

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2021] EDIN 66

PIC-PN2445-20

JUDGMENT OF SHERIFF JOHN K MUNDY

in the cause

ALEX WATSON

Pursuer

against

AXA INSURANCE PLC

Defender

Pursuer: O'Brien QC
Defender: Cowan, Advocate

Edinburgh, 26 October 2021

The sheriff, having resumed consideration of the cause, allow a proof of the parties' respective averments on dates to be afterwards fixed; finds the defender liable to the pursuer in the expenses of an incidental to the diet of debate on 24 August 2021; allows an account thereof to be given in and, when lodged, remits to the auditor of court to tax and report; sanctions the cause as suitable for the employment of senior counsel.

NOTE

Introduction

[1] This is an action for personal injury arising out of a road traffic accident said to have occurred on 5 December 2017. It is averred on behalf of the pursuer that whilst driving his

motor vehicle on the A737 (in Scotland) he was involved in a collision with a motor vehicle being driven by the defender's insured as a result of which he sustained loss, injury and damage.

[2] The defender is an insurance company and is sued on reliance of regulation 3 of the European Communities (Rights against Insurers) Regulations 2002 ("the Regulations"). At the time of the accident the pursuer was resident in Scotland, but prior to the present proceedings being raised he moved to New Zealand where he presently resides. I note that the action was warranted on 12 November 2020 and served on 16 November 2020, shortly before the expiry of the triennium. After sundry procedure, the cause was appointed to a diet of debate following the record being received and this ultimately took place before me on 24 August 2021. The debate was fixed by agreement of the parties' in terms of the interlocutor of the court dated 20 July 2021 and subsequently both sides lodged a Note of Argument. The point to be argued at debate was that of the defender who sought dismissal of the action, the pursuer on the other hand seeking a proof of the parties' respective averments.

[3] The issue at debate stemmed from the pursuer's residence at the time the action was raised and the question was whether the Regulations applied in this case to allow a direct action against the insurers. The Regulations confer that right on an "entitled party" being a person who is a resident of a Member State of the European Union (which since Brexit has been amended to "Member State, The United Kingdom or Gibraltar"). It seemed to be accepted on both sides that at the time of the accident the pursuer was an "entitled party". The issue between the parties' was whether his change of residence from Scotland to New Zealand prior to the raising of this action deprived him of that status and therefore his right to raise an action directly against the insurers in terms of the Regulations. It was argued on

behalf of the pursuer that the test of residence fell to be applied as at the date of the accident. On the other hand, it was argued on behalf of the defender that the test of residence fell to be applied at the date proceedings were raised.

[4] At the debate, the pursuer was represented by Mr O'Brien, QC and the defender by Mr Cowan, Advocate.

Statutory Background

[5] Prior to referring to the submissions in a little more detail it is useful at this stage to set out the relevant statutory provisions, as follows:

Interpretation

2.—(1) In these Regulations—

...

“accident” means an accident on a road or other public place in the United Kingdom caused by, or arising out of, the use of any insured vehicle;

“entitled party” means any person who is—

(a) a resident of a Member State; or

(b) a resident of any other State which is a Contracting Party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 and the Protocol adjusting the Agreement signed at Brussels on 17th March 1993;

“insured person” means a person insured under a policy of insurance satisfying the conditions set out in paragraph (3) of this regulation;

“vehicle” means any motor vehicle intended for travel on land and propelled by mechanical power, but not running on rails, and any trailer whether or not coupled,

which is normally based (within the meaning of paragraph (2) of this regulation) in the United Kingdom.

(2) The territory in which a vehicle is normally based is —

(a) the territory of the State of which the vehicle bears a registration plate; or

(b) in cases where no registration is required for the type of vehicle, but the vehicle bears an insurance plate or a distinguishing sign analogous to a registration plate, the territory of the State in which the insurance plate or the sign is issued; or

(c) in cases where neither registration plate nor insurance plate nor distinguishing sign is required for the type of vehicle, the territory of the State in which the keeper of the vehicle is permanently resident.

(3) For the purposes of these Regulations, a vehicle is insured if there is in force in relation to the use of that vehicle on a road or other public place in the United Kingdom by the insured person a policy of insurance (including a covering note) which fulfils the requirements of section 145 of the 1988 Act or article 92 of the 1981 Order.

Right of action

3. — (1) Paragraph (2) of this regulation applies where an entitled party has a cause of action against an insured person in tort or (as the case may be) delict, and that cause of action arises out of an accident.

(2) Where this paragraph applies, the entitled party may, without prejudice to his right to issue proceedings against the insured person, issue proceedings against the insurer which issued the policy of insurance relating to the insured vehicle, and that

insurer shall be directly liable to the entitled party to the extent that he is liable to the insured person.

[6] These were the provisions at the time of the accident. As indicated, there was, following Brexit, an amendment to the definition of “entitled party” to add “the United Kingdom or Gibraltar” after “Member State” (SI 2020/945, reg. 3) but nothing turns on that as the UK was previously covered by “Member State”.

[7] Further, it was accepted that the Regulations continued to have effect as being made under the European Communities Act 1972 (section 2(2)) and as such being “EU-derived domestic legislation” for the purposes of the European Union (Withdrawal) Act 2018, and continued to be interpreted in light of relevant principles of EU law (sections 2 and 6 of the 2018 Act).

[8] The Regulations were intended to implement and give effect to Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 (“the Directive”). As such, it was a matter of agreement that the Regulations were to be construed in such a way as to conform with and to achieve the results intended by the Directive – a purposive construction (*Litster v Forth Dry Dock and Engineering Co Ltd* 1989 SC (HL) 96, per Lord Oliver of Aylmerton at page 104/5; and *Marleasing SA v LA Comercial Internacional De Alimentación* [1992] 1 CMLR 305).

[9] The Directive contains *inter alia* the following provisions:

Article 1

Scope

1. The objective of this Directive is to lay down special provisions applicable to injured parties entitled to compensation in respect of any loss or injury resulting from accidents occurring in a Member State other than the Member State of residence

of the injured party which are caused by the use of vehicles insured and normally based in a Member State....

Article 3

Direct right of action

Each Member State shall ensure that injured parties referred to in Article 1 in accidents within the meaning of that provision enjoy a direct right of action against the insurance undertaking covering the responsible person against civil liability.

[10] The Regulations go further than the Directive by extending the right of action against insurers to UK residents.

Submissions

[11] On behalf of the defender, it was accepted that at the time of the accident the pursuer was by virtue of regulation 3(1) an "entitled party" and had a cause of action against an insured person in delict. However, the term "entitled party" also appeared in regulation 3(2), which provides that an "entitled party" may "issue proceedings against the insurer". At the time the proceedings were issued in this case, the pursuer was resident in New Zealand. It followed that he was no longer an "entitled party" in terms of regulation 2 and therefore had no direct right of action against the defender in this case. It would have been possible for the Regulations to specifically state that a right to bring proceedings against the insurer was conferred at the same time as the cause of action against the insured. However, that is not what regulation 3 said. It was submitted that the wording of regulation 3 was entirely consistent with any direct right of action only being acquired at the time the proceedings are raised. Regulation 3(2) refers to the "right" to issue proceedings against the

insured person and this contrasted with the option to issue proceedings against the insurer. The provision did not require a right to be conferred at the time of the accident. Counsel submitted that another way of looking at matters was to consider the position of an injured person who was not a resident of the UK or a Member State at the time of the accident, but who became such a resident by the time proceedings were issued. On the pursuer's approach, the regulations would not apply to that person. However, it would be illogical if the regulations applied to persons who had long since ceased to be residents of the UK or EU, but did not apply to persons who were such residents at the time proceedings were raised. That was after all the time at which the ability to issue proceedings against the insurer was of practical benefit. Further, it was submitted that if the regulations were intended to extend to former UK or EU residents the definition of "entitled party" could have been "any person who is, or was at the time of the accident, a resident of a Member State, United Kingdom or Gibraltar". However, that is not how the definition is worded. The wording required consideration of the person's residence at the time the definition is being applied in terms of regulation 3(2) that is at the time proceedings are raised. Accordingly, it was submitted that if a purposive interpretation was adopted, regulation 3(2) only applied if the injured party fell in the definition of "entitled party" at the time proceedings were raised.

[12] On behalf of the pursuer, it was submitted that regulation 3 gives the "entitled party" the right to issue proceedings against the insurer and imposes a direct liability on the insurer. That right and liability came into existence at the time of the accident. It was submitted that it was not a natural reading of the regulations to suggest that they ceased to apply if the pursuer ceased to be a resident of the UK/EU/EEA. On the defenders interpretation the pursuer was an "entitled person" at the date of the accident but had since

ceased to be so. Logically, on the defenders interpretation, the reverse would also apply: a third country resident who was injured in a road traffic accident while on holiday in the UK would be able to bring a claim under regulation 3 so long as he became a UK resident within the limitation period. It was submitted that this was an inherently unlikely interpretation and would result in parties' gaining or losing rights of action depending on events which may take place years after the accident and which were likely to be wholly unrelated to the accident. Such a rule would be arbitrary and illogical. It made sense to have a rule, which allowed people to travel throughout Europe knowing that, in the event of an accident, they would be able to bring proceedings against the other driver's insurer. Conversely, there was no good reason of logic or policy for a rule which would penalise victims for moving abroad for work or study or give a windfall to a third country national coming the other way.

Under that rule, liability would turn on events with no logical connection to the accident, taking place years after the fact. It was submitted that the result was all the more improbable when one considered the other aspects of the tests set out in the regulations.

The right of direct action arose in the case of an "accident" defined as an accident arising from the use of an "insured vehicle". An "insured vehicle" is one which is based at the UK and which has a compulsory policy of insurance in place. These tests must be applied at the date of the accident. Further, regulation 3(2) only makes the insurer liable "to the extent that he is liable to the insured party". Thus, the claim will be brought against the party who was the insurer at the time of the accident. It would be anomalous if the residence of the injured party was the only issue that fell to be determined at the date of raising proceedings. It was submitted that the Directive supported this interpretation, the object being to make it easier for residents of one member state to pursue claims if they were injured while visiting another member state. Reference was made to the terms of the Recitals of the Directive

describing the problem in terms related to the residence of an injured party at the time of the accident. Further, Articles 1 and 3 of the Directive supported this interpretation and employed a residence test simply for the purpose of identifying the category of accidents in which a direct right of action would arise. Therefore, the residence test was to be applied at the date of the accident. Nothing in the Directive suggested that it was to be applied at any later date. It was pointed out that in fact the regulations go further than the Directive required by extending the direct right of action to UK residents as well as to visiting European residents, but that provided no basis for applying a residence test at a different point in time. On the defenders interpretation, an Irish National who was injured in a road traffic accident while on holiday in Scotland, but who then moved to the USA for work or study would lose his right to direct action. Nothing in the Directive suggested that that was its intention and indeed such an interpretation would be disconform to the Directive. It was submitted therefore that, properly construed, the Directive and the Regulations were concerned with the residence of the injured party at the date of the accident. The pursuer averred that he was resident in Scotland at the time of the accident and so a proof should be allowed.

[13] It was indicated by counsel on both sides that no previous reported decision on the issue arising had been found. It was agreed that expenses should follow success. In relation to expenses, Mr O'Brien moved to a sanction for the employment of senior counsel or at least junior counsel given the novelty and importance of the matter.

Discussion

[14] This case involves a fairly short point of interpretation.

[15] It is clear that the Regulations do not state in terms whether an injured party requires to be resident as defined in regulation 2(1)(a) at the time of raising proceedings in order to avail himself of the remedy of direct action against the insurers in terms of regulation 3(2). Hence the debate on the issue. Adopting a purposive approach to construction, as I am required to do (*Litster and Marleasing SA supra*), I find myself preferring the submissions made on behalf of the pursuer on this matter. The purposive approach requires consideration of the Directive as well as the terms of the Regulations themselves.

[16] It is clear, and this was accepted on both sides, that the pursuer was an “entitled party” with a cause of action against an insured person at the time of the accident and that the cause of action arose out of the accident. That satisfies the requirement of regulation 3(1) of the Regulations and therefore regulation 3(2) expressly applies. That provision entitles the party to raise proceedings against insurers of the insured person. The right is conferred where the entitled party has a cause of action, which in most cases will arise at the time of an accident. It did in this case. In this case, therefore the right of action against the insurers emerged at the time of the accident. There is nothing in the provisions of the Regulations, which would suggest that the right, having been acquired, can be lost. I am not persuaded that there is anything in the distinction between the expression of a “right” in relation to proceedings against the insured person that word not appearing when describing the issue of proceedings against the insurers. It is clearly a right to issue direct proceedings against the insurers and indeed the Directive speaks of a “direct right of action against the insurance undertaking” (Article 3). I think it is perfectly clear from the terms of the Regulations themselves that the right emerges at the same time as the cause of action and is consistent with the definitions of “accident”, “insured person”, and “vehicle”, all of which relate to the

time of the accident. The fact that there is no specific reference to the entitlement arising from the date of the accident may well be because the matter is quite clear and obvious.

[17] Accordingly, as a matter of simple interpretation of the Regulations it is quite clear that residence for the purpose of defining an “entitled party” is to be determined at the date of the accident.

[18] I agree with the submissions on behalf of the pursuer that the terms of the Directive are supportive of this construction, focusing on where an accident took place and seeking to define residence simply for the purpose of identifying the category of accidents from which a direct right of action would arise, indicating that the residence test is to be applied at the date of the accident. The direct right of action conferred by Article 3 is given to “injured parties entitled to compensation in respect of any loss or injury resulting from accidents occurring in a Member State” (Article 1). There is nothing to suggest that that right is lost because of a subsequent change of residency. Rather the right is dependent on the entitlement to compensation arising from an accident. There is no suggestion that the right is dependent on residence at the time proceedings are raised.

[19] I agree with counsel for the pursuer’s submission that the defenders construction would lead to absurd results, an injured party gaining or losing a right of direct action because of a change of residence following the accident giving rise to the cause of action.

Decision

[20] Accordingly, I have acceded to the pursuer’s motion for a proof of the parties’ averments and rejected the defender’s motion for dismissal.

[21] In relation to expenses, as agreed, expenses follow success.

[22] As regards sanction for senior counsel, I understand that the point raised was said to be novel and had not been decided before. The reason for that I leave as an open question. Counsel was employed on both sides and there was significant agreement on the law in an area which is not straightforward, the submissions being focussed and helpful. I have concluded, given that, and the importance of the case to the client, that sanction for senior counsel can be granted.

[23] I have pronounced an interlocutor which reflects the foregoing.