



Neutral Citation Number: [2020] EWHC 1207 (QB)

Case No: CL – 2019 – 000157

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2020

Before :

MRS JUSTICE FOSTER DBE

Between :

AXA INSURANCE UK LTD	<u>Claimant</u>
- and -	
EUI LTD (T/A ELEPHANT INSURANCE)	<u>Defendant</u>

Tim Horlock QC (instructed by **Clyde and Co**) for the **Claimant**
Howard Palmer QC (instructed by **Horwich Farrelly**) for the **Defendant**

Hearing dates: 6 December 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Thursday 14th May 2020 at 2pm.

MRS JUSTICE FOSTER :

INTRODUCTION

1. On 29 May 2016, near Wolverhampton, a man I shall refer to as Mr X, driving a Vauxhall Astra motor car, was in a collision with another man, Mr Y who was driving a Ford Ka. Mr Y was injured. The Vauxhall Astra was insured by the Claimant, Axa Insurance (“AXA”); it was a courtesy car owned by the DP Garage who had loaned it to Mr X whilst they repaired his own car, which was insured by the Defendants, EUI Ltd (trading as Elephant Insurance) (“Elephant”).
2. This is a claim under Part 8 by AXA, insurers of the DP Garage against Elephant for a declaration that AXA and Elephant are equally liable to indemnify Mr X in respect of the very severe injuries sustained by Mr Y in the road accident of 29 May 2016.
3. This judgment describes the relevant events without revealing precise details of the protagonists or location, since the liability issues in the case are live and the potential claimant, Mr Y, is under a disability.
4. Mr X usually drove a Ford Focus which he insured under a policy of motor insurance with Elephant (“the Elephant Policy”). DP had insured the Astra with AXA under a policy of motor insurance (“the AXA Policy”). Under the terms of the AXA policy, AXA provided customers of DP with an indemnity where, like Mr X, they were driving a courtesy car such as the Astra.
5. Whether Mr X was dual insured for the trip is dependent upon the resolution of two issues:
 - i) was the use to which Mr X put the Vauxhall Astra at the time of the accident within the terms of his insurance policy with Elephant?
 - ii) was the Vauxhall Astra properly to be described as a “private motor vehicle” under the terms of that policy?
6. If the answer to either one of those questions is “no”, then Elephant have no liability for the accident, it will be borne as to 100% by AXA. Both AXA’s policy, and Elephant’s policy contain dual insurance and other clauses the combined effect of which is that the indemnification of any liability of Mr X falls to be shared equally.

THE ACCIDENT

7. Mr X gave details of the circumstances of the accident. He described it in a statement to the police not long after, and also in a subsequent conversation with AXA. Further details were given by written statement in 2018. His descriptions were, in material particulars, entirely consistent. On the night before the accident he had been working as a security guard at a hotel in Birmingham. The new manager of the hotel was his boss at a different location. Mr X had worked at the hotel on one previous occasion, but it was not his usual place of work and he was doing his boss a favour by working at the Birmingham hotel for a couple of nights. Mr X’s evidence is that on the morning in question, after the night shift, on his way home, he was going to divert to pick up a

friend of his from the local coach station and give him a lift back to Wolverhampton, which was nearby and was where they both lived.

8. Concerning the accident, Mr X said he was coming down the road, was getting to a junction when a car came from his left hand side very quickly, he had no time to react and the other car, driven by Mr Y, collided with him.
9. Mr X explained that the car he was driving had been provided by the garage who had told him he was insured to drive it. They gave it to him because his own car was delayed whilst being repaired. Elephant note that Mr X made no claim on Elephant relating to the collision, indeed he did not notify them of it. They were first notified of the collision by AXA, on 7 October 2016. They also observe that Mr X reported back to DP Garage the morning after the accident and was told that someone from the insurance company (i.e. AXA) would get in touch with him.
10. AXA explain that when Mr X described the circumstances to them in November 2016, he described the Astra as a “hire car”.

THE DOCUMENTS

11. The following are the central portions of the respective Policy documents from Elephant and from AXA. In setting out the extracts from the policies, the emphasis has been added.

Elephant

12. Mr X’s Policy with Elephant provided under “Section 4: Liability to other people” at section 1a as follows:

1a. Driving your car

You will be covered for everything you are legally responsible to pay due to an accident in your car and:

- someone else is killed or injured
- someone else’s property is damaged – motor third party property damage losses for private cars is limited to £20,000,000 per occurrence per policy

This cover also applies to an accident involving a trailer, caravan or broken-down car you may be towing (as long as you hold the correct driving licence entitlement to do so).

“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. Your current Certificate of Motor Insurance will say if you have this cover.

You will be covered for everything listed in clause 1a when you are driving any other car as long as:

- your current Certificate of Motor Insurance says so
- you hold a valid Driving Licence and are not disqualified
- **the other car is not owned by you, a rental car, nor hired to you under a hire purchase or leasing agreement**
- **you have the owner's permission to drive the car**
- there is a valid insurance policy in force for that car
- you are not covered by any other insurance to drive it
- you still have your car and it has not been damaged beyond repair, stolen nor sold"

...

13. The Certificate of Motor Insurance provided relevantly as follows:

"6. Limitations as to use: Use for social, domestic and pleasure purposes only.

"The Policyholder may also drive **with the consent of the owner a private motor car not belonging to him/her and not hired to him/her under a Hire Purchase Agreement** within our territorial limits, providing there is a valid insurance policy in force for that car....

The **Policy does not cover:**

Use for merchandise delivery, **renting out, peer-to-peer hire schemes or use for hire and reward including but not limited to taxiing and chauffeuring whether licensed or unlicensed.**"

14. Consistently with this, the Motor Policy Schedule shows that the permitted use in the Elephant Policy was **"for social, domestic and pleasure purposes only."**

15. The Definition section provides relevantly:

"Private motor car [means] "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"

AXA

16. The AXA Policy under which DP and his garage business was insured is described as "Commercial Insurance Road Risk Cover". The Certificate of Motor Insurance describes the insured vehicles as

"any motor vehicle the property of the Policyholder or in the custody or control of the Policyholder in connection with the Business."

The Certificate continues:

"5. Persons or Classes of Person entitled to drive

a) The Policyholder if a named person or any partner or director of the Policyholder

...

d) Any person driving on the Policyholder's order or with his permission

e) Any person driving on the Policyholder's order or with his permission whose vehicle is in the custody or control of the Policyholder for servicing or repair

...

"6. Limitations as to use

a) Use for motor trade purposes including the carriage of goods by any person named in 5 (a) and 5 (b) above

b) Use for business purposes by any person named in 5 (e) above

c) Use for Social Domestic and Pleasure Purposes by any person named in 5 (c), 5 (e) and 5 (f) above

f) The Policyholder if a named person or any partner or director...

...

EXCLUDING

a) Use for the carriage of passengers or goods for hire or reward or use for motorsports..."

...

Part 2 - Third Party Liability -

1. "... **we will indemnify you against legal liability for damages ... incurred through (a) death of or bodily injury to anyone ... as a result of an accident that is caused by or in connection with the insured vehicle ...**"

2. Liability of other people driving or using your vehicle:

"We will also insure the following people on the same basis that we insure you ... (a) anyone you give permission to drive or use the insured vehicle, provided that your effective Certificate of Motor Insurance allows that person to drive."

17. There is an endorsement to the AXA policy which repeats the effect of these terms, indicating that Mr X was covered by the indemnity offered to DP Garage in respect of use by Mr X of the Astra for business or social and domestic pleasure purposes viz:

"05 – LOAN OR HIRE OF VEHICLES TO CUSTOMERS EXTENSION CLAUSE

"The indemnity provided by this Policy applies to any customer of the Policyholder in respect of the use by the customer for the customer's business or social and

domestic pleasure purposes of a vehicle which has been lent or hired ... by the Policyholder while the customer's vehicle is in the custody or control of the Policyholder for overhaul upkeep or repair."

18. Thus, under the AXA Policy, Mr X was insured both for business and social and domestic pleasure use of the Astra that had been lent to him whilst his own Ford Fiesta was in the custody of DP Garage for repair.
19. The Elephant Policy can be seen to limit cover by two apparently distinct methods: by reference to the use of the car that will be covered, and by reference to the description of the vehicle which will be covered. The incident in question will only be covered if it survives both express limitations. The contentions of the parties were therefore advanced under 2 heads:
 - i) Was Mr X using the Vauxhall Astra for a purpose which fell within the policy, namely for "Social domestic and pleasure purposes only"?
 - and
 - ii) Was he driving a "private motor car" as defined in the Elephant Policy whilst so doing?

In fact the definition of "private motor car" in the Elephant Policy requires not only that the vehicle shall be designed solely for private use, but also that it should be "privately owned" thus importing two potential limitations on cover, so there are effectively three ways in which the cover is confined.

THE CONTENTIONS OF THE PARTIES

(i) "Social domestic and pleasure purposes"

20. AXA note that both the Schedule and Certificate of Insurance of Elephant's policy expressly limit use to "Social, Domestic and Pleasure Use". They argue that the essential character of the trip on which Mr X was engaged was within the meaning of social domestic and pleasure. The trip taken from the pub to the bus station could not be described as a business trip, so must be covered as "social" or "domestic". On the basis of the authorities they say, up to the moment that Mr X's friend was to get into the car at the bus station, the journey was really a social one. It was accepted there is a fine dividing line between a business journey and a domestic one, but even though Mr X was leaving a place of work, AXA say he was engaged in a non-business trip .
21. AXA in fact dispute that Mr X was actually "working" before the accident: he was doing a favour for his boss, he was not attending his usual place of work, and at the time of the accident it was only the second time he had been to the hotel: all in all this was not travel to work. Even if it were, the only relevant explicit exclusion on the face of the Certificate is that for "business use", and AXA rely on the fact that Elephant could have chosen specifically to exclude travel to and from work, (i.e. commuting) but did not do so. AXA submit that it is clear his journey cannot be described as business use - it is more plausibly social. They refer to his recollection of what happened that day, how he passed time socialising with a member of staff for a short time before he

set off. Had he not delayed his departure in order to pick up his friend at the right time from the coach station, to take him home, he would have left the hotel sooner and, by implication, all would have been different. In any event, AXA say that travelling home is clearly a “social” purpose.

22. In any case AXA submit that “commuting” means travelling to or from your regular or usual place of work – which this was not. AXA say it is unreal to suggest, as must be implied, that it would have been necessary for Mr X to take out a commuting extension to the policy so as to be covered for the trip from the hotel to home.
23. Elephant in contrast point to the fact that Mr X was returning from what they say was, as a matter of fact, his place of work after working a night shift. The journey was clearly connected to Mr X’s work. He had been asked to stay at the hotel overnight to carry out a security function, namely preventing customers from bringing non-clients back to the hotel after a night out. The car was being used to commute between the place
24. which at the time was his place of work, and his home. In Elephant’s submission commuting cannot properly be described as “social, domestic or pleasure” use. Elephant rely upon the fact that Mr X says that he had to drive to this security job as there was no other means of transport.

Private Motor Car

25. As to the class of vehicle intended to be covered by the Elephant policy, AXA’s case is that the phrase “private motor car” does not connote a car that is owned “by an individual”. Likewise, “private” , as in “privately owned” does not mean “not commercial”, either generally or within the policy. Rather it means a vehicle provided or owned by an individual or a commercial company, as opposed to one provided or owned by the state – a distinction supported, said AXA, by the Concise Oxford English Dictionary definition.
26. It is AXA’s case that the Vauxhall Astra was a private motor car because it met the physical description in not having been adapted for commercial use, and, because it was owned by the Garage rather than a public entity. Examples of a “public vehicle” given in argument were an ambulance or a community support vehicle. Mr Tim Horlock QC on behalf of AXA asked forensically why if Elephant had intended to exclude a courtesy car from the definition of private motor car they had not done so expressly. His secondary argument was that the policy demonstrated an “utter lack of clarity” and, on a *contra proferentem* construction, his interpretation should prevail. He also relied on the proposition, supported by authority, that if an insurer wishes to exclude cover he should do so clearly: here he had not.
27. Elephant argue the phrase “private motor car” plainly excludes a courtesy car owned by a commercial garage business and lent to customers. They observe that a rental car is expressly excluded from cover under Mr X’s policy and submit that the plain intention of that wording was to exclude a courtesy car whether or not the car was formally hired out. The fact that the garage owned the vehicle for the purpose of lending it to customers was not consistent with the description of a “privately owned motor car” in the Elephant Policy. This particular motor car was in fact one which bore the advertising logo of the garage on its bodywork, making it clear it was a courtesy car provided by DP Garage.

28. According to Elephant, the purpose of the Driving Other Cars extension is to permit a policyholder to drive a car belonging to a family member, friend, or acquaintance, where the car is insured under a Named Drivers Only clause, and the policyholder is not a Named Driver. The extension is purely domestic, and not intended to cover those cases where businesses lend or hire out vehicles as part of a commercial service. Businesses will have their own insurance cover for those instances where they hire or lend vehicles, so the Driving Other Cars extension is not designed to apply to them.
29. AXA's cover reflects this approach submits Elephant. A customer like Mr X who is lent a courtesy car by DP Garage is covered both for Social Domestic and Pleasure Use and for Business Use under the terms of DPs insurance policy with AXA.

GUIDANCE FROM THE CASE LAW

30. The difficulties that arise for the motor insurance industry when a driver gives another person a lift and has a road traffic accident are many and of long standing. So also is the problem of determining whether a journey was "social domestic and pleasure" or "business" use, when often it may be said to contain elements of both.
31. I derive the following guidance from the cases cited to me:
- i) It is necessary to form a judgement on the particular facts as to the overall or primary purpose of the journey *Seddon v Binions* [1978] RTR 163 - where the "essential character of the journey in the course of which the ... accident occurred" was examined and it was held that taking the employer's son to the dentist was an employment (i.e. business) venture and not a social domestic or pleasure purpose.
 - ii) Thus, where a vehicle is insured for one set of purposes (e.g. the social, domestic, pleasure and "personal business" use of the driver), and is used arguably for a different purpose (giving a lift to someone else as a social kindness, who happens to be engaged on a business of their own), that other business purpose did not take the use of the car out of the insured categories: *Passmore v Vulcan Boiler & General Insurance Co. Ltd.* (1936) 54 Lloyd's List Rep 92- the lift given in that case was described by Roskill LJ in *Seddon v Binions* at p 386 (*supra*) as something "incidental" to the journey.
 - iii) Where the facts disclose a primary purpose within the ambit of cover, the court must not be astute to seek after a secondary purpose that suggests that at the time of the accident the car was not being used for a purpose for which cover is given. Megaw LJ encapsulated it thus in *Seddon* at p 387:

"In general I should have thought that there is something that can clearly be called as I would put it, a primary purpose, by which I intend the same meaning, I think, as Roskill LJ intended in using the phrase "essential character of the journey". If there be such a primary purpose, or essential character, then the court should not be meticulous to seek to find some possible secondary purpose or some inessential character, the result of which could be suggested to be that the use of the car fell outside the proper use."

- iv) The court looks primarily to the insured's purposes because it has to construe the policy as between the insurer and insured – not as between the insurer and some other person *Caple v Sewell* [2002] Lloyd's Rep (I and R) 627 per Rix LJ at p 631 paragraph 28.
- v) In a case with somewhat difficult facts, *Keeley v Pashen* [2005] Lloyd's Rep. (I and R) 289 [2005] 1 WLR 1226, the CA emphasised that the essential character was judged "at the time of the incident" such that a cab driver who (after dropping off his last, unruly, fares), trying to frighten them, reversed into them and killed one of them, was not engaged in hire, (an excluded use), but was preparing to go home, because they were his last fares and had been dropped off. The use was therefore of character, and fell within the policy. Accordingly the claimant, the dead man's widow, recovered from the cab driver's insurers.
- vi) It is therefore necessary to ask whether the "essential character or purpose" of a journey changed from its inception. Thus in *AXN v Worboys* [2013] 1 Lloyd's Law Rep (I and R) 207 Silber J had to consider the correct approach in the context of John Worboys who perpetrated his notorious assaults on women in his black cab after picking them up as passengers whilst plying for hire. Silber J set out the rival contentions as follows:

"87. The case for the claimants is that the insurance policy of Worboys covered his activities while they were in the taxi, as first he was plying for hire when the claimant entered his taxi, and secondly, he agreed to take them to their destinations, which he duly did. It was not material, according to the claimants, that the "for hire" sign was or was not illuminated, whether the fare of any claimant was or was not waived. The evidence of Worboys at his trial, according to the claimants, leads to the conclusion that these trips were for his own pleasure and so they fell within the terms of his policy and of his insurance cover. If that is not right, the claimants' case is that the trips were made as part of Worboys' business, and so they were made for public hire.

...

"90. The case for the insurers is that Worboys was not using the taxi for any of the permitted purposes to give him cover, because the assaults were the primary purpose of the journey or at least a primary purpose."

Silber J found that the essential character of the trip, judged from Worboys' point of view, had changed once his passengers had been sedated and had become the victims of attempted or actual assaults. He held that use of the vehicle for those purposes did not come within either of the insured uses, ("for public hire" or "domestic and pleasure purposes"), and cover was therefore denied.

CONSIDERATION

Nature of the Journey on 29 May 2016

32. Adopting the principles set out above, it is in my judgement clear that the journey made by Mr X was covered only by the AXA Policy.
33. The essential character of the journey undertaken, the essential and primary, or the “essential primary” purpose of the trip was driving home from work. This may be called “commuting”, but that term does 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 friend on the way, albeit a necessitating detour, did not alter the fundamental character of the trip. As succinctly expressed in the Skeleton Argument of Mr Howard Palmer QC for Elephant, the vehicle was being used for getting to work to earn a living. As he also submitted, the case is the converse of *Passmore*: here the fact the friend was picked up as a favour does not transform the trip, a commute from work to home, into a journey of a different, and social, character. In my judgement the bus station pick-up did not mark the end of the purpose of the homeward commute in the same way as the drop off of the passenger marked the end of the cabbie’s hire in *Keeley*.
34. The essential character and purpose is supported by the facts - the courtesy to his friend at the nearby bus station fitted into the journey back from work: the friend lived in the same town and no separate ultimate destination was chosen, nor in any material sense, was the timing changed- even if it could be said Mr X delayed his departure somewhat to coincide with his friend’s arrival time at the pick- up point. From Mr X’s point of view, this was his journey home from work: it is wrong in the current circumstances to suggest that when he got in the car, a social, domestic or pleasure purpose took over because he had finished work. This is not a *Worboys* or a *Keeley* change of purpose. It is relevant that the car was his means of getting to the hotel, and in my judgement the frequency or novelty of the assignments does not take the use out of the description and make it a social, domestic or pleasure use in this case.
35. Asking, as was sought to be done on occasions in the case, an officious bystander question in terms of “Where are you going Mr X?” he would have answered, I am sure, “I am going home from the hotel – and I am picking my friend up on the way home”.
36. I go on in any event to consider the second limb of the argument.

Private Motor Car

37. It is of course the case that, whilst rental and hire cars are listed, a courtesy car is not listed amongst the exclusions to the Elephant Policy, and it would have been easy to exclude it. However, it is clear in my judgement that the car in question cannot be described as a “private motor car” within the policy.
38. The Vauxhall Astra 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. It was in effect a marketing tool - a

convenience offered to customers to encourage their patronage, and no doubt a tax-deductible business expense for DP Garage. In my view the notion of a “private” motor car referred to in the Elephant Policy is plainly not a car which is operated or supplied in the course of or for the purposes of a business. Nor is there any justification for the distinction put forward by AXA between vehicles that are owned by public entities, on the one hand and by private entities individual and corporate on the other. It ignores the fact that the concept of what is “private” in this insurance context relates not only to ownership but to use. A privately owned motor car is not one owned for the purposes of business, or by a business. It is also unnecessary to characterise the owner by reference to a particular entity: whether the DP garage is a limited company or a sole trader does not affect my decision that the Vauxhall Astra as a courtesy car, supplied by the policyholder, does not satisfy the description “privately owned motor car”- whatever its physical configuration.

39. I make some common-sense inferences in reaching this conclusion. The likelihood of a car which is used in the course of business, supplied by a business, or for a purpose that has a business character being uninsured for the use, is remote. DP Garage’s policy is, I would venture to suggest, typical in the scope of its cover of courtesy cars driven with the Policyholder’s permission. Elephant’s restriction to privately owned cars is deliberately excluding such commercial overlay. It caters rather for the ad hoc, family or friend’s car that needs to be driven where that family or friend’s car is covered only in terms of a Named Driver. In this non-business context there will unlikely be other insurance to which to look, and, by confining the use to “private”, the scope of cover is delimited.
40. There is no place for a *contra proferentem* construction here, as the meaning is in my judgement not unclear. The requirement that the vehicle be “privately owned” neatly excludes such categories of driving as are not specifically excluded but might be said to bear similar characteristics to “use for merchandise delivery, renting out, peer-to-peer hire schemes or use for hire and reward ...” et cetera. As Mr Palmer QC suggested, a demonstrator car would likely be in the same class.
41. For the above reasons I decline to make the declaration sought by AXA: any liability in respect of these events which falls upon them to indemnify, they must bear alone and may not call upon Elephant to share it.