Hilary Term
[2019] UKSC 16
On appeal from: [2017] EWCA Civ 259

JUDGMENT

R & S Pilling t/a Phoenix Engineering (Respondent) *v* UK Insurance Ltd (Appellant)

before

Lady Hale, President
Lord Wilson
Lord Hodge
Lady Arden
Lord Kitchin

JUDGMENT GIVEN ON

27 March 2019

Heard on 13 December 2018

Appellant	*Respondent*
Graham Eklund QC Patrick Vincent (Instructed by Keoghs LLP)	Colin Edelman QC Richard Harrison (Instructed by DAC Beachcroft LLP)

LORD HODGE: (with whom Lady Hale, Lord Wilson, Lady Arden and Lord Kitchin agree)

1. This appeal is concerned with the interpretation of a policy of motor insurance. The question is whether the policy confers on the insured owner of a vehicle an indemnity against liability for damage caused to the property of a third party which was caused by his acts when he was carrying out substantial repairs to his car in the commercial premises of his employer. The appeal also raises questions about the meaning of the phrase, "damage … caused by, or arising out of, the use of the vehicle on a road or other public place" in section 145 of the Road Traffic Act 1988, which defines the compulsory insurance requirements for the use of vehicles on such places.

The factual background

2. The facts behind this appeal can be stated briefly. In 2010 Mr Thomas Holden was a mechanical fitter employed by the appellants, R & S Pilling, who traded as Phoenix Engineering ("Phoenix"). He was the owner of a car and held a motor insurance policy ("the Policy") with the respondents ("UKI"). On 11 June 2010 Mr Holden's car failed its MOT because of corrosion to its underside. On the following day, he asked his employer, Phoenix, if he could use the loading bay in its premises to carry out work on his car in the hope that he could enable it to pass its MOT. He intended to weld some plates onto the underside of the car to deal with the corrosion. His employer agreed.

3. He disconnected his car battery to make sure there were no live circuits. He then used a fork-lift truck to lift the car onto the driver's side to gain access to the underside of the vehicle. He first used a grinder to prepare the underside for welding and then welded a plate under the driver's side. He then re-connected the battery, started the car and moved it round the other way before again disconnecting the battery, and lifting it up to expose the underside on the passenger's side of the vehicle. He started welding but then stood up to answer a phone call. When he did so, he saw flames inside the car: sparks from the welding had ignited flammable material inside the car, including the seat covers. As the fire spread, it set alight some rubber mats which were lying close to the car. The fire then took hold in Phoenix's premises and in adjoining premises and caused substantial damage before it was put out.

4. Phoenix was insured against property damage and public liability by AXA which had to pay out over £2m to Phoenix and the owner of the adjoining premises.

AXA made a subrogated claim in Phoenix's name against Mr Holden. Mr Holden's only insurance policy which arguably might cover Phoenix's claim ("the claim") is the Policy. As a result, UKI brought an action seeking a declaration that it is not liable to indemnify Mr Holden against the claim, and AXA, denying this, counterclaimed for an indemnity. Mr Holden was named as first defendant in the action but has taken no part in the proceedings because he is not at risk: AXA has undertaken to limit its recovery to such sum, if any, as it can obtain from UKI.

5. The real dispute is therefore between the two insurance companies. At its simplest, UKI says that the Policy does not respond to third party claims involving the car while the car is being repaired on private premises, such as Phoenix's garage. Phoenix contends that the Policy covers accidents involving the car off-road and that in any event the repair of the car can properly be described either as the use of it, or as arising out of its use, on a road or other public place. The question is the correct interpretation of the Policy against the background of domestic and EU legislation which imposes compulsory third party insurance in respect of motor vehicles.

The motor insurance policy

6. The documents which are relevant to Mr Holden's insurance cover are (a) the policy set out in UKI's policy booklet, (b) the certificate of motor insurance ("the certificate"), (c) the motor insurance schedule ("the schedule") and (d) the motor proposal confirmation ("the confirmation"). The policy booklet instructed the insured that he must read the four documents as a whole.

7. The policy booklet set out in section A the insurance cover in relation to the insured's liability to other people. It provided in clause 1a:

> "Cover for you
>
> We will cover you for your legal responsibility if you have an accident in your vehicle and:
>
> - you kill or injure someone;
> - you damage their property; or
> - you damage their vehicle."

Clause 2 provided the following cover for other people:

> "We will also provide the cover under section 1a for:
>
> - anyone insured by this policy to drive your vehicle, as long as they have your permission;
> - anyone you allow to use but not drive your vehicle, for social or domestic purposes;
> - anyone who is in or getting into or out of your vehicle;
>
> …"

The booklet listed what was not covered under section A, including liability for more than £20m for any claim or series of claims for loss of or damage to property, and also liability caused by acts of terrorism, unless such cover was compulsory under the Road Traffic Acts.

8. The booklet contained general exceptions and stated:

> "1. Who uses your vehicle
>
> We will not cover any injury, loss or damage which takes place while your vehicle is being:
>
> - driven or used by anyone not allowed to drive it, or used for any purpose not allowed by the Certificate of Motor Insurance or Schedule; or
> - driven by someone who does not have a valid driving licence or is breaking the conditions of their driving licence.
>
> This exception does not apply if your vehicle is:

- with a member of the motor trade for maintenance or repair;

- stolen or taken away without your permission; or

- being parked by an employee of a hotel, restaurant or car parking service."

The general exceptions also excluded damage caused by war etc "unless we have to provide cover under the Road Traffic Acts".

9. The certificate identified Mr Holden as the policy holder and specified the use limitations as "use for social, domestic and pleasure purposes". It also contained a certificate of the Chief Executive of the insurers in these terms:

> "I hereby certify that the Policy to which this Certificate relates satisfies the requirements of the relevant law applicable in Great Britain and Northern Ireland, the Republic of Ireland, the Isle of Man, the Island of Guernsey, the Island of Jersey and the Island of Alderney."

10. The motor insurance schedule specified among other things the sections of the booklet which applied to the Policy and the details of the car. The confirmation, which has no bearing on this appeal, set out in summary form details of the policy holder, the Policy, the car and method of payment of premium.

The context of compulsory insurance

i) Domestic provision: the Road Traffic Act 1988

11. It has, since 1930, been a statutory requirement that a driver has third party liability insurance in respect of the use of his or her vehicle on the road and it is a criminal offence if one does not. The current statute is the Road Traffic Act 1988 ("the RTA"). Section 143 of the RTA provides that it is an offence to use a motor vehicle on a road or other public place unless there is in force in relation to the use of the vehicle by that person such a policy of insurance or such security in respect of third party risks as complies with Part VI of the RTA.

12. Section 145 of the RTA, which like section 143 falls within Part VI, sets out the conditions which the policy of insurance must satisfy. It provides, so far as relevant:

> "(1) In order to comply with the requirements of this Part of this Act, a policy of insurance must satisfy the following conditions.
>
> …
>
> (3) Subject to subsection (4) below, the policy -
>
> (a) must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person or damage to property caused by, or arising out of, the use of the vehicle on a road *or other public place* in Great Britain …" (Emphasis added)

At the relevant time, section 145(4)(b) provided that such a policy was not required to provide insurance in respect of damage to property of more than £1m.

13. Section 145(3)(a) was amended by the Motor Vehicles (Compulsory Insurance) Regulations 2000 (SI 2000/726) to add the words "or other public place" which I have emphasised, in order to comply with the EU directives on motor insurance, which were later consolidated in the Directive which I describe below. Section 143 was amended in the same way. The amendments responded to the decision of the House of Lords in *Clarke v General Accident Fire and Life Assurance Corpn plc* and *Cutter v Eagle Star Insurance Co Ltd* [1998] 1 WLR 1647, which had held that a "road" did not include a car park or other public place. The current wording of section 145(3) is to that extent implementing the relevant EU legislation.

ii) The EU Motor Insurance Directive

14. Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 ("the Directive") consolidates various earlier EU directives and ensures that civil liability arising out of the use of motor vehicles is covered by insurance.

15. Recital (2) of the Directive states:

> "Insurance against civil liability in respect of the use of motor vehicles (motor insurance) is of special importance for European citizens, whether they are policyholders or victims of an accident. It is also a major concern for insurance undertakings as it constitutes an important part of non-life insurance business in the Community. Motor insurance also has an impact on the free movement of persons and vehicles. It should therefore be a key objective of Community action in the field of financial services to reinforce and consolidate the internal market in motor insurance."

16. Article 3, so far as relevant, provides:

> "**Compulsory insurance of vehicles**
>
> Each member state shall, subject to article 5, take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance.
>
> The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of the measures referred to in the first paragraph.
>
> …
>
> The insurance referred to in the first paragraph shall cover compulsorily both damage to property and personal injuries."

17. Article 12(3) provides:

> "The insurance referred to in article 3 shall cover personal injuries and damage to property suffered by pedestrians, cyclists and other non-motorised users of roads who, as a consequence of an accident in which a motor vehicle is involved, are entitled to compensation in accordance with national civil law."

The prior judgments

18. In a judgment dated 19 February 2016 ([2016] EWHC 264 (QB); [2016] 4 WLR 38) which the Master of the Rolls correctly described as "clear and careful", Judge Waksman QC, sitting as a Judge of the High Court (Queen's Bench Division), held that UKI was entitled to the declaration which it sought. He interpreted the Policy as extending beyond roads and public places so that its cover extended to the location of the accident on private property, if the other requirements of the Policy were made out. But he concluded that those requirements were not made out because the accident had not arisen out of the use of the car. The undertaking of the repair of the car was not using it: it was not being operated but was immobile and partly off the ground so that it could be worked on (para 63). He also rejected Phoenix's argument on causation, that the fire arose out of Mr Holden's use of the car because he had been driving it before carrying out the repair or because he would be driving it after the repair. He held (para 66):

> "The fire was caused by and arose out of the allegedly negligent repair of the car by the use of grinders and welders without taking any precautions with regard to flammable materials in the car itself."

19. The Court of Appeal (the Master of the Rolls, and Beatson and Henderson LJJ) allowed Phoenix's appeal ([2017] EWCA Civ 259; [2017] QB 1357). The Court, recognizing that the wording of clause 1a of the policy booklet was inadequate and that the policy booklet had to be read together with the certificate, held that the Policy should be read to cover the requirements of section 145(3) of the RTA, as the certificate states. The Policy did not have the geographical limitations of the statutory provision nor was the sum insured restricted to £1m. Section 145(3) extended the cover of clause 1a without imposing its statutory geographical limitations and did not require the owner to be in the car at the time of the accident as the express terms of clause 1a provided. The clause as so extended covered repairs which were commonplace for drivers. The court accordingly construed the opening words of clause 1a to mean: "We will cover you for your legal responsibility if there is an accident <u>involving</u> your vehicle" (emphasis added). This entailed substituting "there is" for "you have" and replacing the preposition "in" in the express terms of the clause with the present participle "involving".

20. As a secondary argument, the Master of the Rolls held that the repairs amounted to the "use" of the car under section 145(3). He stated that that interpretation was consistent with the objective of the Directive in the light of the judgment of the Court of Justice of the European Union ("CJEU") in *Vnuk v Zavarovalnica Triglav dd* (Case C-162/13) [2016] RTR 10, which was to protect victims of accidents caused by vehicles. He held that a purposive interpretation of

section 145(3)(a) to cover use of a car consistent with its normal function was consistent with English authorities which held that there may be "use" of a car when it is parked or immobilised.

21. The Master of the Rolls set out the following summary in para 68 of his judgment:

> "The following propositions as to the meaning of 'use of the vehicle' in section 145(3)(a) of the RTA can be derived from the Directive, the CJEU jurisprudence and the English authorities. (1) 'Use' is not confined to the actual operation of the car in the sense of being driven. (2) There may be 'use' of a car when it is parked or even immobilised and incapable of being driven in the immediate future. (3) 'Use' of a vehicle includes anything which is consistent with the normal function of the vehicle. (4) Damage or injury may 'arise out of' the use of the car if it is consequential, rather than immediate or proximate, provided that it is, in a relevant causal sense, a contributing factor."

22. The Master of the Rolls therefore concluded that Judge Waksman had made an error of principle in holding that the repair of a car is not using it for the purposes of section 145(3)(a) of the RTA. Henderson LJ agreed with this judgment and added that he found that Commonwealth authorities from Australia and Canada, some of which take a broader approach to the interpretation of motor insurance policies, were also of assistance. Beatson LJ agreed with both judgments.

23. UKI appeals to this court.

Discussion

24. Having regard to the statutory requirements and the terms of the certificate, the Policy must be construed so that the third party cover meets the requirements of the RTA. The parties are agreed on that and they are plainly correct, because this can be done in this case without resort to rectification. So far as relevant to this appeal, the RTA requires Mr Holden to be insured to cover any liability in respect of damage to property "caused by, or arising out of, the use of the vehicle on a road or other public place …". The principal question in this appeal is whether the Court of Appeal went beyond the bounds of what is required to be read into the Policy to achieve this end in holding that clause 1a of section A of the policy booklet should

be read to state: "We will cover you for your legal responsibility if there is an accident involving your vehicle".

25. In support of the view that the Court of Appeal was in error, UKI advances an argument for the first time in this court. It submits that there is no need to read any term into clause 1a in order to include the RTA cover because the Policy provides cover in two strands. First, there is the provision of clause 1a, whose words should be given their ordinary meaning so as to cover accidents occurring when the driver is in the vehicle wherever it is located, and, secondly and separately, there is the promise in the certificate that the Policy satisfies the requirements of the relevant law in the United Kingdom, which for present purposes is the RTA. Phoenix challenges that assertion, submitting that the Policy follows a standard structure of insurance policies, with insuring clauses which define the cover, followed by exclusions and then by conditions. The reader therefore looks to the insuring clause to determine the scope of cover before examining the extent of the exclusions and the conditions of cover. The certificate, it is submitted, is simply a declaration of compliance and does not operate as an additional insuring clause. Phoenix submits that Judge Waksman and the Court of Appeal were correct in focusing on the correct construction of clause 1a.

26. It is necessary therefore, first, to examine UKI's two strands argument and, secondly, if it is necessary to read words into clause 1a, to address what they are.

The two strands submission

27. The two strands approach can find some support in the Policy's opening statement:

> "Your policy is made up of:
>
> - the Motor Proposal Confirmation;
> - this Policy Booklet;
> - the Certificate of Motor Insurance; and
> - the Schedule.

You must read all these documents as a whole."

The documents must be read as a whole. But what is the role of each document? It is clear from the certificate which I have quoted in para 9 above that UKI intended the Policy to meet the terms of the RTA. But is the needed cover provided by the certificate or by a corrective interpretation of the insuring clause?

28. I am not persuaded by the two strands approach which UKI advocates. The certificate is relevant to and forms part of the Policy because it alone states the limitations as to use which the Policy imposes (para 9 above). Thus it is readily understandable why UKI requires the policy holder to read the four documents as a whole. But the wording of the Chief Executive's certificate distinguishes between the Certificate of Motor Insurance and the Policy when it speaks of "the Policy to which this Certificate relates". It certifies the legal effect of the Policy without purporting to provide additional cover.

29. My concern is also that the two strands approach does not fit in easily with the provisions of the RTA which draw a distinction between an insurance policy and an insurance certificate. The certificate is the product of section 147 of the RTA and the Motor Vehicles (Third Party Risks) Regulations 1972 (SI 1972/1217) as amended ("the 1972 Regulations"). Section 147 provides that an insurer issuing a motor insurance policy must deliver to the insured a certificate of insurance in the form prescribed by the 1972 Regulations. The certificate serves as evidence of the existence of the policy, because, for example, a driver may be required by a police constable to produce the certificate (section 165) and a person against whom a claim is made must give the claimant such particulars of the policy as are specified in the certificate (section 154). The RTA defines "policy of insurance" in section 161 in a non-exclusive way, stating that it "includes a covering note". But the RTA also speaks of "policy" as something separate from the certificate of motor insurance. For example, in section 147 the insurer issuing a policy must also deliver the certificate. In section 144A, which creates the offence of keeping a vehicle which does not meet the insurance requirements, subsection (3) defines the first condition of meeting the insurance requirements in these terms:

> "The first condition is that the policy or security, or the certificate of insurance or security which relates to it, identifies the vehicle by its registration mark as a vehicle which is covered by the policy or security."

30. The RTA's treatment of an insurance policy as a distinct concept from a certificate of insurance points against the two strands approach. Further, if the certificate, although distinct, were interpreted as a separate contractual basis for

insurance cover, questions would arise as to whether an insurer may avoid liability for a risk covered only by a certificate of insurance in circumstances in which it is barred from so doing in relation to cover under a policy. Section 151 imposes a duty on insurers to satisfy judgments obtained against persons insured against third party risks up to the maximum at the relevant time of £1m (now £1.2m). The section applies to judgments relating to a liability which section 145 requires to be covered by insurance and "it is a liability covered by the terms of the policy" (subsection (2)(a)). In deciding whether the terms of the policy cover the liability the section disregards any requirement in the policy that the driver have a valid driving licence (section 151(3)). The obligation to pay exists even if the insurer was entitled to avoid or cancel the policy or had avoided or cancelled it (section 151(5)). In short, section 151 focuses on the liability covered by the terms of the policy and excludes certain terms of the policy and the avoidance or cancellation of the policy. It does not envisage liability covered by the certificate or the avoidance or cancellation of the certificate.

31. I am therefore not prepared to adopt the two strands approach. But the outcome of the appeal does not depend upon the two strands submission because I am persuaded that the Court of Appeal erred in interpreting clause 1a to include the words "there is an accident involving your vehicle" in place of the phrase "you have an accident in your vehicle".

Reading terms into clause 1a

32. Three questions arise in relation to the arguments about the interpretation and application of clause 1a. First, one must ask what is the extent of the insurance cover which section 145(3)(a) requires. Secondly, one must ask what words should be read into the clause 1a. And the third question is whether Mr Holden's accident falls within the wording of the clause as so interpreted.

i) What section 145(3)(a) of the RTA requires

33. The first question requires the court to interpret the statutory requirement that the damage to property has been "caused by, or arising out of, the use of the vehicle on a road or other public place". This involves the interpretation of the noun "use" and also of the causal phrase "caused by, or arising out of". Both predated the various EU Motor Insurance Directives and were the subject of English and Welsh judicial decisions.

34. In English case law "use" has been interpreted to extend beyond driving a vehicle so that an owner had to have third party insurance if he "had the use of the

vehicle on a road". Thus, a person who left his broken-down vehicle on a public road, without a battery and without any petrol in its tank, was convicted of unlawfully using the car without there being in force a third party insurance under section 35(1) of the Road Traffic Act 1930, which is the precursor of section 143(1) of the RTA: *Elliott v Grey* [1960] 1 QB 367, 372 per Lord Parker CJ. Similarly, in *Pumbien v Vines* [1996] RTR 37, a motorist was convicted under section 143(1) of the RTA when he parked his vehicle on a public road for over seven months during which time the rear brakes seized, the tyres deflated and the gearbox ceased to contain any oil. The statutory concept of "use" in this context is that the owner has an element of control, management or operation of the vehicle while it is on the road: *Brown v Roberts* [1965] 1 QB 1, 15 per Megaw J. The good sense of having a broad interpretation of "use" in the requirement for compulsory third party insurance is clear as leaving an immobilised car on a public road may create a hazard for other road users, for example if the vehicle was left close to a blind corner. Similar considerations apply to protect members of the public in other places to which the public have access, such as car parks. The mischief is that an uninsured owner may not be able to compensate members of the public, who can be expected to be on a road or at a public place and who suffer personal injury or damage to property as a result of the presence of the vehicle in that place.

35. It is necessary also to consider the jurisprudence of the CJEU on the Directive as section 145(3)(a) should be interpreted in the light of the wording and purpose of the Directive so long as that is not contra legem: see for example, *Pfeiffer v Deutsches Rotes Kreuz* (Cases C-397/01 to C-430/01) [2005] 1 CMLR 44, paras 108-114, and *Dominguez v Centre Informatique de Centre Ouest Atlantique* (Case C-282/10) [2012] 2 CMLR 14, paras 24 and 25.

36. Both Judge Waksman and the Court of Appeal discussed the CJEU's interpretation of the Directive in their reasoning. Judge Waksman concluded that section 145(3)(a) was not compatible with the Directive; the Court of Appeal gave what I see as a strained interpretation to "use" to achieve such compatibility.

37. Recent case law of the CJEU has demonstrated a need for Parliament to reconsider the wording of section 145(3)(a) of the RTA to comply with the Directive. As the courts below recognized, in *Vnuk* the CJEU held that the objective of the First to Third Directives was to protect injured parties to an accident caused by a vehicle in the course of its use, if that use is consistent with the normal function of that vehicle (para 56). As a result, the CJEU ruled that the concept of "use of vehicles" in article 3(1) of the First Directive (which is materially in the same terms as article 3 of the current Directive) "covers any use of a vehicle that is consistent with the normal function of that vehicle" (para 59 and the dispositif). In that case, the accident occurred when a tractor was reversing in a farmyard in order to place a trailer, to which it was attached, in a barn and the trailer struck a ladder on which the claimant was standing, causing him to fall. The CJEU, rejecting the contention

that the article covered only use of a vehicle on a public road, held that article 3(1) of the First Directive could apply to the manoeuvre of the tractor in the farmyard.

38. Since the judgment of the Court of Appeal was handed down in this case, the Grand Chamber of the CJEU has revisited the meaning of "use of vehicles" in article 3(1) of the First Directive in *Rodrigues de Andrade v Salvador* (Case C-514/16), 28 November 2017. The accident in that case occurred when an agricultural tractor, which had a drum with a herbicide spraying device mounted on its back, was stationary but its engine was running to drive the spray pump for the herbicide. A landslip, which was caused by among other things the vibrations of the tractor engine and the spray, carried the tractor away, causing it to fall down terraces and crush a worker who was working on the vines below. The Grand Chamber held that the concept of "use of vehicles" covers "any use of a vehicle as a means of transport" (para 38). The fact that a vehicle was stationary or that its engine was not running at the time of the accident did not preclude the use falling within the scope of its function as a means of transport (para 39). But the concept of "use of vehicles" did not cover a circumstance in which the tractor's principal function, at the time of the accident, was not to serve as a means of transport but to generate, as a machine for carrying out work, the motive power necessary to drive the pump of a herbicide sprayer (para 42 and the dispositif).

39. The judgments in *Vnuk* and *Andrade* were confirmed in a judgment of the Sixth Chamber of the CJEU, which concerned article 3 of the Directive, in *Torreiro v AIG Europe Ltd* (Case C-334/16) 20 December 2017, [2018] Lloyd's Rep IR 418, which affirmed that in EU law the location of the use of the vehicle under the Directive is not confined to a road or other public place as had been understood in prior English jurisprudence.

40. I am not persuaded that section 145(3)(a) can be read down to comply with the jurisprudence of the CJEU. In *R (RoadPeace Ltd) v Secretary of State for Transport* [2017] EWHC 2725 (Admin), [2018] 1 WLR 1293, Ouseley J (paras 73 and 99) recorded and accepted the view of the Secretary of State for Transport and the Motor Insurers' Bureau that section 145(3)(a) could not be read down and that there required to be amending legislation. In *Lewis v Tindale* [2018] EWHC 2376 (QB) Soole J reached the same conclusion (paras 42-58) because reading down would go against the grain and thrust of the legislation, because it raised policy ramifications which were not within the institutional competence of the courts, and because it would necessarily impose retrospective criminal liability under section 143. I agree.

41. It is important to note that EU law does not require a national court, hearing a dispute between private persons, to disapply the provisions of national law and the terms of an insurance policy, which follows national law, when it is unable to

interpret national law in a manner that is compatible with a provision of a directive which is capable of producing direct effect: see judgment of the Grand Chamber of the CJEU in *Smith v Meade* (Case C-122/17) 7 August 2018 (paras 49, 55, 57 and the dispositif). In that case, the requirement for third party motor insurance cover in Irish road traffic legislation did not comply with the Directive. A motor insurance policy, which was a contract between private persons, reflected the Irish legislation. The CJEU held that the terms of the insurance policy were not to be disapplied, notwithstanding the failure to provide the cover which the Directive required; the person disadvantaged by this failure could instead seek compensation from the member state (para 56). On this basis, it is the cover required by the RTA, and not the extended cover which the CJEU jurisprudence now requires, which is to be read into the Policy. The relevant "use" therefore is use "on a road or other public place".

42. The matter does not stop with the interpretation of the words "use of the vehicle". It is also necessary to consider the causal phrase "caused by, or arising out of" the use of the vehicle on a road or other public place. The addition of the words "arising out of" after "caused" makes it clear that there can be a causal link between use of a vehicle on a road and damage resulting from that use which occurs elsewhere. In *Romford Ice and Cold Storage Co Ltd v Lister* [1956] 2 QB 180, a case which concerned the interpretation of identical words in section 36(1) of the Road Traffic Act 1930, the majority of the Court of Appeal (Birkett and Romer LJJ) held that an accident which occurred in the yard of a slaughterhouse did not arise out of use on the road. Romer LJ (pp 211-212) opined that to hold that the accident arose out of use on a road would be stretching the language of the section beyond permissible limits. He gave the following example to illustrate his understanding of the meaning of the statutory words:

> "An accident is caused by the use of a vehicle on a road if it runs over a pedestrian at a zebra crossing; an accident arises out of the use of a vehicle on a road if it skids off the road and injures a pedestrian who is walking on the pavement."

Birkett LJ expressed a similar view (pp 204-205) in rejecting the idea that the accident arose out of the use of the lorry on the road because the lorry had to be driven on the road to get to the yard. Denning LJ took a different view, holding that because the lorry was engaged in operations incidental or ancillary to a journey on the road, the accident arose out of the use of the vehicle on the road.

43. I agree with the majority in *Romford* in their interpretation of the relevant statutory words. Their interpretation was followed in the unanimous judgment of the Court of Appeal in *Inman v Kenny* [2001] EWCA Civ 35; [2001] PIQR P18. Were an accident similar to that in *Romford* to occur once the RTA has been amended to comply with the CJEU jurisprudence in *Vnuk* and *Andrade*, the result of that case

would probably be different. But that does not affect the meaning of the words "caused by, or arising out of" the use of the vehicle. There must be a reasonable limit to the length of the relevant causal chain. In *Malcolm v Dickson* 1951 SC 542, a case about remoteness of damage in a negligence claim, Lord Birnam stated (p 544):

> "It is of course logically possible, as every schoolboy knows, to trace the loss of a battle, or even of a kingdom, to … the absence of a nail in a horse's shoe. But strict logic does not appear to me to be a safe guide in the decision of questions such as this."

I agree.

44. Mr Eklund QC, who appeared for UKI, submitted that *Dunthorne v Bentley* [1999] Lloyd's Rep 560 was wrongly decided. I would not so hold. The case did not turn on a point of law but on the application of the law to a particular set of facts. The Court of Appeal held in that case that the trial judge was entitled to conclude that Mrs Bentley had crossed the road and so caused the accident while she was seeking help from a colleague to continue her journey, shortly after she had run out of petrol and had parked her car at the side of the road. The judge was entitled to conclude that the accident had arisen out of her use of the car on the road. Mr Dunthorne's claim was close to the line, as Hutchison LJ recognized, but it is not apparent to me that the outcome of that borderline case was wrong, having regard to the close connection in time, place and circumstance between the use of the car on the road and the accident.

45. In summary, section 145(3) of the RTA must be interpreted as mandating third party motor insurance against liability in respect of death or bodily injury of a person or damage to property which is caused by or arises out of the use of the vehicle on a road or other public place. The relevant use occurs where a person uses or has the use of a vehicle on a road or public place, including where he or she parks an immobilised vehicle in such a place (as the English case law requires), and the relevant damage has to have arisen out of that use.

ii) What term should be read into clause 1a

46. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] AC 1101, the House of Lords construed a formal commercial contract to cure a linguistic mistake. The House, in the leading speech which Lord Hoffmann delivered, stated that where the context and background of a contract drove the court to the conclusion

that something must have gone wrong with the language that the parties had used, the court did not have to attribute to the parties an intention which a reasonable person would not have understood them to have had. He emphasised that it required a strong case to persuade a court that something must have gone wrong with the language (paras 14-15). For the court to adopt a corrective construction,

> "it should be clear that something has gone wrong with the language and it should be clear what a reasonable person would have understood the parties to have meant." (para 25)

47. In this case, there is an apparent contradiction between the terms of clause 1a, if those words are given their ordinary meaning, and the promise in the certificate (para 9 above) that the Policy satisfies the requirements of UK law, including the RTA. If, as I have concluded, the certificate is not effective to create the needed cover, there can be no doubt that it is necessary to interpret the insuring clause in the Policy so that it meets the requirements of section 145(3)(a) of the RTA by correcting the mistake in clause 1a. This is one of those rare cases where the mistake is clear as is the intended meaning, so that a party to the agreement does not need to apply for rectification of the Policy.

48. The policy booklet is written in plain language for the benefit of the policy holder and lacks the precision which one might expect from a detailed commercial contract. For example, the statement in clause 1a that UKI will give cover for the insured's liability "if you have an accident in your vehicle" if read strictly would not cover an accident caused by the insured opening his car door and stepping out of the car. Yet clause 2, which appears to address the *Brown* judgment to which I referred in para 34 above, provides such cover for passengers getting out of the car. It was not disputed that clause 1a should be construed as covering the insured driver stepping out of his vehicle. Nor is it disputed that the clause must be construed so that it meets the requirements of the RTA. But the alteration of the clause which the Court of Appeal favoured was much more radical.

49. In identifying the needed correction, I derive no assistance from the fact that the Policy gives extensive first party cover and cover overseas or from the fact that the maximum sum available under the Policy for third party cover far exceeds the statutory minimum. The correction which is needed is to enable the cover to extend beyond what is expressly provided for to that which the RTA requires. If, as is the case, the express terms of the Policy in some respects exceed what the RTA requires, those terms must be given effect. Construction of clause 1a to expand its cover to meet the requirements of the RTA cannot cut back that which is expressly conferred. But that which is to be added to correct the omission is that which is needed to make the cover comply with the RTA and no more.

50. In my view the Court of Appeal erred in not adopting this approach. Its formulation did not confine the Policy's cover to the express terms of clause 1a and such additions as were needed to meet requirements of RTA. Instead, the formulation - "we will cover you … if there is an accident involving your vehicle" - expands the cover significantly beyond both the express terms of the clause and the requirements of the RTA by removing the statutory causal link between the use of the vehicle on a road or other public place and the accident. Indeed, the interpretation which the Court of Appeal favours appears to go beyond that which EU law currently requires.

51. Dealing briefly with other arguments which Phoenix has raised, I see no basis for the operation against UKI of the contra proferentem rule in this context. The necessity for corrective construction arises from the fact that the terms to meet the legal requirements, which the Chief Executive's certificate vouched, have not been expressed in the insuring clause. There is no doubt as to what those terms are as the statutory provision provides them. Nor do I derive any assistance by reference to the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) ("the 1999 Regulations"). The requirement in regulation 7 of the 1999 Regulations (now section 69 of the Consumer Rights Act 2015) that the interpretation most favourable to the consumer is to prevail where there is doubt about the meaning of a written term of a contract applies, for example, in the circumstances which I have discussed in para 48 above. But I am not persuaded that it can apply where the court, having recognized a mistake in the language used, is applying a corrective construction by reading into the clause words, which have not been expressed, to correct the mistake. It is important to recall that a corrective interpretation is available only if it is clear what a reasonable person would have understood the parties to have meant (para 46 above). Nor can the fact that UKI has amended the terms of the Policy to extend its cover since the events which gave rise to the claim in this case assist the process of construction of the terms of the Policy.

52. In my view the appropriate corrective construction of clause 1a to give effect to the requirements of the RTA is to add the words "or if there is an accident caused by or arising out of your use of your vehicle on a road or other public place". The clause would therefore read:

> "We will cover you for your legal responsibility if you have an accident in your vehicle or if there is an accident caused by or arising out of your use of your vehicle on a road or other public place and …"

Clause 2 of the Policy, which I quote in para 7 above, extends this cover to the other people which it specifies, including a person insured by the policy who is driving with the permission of the insured.

iii) Does Mr Holden's accident fall within clause 1a as so interpreted?

53. In my view, neither English domestic case law nor the jurisprudence of the CJEU supports the view that the carrying out of significant repairs to a vehicle on private property entails the "use" of the vehicle. The English case law which interprets "use" in the RTA as "having the use of" makes good sense in the context of vehicles which have been left on a road or in a public place, where members of the public are likely to encounter them, but less sense if applied without qualification to vehicles located on private property. In ordinary language one would not speak of a person who is conducting substantial repairs to a stationary vehicle as "using" that vehicle, but the presence of a vehicle on a road or other public place while the owner was carrying out such repairs would, in my view, fall within the mischief which section 145(3)(a) addresses. EU law now requires the extension of compulsory third party insurance to vehicles on private property to cover use of the vehicles as a means of transport, a concept which can include parked vehicles. I am not persuaded that a vehicle which is on its side being repaired on private property, such as a garage, is being used "as a means of transport" as the CJEU jurisprudence requires. But it is not necessary to decide that point because, as the CJEU has held in *Smith v Meade* (para 55 above) national legislation governs and the repair did not take place on a road or other public place.

54. Turning to the statutory phrase, "arising out of the use of the vehicle on the road", Phoenix's argument is that Mr Holden's repairs met the causal requirement either because the disrepair of the car was the result of its use or because the repair was a precursor to his getting the car back on the road as a means of transport. The repairs, Phoenix submitted, were ancillary and incidental to the use of the car and thus the damage to its property and that of its neighbour arose out of the use of the car. I do not accept this submission because the causal connection is too remote: viz my discussion of the *Romford* case in paras 42 and 43 above.

55. It is likely that the prior use of the car as a means of transport was either a "but for" cause or (for example, if, without washing the underside after use on a road, the car was parked on a private driveway or in a garage for a prolonged period) a contributory cause of the disrepair of the vehicle which necessitated the repairs. I would accept that the repairs may properly be said to have arisen out of the use of the car as they were a response to the disrepair of that vehicle. But it does not follow that the property damage which is the subject of Phoenix's claim was caused by or arose out of the use of the vehicle as the RTA requires. In agreement with Judge Waksman, I consider it to be an artificial analysis to say that the property damage, which Phoenix and its neighbour suffered, was caused by or arose out of the use of the vehicle. As he stated (para 66 of his judgment), "[t]he fire was caused by and arose out of the allegedly negligent repair of the car by the use of grinders and welders without taking any precautions with regard to flammable materials in the car itself". It was Mr Holden's alleged negligence in carrying out the repairs and not

the prior use of the car as a means of transport which caused the relevant damage. In my view, Phoenix's claim clearly falls on the wrong side of the line.

56. I have not overlooked the Commonwealth cases to which this court and the courts below were referred. Some, like *Elias v Insurance Corpn of British Columbia* (1992) 95 DLR (4th) 303 and *Pilliteri v Priore* (1997) 145 DLR (4th) 531, in which repair was treated as a use of a vehicle, concerned differently worded legislation which referred to "damage arising out of the ownership, use or operation … of a vehicle". The Australian cases, which Judge Waksman analysed in paras 52-57 of his judgment, appear to turn on their particular facts and two of the cases draw a distinction between repairs where the car is being prepared for use on the one hand and, on the other, circumstances in which the car is driven or some part of its mechanism is used in the course of repairs. Like the Master of the Rolls, I do not find the Commonwealth cases helpful.

57. Because Mr Holden was not in his car when the accident occurred (as the express terms of clause 1a require) and because, for the reasons which I have given, the RTA does not require third party insurance cover in the circumstances of the accident in this case (with the result that the corrective interpretation does not assist Phoenix), UKI is entitled to the declaration which Judge Waksman gave in his order of 8 April 2016.

Conclusion

58. I would allow the appeal.