Greenaway & Rocks v Covea Insurance: Wrong turn, or expert decision?

By Mike Nkrumah

This case concerns claims made arising out of a road traffic accident in which the Claimants were seriously injured. The driver was a 16 year old who was, at the time of the accident, driving his friend's father's car (who also was a passenger). The motor insurer sought to escape any liability to compensate the Claimants as it would have to do so pursuant to section 151 of the Road Traffic Act 1988, as amended by seeking to argue that the that it that its potential liability was an "excluded liability" within the meaning of s.151(4) of the Road Traffic Act.

Section 151(4) of the Road Traffic provides that:

"*In subsection (2)(b) above "excluded liability" means a liability in respect of the death of, or bodily injury to, or damage to the property of any person who, at the time of the use which gave rise to the liability, was allowing himself to be carried in or upon the vehicle and knew or had reason to believe that the vehicle had been stolen or unlawfully taken, not being a person who—*

(a)did not know and had no reason to believe that the vehicle had been stolen or unlawfully taken until after the commencement of his journey, and

(b)could not reasonably have been expected to have alighted from the vehicle."

The motor insurer's case is that their insured motor vehicle had been unlawfully taken by the driver as he did not have the permission of the owner. Additionally, the motor insurer asserted that the other elements of s.151(4) were made out, i.e. that the claimants had allowed themselves to be carried in the motor vehicle knowing or having reason to believe the vehicle had been unlawfully taken.

This potentially match winning point raised by the motor insurers was met with a very firm rebuttal by the claimants. They said, in response, that

s.151(4) went too far by allowing the motor insurers' potential liability to be excluded by virtue of the vehicle being unlawfully taken, the only circumstance where an exclusion was possible was where the vehicle was stolen and there was requisite knowledge of the same. In essence, they asserted that s.151(4) was not compliant with Article 13 of the Sixth Motor Insurance Directive (Directive 2009/103/EC). That provision allows for an exclusion when "the insurer can prove that they [the passengers] knew the vehicle was stolen" and they voluntarily entered the car anyway. Therefore, an issue arose as to the meaning of the words "they knew the vehicle was stolen".

Of course, as Martin Spencer J correctly points out, the reference to "unlawfully taken" in the Road Traffic Act 1988 results from the fact that domestic law tightly defines the term "to steal" in the Theft Act 1968. Indeed, in joyriding cases a conviction for theft would not result because it cannot be proved that there is an intention to permanent deprive the owner of the car. To deal with this issue an offence of taking without consent was created or TWOC, as it is referred to, by Parliament to fill an apparent gap in the law and deal with a pressing social problem.

At a CMC before Master McCloud an issue arose as to whether the motor insurer was permitted to rely on expert evidence to assist with the construction to be adopted as to the meaning of the word "stolen" in this context. The Master refused permission, holding that it was for the court to reach a view on the construction of the term informed possibly by consideration of the foreign language versions of the Directive. She stated that:

"*I am not persuaded that expert evidence of foreign law is reasonably required in this case. Rather I regard it as a question of law for the British judge, possibly assisted by translations of other states' implementing laws, if it becomes necessary at all to look at other countries' interpretations, but more likely I suspect to be assisted by being given copies of the foreign language versions of the actual Directive itself, if argument were to be made about linguistic differences, and from that information it would be for the UK court to carry out the exercise the CJEU might have carried out if the case became suitable for a reference which otherwise would have gone to the CJEU.*"

The decision was appealed, and the appeal came on before Martin Spencer J.

Martin Spencer J considered s.6 of the European Union (Withdrawal) Act 2018. In so doing he held that the same requires that the court "stands in the shoes of the [CJEU]" in order to determine the meaning of the word "stolen" within the retained general principles of EU law. It is no longer possible to make a reference to the CJEU, therefore, the court effectively has to carry out the task that would have been expected to have been carried out by the CJEU on a reference. This includes, following the decision in *CILFIT Srl v Ministero della Sanita [1982] ECR 3415*, the court, in this instance, considering different language versions of the translation of the Directive to ascertain the true meaning of the word "stolen". His Lordship noted the "nightmare" that could lead to.

The decision makes clear exactly what the court is without, where his Lordship set out:

"*Whilst the European Court of Justice, with the assistance of the Advocate General, might have useful information about the various language versions, and the member states are invited to make submissions as to the issue of the interpretation of the directive which encompasses the translations of the particular countries in question, none of that information is readily available to an English domestic court now faced with the same issue to determine. Effectively what the English court is being asked to do is put itself in the position of the European Court of Justice with one or both hands tied behind its back in not having the access which the European Court of Justice uniquely has by virtue of its now twenty-seven members.*"

Therefore, Martin Spencer J determined that there ought to be expert evidence available to the court. He ruled out the possibility of a report from a lawyer of each of the 27 Member States. He gave

permission for four experts. The evidence envisaged is not limited to a simple translation, there is permission that goes much further than this. Indeed, it is said that the evidence will be directed to how the word "stolen" is used and interpreted in the particular member state as well as "*evidence of how the Directive has been implemented in order to illustrate and explain the use of the translation, the word used, in the particular jurisdiction to convey the concept of the word "stolen".*"

There is a powerful argument that this decision has gone too far and the need for expert evidence is not justified. With respect, there is nothing in s.6 that says the court interpretating a question of retained EU law has to approach the matter as the CJEU would and in the same manner. Parliament could, had it intended such an approach, have said so in clear words or made clear that where a question of interpretation arose then it was permissible for the court to receive expert evidence.

Schedule 5 of the European Union (Withdrawal) Act 2018, the second part of which is entitled "[r]ules of evidence" appears not to have been cited in Greenaway, nevertheless it appears relevant. Paragraph 3 of that Schedule provides that, "*[w]here it is necessary, for the purpose of interpreting retained EU law in legal proceedings, to decide a question as to the… meaning or effect in EU law of any EU instrument, the question is to be treated for that purpose as a question of law*". To avoid confusion, it is worth making explicit that retained EU law includes EU-derived domestic legislation pursuant to s.2. There can be little doubt that s.151(4) is a piece of EU-derived domestic legislation, therefore, the interpretation of the word "stolen" is a question of law. Whilst it would be helpful to have before the court foreign language versions of the Directive that, it is suggested, is all that is required.

Also, it seems that Parliament in enacting paragraph 3 of Schedule of 5 was intending that the question of interpretation of retained EU law would be treated unlike the question of foreign law, which is treated as a matter of fact. This provides a useful clue, though arguably no more than that, as to the lack of any intention on the part of Parliament that expert evidence would be introduced to determine matters of interpretation touching upon matters of EU law.

Aside from that, even if Martin Spencer J is right that the court must take on the weighty role of the CJEU, then does it follow that the court really needs to know about how the word "stolen" is used, interpreted and how the Directive has been implemented? No, is the simple answer. The CJEU's approach is to start off by considering the wording of the provision under examination, including the differing language version, however the overall outcome, is driven by the aims, objectives and purpose of the Directive. It might receive evidence as to implementation, but this is given little importance unless it can be demonstrated that the implementation is consonant with the aims, objectives and purpose. To be clear, if the CJEU conclude that implementation, no matter how efficient and desirable in the circumstances, is not in keeping with the aims, objectives and purpose of a given directive it will not approve it.

Whilst this is an early decision at case management level, it appears that the approach adopted is incorrect, one might be tempted to say the law has taken a wrong turn! It appears that the Master's instinct that this was a question of law and a matter for the trial judge is wholly correct. Expert evidence is simply not "reasonably required".

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