

A regular review of legal developments in the world of property and casualty insurance claims July 2009

CREDIT HIRE - OFFER OF ALTERNATIVE CAR

Copley v Lawn & Maden v Haller - 2009 (CA)

Both of the claimants had entered into credit hire agreements after their cars had been damaged in road traffic accidents where liability was not an issue. Both had been offered alternative hire cars by the defendants; Mrs Copley in a telephone call from the defendant's insurance company followed by a written offer after she had already started the credit hire and Captain Maden received the offer letter before his hire commenced. Both claims for hire had been dismissed at first instance and on appeal for the failure to mitigate their losses by accepting the defendants' offers so that the claimants had recovered nothing at all in respect of their hire claims.

The Court of Appeal took the view that it was effectively the tortfeasor who was making the offer and that the telephone offer was a "cold call" to an innocent claimant and was, therefore, inappropriate and such telephone calls should cease immediately. Furthermore, the letter explaining the consequences of the claimants' failure to accept the offer had a threatening tone and did not provide the cost to the insurer of providing the hire car to enable the claimant to take advice as to whether or not he should accept it. The defendant is already protected by the decision in *Dimond v Lovell* (2002) that the claimant can only recover the market rate for hire and that the court should not become embroiled in complicated mitigation arguments. The claimants could not be said to have acted unreasonably and they should recover the full cost of their hire claims. Even in circumstances where a claimant did act unreasonably in failing to accept the offer of a cheaper hire car the claimant should still be entitled to recover the cost that the insurer would have incurred in providing it. In that respect there was no difference between a cash offer for a past loss and an offer in kind or of restitution for a prospective loss.

Comment

This decision makes it very difficult for insurers to effectively communicate an offer of an alternative hire car to a claimant in that it prohibits telephone offers and places restrictions on the use of written offers. They must contain the hire rate for the claimant's car at a time when the insurer may have limited information about the claimant and his car yet urgently needs to get the offer to the claimant, preferably before he commences credit hire. Even if an effective written offer is possible the claimant is entitled to send it to his solicitors for advice who can simply ignore it, on the basis that the Court of Appeal didn't criticise Mrs Copley or her solicitors for doing exactly that.

LONDON LOCAL AUTHORITIES MUTUAL INSURANCE

Brent LBC v Risk Management Partners Ltd & (1) London Authorities Mutual Ltd (2) Harrow LBC (interested parties) - 2009 (CA)

A group of local authorities in London decided to establish a mutual insurance company with a view to reducing their insurance premiums and improving their risk management. The respondent (RMP) had been invited to submit a tender for the Appellant's insurance cover but had later been informed that the tender process had been abandoned in order to award the insurance to the Mutual (LAML). RMP challenged the Local Authority's power to enter into contracts of insurance with LAML and sought damages for breach of the Public Contracts Regulations 2006. The Court of Appeal held that whilst the Local Government Act 2000 gave local authorities the power to take steps to promote or improve the "well-being" of its area, which might include the setting up of a company, this did not extend to participation in an insurance company with a view to seeking cheaper insurance premiums. This participation would involve giving guarantees to the company and assuming what could be very substantial liabilities to other local authorities and that could not fall within the "well-being" power. It was not merely making an arrangement with other local authorities, it was insuring them. Participation in the Mutual was not within the Local Authority's powers under either the 2000 Act or the 1972 Act and it was liable in damages to RMP.

DAMAGES - PUBLIC POLICY

Gray v Thames Trains - 2009 (HL)

This case arose out of the Ladbroke Grove train crash in which the claimant was a passenger on board one of the trains. He sustained only minor physical injuries but the experience led to post traumatic stress disorder, a personality disorder and he became anxious and socially withdrawn. At the same time as he was undergoing treatment and taking medication for these disorders he stabbed to death a pedestrian who had stepped out in front of his car. Upon conviction for manslaughter on the grounds of diminished responsibility he was committed to a secure hospital and later included in his civil claim for the rail crash damages for the consequences of his manslaughter conviction on the grounds that but for his injuries he would not have committed the crime. The Court of Appeal held that he was not entitled to general or special damages arising from the killing and the subsequent conviction in accordance with *Clunis v Camden & Islington HA* (1998)

but this did not extinguish his loss of earnings claim from continuing after his conviction. Whilst it was accepted that his earning capacity would still have been affected by his injuries the House of Lords decided that the narrow rule in “Clunis” applied and it would be against public policy as part of the principle of *ex turpi causa* to compensate for those lost earnings just as it would be wrong to compensate him for any claim brought against him by the relatives of the dead pedestrian because they all arose as a result of the intentional act of manslaughter.

LIABILITY OF POLICE DRIVER FOR FAILURE TO USE SIREN

Armsden (Exor of the Estate of R Cheesewright dec'd) v Kent Police – 2009 (CA)

The police driver had been driving his police car to an emergency call and displaying the blue warning light but not the siren. He approached a “T” junction at which the deceased was waiting to emerge and turn right in the direction of the approaching police car. The Judge found that the police driver was liable for negligently failing to use the siren, in travelling too fast round the bend and in assuming that the deceased had seen him.

The Court of Appeal found that the deceased’s car had been stationary when first seen by the police driver and that she had probably looked right then left but had failed to look right again before pulling out. Had she done so she would have seen the police car approaching and could have allowed it to pass before pulling out. In that respect she had been negligent. However, had the siren been sounding she would have heard it as she was only about 100 metres from the bend. The police car should have been sounding its siren in addition to the blue light and the fact that it wasn’t doing so made the speed at which it was travelling both excessive and unsafe, thereby exacerbating the danger that a car might enter the junction. In the circumstances the deceased had been 60% to blame for the accident and the police driver 40% to blame.

NEGLIGENCE - ACT OF SCHOOL PUPIL

Shaaira Alexis v Newham London Borough Council – 2009 (QBD)

The claimant, a former teacher, brought an action against her employers for physical and psychological injuries sustained when she drank from her water bottle which had been contaminated with white board cleaning fluid by a pupil. The claimant had been away from school for the day when access to the locked classroom had been allowed by another teacher for three pupils to obtain their study materials. One of the pupils had poured the cleaning fluid into the water bottle out of a sense of mischief and in ignorance of the serious consequences. The school had a policy of locking unoccupied classrooms but it was not unreasonable to allow pupils access to retrieve study materials. The mischief was of a type that could not be regarded as unforeseeable and the duty of the Local Authority to the teacher was that of a reasonable employer to take such precautions as was reasonable to prevent or minimise the risk of injury. However, it was reasonable to allow the pupils to have the key in order to gain access to the classroom as there had been no previous incidents of malicious behaviour and none of the other teachers had any reason to suspect that the pupil would behave as she did.

DISCLOSURE OF ATE POLICY

Barr & ors v Biffa Waste Services Ltd & ors - 2009 (HC)

The claimants were landlords of 140 properties who made claims against the defendants for nuisance. These claims were funded by an ATE insurance policy which was confirmed to the defendant in writing and referred to in a witness statement to support an application for a Group Litigation Order. The claimants refused a request for disclosure of the policy by the defendant on the grounds that it was privileged and not relevant to an issue in dispute. The defendant referred to CPR rule 31.14 which states that a party may inspect a document mentioned in, inter alia, a statement of case and a witness statement. The court held that the policy should be disclosed to enable the defendant to be aware of the policy limitations and exclusions, particularly as this was a collective action. The document was relevant because it was referred to as a factor in support of the Group Litigation Order and the insurance had been effected for the sole purpose of allowing the action to proceed.

EFFECT OF FRAUDULENT INVOICE ON INSURANCE CLAIM

Direct Line Insurance Plc v Kenneth Fox - 2009 (HC)

A buildings insurance policy issued to the owner contained an express clause voiding the policy in the event of a fraudulent claim. The house was damaged by fire and the claim was settled on the basis of a written compromise agreement at £46,524.50 of which the final £4,112.50 was payable upon the submission of a contractor’s VAT invoice. The policy holder submitted a fraudulent invoice and the insurer sought to void the policy and recover the sums already paid by virtue of the express clause in the policy. The Insured argued that the compromise agreement relating to the VAT invoice was completely separate from the policy and the only condition in that agreement was in relation to the payment of the VAT. The court agreed with the policyholder that the compromise agreement was separate from the policy of insurance and governed the submission of the VAT invoice. In those circumstances the insurer was unable to rely on the policy clause and could not recover the monies already paid.

Comment

Insurers should be careful not to create a separate legally binding agreement when negotiating settlement of a claim which makes any terms and conditions in the policy inapplicable.

EUROPEAN MOTOR INSURANCE DIRECTIVE

B Wilkinson v K Fitzgerald and Churchill Insurance Company Ltd - 2009 (QBD)

The claimant’s parents had bought him a car and insured it with Churchill in the mother’s name with the claimant as a named driver. The claimant allowed a friend to drive the car who he knew had been drinking and was not insured to drive it and was seriously injured when his friend crashed the car. He brought a claim against the driver and the insurers who accepted that they were liable to meet the personal injury claim under section 155 of the Road Traffic Act 1988. However, Churchill argued that they were entitled to recover the cost of the claim settlement from the claimant and that the claim failed for circuity of action.

The court held that there was a difference between the obligation to settle the judgement and the right to recover the amount paid out and that the intention of the

Directive to ensure compensation of injured passengers would be defeated if the right to recovery was allowed. Therefore, no right of recovery in these circumstances was permissible.

EFFECT OF FRAUD ON GENUINE CLAIMS

Shah v Ul-Haq, Khatoon and Parveen - 2009 (EWCA)

Mr and Mrs Ul-Haq were injured when their car was hit in the rear by the defendant's car. Liability for the accident was not in dispute but it was alleged that Mrs Ul-Haq's mother had also been in the car and her claim was supported by the claimants. The court found that Mrs Khatoon had not been in the car at the time of the collision and her claim was struck out but the defendant argued that the claimants' genuine claims should also be struck out in view of their connivance with the fraudulent claim. The Court of Appeal decided that there was no authority to deprive a claimant of a genuine claim in circumstances where he had lied to exaggerate his own claim or to support the fraudulent claim of another. However, the claimants were ordered to pay two thirds of the defendant's costs which resulted in a net payment to the defendant.

Comment

In this case the claimants were still able to prove their own claims to the satisfaction of the court despite the court seeing through the attempted fraud. In those circumstances the penalty would be in costs rather than in striking out what had been proved to be genuine claims.

MOTOR FRAUD - LIABILITY OF ACCIDENT MANAGEMENT COMPANY

Farrell & Short v Birmingham City Council and Direct Accident Management Services Ltd - 2009 (CA)

The claimants alleged that they had been involved in an accident with the defendant's bin lorry. Their car was a write-off and they entered into a credit hire arrangement the same day with Direct Accident Management Services Ltd (DAMS) who instructed solicitors to recover the cost of the hire, the pre-accident value of the vehicle and minor personal injury damages from the defendant. After paying the write-off value of the car the defendant uncovered information that the claim was entirely false and that there had been no accident at all. Just before the trial the claims were discontinued and a costs order was made in favour of the defendant. The ATE insurers refused to pay the defendant's costs, who then made an application for DAMS, a non-party, to pay their costs instead. The Judge held DAMS liable to pay 80% of the defendant's costs because they had been the instigators and potential beneficiaries of the litigation and had controlled and funded it by referring it to their regular solicitors who they knew acted on a CFA. This decision was upheld by the Court of Appeal who accepted that the defendant was not obliged to pursue either the solicitors or the ATE insurers as DAMS had the opportunity to bring them in to the proceedings.

List of abbreviations used:

CC	County Court
HC	High Court
QBD	Queen's Bench Division of the High Court
Ch D	Chancery Division of the High Court
CA	Court of Appeal
HL	House of Lords
SCCO	Supreme Court Costs Office
ECJ	European Court of Justice
TCC	Technology and Construction Court

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