Neutral Citation Number: [2019] EWHC 781 (QB)

Case No: E90MA082

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/03/2019

Before :

MRS JUSTICE O'FARRELL

- -

Between :

DANIEL JAMES COLLEY	**Claimant**
- and -	
(1) DYLAN SHUKER	
(2) UK INSURANCE LIMITED	
(3) MOTOR INSURERS' BUREAU	**Defendants**

- -
- -

Gerard McDermott QC & Philip Mead (instructed by **Irwin Mitchell**) for the **Claimant**
Patrick Vincent (instructed by **Keoghs LLP**) for the **Second Defendant**
Richard Viney (instructed by **Weightmans**) for the **Third Defendant**

Hearing dates: 5th March 2019
Further submissions and material by email: 11th March 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE O'FARRELL

Mrs Justice O'Farrell:

1. There are three applications before the Court:

   i) the Second Defendant's application dated 7 September 2018 to strike out the claims against it;

   ii) the Third Defendant's application dated 10 September 2018 to set aside the order extending time for service of the claim form on the First Defendant;

   iii) the Claimant's application dated 20 February 2019 for permission to join the Secretary of State for Transport as a fourth defendant and to amend the Particulars of Claim.

2. The material facts can be summarised shortly. On 27 March 2015 the Claimant, a young man now aged 23, was a passenger in a motor vehicle driven by the First Defendant. The Claimant was aware that the First Defendant did not have a valid driving licence and was not insured to drive the vehicle. The First Defendant lost control and the vehicle overturned on an embankment. The Claimant suffered very serious injuries, including an incomplete spinal-cord injury at level C4, and is an incomplete tetraplegic.

3. On 22 March 2016 the First Defendant was convicted of causing serious injury by dangerous driving.

4. The Second Defendant is an insurer. In May 2014 the Second Defendant issued a policy of insurance in relation to the vehicle, naming the First Defendant's father, Mr N Shuker, as the policyholder and main driver. The policy was not issued to, and did not cover, the First Defendant.

5. On 3 May 2016 the Second Defendant issued proceedings against Mr N Shuker, seeking a declaration that the Second Defendant was entitled to avoid the policy on the grounds of material misrepresentations, namely:

   i) Mr N Shuker stated wrongly that he was the registered keeper of the vehicle; and

   ii) Mr N Shuker stated wrongly that the only drivers of the vehicle would be himself and his partner.

6. On 27 June 2016 the court granted a declaration that the Second Defendant was entitled to avoid the policy pursuant to the Consumer Insurance (Disclosure and Representations) Act 2012 ("the Declaration").

7. On 23 March 2018 the Claimant issued proceedings against the First Defendant driver of the vehicle, the Second Defendant insurer and the Third Defendant, the Motor Insurance Bureau, seeking damages and any other necessary relief, including setting aside of the Declaration.

Second Defendant's application to strike out claim

8. The pleaded case against the Second Defendant in the proposed amended Particulars of Claim is as follows:

> "[8] By proceedings commenced on or about 3 May 2016 in the High Court … the Second Defendant sought a declaration under section 152 of the Road Traffic Act 1988 as amended, as against the Policyholder, Mr N Shuker, that the Claimant was entitled to avoid the Policy.
>
> [9] On or about 27 June 2016, the court made an Order granting the Second Defendant the declaration of avoidance in the terms sought.
>
> [10] The Claimant will aver that the Second Defendant is liable to compensate the Claimant in respect of any judgment and damages found due as a result of the negligence of the First Defendant, whether by way of a purposive interpretation of domestic law in accordance with European law, in particular Directive 2009/103/EC, and/or by setting aside the declaration under section 152 of the Road Traffic Act 1988.
>
> [11] Section 151 of the Road Traffic Act 1988 applies to judgments relating to a liability with respect to any matter where liability with respect to that matter is required to be covered by a policy of insurance under section 145 of the 1988 Act and it is a liability, other than an excluded liability, which would be so covered if the policy insured all persons (including the First Defendant) and the judgment is obtained against any person other than the one who is insured by the policy (see section 15(2)).
>
> [12] The Claimant avers that upon judgment being obtained against the First Defendant in the proceedings herein, absent any declaration under section 152, such liability of the First Defendant would constitute a liability under section 151(2)(b) to which section 151 would otherwise apply.
>
> [13] Accordingly, the effect of section 151 is to impose on the Second Defendant a liability to compensate the Claimant in respect of a judgment obtained against the First Defendant for so long as [the declaration was not obtained].
>
> [14] The Claimant avers that, in so far as that policy has in fact been avoided as against the policyholder, by virtue

> of the Order set out above at paragraph 9, any such declaration is not capable of being raised as against the Claimant, alternatively the Claimant is entitled to set aside such a declaration in so far as the declaration conflicts with the Claimant's directly effective rights under EU law, alternatively, the Courts of the UK are under a duty in exercise of the discretion inherent under section 152 to set aside such a declaration, where that declaration breaches the rights granted to the Claimant under EU law."

9. The relief claimed is (1) a declaration setting aside the Declaration obtained by the Second Defendant; and (2) damages.

10. The Second Defendant seeks to strike out the claim for a declaration and/or damages on the grounds that:

    i) the claim for a declaration is an abuse of the court's process; and/or

    ii) the Particulars of Claim disclose no reasonable grounds for bringing the claim pursuant to CPR 3.4(2)(b).

    Alternatively, the Second Defendant seeks summary judgement against the Claimant pursuant to CPR 24.2(a)(i) on the ground that the claim has no real prospect of success.

11. CPR 3.4(2) provides that:

> "The court may strike out a statement of case if it appears to the court:
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings ..."

12. CPR 24.2 provides that:

> "The court may give summary judgment against a claimant … on the whole of the claim or on a particular issue if:
>
> (a) it considers that
>
> (i) the claimant has no real prospect of succeeding on the claim or issue … and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

13. In determining this application, the following principles are applicable:

i) The court must consider whether the claim (or proposed claim) against the Second Defendant has a realistic as opposed to fanciful prospect of success; a realistic claim is one that carries some degree of conviction and is more than merely arguable.

ii) The court must not conduct a mini trial.

iii) If the application gives rise to a short point of law or construction then, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

iv) The court should be cautious in striking out a claim in areas of developing jurisprudence or on novel points of law without the benefit of full argument: *Barrett v Enfield* [2001] 2 AC 557 per Lord Browne-Wilkinson.

14. Mr Vincent, counsel for the Second Defendant, submits that it obtained a declaration that it was entitled to avoid the policy and therefore has no liability to compensate the Claimant in respect of any judgment obtained against the First Defendant. Section 151 of the RTA imposes an obligation on an insurer to satisfy a judgment against persons insured or against third party risks. However, that obligation is subject to section 152(2) of the RTA which provides expressly that the insurer has no liability where it has obtained a declaration that it is entitled to avoid the policy on grounds including that it was obtained by a material misrepresentation. Even if there is any incompatibility between section 152 of the RTA and EU law, the incompatibility cannot be resolved by a purposive interpretation and the court is not empowered to disapply the statute. Domestic law does not create a direct cause of action between the Claimant and the Insurer and the Claimant has not alleged that any EU provision creates a direct legal right. Therefore, the claim has no real prospect of success.

15. Mr McDermott QC, leading counsel for the Claimant, submits that the application is premature and the Court should order this matter to be tried as preliminary issue. His position on the application is that the effect of section 151 of the RTA is to impose on the Second Defendant a liability to compensate the Claimant in respect of a judgment obtained against the First Defendant tortfeasor for so long as a declaration has not been obtained by the Second Defendant under section 152 of the RTA. Section 152 RTA is incompatible with EU Directive 2009/103/EC. In so far as the policy has been avoided by the Declaration obtained by the Second Defendant, section 152 conflicts with the Claimant's directly effective rights under EU law. The Court should adopt a purposive interpretation of section 152 RTA to ensure that domestic law is brought into conformity with the Directive by not permitting the Second Defendant to rely on the Declaration against the Claimant; permitting the Claimant to set aside the Declaration; or exercising its implied discretion under section 152 of the RTA to set aside the Declaration.

16. Section 143 of the Road Traffic Act 1988 (as amended) ("the RTA") provides that it is an offence to use or permit another to use a motor vehicle on a public road unless there is in place third party insurance.

17. Section 145 of the RTA requires such policies of insurance to cover civil liability for third party property damage and personal injury claims arising out of use of the vehicle.

18. Section 151 of the RTA requires an insurer, who has issued such a policy, subject to certain conditions, to satisfy judgments in favour of third parties who have suffered loss. The material provisions state:

> "(1) This section applies where, after [a policy is issued] … a judgment to which this subsection applies is obtained.
>
> (2) Subsection (1) above applies to judgments relating to a liability with respect to any matter where liability with respect to that matter is required to be covered by a policy of insurance under section 145 of this Act and either –
>
> (a) it is a liability covered by the terms of the policy … and the judgment is obtained against any person who is insured by the policy … or
>
> (b) it is a liability … which would be covered if the policy insured all persons … and the judgment is obtained against any person other than one who is insured by the policy …
>
> (5) Notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy … he must, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment –
>
> (a) as regards liability in respect of …bodily injury, any sum payable under the judgment in respect of the liability, together with any sum … payable in respect of interest on that sum …"

19. The obligation imposed by section 151 of the RTA is subject to an exception in section 152 of the RTA, which states:

> "(2) … no sum is payable by an insurer under section 151 of this Act if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration –
>
> (a) that, apart from any provision contained in the policy … he is entitled to avoid it either under the consumer Insurance (Disclosure and Representations) Act 2012 or, if that Act does not apply, on the ground that it was obtained –
>
> …

> (ii) by a representation of fact which was false in some material particular, or
>
> (b) if he has avoided the policy … under that Act or on that ground, that he was entitled so to do apart from any provision contained in the policy …"

20. Mr McDermott accepts that the express words used in Section 152(2) of the RTA exclude any liability on the part of the Second Defendant to compensate the Claimant in respect of any judgment obtained against the First Defendant by reason of the Declaration. However, he submits that section 152(2) of the RTA is incompatible with EU law. The court should adopt a purposive interpretation of section 152 to ensure that the domestic law conforms to relevant EU law, by implying an inherent discretion to disapply or set aside any declaration. The court should exercise such discretion by setting aside the Declaration.

21. Directive 2009/103/EC, a consolidating measure incorporating earlier directives (collectively referred to as "the Directive"), imposes on Member States the obligation to provide a system of compulsory third-party liability insurance in respect of property damage and personal injury suffered by a passenger, who was not the driver, arising out of use of motor vehicles, including the following:

> "Article 3
>
> Each Member State shall, subject to Article 5, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance.
>
> The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of the measures referred to in the first paragraph.
>
> …
>
> The insurance referred to in the first paragraph shall cover compulsorily both damage to property and personal injuries."
>
> "Article 10
>
> 1. Each Member State shall set up or authorise a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in Article 3 has not been satisfied.…
>
> 2. …
>
> Member States may, however, exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the

> damage or injury when the body can prove that they knew it was uninsured.
>
> …
>
> "Article 12
>
> 1. Without prejudice to the second subparagraph of Article 13(1), the insurance referred to in Article 3 shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle.
>
> "Article 13
>
> 1. Each Member State shall take all appropriate measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3 shall be deemed to be void in respect of claims by third parties who have been victims of an accident where that statutory provision or contractual clause excludes from insurance the use or driving of vehicles by:
>
> (a) persons who do not have express or implied authorisation to do so;
>
> (b) persons who do not hold a licence permitting them to drive the vehicle concerned …
>
> "Article 18
>
> Member States shall ensure that any party injured as a result of an accident caused by a vehicle covered by insurance as referred to in Article 3 enjoys a direct right of action against the insurance undertaking covering the person responsible against civil liability."

22. In *Ruiz Bernaldez* (Case C-129/94) the CJEU ruled that the Directive precluded an insurer from relying on statutory provisions or contractual clauses to refuse to compensate third party victims of an accident caused by an insured vehicle:

> "[18] In view of the aim of ensuring protection, stated repeatedly in the directives, Article 3(1) of the First Directive, as developed and supplemented by the Second and Third Directives, must be interpreted as meaning that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage to property and personal injuries sustained by them, up to the amounts fixed in Article 1(2) of the Second Directive.
>
> [19] Any other interpretation would have the effect of allowing Member States to limit payment of compensation to third-party

> victims of a road-traffic accident to certain types of damage, thus bringing about disparities in the treatment of victims depending on where the accident occurred, which is precisely what the directives are intended to avoid. Article 3(1) of the First Directive would then be deprived of its effectiveness.
>
> [20] That being so, Article 3(1) of the First Directive precludes an insurer from being able to rely on statutory provisions or contractual clauses to refuse to compensate third-party victims of an accident caused by the insured vehicle."

23. In *Fidelidade-Companhia de Seguros SA* (Case C-287/16) the CJEU ruled that the Directive should be interpreted as precluding national legislation which would enable an insurer to invoke against third-party victims the nullity of a contract for motor vehicle insurance against civil liability arising as a result of the policyholder initially making false statements concerning the identity of the owner and the usual driver of the vehicle concerned. The court noted that the Directive requires Member States to ensure that civil liability in respect of the use of motor vehicles normally based in their territory is covered by insurance and specifies that third party victims should be covered by that insurance:

> "[24] …Article 3(1) of the First Directive precludes a company insuring against civil liability in respect of the use motor vehicles from relying on statutory provisions or contractual clauses in order to refuse to compensate those victims for an accident caused by the insured vehicle …
>
> [25] The Court has also held that the first subparagraph of Article 2(1) of the Second Directive simply repeats that obligation …
>
> [26] It is true that, by way of derogation from that obligation, [the Directive] provides that certain victims may be excluded from compensation by the insurance company, having regard to the situation they have themselves brought about, that is to say, persons who voluntarily entered the vehicle which caused the damage or injury, when that company can prove that they knew the vehicle had been stolen. However, and as the Court has already held, [those] derogations … may be made only in that single, specific case …
>
> [27] Accordingly, it must be held that the fact that the insurance company has concluded that contract on the basis of omissions or false statements on the part of the policyholder does not enable the company to rely on statutory provisions regarding the nullity of the contact or to invoke that nullity against a third-party victim so as to be released from its obligation under [the Directive] to compensate that victim for an accident caused by the insured vehicle.
>
> [28] The same is true regarding the fact that the policyholder is not the usual driver of the vehicle.

> [32] … States are nonetheless obliged to ensure that the civil liability arising under their domestic law is covered by insurance which complies with the provisions of the … directives. It is also apparent from the Court's case-law that the Member States must exercise their powers in that field in a way that is consistent with EU law and that the provisions of national legislation which govern compensation for road accidents may not deprive the [Directives] of their effectiveness …
>
> …
>
> [The Directive] must be interpreted as precluding national legislation which would have the effect of making it possible to invoke against third-party victims … the nullity of a contract for motor vehicle insurance against civil liability arising as a result of the policyholder initially making false statements concerning the identity of the owner and of the usual driver of the vehicle concerned …"

24. The principle derived from the relevant EU case law is that the Directive requires Member States to make provision for compensation to third-party victims of motor vehicle accidents. Matters which render a policy voidable, or a nullity, are contractual issues between the insurer and the policyholder. Save for the limited exceptions expressly identified in the Directive, insurers should not be able to raise against innocent third party victims defences based on breach or nullity for which the policyholder is responsible. Member States have an obligation to ensure that national legislation implements the Directive.

25. In *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172, the Court of Appeal the Court of Appeal upheld the finding of Jay J that the Uninsured Drivers' Agreement made between the Motor Insurers' Bureau and the Secretary of State, which excluded the Bureau's liability where the vehicle involved was used in furtherance of a crime, was incompatible with the Directive. In giving the judgment of the court Richards LJ adopted the restrictive approach of EU law in relation to the ability of a compensation body to exclude liability to victims of road traffic accidents, and *obiter* endorsed a similar restrictive approach to the circumstances in which insurers could exclude liability to victims.

26. In *Roadpeace v Secretary of State for Transport* [2017] EWHC 2725 (Admin), challenges were made to domestic legislative provisions for third-party compensation arising out of the use of motor vehicles based on incompatibility with the EU Directive. Incompatibility was alleged in respect of provisions of the RTA but did not include section 152. Having carried out a careful analysis of the Directive and relevant jurisprudence, Ouseley J noted at paragraphs [70] and [71]:

> "[70] [Counsel for the SS Transport] accepted in his written submissions of October that the true effect of *Fidelidade* was that s152(2) RTA was no longer compatible with EU law. The general rule is that the insurer is directly responsible for satisfying judgments obtained by third parties against the insured even if the insurance company will otherwise be entitled to avoid

> the policy. There was an exception to that general rule in s152(2), where a declaration had been made that the policy had been obtained through non-disclosure of a material fact or a materially false representation of fact. Amendment would therefore be required. But that was not part of the challenge in these proceedings, nor did it relate to this ground.
>
> [71] I agree. The defendant is plainly aware of the position and no remedy is called for."

27. More recently, in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6, Lord Sumption stated:

> "The current legislation is Part VI of the Road Traffic Act 1988. As originally enacted, it sought to give effect to the first three EEC Motor Insurance Directives, 72/166/EEC, 84/5/EEC and 90/232/EEC. It was subsequently amended by statutory instruments under the European Communities Act 1972 to reflect the terms of the Fourth, Fifth and Sixth Motor Insurance Directives 2000/26/EC, 2005/14/EC and 2009/103/EC. The object of the current legislation is to enable the victims of negligently caused road accidents to recover, if not from the tortfeasor then from his insurer or, failing that, from a fund operated by the motor insurance industry. Under section 143 of the Act of 1988 it is an offence to use or to cause or permit any other person to use a motor vehicle on a road or other public place unless there is in force a policy of insurance against third party risks "in relation to the use of the vehicle" by the particular driver (I disregard the statutory provision for the giving of security in lieu of insurance). Section 145 requires the policy to cover specified risks, including bodily injury and damage to property. Section 151(5) requires the insurer, subject to certain conditions, to satisfy any judgment falling within subsection (2) …
>
> The effect of the latter subsection is that an insurer who has issued a policy in respect of the use of a vehicle is liable on a judgment, even where it was obtained against a person such as the driver of the Micra in this case who was not insured to drive it. The statutory liability of the insurer to satisfy judgments is subject to an exception under section 152 where it is entitled to avoid the policy for non-disclosure or misrepresentation and has obtained a declaration to that effect in proceedings begun within a prescribed time period. But the operation of section 152 is currently under review in the light of recent decisions of the Court of Justice of the European Union."

28. The EU jurisprudence and the above authorities support the Claimant's case that section 152(2) of the RTA is incompatible with the Directive. It is not necessary to decide the issue. It is sufficient for the purpose of the strike out and summary judgment

applications to conclude that the Claimant's argument of incompatibility has a real prospect of success.

29. Mr McDermott submits that this Court should address such incompatibility, by a purposive interpretation of section 152 of the RTA, by not applying the Declaration or by setting aside the Declaration. He relies on the CJEU ruling in *Wells* (Case C-201/02) in support of his submission that the courts are required to nullify the unlawful consequences of breaches of EU law:

> "[64] … it is clear from settled case-law that under the principle of cooperation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law (see, in particular, Case 6/60 *Humblet* [1960] ECR 559, at 569, and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 36). Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (see, to this effect, Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 13)."

30. In *Inter-Environnement* (Case C-41/11) the CJEU stated that domestic courts are required to take measures provided for in national law in order to remedy a breach of a Directive:

> "The fundamental objective of Directive 2001/42 would be disregarded if national courts did not adopt in such actions brought before them, and subject to the limits of procedural autonomy, the measures, provided for by their national law, that are appropriate…"

31. The obligation on the courts to address potential incompatibility between domestic legislation and EU law by a purposive interpretation is explained in *Marleasing SA v Laa Comercial Internacional de Alimentacion SA* (Case C-106/89) at [8]:

> "… the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty ."

32. The principles to be applied to such interpretation exercise were summarised in *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446 by Sir Andrew Morritt:

> "[37] In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:
>
> (a) It is not constrained by conventional rules of construction (Per Lord Oliver in *Pickstone* at 126B);
>
> (b) It does not require ambiguity in the legislative language (Per Lord Oliver in *Pickstone* at 126B; Lord Nicholls in *Ghaidan* at 32);
>
> (c) It is not an exercise in semantics or linguistics (See *Ghaidan* per Lord Nicholls at 31 and 35; Lord Steyn at 48-49; Lord Rodger at 110-115);
>
> (d) It permits departure from the strict and literal application of the words which the legislature has elected to use (Per Lord Oliver in *Litster* at 577A; Lord Nicholls in *Ghaidan* at 31);
>
> (e) It permits the implication of words necessary to comply with Community law obligations (Per Lord Templeman in *Pickstone* at 120H-121A; Lord Oliver in *Litster* at 577A); and
>
> (f) The precise form of the words to be implied does not matter (Per Lord Keith in *Pickstone* at 112D; Lord Rodger in *Ghaidan* at para 122; Arden LJ in *IDT Card Services* at 114).
>
> [38] The only constraints on the broad and far-reaching nature of the interpretative obligation are that:
>
> (a) The meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed." (Per Lord Nicholls in *Ghaidan* at 33; Dyson LJ in *EB Central Services* at 81) An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; (See *Ghaidan* per Lord Nicholls at 33; Lord Rodger at 110-113; Arden LJ in *IDT Card Services* at 82 and 113) and
>
> (b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate. (See *Ghaidan* per Lord Nicholls at 33; Lord Rodger at 115; Arden L in *IDT Card Services* at 113.)"

33. Mr McDermott seeks to persuade the Court that a purposive interpretation of section 152 of the RTA would require the implication of a residual discretion on the part of the Court to require the Second Defendant to satisfy its obligation under section 151 despite the existence of the Declaration. In my judgment such an argument is bound to fail. The words of section 152 are clear. They provide the Second Defendant with a complete

defence to any claim to satisfy a judgment against the First Defendant. They do not admit the exercise of any discretion. As Mr Vincent submits, the Claimant's implied term would go against the grain of the legislation and cross the boundary between interpretation and amendment.

34. It follows from the above that any incompatibility between section 152 of the RTA and EU law cannot be resolved by any permissible purposive interpretation.

35. Mr McDermott submits that, if the courts are unable to achieve conformity between domestic legislation and EU law, they have an obligation to disapply the relevant domestic legislation. Reliance is placed on *Minister for Justice and Equality v Commissioner of An Garda Siochana* (Case C-378/17). That case concerned the jurisdiction of a tribunal established to enforce directly applicable EU principles concerning equal treatment in employment. Courts established under the Constitution of Ireland have power to disapply national legislation to ensure compliance with European law but the tribunal in question did not have such jurisdiction. The CJEU ruled that the primacy of EU law must be interpreted as precluding national legislation, under which a national body established by law in order to ensure enforcement of EU law in a particular area lacked jurisdiction to decide to disapply a rule of national law that is contrary to EU law:

> "[34] The Member States have the task of designating the courts and/or institutions empowered to review the validity of a national provision, and of prescribing the legal remedies and the procedures for contesting its validity and, where the action is well founded, for striking it down and, as the case may be, determining the effects of such striking down.
>
> [35] On the other hand, in accordance with the Court's settled case-law, the primacy of EU law means that the national courts called upon, in the exercise of their jurisdiction, to apply provisions of EU law must be under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and without requesting or awaiting the prior setting aside of that provision of national law by legislative or other constitutional means …"

36. However, that case was concerned with a claim against a Member State in respect of directly applicable EU principles. In contrast, this case concerns a claim against an individual insurer in respect of rights derived from a Directive. The distinction between directly enforceable EU principles, such as Convention human rights, and claims between private individuals was explained in *Smith v Meade* (Case C-122/17). The CJEU (Grand Chamber) considered whether a national court was obliged to disapply an exclusion clause contained in a motor insurance policy that was incompatible with the Directive:

> "[38] The Court has held on more than one occasion that the Member States' obligation arising from a directive to achieve the result envisaged by the directive, and their duty to take all appropriate measures, whether general or particular, to ensure

the fulfilment of that obligation, is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts…

[39] It follows that, in applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently to comply with the third paragraph of Article 288 TFEU …

[40] However, the Court has held that the principle of interpreting national law in conformity with EU law has certain limits. Thus, the obligation on a national court to refer to EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and cannot serve as the basis for an interpretation of national law that is *contra legem* …

[42] The fact remains that the Court has also consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual …

[43] Accordingly, even a clear, precise and unconditional provision of a directive seeking to confer rights on or impose obligations on individuals cannot of itself apply in a dispute exclusively between private persons …

[44] The Court has expressly held that a directive cannot be relied on in a dispute between individuals for the purpose of setting aside legislation of a Member State that is contrary to that directive …

[45] A national court is obliged to set aside a provision of national law that is contrary to a directive only where that directive is relied on against a Member State, the organs of its administration, such as decentralised authorities, or organisations or bodies which are subject to the authority or control of the State or which have been required by a Member State to perform a task in the public interest and, for that purpose, possess special powers beyond those which result from the normal rules applicable to relations between individuals …

[49] It follows from the foregoing considerations that a national court, hearing a dispute between private persons, which finds itself unable to interpret provisions of its national law in a manner that is compatible with a directive, is not obliged, solely on the basis of EU law, to disapply the provisions of its national

> law which are contrary to those provisions of that directive that fulfil all the conditions required for them to produce direct effect and thereby to extend the possibility of relying on a provision of a directive that has not been transposed, or that has been incorrectly transposed, to the sphere of relationships between private persons."

37. The remedies available in such cases are a declaration of incompatibility and, where applicable, *Francovich* damages against the Member State.

38. If the Claimant had a cause of action against Mr N Shuker, an insured person, in respect of the accident, he would have a right to make a direct claim for damages against the Second Defendant, as insurer, under the European Communities (Rights against Insurers) Regulations 2002. In this case, the Claimant does not have any cause of action against Mr N Shuker. The First Defendant is not an insured person. Therefore, the Claimant does not have a direct right to claim damages against the Second Defendant.

39. A similar issue arose in *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6. In giving the judgment of the court, Lord Sumption stated:

> "[27] Mr Williams submits that the Directive requires a direct right against the insurer on the driver's underlying liability, and not simply a requirement to have the insurer satisfy a judgment against the driver. Secondly, he submits that recourse to the Motor Insurers' Bureau is not treated by the Directive as an adequate substitute…

Having referred to Recital 30, Articles 3 and 18 of the Directive:

> "[29] I assume (without deciding) that article 18 requires a direct right of action against the insurer in respect of the underlying wrong of the "person responsible" and not just a liability to satisfy judgments entered against that person. It is a plausible construction in the light of the recital and the reference to Direction 2000/26/EC. However, Ms Cameron is not trying in these proceedings to assert a direct right against the insurer for the underlying wrong. Her claim against the insurer is for a declaration that it is liable to meet any judgment against the driver …"

40. In these proceedings, the Claimant does not seek to assert a direct claim against the Second Defendant; his claim is a derivative claim against the Second Defendant to satisfy any judgment obtained against the First Defendant. In those circumstances, the Court has no obligation, or power, to disapply the clear provisions of section 152(2) of the RTA.

41. In summary:

    i) The Second Defendant has a statutory defence to the claim based on section 152(2) of the RTA.

ii) The Claimant has a real prospect of success in its claim that section 152(2) of the RTA is incompatible with the Directive.

iii) Any such incompatibility between section 152 of the RTA and the Directive cannot be resolved by any permissible purposive interpretation.

iv) The claim made by the Claimant is against the Second Defendant, a private entity, to enforce rights arising out of the Directive. It does not assert directly enforceable rights against the Second Defendant as an agent of a Member State. Therefore, there is no obligation on the Court, or power, to disapply the domestic legislation.

42. The relief claimed against the Second Defendant is a declaration setting aside the Declaration and damages. The Claimant was not a party to the proceedings brought against Mr N Shuker and has no standing to seek to set aside the Declaration. No assistance is derived from the Claimant's reliance on *Noble v Owens* [2010] EWCA Civ 224 because there is no suggestion in this case that the Declaration was obtained by fraud or other procedural irregularity. The Second Defendant has a complete defence to the claim for damages (or, more properly, satisfaction of any judgment obtained against the First Defendant) by relying on the Declaration.

43. Mr McDermott urged the Court to dismiss the Second Defendant's application and order a preliminary issue trial. But he was unable to identify any evidence that would be required to determine this claim. The Court has before it the materials on which to determine the issue and the parties have had the opportunity to make full submissions.

44. For those reasons, I am satisfied that the claim against the Second Defendant has no real prospect of success. The pleaded case against the Second Defendant in the Statement of Case should be struck out and the claim against the Second Defendant dismissed.

Third Defendant's application to set aside extension of time for service

45. The relevant procedural history is set out in the witness statement of Victoria Akroyd of Irwin Mitchell, solicitors for the Claimant, dated 16 July 2018.

46. On 23 March 2018 the Claim Form was issued by the Claimant against the Defendants. CPR 7.5 required the Claimant to effect service of the Claim Form within four months after issue.

47. At the time of issue, the Claimant's solicitors were aware that the First Defendant was no longer living at the address at which he resided at the date of the accident. They instructed an enquiry agent, Ascent, who ascertained that his new address was 16 Strawberry Moor, Lawley Village, Telford, where he was living with his father.

48. Under cover of a letter dated 20 June 2018, the Claim Form was sent by first class post to the First Defendant at the above address. On 27 June 2018 the papers were returned, stating that First Defendant no longer lived at that address. It transpires that he had an argument with his father and left home.

49. On 16 July 2018 the Claimant issued an application without notice, seeking an extension of time for service of the Claim Form pursuant to CPR 7.6.

50. On 31 August 2018 (stamped 3 September 2018) Deputy District Judge McDonald granted an extension of time for service of the Claim Form to 19 October 2018.

51. Under cover of a letter dated 25 September 2018 the Claim Form was sent by first class post to the First Defendant at his new address.

52. The Third Defendant seeks to set aside the order granting an extension of time on the grounds that the Claimant does not have a good reason for failing to serve the Claim Form within the specified period and did not take reasonable steps to identify the First Defendant's last known residence.

53. Mr Viney, for the Third Defendant, submits that no extension of time should have been granted. The Claimant delayed attempting to effect service until the last moment without any explanation. The Claimant was, or should have been, aware that the First Defendant's address might have changed, given his age, circumstances and the delay since the agent's report on 15 March 2018. A further check should have been procured prior to sending the Claim Form to that address. Once the Claim Form was returned, the Claimant should have established his new address and effected service prior to expiry of the time for service on 19 July 2018.

54. Mr McDermott submits that good service was effected on 22 June 2018, alternatively, an extension of time was appropriate by reason of the difficulties in establishing the First Defendant's address. In any event, even if the claim against the First Defendant were set aside, the Claimant has a direct claim against the Third Defendant in respect of the Directive.

55. Where a Claim Form is served within the jurisdiction, CPR 6.3 and CPR 7.5 provide that the methods of service on an individual include first class post.

56. CPR 6.9(2) provides that service on an individual (other than in person, through his solicitor or at an agreed address) is at his "usual or last known residence".

57. CPR 6.9(3) provides:

> "Where a claimant has reason to believe that the address of the defendant referred to in … paragraph (2) is an address at which the defendant no longer resides … the claimant must take reasonable steps to ascertain the address of the defendant's current residence … ('current address')."

58. CPR 6.9(4) states:

> "Where, having taken the reasonable steps required by paragraph (3), the claimant –
>
> (a) ascertains the defendant's current address, the claim form must be served at that address; or

> (b) is unable to ascertain the defendant's current address, the claimant must consider whether there is –
>
> (i) an alternative place where; or
>
> (ii) an alternative method by which,
>
> service may be effected."

59. CPR 6.9(5) states:

> "If, under paragraph (4)(b), there is such a place where or a method by which service may be effected, the claimant must make an application under rule 6.15."

60. CPR 6.9(6) states:

> "Where paragraph (3) applies, the claimant may serve on the defendant's usual or last known address in accordance with the table in paragraph (2) where the claimant –
>
> (a) cannot ascertain the defendant's current residence or place of business; and
>
> (b) cannot ascertain an alternative place or an alternative method under paragraph (4)(b)."

61. CPR 6.14 provides that a claim form served within the United Kingdom in accordance with Part 6 is deemed to be served on the second business day after completion of the relevant step under rule 7.5(1).

62. It is not disputed that on 20 June 2018 the Claim Form was sent to the First Defendant's last known address. The mere fact that it was returned would not displace the deeming provision in CPR 6.14: *Cranfield v Bridgegrove* [2003] EWCA Civ 656 per Dyson LJ (as he then was) at [102]:

> "In our judgment, the position is clear. There are two conditions precedent for the operation of the provisions of CPR 6.5(6), namely that (a) no solicitor is acting for the party to be served, and (b) the party has not given an address for service. If those conditions are satisfied, then the rule states that the document to be sent must be sent or transmitted to, or left at, the place shown in the table. In the case of an individual, that means at his or her usual or last known residence. The rule is plain and unqualified. We see no basis for holding that, if the two conditions are satisfied, and the document is sent to that address, that does not amount to good service. The rule does not say that it is not good service if the defendant does not in fact receive the document. If that had been intended to be the position, the rule would have said so in terms… The rule is intended to provide a clear and straightforward mechanism for effecting service where the two conditions precedent to which we have referred are satisfied."

63. The issue is whether, as alleged by the Third Defendant, service was not effective because the Claimant failed to take reasonable steps to ascertain the First Defendant's address at the time that it purported to serve the Claim Form as required by CPR 6.9(3).

64. If service in June 2018 was not effective, the Court must consider whether this was an appropriate case in which to grant an extension of time.

65. CPR 7.6(2) provides that a claimant may apply to the Court for an extension of time for service of the Claim Form. In this case the application was made within the 4 months period for service. The test on such an application is set out in *Marshall v Maggs* [2006] EWCA Civ 20. The starting point is to determine and evaluate the reason why the claimant did not serve the claim form within the specified period; the weaker the reason for not serving within the 4 months period, the less likely the court will be to extend time: [95] and [100]. If a claimant purports to serve on an address which he mistakenly believes is the last known residence of the defendant, it is necessary to consider the reasonableness of his belief that the address is indeed the defendant's last known residence; it is incumbent on a claimant to take reasonable steps to ascertain a defendant's last known residence: [101] & [102].

66. In this case I am satisfied that the Claimant took reasonable steps to check the First Defendant's address by engaging an agent for that purpose in March 2018. There was no evidence of any change over the relatively short period between March and June 2018 that required the Claimant to carry out an additional check. Therefore, the Claimant is entitled to rely on the deeming provision of CPR 6.14. Good service was effected by 22 June 2018.

67. In any event, if service in June 2018 was not effective, this was an appropriate case in which to grant an extension of time. The Claimant did not wait until the eleventh hour before attempting to serve the Claim Form. Reasonable steps were taken to ascertain the First Defendant's address. It was reasonable for the Claimant to believe that he continued to reside at the last known address until the Claim Form was returned. No prejudice has been suffered by the Third Defendant and it was able to serve its defence.

68. For those reasons, the Third Defendant's application to set aside the order dated 3 September 2018 is dismissed.

Claimant's application to add the Secretary of State and amend the Particulars of Claim

69. The Claimant's application to add the Secretary of State for Transport as a fourth defendant is not opposed. The Court grants it.

70. The proposed amendments to the Particulars of Claim are allowed, save for the pleaded case against the Second Defendant which is struck out.

Conclusion

71. For the reasons set out above:

    i) the pleaded case against the Second Defendant is struck out and summary judgment is given for the Second Defendant;

ii) the Third Defendant's application to set aside the order extending time for service of the claim form on the First Defendant is dismissed;

iii) the Claimant has permission to join the Secretary of State for Transport as a fourth defendant and to amend the Particulars of Claim, save in respect of the allegations against the Second Defendant, which are struck out.