Horwich Farrelly

THE *large & complex injury* SPECIALISTS

Insight

from Horwich Farrelly's Large & Complex Injury Group

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Welcome to Insight

Welcome to this week's edition of Insight in which we report cases relating to:

- Whether a road traffic policy covered commuting
- Specific disclosure of documents
- The apportionment of costs as between defendants

Malcom Henké
Partner & Head of LACIG

The Extent of 'Doc' Cover

AXA Insurance UK Ltd v EUI Ltd (t/a Elephant Insurance) (2020) EWHC (QB) - 14/05/2020

On 29 May 2016, a collision occurred between a Vauxhall Astra motor car and another vehicle resulting in very serious injuries to the third-party driver. The Vauxhall Astra was insured by the claimant, AXA Insurance ("AXA"); it was a liveried courtesy car owned by a garage (DP; a limited company) who had loaned it to the driver of the Astra whilst they repaired his own car – a Ford Focus - which was insured by the defendant, EUI Ltd ("Elephant").

The AXA policy covered DP and its customers including the driver of the Astra for social, domestic and pleasure purposes as well as business use. There was no dispute that, at the very least, AXA would indemnify the Astra driver for such liability (if any) which he ultimately had to the third-party claimant (liability being very much in issue).

The Elephant policy included 'driving other cars' cover and AXA sought to argue that Elephant's policy also responded to the claim. Elephant, who had never received any notification of a claim from their insured, disputed this.

This was a claim under Part 8 by AXA, for a declaration that AXA and Elephant were equally liable to indemnify the driver of the Astra in relation to the third-party claim (both insurers had what is commonly referred to as an 'escape clause' dual insurance clause as opposed to a 'rateable proportion' clause).

Whether there was dual insurance at the time of the collision was dependent upon the resolution of two issues:

1. Was the use to which the driver put the Vauxhall Astra at the time of the accident within the terms of his insurance policy with Elephant?

2. Was the Vauxhall Astra properly to be described as a "private motor vehicle" under the terms of that policy?

On the night before the collision the driver of the Astra had been working as a security guard at a hotel. This was not his usual place of work but he had agreed to work there on a temporary basis. He could only get there by driving whereas his usual job involved using public transport to get to and from work.

At the end of his shift the driver chatted with the hotel chef, had some breakfast at the hotel before setting off for home albeit with a slight detour to pick up a friend from the city's bus station and give him a lift home, his friend also having finished work as a security guard. The collision occurred whilst the driver of the Astra was travelling to the bus station.

The Elephant policy provided cover for the driver to use the Ford Focus for "use for social, domestic and pleasure purposes only". As is invariably the case, there was no definition of what this actually meant.

The policy extended cover for other cars in the following terms:

"1b Driving other cars

If you are 25 or over and qualify under this Section, cover is for the policyholder only and is third party only while driving a private motor car within our territorial limits".

The policy defined a "private motor car'' as:

"A privately owned motor car manufactured to carry up to eight passengers, which is designed solely for private use and has not been constructed or adapted to carry goods or loads"

The Elephant Policy therefore limited cover by two distinct methods: by reference to the use of the car that would be covered, and by reference to the description of the vehicle which would be covered. The incident in question would only be covered if it survived both express limitations. In addition, the definition of "private motor car" in the Elephant Policy required not only that the vehicle should be designed solely for private use, but also that it should be "privately owned", thus importing a further potential limitation on cover.

Guidance from the earlier authorities was neatly summarised by Silber J in AXN and others v- John Worboys and Inception Insurance (2012):

"… (b) To determine if a use is permitted under the policy, the Court has to ask itself what was the essential character of the journey in the course of which the particular incident occurred?" (Roskill C.J. in [Seddon v Binions (1978) and followed in [Caple v Sewell and others (2002) per RIX L.J.) or what was "the essential primary purpose" (per Browne L.J. in Seddon's case) or "primary purpose or essential character" per Megaw L.J. in Seddon's case);

(c) The purpose has to be determined at the time when the incident occurred and not at the start of the journey [Keeley v Pashen (2005).

(d) The critical factor must primarily be the driver's intention (Caple [28] per Rix L.J.)"

'The essential character of the journey undertaken…was driving home from work'

Finding in favour of Elephant the High Court Judge held that the journey made by the driver of the Astra was covered only by the AXA policy. The "essential character of the journey" undertaken, the "primary and essential", or the "essential primary purpose" of the trip was driving home from work.

This might be called "commuting", but that term did not necessarily add any more than drawing the linguistic distinction more clearly between social, domestic, pleasure on the one hand, and "work" or "business" on the other. The courtesy pick-up of a friend on the way, albeit necessitating a detour, did not alter the fundamental character of the trip. The vehicle was being used for getting to work to earn a living.

Although this disposed of the claim, the judge went on to consider the second limb of the argument.

The Astra could not be described as a "private motor car" within the Elephant policy. It was very much a part of the business of the DP Garage. It was an

inducement to a customer to leave their car with DP for repair that a courtesy car would be provided for the use during the repair. The notion of a "private" motor car referred to in the Elephant policy was plainly not a car which was operated or supplied in the course of or for the purposes of a business.

Whether the DP garage was a limited company or a sole trader did not affect the decision that the Vauxhall Astra as a courtesy car, supplied by the policyholder, did not satisfy the description "privately owned motor car"- whatever its physical configuration.

The judge therefore declined to make the declaration sought by AXA: any liability in respect of these events which it fell upon them to indemnify, they must bear alone and might not call upon Elephant to share it.

The claimant was represented by Clyde & Co and Tim Horlock QC.

The defendant was represented by Horwich Farrelly and Howard Palmer QC.

Comment

The issue of whether the Astra courtesy car was a "private motor vehicle" within the terms of the Elephant policy was an issue which was largely dependent on the particular wording of the Elephant policy. The determination of that point is unlikely to be of wider applicability to other cases. However, it does show the critical importance of how policies are drafted and thereafter correct interpretation where there is a dispute as to the true meaning.

The issue of what amounts to 'social and domestic pleasure' and whether it includes commuting or not is, perhaps surprisingly, something we are not aware of having ever been specifically determined by the courts previously. Some policies will state for example "social, domestic and pleasure purposes excluding commuting…" whereas others may say "social, domestic and pleasure purposes including commuting…"; specific reference to commuting appears to be something which has become far more prevalent over the last 20 years. With such wordings, the position is less open to dispute. However, many policies will not specifically refer to commuting either way. This case points to commuting not being included within the definition of 'social and domestic pleasure'. There may well be scope for further dispute because of variations in policy wordings and the tendency for motor policies (and certificates) to be amended and updated on a somewhat piecemeal basis without necessarily considering the wording as a whole.

Moreover difficulties around ascertaining what the "essential character of the journey" undertaken, the "primary and essential", or the "essential primary purpose" of a particular journey is. It is not too difficult to envisage examples where the question of cover might depend on some rather tenuous distinctions.

This case also serves as a timely reminder that, notwithstanding the demise of post-accident section 152 declarations, motor insurance coverage issues continue to be an area where disputes occur involving very significant sums of money for insurers.

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Specific disclosure

Hankin v Barrington and others (2020) EWHC 1131 (QB)

This judgment related to an unsuccessful application by the third defendant to renew orally an application for permission to appeal against a decision of a Master ordering specific disclosure of documents made under CPR 31.12. In the course of the judgment, the High Court judge looked in detail at the requirements for making an application for specific disclosure.

This was a claim for personal injury by a former member of the third defendant's 1st XV rugby squad. It related to a drinking game allegedly played by a group pf rugby players.

Directions were given as regards exchange of evidence and disclosure. The claimant then issued an application seeking an order that the third defendant disclose "any outstanding medical records and training records as part of their duty to disclose."

The order which was made at the hearing was far more detailed than the application and set out seven specific categories of documents to be disclosed, ranging from medical and training records to salary documents and conditioning programmes.

The appeal related to how the order had evolved from the relatively terse terms in the application. The answer was that in the course of hearing, counsel for the claimant explained more extensively what was sought. As a result of this argument, the Master was persuaded that he should make the more detailed order, even although the precision was not contained in the application, and so accordingly there was no precision in the supporting evidence.

The third defendant was dissatisfied in that (a) in the application, the documents had not been identified with any specificity, (b) even when they were identified at the hearing, there was concern that they were not adequately identified, (c) there was no evidence to support a belief that they were within the third defendant's possession, (d) their relevance was not properly identified.

'The third defendant argued that it was mandatory to specify the documents sought and for this to be supported by evidence'

The relevant procedure was set out in CPR 31.12 and Practice Direction 31. The third defendant argued that it was mandatory to specify the documents sought and for this to be supported by evidence.

The High Court Judge held that third defendant's concerns about the way in which the application was made were justified. The claimant should have set out the documents sought in the application in the specific terms in which they were subsequently ordered. The general terms of the application were inadequate.

Despite that, the Master had jurisdiction to receive this information at the hearing. He had a discretion to reformulate the definition of the documents required without the requirement to insist on written evidence to support the reformulated case.

Nonetheless, the Master had to be slow to allow the identification of documents in the course of the hearing but it was still available for the court, however unsatisfactory the failure of the claimant to identify the documents sufficiently in the application, for the documents to be identified properly in the course of the oral submissions. This must be allowed only with great caution and always provided that the court was satisfied that this could be done with sufficient particularity and dealing with the case justly in accordance with the overriding objective.

In the circumstances of the particular case, the Master took a pragmatic view in accordance with the overriding objective, deciding that the court should make progress in the action rather than have to leave specific disclosure to another time with a properly formulated written application. This was an exercise of his discretion which was available to him, and there was no reason for an appellate court to interfere with the exercise of that discretion.

The foregoing sufficed to dispose of the application, and the decision rested on the above basis. What followed was an additional matter which the judge was entitled to take into account in the decision which he made. Following the order, there had been apparent compliance by the third defendant. The third defendant argued that this had not been a case management decision. It related to standard directions of the kind dealt with in a typical case management conference such as standard disclosure. If the court did not accept this, it was argued, this was a significant matter of principle about failure to comply with the rules and the jurisdiction of the court to make an order for specific disclosure in these circumstances.

The judge held that in the instant case, in addition to the matters which led to the refusal of permission, the court should take into account whether the issue was of sufficient significance to justify the costs of an appeal.

It was not of sufficient significance, bearing in mind (a) the fact that even if a correct procedure had been followed, it was quite likely that such documents would have been ordered, (b) the documents had been provided and it seemed hypothetical only that there would be an allegation of breach and/or that the order would by itself be a significant obstacle to resisting a postponement, and (c) the case did not give rise to some important new matter of principle, but related to the exercise of a discretion.

For these reasons, the oral renewal of the application for permission to appeal was refused.

The third defendant was represented by Plexus Law

None of the other parties were in attendance.

Comment

It is to be hoped that other judges will not permit this decision to be used by parties seeking to obtain specific disclosure without following the apparently strict requirements of CPR 31.12, i.e. identifying clearly what documents are required and for what reason.

'Calderbank' offers

Jagger v Holland and others (2020) EWHC 1197 (QB)

In Insight 143 we reported the judgment on liability in these proceedings. The claimant had sustained serious injury when she was in collision with an articulated lorry driven by the first defendant ["D1"].

The second defendant ["D2"] had organised an event consisting of a bonfire, fireworks display and fair. D2 had contracted with the third defendant ["D3"] to run and organize the fairground event. D1 was to provide the dodgems ride and it was in the course of D1 delivering his dodgems ride to the location of the fair, to set up the ride, that the claimant sustained her accident.

The claimant had originally issued proceedings against D1 alone. D1 denied liability but did not blame either D2 or D3. The claimant amended her claim to include D2. D2 denied liability, blamed D3 and issued third party proceedings against D3. The claimant then further amended her claim to bring claims against all three defendants and in turn each of the defendants blamed the others for the happening of the accident.

During the trial it was agreed that the claimant was contributorily negligent as to 12½% and in the earlier judgment the Deputy High Court Judge held that D3 was not negligent, that each of D1 and D2 were negligent and that liability as between D1 and D2 should be apportioned so that D1 bore 65% and D2 bore 35% of the obligation to compensate the claimant.

This further hearing related to D3`s costs and in particular the basis on which costs should be assessed and who should pay them.

By letters dated 19 December 2018 to the solicitors representing D1 and D2, marked "without prejudice save as to costs", D3 invited both D1 and D2 to withdraw their claims against D3 whereupon D3 would bear his own costs. It was made clear that this was a Calderbank offer which remained open for acceptance until 9 January 2019 and would then be withdrawn. It was expressly stated that, if appropriate, D3 would rely on such letters on the issue of costs, including an application by D3 for indemnity costs.

D3 sought an order for its costs on the standard basis until 9 January 2019, i.e. after the 21-day period had expired, and thereafter on an indemnity basis.

'...the offer by D3 to bear its own costs upon the claims against him being withdrawn should have been accepted'

The judge held that it was self-evident that the offer by D3 to bear its own costs upon the claims against him being withdrawn should have been accepted. However, whilst noting that D3`s solicitors letters dated 19 December 2018 put D1 and D2 on notice that it might seek indemnity costs, an award of indemnity costs, as opposed to costs on a standard basis would not meet the justice of this case, particularly because the offer contained in the letters was limited in time and D3 had not complied with one of the directions made by the Master case managing the case, without showing good reason for not doing so. More importantly, D3's evidence at the trial had been generally unsatisfactory.

Thus, D3`s costs should be assessed on the standard basis.

As to who should pay those costs, both D1 and/or D2 should share the responsibility for the payment of D3`s costs since both actively argued at trial that D3 was liable. However, although the apportionment of liability between D1 and D2 in respect of claimant`s claim was that D1 should bear 65% of liability, such was too high given that D2, and not D1, brought contribution proceedings against D3 which led to the claimant amending her pleadings to join D3 as a defendant and to D1 making a claim against D3.

Moreover, at the trial any reasonable observer would have believed that the major issue in the case was between D2 and D3 as to whether D3 was liable although both D1 and D2 jointly pursued a finding of liability against D3. Although regard was to be had to an offer by D2 to compromise its liability for one third when the judgment provided that D2 was liable to the extent of 35%, it carried little, if any, weight.

It was equitable and just that on the facts of this case D2 should bear a higher percentage of D3`s costs than D1. D3`s costs were to be paid by D1 and D2 in the proportions of 40% and 60% respectively.

The claimant was represented by Barr Ellison LLP

The first defendant was represented by Kennedys

The second defendant was represented by DAC Beachcroft

The third defendant was represented by Clyde & Co.

Comment

Although it achieved only partial success, this judgment illustrates the potential value of a Calderbank offer, in circumstances where a Part 36 offer was not possible.

Useful links:

Hankin v Barrington and others (2020) EWHC 1131 (QB)

Jagger v Holland and others (2020) EWHC 1197 (QB)