/99 etc *Diputacion Foral de Alava v. Commission* [2002] ECR II-1275 (at §185). Time starts to run, therefore, from the date on which the 2015 Act came into force.
113. The First Defendant appear to be asserting in the alternative that the claim has not been brought promptly for the purposes of CPR 54.5. In respect of the State aid ground, that argument must fail as the promptness requirement does not apply to a claim of a breach of EU law, see *R (Berky) v. Newport City Council* [2012] EWCA Civ 378; [2012] LGR 592. As to the Convention grounds this is not claim in which promptitude requires lodging any sooner than 3 months. The measure is not to be implemented until the 2016/17 tax year. The First Defendant refer (faintly) to a detriment to good administration without identifying any particulars. Further, and in any event, this measure will be challengeable in due course by individuals to whom it is applied in the tax year 2016/17.

### Alternative Remedy

114. The First Defendant contend, in respect of the State aid ground only, that the Claimants have an alternative remedy by way of an appeal to the First-tier Tribunal. This is a bad point. The

First-tier Tribunal has no judicial review jurisdiction, see *Revenue and Customs Commissioners v. Noor* [2013] UKUT 71 (TCC) (at 25-33). It follows that the First-tier Tribunal does not have the power to make the declaration sought by the Claimants, namely that section 24 of the 2015 Act constitutes an unlawful grant of State aid (see below).

115. If and to the extent that the First Defendant contend that the First-tier Tribunal would provide an alternative remedy in respect of the Convention grounds, that is also misconceived. The Claimants seek a declaration of incompatibility under section 4 of the 1998 Act. The First-tier Tribunal is not one of the courts listed in section 4(5) of the 1998 Act as having the power to grant such a declaration. **[LA/10/55]**
116. Further and in any event, any right of appeal to the First-tier Tribunal would not be until in or after the tax year 2016-17. The Claimants are entitled to an early resolution of these complaints so that they can take any subsequent steps in respect of their properties as they consider appropriate.

#### **Relief Sought**

117. The Claimants seek the following relief.
118. First, the Claimants seek a declaration that section 24 of the 2015 Act constitutes an unlawful grant of State aid. In the alternative, and to the extent the Court concludes that the proper interpretation of articles 107 and 108 of the TFEU raises particularly difficult questions of EU law which it would be appropriate for the CJEU to consider, a reference to the CJEU pursuant to article 267 of the TFEU.
119. Second, the Claimants seek a declaration pursuant to section 4 of the 1998 Act that section 24 of the 2015 Act is incompatible with the Claimants' rights under A1P1 and/or under article 14 taken with A1P1. Pursuant to the principles in *Sheldrake*, this is not a case in which a Convention compatible interpretation of section 24 can be derived from interpretation pursuant to section 3 of the 1998 Act.

120. Third, the Claimants seek such further or other relief as the Court considers appropriate and their costs.

**Cherie Booth CBE, QC**

**Omnia Strategy LLP**

**Conor Quigley QC**

**Serle Court**

**Sarah Hannett**

**Matrix**

**Omnia Strategy LLP**

**17 February 2016**