



# FOIL UPDATE

June 2009

## **Wilkinson v Fitzgerald and Churchill Insurance Co.**

**[2009]EWCA 1297 (QB), Blair J**

The interpretation of Sec 151 Road Traffic Act 1988

### **Introduction**

Mr and Mrs Wilkinson bought a car for their son Ben, the claimant (C). Mrs Wilkinson was the policy holder with C as a named driver. In 2005 C allowed a friend, who had been drinking, to drive the car, there was an accident and C was severely injured. For the purposes of the case it was accepted that C knew that his friend was not insured. It was common ground that Churchill was obliged, under Sec 151(5) Road Traffic Act 1988 (RTA 1988), to meet C's judgment against his friend. The real question for the High Court in this trial of a preliminary issue was whether, under Sec 151(8), Churchill could then recover the sums payable to C, as he was (a) insured by the policy and (b) had permitted the use of the car which gave rise to the liability – the two pre-requisites for recovery under Sec 151(8).

The court was informed that the only authority dealing with Sec 151(8) is the Court of Appeal decision in *Lloyd-Wolper v National Insurance Guarantee Corp plc* [2004] EWCA Civ 766 which focuses on the meaning of 'permission'. Recovery was allowed against a father who had given permission for his son to drive without insurance. The current case before the court was different however, as C was also a victim in the accident.

### **Art 2 Second Motor Insurance Directive**

At the heart of C's argument was the Second Motor Insurance Directive, which seeks to ensure the widest possible protection for accident victims under the different national regimes within the EU. It provides that even if a motor insurance policy can be voided as between insured and insurer due to certain exclusions in the policy, the insurer must still pay compensation to injured third parties.

The relevant part of Art 2 in this case requires Member States to ensure that any statutory provision or contractual clause in a policy which excludes driving by persons without authorisation is treated as void as against third party victims. The only named class of persons excluded from this protection is persons knowingly travelling in a stolen car. The EU obligations upon the UK Government set out in the Directive were implemented in the UK by Sec 151 of the RTA 1988.

### **Interpretation of Sec 151(8) of the RTA 1988**

The subsection reads as follows:

"Where an insurer becomes liable [under Sec 151] to pay an amount in respect of a liability of a person who is not insured by a policy...he is entitled to recover the amount from that person or from any person who:

- (a) is insured by the policy,....., by the terms of which the liability would be covered if the policy insured all persons.....and
- (b) caused or permitted the use of the vehicle which gave rise to the liability."

### C's case

C argued that if the insurer were allowed to claw back under Sec 151(8) the compensation payable to him the reality of the situation would be that C was uncompensated. That would create a new class of victim not entitled to receive compensation from the insurer as required by Art 2, namely people who may not be policy holders but are named drivers and who cause or permit the use of the car causing the accident. C submitted that this state of affairs was impermissible, as Art 2 was strict in defining the class of persons not entitled to be paid by the insurer (those travelling in a stolen car) and it was not permissible to add a new class. To avoid excluding C and others in his situation from compensation two alternative interpretations of Sec 151(8) were proposed by C:

- (1) interpret the words "insured by the policy" to mean the policy holder only (in this case C's mother and as she had not permitted C's friend to use the car no recovery could be claimed against her); or
- (2) imply additional wording into Sec 151(8) allowing recovery only from persons "not being entitled to a judgment to which [Sec 151] applies", thereby preventing recovery from a compensated victim of the accident.

### The second defendant's case

The insurer argued that recovery from C under Sec 151(8) would not be incompatible with Art 2. Alternatively it contended that if recovery did breach the requirements of Art 2 C's remedy was against the Government, under the Francovich principle, for failing to properly implement the Directive. It was submitted that the payment of compensation to satisfy the judgment and recovery under Sec 151(8) should be looked at separately, the right of an injured person to recover compensation and the insurer's right of recovery being fundamentally different principles. Sec 151(8) was not a statutory provision excluding C from compensation, it was only concerned with the insurer's right of recovery.

The second defendant also argued that there were limits to a domestic court's powers and duties of interpretation and that C's proposals to interpret Sec 151(8) went too far and "did violence" to the language of that subsection.

Looking at the two alternative interpretations proposed by C the insurer argued:

On (1), that C was clearly a person "insured by the policy" and that the wording could not be restricted to the policy holder, and

On (2), that there was no reason why a victim should be excluded from the recovery provisions, and therefore be immune from the consequences of his own actions.

### **The Application of Art 2**

The defendant argued that Art 2 did not apply in this case and therefore the court did not need to consider the interpretation of Sec 151 in the light of the Art 2 obligations on Member States. The defendant argued that there was no exclusion from insurance of a person without authorisation in this case as C's friend did have C's authorisation to drive. C argued that 'authorisation' in Art 2 meant 'authorisation under the cover of the policy' which C's friend did not have. The judge accepted C's submissions, which meant that C's friend was, in fact, 'without authorisation' to drive and therefore the requirements of Art 2 were relevant.

## **European cases**

The court examined a number of decisions of the ECJ to show the aims and purposes of the Motor Insurance Directives and to show how the ECJ dealt with analogous questions that had arisen in the context of road accidents.

## **Conclusion**

The judge confirmed that he had not found any of the points in the case easy. In principle he accepted the second defendant's point that there was a difference between C's right to receive compensation from the insurer and the insurer's right of recovery under Sec 151(8). However, that recovery had to be viewed against the obligation on the insurer to satisfy C's judgment. In effect the insurer's claw back of the compensation would result in C losing his right of compensation altogether.

The judge accepted C's argument that the defendant's case would create an additional class of persons left without compensation, a result which was impermissible. Whilst in this case there were clearly significant issues of contributory negligence it was not compatible with the Directives to deny compensation altogether.

On the interpretation of Sec 151(8) the judge broadly accepted C's submission that the right to recovery from a 'person' under Sec 151(8) should be interpreted as meaning a person "not entitled to the benefit of a judgment [under Sec 151]" but he preferred not to imply specific wording.

In the judge's view the insurer's right to recover under Sec 151(8) could not be applied in such a way as to negate the insurer's obligation under Sec 151(5) to pay compensation. The judge was at pains to indicate that factual situations would vary, but on the particular facts of this case recovery under Sec 151(8) would negate payment under Sec 151(5).

It was therefore held that the insurer must indemnify C in respect of the claim and that the insurer did not have the right to recover those sums from C.

Leave to appeal was granted without any submission being required and it is understood that the Notice will be filed shortly.

The defendant was represented by Andrew Underwood of Keoghs LLP. Members will be notified as and when a date for the appeal is fixed.

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