Neutral Citation Number: [2009] IEHC 99

THE HIGH COURT

2000 10527P

BETWEEN/

DAVID SMITH

PLAINTIFF

AND

PATRICK MEADE, PHILIP MEADE, FBD INSURANCE PLC., IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment delivered by Mr. Justice Michael Peart delivered on the 5th day of February 2009.

The plaintiff was injured on the 19th June 1999 when the car in which he was a passenger, which was owned by the second defendant, and being driven by the first defendant, was in collision with another vehicle due, it is alleged, to the negligence of the first named defendant.

The part of this vehicle where the plaintiff was when this accident occurred had not been designed and constructed with seating accommodation for passengers.

There was in existence a compulsory insurance policy in respect of this vehicle which the second named defendant had taken out with the third named defendant "FBD", whereby that body was required to provide an indemnity in respect of loss and damage sustained by third parties as a consequence of any negligence, breach of duty and breach of statutory duty by the second named defendant and any persons driving the vehicle with his consent and authority.

FBD has declined to provide an indemnity to the second named defendant in respect of the plaintiff's injuries, on the basis that the policy in question does not cover liability in respect of personal injuries to persons being carried as a passenger in a part of the vehicle which was not designed and constructed with seating accommodation for passengers.

In its Defence FBD has pleaded that the policy of insurance taken out by the second named defendant does not cover the plaintiff's loss because the vehicle in question was a van and that the plaintiff was travelling as a passenger in the rear of the van where there were no seats for passengers. It pleads also that at all material times FBD complied with its obligations under the Road Traffic Acts and under S.I. 346 and 347 of 1992. It relies upon the provisions of s.65 (1) (a) of the Road Traffic Act, 1961, as amended by Article 7 of S.I. 347of 1992. Section 65 of the Act provides a definition of "excepted person" i.e. persons whose injuries are not required to be covered in a policy of insurance. That amended section provides:

> *"65. – (1) (a) Any person claiming injury to himself sustained while he was in or on a mechanically propelled vehicle (or a vehicle drawn thereby) to which the relevant document relates, other than a mechanically propelled vehicle, or a drawn vehicle, or vehicles forming a combination of vehicles, of a class specified for the purposes of this paragraph by regulations made by the Minister, provided that such regulations shall not extend compulsory insurance in respect of civil liability to passengers to –*
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> *(i) any part of a mechanically propelled vehicle, other than a large public service vehicle, unless that part is designed and constructed with seating accommodation for passengers, or*
>
> *(ii) a passenger seated in a caravan attached to a mechanically propelled vehicle while such a combination of vehicles is moving in a public place."*

FBD submits that the plaintiff is therefore an excepted person, and one in respect of whose injury while a passenger it was not required by law to cover the liability of the first and second named defendants.

The policy of insurance taken out by the second named defendant provided, inter alia, that "*passenger cover only operates for one passenger seated on a fixed seat in the front of the vehicle*".

The preliminary issue for decision at this point ahead of the hearing of the plaintiff's claim for damages for his injuries is whether or not the clause in the policy upon which FBD seek to rely in order to decline an indemnity to the first and second defendants in respect of any liability they may be found to have to the plaintiff is in fact void, having regard to certain EU Directives and certain judgments of the European Court of Justice. I will come to those in due course. In the event that the Court concludes that this clause is not void, certain other issues arise such as whether the plaintiff has a claim against the fourth named defendant arising from what is submitted would have been a failure, neglect or refusal to transpose these Directives into Irish law as of the date of the collision in which the plaintiff was injured, the 31st December 1998 being the date by which the fourth named defendant was required to have transposed same into Irish law.

The plaintiff's legal submissions:

Anthony Collins SC for the plaintiff refers to the relevant articles of the EU Directives relevant to this issue, and he has helpfully set out the relevant provisions upon which he relies in his written submissions, as follows:

Article 3 (1) of Council Directive of 24th April 1972 (72/166/EEC) (hereinafter referred to as "the First Directive") on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of he obligation to insure against liability:

"*Each Member State shall, subject to Article 4, 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 these measures*."

Recitals 7 and 9 of Council Directive of 30th December 1983 (84/5/EEC) (hereinafter referred to as "the Second Directive") on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles:

"*Whereas it is in the interest of victims that the effects of certain exclusion clauses be limited to the relationship between the insurer and the person responsible for the accident*; …"

"*Whereas the members of the family of the insured person, driver or any other person liable should be afforded protection comparable to that of other third parties, in any event in respect of their personal injuries*."

Article 2 (1) of the Second Directive:

"*Each Member State shall take the necessary measures to* ***ensure that any statutory provision or any contractual clause*** *contained in an insurance policy issued in accordance with Article 3 (1) of Directive 72/166/EEC,* ***which excludes*** *from insurance the use or driving of vehicles by*:

- persons who do not have express or implied authorization thereto, or

- persons who do not hold a licence permitting them to drive the vehicle concerned, or

- persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned, shall, for the purposes of Article 3 (1) of Directive 72/166/EEC ***be deemed to be void*** *in respect of claims by third parties who have been victims of an accident*.

However, the provision or clause referred to in the first indent may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen." (my emphasis)

Article 1 of Council Directive of 14th May 1990 (90/232/EEC) (hereinafter referred to as "the Third Directive"):

"*Without prejudice to the second subparagraph of Article 2 (1) of Directive 84/5/EEC, the insurance referred to in Article 3 (1) of Directive 72/166/EEC shall* ***cover liability for personal injuries to all passengers****, other than the driver, arising out of the use of a vehicle*." (my emphasis)

In addition to Article 1 thereof, Mr Collins has referred to certain recitals in the Third Directive which state that motor accident victims should be guaranteed comparable treatment irrespective of where in the European Community accidents occur, and note that there are gaps in the compulsory insurance cover of motor vehicle passengers in certain Member States and that, in order to protect "this particularly vulnerable category of potential victims" such gaps should be filled. Other recitals therein state that the first and second directives should be supplemented in a uniform manner, and that such an addition which leads to greater protection for the parties insured and for the victims of accidents, will facilitate still further the crossing of internal Community frontiers and hence the establishment and functioning of the internal market.

Mr Collins has referred to the fact that in its judgment in *Ruiz Bernáldez* [1996] E.C.R.I-1829 at paragraphs 16 and 18 the Court of Justice has observed:

"16. *In order to reduce the disparities which continued to exist between the laws of the Member States with respect to the extent of the obligation of insurance cover (third recital in the preamble to the Second Directive), Article 1 of the Second Directive required compulsory cover, as regards civil liability, for both damage to property and personal injuries, up to specified sums. Article 1 of the third Directive extended that obligation to cover for personal injuries to passengers other than the driver.*

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 amounts fixed in Article 1 (2) of the Second Directive*."

Mr Collins has referred to the fact that the Road Traffic (Compulsory Insurance) (Amendment) Regulations 1992 (S.I. No. 346 of 1992) and the European Communities (Road Traffic) (Compulsory Insurance) (Amendment) Regulations 1992 (S.I. 347 of 1992), which purported to transpose the Third Directive into Irish law, expressly excluded passengers in the rear of vehicles not generally designed or constructed to carry passengers from the scope of compulsory third party motor insurance.

By way of submission that the Third Directive has not been properly transposed into Irish law, and also that the exclusion clause at issue in these proceedings is void, has referred to the judgment of the Court of Justice in *Farrell v. Whitty* [2007] E.C.R. I-3067 arising from a reference for a preliminary ruling under Article 234 EC by the High Court here concerning the interpretation of Article 1 of the Third Directive. The plaintiff in that case had been travelling in a van which was not designed and constructed for the carriage of passengers in the rear of the vehicle. She had been seated on the floor of the van behind the front seats thereof. The driver was not insured, but the MIBI had refused to compensate her since she was travelling in that way, and that her injuries were not therefore a liability for which insurance was compulsory under the Road Traffic Act, 1961. Firstly it was pointed out that Article 1 provides that compulsory insurance is to cover liability for personal injuries to "all passengers, other than the driver". Secondly it was stated that it would be contrary to the objectives of the Community legislation to exclude from the concept of 'passenger' and thus from insurance persons such as the plaintiff in that case, and therefore the plaintiff in the present proceedings, and that such an interpretation had been confirmed by the case-law of the Court. The Court stated that "*Article 1 of the Third Directive is to be interpreted as precluding national legislation whereby compulsory motor vehicle liability insurance does not cover liability in respect of personal injuries to persons travelling in a part of a motor vehicle which has not been designed and constructed with seating accommodation for passengers*". The Court went on to state that Article 1 of the Third Directive has direct effect, the criteria of

unconditionality and sufficient precision being satisfied.

Mr Collins submits that FBD cannot rely on the exclusion clause in the policy of insurance in this case, and thereby refuse to indemnify the first and second named defendants in respect of the plaintiff's injuries, and in support refers to the judgment of the Court of Justice in *Ruiz Bernáldez* [supra]. That case is factually different to the present case in so far as the exclusion clause sought to be relied upon so as to absolve the insurance company in question was one that excluded damage to property caused where the driver of the vehicle was intoxicated. Nevertheless, the questions asked by the national court and the Court's judgment speak to the issue in the present proceedings. The judgment of the Court states:

> "*By Questions 1 to 4, which may be considered together, the national court seeks to ascertain whether Article 3 (1) of the First Directive is to be interpreted as meaning that, without prejudice to the provisions of Article 2 (1) of the Second Directive, a compulsory insurance contract may provide that in certain cases, in particular where the driver of the vehicle was intoxicated, the insurer is not obliged to pay compensation for the personal injuries and damage to property caused to third parties by the insured vehicle, or whether in such cases the compulsory insurance contract may provide only that the insurer is to have a right of recovery against the insured.*"

I have already set out what the Court stated at paragraphs 16 and 18 of its judgment, and at paragraph 24 of its judgment, the Court concluded as follows:

> "*The answer to Questions 1 to 4 must therefore be that Article 3 (1) of the First Directive is to be interpreted as meaning that, without prejudice to the provisions of Article 2 (1) of the Second Directive, a compulsory insurance contract may not provide that in certain cases, in particular where the driver of the vehicle was intoxicated, the insurer is not obliged to pay compensation for the damage to property and personal injuries caused to third parties by the insured vehicle. It may on the other hand provide that in such cases the insurer is to have the right of recover against the insured.*"

Mr Collins in addition has referred to passages from the Opinion of Advocate General Lenz in the same case delivered on the 25th January 1996. I do not feel it necessary to set these out in my judgment.

FBD's legal submissions:

The Court has received very helpful submissions on behalf of the Third named defendant from both Patrick Connolly SC and Anthony Kidney SC. They have highlighted the fact that the Third Directive was not transposed into Irish law by the date limited for such transposition, namely 31st December 1995, and that FBD in issuing the policy of insurance to the second named defendant, it did so in accordance with the statutory regime in place here as of the date of issue, and in compliance therefore with S.I. 346 of 1992 and S.I. 347 of 1992. In such circumstances, it is submitted, FBD was not required to provide insurance cover in respect of injuries caused to any passenger travelling "*in any part of a mechanically propelled vehicle … unless that part is designed and constructed with seating accommodation for passengers*", and in these proceedings are entitled to rely upon that exclusion clause in order to decline an indemnity to the first and second named defendants in respect of the plaintiff's injuries.

It is submitted on behalf of FBD that since it had operated in accordance with the statutory regime in place when it issued this policy to the second named defendant, the plaintiff's remedy is against the fourth named defendant on the basis of a failure to transpose the Third Directive into Irish law by the required date, in accordance with so-called Frankovich principles. It is submitted also that in so far as this Third Directive may have direct effect, it does so against the State and any emanation of the State only, and not against FBD which, it is accepted, is not an emanation of the State. Having referred to judgments of the Court of Justice in cases *Marshall v. Southampton & South-West Hampshire Area Health Authority* (Case 152/84) [1986] ECR 723, and *Faccini Dori v. Receb Srl* (Case C-91/92) [1994] ECR I-3325, Mr Connolly has referred to the judgment of the Court of Justice in *Whitty v. Farrell* [supra] and to what is stated at paragraph thereof in relation to Question 2 in the preliminary reference submitted to the Court by the High Court as to whether individuals may rely directly upon Article 1 of the Third Directive before the national courts. In that regard the Court of Justice stated at paras. 37 – 40 of its judgment:

> "*37. …… it should be pointed out that it has consistently been held that a provision in a directive has direct effect if it appears, as far as its subject-matter is concerned, to be unconditional and sufficiently precise …….. .*
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> 38. *It must be held in the present case that, as the Commission argues, those criteria are satisfied by Article 1 of the Third Directive. That article allows both the obligation of the Member State and the beneficiaries to be identified, and its provisions are unconditional and precise. Article 1 of the Third Directive may accordingly be relied upon in order to set aside provisions of national law which exclude from the benefit of the guarantee provided by compulsory insurance cove persons travelling in any part of a vehicle which is not designed and constructed with seating accommodation for passengers.*
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> 39. *The question remains whether that provision may be relied on against a body such as the MIBI.*
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> 40. *A directive cannot be relied on against individuals, whereas it may be relied upon as against the State, regardless of the capacity in which the latter is acting, that is to say, whether as employer or as public authority. The entities against which the provisions of a directive that are capable of having direct effect may be relied upon include a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals*……" (my emphasis)

It is paragraph 40 above upon which Mr Connolly has placed particular reliance.

In these circumstances Mr Connolly has submitted that the consequence of the State's failure to transpose the Third Directive is not one

which can be visited upon FBD, that entity not being an emanation of the State, and that the appropriate remedy, given the direct effect nature of the Directive, is one against the State only, since all FBD has done is issue a policy of insurance permitted under the laws of the State at the time that the policy issued to the second named defendant.

In further submissions on behalf of FBD, Anthony Kidney SC referred the Court to a judgment of the Court of Justice delivered on 24th July 2003 in *Viegas v. Companhia de Seguras Zurich SA* (Case C-166/02) where at paragraph 23 the Court stated:

> "*The Court has consistently held that the obligation of national courts to disapply national legislation contrary to a directive does not have the effect of enabling it to impose on an individual an obligation laid down by a directive which has not been transposed …*".

Mr Kidney relies on this passage in support of the submission by FBD that where the State has failed to transpose the Third Directive by the time limited for so doing, any consequence resulting to the plaintiff by reason of the first and second named defendants being denied an indemnity by FBD in respect of the plaintiff's injuries, cannot be visited upon FBD, but must result in a claim against the State for failure to so transpose the Directive.

In response to these submissions, Mr Collins has submitted that the question of direct effect is not the real issue in this case. He accepts that if direct effect was the beginning and end of the question to be determined, the plaintiff would have no case to make against FBD. He submits that quite apart from any question of direct effect, it is a principle of community law that individuals are entitled to rely upon community law rights in national courts in certain circumstances against private individuals on the basis of the principle of the primacy of community law.

In that regard he has referred to the judgment of the Court of Justice in *Marleasing SA v. La Comercial Internacionle de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135, [1990] 1 CMLR 305. That case involved a private dispute between two commercial entities, where in the national court the plaintiff sought a declaration that the founders' contract establishing the defendant company was void on the grounds that "the establishment of the company lacked cause, was a sham transaction and was carried out in order to defraud the creditors of Barviesa SA, a co-founder of the defendant company". As appears from the judgment, the defendant contended that the action should be dismissed on the ground that Article 11 of Directive 68/151 "*which exhaustively the cases in which the nullity of a company may be ordered, does not include lack of cause amongst them*". By the date on which this reference was made to the Court of Justice that Directive had not been transposed into Spanish law. The national court referred the following question to the Court of Justice:

> "*Is Article 11 of Council Directive 68/151/EEC of 9 March 1968, which has not been implemented in national law, directly applicable so as to preclude a declaration of nullity of a public limited company on a ground other than those set out in the said article*?"

In answering that question, the Court stated:

> "*With regard to the question whether an individual may rely on the directive against a national law, it should be observed that, as the Court has consistently held, a directive may not of itself impose obligations on an individual and, consequently a provision of a directive may not be relied upon as such against such a person …... .*
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> *However, it is apparent from the documents before the Court that the national court seeks in substance to ascertain whether a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.*
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> *In order to reply to that question, it should be observed that, as the Court pointed out in its judgment in Case 14/83 Von Colson and Kamann v. Land Nordhein - Westfalen [19844] ECR 1891, paragraph 26, 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 with the third paragraph of Article 189 of the Treaty.*
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> *It follows that the requirement that national law must be interpreted in conformity with Article 11 of Directive 68/151 precludes the interpretation of provisions of national law relating to public limited companies in such a manner that the nullity of a public limited company may be ordered on grounds other than those exhaustively listed in Article 11 of the directive in question.*"

Mr Collins submits that accordingly this Court must, on the basis of primacy of community law, and the case-law of the Court of Justice to which he has referred, give to the plaintiff the benefit of the Directives in play in this case as against FBD, even though they do not enjoy direct effect, by holding that the clause sought to be relied upon as excluding an indemnity is void in the light of the wording and purpose of the Directives, and particularly the Third Directive.

I should say that on behalf of the first and second named defendants, Charles Meenan SC has supported the submissions made by Mr Collins on behalf of the plaintiff. He has of course made his own submissions in that regard, but it is unnecessary for me to set them out in any detail.

Hugh Mohan SC also supports the plaintiff's submissions in addition to making other submissions relating, inter alia, the entitlement of the plaintiff to seek redress against the State in the event that he cannot recover against FBD, and whether FBD are entitled to any indemnity from the State in the event of it being found liable to the plaintiff. I do not need to set out these submissions in detail, and I intend no

disrespect to any of these submissions by not doing so. Eileen Barrington BL has also made submissions on behalf of the fourth and fifth submissions which largely support the submissions of Mr Collins in relation to harmonious interpretation and the judgment of the Court of Justice in Marleasing.

Conclusions:

The relevant facts in this case are not in dispute. There is no doubt that the policy of insurance taken out by the second named defendant with FBD excluded any indemnity in respect of this plaintiff's injuries as he was seated in the rear part of this vehicle which was not fitted with a seat. FBD has by letter dated 13th August 2001 invoked that clause and has denied to provide such indemnity.

There is no dispute either that at the date of this accident, 19th June 1999, the Third Directive had not been transposed into Irish law, and that the time by which such transposition was to have taken place had by then passed.

It is also clear from the case-law of the Court of Justice to which I have been referred that the Third Directive has direct effect, but in that regard direct effect does not provide a remedy as against an individual such as FBD, but rather against the State or any emanation of the State. That is accepted by the plaintiff. Some submissions have been made as to the possibility that the plaintiff could pursue a remedy against FBD on the basis of a horizontal direct effect or indirect effect, but it is in my view unnecessary to reach a conclusion in that regard.

In my view the conclusion to the issue for determination in this case is reached by the route of harmonious interpretation and the primacy of community law, as submitted by Mr Collins and Ms. Barrington, and in that regard the position seems clear. When one reads the three directives, including the recitals thereto, which are in play in this case, the objectives sought to be achieved is very clear. Those objectives have been explained in the cases to which the Court has also been referred and I have set out certain of the passages to which I have been referred.

All passengers being carried in vehicles and who are injured as a result are intended to be guaranteed equal treatment throughout the European Community regardless of in which Member State the injury is caused. The Second Directive required each member state to take necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy which excludes from insurance persons, inter alia, such as this plaintiff shall for the purpose of Article 3 (1) of the First Directive be void. I should perhaps note that this obligation is one imposed upon Member States i.e. to put measures in place to so ensure. The Directive does not itself state that such a clause is void. Nevertheless the objective is clear. The amendment to s. 65 of the Road Traffic Act, 1961 which I have set forth above is clearly in conflict with these objectives, and the failure to transpose the Third Directive by the date required has meant that on the date of the accident in which the plaintiff received his injuries, the law of this State was out of line with what was required by community law.

I have set out the relevant passage from the Court of Justice's judgment in Marleasing. It requires a national court, when applying national law, to do so as far as possible in the light of the wording and purpose of the directive in order to pursue the result sought to be pursued by the directive. It seems inescapable that in the present case this Court is required to read s. 65 of the Act as amended by S.I. 346 and 347 of 1992 by overlooking or ignoring the exclusion permitted therein in respect of liability for injuries caused to persons such as the plaintiff in this case. It seems to follow inevitably from this that the Court must conclude that the clause to that effect contained in the policy of insurance by the second named defendant must be regarded as void, therefore disentitling FBD from relying upon it in order to refuse to indemnify the first and second named defendants in respect of the plaintiff's claim for damages for his injuries and loss, in the event that he is found at hearing to have so suffered as a result of the negligence of the first named defendant. I so find.