Gallaher: consistency, fairness and legitimate expectation

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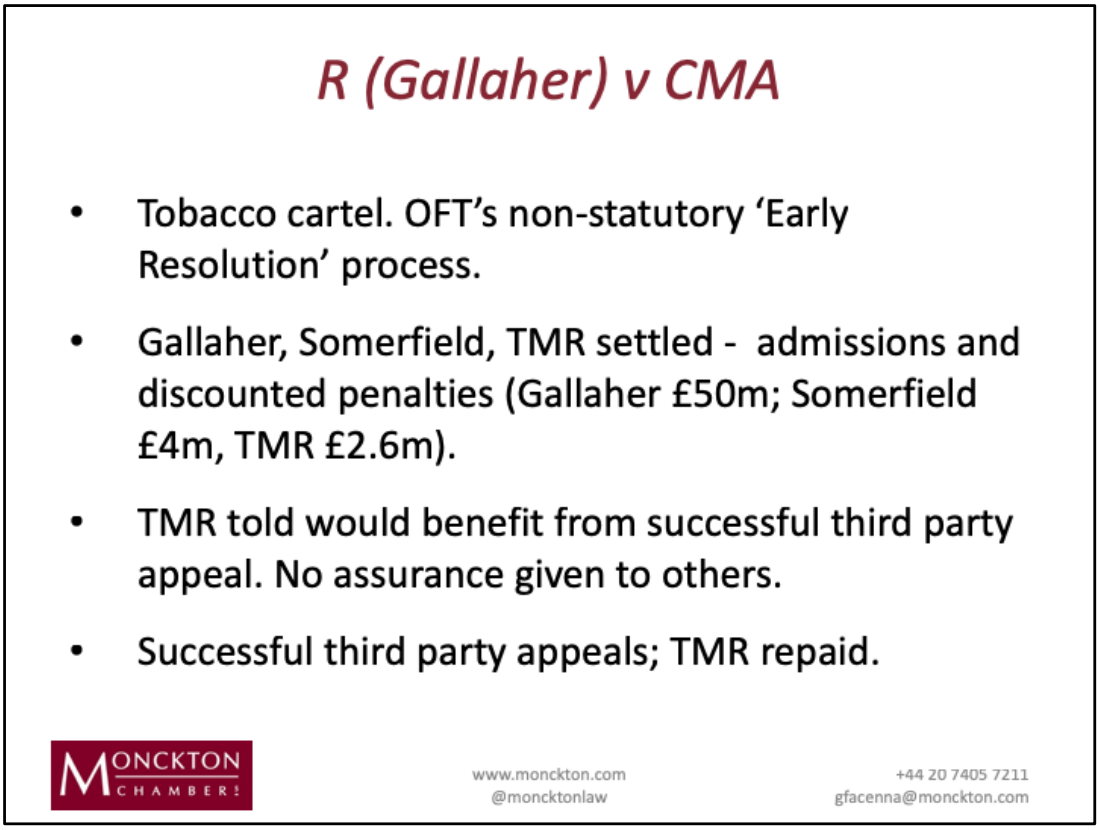
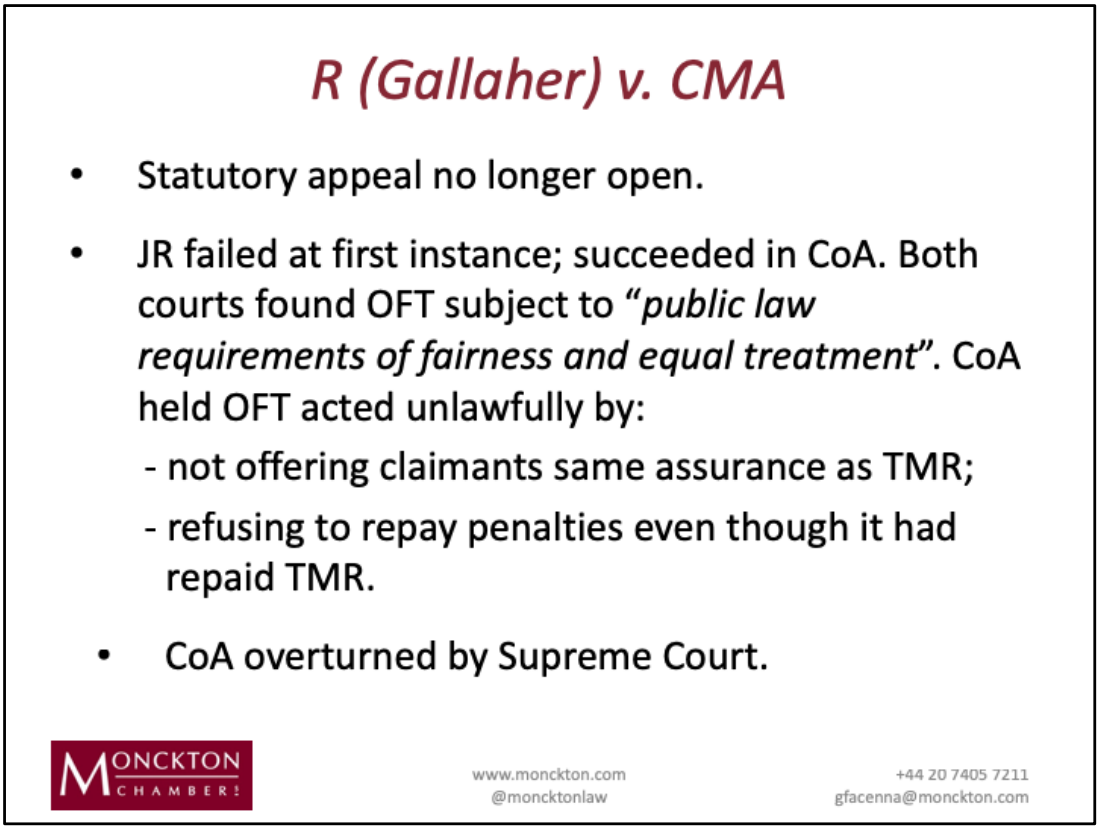


Early Resolution Agreements required the signatories' admission of involvement in the infringements, set out a series of terms for further co-operation, and indicated the penalties to be imposed subject to a possible reduction of up to 20% for procedural co-operation. Entry into an ERA did not prevent a party from terminating that agreement at any time up to publication of the OFT's final decision. If a party did terminate an ERA, it would forgo any discounted penalty negotiated as part of the ERA. In that event, the OFT would continue with its case against that party in accordance with the usual administrative procedure. A party to an ERA could also, upon receiving the final decision, decide to appeal against it if it wished to do so, notwithstanding the admissions in the ERA. In that event, the OFT reserved the right to make an application to the tribunal to increase the penalty and to require the party to the ERA to pay the OFT's full costs of the appeal regardless of the outcome.

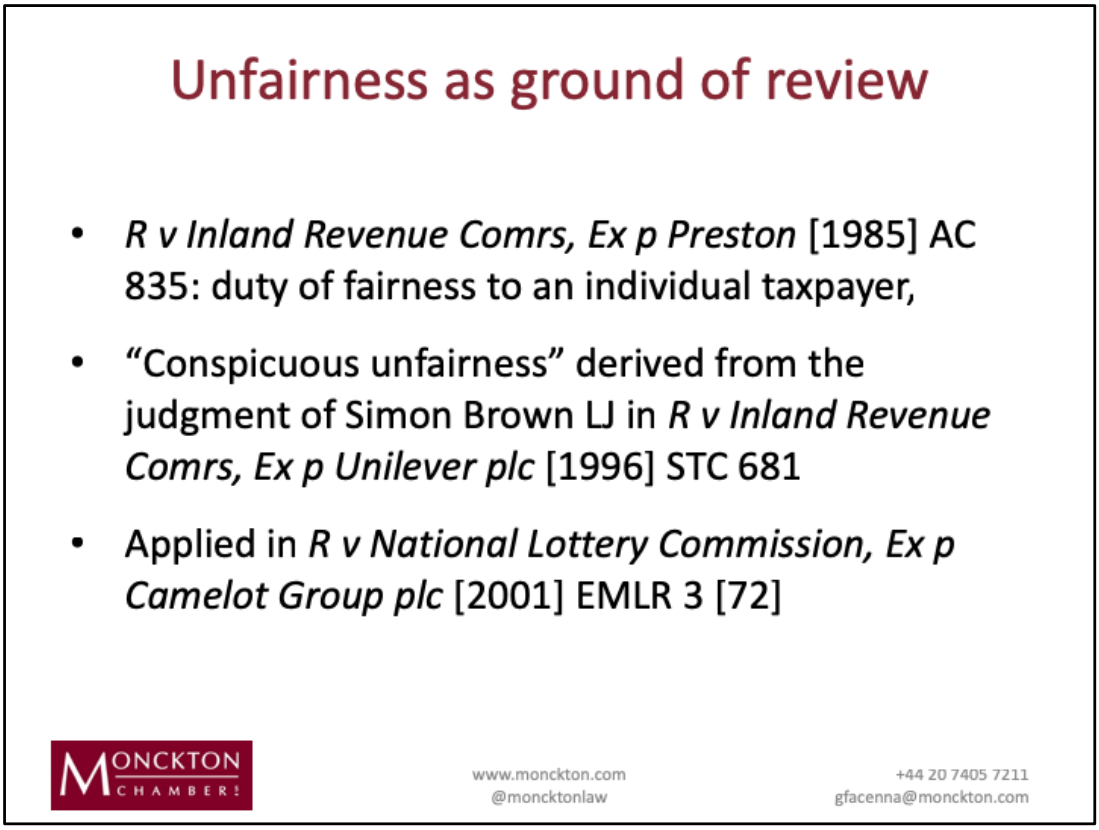
Following the appeals, the OFT considered that the statements it had made to TMR in 2008 might have given rise to an understanding on the part of TMR that the OFT would withdraw or vary its decision against TMR in the event of a successful third party appeal. In light of this, the OFT considered that there was a real risk that TMR would, as a result of this reliance on those statements, be permitted to appeal out of time to the tribunal and would succeed in that appeal. The OFT reached a settlement agreement with TMR, by which the OFT agreed to pay to TMR an amount equal to the penalty TMR had paid together with a contribution to interest and legal costs. The Tobacco Decision was not withdrawn against TMR.



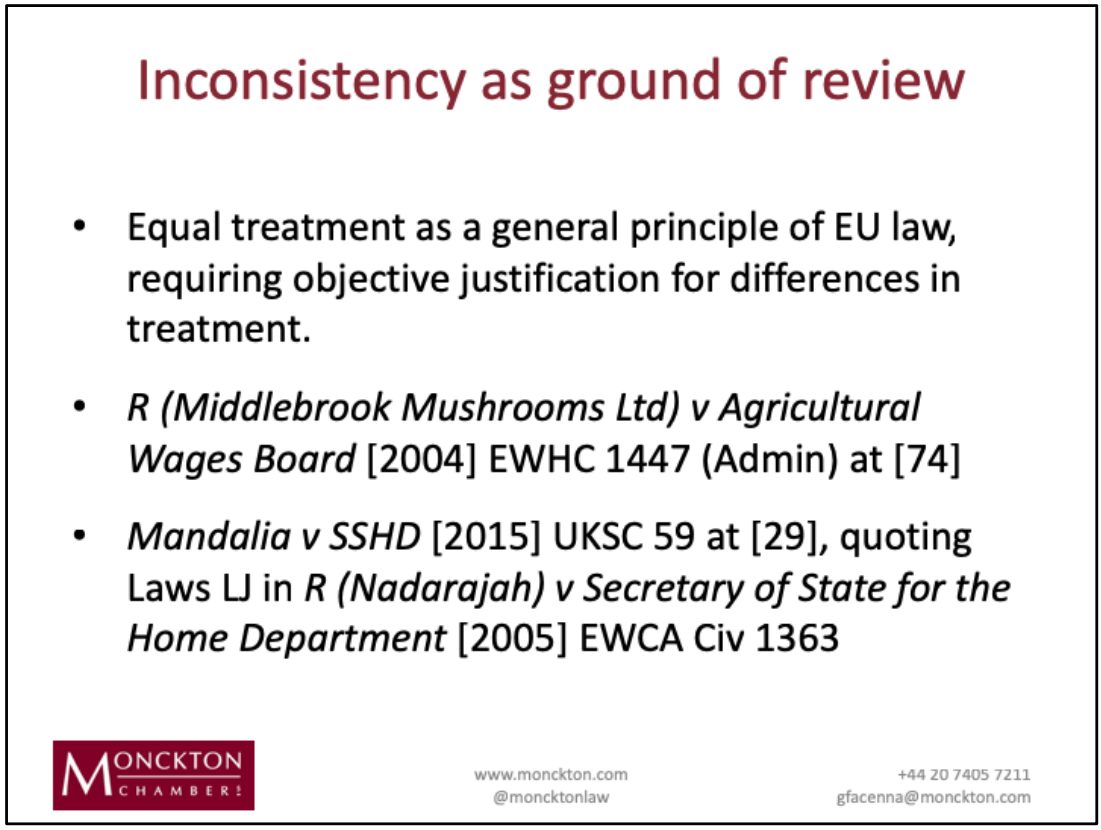
Applications to appeal out of time succeeded before the CAT, but its decision was reversed by the Court of Appeal: *Office of Fair Trading v Somerfield Stores Ltd* [2014] EWCA Civ 400.

At first instance in the JR, Collins J. found that the assurance given to TMR had been given in error and that consideration provided "an objective justification" for the refusal by the OFT to make payment to the claimants.

CoA (Dyson MR) at [60]:
"But the real focus must be on the question whether the 2012 decision was objectively justified. … The only difference between the positions of TMR on the one hand and that of the claimants on the other hand was that the OFT had given the assurances to TMR in 2008, but not to the claimants. The effect of that manifestly unfair and unequal treatment in 2008 could have been reversed after the issue had been raised by Asda and party A and the OFT's eyes had been opened to the significance of its earlier mistake in giving the assurances to TMR. That would have put all the companies which had been the subject of the Tobacco Decision and to which the [Statement of Objections] has been addressed on an equal footing. The OFT could have withdrawn the assurances. It would not have been too late for TMR to appeal at that time. Even if TMR had been out of time, it would have had a very powerful case for arguing that the withdrawal of the assurances was an exceptional circumstance which justified an extension of time for appealing. Instead, the OFT acted on the assurances it had given to TMR, made the 2012 decision and repaid the penalty previously levied and made further payments too. In all the circumstances, this was a plain breach of the principle of equal treatment and unfair."



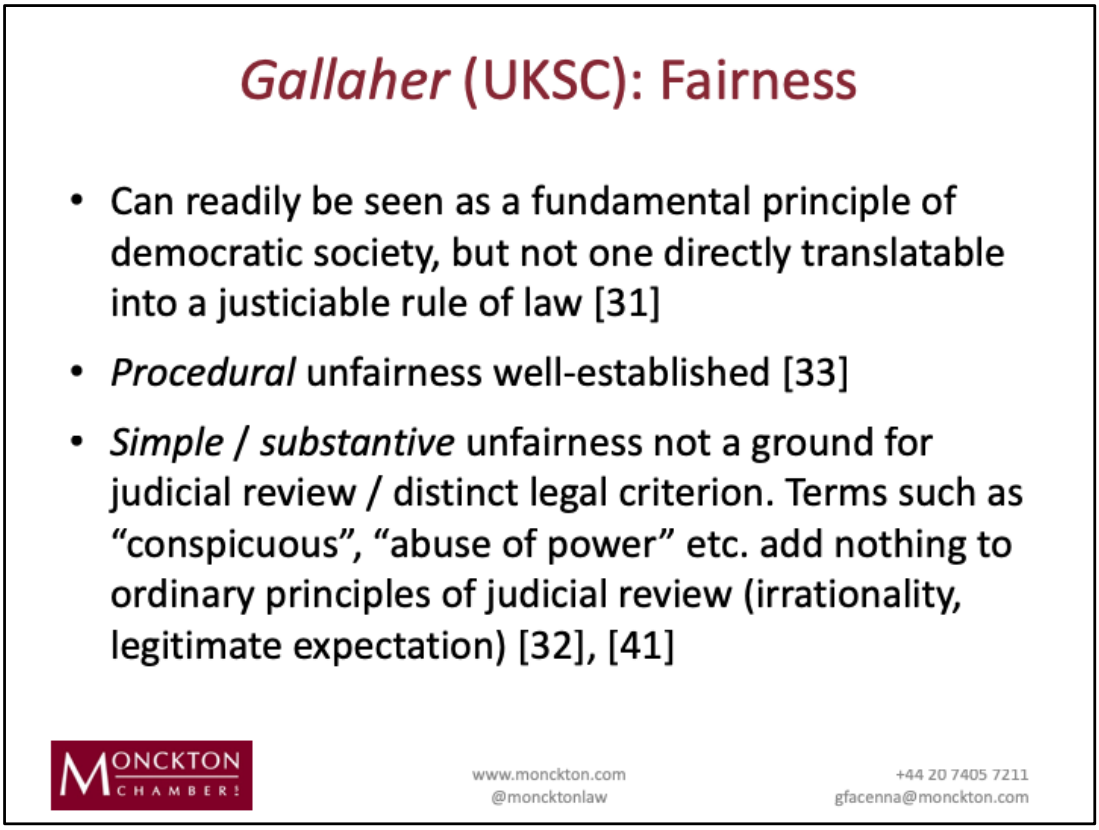
R v Inland Revenue Comrs, Ex p Unilever plc [1996] STC 681: "Unfairness amounting to an abuse of power" as envisaged in Preston and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power. As Lord Donaldson, MR, said in R v ITC ex parte TSW : "The test in public law is fairness, not an adaptation of the law of contract or estoppel".



Middlebrook Mushrooms at [74]: "It follows that the Board had no lawful justification for the exclusion of mushroom pickers from the MHW rate. "It is a cardinal principle of public administration that all persons in a similar position should be treated similarly." (Lord Donaldson MR in *R (Cheung) v Hertfordshire County Council*, The Times, 4 April 1998 , cited in de Smith, Woolf & Jowell, Judicial Review of Administrative Action , fifth edition, at paragraph 13–041. This principle was infringed. The exclusion of manual harvesters of mushrooms from the MHW category was Wednesbury unreasonable and unlawful: if the Board had correctly applied the law, the decision to exclude them would not and could not have been made."

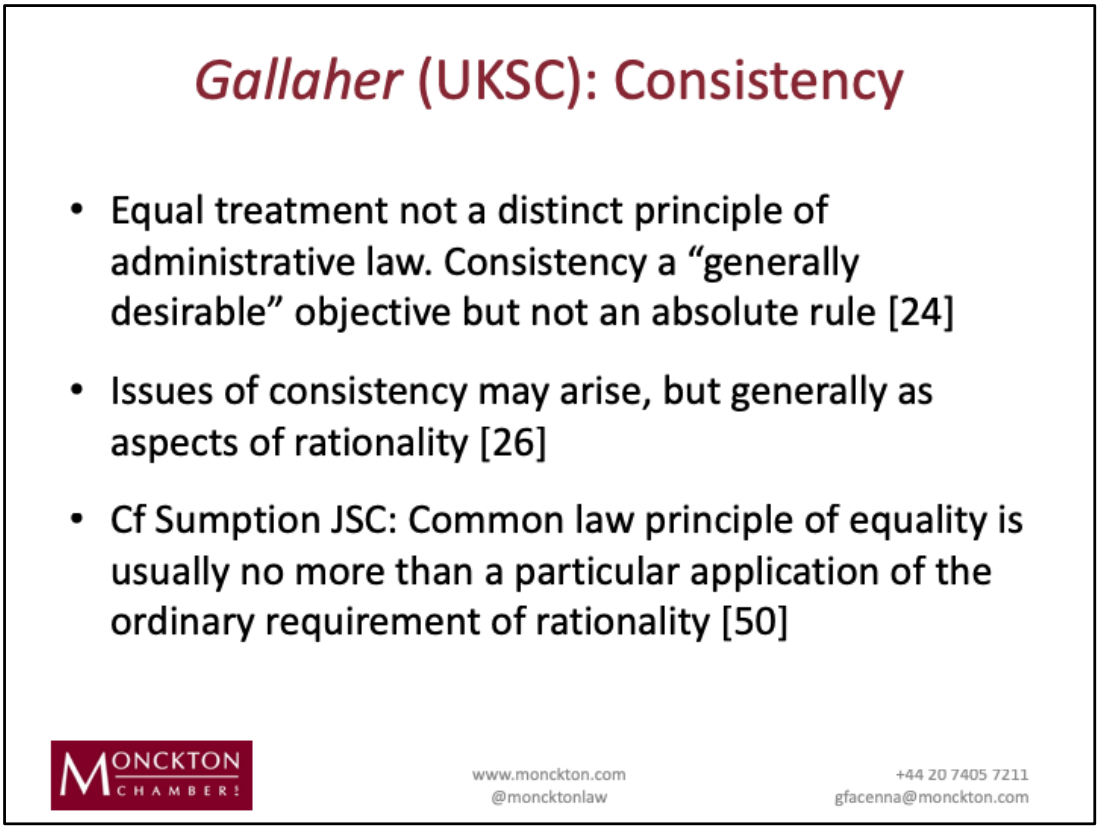
Mandalia v SSHD at [29]: "… the applicant's right to the determination of his application in accordance with policy is now generally taken to flow from a principle, no doubt related to the doctrine of legitimate expectation but free-standing, which was best articulated by Laws LJ in *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, as follows:

> *"68 … Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public."*



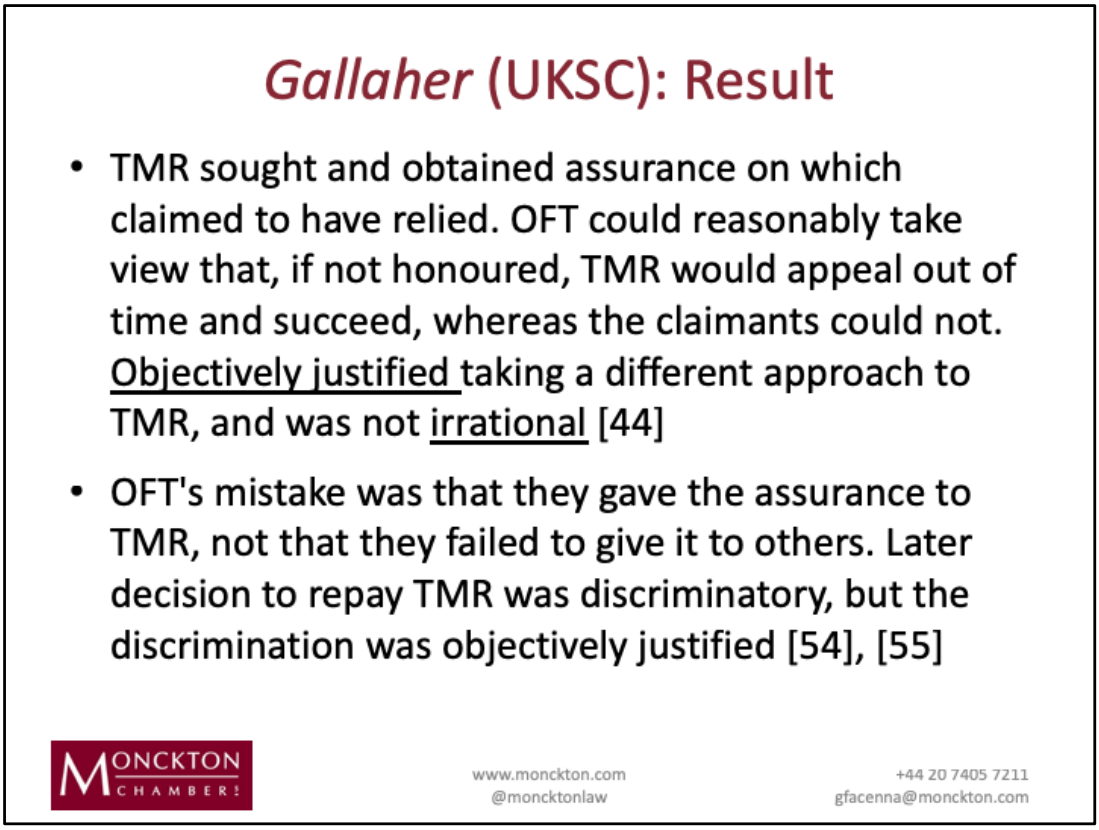
Carnwath JSC:
40 I have quoted at some length from these judgments to show how misleading it can be to take out of context a single expression, such as "conspicuous unfairness", and attempt to elevate it into a free-standing principle of law. The decision in *Ex p Unilever plc [1996] STC 681* was unremarkable on its unusual facts, but the reasoning reflects the case law as it then stood. Surprisingly, it does not seem to have been strongly argued (as it surely would be today) that a sufficient representation could be implied from the revenue's consistent practice over 20 years: see eg *De Smith's Judicial Review* , para 12-021. It seems clear in any event from the context that Simon Brown LJ was not proposing "conspicuous unfairness" as a definitive test of illegality, any more than his contrast with conduct characterised as "a bit rich". They were simply expressions used to emphasise the extreme nature of the Revenue's conduct, as related to Lord Diplock's test. In modern terms, and with respect to Lord Diplock, "irrationality" as a ground of review can surely hold its own without the underpinning of such elusive and subjective concepts as judicial "outrage" (whether by reference to logical or moral standards).

41 In summary, procedural unfairness is well-established and well-understood. Substantive unfairness on the other hand—or, in Lord Dyson MR's words [2016] Bus LR 1200, para 53, "whether there has been unfairness on the part of the authority having regard to all the circumstances"—is not a distinct legal criterion. Nor is it made so by the addition of terms such as "conspicuous" or "abuse of power". Such language adds nothing to the ordinary principles of judicial review, notably in the present context irrationality and legitimate expectation. It is by reference to those principles that cases such as the present must be judged.



Sumption JSC at [50]:
50. I agree with Lord Carnwath JSC's analysis of the relevant legal principles. In public law, as in most other areas of law, it is important not unnecessarily to multiply categories. It tends to undermine the coherence of the law by generating a mass of disparate special rules distinct from those applying in public law generally or those which apply to neighbouring categories. To say that a decision-maker must treat persons equally unless there is a reason for treating them differently begs the question what counts as a valid reason for treating them differently. Consistency of treatment is, as Lord Hoffmann observed in *Matadeen v Pointu* [1999] 1 AC 98 , 109 "a general axiom of rational behaviour". The common law principle of equality is usually no more than a particular application of the ordinary requirement of rationality imposed on public authorities. Likewise, to say that the result of the decision must be substantively fair, or at least not "conspicuously" unfair, begs the question by what legal standard the fairness of the decision is to be assessed. Absent a legitimate expectation of a different result arising from the decision-maker's statements or conduct, a decision which is rationally based on relevant considerations is most unlikely to be unfair in any legally cognisable sense.

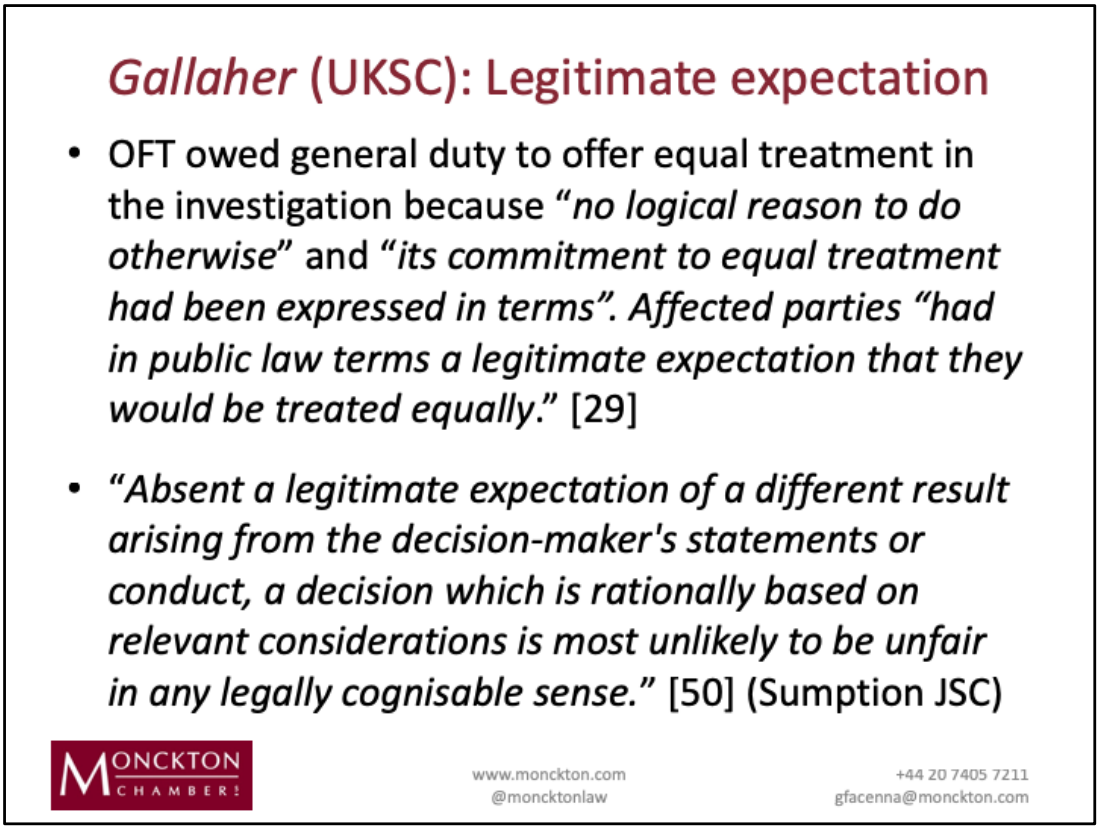
Cf. Prof Mark Elliott, "Consistency as a free-standing principle of administrative law?" at https://publiclawforeveryone.com/2018/06/15/the-supreme-courts-judgment-in-gallaher-consistency-as-a-free-standing-principle-of-administrative-law/ referring to the argument in favour of "according proper doctrinal recognition to a value such as consistent decision-making which the higher courts have in recent years been at pains to single out as vital to good administration."



Briggs JSC at [62]-[63]:
62…Where a public authority has a choice of this kind, and one of the options avoids replicating an earlier mistake, but at some cost to equal treatment, the choice is one for the authority, not for the court, for the reasons which Lord Carnwath JSC gives, subject to the usual constraints of lawfulness and rationality. If, but only if, the authority acts outside those constraints will its choice be subject to judicial review.
63. In the present case I do not consider that the OFT's response to its predicament transgressed those boundaries. The fact that the giving of the assurance to TMR in 2008 was a mistake, that its withdrawal in 2012 would be likely to leave TMR even better off than if the assurance was honoured, and that the claimants had neither received or relied upon any similar assurance seem to me, taken in combination, to amount to a powerful objective justification for unequal treatment, as between TMR and the claimants. On any view the OFT made a rational choice between unpalatable alternatives, with which the court should not interfere.

See commentary, e.g.:
Paul Daly, "The Future of Substantive Review in English Administrative Law: R (Gallaher Group Ltd) v Competition and Markets Authority [2019] AC 96" at https://www.administrativelawmatters.com

Prof Mark Elliott, "Consistency as a free-standing principle of administrative law?" at https://publiclawforeveryone.com



See also:

In the matter of an application by Geraldine Finucane for Judicial Review [2019] UKSC 7, in particular at 55ff. (Lord Kerr JSC) and 156ff (Lord Carnwath JSC)

and critique of Prof. Mark Elliott in "*The Supreme Court's judgment in Finucane — I: Legitimate expectations, reliance, procedure and substance*" at https://publiclawforeveryone.com/2019/03/05/the-supreme-courts-judgment-in-finucane-i-legitimate-expectations-reliance-procedure-and-substance/

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