FARAH v ABDULLAHI

High Court (Queen's Bench Division)

Master Davison: 20 April 2018

[2018] EWHC 738 (QB); [2018] P.I.Q.R. P14

Compulsory insurance; EU law; Insurers' liabilities; Non-disclosure; Permission to issue; Road traffic accidents; Service by alternative permitted method; Setting aside; Unknown persons; Untraced drivers

H1 *Identity of driver—Insurer—road traffic—declaration—service of proceedings*

H2 An order allowing the Claimant in a road traffic accident claim to serve proceedings on an unnamed Defendant by serving proceedings on his insurer, even where the insurer had obtained a declaration that the policy was void *ab initio*, was not set aside.

H3 The Claimant [C] was involved in a fracas in the street when the First Defendant [D1] deliberately drove a Ford car insured by the Second Defendant [D2] at C. In trying to get out of the way of D1's car, C was struck and injured by a Mercedes car driven by the Third Defendant [D3'], someone who had not been identified but which was insured by the Fourth Defendant [D4]. C was then struck by the Ford driven by D1 and dragged under its wheels. D1 was convicted of dangerous driving. C suffered catastrophic injuries and lacked capacity to litigate due to a traumatic brain injury. The insurers, D2 and D4, both sought to place responsibility for C's injuries on each other.

H4 C issued proceedings against all the Defendants, identifying D3 as the unnamed person driving the Mercedes who collided with C on 6 September 2014. C applied without notice for an order pursuant to CPR 6.15 that D4 accept service of proceedings on behalf of D3. That application was granted by Master Eastman on the papers and C effected service of proceedings on D3 by serving them on D4. D4 applied to set aside the order of Master Eastman.

H5 Should a claim be allowed to proceed against an unnamed defendant - a driver who could not be identified - where the insurer of the vehicle has obtained a declaration that it is entitled to avoid the policy *ab initio* on the grounds of material non-disclosure and is therefore not a s.151 Road Traffic Act insurer?

H6 Application dismissed.

H7 **Held:**

1. There was a factual difference between this case and that of *Cameron v Hussain* [2017] EWCA Civ 366. In *Cameron* the Court of Appeal held that a claimant was entitled to add as a defendant a driver who could not be identified in circumstances where the car and a s.151 Road Traffic Act 1988 insurer could be identified. In this case there was no s.151 insurer as D4

had obtained a declaration to avoid the policy under s.152(2) of the Road Traffic Act. However the *ratio decidendi* of *Cameron* did not rest on the existence of a s.151 liability. Instead the basis of the judgment was that the power of the court to allow claims to be made against unknown persons could be extended to claims for damages where a judgment for damages obtained against an unknown person may confer a real benefit on the claimant.

2. In this case, a judgment for damages against D3 was capable of conferring a real benefit on C. C may challenge the declaration obtained by D4 under s.152(2) as being incompatible with the Sixth Motor Insurance Directive 2009/103/EC following *Fidelidade Companhia de Seguros SA v Caisse Suisse de Compensation & Ors (C-287/16)* [2017] R.T.R. 26 and *Roadpeace v Secretary of State for Transport & Anor* [2017] EWHC 2725 (Admin). Further, even if D4's avoidance of the policy was upheld, it would still have to indemnify C as Article 75 insurer pursuant to D5's Articles of Association.
3. Following the principles in *Cameron* C was prima facie entitled to proceed against D3 as an unnamed party. It would also be efficacious and consistent with the overriding objective to allow the claim to proceed.
4. Permission of the court to issue proceedings against an unnamed defendant was not required. No rule explicitly imposed this requirement and it was not issue of proceedings that conferred the jurisdiction of the court over the defendant but service of proceedings.
5. The order permitting service of proceedings on D3 to take place by service of proceedings on D4 would not be set aside. Although *Cameron* contained no lengthy discussion of alternative service on insurers, insurers have a direct and relevant interest in a claim against an unnamed driver and are subrogated to the defence of that claim. Together with the inability to serve someone whose name is unknown, this was a good reason to authorise service on the insurer.
6. The Master was entitled to exercise his judicial discretion to deal with the application on paper. C had a duty to make full disclosure of all material matters when seeking relief without notice. Although C should have disclosed in the application the fact that D4 had obtained a declaration avoiding the policy, it did not follow that the order would be set aside and C should have to make a fresh application. This was for 3 reasons: (i) the non-disclosure was innocent and understandable; (ii) C obtained no particular advantage from the non-disclosure as there had been a hearing in any event; and (iii) where the issue was service and the point of principle fully argued and resolved in favour of C, it would be a waste of costs and not serve the interests of justice to require C to make a fresh application.

H8 **Cases Cited:**

Bloomsbury Publishing Group v New Group Newspapers [2003] EWHC 1205 (Ch); [2003] 1 W.L.R. 1633; (2003) 153 N.L.J. 882

Brink's-Mat Limited v Elcombe [1988] 1 W.L.R. 1350; [1989] 1 F.S.R. 211; (1988) 132 S.J. 1555

Cameron v Hussain [2017] EWCA Civ 366; [2018] 1 W.L.R. 657; [2017] R.T.R. 23

Fidelidade Companhia de Seguros SA v Caisse Suisse de Compensation & Ors Case C-287/16 [2017]; EU-C:2017:575; [2017] R.T.R. 26; [2017] Lloyd's Rep. I.R. 54
Gunther v Circuit [1968] 2 Q.B. 587;[1968] 2 W.L.R. 668; [1968] 1 Lloyd's Rep. 171
Murfin v Ashbridge [1941] 1 All E.R. 231
Roadpeace v Secretary of State for Transport & Anor [2017] EWHC 2725 (Admin); [2018] 1 W.L.R. 1293; [2018] R.T.R. 21; [2017] A.C.D. 141

H9 **Legislation Cited:**
The Road Traffic Act 1988
The Sixth Motor Insurance Directive 2009/103

H10 *Robert Weir QC* (instructed by Irwin Mitchell) for the Claimant
William Audland QC (instructed by Kennedys) for the Second Defendant
Derek O'Sullivan QC (instructed by Horwich Farrelly) for the Fourth Defendant
Timothy Horlock QC (instructed by Weightmans) for the Fifth Defendant

JUDGMENT APPROVED

MASTER DAVISON:

Introduction

1 In *Cameron v Hussain* [2017] EWCA Civ 366, the Court of Appeal held that the claimant, a victim in a road traffic accident, should be entitled to add as defendant a person who could only be described as "the person unknown driving vehicle registration number Y598 SPS who collided with vehicle registration number KG03 ZIZ on 26th May 2013". The circumstances were that the claimant could not identify the driver, but he could identify both the car and an insurer who had provided insurance cover for the vehicle at the time of the accident. The court (by a majority) held that there was no procedural bar to issuing proceedings and obtaining orders against persons unknown (following *Bloomsbury Publishing Group v New Group Newspapers* [2003] EWHC 1205 (Ch)) and that the case before it was an appropriate one to allow such a claim to proceed. An important part of the factual matrix in the case was that there was a s.151 insurer, i.e. an insurer who, notwithstanding the fact that the use of the vehicle was outside the contractual scope of the insurance, was statutorily liable to meet the claim.

2 The principal question in this case is whether I should permit the claim before me to proceed in circumstances where the insurer has, on 12 January 2017, obtained a declaration that it is entitled to avoid the policy *ab initio* on the grounds of material non-disclosure. Such a declaration was obtained by the Fourth Defendant (as claimant) at an uncontested hearing before Deputy District Judge R Hendicott at the Cardiff County Court. Thus, on the face of it, there is no s.151 insurer. Does that mean that in this case the claim against the unnamed, third defendant should not be allowed to proceed?

The facts giving rise to the claim

3 The facts are striking. In the early hours of the morning on 6 September 2014 the claimant was a pedestrian on Harlesden High Street, London NW10. He was in a group. There was some kind of fracas or disturbance. The first defendant driving a Ford Focus insured by the second defendant drove directly at him. The claimant attempted to jump out of the way. In seeking to evade the Ford Focus he jumped (or possibly a glancing blow from the Ford Focus propelled him) into the path of a Mercedes A Class driven by someone who has not been identified. The Mercedes was insured by the fourth defendant. The claimant's head impacted the windscreen and he lay sprawled across the bonnet. The Mercedes accelerated, then braked, throwing him off the bonnet and on to the ground. As he was lying on the ground injured, the first defendant, who had now turned his car around, drove back towards him, struck him and pushed him along the road some 33 metres. The claimant was effectively caught underneath the front wheels of the Ford Focus. A charge of attempted murder against the first defendant resulted in two hung juries. He was eventually convicted of dangerous driving and other motoring offences and sentenced to a term of imprisonment.

4 The claimant suffered catastrophic injuries. He lacks capacity to litigate and the claim proceeds with the benefit of a litigation friend. It is relevant to mention that the insurers of the two vehicles concerned each seek to place responsibility for the claimant's injuries on the other. The insurer of the Ford Focus maintains that the claimant's traumatic brain injury was exclusively caused by his being thrown from the bonnet of the Mercedes; see [22] of its Defence. The insurer of the Mercedes maintains that the two drivers committed "concurrent torts" and that the claimant will be able to enforce all of his claim for damages against the insurer of the Ford Focus; see [25] of Mr O'Sullivan QC's skeleton argument of 19 March 2018.

The procedural history and the application

5 The Claim Form was issued on 25 August 2017 and had to be served four months later. The third defendant was not named, but was identified as the person who had collided with the claimant on 6 September 2014. The Claim Form, Particulars of Claim, Preliminary Schedule and report of Dr Liu were served on 8 December 2017 having been posted out on 6 December 2017. Service on the third (unnamed) defendant was effected by serving the sealed copy of the Claim Form on the fourth defendant—the insurer of the car he was driving. That was done pursuant to an order of Master Eastman. Master Eastman's order was obtained in the following way. On 5 December 2017 the claimant's solicitors issued an application for an order pursuant to CPR r.6.15 "that the fourth defendant accept service of proceedings on behalf of the third defendant". The application was supported by a witness statement from Mr Charankamal Dhaliwal, the solicitor with conduct of the claim. He explained the circumstances of the accident; explained the effect of *Cameron*; stated that the fourth defendant's solicitors, Horwich Farrelly, were instructed to accept service on behalf of the fourth defendant but had refused to accept service on behalf of the third defendant; he exhibited "relevant party and party correspondence". He asked the court to deal with the application on the papers given the imminent deadline for service, or, if that was not considered appropriate, to extend the deadline for service pending determination of the application. The application was placed before Master Eastman. Master Eastman considered it and

made an order in the terms requested, adding the words "CPR 23.9 & 23.10 apply". (Those rules provide for a party not served with an application resulting in an order to have the right to apply to set it aside.)

6 By an application issued on 12 December 2017, Horwich Farrelly acting for the fourth defendant, applied to set aside Master Eastman's order. Put broadly, the application rests on two bases. The first basis is that set out above, namely that because the fourth defendant in this case is not a section 151 insurer (having avoided the policy) the claim was "not one to which the *ratio* of the decision in *Cameron* applied". The second basis was that the claimant had neither complied with relevant procedural rules nor the practice applicable to seeking orders without notice. Specifically, Master Eastman had not been made aware / sufficiently aware of the arguments that the fourth defendant was deploying in opposition to the proposal to pursue a claim against an unnamed driver. Had he been made aware of them, he probably would not have made the order.

7 The submissions made on these points appear sufficiently from the discussion below.

Does Cameron apply?

8 Section 151 of the Road Traffic Act 1988 provides that insurers must meet judgments in respect of insured third party liabilities even if the insurer is not liable to its insured as a matter of contract. A typical situation would be where the person driving was a partner or friend who was not actually a named driver on the policy. The insurer would have to meet a claim under s.151 in respect of liabilities incurred by such a driver. Indeed, s.151 would even extend to driving by a thief. But there are various "get-outs" for insurers. The relevant one for present purposes is contained in s.152(2). By that sub-section, (paraphrasing it), if a policy has been obtained by misrepresentation or failure to disclose material facts, then, if the insurer obtains a declaration that it is entitled to avoid the policy on these grounds, "no sum is payable … under s.151". There are time limits to be observed if an insurer wishes to take advantage of s.152(2). The insurer must commence the action for a declaration "before or within three months after the commencement of" the proceedings leading to the judgment in favour of the victim of the road accident.

9 There is an issue as to whether s.152(2) is compatible with the Sixth Motor Insurance Directive 2009/103. The Directive (which is a consolidating measure) imposes on Member States an obligation to ensure that civil liability in respect of the use of vehicles based in each Member State's territory is covered by insurance. Only where a vehicle is unidentified or uninsured is the victim of a road accident to be thrown back on to a body of last resort; (in the UK this body is the Motor Insurers' Bureau). Thus, in *Fidelidade-Companhia de Seguros SA v Caisse Suisse de Compensation & Ors* (C-287/16) [2017] R.T.R. 26, the European Court of Justice held that national laws that permitted motor insurers to deny a third party claim on the ground that the policyholder's misrepresentation rendered it void were contrary to EU law. *Fidelidade* led to a concession by the government in *Roadpeace v Secretary of State for Transport & Anor* [2017] EWHC 2725 (Admin) that s.152(2) was no longer compatible with EU law.

10 The difference between the case before me and *Cameron*, is that in *Cameron* there was no issue that the insurer would have to meet the claim under section 151, whereas, in this case, the claimant would first have to make good the claim put

forward in paragraph 18 of the Particulars of Claim. That paragraph states that section 152(2) is incompatible with the Directive and that, notwithstanding the declaration that the fourth defendant has obtained, it is still liable to indemnify the third defendant. To put it another way, in *Cameron* the claimant had an undisputed right to be indemnified whereas in this case the claimant has nothing more than an arguable claim to an indemnity. The submission of Mr O'Sullivan QC for the fourth defendant (supported by Mr Horlock QC for the fifth defendant) was that this made all the difference. They submitted that the existence of an extant, non-avoided insurance policy was "critical" to the exercise of the discretion to permit the claimant to join an unnamed defendant. I was taken to various passages in the judgments, including the following:

> "40. In my judgment, in a case such as the present, the court can and should, in accordance with principle, exercise its procedural powers to permit an amendment of the claim form (and the consequent amendment to the particulars of claim) to allow a claimant to substitute an unnamed defendant driver, identified by reference to the specific vehicle which he or she was driving at a specific time and place, and consequently to enable a judgment to be obtained against such a defendant, *which an identified insurer is required to satisfy pursuant to the provisions of*section 151*of the 1988 Act.*" (Gloster LJ) (emphasis added)
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> 86. "It is important to bear in mind that the procedural innovation sought *would be limited to cases where the vehicle driven by the tortfeasor was insured* and where the insured and the registered owner are identifiable. Moreover, as explained earlier, to proceed against an unnamed party could only be permitted where to do so would be efficacious and consistent with the overriding objective. These considerations suffice to dispel most of the spectres conjured up by Mr. Worthington." (Lloyd Jones LJ) (emphasis added)

11 The Supreme Court has given the insurer (Liverpool Victoria) in *Cameron* permission to appeal. The grounds include (i) that the concession that s.151 applied to a person who was unnamed was wrongly made, (ii) that the judgment has rendered the provisions of ss.11 and 14 of the Limitation Act 1980 meaningless and (iii) has also rendered the MIB Untraced Drivers Agreement practically redundant. Mr O'Sullivan QC and Mr Horlock QC urged upon me that in circumstances where *Cameron* was to be reconsidered, I ought to confine its consequences to cases where the existence of insurance cover was unequivocally established or accepted. Expressed in the language of the judgments, it would be neither "efficacious" nor "consistent with the overriding objective" to allow a claim to go ahead against an unnamed defendant whose insurance cover was, at best, doubtful.

12 I reject these submissions.

13 The *ratio decidendi* of *Cameron* does not rest on the existence of a s.151 liability. The nub of the argument in *Cameron* was that the acknowledged power of the court to allow claims for injunctive relief to be made against unknown persons should not be extended to claims for damages because in such a case "no effective relief can be obtained"; see the argument of Mr Worthington QC set out in the judgment of Lloyd Jones LJ at [74]. This argument was rejected as inapplicable to a case where "a judgment for damages obtained against an unknown person may confer a real benefit on the claimant"; see [76]. I consider that that is the underlying

basis of the judgments of both Gloster and Lloyd Jones LJJ. The question I have to address is whether the claim against the third defendant in these proceedings is capable of conferring a real benefit on the claimant. The answer to that question is, Yes. There are two reasons:

(1) It was indicated to me that the claimant (and possibly the second defendant, whose interests on this matter are aligned with the claimant's) may seek to challenge the declaration made in the Cardiff County Court that the policy of insurance covering the use of the Mercedes motor vehicle driven by the third defendant is void *ab initio*. The precise mechanism for that challenge and the content of the legal arguments that will be deployed are matters for another day. Suffice it to say that, in the light of authorities such as *Fidelidade*, the claimant would appear to have the prospect of deriving a real benefit from proceedings against the unnamed third defendant pursuant to the provisions of Pt VI of the Road Traffic Act 1988. To express that proposition as a negative, I cannot, at this stage, say that such a claim has no real prospect of success.

(2) If the fourth defendant's avoidance of the policy is upheld, it will still have to indemnify the claimant. This is because the fifth defendant, the MIB, will be liable to satisfy any judgment in the claimant's favour under cl.5 of the Uninsured Drivers Agreement and pursuant to art.75 of the MIB's Articles of Association, that liability falls to be met by the fourth defendant as the "Article 75 insurer". It seems incontrovertible that by this route also proceedings against the unnamed third defendant are capable of conferring a real benefit on the claimant.

14 I therefore find that the principles set out in *Cameron* are engaged and that the claimant is *prima facie* entitled to proceed against the third defendant as an unnamed party. It seems to me that it would be both efficacious and consistent with the overriding objective to allow the claim to go forward in that way. The entitlement of a claimant to proceed against an unnamed driver should not depend on the section 151 liability of the insurer being incontrovertibly established. That would be to draw a somewhat arbitrary distinction between cases where the claimant's rights rested on s.151 and cases where his rights rested on the Uninsured Drivers' Agreement / Article 75 (or some combination of the two). It would be arbitrary because both routes offer a remedy of value and both form part of an overall scheme intended to meet the UK's obligations under the Motor Insurance Directives. Furthermore, given the time limit in s.152(2) and given also the fact that the victim of a road accident cannot know if there are matters that might lead to the avoidance of the insurance covering the vehicle which injured him, at the point of issue and/or service of the Claim Form neither he nor the court can be confident that s.151 will ultimately be engaged. For this practical reason too, it seems to me that the right to proceed against an unnamed defendant should not be confined in the way that Mr O'Sullivan QC and Mr Horlock QC contended.

The fourth and fifth defendant's procedural objections

15 I can deal with these more shortly. I propose to do so in the order in which they arise within the proceedings.

Permission to issue?

16 Mr O'Sullivan QC and Mr Horlock QC submitted that a claimant who wished to issue against an unnamed defendant had first to seek the permission of the court to do so. No rule explicitly so states. The Practice Direction to Pt 7 of the rules provides that the title of the action "should state" the full name of each party (7A PD 4.1(3)) and that to Pt 16 provides that the full name should be given "where known" (16 PD 2.6(a)). Both Practice Directions imply that in an appropriate case proceedings may be issued against an unnamed party. On the other hand, there are at least two rules which expressly permit claims against unnamed parties. These are r.19.7, dealing with representative actions, and r.55.3(4) dealing with claims against trespassers. These rules, at the very least, reinforce the premise of the Practice Directions to CPR r.7 and r.16, which is that parties should be named.

17 Whatever steer is taken from the rules, it is a fact that no rule imposes a requirement of obtaining permission before issuing against an unnamed party in circumstances such as the present. Common law jurisdictions have a long tradition dating back to the Middle Ages of permitting claims against a person or persons who cannot be named, where appropriate; see the discussion of Sir Andrew Morritt VC in *Bloomsbury Publishing plc v News Group Ltd* [2003] EWHC 1205 (Ch) at [5]–[14]. Despite that long tradition and an interval of 15 years since the *Bloomsbury Publishing* case, the CPR have not been amended to introduce a requirement of permission and nor has any court – including the Court of Appeal in *Cameron* itself—indicated that permission is necessary. I agree with the submission of Mr Weir QC for the claimant that this is because it is not the issue of proceedings that confers the jurisdiction of the court over the defendant. It is the service of those proceedings. This, to use Mr Weir QC's phrase, is the "pinch point". Upon service, CPR r.11 contains a comprehensive code for disputing the court's jurisdiction and the orders then available to the court include both setting aside service of the Claim Form and setting aside the Claim Form itself; see CPR r.11(6) (a) & (b).

18 For these reasons, I find that permission to issue a Claim Form against the unnamed third defendant was not required. (But if it was, it is implicit in Master Eastman's order of 5 December 2017 that such permission was given—albeit retrospectively.)

Issues relating to service

19 Master Eastman's order of 5 December 2017 followed the wording suggested by the claimant, which was "that the fourth defendant accepts service of proceedings on behalf of the third defendant through their nominated solicitors, Horwich Farrelly". Taken in conjunction with the explicit reference to CPR r.6.15 in the preamble, the sense of the order was to permit service on the third defendant to take place by serving the proceedings on the fourth defendant. CPR r.6.15(4) stipulates that the order must specify the date of deemed service and the period for filing acknowledgement of service and an admission or defence. This part of the rule was not complied with; but that is a matter than can easily be rectified by a further order. The real objection of the fourth defendant is that service under CPR r.6.15 should not be allowed in a case such as the present because the basic aim of alternative service is to bring the proceedings to the attention of the defendant in question. In the case of an unnamed defendant that aim could not be achieved. Mr O'Sullivan QC went as far as to say that for this reason, *Cameron* (which contained

no analysis of the problem of service) was decided *per incuriam* and/or was wrongly decided.

20 It is unsurprising that *Cameron* contains no or no lengthy discussion of this point because counsel for the insurer, Mr Worthington QC (a highly experienced and respected insurance silk) had not sought to argue that an order for alternative service on the insurers could not be made; see the judgment of Gloster LJ at [44] and [62]. That concession was clearly correct and grounded in cases of longstanding such as *Murfin v Ashbridge* [1941] 1 All E.R. 231 (CA) and *Gurtner v Circuit* [1968] 2 Q.B. 587. In *Cameron* and in this case too, the insurer has a direct and relevant interest in the claim against the unnamed driver and is subrogated to the defence of that claim. In combination with the inability to serve someone whose name is unknown, that is a "good reason" within the meaning of CPR r.6.15 to authorise service on the insurer. It is true that the principal aim of service is to bring the proceedings to the attention of the defendant. But not every aim of procedural rules is attainable and hence, if justice is to be done, there has to be flexibility in the application of them. Here, the choice was between service on the insurer who was the party who actually stood to foot the bill, or to dispense with service altogether, which CPR r.6.16 provides for in "exceptional circumstances". Plainly, justice in this situation is better served by service on the insurer. And given the insurer's strong financial interest in defending the proceedings and of seeking contribution or indemnity from the unnamed driver, service on the insurer may also eventually bring the proceedings to the attention of the driver.

21 For these reasons, I agree in this respect with the order made by Master Eastman and would not set it aside.

Should Master Eastman's order be set aside on the ground of non-disclosure?

22 This topic sub-divided into two points, which were that (i) the application to Master Eastman should not have been made without notice, but, that having been done, (ii) it was incumbent on the claimant to place all relevant facts before the Master, including facts that were adverse to the relief sought.

23 Again, there does not appear to me to be much substance in these points. The application of the claimant was placed before Master Eastman by Irwin Mitchell's outdoor clerk very shortly after it had been issued. Although Box 9 ("Who should be served with this application?") was left blank, [17] of the witness statement of Mr Dhaliwal quite clearly invited the Master to consider whether he was prepared to make the order without a hearing or whether he required that a hearing be listed. Although there was not an explicit reference to CPR r.23.8, Mr Dhaliwal had in mind (and Master Eastman would have appreciated) that the question whether a hearing was necessary and appropriate was being left in the hands of the Master. Master Eastman considered that the matter could be dealt with on the papers. He catered for the fact that the fourth defendant had not had notice by annotating on the order that CPR rr.23.9 & 23.10 applied. There were other ways of dealing with it. He could have directed that the application notice be served and the fourth defendant respond in writing. Or he could have directed a hearing be listed. He chose to deal with it under rr.23.8–23.10. As an exercise of judicial discretion he was plainly entitled to do that.

24 As to non-disclosure, by letter faxed on 28 November 2017 Mr Dhaliwal had given notice to the fourth defendant's solicitors that he proposed to apply for an

order for "substituted service" on them; (he was using the old terminology for what is now called service by an alternative method). He received an immediate and full response by letter of the same date and he was careful to exhibit this letter to his witness statement. The letter was directed to the issues relating to service which I have described and dealt with in the immediately preceding part of this judgment. It did not mention the fact that the fourth defendant had obtained a declaration avoiding the policy—even though that had been mentioned in earlier correspondence and has now become the centrepiece of the fourth defendant's opposition to the order. In those circumstances, should Mr Dhaliwal nonetheless have drawn the point to the attention of the Master? (I mention that the information that the policy had been avoided was contained in the Particulars of Claim. But it is not clear whether the Particulars of Claim were or were not placed before Master Eastman and I have therefore proceeded on the basis that they were not.) The duty on a party who seeks relief without notice is to make full disclosure of all material matters; see e.g. *Gee* on Commercial Injunctions, 6th edn. at 9(1). In my view, Mr Dhaliwal should have disclosed this matter because it was plainly material. The duty to do so was not removed or diluted by the fact that he was inviting the Master to decide for himself whether to make an order *ex parte* or whether to direct that there be an *inter partes* hearing. The Master could not decide that threshold question in ignorance of a material fact. However, it does not follow that the order of Master Eastman should simply be set aside and that the claimant should be left to make a fresh application from scratch. I have considered the principles applicable to cases of material non-disclosure set out by the Court of Appeal in *Brink's Mat v Elcombe* [1988] 1 W.L.R. 1350 and in *Gee* at 9(4). The dominant considerations in this case appear to me to be as follows. First, the non-disclosure was innocent and arose primarily because Horwich Farrelly, in their letter of 28 November 2017, had chosen not to mention (or, on the face of it, rely upon) the avoidance of the policy. That did not absolve Mr Dhaliwal from his duty of disclosure. But it makes the non-disclosure very understandable. Second, the claimant has obtained no particular advantage from the non-disclosure. Had the matter been brought to Master Eastman's attention, he would probably still have made the order that he did. But if he had not made that order, he would simply have directed an *inter partes* hearing and extended the time for service of the proceedings until the application could be determined. The only difference between that and the order that he in fact made is that at the subsequent hearing of the application it would have been for the claimant to make the running, i.e. to open the application to the Master. At Mr O'Sullivan QC's suggestion, that was, in the event, precisely what I directed should take place. Notwithstanding that it was Mr O'Sullivan QC's application to set aside Master Eastman's order, it was Mr Weir QC who (after a few preliminaries) made his submissions first. Third, where the issue is service and where the point of principle lying behind that issue has been fully argued and resolved in favour of the claimant, it makes no sense to require the claimant to make a fresh application. That would be a waste of costs and would not serve the interests of justice.

Conclusion

25 For these reasons, the application to set aside Master Eastman's order of 5 December 2017 fails and is dismissed. I will leave it to counsel to agree and submit an order reflecting the above.

Postscript

26 The day before the hearing, i.e. 19 March 2018, the claimant issued an application (1) to join a Mr Osman Elmi as sixth defendant and (2) for an order that the fourth defendant make disclosure of its claim for the s.152 declaration in the Cardiff County Court. The application to join Mr Elmi arose out of a file of documents sent to the claimant's solicitors on 2 March 2018 by the second defendant's solicitors. These included a statement from a Ms Gedi dated 14 January 2015. (For some reason this was not in the disclosure which the claimant's solicitors had requested from the police.) Ms Gedi was a passenger in a vehicle which may, from her description of it, have been the Mercedes. She named the driver as "Osman". Osman Elmi was arrested by the police on suspicion of dangerous driving. It is possible that a court will find that he was the driver of the Mercedes, though he denied that to the police. There is clearly a basis for joining him and I would be minded so to order. I detected no resistance to that proposal from the defendants.

27 The file in the s.152 proceedings is clearly relevant both to the claimant and to the second defendant because both are affected or potentially affected by the declaration. Mr O'Sullivan QC resisted an order being made and pointed (very reasonably) to the lack of notice and his inability to take full instructions on this matter. I will allow the fourth defendant a reasonable period to consider. If there is no agreement, then I will list a short hearing to deal with it.

28 Lastly, if there is to be a challenge to the order made in the Cardiff County Court, then it may be sensible to transfer those proceedings up to the High Court so that all relevant matters are before the same court. I invite the parties to consider that.