

Motor Insurance – the Death of a Declaration

In the murky depths of motor insurance litigation, the section 152 RTA 1988 declaration of an insurer's entitlement to avoid its policy has been weaponised as insurers seek to protect their own commercial interests necessarily at a cost to other insurers or, in some rare cases, the MIB.

It is an area almost devoid of authority in which the battle between insurers has become increasingly fierce over the last decade. No more.

On 20 July 2017 the CJEU gave judgment in *Fidelidade-Companhia de Seguros SA v Caisse Suisse de Compensation and Others* (Case C-287/16) indicating that any right of an insurer to avoid paying a Claimant's claim by avoiding its insurance policy was contrary to EU law, even if the claim would still be paid by a body such as the MIB. In *R (Roadpeace) v Secretary of State for Transport & MIB* [2017] EWHC 2725 (Admin) (7/11/17), the Secretary of State for Transport conceded that the procedure whereby an insurer can avoid its liability under section 151 of the RTA 1988 by obtaining a declaration satisfying section 152(2) of the RTA that it was entitled to avoid its policy of insurance for misrepresentation or non-disclosure was therefore contrary to EU law. It was indicated that the government would take steps to rectify the situation.

In *Colley v Shuker* [2019] EWHC 781, O'Farrell J held that an insurer could rely on its section 152 declaration under the RTA 1988 despite its incompatibility with EU law.

Two years after *Fidelidade* and (possibly) as one of the last exercises of the statute-amending powers under the European Communities Act 1972, Chris Grayling the Secretary of State for Transport laid before Parliament the snazzily titled Motor Vehicles (Compulsory Insurance) (Miscellaneous Amendments) Regulations 2019. They will come into force on 1 November 2019.

The Regulations do 3 things, only one of which is of practical importance to practitioners and insurers:

- they remove the ability to make a deposit or take out a security as an alternative to obtaining a motor insurance policy for the use of a motor vehicle: probably of little practical importance; I have never come across a claim involving a person protected by deposit or security;
- they correct an incorrect cross-reference in the Motor Vehicles (Insurance Requirements) Regulations 2011;
- they repeal section 152(2) of the RTA 1988 insofar as it applies to declarations obtained after an accident (it will continue to apply to declarations obtained prior to accidents: a rare occurrence particularly since the Deregulation Act 2015 amendments to the RTA 1988 which enable an insurer to avoid liability under section 151 by validly cancelling its policy). Further associated repeals of sections 152(3) & (4) are made.

The Regulations come into force and amend the RTA from 1 November 2019. The saving provisions in the Regulations mean that if a declaration has been obtained prior to 1 November 2019 that declaration will continue to exempt an insurer from any liability to make payment under section 151.

The practical effects of these changes will be:

- declaration actions will cease to be of any significance: most motor insurance policies can be cancelled by the insurer in accordance with their terms on giving notice. Cancellation will almost always be faster than obtaining a declaration and will prevent an insurer being liable for any future accident either under the RTA or, if the MID is properly amended as well, as an Article 75 insurer. Cancellation will therefore almost always

be preferable to obtaining a declaration;

- there will be pressure to conclude any ongoing declaration proceedings prior to 1 November 2019, although in some courts it may be unlikely that post will be opened before then and the resolution of declaration proceedings may be a forlorn hope;
- arguments as to “use” of vehicles will now come to the fore: the Court of Appeal decision in *EUI Ltd v Bristol Alliance Ltd Partnership* [2012] EWCA Civ 1267 means that if a motor vehicle is being used for an uninsured use, a Claimant cannot rely on section 151 RTA 1988 and the insurer’s status will drop to Article 75 under the MIB Articles of Association.

Ironically, insurers generally will ultimately benefit from this change by saving costs. The potential effects of reducing status were such that it required investigation (and in many cases declaration proceedings) in any multi-vehicle, multi-insurer case. In many cases all insurers would obtain declarations and end up in the same (or a very similar) position having kept lawyers in gainful employment.

Motor insurance lawyers will have to find something else to argue about.

Stephen Worthington QC and Richard Viney appeared for MIB in *R (RoadPeace) v Secretary of State for Transport*

Patrick Vincent appeared for UK Insurance and Richard Viney appeared for MIB in *Colley v Shuker*