Case Report:

CASE NUMBER: CL-2016/000639

High Court of Justice, Commercial and Admiralty Court.

27.10.2017

Before Mr Justice Bryan

Charlie Lewington v MIB

Note of Judgment

Facts: The Claimant was driving along the A120 on 23 February 2012 at night in her car when she came upon 2 large Bell B30D earthmovers driving slowly with no rear lights. She saw the dark shape, swerved to avoid it, lost control, went off the road and was seriously injured. The drivers of the earthmovers ran off and the police discovered the vehicles had been stolen from a nearby quarry. The drivers had created the danger and were negligent.

Untraced Drivers Agreement 2003 application

In September 2013 the Claimant applied to the MIB for compensation under the Untraced Drivers Agreement 2003. The MIB had a duty to investigate the accident at their own cost and after a "full investigation" rejected the application on the basis that the earthmover was not a "motor vehicle" within S.185 of the Road Traffic Act 1988 so did not have to be insured when driven on roads.

Appeal by Arbitration

The Claimant appealed and Richard Methuen QC was appointed as arbitrator. He made a preliminary ruling that the *Marleasing* principle of interpretation did not apply to the interpretation of the relevant provisions and that the earthmover was not a "motor vehicle" because its main function was as an off road vehicle and it was not "intended or adapted for use on roads". The Claimant requested full hearing and after hearing expert evidence on the Bell B30D the arbitrator once again ruled against the Claimant. In his final award he found the following facts: the Bell had a driver cab, a speedometer, a windscreen, a steering wheel, a top speed of 33 mph, 6 rubber tyres on 6 wheels, front lights and gears. He found that similar Bell earthmovers were used on roads to drive between quarries in Cornwall and the Bell B30D was offered for hire DVLA registered by various hire agencies. He found that the Bell B30D might have been capable of being designated as a Special Vehicle under the 2003 Special Vehicle Regulations so that it could be driven to and from repairs and maintenance garages and to and from work sites.

On the law the arbitrator considered the scope of Art 1.1 of EC Directive 2009/103 which required insurance for all vehicles with engines used on land and ruled that he could not reconcile that with the scope of S.185 of the RTA which defined motor vehicles as ones "intended or adapted for use on roads". He considered the English law and the test laid down by Lord Parker CJ *Burns v Currell* [1963] and ruled that the test was: what a reasonable man would say about the main use or a subsidiary general use of the vehicle but excluding isolated or emergency use. He accepted that the rule in *Marleasing* applied but held that the main use of the Bell B30D was off road and that a reasonable man would not take into account illegal use on roads so the earthmover was not a motor vehicle.

Appeal to the High Court

The Claimant appealed under S.69 of the Arbitration Act 1996 on the law asserting that the arbitrator applied the wrong test, failed to apply a purposive interpretation of the RTA 1988 and failed to apply the purpose and intention of the EC Directive which was to provide blanket insurance cover for motorised vehicles on land and to protect injured victims from uninsured losses without derogations created by any Members States.

Bryan J held: allowing the appeal, that the earthmover was a motor vehicle because the reasonable man test was to be interpreted widely so as to cover vehicles where "one of the uses might be on a road" whether that use was legal or illegal. Reviewing the Directive and *Marleasing c-106/89* he ruled that the arbitrator was bound to apply a purposive interpretation but had failed to do so. Reviewing the cases: *Vodaphone 2 [2009] Court of Appeal civ* and *Churchill v Wilkinson* [2012] EWCA civ 1166; he ruled that the arbitrator had wide power to interpret the RTA 1988 purposively in line with the EC Directive which included the ability to imply words into the Act and to change the literal meaning of words.

Reviewing the EC case law including *Ruiz Bernaldez C-129/94; Caondolin C-587/03; Farrell v Whitty C-356/05; McCraken v Smith & BIM [2013] EWHC 3620; Delaney [2014] EWHC 264 and VNUK C-162/13* the Judge ruled that the ECJ had time and time again refused to let Member States created new derogations from the blanket obligation to insure vehicles used on land unless the derogation was specifically set out in the Directive. There was no derogation allowed based on the type of vehicle (save for those on a list created by the government and sent to the commission).

Reviewing the English case law the judge held that the test in *Burns v Currell* was flexible enough to be interpreted in accordance with the EC Directive. The reasonable man test had to be applied widely when considering "one of the foreseeable uses being on a road" and that the reasonable man would take into account what criminals would do and would take into account legal and illegal use. Overturning the arbitrators decision the judge ruled that the Bell B30D was a motor vehicle, had to be insured and the MIB were liable.

Comment:

For decades the MIB have been denying and rejecting claims by innocent victims run down or injured by drivers of "off road vehicles" on the fallacious basis that such vehicles do not

need insurance when being driven on public roads. The judgment of Bryan J makes it clear that *off road vehicles* do need insurance when being driven on roads or in other public places.

After 5 years and 8 months of denial by the MIB Ms Lewington has finally been granted justice. The transcript will be made available when it is provided.

Andrew Ritchie QC, 9 Gough Square, London, for the Claimant

Instructed by Slater and Gordon, Manchester.