From insurer of last resort to an insurer of convenience: the Court of Appeal and the recanted policy

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In *Colley v Motor Insurers' Bureau* [2022] EWCA Civ 360 the Court of Appeal heard the Motor Insurers' Bureau (MIB) appeal against a decision of Freedman J. in *Colley v Shuker* [2020] EWHC 3433 (QB). Mr Colley, passenger in a car negligently driven by Mr Shuker, sustained catastrophic injuries following a motor vehicle accident. At the time of the accident the car in question was subject to an insurance policy, held by the driver's father, but Shuker was not a named driver (or covered) on the policy. Further, Colley knew before entering the vehicle that Shuker did not have a valid driving licence and was uninsured. Colley brought proceedings first against Shuker directly, judgment being entered against him in June 2020. Shuker was unable to satisfy the judgment. The significance of the case came at the next stage. Section 151 of the Road Traffic Act 1988 (RTA88) requires an insurer to satisfy a judgment if a person, whom the insurer has not insured to drive the vehicle at fault, causes injury to or damage to property of a third-party. The insurer becomes a statutory insurer and settles the action for damages, having the right to recoup from the tortfeasor any payments made on the claim. However, s. 152(2) RTA88 provides exceptions to the indemnity required by/under s. 151. An insurer with permission from the court, if it acted sufficiently promptly either before or after the accident, may avoid the policy of insurance for non-disclosure or misrepresentation. The insurer in the present case obtained such a declaration against the policyholder on the grounds of material misrepresentation.

Despite s. 152(2) RTA88, Colley continued his action with the insurer named as second defendant, arguing that the operation of the Motor Vehicle Insurance Directive 2009/103/EC [2009] OJ L263/11 (MVID) prevented the court from applying the relevant section of the RTA88. This line of argument had earlier been rejected by O'Farrell J. in *Colley v Shuker* [2019] EWHC 781 because the wording of s. 152(2) was clear, preventing a purposive interpretation to change its meaning, and as no horizontal direct effect of the MVID existed between private parties, the national legislation provided the insurer a complete defence. Further, Colley initiated a state liability claim against the Secretary of State (per Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* ECLI:EU:C:1991:428; [1993] 2 CMLR 66) and an action against the MIB. Colley's claim against the Secretary of State was stayed pending the result of his action against the MIB. The MIB is a private organisation whose role is

to compensate the third-party victims of uninsured drivers and untraced vehicles as "insurer of last resort", the designated national compensatory body as required to be established following enactment of the Second MVID (Council Directive 84/5/EEC [1984] OJ LL8/17).

This is a potentially complex series of disputes relating to one motor vehicle accident and the operation of EU and national laws. However, it can be distilled as follows. The vehicle driven by Shuker was subject to an insurance policy, just one not covering Shuker's use of it. The Court of Appeal was tasked with determining whether national law, which permitted the recanting of an insurance policy by an insurer after the accident event, and albeit in breach of the MVID, should be applied in contradiction of superior EU law. The Court accepted the breach of EU law, but considered it bound by national law which meant Colley was unable to recover damages against the insurer of the vehicle. The result was the MIB being called upon to satisfy Colley's claim for damages as the vehicle was, for the purposes of these proceedings, uninsured. The MIB argued that the national law permitting the insurer's action was contrary to authorities of the Court of Justice of the European Union (CJEU). For EU law, where a contract of insurance applying to a vehicle was in existence at the time of the accident, the vehicle was not uninsured, irrespective of subsequent events. As will be discussed later, the Court of Appeal referred to authorities of the CJEU but interpreted these as simply directing Member States to ensure third-party victims were protected against injury and/or damage from use of an uninsured vehicle, whether this being through an action directly against the insurer or via the national compensatory body. This is a misreading of the MVID and the CJEU's line of authorities. Collectively, Case C-287/16 *Fidelidade-Companhia de Seguros SA v Caisse Suisse de Compensation and Others* ECLI:EU:C:2017:575; [2017] Lloyd's Rep. IR 540, Case C-129/94 *Ruiz Bernáldez* ECLI:EU:C:1996:143; [1996] E.C.R. I-1847 and Case C-409/11 *Gábor Csonka and others v Magyar Állam* ECLI:EU:C:2013:512; [2014] 1 CMLR 14 make clear that where an insurance policy exists at the time of an accident, whether the insurer attempts to use contractual or statutory escape clauses, or becomes insolvent and is thereby unable or incapable of satisfying the judgment, this does not invoke the national compensatory body to intervene and remedy shortfalls in national legal systems which have left the victim without access to a party from which to recover. Given the retained EU laws and cases which will continue to be heard domestically for scenarios which occurred during the UK's membership, this case is far from a moot point following the UK's withdrawal. It identifies serious flaws in the application and interpretation of laws derived from the EU.

Turning to the details of EU law, the Court of Appeal questioned whether the following apply to the MIB: to satisfy compulsory liability insurance for motor vehicles and their passengers (as established in Arts. 3 and 12 of the Consolidated MVID – all subsequent references to Arts. refer to this Directive unless otherwise stated); the obligation for the national compensatory body to be responsible for compensating injured victims (Art. 10(1)); and the restriction of the scope of its responsibility in the event that the injured party had knowledge before entering the vehicle that it was uninsured (at Art. 10(2) – a question easily answered in the negative and needs no further consideration here). Alternatively, was the MIB correct that the vehicle in which Colley was travelling was not uninsured within the meaning of the MVID (Art. 10(2)) and hence the facts of the present case did not fall within the scope of its obligation to provide compensation?

Article 3 instructs Member States to ensure civil liability in respect of motor vehicles is covered by insurance. For the Court of Appeal, this is a matter of national law, not EU law and at para. 27 of *Colley*, references to rules and precedents of the CJEU precluding an insurer from recanting their insurance policies or obligations only apply nationally against an emanation of the State. To establish this position, Stuart-Smith L.J. referred to *Fidelidade* at [31], a case involving a crash between a car and a motorcycle where the insurer denied liability on grounds that the policy was invalid due to a material misrepresentation. The Portuguese national compensation body also resisted the claim on the basis that there was in existence, at the time of the accident, a valid insurance contract. Stuart-Smith L.J. referred to the following paragraph of the CJEU judgment that the MVID:

> "[37] … precluded national legislation having the effect of allowing an insurer to invoke against third-party victims the nullity of a contract for motor vehicle insurance against civil liability [on the same factual basis as applies in the present case]."

At para. 27, the CJEU had already stated that :

> "… 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 contract or to invoke that nullity against a third-party victim so as to be released from its obligation under Art. 3(1)… to compensate that victim for an accident caused by the insured vehicle." (authors' emphasis).

When faced with such clear and unequivocal direction as to the inability of s. 152(2) RTA88 to operate to release the insurer from its obligation to compensate, Stuart-Smith L.J. explained: "I interpose that this was a question of EU law, not national law, and that caution needs to be exercised to avoid confusion" [38]. There is no confusion as to the exercise of the law. The CJEU did not artificially separate EU law from inconsistent national provisions – indeed, to do so would have invalidated the nature of the obligations Member States accept upon membership of the Union. At para. 66, Stuart-Smith L.J. accepted the factual similarity between *Colley*'s case and *Fidelidade,* and how the CJEU explained that the MVID "must be interpreted as precluding national legislation" from allowing the insurer to avoid its policy on the grounds of misrepresentation. On this point, Stuart-Smith L.J. concluded:

> "In normal English meaning it does not 'preclude' the national legislation. What is meant is that, according to EU law, the scope of the insurance cover required by Article 3 is not limited by excluding cases where a policy was in existence at the time of the accident but was entered into on the basis of a misrepresentation by the policy holder." [66].

He justified this approach on the basis that:

> "The most that can be said in such circumstances is that the national legislation is incompatible with the Codified Directive and that the Directive is directly enforceable against an emanation of the state: but that is different from saying (in normal English) that the Directive 'precludes' the national legislation." [68].

This is perhaps the most significant misunderstanding of the law and a conclusion that is difficult to reconcile with the instruction of the CJEU. First, national law, when applied in accordance with EU law, does not allow the use of s. 152(2) RTA88. Second, even if – ignoring the incidental direct effect of the MVID, which would have prevented the insurer from obtaining a declaration absolving it of its s. 151 RTA88 responsibilities – s. 152(2) RTA88 were to apply, that provision does not confer upon the MIB any responsibility to satisfy Colley's claim. *Fidelidade* established that any right of an insurer to circumvent paying a claim by avoiding its insurance policy was contrary to the MVID and precluded the application of

inconsistent national law. This was the case even where such a claim could continue to be satisfied by a national compensatory body (such as the MIB).

Previously in *Bernáldez* it was held Art. 3(1) of the first MVID (72/166/EEC [1972] OJ L103/1) requires that compulsory motor insurance must enable third-party victims of accidents caused by vehicles to be compensated for all the damage sustained by them. Further, this interpretation precluded any insurer from relying on statutory provisions or contractual clauses to refuse to compensate this third-party victim of an accident caused by an "uninsured" vehicle (see Case C-537/03 *Katja Candolin, Jari-Antero ViL.J.aniemi and Veli-Matti Paananen v Vahinkovakuutusosakeyhti&ouml Pohjola and Jarno Ruokoranta* ECLI:EU:C:2005:417; [2005] E.C.R. I-5745 at para. 18). Not only has the Court of Appeal previously misunderstood *Bernáldez* and held contrary to its precedent (see *EUI Ltd v Bristol Alliance Ltd Partnership* [2012] EWCA Civ 1267; [2013] Lloyd's Rep. IR 351), it did so on the basis, *inter alia*, that *Bernáldez* was fact-specific and did not establish any rule of general application (at [66-67]). Yet in Case C-442/10 *Churchill Insurance Company Limited v Benjamin Wilkinson and Tracy Evans v Equity Claims Limited* ECLI:EU:C:2011:548; [2011] E.C.R. I-12639 at para. 27, the Advocate-General opined: "[t]he Court's case-law teaches us that, unless one of the exceptions laid down by the Directive is applicable, the victims of an accident are *always* entitled to be compensated by the insurer." The use of a vehicle outside of the scope of the policy does not transform a statutory insurance claim into one which should be covered by the MIB.

Given these case authorities from the CJEU and the requirement to prevent the application of national rules such as s. 152(2) RTA88 under Art. 3, the interpretation of Stuart-Smith L.J. is deeply flawed. If it were to be argued that the judgment might be saved through the application of Art. 10, which invokes the national compensatory body to stand in place of an insurer where the accident involves an uninsured vehicle, analysis of *Csonka* explains with clarity why this is incorrect. The Court of Appeal attempted to use the MVID as a mechanism to require the MIB essentially to be responsible for deficiencies in the national law and to operate, less as an insurer of last resort, but more akin to an auxiliary provision for vulnerable victims – an insurer of convenience. Stuart-Smith L.J. refers to *Csonka* at paras. 23, 25, 32-33, 36, 46, 54-55, 62, and 64-65 of *Colley*. These extensive references are appropriate given the significance that this case has to the application of Art. 10 and the role to be played by the MIB. The most damning elements of *Csonka* to the MIB's claim, argued Stuart-Smith L.J., come in paras. 64 and 65 of his judgment. Apparently, the case decided that the Art. 3 insurance obligation did not extend to requiring the

assumption of the risk of insurers' insolvency and did not address the position where a policy is in existence at the time of the incident giving rise to liability but is subsequently avoided. The method adopted by Stuart-Smith L.J. to avoid its application was to interpret the binding precedent of *Csonka* by arguing that it only operates where there is a policy in being. That in the current case the insurance policy was avoided by operation of national law resulted in the precedent not applying. To say that this is an extraordinary approach would not be hyperbole. It was in *Csonka* where the CJEU put to rest any issue of the appropriate use of the MIB. The CJEU explained how the national compensatory body's obligation was confined to recompense a victim of the use of "a vehicle in respect of which no insurance policy exists." The policyholders had been subject to insurance cover at the time of the accident (as in *Colley*) and consequently the Hungarian MIB was not obliged to compensate victims of the policyholders whose insurer had become insolvent. The CJEU, in *Csonka*, was unequivocal that the role of the MIB was as an insurer of last resort (at [31]). The ruling meant, for the purposes of national law, *the insurer* is required to fulfil the award of damages itself, either as a contractual or statutory insurer, not the MIB.

Rather than simply criticising the judgment, we wish to outline the options that faced the Court and how it *should* have proceeded. Stuart-Smith L.J. demonstrated familiarity with the jurisprudence of the CJEU, but rather than look to apply a consistent interpretation, likely leading the Court to the unsavoury prospect of denying to Colley claims against the insurer and the MIB, he contorted the meaning in the precedents as to enable Member States with discretion in remedying deficiencies present in the protection within national laws, insofar as they were remedied. Given this hypothesis, Stuart-Smith L.J. may in these circumstances have considered it available to select the most appropriate from the following options: 1) to discover and apply an MVID-compatible interpretation of the RTA88 (however, this was unlikely); 2) identify the national law as being clear and unambiguous (and consequently incapable of purposive interpretation due to the lack of horizontal direct effect of Directives). Here the national law would be applied, the jurisprudence of the CJEU would prevent the MIB from having to satisfy Colley's claim, and Colley would have to seek redress through a separate *Francovich* action; 3) recognise the clarity of national law and the non-application, horizontally, of the MVID but contort the CJEU's authorities to compel the MIB to fulfil its position as insurer of last resort; or, finally, 4) accept the rulings in *Bernáldez* and *Csonka* as binding authorities, accept their incidental direct effect as being used as a shield (Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* ECLI:EU:C:1996:172) not a sword (*Bernáldez*) and thereby precluding the application of national law (s. 152(2) RTA88). Section 152(2) RTA88 would be disapplied,

substituting it with nothing and only leaving applicable those elements of national law that are compliant with the MVID.

The incidental direct effect of EU law is an enforcement mechanism not without its detractors. It has been subject to criticism that it blurs the lines of horizontal direct effect of Directives and is merely a means of arriving at such horizontality without the CJEU raising its spectre to an unwilling union of States. Such arguments are unfounded when applied in this context. The incidental direct effect of using the MVID to prevent the application of s. 152(2) would not have created any obligation nor placed onto the insurer any burden, it would simply have prevented the use of a discretionary route to the avoidance of liability. Such discussion and application of these points in a case such as *Colley v Shuker* / *Colley v MIB* would have likely led to Colley's benefit, a clarifying of national law and assistance to the EU in its discussion of enforcement mechanisms. There could be no arguments to the lack of legal certainty that the adoption of incidental effect of the MVID creates, as the CJEU has been clear as to the prevention of recanting insurance cover due to misrepresentation. The Court of Appeal chose option 3, when the proper interpretation and application of EU law would have led to the adoption of option 4 in the first instance, but option 2 if the principal option (4) was considered a step too far. It must be concluded the Court of Appeal's judgment in *Colley* provides confirmation that the UK often fails to appreciate the nuance between EU obligations and national law.

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