**THE COURT OF APPEAL**

Neutral Citation Number: [2016] IECA 389

**Record No. 2014/176**

**[Article 64 transfer]**

**Irvine J.**
**Hogan J.**
**Hedigan J.**

**BETWEEN/**

**DAVID SMITH**

**PLAINTIFF**

**- AND -**

**PATRICK MEADE AND PHILIP MEADE**

**DEFENDANTS**

**- AND BY ORDER-**

**FBD INSURANCE plc**

**DEFENDANT/APPELLANT**

**- AND -**

**IRELAND AND THE ATTORNEY GENERAL**

**DEFENDANTS/RESPONDENTS**

**JUDGMENT of Mr. Justice Gerard Hogan delivered on the 16th day of December 2016**

1. On 19th June 1999 the plaintiff, Mr. Smith, was very seriously injured when the van in which he was travelling as a passenger in the rear of that vehicle was involved in an accident on a public roadway near Tullyallen in Co. Louth. The van, which collided with another vehicle, was being driven at the time by the first defendant and the van was owned by the second defendant. The complex legal issues which arise in the case should not, however, be permitted to obscure these tragic personal circumstances and life changing injuries which the plaintiff suffered and of which all members of the Court are all too painfully aware.

2. The plaintiff sued these two defendants for negligence and breach of duty. The actual legal issue which arises on this appeal is, however, a more complicated one and goes well beyond the parameters of even a serious personal injuries action such as the present case. The motor insurance policy which the second defendant, Mr. Philip Meade, had in force at the time of the accident contained an exclusion clause in respect of rear passengers who, like the plaintiff, travelled in the rear of the van which had no fixed seating for such passengers. The policy which was in force at the time for the van was written by the third defendant, FBD Insurance ("FBD"), and it contained the following clause:-

> "Passenger cover only operates for the one passenger seated on the fixed seat in the front of the vehicle."

3. Following the notification of the claim by the plaintiff, FBD, by letter dated 13th August 2001, declined to provide an indemnity to the second named defendant in respect of the plaintiff's injuries. In explaining this decision FBD invoked the provisions of the exclusion clause contained in the policy in question, saying that it did not cover liability in respect of personal injuries to persons (such as the plaintiff) who were being carried as a passenger *in a part of the vehicle which was not designed and constructed with seating accommodation for passengers*.

4. It is not now disputed but that Article 3(1) of the Third EU Motor Insurance Directive 90/232/EEC ("the Third Directive") required Member States to approximate their laws in order to ensure that the general compulsory motor insurance obligation provided for in their laws did not provide for exclusions from cover of this nature. It is also accepted that the relevant provisions of the Third Directive (the details of which I propose to address later in this judgment) had not been fully transposed into our domestic law by the latest date for transposition, namely, 31st December 1995. Indeed, if there was any lingering doubt about this, the Court of Justice confirmed in Case C-365/05 *Farrell v. Whitty* [2007] E.C.R. I-3067 (a case which I propose to examine in greater detail at a later stage of this judgment) that Article 3(1) of the Third Directive had precisely this effect.

5. The particular difficulty which arises in this case is whether the relevant national legislative provisions, namely, s. 65 of the Road Traffic Act 1961 (as amended) ("the 1961 Act") and Article 6 of the of the Road Traffic (Compulsory Insurance) Regulations 1962 (S.I. No. 14 of 1962) ("the 1962 Regulations") can be read in a manner consistent with the requirements of Article 3(1) of the Third Directive. In the High Court Peart J. concluded that it was possible, employing the *Marleasing* interpretative principles (Case C-106/89 *Marleasing SA v. La Comercial Internacionale de Aliementacion SA* [1990] E.C.R. I-4135), to interpret s. 65(1)(a) of the 1965 Act and Article 6 of the 1962 Regulations to arrive at such a result: see *Smith v. Meade* [2009] IEHC 99, [2009] 3 I.R. 335.

6. In his judgment Peart J. stated ([2009] 3 I.R. 335, 348):

> "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…. When one reads the three directives, including the recitals thereto, which are in play in this case, the objectives sought to be achieved are 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.
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> 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."

7. As it happens, following the delivery of the judgment of Peart J. on 5th February 2009, a settlement was arrived at between the insurer and the plaintiff. On 10th February 2009 the High Court (Quirke J.) duly approved the settlement and a sum of €3m. was paid to the plaintiff who was later made a ward of court. FBD have clearly subrogation rights in respect of this award and it may be noted that the order made by Quirke J. records that the proceedings against the first, second, fourth and fifth defendants (i.e., the Meades on the one hand and Ireland and the Attorney General on the other) were adjourned generally with liberty to re-enter.

8. In the course of the hearing before this Court counsel for FBD, Mr. Collins S.C. and Mr. O'Reilly S.C., made no secret of the fact that, in the event that their client were to succeed in this appeal, it would then seek to recoup through an appropriate legal mechanism (which might include a *Francovich* damages claim) the moneys paid by it to the plaintiff as against the State. I express no view on what remedies might or might not be available to FBD were it to succeed on this appeal. It is sufficient to say that against this background it cannot realistically be suggested that the present appeal has been rendered moot by reason of the fact that the plaintiff settled his claim with FBD in the aftermath of the High Court judgment.

9. So far as the merits of the appeal are concerned, FBD have now appealed against the decision of Peart J., contending that the High Court went beyond the *Marleasing* principle and that the judge, in effect, interpreted the domestic legislation in a manner which was *contra legem* and, essentially, that he gave the Third Directive a form of retrospective horizontal direct effect as against it, a private insurance company.

10. Before considering this question it is first necessary to examine the relevant provisions of national law as they obtained at the date of the accident.

**Relevant national law**

11. As I have already noted, FBD pleaded that the policy of insurance taken out by the second named defendant does not cover the plaintiff's injuries because the vehicle in question was a van and the plaintiff was travelling as a passenger in the rear of that vehicle where there were no seats for passengers. It further pleaded that at all material times it had complied with its obligations under the Road Traffic Act 1961, the provisions of the Road Traffic (Compulsory Insurance)(Amendment) Regulations 1992 (S.I. No. 346 of 1992) ("the 1992 Regulations") and the European Communities (Road Traffic) (Compulsory Insurance) (Amendment) Regulations (S.I. No. 347 of 1992) ("the 1992 EC Regulations") in issuing the insurance policy in question to the third defendant, the owner of the vehicle.

12. Motor insurance has, of course, been compulsory in this State since the enactment of the Road Traffic Act 1933. The present law is contained in the 1961 Act, as supplemented and amended by a variety of later legislation and statutory instruments designed, *inter alia*, to transpose the various EU Motor Insurance Directives. All of this is helpfully summarised in Buckley, *Insurance Law* (Dublin, 2012) (3rd ed.) at 351 et seq.

13. As it happens, the version of s. 56(1) of the 1961 Act has been replaced by the substitution of a new version of this sub-section by s. 34 of the Road Traffic Act 2004, but this new version has yet to be commenced by ministerial order, so that it is not yet in force. To avoid any confusion, in the rest of this judgment I intend to refer to the version of the 1961 Act (and the associated regulations) as was in force as of the date of the accident in question in June 1999.

14. Section 56(1) of the 1961 Act provides that a motorist may not drive a mechanically propelled vehicle on a public road unless there is an approved policy of insurance in force covering the negligent use of the vehicle resulting in a liability to pay damages to any person, "exclusive of the excepted person." This arrangement was slightly convoluted, since in essence every one was an "excepted person", save to the extent that certain classes of persons and vehicles were expressly so specified by regulations made by the Minister for Housing, Planning, Housing and Local Government (formerly Minister for the Environment). Section 56(3) (as amended) of the 1961 Act provides that an offence is committed if the vehicle is used in contravention of the prohibition contained in s. 56(1).

15. Section 65(1)(a) of the 1961 Act (as substituted by Article 7(1) of the 1992 EC Regulations) provides for a definition of "excepted person", *i.e.* persons whose injuries are not required to be covered in a policy of insurance as follows:-

> "(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:-*

(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." (emphasis supplied)

16. The effect of this provision was that whereas the Minister was still entitled to make regulations which had the effect of defining who constituted an "excepted person", the italicised words meant that he could not make regulations which extended the definition to any part of a mechanically propelled vehicle (other than a large public service vehicle), *unless* that part was designed and constructed with seating accommodation for passengers.

17. In addition, Article 4 of the 1992 Regulations sought to give effect to the Third EU Motor Insurance Directive by substituting a new Article 6 of the of the Road Traffic (Compulsory Insurance) Regulations 1962 (S.I. No. 14 of 1962) ("the 1962 Regulations"). As thus substituted, Article 6(1)(a) of the 1962 Regulations provides:-

"The following vehicles are hereby specified for the purpose of paragraph (a) of subsection (1) of s. 65 of the Act:-

(a) all vehicles, other than cycles, designed and constructed with seating accommodation for passengers."

18. It is clear, therefore, that as of the date of the accident in June 1999, persons travelling in a van *without* fixed seated accommodation being provided for them were "excepted persons" for the purposes of both s. 65(1)(a) of the 1961 Act (as amended) and the 1962 Regulations, so that there was no legal obligation to insure them. Just as importantly, perhaps, motorists who otherwise had an approved policy of insurance did not commit any criminal offence by driving a vehicle with no cover for persons travelling without fixed seating accommodation. Indeed, the language of s. 65(1)(a) of the 1961 Act (as amended) was such that even if the Minister had wanted to make regulations in order to extend compulsory insurance to such persons, he would have been acting *ultra vires* his powers were he to have done so.

**The EC Motor Insurance Directives**

19. It is next necessary to consider the relevant provisions of the various EU Motor Insurance Directives.

20. Article 3(1) of Council Directive of 24th April 1972 (72/166/EEC) ( "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 provides:-

"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."

21. Recitals 7 and 9 of Council Directive of 30th December 1983 (84/5/EEC) ("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 state:-

"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."

22. Article 2 (1) of the Second Directive then provides:-

"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." (emphasis supplied)

23. Article 1 of Council Directive of 14th May 1990 (90/232/EEC) ("the Third Directive") provides:-

"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." (emphasis supplied)

24. The object of these provisions of the various Directives was to extend the benefits of compulsory insurance to all categories of motor vehicle passengers and that in order to protect such potential victims any gaps in such cover as were disclosed in the laws and practice of the Member States should be filled. The thinking which underpinned the Directives was explained thus by the CJEU in Case C-129/94 *Ruiz Bernáldez* [1996] E.C.R. I-1829:

"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…..

> 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."

25. Although the declared aim of the 1992 EU Regulations was to give effect to the provisions of the Third Directive, it is clear that it was not completely effective for this purpose. This emerges from the judgment of the CJEU in Case C-365/05 *Farrell v. Whitty* [2007] E.C.R. I-3067, which in turn arose from a reference for a preliminary ruling under Article 267 TFEU by the High Court 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 and she had been seated on the floor of the van behind the front seats.

26. The driver was not insured, but the Motor Insurers' Bureau of Ireland ("MIBI") had refused to compensate her since she was travelling in that fashion. The MIBI contended that her injuries were not therefore a liability for which insurance was compulsory under the Road Traffic Act 1961, and, accordingly, it was not required to compensate her under the terms of the MIBI Agreement. This raised the question of whether the exclusion in liability provided for in s. 65(1)(a) of the 1961 Act and Article 6 of the 1962 Regulations was compatible with the provisions of Article 1 of the Third Directive.

27. The CJEU clearly viewed the national provisions as incompatible with Article 1 of the Third Directive. It pointed out that Article 1 of the Third Directive provides that compulsory insurance is to cover liability for personal injuries to "all passengers, other than the driver". Second, it 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. The CJEU 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".

28. The Court went on to state that Article 1 of the Third Directive has direct effect, the criteria of unconditionality and sufficient precision having being clearly satisfied.

29. The question which accordingly arises as to the consequences for these proceedings of the decision of the CJEU in *Farrell.* Two differences between the two cases should be immediately noted. First, in *Farrell* the driver was uninsured, so that the liability to cover fell to the MIBI, which body may well be an emanation of the State for the purposes of the direct effect of the Directives in the light of the judgment of the CJEU in Case C-188/89 *Foster v. British Gas* [1990] E.C.R. I-3313. By contrast to the position in Farrell, there is no dispute that the insurer here, FBD, is a private body. Second, unlike *Farrell*, the owner of the vehicle had insurance, albeit that the terms of the policy expressly excluded liability in the case of passengers travelling otherwise than in fixed seating in the rear.

30. In the present case FBD clearly has subrogation rights in respect of the award which was made to the plaintiff, Mr. Smith, and it seeks to argue in this Court that the High Court was wrong to apply the *Marleasing* principles in the manner in which it was done. In essence, FBD argues that the effect of the High Court decision was to give the Third Directive a form of horizontal direct effect against a private party in a manner which the CJEU had previously ruled against in cases such as Case 152/84 *Marshall v. Southampton Teaching Hospital* [1986] E.C.R. 723 and Case C-91/92 *Faccini Dori* [1994] E.C.R. I-3325 was impermissible.

31. This submission is denied by Ireland and the Attorney General: they contend that in the light of the decision of the CJEU in Farrell this Court should first affirm the reasoning of the High Court and give the national provisions a *Marleasing* interpretation so that these provisions were now in conformity with EU law. If, however, this Court considers that such an interpretation would be *contra legem*, then it is submitted that the Court should find the national legislation to be inapplicable and, on this basis, hold that the plaintiff would have been entitled, so to speak, to march through the gap in the legislation and to recover directly against FBD, the exclusion clause in the insurance policy notwithstanding.

32. It is to a consideration of these difficult issues to which I now propose to turn.

**Does the High Court judgment sanction a form of horizontal direct effect?**

33. Counsel for Ireland and the Attorney General, Mr. Mohan S.C. and Mr. Toland S.C., both submitted that so far from a form of horizontal direct effect, in the light of the judgment of the CJEU in *Farrell*, FBD could no longer 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. As a central feature of their argument is that the judgment of CJEU in *Ruiz Bernáldez* has this very effect, it may be convenient to examine this case in some detail.

34. In that case the accused had been convicted of causing a road accident while intoxicated. He was ordered by the court of trial to pay damages in respect of the property damage caused, but his insurance company was absolved from the responsibility to indemnify him by reason of a Spanish decree regulating compulsory insurance rules which excluded liability where the driver was intoxicated.

35. Following an appeal to the Audiencia Provincial, that Court referred certain questions to the CJEU concerning the interpretation of the decree and the potential impact of the Third Directive. In its judgment the CJEU held:-

> "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."

36. The CJEU ultimately concluded:-

> "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 recovery against the insured."

37. At first blush this judgment *seemed* to suggest that Article 3(1) of the First Directive might have direct effect as against the private insurance company. Of course, the effect of the decision was that the national law in question (*i.e.*, the Spanish decree) would have to be declared to be contrary to EU law. But the judgment also seemed to go further by indicating that the relevant excluding clause in the individual insurance policy should also be invalidated, although this, admittedly, is not absolutely clear from the text of the judgment itself.

38. The same approach seems to underpin the judgment of the CJEU in Case C-537/03 *Katja Candolin* [2005] E.C.R. I-5762. In this case the claimant's mother had been killed in a road accident when travelling in a vehicle owned by a Mr. Paananen which was driven by a Mr. Ruokoranta. The Finnish courts found that the driver and all the passengers were drunk at the time of the accident. Finnish law permitted the amount of compensation payable to be reduced if the road traffic accident victim had contributed to the injuries by his or her own carelessness. The relevant insurance company, Pohjola, refused to pay compensation to the victims (or their representatives) on the ground that where a passenger enters a vehicle in the knowledge that he runs a higher than normal risk of being injured he must be liable for the consequences of his conduct.

39. Following a reference from the Finnish Supreme Court (Korkein Oikeus) the CJEU held that the Finnish law was contrary to both Article 2(1) of the Second Directive and Article 1 of the Third Directive on the basis that it allowed for the reduction of compensation based on the conduct of the passenger in the vehicle. Just as in *Ruiz Bernáldez*, however, it seems implicit in this judgment that the relevant insurance company would have been obliged to pay compensation to Ms. Candolin and the other passengers once the Finnish law at issue was disapplied, even though this would seem to constitute at least a form of horizontal direct effect. I propose later to return to a consideration of both *Ruiz Bernáldez* and *Candolin*.

40. In *Farrell v. Whitty* the CJEU held that insofar as the 1961 Act excluded passengers travelling in a mechanically propelled van for whom no fixed seating had been provided, such an exclusion was contrary to the terms of Article 1 of the Third Directive. It follows, therefore, that the specific exclusions from liability contained in s. 65(1)(a) of the 1961 Act and Article 6 of the 1962 Regulations are *ex facie* in breach of the requirements of the Third Directive and, at a minimum, cannot be applied in their present form.

41. The CJEU then went to assess the wider consequences of its judgment. Here it should be recalled that the ultimate insurer in *Farrell* was the MIBI, rather than any private insurer:-

> "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 ……..
>
> 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 those 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……." (emphasis supplied)

42. As it happens, when the matter came back before the High Court it was held by Birmingham J. that the MIBI was an emanation of the State, so that the plaintiff could rely directly on the provisions of the Third Directive as against the MIBI itself: see *Farrell v. Whitty (No.2)* [2008] IEHC 124. This matter was subsequently appealed to the Supreme Court who have since subsequently made a reference to the CJEU on the question of the status of the MIBI and whether it was an emanation of the State for this purpose: see *Farrell v. Whitty (No.2)* [2015] IESC 39. The outcome of that reference is currently awaited.

43. It is, of course, necessarily implicit in all of this that the status of the ultimate insurer was and is of importance. In other words, the entire judgment of the CJEU in *Farrell* proceeds on the basis that the exclusions contained in the national legislation could only be disapplied as against a public body and not as against a private insurer. If matters were otherwise, then the discussion at para. 40 of the judgment of the CJEU in *Farrell* (quoted above) would be entirely meaningless, because then the provisions of Article 3(1) of the Third Directive would have had direct effect against all defendant insurers, irrespective of whether they were a public body or simply a private party. I propose to return later in the judgment to this point.

**Is it possible to apply the *Marleasing* principles to the national legislation?**

44. As I have already noted, the immediate question is whether it is possible to give s. 65(1)(a) of the 1961 Act and Article 6 of the 1962 Regulations an interpretation which conforms to the requirements of the Third Directive. In the High Court, Peart J. considered that the application of the Marleasing principles both permitted and, indeed, required this.

45. The decision in *Marleasing* 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 was for a lack of cause, *i.e.,* that it 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 list 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?"

46. In answering that question, the CJEU 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 …… .
>
> 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* [1984] E.C.R. 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."

47. This extent of this interpretative obligation was further explained by the CJEU in Cases C-397-401/01 *Pfeiffer v. Deutsches Rotes Kreuz* [2004] E.C.R. I – 8835 when it said that:-

> "111. It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.
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> 112. That is a *fortiori* the case when the national court is seised of a dispute concerning the application of domestic provisions which, as here, have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. The national court must, in the light of the third paragraph of Article 249 EC [now Article 288 TFEU], presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned……
>
> 113. Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, 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 comply with the third paragraph of Article 249 EC…..
>
> 114. The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it ….
>
> 115. Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive…
>
> 116. In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.
>
> 117. In such circumstances, the national court, when hearing cases which, like the present proceedings, fall within the scope of Directive 93/104 and derive from facts postdating expiry of the period for implementing the directive, must, when applying the provisions of national law specifically intended to implement the directive, interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the directive…..
>
> 118. In this instance, the principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that Directive 93/104 is fully effective, in order to prevent the maximum weekly working time laid down in Article 6(2) of the directive from being exceeded…..
>
> 119. Accordingly, it must be concluded that, when hearing a case between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2) of Directive 93/104, is not exceeded."

48. The first question, therefore, is whether it is possible to interpret s. 65(1)(a) of the 1961 Act or, for that matter, Article 6 of the 1962 Regulations in a manner which is compatible with the requirements of the Third Directive as explained by the CJEU in *Farrell*. For my part, I do not think that it is possible to interpret either s. 65(1)(a) of the 1961 Act or Article 6 of the 1962 Regulations in this fashion, even though both provisions were amended in 1992 with a view to transposing the Third Directive itself.

49. It is, of course, correct to say that, as the CJEU made clear in cases such as Case C-334/92 *Wagner Miret* [1993] E.C.R. I - 6911 and *Pfeiffer*, the *Marleasing* interpretative obligation applies with particular force where – as here - the national law was expressly

amended with the declared intention of giving effect to the Directive in question. Yet both national provisions are in themselves pellucidly clear and are entirely free from *any* ambiguity whatever: *both* expressly *exclude* cases such as the present one where the passenger was travelling in a part of a mechanically propelled vehicle which did not have fixed seating.

50. These exclusions clearly represent what must have been understood at the time to have been a legislative policy choice in that they were plainly quite deliberate and are obviously not the product of some legislative oversight. Private parties (such as FBD) quite obviously acted on foot of these excluding provisions. There can, moreover, be little doubt but that the cost of the insurance policy written by FBD in the present case reflected what it legitimately understood to be the limits of its insurance risks and those risks did not extend to passengers travelling in vans which did not have fixed seats.

51. In these circumstances, I must respectfully disagree with the view taken of this issue of interpretation by Peart J. in the High Court. I consider that it is simply not possible to interpret these provisions in a manner which would be compatible with the requirements of the Third Directive, as to do otherwise would be to adopt an interpretation which would be *contra legem* and which would do violence to the actual wording of both provisions.

**The approach of a national court in a case involving private parties where the national law cannot be interpreted in a manner compatible with the requirements of a Directive**

52. The next question is what a national court should do in a case involving private parties where the relevant legislation is manifestly contrary to the requirements of a Directive and where it is simply impossible to interpret the legislation in a manner which is compatible with those requirements. The conventional response would be to say that in these circumstances the national court cannot give effect to the Directive in this manner in a case involving a purely private party, as this would amount to a form of horizontal direct effect, contrary to the leading authority of Case C-152/84 *Marshall v. Southampton Teaching Hospital* [1986] E.C.R. I-723.

53. As both Advocate General Slynn and the CJEU itself explained in that case, any other conclusion would lead to the collapsing of the distinction between Directives and Regulations. The obligations regarding the transposition of Directives under Article 288 TFEU rests, moreover, on the Member States and not on private parties. To that extent, it was thought contrary to principle that purely private parties should find themselves faced with obligations arising from the terms of an untransposed Directive when they had no responsibility in the matter.

54. There has also been a consistent line of case-law which has stressed the limits of *Marleasing* and which suggests in these circumstances (i.e., where an EU-Law conforming interpretation is not possible) that the claimant's remedy may lie in pursuing a claim for *Francovich* damages against the Member State in question. The decision in *Wagner-Miret* may serve as a representative example of this approach where the Court stated:-

> "It would appear from the order for reference that the national provisions cannot be interpreted in a way which conforms with the Directive on the insolvency of employers and therefore do not permit higher management staff to obtain the benefit of the guarantees for which it provides….If that is the case, it follows from the *Francovich* judgment…that the Member State concerned is obliged to make good the loss and damage sustained as a result of the failure to implement the Directive in [this] respect."

55. There is also, however, a line of recent CJEU case-law which holds that where an EU law conforming interpretation is not possible, then the national court must nonetheless hold that the national measures are inapplicable, even in litigation between two purely private parties. The CJEU has further held that national courts cannot refuse to disapply such national law on the ground that such would be inconsistent with the legitimate expectations of the party relying on the provisions of the national law, since this would effectively mean that national courts could of their own motion limit the temporal effects of the Court's interpretation, a power which is reserved to the CJEU itself.

56. These principles have been summarised in the judgment of the CJEU in Case C-441/14 *Dansk Industri* EU:C:2016:278. In that case a private Danish employer refused to pay a particular severance allowance to an employee on the ground of age. The CJEU had previously ruled in Case C-499/08 *Ingeniorforeningen i Danmark* EU:C;2010:600 that the Danish law which had been interpreted as sanctioning a refusal to pay in such circumstances was contrary to Directive 2000/78 prohibiting age discrimination in the workplace. But did this mean that the national courts were now obliged to disapply that law and award compensation to the departing employee in question?

57. Following a reference of a number of questions from the Danish Hojesteret (Supreme Court), the CJEU held:-

> "In the light of all the foregoing, the answer ….is that EU law is to be interpreted as meaning that a national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required, when applying provisions of national law, to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age. Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation."

58. Several matters emerge clearly from this passage. First, where a confirming interpretation is not possible, the national court must, where possible, disapply the national law, even in litigation between two private parties. Second, in arriving at this conclusion, the national court cannot take account of the legitimate expectation of the defendant to the effect that the pre-existing national law would be applied. Third, the national court cannot have regard to the *Francovich* principles in arriving at this conclusion.

59. It follows, therefore, that in the present case, this Court must disapply the relevant provisions of both s. 65(1)(a) of the 1961 Act and Article 6 of the 1962 Regulations insofar as they contain exclusions from liability in respect of standing passengers. It is next necessary to consider the implications of such a finding of dis-application.

**The consequences of a finding of disapplication so far as present case is concerned**

60. If the relevant provisions of Article 6 of the 1962 Regulations are disapplied, it would seem to bring about the following effects. Article 6(1) presently states:

> "The following vehicles are hereby specified for the purpose of paragraph (a) of subsection (1) of section 65 of the Act:

(a) all vehicles, other than cycles, [designed and constructed with seating accommodation for passengers]."

61. If the words (which I have for convenience highlighted both in bold and in square brackets) are disapplied by reason of the CJEU decision in *Farrell* (and are thus, effectively, ignored), then the consequence would be that *all* vehicles *other* than cycles are specified for the purposes of s. 65(1)(a). In the case of s. 65(1)(a) itself, the disapplied provisions are effectively the entirety of sub-paragraph (i), now highlighted in bold and the square brackets:

> "(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:-
>
> > [(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."

62. As it happens, this latter change is largely consequential, since the effect of the change is simply to enable the Minister to make regulations imposing a duty to effect compulsory insurance in the case of all vehicles, with the exception of passengers seated in a caravan. The real change is that effected with regard to Article 6 of the 1962 Regulations, since the disapplication of the relevant then means that there is now a legal duty to insure all vehicles. As, moreover, *Dansk Industri* makes clear, this disapplication would seem to have retrospective effect, so on this line of reasoning, it would follow that a court sitting in 2016 must now hold there was a duty in 1999 to have compulsory insurance in respect of all vehicles without any exclusions for passengers in the vehicle for whom no fixed seating had been provided, even though there was *not* in fact any such legal duty so far as Irish national law was concerned in June 1999.

63. It should be noted, however, that s. 62(1) of the 1961 Act specifies the conditions for what constitutes an "approved policy of insurance." One of those conditions is specified at s. 62(1)(b):-

> "the insurer by whom it is issued binds himself by it to insure the named person (the insured) against all sums without limit which the insured or his personal representatives shall become liable to any person (exclusive of excepted persons) whether by way of damages or costs on account of injury to person or property caused by the negligent use of a mechanically propelled vehicle to which the policy applies."

64. Putting to one side for the moment the retrospective effect of any finding of inapplicability, it is clear that in 1999 when the policy was issued, it qualified as an approved policy of insurance within the meaning of this sub-section. In particular, it applied to all third party liability, exclusive of excepted persons. It is true that the policy did not apply to persons in a mechanically propelled vehicle for whom no fixed seat had been provided, but, as the law was then expressed and understood to be, such persons were excepted persons by virtue of both s. 65(1)(a) of the 1961 Act and Article 6(1)(a) of the 1962 Regulations.

65. If, however, the declaration of inapplicability is applied with retrospective effect, this would have had had the consequence – subject to one caveat which I will immediately address – that the insurance policy as issued was no longer an approved policy within the meaning of s. 62(1)(a) of the 1961 Act. This would then have had the further consequence that the driver or owner of the motor vehicle would in theory have been committing a criminal offence by either driving the vehicle on a public road without an approved policy of insurance or allowing it to be so driven: see s. 56(3) of the 1961 Act.

66. The caveat of which I have just spoken is as follows: it may be, whether by virtue of the reasoning of the CJEU in *Ruiz Bernáldez* and *Candolin* (regarding the effect of the EU Motor Directives) or *Dansk Industri* (regarding the effect of a finding of inapplicability) or otherwise, that the exclusion clause regarding non-seated passengers *contained in the insurance policy* should itself be disregarded as inapplicable as a matter of EU law. If that were so, then, at one stroke, the insurance policy would revert to the status of an approved policy within the meaning of s. 62(1) and the (admittedly now purely theoretical) problems regarding potential criminal liability on the part of the insured by driving the vehicle on a public road without such an approved policy would also disappear.

67. This, in turn, raises the question of whether any declaration of inapplicability can or should extend this far. Alternatively, if a court were to grant such a declaration the question arises as to whether this would really amount in substance of a form of horizontal direct effect as against the private party insurer, FBD.

**Conclusions**

68. It is plain, therefore, that this case raises difficult and heretofore unresolved issues concerning the extent to which the Motor Insurance Directives can be held to have direct effect as against a purely private party such as FBD following the necessary disapplication of the relevant provisions of s. 65(1)(a) of the 1961 Act and Article 6 of the 1962 Regulations in the light of *Farrell v. Whitty*. I would therefore propose that this Court should refer the following draft question to the Court of Justice of the European Union pursuant to Article 267(1) TFEU:

> "Where:-
>
> (i) the relevant provisions of national law provide for an exclusion for compulsory motor insurance in respect of persons for whom no fixed seats in a mechanically propelled vehicle have been provided,
>
> (ii) the relevant insurance policy provides that cover will be confined to passengers travelling in fixed seating and this policy was, factually, an approved policy of insurance for the purposes of that national law at the time of the accident,
>
> (iii) the relevant national provisions providing for such an exclusion from cover have already been adjudged to be contrary to EU law in an earlier decision of this Court (Case C-365/05 *Farrell v. Whitty*) and, accordingly, required to be disapplied, and
>
> (iv) the language of the national provisions is such that it does not permit of an interpretation conforming to the requirements of EU law,

then, in litigation between private parties and a private insurance company concerning a motor accident involving a serious injury to a passenger in 1999 who was not travelling in a fixed seat, is the national court when disapplying the relevant provisions of national law also obliged to disapply the exclusion clause contained in the motor insurance policy which was in force at the time such that injured victim could then have recovered directly as against the insurance company on foot of that policy? Alternatively, would such a result amount in substance to a form of horizontal direct effect of a Directive against a private party in a manner prohibited by EU law?"

69. The importance of these questions cannot be overstated so far as this appeal is concerned. If this Court is obliged to disapply the exclusion clause in the insurance policy, then it follows that the plaintiff could properly have recovered as against the first defendants and FBD would in turn have been obliged to indemnify these defendants. Alternatively, if there is no such obligation on the national court, FBD would be free to seek to recover from the State the €3m. it paid out to the plaintiff by way of settlement by means of appropriate legal proceedings (which might include a *Francovich* claim).

70. I would accordingly propose that the appeal should stand adjourned pending the determination of the reference by the CJEU. I would further invite counsel to make submissions concerning the form of the draft reference to the CJEU pending the finalisation of that draft wording.