

BILLINGSLEY v UPS LTD**QUEEN'S BENCH DIVISION**

Judge Oliver-Jones QC (sitting as a judge of the High Court): 10
December 2012

HQ10X04473; [2013] R.T.R. 30

Ⓒ Financial Services Compensation Scheme; Motor insurance; Periodical payments orders; Persons lacking capacity; Road traffic accidents; Settlement

H1 DAMAGES**Personal injuries**

Periodical payments—Claimant severely injured in road traffic accident—Agreement for periodical payments to be made by defendant's insurer—Insurer regulated in Republic of Ireland—Whether continuity of payments reasonably secure—Damages Act 1996 s.2—Financial Services and Markets Act 2000 ss.31(1), 213(3)(9).

H2 Section 2 of the Damages Act 1996 [as substituted by s.100(1) of the Courts Act 2003] provides:

- “(1) A court awarding damages for future pecuniary loss in respect of personal injury—(a) may order that the damages are wholly or partly to take the form of periodical payments, and (b) shall consider whether to make that order.
- (2) A court awarding other damages in respect of personal injury may, if the parties consent, order that the damages are wholly or partly to take the form of periodical payments.
- (3) A court may not make an order for periodical payments unless satisfied that the continuity of payment under the order is reasonably secure.
- (4) For the purpose of subs.(3) the continuity of payment under an order is reasonably secure if—(a) it is protected by a guarantee given under s.6 of or the Schedule to this Act, (b) it is protected by a scheme under s.213 of the Financial Services and Markets Act 2000 (compensation) (whether or not as modified by s.4 of this Act), or (c) the source of payment is a government or health service body.”

H3 Section 31(1) of the Financial Services and Markets Act 2000 provides:

“The following persons are authorised for the purposes of this Act—(a) a person who has a Part IV permission to carry on one or more regulated activities; (b) an EEA firm qualifying for authorisation under Sch.3 ... (d) a person who is otherwise authorised by a provision of, or made under, this Act.”

H4 Section 213 provides:

“(3) The compensation scheme must, in particular, provide for the scheme manager—(a) to assess and pay compensation, in accordance with the scheme, to claimants in respect of claims made in connection with regulated activities carried on (whether or not with permission) by relevant persons; and (b) to have power to impose levies on authorised persons, or any class of authorised person, for the purpose of meeting its expenses (including in particular expenses incurred, or expected to be incurred, in paying compensation, borrowing or insuring risks). ...

(9) In this Part (except in ss.219, 220 or 224) ‘relevant person’ means a person who was—(a) an authorised person at the time the act or omission giving rise to the claim against him ... took place; or (b) an appointed representative at that time.”

H5 The claimant sustained a severe head injury in a road traffic accident caused by the negligence of a driver employed by the defendant, and summary judgment was entered against the defendant for damages to be assessed. A settlement was reached for the payment of a lump sum and for periodical payments of £115,000 per annum to be made by the defendant’s insurer, a company regulated as an insurer by the Republic of Ireland, a Member State of the European Economic Area (EEA).

H6 On an application for approval of the order, the claimant lacking capacity:

H7 **Held**, approving the order, that under s.213(3) of the Financial Services and Markets Act 2000 the Financial Services Compensation Scheme established pursuant to that Act would meet to its full extent the ongoing liability under a periodical payments order of a “relevant person” who became insolvent ([5]); that, pursuant to ss.213(9) and s.31(1)(b), a “relevant person” included an authorised EEA insurer, and, on the facts, the claimant’s claim was a “protected claim” within the scheme ([6], [7]); and that, consequently, the continuity of payment under the proposed periodical payments order was “reasonably secure” within s.2(3) of the Damages Act 1996 ([10]).

H8 **No cases are referred to in the judgment.**

Application

H9 The claimant, Evelyn Joan Billingsley, by her litigation friend, John William Seagrave, sought the court’s approval of an order settling her claim for damages for personal injuries against the defendant, UPS Ltd, arising out of a road traffic accident on 12 December 2007, whereby the defendant agreed to pay a lump sum of £430,000 and annual payments of £115,000 by the defendant’s insurer, UPS International Insurance Ltd, a company registered in Dublin.

H10 The facts are stated in the judgment.

H11 *Robert Weir QC* for the claimant.
Jeremy Ford for the defendant.

H12 Solicitors for the claimant: Ashton KCJ.
Solicitors for the defendant: Clyde & Co.

JUDGMENT**JUDGE OLIVER-JONES QC:**

- 1 On 12 December 2007 the claimant sustained a severe head injury with damage to her brain in a road accident which occurred on the A43 road near Towcester in Northamptonshire. She was travelling as a passenger in a car driven by her husband which was in collision with a vehicle which was being driven by the defendant's driver. Tragically, the claimant's husband sustained fatal injuries in the accident. The injury sustained by the claimant has left her in a minimally aware state and, consequently, she lacks capacity to litigate. By a claim issued on 23 November 2010 the claimant, acting by her son and litigation friend, claimed against the defendant damages for the injuries she had suffered and her consequential loss which, it was alleged, were caused by the negligent driving of the defendant's driver. By an order dated 22 September 2011 summary judgment was entered for the claimant against the defendant for damages to be assessed.
- 2 The parties have reached a settlement which provides for a lump sum payment of £430,000 and a periodical payment order (PPO) in the sum of £115,000 per annum. Because the claimant lacks capacity, any settlement of her claim requires the approval of the court. By virtue of s.2(3) of the Damages Act 1996 "the court may not make an order for periodical payments unless satisfied that the continuity of payment under the order is reasonably secure". Consequently, any approval of the terms of settlement proposed for approval in this case requires me to be satisfied that continuity of payment under the terms of the PPO "is reasonably secure". This is the case notwithstanding that the parties have agreed that continuity of payment by the defendant's insurer is reasonably secure. Because, at one stage, the appropriateness of a PPO was not agreed, as it is required to be by s.2(1) of the Damages Act 1996, an application, dated 25 June 2012, was made by the claimant's solicitors for an order as to appropriateness and reasonable security of continuity of payment. That application is before me today, necessarily as part of what is otherwise listed as a settlement approval hearing.
- 3 By virtue of s.2(4) of the Damages Act 1996:

"For the purposes of subsection (3) the continuity of payment under an order is reasonably secure if: (a) it is protected by a guarantee given under section 6 of the Schedule to this Act; (b) it is protected by a scheme under s.213 of the Financial Services and Markets Act 2000 (compensation) (whether or not as modified by section 4 of this Act); or (c) the source of payment is a government or health service body."

Because this is not a case which would fall within s.2(4)(a) or (c), the question is whether continuity of payment is protected "by a scheme under s.213 of the Financial Services and Markets Act 2000" and is thereby reasonably secure.
- 4 It is because the insurers of the defendant's vehicle at the time of the accident, namely UPS International Insurance Ltd, is what is known as a "captive insurer" registered in Dublin in the Republic of Ireland, that the original issue as to protection arose.
- 5 Section 213(1) of Financial Services and Markets Act 2000 provides that the Financial Services Authority (the FSA) "must by rules establish a scheme for compensating persons in cases where relevant persons are unable, or are unlikely to be able to satisfy claims against them". This scheme, being the scheme referred

to in s.2(4) of the Damages Act 1996, is known as the Financial Services Compensation Scheme (the FSCS). If an insurer is a “relevant person” within the FSCS, then, in the event that the insurer becomes insolvent, the FSCS would meet—in the circumstances of this case—to its full extent, the ongoing liability under the PPO entered into by that insurer. By virtue of s.4 of the Damages Act 1996, even where a person has a right to receive periodical payments and the right is protected under a s.213 scheme only as to PART of the payments, then the protection provided by the scheme extends to the WHOLE of the payments.

- 6 Is UPS International Insurance Ltd, as a foreign insurer, covered by the FSCS?
 - (a) Section 213(3) of the Financial Services and Markets Act 2000 provides that the compensation scheme must provide for the scheme manager (see s.212) “to assess and pay compensation, in accordance with the scheme, to claimants in respect of claims made in connection with regulated activities carried on (whether or not with permission) by relevant persons”.
 - (b) Section 213(9) defines a “relevant person” as an “authorised person” at the time the act or omission giving rise to the claim against him took place.
 - (c) An “authorised person” includes “an EEA firm qualifying for authorisation under Schedule 3” of the Act (see s.31(1)(b)).
 - (d) Paragraph 5(d) of Sch.3 covers an undertaking pursuing the activity of direct insurance within the meaning of art.1 of the First Non-life Insurance Directive which has received authorisation under art.6 of the First Non-Life Insurance Directive from its home state regulator. It is common ground that, as a matter of fact, UPS International Insurance IS authorised by the “home regulator”.
 - (e) The insurance activity of UPS International Insurance is also a “regulated activity” by virtue of s.22(1) of the 2000 Act and art.10 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, a contract of general insurance including motor vehicle liability by virtue of para.10 Pt 1 of Sch.1 to that Order.
- 7 The qualifying conditions for paying compensation under the FSCS are set out in the FSA Compensation Handbook, known as “Comp”. Comp 3.2.1R sets out the qualifying conditions for paying compensation under the FSCS. In particular the claim must be a “protected claim” against “a relevant person”. A “protected claim” is a claim under a “protected contract of insurance”. By Comp 5.4.1(1)(R) a protected contract of insurance is “a contract of insurance within Comp 5.4.2R” being one which relates to “a protected risk” issued by the relevant person. A risk is a protected risk if, in the case of a contract of insurance falling within Comp.5.4.2R(2)(b), it is situated in an EEA state except that where the relevant person is a firm which is not a UK firm issuing a contract of insurance, the risk must be situated in the United Kingdom i.e. where the vehicle is registered—in the instant case the defendant’s vehicle was registered in the United Kingdom.
- 8 In addition, for a foreign insurer to be providing compulsory road traffic insurance in England it must be a member of the MIB (Motor Insurers Bureau), as well as being an EEA firm which satisfies the definition of “relevant person” under s.213(9) of the 2000 Act. There is no issue but that insurer in this case is a member of the MIB and a “relevant person”.
- 9 Returning to the compensation rules in Comp, Comp 5.4.7R provides that the FSCS must treat liabilities of an insurance undertaking which is in default in respect

of “claims by persons entitled to the benefit of a judgment under s.151 of the Road Traffic Act” as giving rise to claims under a protected contract of insurance. It is clear that UPS International Insurance Ltd provided insurance in this case that provided the claimant with the benefit of a judgment under s.151 of the Road Traffic Act (i.e. the duty of insurers or persons giving security to satisfy judgment against persons insured or secured against third-party risks under compulsory motor insurance).

- 10 Consequently, I am satisfied that the continuity of payment under the proposed order is reasonably secure because the relevant insurer is protected by the FSCS.
- 11 I am equally satisfied, notwithstanding that this is agreed, that a PPO rather than a lump sum is the more appropriate form for damages for future losses not least because of the scope for disagreement as to the claimant’s life expectation.
- 12 I also unreservedly approve the entirety of the settlement to include a lump sum, having considered Mr Weir QC’s written advice and the papers in the approval bundle, not least the reports containing the financial advice of Mr Richard Cropper.
- 13 The inclusion of what is identified as “a passive reverse indemnity” in the event that there is any future state funding paid in respect of the claimant’s injuries suffered “as a result of the road traffic accident” is also entirely reasonable.

Order accordingly.

Reported by Clare Noon, Barrister.